

PARLIAMENTARY STANDING COMMITTEE OF PUBLIC ACCOUNTS

SPECIAL REPORT

FAILURE TO COMPLY WITH SUMMONS

Members of the Public Accounts Committee

Legislative Council

Hon Ivan Dean MLC (Chair)

Hon Ruth Forrest MLC

Hon Michael Gaffney MLC

House of Assembly

Mr Scott Bacon MP

Ms Sarah Courtney MP (Deputy Chair)

Mrs Joan Rylah MP

1. The Public Accounts Committee (the Committee) is currently inquiring into the financial position and performance of Government owned energy entities in Tasmania.

Committee request for information from the Treasurer during the course of its Inquiry

2. The Committee has been pursuing a full copy of a letter titled "The Sale of the Tamar Valley Power Station"(the Letter) dated 9 April 2015 between the Treasurer and the Minister for Energy since the Treasurer appeared before the Committee on 30 August 2016.
3. Mr Scott Bacon, MP referred to the Letter during the Treasurer's appearance before the Committee and a request for a copy of the Letter was made in a question on notice to the Treasurer dated 2 September 2016. An extract from Hansard is attached at Appendix 1.
4. The Treasurer's response of 14 September 2016 (extract from response to Questions on Notice attached at Appendix 2) stated:

This letter has been released, under a Right to Information Request, and appropriate information has been withheld based on an assessment under the Right to Information Act 2009.

5. A redacted copy of the Letter was attached to this response. The redacted Letter is attached at Appendix 3.
6. Following advice from the Clerk of the Council the Committee forwarded a request, dated 10 November 2016, to the Treasurer seeking that the Letter be released in safe-custody to the Clerk of the Council, to enable the Committee to view the Letter.
7. The Treasurer responded on 9 December 2016 (attached at Appendix 4) stating :

As requested by the Committee, I have again considered your request in the context of established precedent and convention however I do not consider it appropriate to release the whole Tamar Valley Letter to the Committee for similar public interest grounds to the RTI decision ...That is, the Tamar Valley Letter includes 'cabinet information' and the Departmental advice attached to that letter is a 'working document' including 'internal

deliberative information'; both of which require confidentiality to be maintained.

8. The Committee sought legal advice regarding the Treasurer's grounds of refusal. A copy of the legal advice is attached at Appendix 5.
9. The Committee wrote to the Treasurer on 10 February 2017 to again request a full copy of the Letter and included reference to legal advice received by the Committee as follows:

- *Given what I have already said, it follows, I think, that without seeing the entire document it is very difficult to express any confident view about whether the Treasurer's claim to public interest immunity in relation to the 9 April Letter has been substantiated. There is nothing on the face of the document (so far as its contents have been disclosed) which would indicate that it contains any details of the deliberations of Cabinet. It is not, for example marked "Cabinet in Confidence" or in any other way which would indicate that it has any greater sensitivity than any other inter-departmental correspondence. In addition, one can infer that there is a second dot point concerning an instruction given by the Treasurer to his Department. That is hardly likely to be a matter which would attract immunity. It is also inherently unlikely that one Minister would write an apparently open letter to another Minister in which he disclosed the deliberations of Cabinet.*
- *I think it follows from what I said earlier that I do not know precisely what is meant by the terms "cabinet in confidence" or "working documents". What I can say is that the mere use of those descriptive phrases does not assist in determining whether it would be contrary to the public interest for the contents of the 9 April Letter to be disclosed either confidentially to members of the Committee or to the public generally. It seems to me to be implicit in the Treasurer's refusal to disclose the full contents of the 9 April Letter even to the members of the Committee on a confidential basis, that the Minister considers the contents of the 9 April Letter to be so sensitive that not even elected members of Parliament are to be trusted with them. That is, if I may say so, a very extraordinary position.*

- *With great respect, it appears to me that the Treasurer has formed the mistaken view that the provisions of the Right to Information Act 2009 are somehow relevant to the question of whether, or to what extent, the Minister is required to comply with a request from the Committee for the production of documents. As I have already pointed out, that is not correct. In my opinion the Minister's duty to the Parliament is much higher than that of a government department to a citizen under the Right to Information Act 2009.*

10. In his response of 27 February 2017 (attached at Appendix 6) the Treasurer again refused release of the full Letter.
11. At its meeting of 15 March 2017 the Committee resolved to summons the Treasurer to appear before the Committee and to produce the Letter. Ms Sarah Courtney, MP and Mrs Joan Rylah, MP voted against the motion. The date of the hearing was to be confirmed.
12. The decision to issue the summons was considered after a number of requests by the Committee, as outlined, and in accordance with section 7 of the *Public Accounts Committee Act 1970* and sections 1 and 2 of the *Parliamentary Privileges Act 1858*.
13. At its meeting of 21 March 2017 the Committee approved the wording and release of the summons to the Treasurer to appear before the Committee on 30 March 2017 for the purpose of producing a full copy of the Letter.

Hearing of 30 March 2017 (Hansard transcript attached at Appendix 7)

14. The Treasurer appeared before the Committee at 10am on 30 March 2017.
15. The Treasurer did not produce a full unredacted copy of the Letter.
16. In the Chair's opening comments he indicated the Treasurer would be given the opportunity to provide comment as to his decision.
17. The Treasurer made comment (albeit incomplete, a full copy of his Statement is attached at Appendix 8) which put on the record his reasoning for not complying with the summons.
18. The Treasurer was asked to desist from making comment regarding matters which did not relate to the issue of the summons and the Chair requested that

the Treasurer discontinue his statement when it became evident the Treasurer's intention was to discuss such other matters.

B. Findings

The Committee finds –

1. That the Treasurer's claim to public interest immunity in relation to the Letter remains unsubstantiated;
2. There is nothing on the face of the Letter which would indicate that it contains any details of the deliberations of Cabinet, for example no marking such as "Cabinet in Confidence";
3. That the Treasurer consistently incorrectly relies upon the provisions of the *Right to Information Act 2009* as being relevant to the question of whether, or to what extent, he is required to comply with a request from the Committee for the production of documents.
4. That Legal advice received by the Committee makes clear that the Treasurer's duty to a Committee of the Parliament is higher than that afforded an applicant under the *Right to Information Act 2009*; and
5. That the Treasurer has not complied with the summons issued to him by the Chair of the Committee on 21 March 2017 as he did not provide the unredacted copy of the Letter.

C. Recommendation

1. The Committee recommends that the House of Assembly and the Legislative Council consider what action they wish to take in response to the Committee's findings, which may include –
 - i. Noting the report; and
 - ii. Consider what action, if any, should be taken in relation to the Findings of the Committee.

A handwritten signature in black ink, consisting of a large loop followed by a horizontal line extending to the right.

Hon Ivan Dean MLC
Chair

Appendix 1 – Extract from Hansard – Energy Inquiry hearing 30 August 2016

Mr BACON - On 9 April 2015, you wrote to the Minister for Energy, Matthew Groom, about the sale of the Tamar Valley Power Station. This letter has been released to the Opposition under right to information, but it is heavily redacted. Can you table a copy of that letter for the committee, to allow us to understand your thinking behind the sale of the Tamar Valley Power Station?

Mr GUTWEIN - No.

Mr BACON - Why not?

Mr GUTWEIN - You have received, under RTI, information that that act believes is fair and reasonable. I am happy to talk about the decision the Government made and the correspondence formally sent to Hydro in August in regard to the expression of interest process Hydro could engage in. The advice to me, as Treasurer, from Treasury -

Mr BACON - To be clear, this is not advice from Treasury to you, this is a letter from you to the Minister of Energy.

Mr GUTWEIN - Which speaks about advice, as I understand it.

Mr BACON - It attaches the advice to the letter. Why is it heavily redacted?

Mr GUTWEIN - I am not certain what is in those paragraphs. It has been through a process, it has been considered and that is what is being released.

Mr BACON - You do not know what is in this letter?

Mr GUTWEIN - I do not have a copy of that letter in front of me, no.

Mr BACON - Could you provide a copy of the letter to the committee?

Mr GUTWEIN - You have got a copy of the letter provided under RTI.

Mr BACON - Will you be providing a copy of this letter to the committee?

Mr GUTWEIN - No, I will not be.

Mr BACON - Why not?

Mr GUTWEIN - What was viewed as appropriate under that act has been released to you under RTI

Mr BACON - It is not Cabinet-in-confidence; this is a letter from you.

CHAIR - Order, to raise the issue. Is it possible to release that letter in confidence to this committee?

Mr GUTWEIN - I would have to have a look at what is in that letter. I am not sure what it refers to in the areas redacted.

CHAIR - Will you take it on notice to consider that, and provision of that document to the committee?

Mr GUTWEIN - I will consider that.

Appendix 2 – Extract from Treasurer’s response to Questions on Notice of
14 September 2016.

