

SAS TRUSTEE CORPORATION

ORDER FOR PAPERS – Election of Mr John Frederick Flowers MP

Privilege not claimed

Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(1)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Email from Manager, Legal Services, Public Sector Work, Department of Premier and Cabinet with attached opinion from Parliamentary Counsel	27 April 2011	Tony Nicod Manager, Legal Services, Public Sector Work, Department of Premier and Cabinet and attachment from Don Colagiuri, Parliamentary Counsel	N

Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(2)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Email from Deputy Director General, Public Sector Work, Department of Premier and Cabinet to SAS Trustee Corporation	27 April 2011	Mr Chris Raper, Deputy Director General,, Public Sector Work, Department of Premier and Cabinet	N Attachment not included on basis of Crown Solicitor's advice, 18 May 2011
Item 1 (a)(3)	All documents, excluding personal medical records, created since 26 March 2011, in the	Letter from SAS Trustee Corporation to Department of Premier and Cabinet	19 May 2011	Chris Durack, CEO, SAS Trustee Corporation	N



Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
	<p>possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.</p>				

Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(4)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Email from Department of Premier and Cabinet with attached Regulation to SAS Trustee Corporation enclosing final regulation as posted on the legislation website	29 April 2011	Tony Nicod, Manager, Legal Services, Public Sector Workforce, Department of Premier and Cabinet	N



Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(5)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Email from SAS Trustee Corporation to Minter Ellison	10 May 2011	Narelle Wooden, General Counsel, SAS Trustee Corporation	N
Item 1 (a)(6)	All documents, excluding personal medical records,	Email from SAS Trustee Corporation to Deputy Director	25 April 2011	Dr Don Russell, SAS Trustee Corporation	N

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Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
	<p>created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.</p>	<p>General, Public Sector Management Reform</p>			

Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(7)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Email from SAS Trustee Corporation to Chairman, SAS Trustee Corporation	25 April 2011	Chris Durack, CEO, SAS Trustee Corporation	N Attachment not included on basis of Crown Solicitor's advice, 18 May 2011



Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(8)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Internal email from SAS Trustee Corporation attaching email from Department of Premier and Cabinet	27 April 2011	Brian Matthew, Legal and Policy Consultant, SAS Trustee Corporation	N



Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(9)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Internal email from SAS Trustee Corporation attaching opinion from Parliamentary Counsel	29 April 2011	Brian Matthew, Legal and Policy Consultant, SAS Trustee Corporation	N

Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(10)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Internal email from SAS Trustee Corporation	29 April 2011	Narelle Wooden, General Counsel, SAS Trustee Corporation	N

Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(11)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Internal email from SAS Trustee Corporation attaching email from Department of Premier and Cabinet	29 April 2011	Narelle Wooden, General Counsel, SAS Trustee Corporation	N



Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(12)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Internal email from SAS Trustee Corporation attaching internal email	29 April 2011	Narelle Wooden, General Counsel, SAS Trustee Corporation	N

Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(13)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Letter from Department of Premier and Cabinet to SAS Trustee Corporation	Received by SAS Trustee Corporation on 9 May 2011	Paul Miller, General Counsel, Department of Premier and Cabinet	N
Item 1 (a)(14)	All documents, excluding personal medical records, created since 26 March 2011, in the	Letter from SAS Trustee Corporation to the Department of Premier and Cabinet	19 May 2011	Narelle Wooden, General Counsel, SAS Trustee Corporation	N



Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
	<p>possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.</p>				

Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
Item 1 (a)(15)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.	Email with attached letter from SAS Trustee Corporation to Crown Solicitors	13 May 2011	Narelle Wooden, General Counsel SAS Trustee Corporation	N
Item 1 (a)(16)	All documents, excluding personal medical records, created since 26 March 2011, in the	Internal email with attached items from SAS Trustee Corporation	29 April 2011	Brian Matthew, Legal and Policy Consultant, SAS Trustee Corporation	N



Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
	possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.				
Item 1 (a)(17)	All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick	Submission in support of claim for confidentiality and privilege by SAS Trustee Corporation	18 May 2011	Narelle Wooden, General Counsel, SAS Trustee Corporation	N



Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
	<p>Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.</p>				
Item 1 (a)(18)	<p>All documents, excluding personal medical records, created since 26 March 2011, in the possession, custody or control of the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP. Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly,</p>	<p>Email from the Crown Solicitor to SAS Trustee Corporation attaching advice and letter from Crown Solicitor's office</p>	18 May 2011	<p>Carolyn Berhardt, PA to Crown Solicitor/Administrative Assistant Government Law</p> <p>Mr John McDonnell, Assistant Crown Solicitor</p>	N

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Document No.	Item	Document	Date of creation	Author	Privilege Claim Y/N
	<p>excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any documents which records or refers to the production of documents as a result of this order of the House.</p>				

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Brian Matthews

From: Tony Nicod [Tony.Nicod@dpc.nsw.gov.au]
Sent: Wednesday, 27 April 2011 5:31 PM
To: Brian Matthews
Subject: Fwd: Superannuation Amendment (Breakdown Pensions) Regulation 2011 [s2011-137]
Attachments: s2011-137-d02.pdf; SI Information Sheet.pdf

Brian

The final Reg. Please forward the signed letter requesting the Regulation be made.

TONY NICOD
Manager, Legal Services
Public Sector Workforce
Department of Premier & Cabinet
PH:9228 3592
fax: 9228 3102
tony.nicod@dpc.nsw.gov.au

This message is intended for the addressee named and may contain confidential information. If you are not the intended recipient, please delete it and notify the sender. Views expressed in this message are those of the individual sender, and are not necessarily the views of the Department of Premier and Cabinet.

>>> Natasha Mitchell 27/04/2011 17:20 >>>

Please find attached the instrument and Parliamentary Counsel's Opinion. The pdf file may be printed for the official process of making the instrument.

For records purposes, please confirm receipt of this email by replying to it.

For information about the official notification of the instrument once it has been made please see the attached information sheet.

Regards

Parliamentary Counsel's Office
Level 23, AMP Centre
50 Bridge Street
Sydney NSW 2000
Ph: +61 2 9321 3333
Fax: +61 2 9232 4796



New South Wales

PARLIAMENTARY COUNSEL

Opinion

Superannuation Act 1916
Proposed Superannuation Amendment (Breakdown Pensions) Regulation 2011

Your ref: Tony Nicod
Our ref: DC s2011-137-d02

In my opinion the attached draft Regulation may legally be made.

