LEGISLATIVE COUNCIL

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18 December 2009

Mr Stephen Palethorpe
Committee Secretary
Senate Finance and Public Affairs Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Palethorpe

Senate Finance and Public Administration References Committee – Inquiry into Independent Arbitration of Public Interest Immunity Claims

Please find attached corrections to the transcript of evidence from the hearing of 7 December 2009, as well as the answer to a question taken on notice during the hearing concerning cabinet documents.

I would like to take this opportunity to clarify an issue raised during the evidence. Page 20 of the transcript referred to documents provided to the Council in response to orders for papers being returned to government departments on motions of the House.

In November 2001 the House adopted a sessional order providing that, for the remainder of the session, all documents tabled under standing order 18 (now standing order 52) and made public, be returned to the Premier's Department 12 months after being tabled in the House. However the sessional order lapsed when the House was prorogued in February 2002 and no documents were returned. The sessional order was not adopted in subsequent sessions.

Yours sincerely

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Answer to question on notice

On Monday 7 December 2009, at a public hearing into Independent Arbitration of Public Interest Immunity Claims, the following question from Senator Xenophon was taken on notice.

Hansard page reference: page 19

> Ms Lovelock— (...) There have been some comments in the courts, some obiter dicta on occasion, that have indicated that the courts themselves are a getting a little frustrated with claims that documents are cabinet documents. There was one interesting comment by a magistrate, I think in the Land and Environment Court, where he actually said in one of his rulings that it was not sufficient simply to put a document into a wheelbarrow and wheel it through cabinet to make that—
>
> Senator XENOPHON—I knew I got it from somewhere.
>
> Ms Lovelock—That is an area where I believe there will be a battle at some point in the future.
>
> Senator XENOPHON—Finally, can you give the reference to that decision—the wheelbarrow decision?
>
> Ms Lovelock—Yes, I can get for you.

There is both judicial and non-judicial recognition of an apparent practice whereby governments in some cases have sought to avoid disclosure requirements by the device of submitting documents to Cabinet.

For example, with reference to the former freedom of information legislation in Queensland, it has been claimed that 'boxes of documents [were] wheeled in and out of the Cabinet room on trolleys to give them protected status',[1] that the '"Cabinet tea trolley exemption" ... allow[ed] a document to be exempted as a cabinet document if it had even been in the cabinet room',[2] and that attempts were made to avoid the publication of embarrassing material by use of a 'fridge trolley in order to deliver and subsequently retrieve from the Cabinet room ... boxes of documents associated with the Cabinet process'.[3]

In addition to discussions and commentaries on the subject, there have been judicial decisions rejecting the notion that the mere submission of a document to Cabinet is sufficient to attract exemptions under freedom of information laws. For example, in *National Parks Association of New South Wales Inc v Department of Lands and Anor* [2005] NSWADT 124 at paragraph 37, Deputy President Hennessy held that:

> In my view the mere fact that a document, or part of a document, went before Cabinet or was considered by Cabinet when deliberating or reaching a decision, does not make the information in that document, information 'concerning' any deliberation or decision of Cabinet ...

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1 http://foi-privacy.blogspot.com/2007/05

2 Waterford, Jack, 'Queensland leads on FOI reform', *The Public Sector Informant*, February 2008, p 13

3 'Submission to the review of the Freedom of Information Act 1982 by David Fagan, Editor of the Courier Mail', p. 1: http://www.foireview.qld.gov.au/submissions.htm

such as to attract the exemption in section cl (1)(e) of Schedule 1 of the *Freedom of Information Act 1989* (NSW). In *Re Hudson and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at paragraph 27, Abietz J stated that:

> it is not open to a Minister or official simply to attach to a Cabinet submission a document not designed for Cabinet consideration but believed to be sensitive, and thereby claim that it is exempt from disclosure under s.36(1)(a) of the [former Queensland] FOI Act.

While no judicial reference to the specific 'wheelbarrow' analogy mentioned in evidence has been able to be identified, it is hoped that the information provided will be of assistance to the Committee.