Treasurer

Minister for Planning and Local Government

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14 SEP 2016

The Hon Ivan Dean MLC
Chairman
Public Accounts Committee

Dear Mr Dean

Questions on Notice

Please find enclosed a copy of my responses to six questions on notice that I received following my attendance at the Committee's inquiry hearing on Tuesday 30 August 2016. Also enclosed is some additional information, including three letters.

Yours sincerely

A handwritten signature in black ink, appearing to read "P. Gutwein", with a long horizontal flourish extending to the right.

Peter Gutwein
Treasurer

Answers to Questions on Notice

1. Provide a copy of the correspondence that provides the date upon which the Government informed Hydro Tasmania that it would be required to provide a \$75 million dividend.

As I outlined on 30 August 2016, when I appeared in front of the Parliamentary Standing Committee on Public Accounts, there were a range of discussions through the budget process with Hydro, and with Treasury, in landing at a \$75 million dividend. As explained, these discussions simply reflect the standard process that is undertaken each year when preparing the State Budget, particularly in relation to estimating the revenue forecasts for State Owned Businesses.

Attached for your information, is a letter sent to the Chair of Hydro Tasmania which confirms the discussions regarding the dividend expectation in the 2014-15 Budget.

2 Provide an un-redacted copy of the letter dated 9 April 2015 from the Treasurer to the Minister for Energy, regarding the sale of the Tamar Valley Power Station.

As I clearly stated to the Committee on 30 August 2016, this letter has been released, under a Right to Information Request, and appropriate information has been withheld based on an assessment under the Right to Information Act 2009.

More specifically, the information was redacted based on a determination of a Delegated Right to Information Officer because its disclosure would involve the disclosure of a deliberation or decision of the Cabinet.

Further, in relation to Cabinet deliberations, the system of responsible government, in which Cabinet takes collective responsibility for its decisions, requires the promotion and maintenance of full and frank deliberations in Cabinet. This, in turn requires that documents created for the purposes of Cabinet, including any advice that has been provided in relation to a matter being considered by Cabinet, must be kept confidential.

In this context, a fundamental principle that guides any decision regarding the release of information (including documents) is the extent that the public interest renders it necessary.

For your information, a copy of the partially redacted letter is attached for your information.

3. Provide a copy of the draft Ministerial Charter between Hydro Tasmania and Shareholder Ministers.

The draft Minister Charter for Hydro Tasmania is still being considered by the Shareholding Ministers in consultation with Hydro Tasmania. It will be made publicly available when finalised, in accordance with section 36(7) of the *Government Business Enterprise Act 1995*.

As the Committee is aware, a similar request was made to the Department of Treasury and Finance and this was assessed by the Delegated Right to Information Officer. The Officer concluded that a draft reflects the opinions and recommendations of an officer of a public authority, prepared for the purpose of negotiating a final position and is considered deliberative in nature. The Officer therefore exempted the release under section 35(1)(a) of the Act. Furthermore the Officer, determined that releasing a draft document that was not settled or ultimately adopted was not in the public interest.

I can advise that the determination provided by the Delegated Right to Information Officer for not releasing a draft Ministerial Charter is consistent with my, and the Minister's, views about the information that we are prepared to release to the Committee.

Once the Ministerial Charter has been finalized we will provide a copy to the Committee.

4. Provide a copy of the letter which advises Hydro Tasmania that the sale of the Tamar Valley Power Station would no longer proceed.

As outlined on 30 August 2016, Minister Groom and I met with Hydro Tasmania on 22 December 2015 and advised them that the Government no longer supported the sale of the combined-cycle gas turbine.

Appendix 3 – Copy of Redacted Tamar Valley Letter

Treasurer

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09 APR 2015

Hon Matthew Groom MP
Minister for Energy

The Sale of the Tamar Valley Power Station

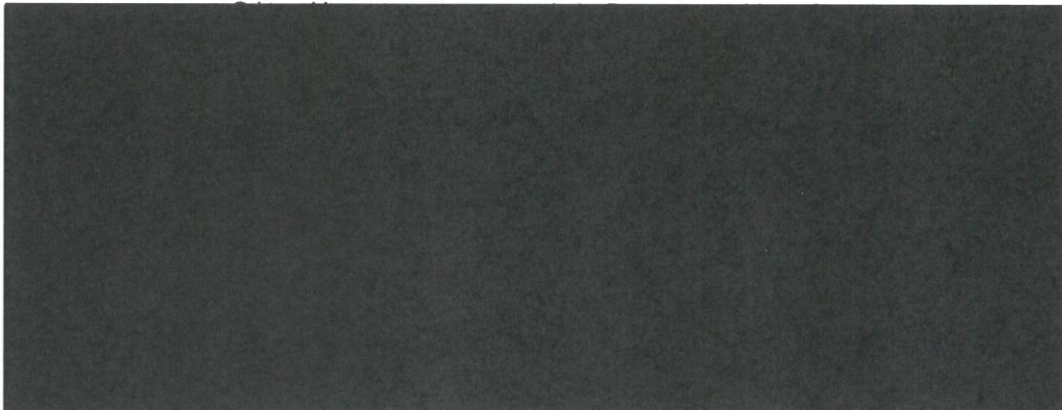
Hydro Tasmania wrote to us on 13 January 2015 formally requesting approval to mothball and divest the Tamar Valley Power Station (TVPS) combined cycle gas turbine (CCGT).


In a letter from us to Hydro Tasmania dated 21 January 2015, in which a new strategic direction was outlined, we advised Hydro Tasmania that before a decision would be made in relation to the divestment of the CCGT, a greater understanding was required of the impact of the CCGT on energy security and in relation to gas supply, transportation contracts and gas prices in the State. A further related issue is whether Hydro Tasmania should again have the responsibility for energy security in the State.

I have attached for your information, advice that I have received from the Department of Treasury and Finance in relation to Hydro Tasmania's proposal.

Based on this advice I have instructed the Department of Treasury and Finance to:

- provide advice to the Government on the proposal that Hydro Tasmania resume responsibility for energy security; and




Hon Peter Gutwein MP
Treasurer

Appendix 4 – Treasurer’s Letter to the Chair of 9 December 2016

Treasurer
Minister for Planning and Local Government

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Email: Peter.Gutwein@dpar.tas.gov.au



Hon Ivan Dean MLC
Chair
Parliamentary Standing Committee of Public Accounts

09 DEC 2016

Dear Mr Dean, *Ivan,*

PAC Request – Sale of the Tamar Valley Power Station

Thank you for your letter of 10 November 2016 seeking a letter from myself to the Minister for Energy, dated 9 April 2015 and titled 'The Sale of the Tamar Valley Power Station' (Tamar Valley Letter).

As you are aware on 4 April 2016, the Department of Treasury and Finance (Department) received an application for information under the *Right to Information Act 2009* (RTI Act) from Mr Bryan Green MP. The application was assessed in accordance with the RTI Act and the Tamar Valley Letter (Item 2 in table titled 'RTI Request 2: Energy Security Part 2-5 April 2016) was released on 18 May 2016 other than exempt information ('cabinet information' under section 26 of the RTI Act). The Department's advice that was attached to the Tamar Valley Letter was exempt in full ('internal deliberative information' under section 35 of the RTI Act).

It is my view that the Department's decision in relation to non-disclosure of the exempt information is relevant to your request for the Tamar Valley Letter. The right to access information under the RTI Act is subject to certain limitations to ensure that the right to request information is balanced against the public interest in some information not being disclosed. I am satisfied that the RTI decision provides for:

- a strong cabinet system by maintaining the confidentiality of cabinet deliberations; and
- effective public administration by protecting from disclosure material forming part of the policy decision-making of the Department and of the government when the circumstances require confidentiality of those deliberations.

As requested by the committee, I have again considered your request in the context of established precedent and convention however I do not consider it appropriate to release the whole Tamar Valley Letter to the Committee, for similar public interest grounds to the RTI decision discussed above. That is, the Tamar Valley Letter includes 'cabinet information' and the Departmental advice attached to that letter is a 'working document' including 'internal deliberative information'; both of which require confidentiality to be maintained.

Accordingly, I am of the view that it would not be appropriate for me to release the whole Tamar Valley Letter to the Committee.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Peter Gutwein".

