

**The Hon Richard Refshauge SC
Disputed Claim of Privilege**

**Report of the Independent Arbiter
Icon Water Contracts with ActewAGL**

A. *Introduction*

1. By letter dated 16 October 2018, I was appointed by the Speaker of the Legislative Assembly of the Australian Capital Territory (**the Legislative Assembly**) to report on a claim of privilege made in respect of certain documents required by the Legislative Assembly to be produced to it.

B. *Parliamentary History*

2. On 23 August 2018, Mr Alistair Coe MLA (Member for Yerrabi) moved

That, in accordance with standing order 213A, this Assembly orders the tabling of the Icon Water contracts with ACTEWAGL (Corporate Services Agreement and Customer and Community Support Agreements).

The question was resolved in the affirmative.

3. The two contracts described by Mr Coe are the contracts the subject of my consideration and on which I am required to report on the claim for immunity in respect of parts of them. The contracts were made on 27 June 2012. I shall refer to them as **the subject contracts**.
4. Under Standing Order 213A of the Standing Orders of the Legislative Assembly, requests for documents that the Legislative Assembly orders to be tabled are then made to the Chief Minister's Directorate with the implied, but not express, expectation that the Directorate will produce the papers ordered to be tabled with or without any claim of privilege.
5. On 20 September 2018, Mr Mick Gentleman MLA (Member for Brindabella) advised the Assembly of the advice he had received that the Australian Capital Territory Executive (**the Executive**) was not able to compel the production of the subject contracts because they were not in the Executive's possession.
6. As a result, Mr Gentleman moved a more comprehensive motion on that day which was directed to Icon Water Limited (**Icon Water**) requiring it to produce the documents referred

to in Mr Coe's motion and, in the event of a claim for privilege or public interest immunity being made for them by Icon Water, referring that claim to an independent legal arbiter along the lines of Standing Order 213A.

7. That question was resolved in the affirmative. I shall refer to the resolved question as **the Resolution**. A copy of the Resolution is reproduced in the Schedule to this Report.
8. On 4 October 2018, Icon Water provided the subject contracts to the Clerk of the Legislative Assembly in accordance with the Resolution, but made a claim of public interest immunity in respect of parts of the subject contracts. One of the copies of the subject contracts produced had the provisions subject to the claim highlighted so that those parts could be easily identified and read by me.
9. On 11 October 2018, Mr Coe disputed that claim of immunity by email to the Clerk of the Legislative Assembly.
10. As noted above (at [1]), I was then appointed by the Speaker as the Independent Legal Arbiter under the Resolution to report of the claim.

C. The Procedure

11. Standing Order 213A provides a convenient mechanism for the resolution of a dispute about a claim of privilege or immunity which has been made by the Chief Minister when the Chief Minister's Directorate produces documents which the Legislative Assembly has ordered to be tabled.
12. In this case, the documents, being the subject contracts, were not in the custody of the Executive but a private company registered under the *Corporations Act 2001* (Cth). I will consider its status further below.
13. As a result, and as noted in the Resolution, Standing Order 213A did not respond to the particular circumstances of this matter and so the Resolution provided for a bespoke mechanism, but which followed closely the provisions of the Standing Order.
14. When appointed, I had helpful submissions from Icon Water and from Mr Alistair Coe MLA, both of which submissions I have read carefully.

D. The Legal Context

15. In my Report on the *Public Housing Renewal Steering Committee Agenda Papers (11 July 2017)* (the **Public Housing Committee Report**) at [37]-[40], I set out the role of the Independent Legal Arbiter. I adopt what I there said.
16. I note, however, that the provisions of Standing Order 213A (9) and (10) do not appear in Standing Order 52 of the Standing Orders of the NSW Legislative Council on which Standing Order 213A is clearly based.
17. To this extent, the procedure in the Legislative Assembly is a little different from that set out in the Report of the Hon Keith Mason AC QC, *WestConnex Business Case* (8 August 2014) and which I quoted at [39] of the *Public Housing Committee Report*.
18. Under Standing Order 213A (9) and (10), the determination of the Independent Legal Arbiter triggers an immediate response – the documents are either returned to the Chief Minister’s Directorate (if the claim of privilege or immunity is upheld) or the documents are tabled and, if the Legislative Assembly is not sitting, may be released to any Member.
19. There is, however, no express provision for the situation where only parts of a document are the subject of the claim. The practice appears to be that, where only part of a document is subject to a claim of privilege, the Chief Minister’s Directorate produces to the Clerk of the Legislative Assembly the document redacted to protect from production that part of it in respect of which privilege or immunity is claimed, but also separately to provide confidentially the complete, unredacted document. Thus, to accord with the Standing Order, if the claim of privilege or immunity is upheld by the Independent Legal Arbiter, then the redacted document is tabled (or made available to Members) and the unredacted document is returned to the Chief Minister’s Directorate.
20. As to the issue of privilege and immunity, I also adhere to the views and principles on this matter that I expressed in the *Public Housing Committee Report* at [41]-[63] and, so far as is relevant, will apply them. In this case, however, a somewhat different issue of immunity arises because Icon Water claims, inter alia, that parts of the subject contracts are subject to public interest immunity as a result of information in them being confidential, sometimes called “commercial-in-confidence” confidentiality. I shall address this further below.