A handwritten signature in black ink, appearing to read 'D Colagiuri'.

(D COLAGIURI)
Parliamentary Counsel

27 April 2011

The Director-General
Department of Premier and Cabinet



New South Wales

Superannuation Amendment (Breakdown Pensions) Regulation 2011

under the

Superannuation Act 1916

The Administrator, with the advice of the Executive Council and on the recommendation of STC, has made the following Regulation under the *Superannuation Act 1916*.

Minister for Finance and Services

Explanatory note

The object of this Regulation is to amend the *Superannuation Regulation 2006* to enable the SAS Trustee Corporation to cancel a breakdown pension for a particular period at the direction of the person who is receiving the pension and to grant the pension (or some other benefit to which the person is entitled) at the end of that period. The amendment will enable a person to apply for the cancellation of such a pension during the person's term of office as a Member of Parliament and so avoid disqualification under the *Constitution Act 1902*.

This Regulation is made under the *Superannuation Act 1916*, including section 52.

Superannuation Amendment (Breakdown Pensions) Regulation 2011

under the

Superannuation Act 1916

1 Name of Regulation

This Regulation is the *Superannuation Amendment (Breakdown Pensions) Regulation 2011*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

Schedule 1 Amendment of Superannuation Regulation 2006

Clause 11A

Insert after clause 11:

11A Cancellation of breakdown pension at direction of pensioner

- (1) A pensioner in receipt of a breakdown pension that is not payable for the remainder of the pensioner's life may direct STC, by notice in writing, to cancel the pension.
- (2) The notice may direct that the cancellation have effect only for the period stated in the notice and that STC re-determine the grant of the pension at the end of that period. The period stated in the notice may be a period ending on a specified date or ending on the happening of a specified event.
- (3) If STC receives a notice under this clause, the breakdown pension is cancelled on the date of receipt of the notice or, if a future date is specified in the notice for that purpose, on that future date.
- (4) Subject to subclause (5), when the breakdown pension is cancelled, entitlement to a further pension or other benefit under the Act is to be determined on the basis that the pensioner ceased on the cancellation to be on leave of absence without pay as provided by sections 48 and 49 of the Act.
- (5) If the notice directs that the cancellation have effect only for the period stated in the notice:
 - (a) a breakdown pension is not payable to the person concerned during that period (other than a breakdown pension payable for the remainder of the person's life), and
 - (b) at the end of that period STC may, on application, grant a breakdown pension (or other pension or benefit) for which the person concerned is eligible as if the person had continued during that period as an employee on leave of absence without pay in accordance with sections 48 and 49 of the Act.

The person may, at any time during that period, by further notice in writing to STC, extend or reduce that period.

- (6) In this clause, *breakdown pension* means a pension payable under section 29 or section 52E of the Act.



New South Wales

PARLIAMENTARY COUNSEL'S OFFICE

Information sheet on the Online notification of Statutory Instruments (including Environmental Planning Instruments)

Once the instrument has been made or approved by the Governor-in-Council or made by the Minister, send a request to the PCO for online notification on the NSW legislation website.

It is anticipated that the instrument will generally be notified on Friday following the established Wednesday Executive Council meeting at which the instrument is dealt with. However, urgent or delayed notification can be arranged at other times if required.

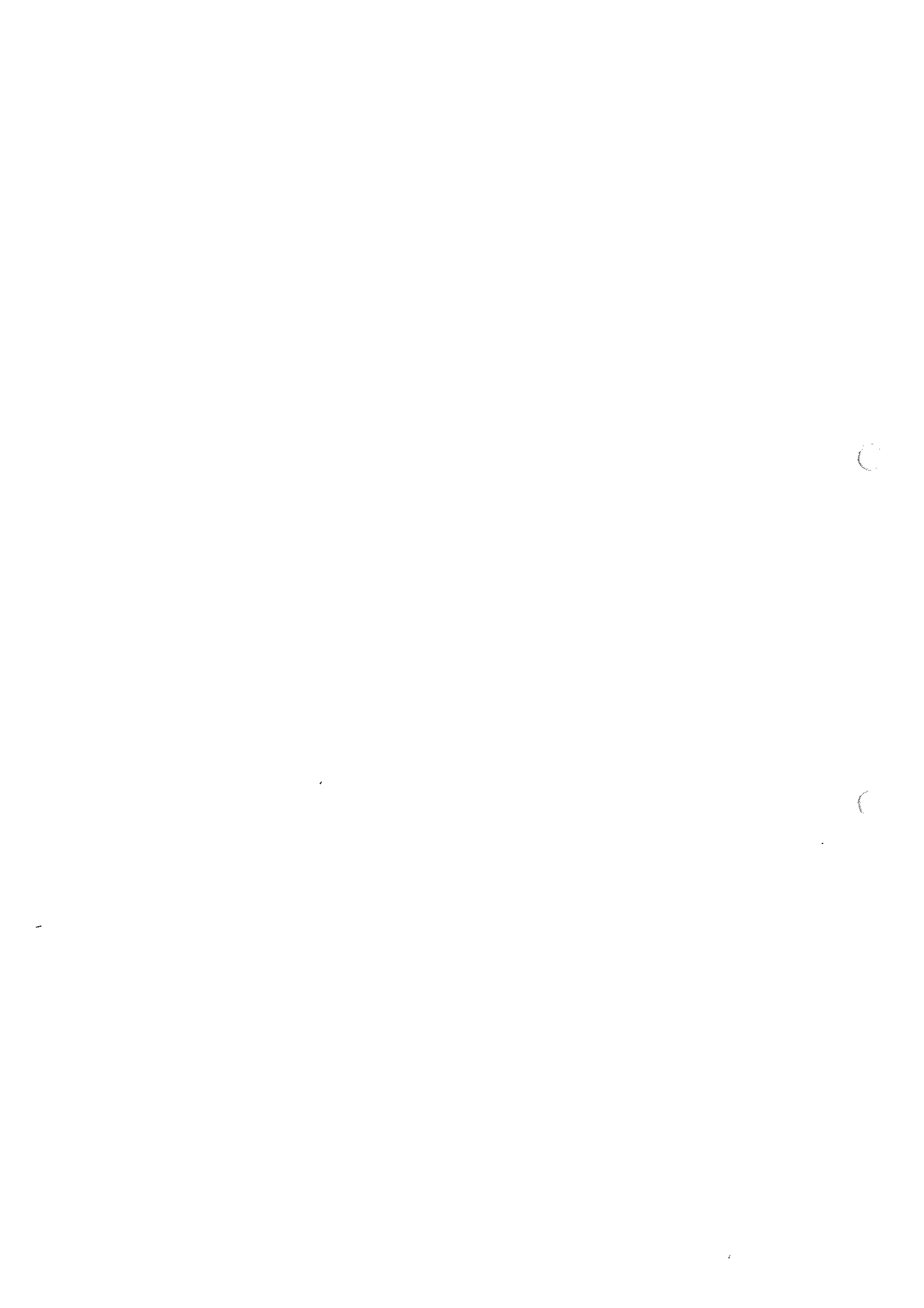
For normal notification on a Friday the request should be sent by 5.00 pm on the Wednesday of that week. Requests for special notification should be made by telephone as soon as possible, but preferably no later than 1.00 pm on the day in question.