Peter Gutwein MP
Treasurer

16/193564

Appendix 5 – Legal advice received by the Committee

PARLIAMENTARY STANDING COMMITTEE OF PUBLIC ACCOUNTS

INQUIRY INTO THE FINANCIAL POSITION AND PERFORMANCE OF GOVERNMENT-OWNED ENERGY ENTITIES

PRODUCTION OF DOCUMENTS AND “PUBLIC INTEREST IMMUNITY”

ADVICE

1. By letter dated 16 December 2016, the Chair of the Parliamentary Standing Committee on Public Accounts (**the Committee**) (the Hon. Ivan Dean M.L.C.)(**the Chair**) seeks advice in relation to a number of specific questions all of which relate to the failure or refusal of the Treasurer (the Hon. Peter Gutwein M.P.)(**the Treasurer**) to produce to the Committee an unredacted copy of a letter to the Treasurer from the Minister for Energy (the Hon. Matthew Groom M.P.) dated 9 April 2015 (**the 9 April Letter**).
2. By letter to the Chair dated 14 September 2016, the Treasurer, in answer to the second of a series of six “questions on notice” from the Committee, the Treasurer produced what he described as a “partially redacted” copy of the 9 April Letter in the form in which it had been previously released “based on an assessment under the *Right to Information Act 2009*.” According to the Treasurer, that assessment, made by “a Delegated Right To Information Officer” had concluded that the disclosure of an unredacted copy of the 9 April Letter “would involve the disclosure of a deliberation or decision of the Cabinet.”
3. It is not clear from the answer given whether the Treasurer applied his own mind to the question of whether or not the 9 April Letter contained details of a “deliberation or decision of Cabinet” or even whether the Treasurer was distinctly making a claim that the 9 April Letter was subject to “public interest immunity” as distinct from merely saying that someone who made an assessment pursuant to legislation which has no present relevance, had reached that conclusion.¹

¹ The provisions of the *Right To Information Act 2009* confer certain entitlements upon “a person” to obtain information held by the executive government and other instrumentalities (see s 7) but even if one were to take the view that the Committee or the Parliament (or even one or other House of the Parliament) was “a

4. By letter dated 10 November 2016, the Chair wrote to the Treasurer requesting that an unredacted copy of the 9 April Letter “be provided to the Clerk of the Legislative Council in safe-custody” to enable the Committee to have restricted access to the document. The Treasurer responded to that request by letter dated 9 December 2016, in which the Treasurer again made reference to an assessment of the 9 April Letter that had been conducted for the purposes of the *Right To Information Act 2009*. In the penultimate paragraph of his letter the Treasurer says:
“...I have again considered your request in the context of established precedent and convention however I do not consider it appropriate to release the whole [9April Letter] to the Committee, for similar public interest grounds to the RTI decision discussed above. That is, [the 9 April Letter] includes “cabinet information” and the Departmental advice attached to that letter is a “working document” including “internal deliberative information”; both of which require confidentiality to be maintained.”
5. Against this background I now turn to consider the specific questions that have been asked.

Question 1

Does the Public Accounts Committee have the power to obtain documents from a Government Minister when a claim of public interest immunity on grounds of “cabinet in confidence” or “working documents” has been made and if so, do you believe such a claim has been substantiated by the Treasurer on this occasion?

6. In my opinion it is unquestionably the case that the Committee is *entitled* to call for the production of any document held by the executive government (or indeed any person) irrespective of whether any claim of privilege or immunity is or may be made.
7. The real question is how should the Committee proceed when such a claim is made, or, in the event that the Committee concludes that a claim is unfounded but the person requested to produce the document nevertheless continues to refuse to do so?

person”, the Act has no application to the production of documents to the Parliament or to committees of the Parliament which is provided for by the *Parliamentary Privilege Act 1958* generally and, in the case of the Committee, more particularly by s 7 of the *Public Accounts Committee Act 1970*.

8. In large measure, the answer to those questions is political rather than legal.²
9. It is very doubtful whether a person who, without justification³, refuses or fails to produce a document to the Committee is guilty of any offence punishable by the ordinary courts.⁴ The orthodox view is that it is a matter for the Committee (or ultimately, for one or other Houses of the Parliament) to determine whether a person is guilty of contempt and if so, what, if any, sanction should be imposed.
10. In this regard it is notable that sections 3 and 5 of the *Parliamentary Privilege Act 1858* expressly empower each House of the Parliament (as distinct from committees) to summarily punish contempts by imprisonment and the Speaker and the President respectively, to issue arrest warrants.⁵
11. However, whilst either House of the Parliament (and their committees) is *entitled* to demand the production of *any* document in the fulfillment of its function of securing the accountability of government, the Houses⁶ have, historically been prepared to accept that there are some documents or classes of documents which *may* be immune from production. In this regard, probably the least contentious class of documents are those which disclose the deliberations of Cabinet. But properly understood, that class class of documents is rather narrower than governments often contend.
12. It is noteworthy that in his letter of 14 September 2016, the Treasurer says that according to an assessment carried out by someone else for another purpose, the 9 April Letter contains details of "a deliberation or decision of the Cabinet" whereas in his letter of 9 December 2016

² See the discussion of this topic at paragraphs 2.13 to 2.17 of the report of the Senate Legal and Constitutional Affairs References Committee - "A Claim of Public Interest Immunity Raised Over Documents", March 2014:

http://www.sph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Public_Interest_Immunity/Report/index

³ Self-incrimination and client legal privilege may justify a refusal to produce a document - especially in proceedings before the Committee in view of s 7(2) of the *Public Accounts Committee Act 1970*.

⁴ Such a view is entirely consistent with s9 of the *Bill of Rights 1688*, viz;

"That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. (underlining added)

⁵ To the modern eye, the idea of a House of the Parliament acting as though it were a court of law by imprisoning people may seem to be inconsistent with the doctrine of the "separation of powers" but historically the Parliament at Westminster was always understood to be a "court". Indeed until relatively recent legislative amendment, the House of Lords continued to be the final court of appeal in the British legal system.

⁶ Almost invariably the upper Houses, since the government ordinarily controls the numbers in the lower House.

the Treasurer refers only to "cabinet information". These two somewhat different descriptions serve to highlight the elasticity of the phrase "cabinet documents".

13. The reasons why courts have accepted claims of "public interest immunity" in relation to documents which reveal the deliberations of Cabinet is reasonably clear. The system of Cabinet government requires that once the Cabinet has resolved upon a particular policy position, every member of the Cabinet is thereafter bound to support that policy position even if it were the case that he or she strenuously opposed the policy during Cabinet deliberations. If a member is unable to support the final Cabinet position then, by convention, he or she should resign from the Cabinet.
14. The courts have readily accepted⁷ and common sense dictates that the system of Cabinet government would be critically undermined if, by the disclosure of Cabinet deliberations, it were to become public knowledge that one or more ministers had not supported what has ultimately become government policy. This is especially so where the policy in question is the subject of popular debate or is otherwise contentious. In addition, the potential for such deliberations to become public would be likely to discourage robust debate within the Cabinet and so detrimentally affect decision-making.
15. Nevertheless, there is in my view, a very great difference between the disclosure of the *deliberations* of the Cabinet in the sense just described and the disclosure of the mere fact that the Cabinet has made a particular decision or has seen or considered a particular report or recommendation. Indeed, very many Cabinet decisions are announced publicly - sometimes with great fanfare - as being the government's newly-established policy on a particular matter.
16. Accordingly, whilst it is relatively easy to understand the need for immunity from the disclosure of the "deliberations" of Cabinet, it is more difficult to understand why (one might even say, *how*) it is contrary to the public interest for the elected representatives of the people to know what decisions the Cabinet has made and the information upon which those decisions were based.
17. The question presently under consideration refers to the terms "cabinet in confidence" and "working documents". I am

⁷ See, for example *Commonwealth v Northern Land Council* (1993) 176 CLR 604 and *Egan v Chadwick* (1999) NSWCA 176

unable to attribute any precise meaning to the phrase “cabinet in confidence” and, in any case, the Treasurer does not appear to me to have used the phrase. It may be some form of State Service shorthand adapted from the phrase “commercial in confidence” and intended to indicate that a particular document has some association with Cabinet such that its contents should be kept confidential. It is perhaps another example of the elasticity of the language used for the purpose of seeking to spread the cloak of public interest immunity as widely as possible.

18. For the reasons given above, the mere fact that a document may have some association with Cabinet does not, in my opinion, mean that it attracts immunity. Where a claim of immunity is made it is probably necessary, in every case, to look at the contents of the document in order to determine whether the claim to immunity can be supported. Of course, that is impossible to do unless the holder of the document produces it for that limited purpose. This typically results in the stand-off that presently exists between the Minister and the Committee.
19. So far as I am aware, the only House of Parliament in Australia that has so far devised a response to this problem is the the Legislative Council of the Parliament of New South Wales. The solution involves an acceptance by the government of New South Wales that it must produce any document requested of it but may claim “public interest immunity” in respect of any document so produced. All claims of immunity together with the relevant documents are then submitted to an independent arbiter who will either uphold or dismiss the claim. The process is more fully described in a submission made by the Clerk of the Legislative Council of New South Wales to the Senate Legal and Constitutional Affairs References Committee Inquiry Into a Claim of Public Interest Immunity Raised Over Documents.⁸
20. The phrase “working document” presumably means a draft or preliminary version of a later document. It may be being used as a synonym for “internal deliberative information” of the kind referred to in s 35 of the *Right to Information Act 2009*. Whatever the case may be, I know of no basis upon which the government or any other person could properly refuse to produce a document to the Committee on the ground that it is a “working document”. Indeed, a working document could be of the greatest importance in

⁸ <http://www.apb.gov.au/DocumentStore.aspx?id=d89acd94-2f4a-41c6-a67b-0fe72f4c9ea1&subId=31832>

demonstrating the development or evolution of a particular policy or decision despite having little apparent relevance to the the final policy or decision.