E. The Status of Icon Water

21. As noted above (at [12]), Icon Water is a company registered under the *Corporations Act*.

22. It is, however, a Territory-owned Corporation, indeed, the only Territory-owned Corporation, under the *Territory-owned Corporations Act 1990* (ACT) (the **TOC Act**). The **TOC Act** makes various provisions about what can and cannot be included in the constitution of a company that is such a corporation and those provisions prevail over any inconsistent provisions of its constitution. It also regulates the operation of the corporation in various ways to some of which I refer below
23. There are two further matters in the **TOC Act** that are particularly relevant. The first relates to the status of such a corporation and s 8 of the Act relevantly provides:

8 Status of territory-owned corporations and subsidiaries

- (1) A territory-owned corporation or subsidiary is not, only because of its status as a territory-owned corporation or subsidiary—
- (a) the Territory; or
 - (b) a representative of the Territory; or
 - (c) a government entity under the Legislation Act, section 121 (Binding effect of Acts).
- (2) Accordingly, a territory-owned corporation or subsidiary is not, only because of its status as a territory-owned corporation or subsidiary—
- (a) entitled to any immunity or privilege of the Territory; or
 - (b) exempt from a tax, duty, fee or charge payable under an Act.

24. The second relates to accountability, where relevantly s 15 of the Act provides:

15. Provision of information

- (1) A territory-owned corporation or subsidiary must, if asked in writing by the voting shareholders, prepare and give to the voting shareholders periodical financial statements, performance reports and any other information about the corporation or subsidiary asked for.

F. Relevant History

25. It is relevant to set out some history. This history is taken from the Icon Water website to which I was referred in the Icon Water submissions in reply. Prior to 1988, electricity and water services were provided by the Commonwealth; water by the public service, electricity by the statutory authority, ACT Electricity Authority. Gas was provided by a private company, the Australian Gas Light Company (**AGL**).
26. In 1988, the arrangements for the provision of electricity and water were changed so as to be provided by the one statutory authority, the ACT Electricity and Water Authority. Gas continued to be provided by AGL.

27. In 2000, the arrangements for the provision of water were again altered so that the now named ACTEW Corporation owned the assets and ActewAGL provided operations and maintenance services and corporate and customer services. Electricity and gas were provided by ActewAGL.
28. In 2012, the water operations were re-integrated with ACTEW Corporation, which subsequently changed its name to Icon Water, and which took over these services from ActewAGL to ensure that both ownership and operations aligned with the *TOC Act* objectives.
29. Nevertheless, ACTEW Corporation (now Icon Water) entered into various contracts for the actual delivery of some of these services. Among these contracts were those the subject of this matter, the Corporate Services Agreement and the Customer Services and Community Support Agreement, the subject contracts.
30. The contracts are described on the Icon Water website as follows:

Corporate Services Agreement

The Corporate Services Agreement (CSA) was entered into between ActewAGL and Icon Water in 2012 when responsibility for the operation and maintenance of the water and sewerage networks was internalised back into Icon Water. The CSA sets out the arrangements for the provision of corporate services to Icon Water. The CSA allowed for the continuation of the services provided to the water business until 2023.

Customer Services and Community Support Agreement

The Customer Services and Community Support Agreement (CSCSA) was entered into between ActewAGL and Icon Water in 2012 when responsibility for the operation and maintenance of the water and sewerage networks was internalised back into Icon Water. The CSCSA sets out the arrangements for the provision of customer and community support services to Icon Water. The CSCSA allowed for the continuation of the services provided to the water business until 2023.

G. Power to order production of documents

31. There is no doubt that a parliament has the power to require the production of what is often termed "State papers", defined by Gleeson CJ in *Egan v Willis* (1996) 40 NSWLR 650 at 654 as "papers which are created or acquired by ministers, office-holders and public servants by virtue of the office they hold under, or their services to, the Crown in the right of [the relevant polity]".

32. This, of course, is subject to the particular constitution, laws and practices of the particular parliament.
33. In general terms, the powers, privileges and immunities of the Legislative Assembly are set out in the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (the **Self-Government Act**).
34. Section 24(3) of the *Self-Government Act* provides:
- (3) Until the Assembly makes a law with respect to its powers, the Assembly and its members and committees have the same powers as the powers for the time being of the House of Representatives and its members and committees.
35. I am not aware of any law made by the Legislative Assembly which empowers or regulates the power of the Legislative Assembly, in the ordinary course of its business, to require the production of documents to it. Any power, then, must be a power of the kind possessed by the House of Representatives of the Federal Parliament.
36. This matter is address to some extent in the 7th edition of the *House of Representatives Practice*, described as “the comprehensive and authoritative text in the procedure and practice of the House of Representatives”.
37. Standing Order 236 of the Standing Orders of the House of Representatives empowers a committee or a subcommittee to call for witnesses to attend and for documents (not, apparently, just State papers) to be produced. Of such a power given by the Standing Order, the *House of Representatives Practice* in Ch 18 states as to the power of committees, in the context of those given by the Standing Orders, including Standing Order 236:
- A committee possesses no authority except that which it derives by delegation from the House or Houses appointing it, or which has been specifically bestowed by legislation in the case of statutory committees. The power of a House or joint committee is determined by the power possessed by the House or Houses and the degree to which this has been delegated.
38. It is clear that, at 1901, the House of Commons (UK) had power to summons witnesses and require the production of documents which, under s 49 of the *Constitution of the Commonwealth of Australia*, was a power bestowed on, inter alia, the House of Representatives. This is confirmed by s 5 of the *Parliamentary Privileges Act 1987* (Cth). It is further implied in ss 12 and 13 of that latter Act that the House of Representatives has that power.