Requests should be sent by email to notification@pco.nsw.gov.au or by fax (02) 9232 4796.

The request should include the full name of the instrument and PCO's file reference (which you can find on the top of the Opinion relating to that instrument or on the bottom left hand side of the instrument itself).

The telephone contact for notification matters is Ms Melissa Low (02) 9321 3323.

Parliamentary Counsel
January 2011



Glenda Owen

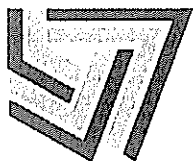
From: Chris Raper [Chris.Raper@dpc.nsw.gov.au]
Sent: Sunday, 24 April 2011 11:28 AM
To: Chris Durack
Cc: Chris Eccles; Chris Raper; Tony Nicod
Subject: Fwd: Re: Proposed REgulation and has the need for a resolution already been triggered
Attachments: Re: Proposed REgulation and has the need for a resolution already been triggered

Chris, As discussed attached is an exchange of email correspondence between Tony Nicod and Don Colagiuri yesterday and Don's formal advice this morning on what type of regulation can be validly made.
Happy to discuss if needed Chris R

Chris Raper
Deputy Director General
Public Sector Management Reform
Ph 02 9228 5572

This message is intended for the addressee named and may contain confidential information. If you are not the intended recipient, please destroy it and notify the sender. Views expressed in this message are those of the individual sender, and are not necessarily the views of the Premier's Department.





STATE SUPER
SAS Trustee Corporation

File No: B1065
Contact: Narelle Wooden
Phone: (02) 9238 5911
Fax No: (02) 9238 5999
ABN: 29 239 066 746

Suite 1, Level 17, 83 Clarence Street, Sydney NSW 2000 Postal: PO Box N259, Grosvenor Place NSW 1220 Ph: 9238 5906 DX: 10152 Syd-Stock Exch

19 May 2011

Ms Rachel McCallum
Acting Executive Director, Legal Branch
Department of Premier and Cabinet
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Ms McCallum

I refer to the letter from Mr Paul Miller, General Counsel of your office to myself dated 9 May 2011 requiring production of certain documents under Standing Order 52 and specifically the resolution of the Legislative Council on 6 May 2011 (The Resolution). The Resolution required production of documents in the possession, custody or control of the Trustee relating to the *'eligibility of Mr John Frederick Flowers, MP, Member for Rockdale to be elected and to hold a seat as a member of the Legislative Assembly'*.

As you are aware Ms Narelle Wooden, General Counsel of SAS Trustee Corporation, after discussions with your office, sought advice from the Assistant Crown Solicitor concerning whether SAS Trustee Corporation was **permitted** to produce documents in response to the Resolution and the Letter. The advice from Mr John McDonnell, Assistant Crown Solicitor, was that some documents were not permitted to be produced to either the Department of Premier and Cabinet or the Legislative Council, for the purposes of the Resolution. Given that the advice of the Assistant Crown Solicitor was that certain documents were **not permitted** to be returned under the Resolution rather than that documents were not required to be produced, this advice was relied upon by the SAS Trustee Corporation in collating documents to return to your office and the Legislative Council.

Mr Brian Matthews, Legal and Policy Consultant, SAS Trustee Corporation, who had the primary carriage of issues relating to Mr Flowers since 26 March 2011 has been on annual leave since 29 April 2011. Ms Narelle Wooden has attempted to contact Mr Matthews on several occasions from 9 May 2011 to determine if there were other documents relevant to the Resolution, apart from those included on the paper file for this matter or in Mr Matthew's SAS Trustee Corporation email account that he may have in his custody or possession. Unfortunately she has been unable to contact Mr Matthews to confirm whether there were such additional documents.

Subject to the matters raised in this letter and the letter forwarded to you by Ms Narelle Wooden on 19 May 2011 in relation to the return of documents under the Resolution, I certify to the best of my knowledge all documents held by the SAS Trustee Corporation and covered by the terms of the Resolution, which are permitted to be provided, have been provided.

Yours sincerely
For and on behalf of SAS Trustee Corporation

Chris Durack
Chief Executive Officer
SAS Trustee Corporation

Enclosure

Common/Legal/Wooden/Letter to DPC attaching produced material re LC May 2011



STATE SUPER
SAS Trustee Corporation

File No: B1065
 Contact: Narelle Wooden
 Phone: (02) 9238 5911
 Fax No: (02) 9238 5999
 ABN: 29 239 066 746

Suite 1, Level 17, 83 Clarence Street, Sydney NSW 2000 Postal: PO Box N259, Grosvenor Place NSW 1220 Ph: 9238 5906 DX: 10152 Syd-Stock Exch

19 May 2011

Ms Rachel McCallum
 Acting Executive Director, Legal Branch
 Department of Premier and Cabinet
 Level 37, Governor Macquarie Tower
 1 Farrer Place
 SYDNEY NSW 2000

Dear Ms McCallum

We refer to the letter from Mr Paul Miller, General Counsel of your office to Mr Chris Durack, CEO of SAS Trustee Corporation (the Trustee) dated 9 May 2011 requiring production of certain documents under Standing Order 52 and specifically the Resolution of the Legislative Council on 6 May 2011 (The Resolution). The Resolution requires production of documents relating to the *'eligibility of Mr John Frederick Flowers, MP, Member for Rockdale to be elected and to hold a seat as a member of the Legislative Assembly'*.


