LEGISLATIVE ASSEMBLY OF THE AUSTRALIAN CAPITAL TERRITORY

DISPUTED CLAIMS OF PRIVILEGE RE DOCUMENTS ORDERED TO BE PRODUCED

Health expenditures and the 2024 caretaker period information

Light rail

The Hon Keith Mason AC KC

15 May 2025

Pursuant to Standing Order 213A I have been appointed the independent legal arbiter to evaluate and report as to the validity of claims of privilege made by the Chief Minister over specified documents in these two orders for documents.

Some general principles relevant to my present task

The powers of the Legislative Assembly include the power to 'send for persons, papers and records': see generally *Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory,* 2nd ed, p 51ff, *Egan v Willis* (1998) 195 CLR 424. Where, as in the present instance, papers are called for from the Government, the constitutional principle of responsible government underpins the exercise of that power - for three broad and overlapping purposes that were identified by the High Court, citing Priestley JA in the Court below (195 CLR at 453):

> *'the imperative need for [the Parliament] to have access (and ready access) to all facts and information which may be of help...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 Govenment is executing the laws.'*

It is no answer to a parliamentary call for papers to invoke common law privileges and immunities that are recognised in litigious contexts: see *Egan v Chadwick* (1999) 46 NSWLR 563, where the New South Wales Court of Appeal ruled that neither public interest immunity nor legal professional privilege offered an excuse for resisting a call for papers.

Nevertheless, the Standing Orders of the ACT Legislative Assembly (SO 213A) and of the NSW Legislative Council (SO 52) recognise that a claim of 'privilege' raised by the Government will impact procedurally and substantively upon the access of Members to documents that are produced in response to a call. Each of those standing orders were formulated after the *Willis* and *Chadwick* cases. 'Privilege' under rubrics such as public interest immunity ('PII') and legal professional privilege ('LPP') may still be raised, not in opposition to the call for papers, but (in an appropriate case) in opposition to automatic Member access. But, if privilege is disputed, the task of the independent arbiter is to weigh competing public interests: on the one hand, the public interst in Parliament attending to its constitutional duties; and on the other hand, whatever information the Executive advances to support its claim that access to Members (in the ACT) or unrestricted access to Members (in NSW) should be withheld. The onus rests on the Executive to establish its claim in

the specific context. And the limited redaction of documents is to be preferred to their entire suppression. See generally my report to the NSW Legislative Council in *WestConnex Business Case* (8 August 2014) and *New South Wales Legislative Council Practice.*

To date, there have been five tabled reports by independent legal arbiters appointed in the ACT under SO 213A and numerous tabled reports by independent legal arbiters appointed under the NSW Legislative Council standing order.

'Privilege' claims in this context that invoke the rubric of 'Cabinet deliberations' have been considered on occasions: see *Egan v Chadwick* (1999) 46 NSWLR 563 per Spigelman CJ, the reports of Sir Laurence Street on *Review of ACT Public Sector and Services* (7 April 2009), of myself on *Aecom Infrastrucuture* (16 June 2017) and of the Hon Richard Refshauge SC on *SPIRE Options Paper* (16 March 2020); and generally *New South Wales Legislative Council Practice, 2nd ed* p 699 ff. Reports or submissions prepared for the assistance of Cabinet will not fall within this category, in the absence of information establishing that they offer clues as to intra-Cabinet deliberations. Announced decisions emanating from Cabinet are not within this category.

Legal professional privilege does not offer an excuse for the Executive arm to withhold papers that are called for by the Parliament: *Egan v Chadwick.* And when, under the standing orders it is raised as a 'privilege' to preclude automatic access by Members to documents that have been returned, there will be a nuanced task for the independent arbiter. First, he or she will seek to ascertain if the relevant part of the document truly contains confidential legal advice or information sought dominantly for that purpose or the purpose of legal proceedings. The inquiry then shifts to consider whether some public harm is likely to arise were that information to be shared with the Members of Parliament when exercising their own oversight and legislative functions. See for example my reports to the NSW Legislative Council on *Landcom Bullying Allegations* (13 September 2019) and *Insurance and Care NSW and the State Insurance Regulatory Authority Interim Report* (22 September 2020).

The independent legal arbiter is tasked with 'evaluation and report' as to the validity of the Executive's disputed claim. Under the ACT Standing Order his or her determination is to be reported to the Members via the Clerk, but it takes automatic effect without having to be adopted by the House. If the claim of privilege is upheld, the Clerk must return the documents to the Chief Minister's Directorate (SO 213A (k)). This contrasts with the NSW situation where the Members get to see the documents returned but are restricted in their use of them until the privilege issue is resolved in their favour (see SO 52 (5)).

