

LEGISLATIVE ASSEMBLY OF THE AUSTRALIAN CAPITAL TERRITORY
DISPUTED CLAIMS OF PRIVILEGE RE DOCUMENTS ORDERED TO BE PRODUCED

Climate Change Mitigation – Documents and briefs to Ministers

Report

The Hon Keith Mason AC KC

27 November 2025

1. Invoking SO 213A, the Legislative Assembly on 25 September 2025 called for papers relating to climate change mitigation.
2. A return was provided by Ms Kathy Leigh, Head of Service, on 31 October 2025. 356 documents were identified and privilege was claimed over 162 of them.
3. On 6 November 2025 Miss Nuttall MLA disputed the claims over 153 of those documents, acknowledging that partial redaction may be appropriate for some of them. The Member pointed out that, from their titles, a number of the documents do not appear to be Cabinet documents but were created for another purpose.
4. I was appointed the independent legal arbiter to evaluate and report as to the validity of the claims.
5. Some of the returned documents already contained redactions that are described as identifying 'out of scope' information in the sense that the Executive asserts that it was not called for when the Assembly ordered production. I am not familiar with this practice. But, unless instructed otherwise, I shall proceed on the basis that I am not tasked with arbitrating as to the validity of these proposed redactions.
6. An updated return was filed on 14 November 2025. As explained in the letter from the Chief Minister of that date, several of the claims were withdrawn and some were reformulated. This report addresses the remaining disputed claims which fall under three broad rubrics:
 - Deliberations or decisions of Cabinet
 - Harm to business affairs
 - Personal information.

Deliberations or decisions of Cabinet

7. My understanding of the relevant principles in their application to the Territory is set out in the Interim Report *ACT Government Projects – Business Cases* dated 13 August 2025 (hereafter the *Interim Report*).
8. The Chief Minister's letter partly restates and partly develops the Executive's submissions on this aspect of privilege. I stand prepared to revisit the principles and their application. Issues often fall into sharper focus when applied to fresh situations. And there is no rigid doctrine of *stare decisis* in this context, a fortiori because the Arbiter is the sole reviewer of his or her work in a particular matter. Each Arbiter will of course bring an open, but not an empty, mind to his or her task.

9. For most of the documents still in dispute the Executive has proffered versions with limited redactions. This helpfully reduces the ambit of the dispute and allows the Arbiter to focus upon the particular information said to reveal the confidential and privileged deliberations of the Cabinet or its ERC sub-committee. A column in the updated return provides some additional reasons for the claim or proposed redactions.
10. For some of the documents, the proposed redactions extend to the document almost in its entirety. For others, the redactions appear to this observer to be selective as to content in the sense that nothing indicates why the redacted portions are considered deliberative and privileged whereas the open portions are not. I mention this topic only to explain that I have tended to examine the whole document as I endeavour to understand why the redacted portions are still said to attract privilege under this rubric.
11. The Chief Minister acknowledges that a submission by a Minister to Cabinet may ultimately be supported, not supported, supported in part or sent back for further consideration. This stated, the thrust of his letter is that the still contested passages 'offer clues as to intra-Cabinet deliberations' by revealing the position individual Ministers took to Cabinet.
12. The letter offers an example from a recent return where a business case revealed that the Minister for Capital Metro presented a position to Cabinet which recommended that the initial stage of Light Rail be developed in a particular way. The 'ultimate Cabinet decision' showed that a different choice was taken by Cabinet. The Chief Minister submits that disclosing this would 'undermine... the doctrine of collective Cabinet responsibility as the revelation of the individual Minister's position reveals the Cabinet deliberations'. On the facts posited I am inclined to respectfully agree, and I would point to paras 18, 23, 35-39 of the Interim Report of 13 August 2025.
13. Since, however, the burden lies upon the Executive invoking a privilege to demonstrate how it applies to the particular document or portion, I have not found persuasive some of the formulaic statements in the Reasons column of the updated return. For example, it is said of document CED.1(d).045 that releasing the Minister's comments '**risks** releasing the deliberations of the Minister and Cabinet' (emphasis added). Without more evidence, this reasoning is speculative in my respectful opinion.
14. Nor, consistently with my earlier Report, will it suffice that the business case or other proposal put to Cabinet by a Minister merely lists a variety of options or costings. See *Interim Report* paras 36, 38-39.
15. The rationale and justification for this particular privilege is the encouragement of frank and fearless deliberation 'within Cabinet' by relieving Ministers from the threat of individual attack through isolating them from the **collective** responsibility for decisions made in Cabinet: see *Interim Report* paras 33-35. It follows that Ministerial briefings and Ministerial submissions to Cabinet that contain factual information or policy analysis or which report shortfalls in statutory targets do not in themselves reveal information that is privileged under this rubric.
16. Miss Nuttall is correct to point out that several of the documents are Ministerial Briefings. Others include changing drafts of a still future Cabinet submission. I recognise in principle that a document generated outside Cabinet meetings may contain information that attracts privilege, but not merely because its information may have been intended for use in Cabinet deliberations.
17. I have examined the documents that remain in dispute in whole or part as regards this rubric.
18. They are replete with information that is clearly relevant to parliamentary oversight of the Executive's decision-making and planning in this important area. This, of course offers no basis for over-riding a proper claim of privilege under the rubric in consideration. But it does, in my opinion, reinforce the considerations tending towards a fairly strict scope of that privilege in this parliamentary context. See *Interim Report* para 35.
19. A Cabinet submission on a matter of current or continuing controversy might contain material that attracts privilege by reference to other particular and demonstrable aspects of