As you are aware, the Trustee, after discussions with your department, obtained legal advice from the Assistant Crown Solicitor, Mr John McDonnell. The advice sought was whether the Trustee was **permitted** to produce documents to the Department of Premier and Cabinet and the Legislative Council for the purposes of the Resolution. That advice is attached to this letter as Annexure A. Given that this advice considered whether the Trustee was permitted to produce documents in response to the Resolution rather than whether the Trustee was required to produce such documents, SAS Trustee Corporation has relied on this advice when returning documents under the Resolution.

Mr Brian Matthews, Legal and Policy Consultant, SAS Trustee Corporation, had the primary carriage of this matter. Mr Matthews went on annual leave on 29 April 2011 and will not have returned to the office by the date of return of the documents. We attempted to contact Mr Matthews on his personal mobile telephone on 9 and 10 May 2011 after receipt of notice of the Resolution. We are aware that Mr Matthews is holidaying in Canada and Alaska and will not be returning to work at the Trustee's office until or about 6 June 2011. Accordingly, we cannot confirm that all documents in the possession, custody or control of Mr Matthews have been produced. We will interview Mr Matthews promptly on his return to work and if required, will produce any further documents he may have in his possession, custody or control relevant to the Resolution and that we are permitted to produce.

Only that material **directly** relating to the eligibility of Mr John Frederick Flowers MR, Member for Rockdale has been included and only to the extent that SAS Trustee Corporation is aware of the relevance of that material to this issue.

Please find attached a letter from Mr Chris Durack CEO of SAS Trustee Corporation addressing confirmation of the completeness of the documents produced in response to the Resolution and the letter from Mr Miller of 9 May 2011.

Yours sincerely
 For and on behalf of SAS Trustee Corporation


Narelle Wooden
General Counsel
SAS Trustee Corporation
Enclosure





CROWN SOLICITOR
NEW SOUTH WALES

Advice

Flowers J F - SO 52 Call for Papers

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Prepared for: SAT722 SAS Trustee Corporation

Date: 18 May 2011

Client ref: Narelle Wooden

CSO ref: 201101382 T08 John McDonnell



1. Summary of advice

- 1.1 You have sought my urgent advice as to whether the SAS Trustee Corporation ("STC"), as Trustee of the STC Schemes under the *Superannuation Administration Act 1996* ("the Act"), is permitted to provide documents purportedly required under a resolution of the Legislative Council made under Standing Order 52 ("SO 52").
- 1.2 In my view, the Legislative Council cannot require production of any documents from the STC under SO 52.
- 1.3 Nor can the Legislative Council require the Minister administering the Act to produce documents "relating to Mr Flowers" as the Minister's power of direction and control does not extend to requiring production of documents relating to an individual member to the Legislative Council, the Minister or the Department of Premier and Cabinet ("DPC").
- 1.4 More importantly, in my view, STC is not permitted to provide these documents in 1.3 above to the Legislative Council, the Minister or DPC by reason of a prohibition in the *Privacy and Personal Information Protection Act 1998* ("PPIP Act") and implications to be drawn from the Act itself.
- 1.5 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Background

- 2.1 You instruct that SAS Trustee Corporation ("STC") is the trustee of the STC schemes as that term is defined under the Act. The STC schemes include the State Authorities Superannuation Scheme, the Police Superannuation Scheme, the State Superannuation Scheme (SSS) and the State Authorities Non-contributory Superannuation Scheme. STC, as the trustee of these superannuation schemes, must comply with all common law duties, obligations and rights of trustees and the obligations, duties and rights of trustees under the *Trustee Act 1925* and the Act. In addition, it has privacy obligations to its members under the *Privacy and Personal Information Protection Act 1998* ("PPIP Act").
- 2.2 The Chief Executive Officer of STC received a letter from Paul Miller, General Counsel of the DPC, on 9 May 2011 requiring production of certain documents under SO 52 by the Legislative Council. The Resolution of the Legislative Council required production of those documents in the possession, custody or control of SAS Trustee Corporation "relating to the eligibility of Mr John Frederick Flowers, MP, and Member



for Rockdale to be elected and to hold a seat as a member of the Legislative Assembly by 20 May 2011".

- 2.3 Mr Flowers was in receipt of a break down pension under the SSS scheme until he requested that pension be cancelled under clause 11A of the *Superannuation Regulation 2006* (NSW).

3. Advice sought

- 3.1 You seek my urgent advice as to whether STC is permitted to provide the documents required under the Resolution to the DPC and, ultimately, the Legislative Council.
- 3.2 Please note that the text of relevant legislation is set out in the Appendix to this advice.

4. Advice

Power of Legislative Council to require production by STC

- 4.1 By letter dated 9 May 2011, General Counsel for the DPC wrote to the STC's Chief Executive Officer informing him of the Legislative Council's Resolution of 6 May 2011, and advising him of the applicable guidelines, including a guideline that copies of all documents falling within the terms of the Resolution be provided to DPC in a certain format.
- 4.2 Standing Order 52(1), made under s.15(1)(a) of the *Constitution Act 1902*, provides that "the Clerk is to communicate to the Premier's Department, all orders for documents made by the House". The Order here requires tabling of "all documents, excluding all personal medical records created since 26 March 2011, in the possession, custody or control of ... the Department of Premier and Cabinet, the Minister for Finance and Services ... and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP ... to be elected and to hold a seat ... excluding all correspondence between Mr Flowers and the SAS Trustee Corporation".
- 4.3 Thus, the Resolution, properly construed, calls for documents created since 26 March 2011, in the possession, custody or control of STC, except personal medical records and correspondence between STC and Mr Flowers.
- 4.4 There is an issue, however, as to whether the Legislative Council has the power to make a resolution addressed to STC. In my view, it does not.
- 4.5 The Legislative Council has the power to compel production of State papers from the Executive Government (*Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563). The High Court has found that such a power is reasonably