39. The matter is not entirely free from doubt. Thus, McHugh J in *Egan v Willis* (1998) 195 CLR 424 at 472, considered that the NSW Legislative Council did not have power to compel ordinary citizens to produce documents to it. That may, however, be because there is no equivalent to s 49 of the *Constitution of the Commonwealth of Australia* in the *Constitution Act 1902* (NSW).
40. In addition, it would also appear that s 15 of the *TOC Act* gives certain members of the Executive, as voting shareholders, power to require documents of Icon Water to be produced to them. It is perhaps arguable that this renders such documents to be State Papers within the meaning of that phrase explained in *Egan v Willis* as set out above at [31].
41. If it does not, and this seems more likely, the documents of Icon Water would seem to be within the power of the Executive to obtain under that section and which may be a reasonable basis for the Legislative Assembly to be able to require their production to the Legislative Assembly by the exercise of that power. This, however, is speculative as, for example, a subpoena to produce those documents with a person's possession, custody or control may not require such a power of taking action, to obtain possession of subpoenaed documents, to be exercised, though it is by no means certain that this would come within the notion of "control": *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2006) 230 ALR 549.
42. Neither Icon Water nor Mr Coe addressed the question of the power of the Legislative Assembly to order the production of the documents sought. I have, however, addressed the issue for my power to report depends on the validity of the resolution requiring their production and so I must at least satisfy myself that I have such power. Because of the fact that I had no submissions on the matter and from the limited time I have had to research the matter, my view must to that extent be provisional.
43. Under s 21 of the *Self-Government Act*, the Legislative Assembly has power to make standing rules and orders. These are, subject to any contrary laws, made by resolution of the Legislative Assembly. I see no reason why the specific matters provided for by the Resolution under which I must make this report, similar to that given under Standing Order 213A, should not be validly made in the same procedural way.
44. I am satisfied that there is, at the very least, a strongly arguable case that the Resolution is valid in its terms and so I have the power granted by it.

H. *The submissions by Icon Water*

45. In Icon Water's submissions to me, the claim of immunity from production of certain parts of the subject contracts was supported on the primary ground of public interest immunity.
46. In its submissions, it pointed out, correctly, that such a claim requires a balancing of the factors in favour and against disclosure to determine what the public interest is.
47. It submitted that the following matters militated against disclosure:
 - (a) Icon Water is contractually bound not to disclose confidential information, such as the redacted portions of the subject contracts without the consent of the ActewAGL Partnerships.
 - (b) Under the *Corporations Act* and the *TOC Act*, Icon Water has duties, including to act in the best interests of the company, to operate at least as efficiently as any other business and to maximise the sustainable return to the Territory.
 - (c) Icon Water has been intentionally and expressly excluded from the operation of the *Government Procurement Act 2001 (ACT)*, which requires entities subject to it to publish certain contracts but with an express protection of "confidential text" from public disclosure and it would be inconsistent to require greater disclosure from Icon Water.
 - (d) Icon Water is publicly accountable through regulatory requirements, including the following: to keep its voting shareholders informed of significant events (s 16A of the *TOC Act*), to comply with requests from shareholders for information (s 15 of the *TOC Act*), to submit to independent audit by the ACT Auditor-General (s 18 of the *TOC Act*), to provide to the shareholders an annual report with specified contents and which must be tabled in the Legislative Assembly (s 22 of the *TOC Act*), to provide the company's annual budget and forecast for publication in the ACT budget papers, which are tabled in the Legislative Assembly, to attend hearings of committees of the Legislative Assembly, including Estimates Committee hearings, and to answer any questions, subject to proper claims of privilege, to disclose information under s 24 of the *Freedom of Information Act 2016 (ACT)* (see s 15(1)(e) of that Act) and to be subject to periodic review by the Independent Competition and Regulatory Commission established under the *Independent Competition and Regulatory Commission Act 1997 (ACT)* and which Commission had already reviewed the subject contracts twice and found the terms of them and the costs incurred under them to be prudent and efficient.
 - (e) A number of the regulatory mechanisms to which Icon Water is subject expressly provide for confidentiality of business affairs, which would include its business affairs, to be maintained by being immune from production in specified circumstances, as set out in the following provisions:

- s 19 of the *Auditor-General Act 1996* (ACT);
 - s 19 of the *TOC Act*;
 - ss 6, 24 and 50 and item 2.2 of Schedule 2 of the *Freedom of Information Act*; and
 - ss 23, 43 and 46 of the *Independent Competition and Regulatory Commission Act*.
- (f) The disclosure of the parts of the subject contracts for which immunity from production is sought would prejudice the commercial interests of Icon Water as follows:
- to place Icon Water at a significant disadvantage when negotiating or entering into future contracts of a similar nature, which it must do no later than 2023;
 - to prejudice Icon Water's ability to do business with the same or other suppliers in the future; and
 - to cause Icon Water arguably to breach its confidentiality obligations to the ActewAGL Partnership.