- public interest immunity. But the only head of privilege with which this portion of the Report is concerned is that which is related to the convention of collective or shared Cabinet responsibility.
20. I propose to explain in some detail my reasoning about most of the disputed documents to further expose my reasoning.
 21. *Document CED.1(a).10* is the Business Case (Final) relating to Environmental Offsets Funding Policy, signed as endorsed by a Minister and dated 26 February 2024. The Chief Minister proposes extensive but not complete redactions of 'deliberative information' said to contain the Minister's preferred position put forward to Cabinet. These would cover information regarding capital impacts, the need for government intervention, the range of possible solutions (and their estimated costings), the risks pro and con of not proceeding, proposed ways forward, stakeholder engagement etc. The redactions would mask much that is central to fiscal management and policy-making (tasks shared by the Executive and Parliamentary branches of the ACT polity).
 22. Obviously the Cabinet was intended to consider this document and presumably it did so. But, beyond the Minister's endorsement of the Business Case per se, I have not seen or had my attention directed to anything that shows the Minister's preferred position put forward to Cabinet, as suggested in the reasons column of the amended return. The situation is indistinguishable from those considered in the *Interim Report*. Allowing the Assembly to have access to this document assists in the Assembly's oversight of the whole Government. But it does not, in my evaluation, reveal the later deliberations in Cabinet. Nor does it expose any individual Minister to that type of criticism which is the harm that generates the convention of collective Cabinet responsibility and informs the scope of the instant privilege.
 23. *Document CED.1(d).028* is a Ministerial Brief on the topic of 'Exposure Draft lodgement of Cabinet item "ACT emissions projections towards net zero emissions by 2045"'. Much of the document is said to be out of scope according to the redacted version: for reasons above, I am not concerned with them. A couple of redactions of 'deliberative information' are however proposed which at best disclose in the most general of terms the stance which it is suggested the Minister should take to Cabinet. However, for all I know, the outcome of the Cabinet meeting may have been a decision expressed in those same general terms. Unlike the scenario posited in para 12 above, no information has been offered to show that the 'ultimate Cabinet decision' was such as to reveal any internal Cabinet deliberations that could suggest that the position the Minister was being advised to take to Cabinet was any different to what (if anything) emerged out of Cabinet. The same can be said about the non-'out of scope' redactions proposed to mask Cabinet deliberations for *Document CED.1(k).036* which concerns the final lodgement of the emissions projections.
 24. *Document CED.1(k).037* similarly has much that is redacted as 'out of scope'. The portions proposed for redaction as 'deliberative information' are items of significant information provided to Cabinet for 'noting'. In my evaluation, this Cabinet Submission does not disclose Cabinet deliberations that fall within the scope of the relevant privilege.
 25. *Documents CED.1(d).045 and 046* are Ministerial Briefs relating to a statutorily mandated independent review of ACT government action on climate change and the Government's proposed response to it. The redaction proposed to the handwritten material in the Minister's Feedback portion on the first page of the former document, ie that which is **below** the line with the Minister's signature, is relevantly privileged in my opinion. But not the other material proposed for redaction in the two documents. That material merely summarises information from the statutory review and offers general options to the Minister and Cabinet.
 26. Only the paragraph numbered 17 is proposed for redaction as regards *Document CED.1(d).047* which is a Cabinet Submission. What remains offers unredacted disclosure of the (proposed and presumably adopted) ACT Government response to the said independent

review. What is proposed for redaction arguably provides information as to future matters considered and deliberated upon in the same context. I would also uphold the claim of privilege over that paragraph. (I do so for the first, but not the second, reason advanced in the Reasons column of the updated return).