- necessary for the House for the proper exercise of the functions of the House and is given effect to in SO 52. As noted above, SO 52 provides that "[t]he House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House" (cl. (1)).
- 4.6 In holding that there is an implied power in the House to order Ministers to produce State papers, the High Court seems to have accepted the definition of "State papers of Gleeson" CJ in the NSW Court of Appeal, namely, "papers which are created or acquired by ministers, office-holders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of the State of New South Wales" (*Egan v Willis* (1996) 40 NSWLR 650 at 654; *Egan v Willis* (1998) 195 CLR 424 at 442 per Gaudron, Gummow and Hayne JJ).
- 4.7 The STC is constituted as a corporation and is, for the purposes of any Act, a statutory body representing the Crown (s. 48(3)). As a statutory body corporate, the STC's obligations to provide advice and annual reports to the Attorney-General are prescribed by statute.
- 4.8 In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 the High Court stated, in effect, that the executive branch to which the principle of responsible government attaches "is not confined to ministers and the public service", but extends to "the affairs of statutory bodies and public utilities which are obliged to report to the legislature or to a minister who is responsible to the legislature" (at 561). Their Honours referred to Lord Wilberforce in *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1168. After stating that the conduct of the British Steel Corporation's affairs and the disclosures and reports which had to be made were regulated by statute, his Lordship observed that "[t]he legitimate interest of the public in knowing about its affairs is given effect to through information which there is a statutory duty to publish and through reports to the Secretary of State who is responsible to Parliament". That is, to the extent that the Minister responsible to Parliament for the activities of the STC, he is required to rely on the STC's statutory reporting and advice-giving functions.
- 4.9 The High Court identified the executive branch as including "the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature". The joint judgment of Gaudron, Gummow and Hayne JJ in *Egan* at para [56] concluded with the following statement:
- "It is important to emphasise that no question arises in this case about what powers a House of the New South Wales Parliament may have to deal with persons who are not members of the House concerned. Altogether different considerations might arise in such a case."
- 4.10 There is therefore no authority to the effect that a House can order a person other than a Minister who is a member of the House to produce State or other papers to it. Accordingly, I do not think that the House can order the STC to produce State papers



to it. The power of a House to order a Minister to produce documents appears to be confined to documents which are in the custody and control of the Minister or which the Minister is able to obtain (*Egan v Willis* at 444 and 447).

- 4.11 Accordingly, given that the accepted basis of the power in SO 52 is s.15(1)(a) of the *Constitution Act* relating to the "orderly conduct" of the House, I am of the view that the power of the Legislative Council under SO 52 to require production of documents does not extend to statutory corporations such as the STC.

Power to require production by a Minister

- 4.12 The next question is whether the Legislative Council could achieve indirectly what it cannot achieve directly by seeking to obtain the documents through the Minister responsible for the STC. However, that means, for indirect production to be effective, the Minister must have the power to acquire production of papers held by the STC.
- 4.13 In this regard, s. 55 provides that the STC must comply with a direction of the Minister "relating to the exercise by STC of any one or more of its functions, if the Minister is of the opinion that an act or omission, or conduct, by STC has had or could reasonably be expected to have a significant adverse effect on the Consolidated Fund or the financial management of the State" (s. 55(1) and (2)). Such a direction must not be inconsistent with the Act (s. 55(1)) and the Minister, in making the direction, must have regard to the interests of persons entitled to receive benefits under the STC schemes (s. 55(3)(a)). Any direction under s. 55 must be laid before Houses of Parliament (s. 56). In my view, no direction could be given under s.58.
- 4.14 As noted above, s. 55 is to be interpreted subject to the rest of the Act. Section 90 requires the STC to furnish to the Minister administering the Act or the Minister administering the STC fund Acts, such information relating to the general administration and operation of the STC schemes and the STC Fund as the Minister concerned may from time to time require (s. 90(1)), but the STC must not furnish information relating to an individual member of an STC Scheme to a Minister except with the member's consent (s. 90(2)). I assume such consent has not been provided.
- 4.15 Section 97, more generally, authorises the Minister or an "authorised person" to require STC to give to the Minister or authorised person information or a report relating to STC's exercise of its functions, on matters in relation to specified years of income. However, I do not think that the broad authorisation in s. 97 could override the more specific prohibition in s. 90(2).
- 4.16 Accordingly, in my view, the fact that the resolution is also addressed to the Minister for Finance and Services will not enable the Legislative Council to obtain access to those documents as the Minister has no power to direct STC to provide him with the documents falling within the prohibition in s. 90 (2), that is, information relating to an individual member.



Power to provide documents to the DPC

- 4.17 The legislative scheme of the Act, including the functions of the STC set out in your instructions, suggests strongly that, although there is no general secrecy provision in the Act, disclosure of information relating to individual members or, indeed, any information obtained in the administration and execution of the Act, only occur in the rare circumstances contemplated by ss. 55, 90 and 97.
- 4.18 Likewise, s. 18 of the *PIIP Act* would appear to expressly prohibit disclosure by STC of Mr Flowers' "personal information". I can find no exemption under ss. 18, 19, 23 or 25 which would enable exemption from that prohibition. In particular, whilst DPC coordinates the return to be made by the Executive to orders for production and is referred to in Standing Order 52(1) itself, I do not think that disclosure of members' personal information is lawfully authorised, necessarily implied, or even reasonably contemplated within the meaning of s. 25 of the *PIIP Act*.
- 4.19 Nor, having regard to the conclusion I have reached above as to the power of the Legislative Council to compel STC to provide documents, could a power to coordinate production by DPC be implied.
- 4.20 Accordingly, in my view, STC has no power to provide the documents to DPC for coordinating its response to the call for documents. More importantly, STC is not permitted by the *PIIP Act*, and probably implications in the Act itself, to provide the documents to DPC or the Legislative Council.

Signed:



John McDonnell
A/Crown Solicitor



Appendix: Relevant legislation

Superannuation Administration Act 1996

48 Continuation of STC (formerly the State Authorities Superannuation Board)

- (3) STC is, for the purposes of any Act, a statutory body representing the Crown.