These matters were said to be especially relevant as Icon Water had recently commenced a procurement process, using a "Request for Expressions of Interest", seeking advice on the best approach and process to obtain corporate, customer and ICT related services after the subject contracts expire on 30 June 2023. No specific details of these claims were given in the submission, however, especially not by reference to particular clauses.

- (g) The disclosure would also adversely affect the commercial interests of the ActewAGL Partnerships, a quite separate third party, by
- placing the ActewAGL Partnerships at a significant commercial disadvantage when entering into future contracts of a similar nature to the subject contracts;
 - providing a commercial advantage to competitors of the ActewAGL Partnerships;
 - providing a commercial advantage to Competitors of the ActewAGL Partnerships;
 - providing a commercial advantage to third parties which may provide services to the ActewAGL Partnerships as sub-contractors.

Specific explanations were not given of the way that there would be the claimed adverse effects to the ActewAGL Partnerships. I was not provided with assistance in understanding the nature of the relevant market for the services to be provided by the subject contracts nor the commercial circumstances and so had to rely on my general knowledge of commercial matters and the application of appropriate logic.

48. Mr Coe submitted that the release of the parts of the subject contracts that were redacted would promote other discussion and enhance the accountability of the ACT Government and Icon Water and contribute to a positive and informed debate on "this important matter" which has thus far been frustrated.
49. The reference to "this important matter" is not explained in the submission, but, when Mr Coe spoke in support of his motion, which I have set out at [2] above, he referred in that speech to Icon Water's "arrangements to the tune of \$25 million per year". He then referred to what he said was a lack of visibility of the expenditure and the subject contracts and expressed the "two issues of particular concern ... firstly, the cost and value of the contracts; but secondly, the lack of information about these contracts".
50. Mr Coe submitted that it would be negligent of members of the Legislative Assembly if they did not scrutinise such substantial expenditure, especially given the monopoly position of Icon Water and that release of the subject contracts in full would be required for this. He relied also on the community's right to information about government operations, implying that the subject contracts as unredacted would and should be put into the public realm with no protection for any confidential information in them.
51. Mr Coe further submitted that committees of the Legislative Assembly had heard evidence that the subject contracts were intended to preserve existing arrangements between ActewAGL and Icon Water when they were "linked", presumably referring to the changed arrangements in 2012. That seemed to be admitted by Icon Water in the history to which it directed my attention. He further submitted, however, that employees of ActewAGL assisted Icon Water in the negotiations for the key reasons "to retain jobs within ActewAGL". He noted that the subject contracts were not open to tender prior to them being concluded. He relied on this to show "clear conflicts in the making of these deals" and that it was "not clear how these contracts benefit Icon Water or its customers long term". He gave no basis for these claims other than asserting them. He submitted that it was not clear how ActewAGL met Icon Water's needs better than other service providers.
52. He submitted that the prevention of legitimate scrutiny would set a "poor precedent" and that because of apparent excessive, and implicitly unjustified, redaction of copies of the subject contracts supplied to him under a request under the *Freedom of Information Act 1989* (ACT,) showed that the claim had "not been sincerely applied [sic]; but ... [was] a shield to prevent reasonable and justifiable scrutiny".

53. Mr Coe did not specifically address the ground of commercial in confidence as raised by Icon Water in its submissions.

J. The submissions in reply by Icon Water

54. Icon Water requested that I provide it with an opportunity to reply to the submissions of Mr Coe and I agreed. It supplied those submissions within the time I allowed.

55. Icon Water addressed Mr Coe's concerns. It pointed out that the subject contracts were entered into when the operations and maintenance part of the business of supplying water to the Canberra community were re-integrated into Icon Water from being conducted by ActewAGL. Prior to that, the water operations and asset maintenance had been conducted under a Utilities Management Agreement between Icon Water and ActewAGL. That contract, made in 2004, had a contractual life until 30 June 2023.

56. It was as a result of this life that the subject contracts were made for the balance of the period to provide for continuation of certain services until the expiry date of the Utilities Management Agreement.

57. Icon Water rejected the implication in Mr Coe's submission of any inadequacy in the arrangements for the management of the contracts. I am not sure that this is Mr Coe's submission, but rather that the negotiation for the subject contracts was flawed and that he suggested that there had been a conflict of interest in the degree of involvement of ActewAGL in the negotiations. In any event, Icon Water submitted that it had a rigorous contract management framework which has been externally audited and found appropriate.

58. Reference was also made to the *Review of Institutional Arrangements for ACTEW Corporation Limited (ACTEW)* (December 2013), conducted by Dr Bruce Cohen. Dr Cohen reported some 18 months after the date of the subject contracts.