21. Given what I have already said, it follows, I think, that without seeing the entire document it is very difficult to express any confident view about whether the Treasurer's claim to public interest immunity in relation to the 9 April Letter has been substantiated. There is nothing on the face of the document (so far as its contents have been disclosed) which would indicate that it contains any details of the deliberations of Cabinet. It is not, for example marked "Cabinet in Confidence" or in any other way which would indicate that it has any greater sensitivity than any other inter-departmental correspondence. In addition, one can infer that there is a second dot point concerning an instruction given by the Treasurer to his Department. That is hardly likely to be a matter which would attract immunity. It is also inherently unlikely that one Minister would write an apparently open letter to another Minister in which he disclosed the deliberations of Cabinet.
22. On the other hand, the Minister says in his letter to the Chair of 9 December last that he has "again considered your request" for the production of an unredacted copy of the 9 April Letter and that he does "not consider it appropriate to release the whole ...Letter to the Committee". I suppose that the Minister's considered view about the matter is entitled to be accorded some weight although I note that in neither of his letters does the Treasurer distinctly claim that the 9 April Letter is immune from production on the ground that the disclosure of its contents would reveal the deliberations of Cabinet and would therefore be contrary to the public interest. In my opinion that is the only possible ground upon which the Minister, properly advised, could claim that the 9 April Letter is immune from production.

Question 2

What documents can reasonably be claimed to be "cabinet in confidence" or working documents?

23. I think it follows from what I said earlier that I do not know precisely what is meant by the terms "cabinet in confidence" or "working documents". What I can say is that the mere use of those descriptive

phrases does not assist in determining whether it would be contrary to the public interest for the contents of the 9 April Letter to be disclosed either confidentially to members of the Committee or to the public generally. It seems to me to be implicit in the Treasurer's refusal to disclose the full contents of the 9 April Letter even to the members of the Committee on a confidential basis, that the Minister considers the contents of the 9 April Letter to be so sensitive that not even elected members of Parliament are to be trusted with them. That is, if I may say so, a very extraordinary position.

24. With great respect, it appears to me that the Treasurer has formed the mistaken view that the provisions of the *Right to Information Act 2009* are somehow relevant to the question of whether, or to what extent, the Minister is required to comply with a request from the Committee for the production of documents. As I have already pointed out, that is not correct. In my opinion the Minister's duty to the Parliament is much higher than that of a government department to a citizen under the *Right to Information Act 2009*.

Question 3

Can [the 9 April Letter] be reasonably said to be "matters of state" under s 30 of the *Evidence Act 2001*?

25. Whether or not the contents of the 9 April Letter relate to "matters of state" of course depends upon the nature of those contents. Accordingly, I am in no better position to answer that question than I am to determine whether the 9 April Letter contains details of the deliberations of Cabinet.
26. However, I do not think that the answer to this question is of any real relevance. Section 3 of the *Evidence Act 2001* sets out the courts and proceedings to which that act applies. Unsurprisingly, the Evidence Act does not apply to the proceedings of the Parliament of Tasmania or of any committee of the Parliament. By reason of s 9 of the *Bill of Rights*⁹ any claim made to the Committee by the Minister (or anyone else) that the contents of a particular document include "matters of state" would not be justiciable by any court. As things presently stand in Tasmania, it would be a matter for the Committee or the relevant House to determine for itself as best it could.

⁹ See footnote 4

Question 4

Can the Committee still compel the provision of [the 9 April Letter] under s 133 of the *Evidence Act 2001* in order to make a reasonable determination about whether the document in question is in fact “cabinet in confidence” or “working documents” before a final decision is made by the Committee about the status of [the 9 April Letter] and the claim of a public interest immunity.

27. It follows from my answer to Question 3 and from the proposition that the *Evidence Act 2001* has no application to the proceedings of the Parliament, that the answer to this question must be “No”.¹⁰
28. The procedure embodied in s133 of the *Evidence Act 2001* is designed to allow a court to act as an independent arbiter of a claim of public interest immunity when such a claim is made in litigation between (usually) a government and a citizen. In that situation, the court is impartial for it is not the court but one of the parties who is seeking the production of the document in relation to which immunity is claimed. If the claim to immunity is upheld, the party seeking the document never sees it.
29. By contrast, in parliamentary proceedings, the House or committee seeking the production of the document always has a direct interest in the matter and must necessarily see the document in order to determine the validity of the claim to immunity. This almost inevitably results in a stand-off like the present with the Parliament or the government backing down according to their respective judgments about what is in their best political interests - or according to who has the numbers on the floor of the House! Only rarely does the Parliament exercise its undoubted power to imprison for contempt.¹¹
30. As discussed earlier, only the New South Wales Legislative Council has developed what appears to be a workable procedure to deal with what is a recurring problem that goes to the very heart of “responsible government”.

¹⁰ I am, of course, conscious that s 7 of the *Public Accounts Committee Act 1970* confers upon a witness appearing before the Committee the same protections and privileges as a witness appearing in a trial in the Supreme Court. However, that does not mean that the provisions of the *Evidence Act 2001* apply to proceedings of the Committee.

¹¹ Although as earlier mentioned, there may be other political and procedural sanctions available - see footnote 2

Question 5

Does a substantiated claim of public interest immunity under the *Evidence Act 2001* override the powers available to the Committee or to either House of Parliament under the *Parliamentary Privilege Act 1858* to produce documents?

31. Unless I misunderstand the question, it seems to assume that there could be, in proceedings before the Committee, a “substantiated claim of public interest immunity” under the Evidence Act .
32. As presently advised, I do not see how that could happen because, in my opinion, the provisions of the *Evidence Act 2001* have no application to the proceedings of the Committee and neither are those proceedings justiciable in any court by reason of s 9 of the Bill of Rights.
33. I suppose that it could happen that the Committee might adopt a procedure analogous to that set out in Division 3 of part 10 of the *Evidence Act 2001* (which would presumably involve the production of the document to the Committee or a delegate) but if it did so it would either uphold the claim and not receive the document in evidence or dismiss the claim and receive the document. In either case, the Committee’s power to compel the production of documents under either its own Act or the *Parliamentary Privilege Act 1858* would remain unaffected.

Other Matters

34. In summary, there is, in my opinion, no doubt that the Committee has the power to request the production of the 9 April Letter.
35. Whether by failing to produce the 9 April Letter and/or by failing to satisfy the Committee that the 9 April Letter is immune from production, the Treasurer is guilty of contempt, must ultimately be a matter for one or other of the Houses from which the members of the Committee come.¹²

¹² In reality, it is unlikely that the House of Assembly will make any such finding because the Treasurer presumably has the support of a majority of the members of that House. Moreover, if the Legislative Council were to resolve that the Treasurer has committed a contempt, the House of Assembly may well regard any attempt to impose any sanction upon the Treasurer as an infringement of the privileges of one of its members.

36. Neither the Treasurer, the Committee nor either House of the Parliament is able to compel any of the others to act or to refrain from acting by the taking of proceedings in the civil courts. The question of whether the 9 April Letter is immune from production to the Committee (assuming that is what the Treasurer is claiming) is not justiciable and is, in the first instance, solely a matter for the Committee but ultimately a matter for one or other of the Houses of the Parliament to determine.
37. Based upon the contents of the redacted copy of the 9 April Letter which has been produced to the Committee and the information and reasons provided by the Treasurer in his letters to the Committee of 14 September 2016 and 9 December 2016;
- It is not, in my view, entirely clear whether the Treasurer is saying that, in its unredacted form, the 9 April Letter is subject to claim of “public interest immunity” on the ground that it reveals the deliberations of Cabinet or whether the Treasurer is instead seeking to invoke some other vague or generalized concept such as “cabinet in confidence” or “working documents” (whatever those phrases may mean).
 - Whether a claim of “public interest immunity” is being made by the Treasurer. If so, the *precise* basis of that claim needs to be clarified before the Committee can even begin to consider the validity of the claim.
38. Without access to an unredacted copy of the 9 April Letter, I consider that it is very unlikely that the Committee could confidently reach any conclusion about the validity of any claim of “public interest immunity in respect of the 9 April Letter.
39. Based upon the information so far provided by the Treasurer, I would be very surprised indeed if any member of the Committee were able to conclude that the 9 April Letter is immune from production to the Committee on any recognized ground.