55 STC to be subject to Minister's directions in certain circumstances

- (1) The Minister may give a direction to STC relating to the exercise by STC of any one or more of its functions if the Minister is of the opinion that an act or omission, or conduct, by STC has had or could reasonably be expected to have a significant adverse effect on the Consolidated Fund or the financial management of the State. A direction must not be inconsistent with this or any other Act.
- (2) STC must comply with any such direction.
- (3) In giving a direction the Minister must have regard to:
- (a) the interests of persons entitled to receive benefits under the STC schemes, and
 - (b) the duties and obligations of STC and the members of the STC Board.
- (4) Nothing in this section constitutes the Minister as a trustee of the STC schemes.
- (5) STC is not liable for anything done or omitted for the purpose only of complying with a direction of the Minister under this section.

90 Provision of information to relevant Ministers

- (1) STC must furnish to the Minister administering this Act or the Minister administering the STC fund Acts such information relating to the general administration and operation of the STC schemes and the STC funds as the Minister concerned may from time to time require.
- (2) Despite subsection (1), STC must not furnish information relating to an individual member of an STC scheme to a Minister under this section, except with the member's consent.
- (3) In this section, *STC fund Acts* mean the Acts referred to in the definition of *STC fund* in section 4.

97 Information to be given to Minister and authorised persons

- (1) The Minister or an authorised person may, by written notice to STC, require STC, within a specified period, to give to the Minister or authorised person in relation to a specified year of income the information, or a report on matters, specified in the notice.
- (2) STC must comply with any notice given to it under subsection (1).
Maximum penalty: 50 penalty units.
- (3) The information or report required to be provided under subsection (1) must relate to STC's exercise of its functions.
- (4) If STC gives information or a report to the Minister or authorised person as required by this section, the Minister or authorised person must give to STC a written statement that the information or report has been received.

Constitution Act 1902 No 32

15 Standing Rules and Orders to be laid before Governor

- (1) The Legislative Council and Legislative Assembly shall, as there may be occasion, prepare and adopt respectively Standing Rules and Orders regulating:



- (a) the orderly conduct of such Council and Assembly respectively, and

...

Standing Order No. 52

Order for the production of documents

- (1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.
- (2) When returned, the documents will be laid on the table by the Clerk.
- (3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.
- (4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to be have been presented to the House and published by authority of the House.
- (5) Where a document is considered to be privileged:
 - (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,
 - (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:
 - (i) made available only to members of the Legislative Council,
 - (ii) not published or copied without an order of the House.
- (6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.
- (7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.
- (8) A report from the independent legal arbiter is to be lodged with the Clerk and:
 - (a) made available only to members of the House,
 - (b) not published or copied without an order of the House.
- (9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

Privacy and Personal Information Protection Act 1998

18 Limits on disclosure of personal information

- (1) A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:
 - (a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or
 - (b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or



- (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.
- (2) If personal information is disclosed in accordance with subsection (1) to a person or body that is a public sector agency, that agency must not use or disclose the information for a purpose other than the purpose for which the information was given to it.

25 Exemptions where non-compliance is lawfully authorised or required

A public sector agency is not required to comply with section 9, 10, 13, 14, 15, 17, 18 or 19 if:

- (a) the agency is lawfully authorised or required not to comply with the principle concerned, or
- (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the *State Records Act 1998*).

46

Narelle Wooden

From: Tony Nicod [Tony.Nicod@dpc.nsw.gov.au]
Sent: Friday, 29 April 2011 4:23 PM
To: Narelle Wooden
Subject: Fwd: Regulation now on website
Attachments: 2011-207[1].pdf

>>> Mark Arbuz 29/04/2011 16:22 >>>

Chris, attached Regulation as appears on legislation website.
Note footer states "Published LW 29 April 2011".

Mark



New South Wales

Superannuation Amendment (Breakdown Pensions) Regulation 2011

under the

Superannuation Act 1916

The Administrator, with the advice of the Executive Council and on the recommendation of STC, has made the following Regulation under the *Superannuation Act 1916*.

GREG PEARCE, MLC
Minister for Finance and Services

Explanatory note

The object of this Regulation is to amend the *Superannuation Regulation 2006* to enable the SAS Trustee Corporation to cancel a breakdown pension for a particular period at the direction of the person who is receiving the pension and to grant the pension (or some other benefit to which the person is entitled) at the end of that period. The amendment will enable a person to apply for the cancellation of such a pension during the person's term of office as a Member of Parliament and so avoid disqualification under the *Constitution Act 1902*.

This Regulation is made under the *Superannuation Act 1916*, including section 52.

2011 No 207

Clause 1 Superannuation Amendment (Breakdown Pensions) Regulation 2011

**Superannuation Amendment (Breakdown Pensions)
Regulation 2011**

under the

Superannuation Act 1916

1 Name of Regulation

This Regulation is the *Superannuation Amendment (Breakdown Pensions) Regulation 2011*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

**Schedule 1 Amendment of Superannuation
Regulation 2006****Clause 11A**

Insert after clause 11:

11A Cancellation of breakdown pension at direction of pensioner

- (1) A pensioner in receipt of a breakdown pension that is not payable for the remainder of the pensioner's life may direct STC, by notice in writing, to cancel the pension.
- (2) The notice may direct that the cancellation have effect only for the period stated in the notice and that STC re-determine the grant of the pension at the end of that period. The period stated in the notice may be a period ending on a specified date or ending on the happening of a specified event.
- (3) If STC receives a notice under this clause, the breakdown pension is cancelled on the date of receipt of the notice or, if a future date is specified in the notice for that purpose, on that future date.
- (4) Subject to subclause (5), when the breakdown pension is cancelled, entitlement to a further pension or other benefit under the Act is to be determined on the basis that the pensioner ceased on the cancellation to be on leave of absence without pay as provided by sections 48 and 49 of the Act.
- (5) If the notice directs that the cancellation have effect only for the period stated in the notice:
 - (a) a breakdown pension is not payable to the person concerned during that period (other than a breakdown pension payable for the remainder of the person's life), and
 - (b) at the end of that period STC may, on application, grant a breakdown pension (or other pension or benefit) for which the person concerned is eligible as if the person had continued during that period as an employee on leave of absence without pay in accordance with sections 48 and 49 of the Act.

The person may, at any time during that period, by further notice in writing to STC, extend or reduce that period.

- (6) In this clause, *breakdown pension* means a pension payable under section 29 or section 52E of the Act.

Narelle Wooden

From: Narelle Wooden
Sent: Tuesday, 10 May 2011 3:28 PM
To: 'Nathan Hodge'
Subject: Order - Leg Council
Attachments: img-5101504-0001.pdf

Hi Nathan,
As discussed, please find attached the order from the Legislative Council.