59. In that *Report*, Dr Cohen stated at pp 13-14:

ACTEW's current institutional arrangements are in part the product of the distinct natural and demographic characteristics of the ACT, and the nature of its historical development. They also derive heavily from the policy environment that operated during the 1990s – ACTEW's current structure formed in the context of a complex and passionate debate as to the benefits of competition, the potential for privatization and the support which existed for ongoing public ownership of the ACT's water, sewerage and energy assets.

The structures put in place have served the ACT for nearly a decade and a half. In that time there have been issues of concern and controversy. Some of these are ongoing. Yet in terms of its core responsibilities, ACTEW has generally fulfilled its role

of providing a safe and secure supply of water, and ensuring effective sewage transfer and treatment. Further the ActewAGL joint venture in which its hold a 50 per cent interest has operated profitably, and continues to be the major provider of energy services to the ACT community. As such, the circumstances in which this Review is being undertaken are not of apparent imminent crisis requiring drastic and dramatic reform.

60. In that Report, Dr Cohen made 22 recommendations which included some reference to issues of transparency and governance. The ACT Executive accepted most of them. Icon Water indirectly referred to these recommendations but Mr Coe made no reference to them.
61. There was also an independent review of ACTEW's internal governance conducted by Price Waterhouse Coopers in 2013 which was said to have found "the framework to be consistent with principles of effective governance".
62. I assume that, along with the annual audit by the Auditor-General and the reviews undertaken by the Independent Competition and Regulatory Commission, these are the external audits to which the Icon Water submission refers.
63. So far as Mr Coe's reference to the expenditure under the subject contracts was concerned, Icon Water noted its independence from Government as a company and a Territory-owned corporation, including the requirement for decisions relating to the operation of the company being made by the directors in accordance with the company's statement of intent (Item 3 in Part 3.1 of Schedule 3 of the *TOC Act*). Nevertheless, s 17 of the *TOC Act* permits the voting shareholders, being Ministers, to give Icon Water certain directions with which it must comply and s 17A requires the directors to ensure that applicable Government policies are complied with by Icon Water and its subsidiaries.

K. Public Interest Immunity

64. The terms of the resolution under which I was appointed expressly permits a claim to be made of public interest immunity which will, if upheld, prevent the production of the document or part of the document subject to the order for production but which enjoys the immunity.
65. In the *Public Housing Committee Report* at [63], I summarised the test to be applied in such claims as requires the Independent Legal Arbiter to determine whether "the interest in non-disclosure outweighs the interest in disclosure". I rely on what I said there.

66. It must be accepted that there is a significant interest in disclosure of documents that the Legislative Assembly identifies as necessary or desirable for it to carry out its constitutional functions by garnering and processing information to participate in the governance of the Territory which includes an accountability function in relation to the ACT Executive. I summarised the principles in the *Public Housing Committee Report* at [54], and adopt what I there said.
67. Further, as the High Court stated in *Egan v Willis* at 454, adopting what Priestley JA had said in the Court of Appeal, namely that there is an
- imperative need for each chamber to have access to material which may be of help to it in considering not only the making of changes to existing laws or the enactment of new laws, but as an anterior matter, to the manner of operation of existing laws.
68. In that case, of course, the reference to “each chamber” was to the two chambers of the NSW Parliament and the statement is applicable in the same terms to the Legislative Assembly.
69. This is a very significant obligation. Associated with it is what I described in the *Public Housing Committing Report* at [55], [56], that there is a public interest in transparency and accountability which militates in favour of the disclosure of government documents to the public and which secrecy inevitably undermines. This has some legislative expression in a similar context in the *Freedom of Information Act*.
70. Thus, as Mr Coe puts it, the Members of the Legislative Assembly have an obligation to address issues where they consider that they need exploration and investigation. I do not accept that there is an issue of negligence, but I accept the tenor of his submission.
71. The large expenditure is not of public funds, for which the Legislative Assembly has a particularly important responsibility to scrutinise. There is some but only some analogy here where the expenditure is paid for by the public, though in exchange for an essential service, the provisions of water. Some strength to the requirement for accountability for the expenditure of this money is provided by the fact that the service is provided by a government mandated monopoly.
72. There are, however, proper considerations that support non-disclosure, even in the face of strong factors that favour disclosure.