Dated the 25th January 2017



LEIGH SEALY S.C.
Malthouse Chambers, Hobart

Appendix 6 – Treasurer’s Letter to the Chair of 27 February 2017

Treasurer

Level 9 Executive Building
15 Murray Street HOBART TAS 7000
Ph +61 3 6165 7670
Email treasureroffice@dpact.tas.gov.au



Hon Ivan Dean MLC
Chair
Parliamentary Standing Committee of Public Accounts

27 FEB 2017

Dear Mr Dean

Further PAC Request – Sale of the Tamar Valley Power Station

I refer to your letter dated 10 February 2016 again seeking an unredacted version of a letter from myself to the Minister for Energy, dated 9 April 2015 and titled '*The Sale of the Tamar Valley Power Station*' (Tamar Valley Letter).

I have reviewed your letter, including the selected excerpts from legal advice you have obtained from Mr Leigh Sealy SC.

As you know, on 14 September 2016 and 9 December 2016, I confirmed my position that I would not be disclosing the Tamar Valley Letter on the grounds that:

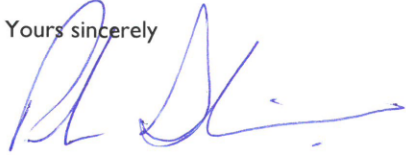
- in considering your request in the context of established precedent and convention, my consistent position has been that it is not appropriate to release the Tamar Valley Letter in an unredacted form to the Committee on the grounds that the letter includes information that directly relates to 'cabinet deliberations'. Accordingly, it would be contrary to the public interest for the unredacted version to be released either confidentially to members of the Committee or the public more broadly; and
- the Department of Treasury and Finance (Department) has already assessed an application under the *Right to Information Act 2009* (RTI Act) from Mr Bryan Green MP which included the Tamar Valley Letter. As you know, the Department has published the Tamar Valley Letter, other than redacted information which is 'exempt information' under the RTI Act.

As I explained in my correspondence of 9 December 2016, I am satisfied that the RTI decision provides for:

- a strong cabinet system by maintaining the confidentiality of Cabinet deliberations; and
- effective public administration by protecting from disclosure material forming part of the policy decision-making of the Department and of the Government when the circumstances require confidentiality of those deliberations.

I remain of the view that it would not be appropriate for me to release the unredacted version of the Tamar Valley Letter to the Committee.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Peter Gutwein', with a long horizontal stroke extending to the right.

Hon Peter Gutwein MP
Treasurer

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**THE PARLIAMENTARY STANDING COMMITTEE OF PUBLIC ACCOUNTS MET IN
COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON FRIDAY 30 MARCH
2017.**

**INQUIRY INTO THE FINANCIAL POSITION AND PERFORMANCE OF
GOVERNMENT-OWNED ENERGY ENTITIES**

Mr PETER GUTWEIN MP, TREASURER, WAS CALLED AND EXAMINED.

CHAIR (Mr Dean) - Welcome, Treasurer. Thank you for attending today. This is a public hearing and is being recorded on *Hansard*. It will go online as well so all the protections apply to you in this situation. The purpose of the hearing this morning is to deal with the question of the summons that was issued by hand to you on 21 March 2017. The hearing has not been convened to deal with any other issue. At this stage I will read through that summons:

Take notice that you, the Honourable Peter Gutwein MP, Treasurer, 15 Murray Street, Hobart, Tasmania 700, by resolution of the Parliamentary Standing Committee of Public Accounts in relation to an inquiry into government-owned entities you are required to give your attendance before the Committee at 10 a.m. on 30 March 2017 in Committee Room 2 at Parliament House in Hobart and to produce an unredacted copy of the letter from you in your capacity as Treasurer and addressed to the Minister for Energy, titled *The Sale of the Tamar Valley Power Station*, dated 9 April 2015 which has been the subject of correspondence between yourself and the Committee.

Issued and authorised by the Honourable Ivan Dean, Chair of the Parliamentary Standing Committee of Public Accounts under sections 1 and 2 of the Parliamentary Privileges Act 1858 and section 7 of the Public Accounts Committee Act 1970 on 21 March 2017.

That is signed by me.

By your attendance here this morning do you produce a full, unredacted copy of the letter from you in your capacity as Treasurer and addressed to the Minister for Energy, titled *The Sale of the Tamar Valley Power Station*, dated 9 April 2015?

Mr GUTWEIN - What I would like to do, Chair, is to read a statement that explains my position.

CHAIR - I will give you an opportunity to give an explanation, but I assume you are not producing the document?

Mr GUTWEIN - I would like to explain my reasoning and position, which will go the question you have asked. I am more than happy to do that.

CHAIR - I don't intend to open this up to a session to discuss anything other than the reason that document is not being produced. I am not going to provide an opportunity for criticising of

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the committee or anything else. I will give you a short period in which to provide to this committee your reasons for not producing that document. I have taken a lot of advice and my advice is that I need to get from you whether you are producing that document - yes or no?

Mr GUTWEIN - The statement I would like to make will go to that question and answer the questions before the committee. I believe I should be allowed the opportunity to have that time to provide that explanation and the answer.

CHAIR - The summons requires that you be here today. It also requires that you produce an unredacted copy of that document. Are you producing a copy of that unredacted document?

Mr GUTWEIN - What I would like to do is explain the answer to that question.

CHAIR - I would like you to answer that yes or no, firstly.

Mr GUTWEIN - I think that is an extraordinary position for the committee to take. I am more than comfortable to provide you with that answer, but I would like the opportunity to provide my reasoning. Would you provide me with that opportunity?

CHAIR - At the end of that statement will you be producing an unredacted copy of that document?

Mr GUTWEIN - No, I won't.

First, I would like to point out that if you had requested me to attend today's hearing to explain my position on the document in question I would have willingly attended, just as I did on 13 August when I appeared before this committee as you had requested. I answered your questions for around two hours on that day. To be clear, there was no need to go through the political theatre of a summons. If you had asked me, I would have willingly attended today.

One question I took on notice when I appeared before you was to consider providing an unredacted copy of a letter between myself and Minister Groom. The letter in redacted form had already been released following a right-to-information request where the delegate acting under the framework of the RTI, at arm's length from me, determined that parts of the letter should not be released due to their referencing matters relating to Cabinet information as defined under the act.

As you will also be aware, section 26(1) of the RTI act states in respect to Cabinet information:

- (1) The information is exempt from disclosure of information if it is contained in -
 - (a) the official record of a deliberation or a decision of the Cabinet; or
 - (b) a record proposed by a minister for the purpose of being submitted to the Cabinet for consideration; or
 - (c) a record that is a copy of, or a copy of part of, a record referred to paragraph (a) or (b); or

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- (d) a record, disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet other than a record by which a decision of the Cabinet was officially published.

The independent RTI officer exempted the section of the letter in question because it was Cabinet information as defined by the act. As the redacted paragraphs referred to Cabinet deliberations and processes, I informed the committee I was not prepared to release an unredacted copy and provided you with my reasoning in my response to the questions on notice dated 14 September 2016.

Since that time you have written to me twice more requesting a copy of the unredacted letter. I have duly responded to you in letters dated 9 December 2016 and 27 February 2017. In all cases I have explained my rationale for not releasing the full letter.

In my letter of 9 December 2016, I stated that the Tamar Valley letter includes Cabinet information and that required that the relevant sections of the letter be withheld to ensure the confidentiality was to be maintained. Further, in my letter of 27 February 2017, I confirmed I would not be disclosing the Tamar letter on the grounds that - and I quote:

In considering your request in the context of established precedent convention, my consistent position has been that it is not appropriate to release the Tamar Valley letter in an unredacted form to the committee on the grounds that the letter includes information that directly relates to Cabinet deliberations. Accordingly, it would be contrary to the public interest for the unredacted version to be released either confidentially to members of the committee or the public more broadly.

I made, I believe, the position perfectly clear. However, as I have already pointed out, if you had requested that I attend another hearing of this committee to explain the Government's position, I would have willingly attended without that summons.

Chair, the precedent of maintaining Cabinet confidentiality is well established. It has been a cornerstone of the Westminster system of government for centuries and governments throughout history have preserved this important convention and, equally importantly, parliaments have respected it, too. A system of responsible government in which Cabinet takes collective responsibility for its decisions requires the promotion and maintenance of full and frank deliberations in Cabinet. Any limitation on this freedom would severely undermine the performance by government of its executive duties. This fundamental tenet is recognised in the RTI act, which was supported to and agreed to by both Houses of this Parliament, as it provides for information pertaining to Cabinet deliberations and processes to be kept confidential. This has long been accepted practice and parliaments have supported this practice in the past.