Thanks

Narelle
Narelle Wooden
General Counsel
State Super
Suite 1 Level 17
83 Clarence Street
Sydney NSW 2000
Phone: 02 9238 5911
Fax: 02 9238 5999



Premier
& Cabinet

URGENT

Mr Chris Durack
Chief Executive Officer
SAS Trustee Corporation
Level 17, Suite 1, 83 Clarence Street
SYDNEY NSW 2000

- 9 MAY 2011

BY FACSIMILE AND POST
Facsimile: (02) 9238 5999

Dear Mr Durack

Standing Order 52 – Order for Papers – Election of Mr John Frederick Flowers MP

I write to inform you that on Friday, 6 May 2011, the Legislative Council agreed to the following Resolution:

"That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers-MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any document which records or refers to the production of documents as a result of this order of the House.

An extract from the Minutes of the Proceedings of the Legislative Council, Friday, 6 May 2011, entry 9, page 65, is attached.

The resolution requires the documents to be tabled within 14 days, that is, by Friday, 20 May 2011.

The following guidelines apply to your response to the Resolution.

1. Provision of Papers

All papers (other than Cabinet documents) which fall within the terms of the Resolution must be produced. Cabinet documents must not be produced (see section 6 below).

Papers which fall within the terms of the Resolution should be produced in full, even if they contain irrelevant information. That is, material should not be blacked out or

otherwise masked when photocopying papers which fall within the terms of the Resolution.

It may, however, be appropriate to mask some material in documents if a claim for privilege is made (see section 3 below).

Please note that only photocopies of original papers and files are to be provided. All papers should be delivered by close of business on Friday, 13 May 2011 to:

Ms Rachel McCallum
Acting Executive Director, Legal Branch
Department of Premier and Cabinet
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Please contact Ms Jennifer Haling, Senior Project Officer, Legal Branch, on (02) 9228 5871 if you wish to discuss any aspect of this request.

2. Non-privileged papers

Standing Order 52(3) provides that, 'A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document'.

A document showing the standard format to be used when preparing an index under Standing Order 52 is enclosed at Annexure A. Please adhere to the standard format when preparing an index of documents.

Please note that the index should contain the following information:

<i>Document Number</i>	The document number should follow the format '(a)(i) 1', where '(a)' refers to the relevant paragraph of the Resolution, '(i)' refers to the relevant subparagraph of the Resolution, and '1' refers to the first document in the group of documents that fall within subparagraph (a)(i).
<i>Item</i>	The description of the relevant item as per the Resolution. For example, 'Documents relating to concept formulation and cost benefit analyses'.
<i>Document</i>	A short description of the relevant document. For example, 'Letter from X to Y'.
<i>Date of creation</i>	Where the exact date is unknown, insert an estimated date range if possible.
<i>Author</i>	The agency or organisation that created the document.
<i>Privilege Claim</i>	If the index relates to privileged documents, write 'Yes'. If the index relates to non-privileged documents, write 'No'.

3. Claims of Privilege

A document showing the standard format to be used when making claims for privilege is enclosed at Annexure B. Please adhere to the standard format, where appropriate, when making a claim for privilege.

If a privilege claim is subsequently challenged, the question of whether the document is privileged will be referred to a legal arbiter for a ruling.

It is important, therefore, that the basis of the claim is clearly set out in the response to the Resolution so that the arbiter can properly assess the validity of the claim. There will be no opportunity to provide further submissions in support of a claim of privilege if it is challenged.

Please note that a separate Index is required for 'non-privileged' and 'privileged' documents as these types of documents are returned separately.

If a document contains only a minor amount of privileged material, it may be appropriate to produce two copies of the document: a full copy of the document as a 'privileged' document, and a copy of the document with the privileged material blacked out or otherwise masked as a 'non-privileged' document.

This approach may be appropriate where, for example, a document contains a relatively small amount of personal information which may be subject to a claim for privilege on the grounds of privacy, but which is not needed for the document to be understood. For example, letters to the Government on a particular issue could be produced on a 'non-privileged' basis with the names and addresses of the authors blacked out, with full copies provided on a 'privileged' basis.

4. Delivery and Identification

As time is critical, it would be appreciated if all papers could be delivered in file record boxes with the corresponding parts of the index affixed to the top of each box. For example, that part of the index which lists the documents contained in Box 1 should be attached to the top of Box 1.

Please place 'privileged' and 'non-privileged' documents in separate boxes.

The Legislative Council has also requested that agencies return documents in standard archive boxes (Type 1 boxes). Further information about this type of box may be obtained from State Records at <http://www.records.nsw.gov.au/qrr/docs/storageboxes.doc>

5. Certification by Chief Executive Officer

Papers should be accompanied by a letter signed by you stating, "I certify to the best of my knowledge all documents held by the SAS Trustee Corporation and covered by the terms of the resolution have been provided".

6. Cabinet Documents

Cabinet documents should not be produced or referred to in responding to the Resolution.

All agencies are obliged to protect the confidentiality of Cabinet documents (refer to Premier's Memorandum 2006-08 *Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions*).

7. Agency Contact

Could you please provide the contact details of the officer assigned to coordinate your agency's response to Jennifer Haling as soon as possible.

I seek your assistance in ensuring that your agency's documents are with the Legal Branch of the Department no later than by close of business on Friday, 13 May 2011.