SO 213A (e) stipulates that the Chief Minister's return should include the reasons for the claim of privilege. The importance of reasons in a disputed privilege context is discussed by the Hon Richard Refshauge SC in his report on the *SPIRE Options Paper* (16 March 2020). SO 213A (h) also contemplates that any Member of the Assembly may offer submissions relevant to the (disputed) claim.

Health expenditures and the 2024 caretaker period information

On 4 March 2025 the Assembly called for papers created between 1 July and 6 November 2024 provided to the Chief Minister and others regarding health demand or expenditure, including any records of advice, decisions, options, or consideration of providing information to the Opposition, crossbench, or the public during the caretaker period and any material provided to any minister, agency, or official regarding caretaker conventions in 2024. In 2024, the caretaker period began at 12 am on 13 September 2024 and ended with the election of the Chief Minister on the first sitting of the Assembly following the election: see ACT Government, *Australian Capital Territory 2014*

Election Guidance on Caretaker Conventions, p 3.

The debate on the resolution on 4 March discloses that the non-government Members wish to explore the alleged non-disclosure of the 'potential insolvency of the health system' prior to the general election that took place in October 2024; as well as communications between health officials and the Labor Government during the election campaign that were allegedly not made available to other parties. There was a Labor Government before, during and after the 2024 election.

A resolution of the Assembly passed on 5 March 2025 established a Select Committee to investigate the operation of caretaker conventions in the Territory.

Several documents, listed in the Index, have been produced. Of those that are claimed to be privileged, three are disputed. I have examined these documents. No submissions have been filed either by the Executive or any Member.

Document Ref Part 2 - 0708 Election Commitments Implementation Advice

The Index states that this document was created on 1 October 2024 by the Chief Minister, Treasury and Economic Development Directorate. It has 577 pages and, in its original form inspected by me, it is called *Chief Minister Incoming Government Briefing. Delivering Government Priorities. Election Commitments.*

To my understanding, this type of document is commonplace in parliamentary systems functioning under the priciples of responsible government. At its broadest level, it is the creation of senior public servants designed to assist an incoming government to 'hit the ground running'. The abovementioned *Guidance on Caretaker Conventions* states (p 7):

> ***Incoming government briefs***
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> *The Chief Minister, Treasury and Economic Directorate (CMTEDD) is responsible for coordinating incoming government briefs in the lead-up to the election. One set of briefing papers will be developed in preparation for a returned government, and a second set is developed for a newly elected government taking office. Separate guidance on this issue will be issued by the Head of Service in the lead up to the election.*

The actual document appears to straddle both categories while taking as its focus the 2024 election policy and commitment platform of ACT Labor. (I suggest nothing untoward in this.) Moving through documented 'election commitments', the Folder offers detailed information including Key Implementation Steps, Anticipated Delivery Timeframe, Comments, Additional Implementation Information, Key Stakeholders, Treasury Costing and Party Announced Budget. In short, there is a wealth of information generated by a skilled public service about what is perceived likely to be involved for Government if (as it turned out) ACT Labor were returned to Government. That information would be of great assistance to the Parliament as well, in the exercise of the oversight and legislative constitutional functions adverted to in *Egan v Willis* above.

What is placed in the scales to support a relevant 'privilege' that would keep the information from all Members? In the Index, privilege is claimed on the basis that the document 'contains material that would prejudice a deliberative process of government and disclose the deliberations of Cabinet, and unreasonably prejudice intergovernmental relations'.

I have found it difficult to understand what is sought to be advanced by these assertions in their application to this particular document. This, before turning to evaluate their force to see if they carry sufficient weight to displace the public interest in facilitating proper oversight of government

and informed law-making and budgetary oversight by the Legislative Assembly. The deliberation within the public service that ultimately produced this single document is not exposed or even relevant. Nor is any deliberation by the incoming Government. My attention has not been drawn to any part of the document that is 'deliberative' either within government or Cabinet or which touches 'intergovernmental relations'. As I read it, the document simply provides a lot of very useful information which the incoming government is free to accept or disregard as it thinks fit. Like a public servant's briefing paper on a specific action it informs, perhaps recommends. In a system of responsible government the Legislature has its own constitutional reasons to be interested in the nature and quality of any such information and advice..

In my evaluation, this document is not privileged within the scope of the Standing Order.

Document Ref Part 3 -0660 Brief to the CM – update to PSM Standards s54A September 2024

The Index states that this was created on 11 September 2024 by Kathy Leigh - Head of Service. It has 4 pages and privilege is asserted on the basis that it 'contains material that is subject to legal professional privilege'. The document appears to have been actioned by the Chief Minister on that day.