By way of recent example, in 2012 the former government refused to provide information to a Tasmanian parliamentary committee on the basis it was Cabinet material. I note that the summons was not issued in those circumstances, which were very similar to this one today. I will now refer to a letter that was prepared under the previous government, and agreed and signed by the then premier, Lara Giddings, in 2012.

CHAIR - Treasurer, I am just wondering how far this is going and whether this supports your reason for not having produced this document. You have now given us an explanation as to why

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you are not producing that document, that it is Cabinet in confidence, and you have referred to the RTI process. I am of the view that you do not need to proceed any further in relation to what has happened previously.

Ms COURTNEY - Point of order, Chair. Considering the serious nature of the matter we are dealing with, the witness should be afforded the opportunity of a full explanation.

CHAIR - On the point of order, how much more information do you have?

Mr GUTWEIN - I have a couple of pages, which effectively sets out the Government's reasoning in respect of this matter. I would hope, in the interests of the committee understanding fully the Government's position, that you would not attempt to stifle me in providing the Government's reasoning.

CHAIR - I will allow you to proceed at this stage. It has just been brought to my attention - and the position is there will be the right to go through all this information when it comes before the Houses, because it will go before both Houses of Parliament for them to determine any courses of action. There will be that opportunity for all this explanation to be given in that process.

Mr GUTWEIN - It sounds as though you have already prejudged what actions you are going to take as a result of today. That astounds me.

CHAIR - The only statement I make there is that the summons required two positions of you: one of your attendance, and one of the production of the document. The document has not been produced. That is all the committee is determining today.

Mr GUTWEIN - You have just explained to me that this will end up before both Houses. If that is a matter the committee has already prejudged, that is a matter for the committee. I do find it interesting that in asking the question you will not allow me to provide my reasoning behind that so the committee, fully informed, can make a decision as to what its next step is. If you are explaining to me that you have already decided on that next step, that is an extraordinary set of circumstances.

CHAIR - The committee under the act has certain obligations and requirements of it in these circumstances. I believe I have given you sufficient time in which to explain but I will allow you to finalise your statement. However, I ask you do that without going into any great detail because there is another opportunity for that to occur.

Ms COURTNEY - Point of order, Chair. The witness should have the ability to put a full explanation on *Hansard*, considering the circumstances we find ourselves in. Whatever action is taken afterwards could be prejudged if we do not allow the witness to provide the explanation he desires.

CHAIR - I appreciate the point you make, and I have allowed the Treasurer to continue at this time. But I ask he keep it succinct because there will be further options in relation to this matter.

Mr GUTWEIN - This reeks of a kangaroo court.

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CHAIR - Order. I am giving you an opportunity to continue at this stage.

Mr GUTWEIN - We take governing very seriously. It surprises me that this committee has already prejudged what actions it will take.

CHAIR - No.

Mr GUTWEIN - I believe *Hansard* will reflect that you indicated this will go to both Houses. To me, that sounds as though you have already made a determination. That being said, you know my views in respect of this committee and the way it has conducted itself.

CHAIR - Order. I am going to allow you to go into any criticism of the committee.

Mr GUTWEIN - I would like to explain my position, but I would like the opportunity to explain it fully. It will take me a couple of minutes and, noting the gravity of the situation, I would appreciate it if you would give me that opportunity.

CHAIR - I will let you continue at this time.

Mr GUTWEIN - The former premier wrote to the committee secretary of the Legislative Council Government Administration Committee A in relation to the cost reduction strategies for the Department of Health and Human Services. In that letter she stated:

Cabinet documents, which included the advice provided to the Cabinet, are a class of documents that irrespective of their actual contents belong to a class which the public interest requires to be withheld from production. That this is so has long been recognised by parliaments and the courts alike. Documents in this class are typically those which reveal the deliberations of the Cabinet or the views of individual members of the Cabinet expressed before the Cabinet has reached a concluded and collective view on a matter of public policy.

The letter goes further and specifically quotes from a relevant High Court judge, which I will read parts of for the benefit of the committee today:

In the case of *Commonwealth vs Northern Land Council* 1993, the High Court unanimously said at paragraph (6):

It has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of the Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential.

Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by

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encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny.

Whilst there is increasing public insistence upon the concept of open government, we do not think that it has been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at this who would seek to criticise and publicise their participation in discussions in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring decision making and policy development by Cabinet in uninhibited.

Chair, it is rare that I find myself in agreement with the former premier but in this matter, in respect of the release of Cabinet information, I am. I will table Ms Giddings letter, with your agreement, after I have made this statement.

The letter you see from me has been redacted by an independent RTI officer under section 26 of the RTI act because it very clearly outlines matters in respect of the processes and deliberations of Cabinet. This committee, however, appears prepared to forsake hundreds of years of precedent and practice, including actions taken by previous Tasmanian governments, in the pursuit of the release of information that forms part of the Cabinet decision-making processes of government.

Before I conclude I would like to make some general observations in regard to this matter. I believe that over the course of this inquiry that information received by this committee has entered the public domain without being formally released by the committee.

CHAIR - Order. I have already indicated to you I am not going to provide you with any opportunity to go through that process or any criticism of this committee. This is to do with your reasoning for not producing that document. I ask you not continue with that statement. If there is any final statement you would like to make, please make it.

Ms COURTNEY - Point of order, Chair. Could I just clarify that ruling you just made? How are you prejudging what the Treasurer is about to say? This might go to his reasoning as to whether he is producing the document.

CHAIR - Thank you for your interjection. It was fairly clear as to where the Treasurer was going to go, but before we move into that area I am going to cut it off. I am not going to provide the opportunity for that to occur. That is my ruling in relation to that matter. I ask that you continue, Treasurer, to finalise your statement.

Mr GUTWEIN - The circumstances I find myself in today, and the way I found out I would be here today, are a matter I believe need to be placed on the public record.

CHAIR - Order. That is a matter that has been dealt with by this committee by way of special report. A special report will be provided to both Houses as of next week in relation to that matter. That matter is a separate issue to what we are talking about today, so I ask that you refrain from that. I will not give you the opportunity to go through that process here today.

Mr GUTWEIN - It can hardly be a separate issue when I am before this committee under these circumstances. The way I found out I would be before this committee was because the ABC had received notification from someone on this committee that I was to be summonsed.

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CHAIR - Order, Treasurer. I have made the ruling that you will not be proceeding in that direction here today. If you want to proceed with a final statement, if it does not refer to that position, I will allow you to do so. I will not allow you to go down the path you want to go down right now. That is a separate report and this committee is providing a special report to both Houses on that matter and it will be dealt with the Houses.

Ms COURTNEY - Point of order, Chair. Can I clarify that your ruling means the Treasurer is unable to give a full explanation regarding his position today?

CHAIR - No, not at all. It is in relation to the matter we are dealing with, and that is the reasons as to why that document was not produced here today. I have been fairly liberal and open to allow the Treasurer to go down the path he is today. I am now giving him the opportunity to make any final statement he wants to make on this matter.

Mr GUTWEIN - Before I make my final statement, that is an extraordinary view from you as the chair.

CHAIR - I ask you do not refer to the position I have taken on this and continue with your statement, Treasurer.

Mr GUTWEIN - So I am not allowed to make a statement in front of this committee that clearly explains my reasoning or goes to the reasons I am before this committee today?

CHAIR - I have gone through that once and I am not going to go through it again. I have gone through it a couple of times now. I have given you the reasons as to why I am not going to provide you with that opportunity. I have asked if you have any further statement to please make it. If not, I will bring this an end and I will then need to make a further statement.

Mr GUTWEIN - Chair, the PAC is an important and highly-respected committee of the parliament and it is deeply unfortunate that this particular inquiry has become so politicised -

CHAIR - I am asking you to be careful as to where you are going with this.

Mr GUTWEIN - Again, where I am going with this is to place on the record my views and the views of the Government in regard to the reason we are not providing the unredacted copy, and our views in regard to this committee and the processes it has engaged in, which has tainted this committee over the period -

CHAIR - Order. Treasurer, I have given you the opportunity to make any concluding statement you want to make, but I am not going to open it up now for you to go down that path, which is a separate issue. The committee has directed its attention to that and a special report will go to both Houses. That will be dealt with by the Houses in due course.

Ms COURTNEY - Point of order, Chair. I have a problem with the fact we are not allowing a witness to give the information he wants to give, even if we disagree with what his comments are. I believe the witness should be afforded the opportunity to put his case forward.

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CHAIR - I have made my position perfectly clear. As the chair of this committee I am not going to provide for that opportunity to occur as it has been addressed separately in another report. Treasurer, if you want to conclude, please do so but do not go down that path.

Mr GUTWEIN - Chair, what you are doing is censoring a witness before your committee. I am sorry if the matters I want to raise do not find favour with you, but they are matters of fact.