73. The relevant one in this context is that the parts of the subject contracts for which an immunity from production is claimed is that they are what has commonly been known as "commercial-in-confidence".
74. That the contents a document or part of a document is said to be and in fact is commercial-in-confidence does not, of itself, render it immune from production. Thus, unlike legal professional privilege, which provides a privilege once proved unless waived, such a claim, if substantiated, does not by virtue of that characterisation alone justify the immunity.
75. There is no clear definition of the phrase "commercial-in-confidence". Not all business or commercial information is confidential. It is generally regarded as requiring that the information be confidential and that the disclosure of it be likely to damage the owner's commercial interests, intellectual property or trade secrets. The information must have been created in circumstances where it is agreed or understood to be confidential and clearly not information to be found in the public domain.
76. In this case, the subject contracts have been produced not by the Executive, but by a private company. It is, of course, not entirely a private company because its voting shareholders are and must remain Ministers, it is subject to significant constraints and restraints under the *TOC Act* including that it is also subject to directions to perform, cease to perform or refrain from performing an activity in a way that the directors intend to perform the activity and that it comply also with general government policies with which the voting shareholders tell it to comply.
77. On the other hand, it is a company registered under the *Corporations Act*, a Commonwealth statute which imposes duties on companies and directors which statute would override the provisions of the *TOC Act* to the extent of any inconsistency. Further, Icon Water is not the Territory, a representative of the Territory nor a government entity under the *Legislation Act 2001 (ACT)*. Further, the Territory is not responsible, unless under a Territory Act or by agreement, for any of its debts or liabilities. It has a statutory obligation to operate as efficiently as any comparable business and to maximise a sustainable return to the Territory
78. This is relevant in this circumstance because the High Court in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52 per Mason J made a distinction between private citizens and government when his Honour said in the context of an application for restraint from publication of confidential material:

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.

79. This may affect the way in which the relevant factors are balanced when determining whether there public interest immunity is sustained, perhaps especially in the context of a claim that the relevant documents are to be characterised as commercial-in-confidence.
80. There is a public interest in the maintenance of the confidentiality in general terms of information that is confidential. The healthy conduct of society requires an appropriate degree of respect to this way in which affairs are conducted by its members.
81. There is a public interest in maintaining an appropriate degree of protection of business and other economic units in the community from actions that undermine or damage their ability to conduct their affairs in a profitable and undamaged way.
82. I note also that the particular time and circumstances may be relevant to whether the public interest favours non-disclosure.
83. None of these matters are determinative and must be balanced against the public interest in the Legislative Assembly being able to discharge its constitutional functions.
84. There are suggestions in reports of the independent legal arbiter appointed in New South Wales that the function of the position is not to consider whether dissemination of the material sought to be protected from disclosure should be disclosed to the public in order that the parliament be able to discharge its proper function. See, for example, *Report on Sydney Stadiums* (22 May 2018) at p 3. That may be a position that can be taken because of the particular procedure in that State.
85. Given the different procedure, in this Territory, I consider that, at least in relation to public interest immunity claims, it is not possible to decide whether the immunity exists

without conducting the balancing exercise, for it is only if the factors favouring non-disclosure outweigh those favouring disclosure that the immunity can be said to exist.

L. *Assessment of the Claim for Public Interest Immunity*

86. It is unarguable that the entity from whom any documents are required to be produced must establish the immunity from production that it claims. It is not enough merely to state the claim but the entity must descend into particulars of how the actual material fits within the concept of the immunity sought.
87. This has been difficult in this case for neither Icon Water nor Mr Coe have been as specific as would be helpful as to how the particular provisions the subject of the public interest immunity claim show the commercial risks or the overriding need for disclosure that would assist in assessing the claim. It may be that a process of the kind described by the NSW independent legal arbiter in *Report on Greyhound Welfare* (14 February 2017) at pp 8-10, where the parties had an opportunity to consider the independent legal arbiter's draft reasons and confer with a view to modifying their demands for production or claims for privilege, may produce a better outcome were the parties able to confer. See also *Report on Sydney Stadiums* at pp 6-7, 9-11. Of course, in that jurisdiction, the members of parliament have access to the unredacted documents and so the task of explaining or refuting the challenges to the claim of privilege or immunity can be much more specific. That is not the situation here.
88. Nevertheless, doing the best I can, I must assess the claims in the light of the challenges. To do so, of course, I must read the subject contracts and I have done so.
89. It seems to me that the factors favouring disclosure in this case are:
- (1) the important constitutional function of the Legislative Assembly to scrutinise carefully Executive action which would include, as here, where some of its members are involved, through their position as voting shareholders of Icon Water and the powers they exercise in that role, in the delivery of services;
 - (2) the fact that Icon Water has a monopoly on the provision of water services which is created by government;
 - (3) the fact that the payments made by Icon Water under the subject contracts are very substantial;
 - (4) that the ownership and governance arrangements regulating the creation and operation of Icon Water show a close relationship with the Executive including significant control; and

(5) that non-governmental private bodies contracting with Icon Water must accept and be aware that Icon Water is accountable to the Legislative assembly and that contractual arrangements cannot be immune from appropriate scrutiny by simply being labelled as confidential or commercial-in-confidence.

90. In the absence of a specific basis for the allegation of a conflict of interest in the creation of the subject contracts, I do not consider that I can rely on this mere assertion. ActewAGL's subsidiaries constitute the other party to the subject contracts and so they and, no doubt ActewAGL staff would inevitably be involved in the negotiations involved in the making of the subject contracts. Further, the subject contracts were made to ensure continuity of services that had apparently been properly delivered previously and in respect of which services no challenge had been made to the propriety or adequacy of their delivery in connection with the information or submissions provided to me. Indeed, inquiries and audits had come to the opposite conclusion.