I have difficulty is seeing anything in the nature of legal advice in the document beyond the assertion that the proposed text of certain legislation has been 'finalised' by the Parliamentary Counsel's Office. The text is not part of the document returned. And in any event there could be no harm to the public interest if the Legislature became privy to this snippet of useful information.

In my evaluation, this document is not privileged within the scope of the Standing Order.

Document Ref Part 3 – 0784 Confirming advice re caretaker conventions

The Index states that this short note was created on 12 September 2024 by Emma Matthews – Executive Branch Manager – Office of Industrial Relations and Workforce Strategy. Privilege is asserted on the basis that it 'contains material that would prejudice a deliberative process of government and disclose the deliberations of Cabinet'.

The note confirms advice that certain proposed action was consistent with the caretaker conventions. I see no harm to the public interest if Members of the Assembly have access to it in order to allay or inform whatever concerns they have.

The note adverts to a 'Cabinet decision from May 2024'. Cabinet decisions are frequently announced or disclosed and in the ACT summaries of Cabinet decisions are posted on a website. This does not entail the revelation of the processes whereby Cabinet arrived at the decision, let alone whether there was unanimity or debate.

In my evaluation, this document is not privileged within the scope of the Standing Order.

Light rail

On 19 March 2025 the Assembly called for papers that included:

> *(a) any business cases and post-implementation reviews relating to the development of the*

light rail network, including individual stages;...(c) the Early Presentation of Project, Investment Logic Map, and any draft or indicative business cases, economic appraisals, or economic evaluations of Light Rail Stage 2B...(e) actual capital expenditure on light rail, including all planning, design and construction costs.

Three documents listed in the Index are subject to disputed claims of privilege that have been referred to me for evaluation and report. They are or form part of the Business Cases for Capital Metro Russell Extension (68 pages), Light Rail Stage 2 (191 pages) and City to Woden Light Rail (217 pages). Their respective dates of creation were in 2016, 2018 and 2019. Each is said to be privileged on the basis that it 'contains material that would prejudice a deliberative process of government and disclose the deliberations of Cabinet in relation to future Budget decisions'.

When speaking to the proposed resolution on 19 March 2025, the Leader of the Opposition said:

> *'Unfortunately, we do not know the full costs of the project to date. We have seen a contract for stage 1 and have seen some indicative numbers but nothing concrete, and certainly nothing that points to the benefits that the government expects to realise from any stage of the project. The purpose of this motion is to access that information by seeking the business cases that have been prepared for each stage of the project. My understanding is that the business case has not been finalised yet for stage 2B, so the motion seeks the current estimate of the total capital costs and any economic appraisals or similar that have been prepared.'*

The three disputed business case documents are bulky, each labelled 'Cabinet in Confidence'. The stated purpose of the first was 'to support the Minister for Captal Metro in seeking the Capital Metro Sub-Committee of Cabinet's...consideration of the potential for Territory to procure the Capital Metro light rail project...on the basis of it extending from Gungahlin to Russell'. In the paper Capital Metro Agency seeks to provide sufficient information to allow Cabinet to make an investment decision with regards to the Russell Extension.

The stated purpose of the second business case was to 'provide a robust analysis of the route alignment options, benefits and risks for LRS2. In turn, this Business Case is designed to support Cabinet in its investment decision deliberations in connection with LRS2'.

The stated purpose of the third business case was 'to (i) seek approval to deliver the Project, and (ii) provide an analysis of the Project's final route alignment options, benefits, risks and the procurement approach for the Project to support Cabinet in its investment deliberations regarding the Project'.

Each Business Case contains fairly specific recommendations. For all I know, they may have been ignored, or taken up entirely or in part. But this in itself discloses nothing about intra-Cabinet deliberations that would have been involved in responding to the business cases, by which I mean disclosure of information about the 'actual deliberations within Cabinet' (*Egan v Chadwick* at 576 per Spigelman CJ).

Each business case contains detailed estimates of the financial, environmental, social aspects and risks of a major capital project anticipated to span several years. Very significant sums of money are involved, placing the information at the heart of that which is of primary interest to a Legislature tasked with fiscal oversight and the appropriation of money. Nothing has been advanced to suggest any risk to still future tendering strategy.

I note that the Treasurer indicated during debate on the motion calling for these papers on 19 March 2025 that the Government would continue to be transparent 'for example, by publishing business

cases for stage 1 and stage 2A' of the light rail project.

My attention has been directed to no portions of the documents that may be of particular sensitivity and no submissions have been presented to supplement the globally expressed claims of privilege.

In my evaluation, these documents are not privileged within the scope of the Standing Order.

The Hon Keith Mason AC KC