CHAIR - Please proceed, but do not go down that path. If you do, I will cut you off and end the session.

Mr GUTWEIN - I find it extraordinary that you are censoring -

CHAIR - You are entitled to your view on that, but please continue with any closing statement.

Mr GUTWEIN - So I am entitled to my view but I am not allowed to state it?

CHAIR - Make any closing statement you want to make, please.

Mr GUTWEIN - I would like your clarification on this. I am entitled to my view but I am not allowed to state it before this committee?

CHAIR - That could well be so. We all have certain views we are not able to state in certain circumstances. You have been given an opportunity here to put your position for not producing the document. I have said this is not an opportunity to go through any processes of criticising this committee on what has and has not happened. This is directly dealing with your position and your requirement to produce the document. If you want to close, please do so, but if not I will bring it to an end.

Mr GUTWEIN - Chair, I find it extraordinary that I have been censored today. I would have thought it was in the interests of this committee to hear full and frank evidence from any witness who appeared before it. Unfortunately, you are not allowing me to do that. In finishing, it is my view this committee has been on a course of attempting to score political points.

CHAIR - I intend to bring this hearing to a conclusion. You have provided an explanation and I will now finalise this. I need to make a statement: given you have failed to comply with the summons, this is a very serious matter and may constitute the contempt of parliament. The committee will refer the matter to both Houses for further consideration. Thank you very much for your attendance, Treasurer.

DISCUSSION CONCLUDED.

Chair

I would like the opportunity to make a statement to the committee.

Thankyou

Firstly I would like to point out that if you had requested me to attend today’s hearing to explain my position on the document in question I would have willingly attended, just as I did on the 30 August when I appeared before this committee as you had requested and I answered your questions for around 2 hours.

So to be clear there was no need to go through the political theatre of a summons, if you had asked me, I would have willingly attended today.

Chair, one question I took on notice when I appeared before you was to consider providing an un-redacted copy of a letter between myself and Minister Groom.

The letter in redacted form had already been released following a Right to Information request where the delegate acting under the framework of the RTI Act, at arm’s length from me, determined that parts of the letter should not be released due to their referencing matters relating to Cabinet information as defined under the Act.

As you would also be aware Section 26 (1) (d) of the RTI Act states:

26. Cabinet information

(1) Information is exempt [from disclosure] information if it is contained in –

(a) the official record of a deliberation or decision of the Cabinet; or

(b) a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration; or

(c) a record that is a copy of, or a copy of part of, a record referred to in [paragraph \(a\)](#) or [\(b\)](#); or

(d) a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published.

So to be clear, the independent RTI officer exempted the section of the letter in question because it was Cabinet information as defined by the Act.

As the redacted paragraphs referred to Cabinet deliberations and processes I informed the committee that I was not prepared to release an un-redacted copy and provided you with my reasoning in my response to the Questions on Notice dated 14 September 2016.

Since that time you have written to me two more times requesting a copy of the un-redacted letter. I have duly responded to you in letters dated 9 December 2016 and 27 February 2017. In all cases I have explained my rationale for not releasing the full letter.

In my letter of 9 December 2016 I stated, that the "Tamar Valley letter includes cabinet information" and that required that the relevant sections of the letter to be withheld to ensure that the confidentiality was to be maintained.

Further, in my letter of 27 February 2017 I confirmed that I would not be disclosing the Tamar letter on the grounds that:

"in considering your request in the context of established precedent and convention, my consistent position has been that it is not appropriate to release the Tamar Valley letter in an un-redacted form to the Committee on the grounds that the letter includes information that directly relates to cabinet deliberations. Accordingly, it would be contrary to the public interest for the un-redacted version to be released either confidentially to members of the Committee or the public more broadly."

I made I believe the position perfectly clear however as I have already pointed out ,if you had requested that I attend another hearing of this committee to explain the Governments position I would have willingly attended without needing to be summoned.

Chair, the precedent of maintaining cabinet confidentiality is well established. It has been a cornerstone of the Westminster system of government for centuries and Governments throughout history have preserved this important convention and equally importantly, parliaments have respected it too.

A system of responsible government, in which Cabinet takes collective responsibility for its decisions, requires the promotion and maintenance of full and frank deliberations in Cabinet. Any limitation on this freedom would severely undermine the performance by Government of its executive duties.

This fundamental tenet is recognised in the RTI Act, which was supported and agreed to by both Houses of this Parliament , as it provides for information pertaining to cabinet deliberations and processes to be kept confidential. This has long been accepted practice and Parliaments have supported this practice in the past

By way of recent example, in 2012 the former Government refused to provide information to a Tasmanian parliamentary committee on the basis it was Cabinet material. I note that a summons was not issued in circumstances similar to this one today.

Chair I will now refer to a letter that was prepared under the previous Government and signed by the then Premier Lara Giddings in 2012.

The former Premier wrote to, the Committee secretary for the Legislative Council Government Administration Committee "A" in relation to the cost reduction strategies of the Department of Health and Human Services. In that letter she stated "Cabinet documents, which include the advice provided to the Cabinet, are a class of documents that, irrespective of their actual contents, belong to a class which the public interest requires to be withheld from production. That this is so has been long recognised by parliaments and the courts alike. Documents in this class are typically those which reveal the deliberations of the cabinet or the views of individual members of the Cabinet expressed before the Cabinet has reached a concluded and collective view on a matter of public policy

The letter goes further and specifically quotes from a relevant High Court judgement which I will for the benefit of the committee read parts today:

In the case of Commonwealth v Northern Land Council (1993) 176 CLR 604 the High Court unanimously said at para 6:

.... it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government.

The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room.

It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited.

Chair it is rare that I find myself in agreement with the former Premier but in this matter in respect of the release of Cabinet information I am. I will table Ms Giddings letter with your agreement.

Chair, the letter you seek from me has been redacted by an independent RTI officer under section 26 of the RTI Act because it very clearly outlines matters in respect of the processes and deliberations of Cabinet.

This committee however appears prepared to forsake hundreds of years of precedent and practice including actions taken by previous Tasmanian Governments, in the pursuit of the release of information that forms a part of the cabinet decision making processes of Government.

Chair before I conclude I would like to make some general observations:

I believe that over the course of this inquiry that information received by this committee has entered the public domain without being formally released by the committee.

It is also unfortunately a statement of fact that there was a leak to the media last week regarding the intent of the committee to summons me here today.

On Monday evening the 20th of March the Government was contacted by the ABC which had been informed that I had been summonsed. An email which included the following comment was received by our media office at 6:24 pm from Richard Baines at the ABC:

As discussed I've been told that the Treasurer has been issued a subpoena to give an unredacted copy of the Tamar Valley Power station advice.

I hadn't received a summons at that time nor did I receive any contact from the committee until around 10am the next morning when the Chair contacted me to apologise for the media knowing about the committee's decision before I did and to inform me that I would be summonsed.

Chair, to state the obvious-prior to your conversation with me there are very few people who would have known that a summons was to be issued and the vast majority are here today in this room.

I don't intend to repeat on the public record the conversation we had, but suffice to say I believe that you shared my view that this latest leak raised serious questions about the integrity of the committee and its processes.

Chair, I and the Government agree that the issue of energy security is very important to the state, that's why we supported the referral of this matter to the Public Accounts Committee for consideration.

PAC is an important and highly respected Committee of the Parliament, and it is deeply unfortunate that this particular inquiry has become so politicised, in a way previously unseen of PAC inquiries.

It is my view, that the repeated leaks of information from the Committee in an attempt to score political points have irreparably tainted this inquiry and throw into doubt its integrity, and the validity of any finding it might make.

That being said as the letter contains cabinet information as I have stated the Government will not be releasing an un-redacted copy of the letter that you have requested.

Thank you.

Dissenting Statement of Ms Sarah Courtney MP AND Mrs Joan Rylah MP

1. Introduction

The Public Accounts Committee (the PAC) has historically been regarded as one of the most respected and important committees within a Parliament. It is therefore disappointing that that the politically motivated pursuit of a redacted section of a letter, which was indeed redacted by an independent RTI officer in accordance with the law, has taken precedence over producing a timely report to the Tasmanian Parliament responding to the Terms of Reference that were established in 2016.

2. Evidence

2.1 Section 26 (1) (d) of the RTI Act states:

26. Cabinet information

(1) Information is exempt [from disclosure] information if it is contained in –

(a) the official record of a deliberation or decision of the Cabinet; or

(b) a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration; or

(c) a record that is a copy of, or a copy of part of, a record referred to in paragraph (a) or (b); or

(d) a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published.

2.2 The precedent of maintaining Cabinet confidentiality is well established. It has been a cornerstone of the Westminster system of government for centuries and Governments throughout history have preserved this important convention and equally importantly, parliaments have respected it too. Any limitation on this freedom would severely undermine the performance by Government of its executive duties. This fundamental tenet is recognised in the RTI Act, which was supported and agreed to by both Houses of this Parliament, as it provides for information pertaining to cabinet deliberations and processes to be kept confidential. This has long been accepted practice and Parliaments have supported this practice in the past.