91. On the other hand, the factors that favour non-disclosure are:

- (1) that Icon Water is expressly established by laws passed by the Legislative Assembly to have a degree of independence from government with some similarities to a private business and is required to conduct its business on a commercial basis, though this is somewhat diluted as a factor because there is a relatively significant degree of governmental influence by, for example, being subject to direction and being required to comply with specified policies.
- (2) that Icon Water is subject to significant review by the Auditor-General and the Independent Competition and Regulatory Commission as well as its usual review through tabling its Annual Reports and appearance before committees of the Legislative Assembly at estimates hearings, though much of this, especially audit by the Auditor-General is review to which many other agencies that are part of government are also subject and does not replace review by the Legislative Assembly, though relevant to it;
- (3) that Icon Water (under its previous name) has been subject to a review by Dr Cohen in 2013, well after the subject contracts were made in June 2012, and that review, despite making significant recommendations, including as to governance, did not raise concerns with any matter relevant to the subject contracts relevant to my consideration, and was also subject to an independent review by PricewaterhouseCoopers which also did not find any relevant matters of concern so far as concerns my task;

- (4) that, where the subject contracts contain information that is commercial-in-confidence, its disclosure is likely to affect the commercial interests of Icon Water adversely by placing it at a commercial disadvantage in the market when negotiating future contracts, negotiating with current partners and constituting a breach of its obligation to the other parties to the subject contracts;
 - (5) in this context, that Icon Water has already entered the market, though in a very preliminary way, for the contracts that will replace the subject contracts when they expire in 2023;
 - (6) that those contracts provide a contractual obligation of confidence on Icon Water;
 - (7) that the interests of the commercial partners of Icon Water may be damaged by the disclosure; and
 - (8) that the immunity from disclosure of commercial-in-confidence information is already provided for Icon Water (and other relevant entities) by legislation passed by the Legislative Assembly and which applies to Icon Water.
92. Of course, none of these factors by themselves are sufficient to justify disclosure or non-disclosure. It is the combination of them that must be weighed in the particular circumstances and different contractual relations or different timing may make a significant difference to the balancing exercise.
93. Having read the subject contracts, I am satisfied that, where the information is commercial-in-confidence, it should not be disclosed. The factors favouring non-disclosure seem to me to outweigh those favouring disclosure in all the circumstances.
94. I am concerned, however, about the precise claims for immunity made in the subject contracts as they seem more widely drawn than can be justified as truly claims of commercial-in-confidence.
95. In making this assessment, I am, of course, reliant upon the submissions that I have received from Icon Water and Mr Coe. In particular, some of the specific clauses for which immunity is claimed seem to me to be nothing more than the kind of clauses that would be found in any such commercial contract, especially where there are no time periods, or other matters that would make the term special or likely to affect costs in the contract substantially or in a way special to the contract. In the absence of any specific claim or explanation by Icon Water, I see no reason to uphold the claim of immunity for these clauses.

M. Decision

96. Accordingly, I reject the claims for immunity from production in parts of the subject contracts in respect of the following provisions in each of the subject contracts as follows:

(a) Customer Services and Community Support Agreement –

- (i) In clause 1.1, there are a number of definitions given by reference to clauses in respect of which privilege is claimed. I see no reason why the definition should not be disclosed even if the clause is protected, the cross-reference does not waive the claim in respect of the substantive clause. There is no requirement that items not redacted be able necessarily to be given a full meaning. Thus, I would reject the claim for immunity for all the definitions save for those of “ActewAGL Retail Financial Model”, “Actual Allocated Costs”, “Liability Period” and “Unwind Costs”.
- (ii) Clause 5.3(c) does not appear to me to show any particularly confidential information and I reject the claim for immunity.
- (iii) Clause 5.7 deals with an acknowledgement of apparent prior approval for entry into the contract, but there is no apparent reason why that should be confidential; reference to the other agreement will not waive any privilege or immunity from production that it may have and so I reject the claim for immunity.
- (v) Clause 9.5(d) seems to me to be information that was or should have been in the relevant budget submitted by Icon Water for the relevant year and so to be in the public domain and the claim for immunity is rejected.
- (v) I see no reason why clause 9.6(a) is confidential or disclosure would adversely affect any relevant interests and I reject the claim for immunity;
- (vi) I see no confidential or commercially damaging information in clause 14.6 and reject the claim for immunity.
- (vii) Clauses 32.3 and 32.4 appear to me to be clauses of a type that would be expected to be in any commercial contract of this type and the precise terms do not seem to me to disclose terms or conditions that are either confidential or likely, if disclosed, to affect the interests of either party adversely and so I reject the claim for immunity.
- (viii) In Schedule 1, it does not appear to me that either of the items for which privilege is claimed are ones that are confidential or the disclosure of which could damage the commercial interests of Icon Water or the other contractors.
- (ix) Schedule 2 sets out the services to be provided under the contract and none seem to require any particular confidentiality; indeed, many of them

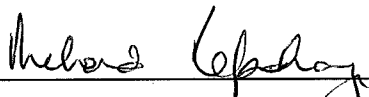
will be known at least to some extent in the public domain. Any tender for these to be provided from 30 June 2023 will need to identify them in any event. Thus, I see no justifiable claim that this information is confidential or would meet the tests for being commercial in confidence and none was explained in the submissions from Icon Water. That view, however, only applies to the first column, headed "BAU Services", in the table that constitutes the Schedule for which I reject the claim of immunity. That does not apply to the contents of the second, third and, where relevant, fourth columns in the table for which I can accept that there are sufficient elements of the claim that they are commercial-in-confidence to justify the claim of immunity.