27. *Documents CED.1(d).055 and 056* similarly deal with the response to the independent review as proposed in a Ministerial Brief and Cabinet Submission. Once again, the redactions proposed to address Cabinet deliberations all appear to provide no more than information about the independent review, with the exception of para 17 in the Cabinet Submission CED.1(d).056. I uphold the privilege claim over para 17 for identical reasons.
28. I do not consider that the redactions proposed for *Documents CED.1(d).065 and CED.1(d).111* to be justified under the Cabinet deliberations rubric.
29. *Document CED.1(d).112* is a recent and particular Budget Business Case supported by a Minister. A solution is proposed and relevant and alternative costings and policies are outlined. This information is proposed for extensive redaction by the Chief Minister. Through an enquiry that I initiated via the Clerk I have been informed that the amount funded in the 2025 Budget for the item does not correspond exactly to any of the options proposed in the Business Case advanced by the Minister. In these circumstances, the proper course is to uphold the claim of privilege as regards the proposed redactions because the particular Business Case has the capacity to disclose, albeit dimly, matters deliberated upon within Cabinet and to reveal 'clues as to intra-Cabinet deliberations', to use the language of the Chief Minister.
30. *Documents CED.1(k).042 and 043* are 2025 Ministerial Briefs relating to an evolving attached Cabinet submission which seek approval to take a Plan to public consultation (without describing the contents of that Plan). That approval is indicated only in the later document (dated 30 July 2025), albeit this (for reason unknown to me) is shown in the redacted but not the original version. The documents contain much information about costings, prior consultations, wellbeing impact assessment, future action contemplated etc.
31. No information was supplied on behalf of the Chief Minister as to the Cabinet outcome of this input. However, I asked the Clerk to inform me if there was anything in the public domain touching upon the current state of this project ('Healthy Waterways Plan for Lake Tuggeranong') that might inform my assessment as to whether the documents themselves disclose protected Cabinet deliberations as distinct from the collective outcome of them. I have been provided with a Media Release on behalf of the Minister, Suzanne Orr MLA dated 30/10/2025. It states that the ACT Government is asking the Tuggeranong community to have their say on a range of proposed options to restore and improve water quality of the Lake.
32. Unless I have missed something, nothing in the Briefs or their attachments or the information provided to me points to any prior or future **internal Cabinet** deliberations as to the content of the evolving Plan. I have not overlooked the submissions in the Reasons column of the amended return to the effect that consulting **other unidentified** documents might enable Cabinet's changing thinking over the years to be reconstructed. But this speculation offers no basis for this Arbiter to conclude that these current documents are privileged under the Cabinet deliberation rubric. If Cabinet's collective thinking progressed over the years that in itself scarcely reveals the internal deliberations of individual Ministers.
33. *Documents CED.1(k).046 ff* are Business Cases or extracts of them. Some on their face are evolving drafts sourced within the relevant Directorate. Most are part of a Ministerial Brief. But critically they have not been shown to have become a final Business Case endorsed by a Minister and placed before Cabinet. Even if they were, nothing distinguishes them from the Business Cases considered and discussed in the *Interim Report*.
34. None of the documents are privileged under this rubric except for the particular portions of particular documents discussed in paras 25, 26, 27 and 29 above.

Harm to business affairs

35. Ten documents are said to contain information attracting privilege on a separate basis, namely 'harm to business affairs' (CED.1(h).011, CED.1(k).060, CED.1(k).062, CED.1(k).065, CED.1(k).066, CED.1(k).080, CED.1(k).082, CED.1(k).083, CED.1(k).084, CED.1(k).085). The amended return explains that during preparation of the response to Ms Nuttall's dispute, the Executive was advised by 'the third party consultant' that the document contains substantial amounts of intellectual property, or commercial in confidence and financial information that should not be released.
36. Each of the said documents was prepared by an outside consultant (often Construction Control Australia Pty Ltd) and each became an Appendix or part of a Business Case or at least a draft Business Case. The documents are lengthy reports of a technical nature which I infer were commissioned by the ACT Government and paid for by that Government. No submission or proposed redaction has indicated the portions of them said to contain the particular information the release of which to the Assembly might produce the suggested harm.
37. Consultants who deal with Government must be taken to do so in the knowledge that Government is responsible to Parliament and that dealings are amenable to scrutiny by Parliament.
38. 'Commercial in confidence' will seldom generate a privilege in this parliamentary context. And certainly not without persuasive evidence that the sources of such information would dry up unless the information was treated as privileged from parliamentary oversight. See generally *Report under Standing Order 52: Westconnex Business Case*, 8 August 2014, pp 10-11.

Personal information

39. In relation to a handful of still disputed documents it is proposed that certain 'personal information' should be redacted.
40. For CED.1(h).011 the proposed redactions are to the names of the authors of a Final Report on *Agriculture and food in the ACT*. The Report was produced by Natural Capital Economics, presumably a consultant retained by the Government. I see no basis for masking this information.
41. For CED.1(k).042 I have been unable to locate the proposed redaction.
42. For CED.1(k).043 the names are those of 'consultant, expert reviewers' who have provided input into a statutory review. I see no reason why their identity should be protected or why this information should be withheld from the Assembly exercising its review functions. It is not even clear that they would wish to be anonymised.



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