2.3 In 2012 the former government refused to provide information to a Tasmanian parliamentary committee on the basis it was Cabinet material. The then-Premier, Hon Lara Giddings wrote to, the Committee secretary for the Legislative Council Government Administration Committee "A" in relation to the cost reduction strategies of the Department of Health and Human Services. In that letter she stated:

"Cabinet documents, which include the advice provided to the Cabinet, are a class of documents that, irrespective of their actual contents, belong to a class which the public interest requires to be withheld from production. That this is so has been long recognised by parliaments and the courts alike. Documents in this class are typically those which reveal the deliberations of the cabinet or the views of individual members of the Cabinet expressed before the Cabinet has reached a concluded and collective view on a matter of public policy."

2.4 The letter from the Premier Giddings specifically quotes from a relevant High Court judgement, the case of Commonwealth v Northern Land Council (1993) 176 CLR 604 where the High Court unanimously said at para 6:

"... it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government.

"The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room.

"It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited."

2.5 A copy of the letter from then-Premier, Hon Lara Giddings wrote to, the Committee secretary for the Legislative Council Government Administration Committee "A" **is ATTACHED** to this report

2.6 At the Public Hearing on 30 March 2017 the Treasurer gave evidence that

"I would like to point out that if you had requested me to attend today's hearing to explain my position on the document in question I would have willingly attended, just as I did on 13 August when I appeared before this committee as you had requested. I answered your questions for around two hours on that day. To be clear, there was no need to go through the political theatre of a summons. If you had asked me, I would have willingly attended today"

2.7 In the hearing of 30 March 2017, the Treasurer was not given an opportunity to defend allegations put to him.

2.8 In the hearing of 30 March 2017, prior to the Treasurer delivering much of his prepared statement, the Chair said

"there will be the right to go through all this information when it comes before the Houses, because it will go before both Houses of Parliament for them to determine any courses of action"

2.9 Section 7 of the Public Accounts Committee Act 1970 states that

"(2) A witness who is summoned to appear, or who appears, before the Committee has the same protection and privileges as a witness in an action tried in the Supreme Court."

2.10 At the hearing of 30 March 2017 Ms Courtney said

"The witness should have the ability to put a full explanation on Hansard, considering the circumstances we find ourselves in. Whatever action is taken afterwards could be prejudiced if we do not allow the witness to provide the explanation he desires."

2.11 At the hearing of 30 March 2017 Ms Courtney said

"I have a problem with the fact we are not allowing a witness to give the information he wants to give, even if we disagree with what his comments are. I believe the witness should be afforded the opportunity to put his case forward."

2.12 At the hearing of 30 March 2017 The Treasurer said

"Chair, I find it extraordinary that I have been censored today. I would have thought it was in the interests of this committee to hear full and frank evidence from any witness who appeared before it. Unfortunately, you are not allowing me to do that."

In finishing, it is my view this committee has been on a course of attempting to score political points."

2.13 After the Treasurer made the above comment (in 2.12) the committee was concluded by the Chair and the Treasurer was not afforded the opportunity to complete his statement.

2.14 The PAC issued a media release on 23 March 2017 that it had;

"today resolved to prepare a Special Report in relation to the alleged disclosure of confidential (privileged) information associated with the current Energy Entities Inquiry to third parties. The Committee has made a unanimous decision given the seriousness of the issue."

2.15 In light of the media release of 23 March 2017, which occurred prior to the hearing of 30 March 2017 and in addition to alleged breaches of confidentiality during 2016, the Treasurer clearly had sufficient evidence to question the integrity of the PAC and the committee's ability to keep confidential information out of the public arena.

3. Findings

3.1 That Finding 1 of the Special Report be rejected. The explanations given by the Treasurer to the PAC on 14th September 2016, 9 December 2016 and 27 February 2017 as well as the fact that the Treasurer was not afforded the opportunity to substantiate his public interest immunity claim during the hearing of 30 March 2017 must be taken into consideration.

3.2. That Finding 2 of the Special Report be rejected as this suggests that all references to deliberations of Cabinet must have specific marking on the "face of the letter". There is no specific requirement in the RTI Act 2009 for documents or letters to stamped Cabinet-in-Confidence to be exempt. Furthermore, Finding 2 does not go to the question of compliance with a summons.

3.3. That Finding 3 of the Special Report be rejected as it is opinion, not fact. The Treasurer was not afforded the opportunity to respond to the allegations that he "incorrectly relies on the provisions of the *Right to Information Act 2009*" and therefore Finding 3 is an unsubstantiated and unproven claim.

3.4. That Finding 4 of the Special Report be rejected at this does not go to the question of compliance with the summons and is therefore irrelevant.

3.5 This dissenting statement finds that the Treasurer was not given the opportunity to defend himself, as per the *Public Accounts Committee Act 1970*, during the hearing of 30 March 2017.

3.6 This Dissenting Statement finds that the Chair made the Treasurer aware that he would be referred to both Houses of Parliament before the Treasurer was able to provide his statement, thereby predetermining the outcome of the hearing on 30 March 2017.

3.7 This Dissenting Statement finds that the matter of the Special Report referred to in the Media Release of PAC on 23 March 2017 has direct bearing on the confidence of witnesses appearing before the PAC's Energy Entities Inquiry




Parliament House
HOBART
4 April 2017

Sarah Courtney MP
LIBERAL MEMBER FOR BASS

Joan Rylah MP
LIBERAL MEMBER FOR BRADDON

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Mr Stuart Wright
Committee Secretary
Legislative Council Government Administration Committee 'A'
Parliament House
HOBART TAS 7000

23 APR 2012

Dear Mr Wright

On 13 April 2012 the Hon Ruth Forrest MLC wrote to me concerning an Inquiry being undertaken by Legislative Council Government Administration Committee 'A' in relation to the cost reduction strategies of the Department of Health and Human Services. In that letter she asks if I would direct my reply to you.

As I understand it Ms Forrest is requesting that I provide the Committee with "A copy of any advice from the Department of Treasury and Finance... [provided to Cabinet] ... concerning the recommended model of local health networks to be established in Tasmania."

It has long been the practice of Governments in Tasmania (and other Westminster system governments elsewhere) to claim public interest immunity when considering such requests.

Cabinet documents, which include the advice provided to the Cabinet, are a class of documents that, irrespective of their actual contents, belong to a class which the public interest requires to be withheld from production. That this is so has been long-recognised by Parliaments and the courts alike.

Documents in this class are typically those which reveal the deliberations of the Cabinet or the views of individual members of the Cabinet expressed before Cabinet has reached a concluded and collective view on a matter of policy. In a well-known passage in Commonwealth v Northern Land Council (1993) 176 CLR 604 the High Court unanimously said at par 6 (footnotes omitted):

"But it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential. See U.K., Parliament, Report of the Committee of Privy Counsellors on Ministerial Memoirs ("the Radcliffe Committee"), Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. Moreover, the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system



or otherwise, is liable to subject the members of that body to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course (See *Conway v. Rimmer* (1968) AC, per Lord Reid at p 952; *Sankey v. Whitlam* (1978) 142 CLR, per Mason J. at pp 97-98; U.K., Parliament, Departmental Committee on Section 2 of the Official Secrets Act 1911 ("the Franks Committee"), (1972), Cmnd.5104, vol.1, p.33). The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support."

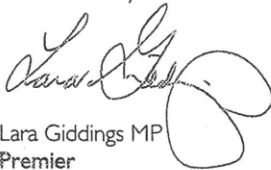
It is also pertinent to note that the Parliament has specifically recognised the special, and confidential, status of Cabinet documents in the provisions of the *Right to Information Act 2010* (RTI Act) and prior to that the *Freedom of Information Act 1991*. In particular I refer you to section 26 of the RTI Act which provides, *inter alia*, that:

"Information is exempt [from disclosure] information if it is contained in –

- (a) the official record of a deliberation or decision of the Cabinet; or
- (b) a record proposed by a Minister for the purpose of being submitted to the Cabinet for consideration; or
- (c) a record that is a copy of, or a copy of part of, a record referred to in paragraph (a) or (b); or
- (d) a record, the disclosure of which would involve the disclosure of a deliberation or decision of the Cabinet, other than a record by which a decision of the Cabinet was officially published."

Despite Ms Forrest's suggestion that Cabinet documents could be provided as in-camera evidence, I intend to uphold the fundamental principle of Cabinet confidentiality, and I am unable to accede to her request.

Yours sincerely



Lara Giddings MP
Premier

cc Hon Ruth Forrest MLC
Secretary, Department of Treasury and Finance