(b) Corporate Services Agreement –

- (i) For the same reason as set out in (a)(i) above, I reject the claim of privilege for all the definitions save for those of "Actual Allocated Costs", "Liability Periods" and "Unwind Costs".
- (ii) I reject the claim for immunity for clause 5.3(c), as it does not appear to me to be confidential or that the disclosure of it would adversely affect any commercial interests of Icon Water or its contractors;
- (iii) I reject the claim for immunity for clause 13.6 for the same reasons as above (a)(v);
- (iv) I reject the claim for immunity for clauses 32.3 and 32.4 for the same reasons as above at (a)(vi);
- (v) I reject the claims for immunity for the items in Schedule 1 sought to be privileged from production, for the same reasons as set out above at (a)(vi).
- (vi) Schedule 2 sets out the services to be performed under the contract and similarly to that set out in the other contract, which I have dealt with at (a)(ix) above. It does not seem to me that the description of the actual services in this Schedule is confidential or would meet the test for being commercial in confidence in this circumstance. The Schedule is more complicated in this contract as there are various tables and commentary or stated exceptions. I accept that some of that material would likely meet the test for being commercial-in-confidence sufficient to justify a limit on the material for which I must reject the claim for immunity. This, I reject the claim for immunity for the material only in the tables which partially constitute the Schedule and only those which contain columns headed "BAU Services" and only the material in those columns, namely the first column in each case, which is so headed. The material in the other

columns and in the Schedule but not in a column headed "BAU Services" is entitled to the immunity claimed.

97. Otherwise, I uphold the claim for immunity for those parts of the subject contracts for which Icon Water has made them against disclosure on the grounds of public interest immunity.



The Hon Richard Refshauge SC

2 November 2018

SCHEDULE

Icon water contracts with ActewAGL

That this Assembly:

(1) notes that:

- (a) Icon Water Limited (Icon) is a registered company under the Corporations Act 2001 (Commonwealth) that as a Territory owned corporation is also subject to the Territory Owned Corporations Act 1990; and
- (b) the Chief Minister has previously stated in this Assembly that Icon's contracts with ActewAGL, being the Corporate Services Agreement and Customer Services and Community Support Agreement (Agreements), are not documents that are created by the Executive, owned by the Executive or held by the Executive;

(2) recognises that:

- (a) standing order 213A does not respond to circumstances where the Assembly seeks information or documents from persons or entities that do not comprise the Executive Government;
- (b) for the Assembly to order Icon to produce the Agreements requires a specific resolution directed to Icon; and
- (c) the resolution should include provision for the process for any objection by Icon for production of all or part of the Agreements and the reference of any such objection to an independent arbiter for determination; and

(3) notwithstanding standing order 213A, calls on the Assembly to:

- (a) order Icon to table the Agreements that it has with ActewAGL being the Corporate Services Agreement and Customer Services and Community Support Agreement (Agreements);
- (b) require Icon comply with this order (where no claim of privilege or public interest immunity is made) by delivering the documents to the Clerk of the Assembly within 14 days of this order and the documents are deemed to have been presented to the Assembly;

- (c) require that if Icon claims that the Agreements or any part of them are privileged or subject to public interest immunity, Icon must, within 14 days of this order, deliver to the Clerk of the Assembly a statement setting out the reasons for the claim of privilege or public interest immunity. A copy of the statement will be provided to each member of the Assembly and any member may within seven days dispute the claim for privilege or public interest immunity. Any notice disputing the claim may be accompanied by a statement setting out why it is disputed;
- (d) require that if the claim for privilege or public interest immunity is not disputed then it is accepted;
- (e) require that if the claim for privilege or public interest immunity is disputed then the Clerk will inform Icon and Icon must within seven days deliver the Agreements to the Clerk in a sealed envelope and the Clerk is authorised to release the Agreements and the statements to an independent legal arbiter for evaluation of the claim for privilege or public interest immunity and report within 14 days as to the validity of the claim;
- (f) require that the Speaker appoint an independent legal arbiter who must be a retired Supreme Court, Federal Court or High Court Judge;
- (g) require that the independent legal arbiter provide a report that is to be lodged with the Clerk and:
 - (i) made available only to Members of the Assembly and Icon; and
 - (ii) not published or copied without an order of the Assembly;
- (h) require that if the independent legal arbiter upholds the claim of privilege or public interest immunity, the Clerk shall return the Agreements to Icon; and
- (i) require that if the independent legal arbiter does not uphold the claim of privilege or public interest immunity, the Clerk will table the Agreements. In the event that the Assembly is not sitting, the Clerk is authorised to provide the Agreements to any Member upon request, however, the Agreements do not attract absolute privilege until tabled by the Clerk at the next sitting of the Assembly.

Question resolved in the affirmative.