Yours sincerely



Paul Miller
General Counsel

ENERGYAUSTRALIA

ORDER FOR PAPERS - REDEVELOPMENT OF WALSH BAY

Document No.	Item	Document	Date of Creation	Author	Privilege Claim Y/N/?
Item 1 (a)(1)	Any proposal, agreement or tender between Walsh Bay Properties, Walsh Bay Partnership or Walsh Bay Finance Pty Ltd and the Government	Letter from Barry Webb & Associates to EnergyAustralia cc: Walsh Bay Properties	14 May 1996	Steven Marks, Barry Webb & Associates	No
Item 1 (a)(2)	Any proposal, agreement or tender between, Walsh Bay Properties, Walsh Bay Partnership, Walsh Bay Finance Pty Ltd and the Government	Letter from Department of Urban Affairs & Planning to EnergyAustralia	8 July 1996	David Hume, Manager, Sydney South, Department of Urban Affairs and Planning.	No
Item 1 (a)(3)	Any proposal, agreement or tender between, Walsh Bay Properties, Walsh Bay Partnership, Walsh Bay Finance Pty Ltd and the Government	Letter from EnergyAustralia to George Fioth Pty Ltd	15 August 1996	Ian Swords for Manager Network Connections - South, EnergyAustralia	No

ANNEXURE A

LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

6 May 2011

Mr Chris Eccles
Director General
Department of Premier and Cabinet
Level 39, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Mr Eccles

Attention: Ms Rachel McCallum, Legal Branch

Order for Papers—Election of Mr John Frederick Flowers MP

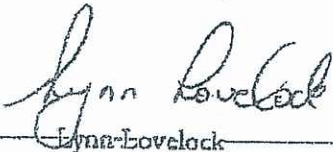
I am writing to inform you that, on Friday 6 May 2011, the Legislative Council agreed to the following resolution:

That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any document which records or refers to the production of documents as a result of this order of the House.

An extract from the Minutes of the Proceedings of the Legislative Council, Friday 6 May 2011, entry 9, page 65, is attached.

The resolution requires the documents to be tabled within 14 days, that is Friday 20 May 2011.

Yours sincerely



Lynn Lovelock
Clerk of the Parliaments

cc: The Hon Michael Gallacher MLC

Legislative Council Minutes No. 4—Friday 6 May 2011

9 ORDER FOR PAPERS—ELECTION OF MR JOHN FREDERICK FLOWERS MP

Mr Foley sought the leave of the House to amend private members' business item no. 7 outside the order of precedence by inserting "excluding all personal medical records," after "all documents".

No objection taken.

Leave granted.

Mr Foley moved, according to notice, as by leave amended: That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, and any document which records or refers to the production of documents as a result of this order of the House.

Debate ensued.

Dr Kaye moved: That the question be amended by inserting "excluding all correspondence between Mr Flowers and the SAS Trustee Corporation," before "and any document which records or refers to the production of documents as a result of this order of the House".

Debate continued.

Question: That the amendment of Dr Kaye be agreed to—put and passed.

Original question, as amended: That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any document which records or refers to the production of documents as a result of this order of the House—put and passed.

**SUBMISSION IN SUPPORT OF CLAIM FOR CONFIDENTIALITY AND PRIVILEGE
BY THE DEPARTMENT OF PUBLIC WORKS & SERVICES AND
MARINE MINISTERIAL HOLDING CORPORATION
WALSH BAY**

The Marine Ministerial Holding Corporation ("MMHC") has entered into an agreement, for the redevelopment of a 15 hectare waterfront heritage site at Walsh Bay, with Walsh Bay Properties Pty Limited, Transfield (Walsh Bay) Pty Limited, Mirvac (Walsh Bay) Pty Limited and Walsh Bay Finance Pty Limited ("the Walsh Bay parties"). The Department of Public Works & Services ("DPWS") has been appointed MMHC's agent in respect of the project.

All documents and material passing to MMHC from the Walsh Bay parties were provided on the basis that they, and all material arising out of those documents, were, and would continue to remain, "commercial in confidence". Further, under the terms of the Project Delivery Agreement dated October 1997 between MMHC and the Walsh Bay parties, the parties have specifically agreed to maintain confidential all information relating to the project.

Clause 27.16 of the Project Delivery Agreement provides:

- (a) Each party agrees and undertakes to keep and maintain confidential all the terms, covenants and conditions of this agreement any information supplied by one party to another under this agreement including but not limited to information provided by the Contractor to MMHC under clause 3.2(b) and not to disclose those terms, covenants and conditions or any part of them or any information or part of that information to any person, company or organisation except as provided in this clause.
- (b) Nothing in this clause will prohibit the parties from disclosing any term, covenant or condition of this agreement:
1. Which it believes in good faith is required to be disclosed by law or by the ASX Listing Rules; or
 2. Which was already in the lawful possession of the recipient in written form; or
 3. Is generally available to the public otherwise than by disclosure in breach of the terms of this clause; or
 4. To any consultant or contractor of a party, to any proposed assignee or mortgagee or Financier of a party and their consultants, or to any person considering investing in the Project or their consultants for the purposes of or in connection with any matter contemplated by this agreement; or
 5. With the prior written consent of the other party.

- (c) Nothing in this clause will prohibit MMHC from disclosing any term, covenant or condition of this agreement to the Government of the State of New South Wales or any Minister of the Crown.
- (d) Media releases in respect of the Project must be jointly agreed between the parties. Both the Contractor and MMHC must keep each other informed of a name and emergency contact details of their representative who has authority to approve media releases on their behalf. Both parties must ensure their representative is available on 24 hours notice to approve a media release. The Contractor acknowledges that the Minister for Ports has the right to make press releases in respect of the Project and is not bound by the provisions of this clause. MMHC must ensure the Minister is informed of the contents of this clause."

Obligations of confidentiality were also imposed by the terms of the original tender documents. The parties, including MMHC, are therefore bound to keep confidential all documents or information dating from either before or after the date of the Project Delivery Agreement.

Notwithstanding this obligation, the Walsh Bay parties have agreed that MMHC may provide to the Parliament and make available to the public all documents other than those specified in the Return in Support of Claim for Privilege prepared by MMHC and DPWS.

The Walsh Bay parties have indicated that they regard the documents specified in the Returns, whether coming into existence before or after the Project Delivery Agreement, to be of such a commercially sensitive nature that release of the material contained in those documents will have serious adverse commercial implications for the Walsh Bay parties. Those adverse commercial implications include the following consequences:

1. Disclosure to competitors of the methods and costings for the implementation, construction, financing and marketing of the project; and
2. Disclosure to potential purchasers of the costings for the projects.

It is submitted that the documents should not be made public as the following detriment may arise:

1. Breach of contractual promises of confidentiality.
2. Prejudice current or future contractual or other relationships between Government and the private sector.
3. Discourage future dealings with Government.
4. Cause loss of commercial advantage and competitiveness within the private sector.
5. Cause detriment to private sector participants.
6. Reduce Government's ability to deliver the maximum public benefit.

We attach a letter from the Walsh Bay parties in respect of their concerns.

Claims for legal professional privilege

It is submitted that those documents listed in Department of Public Works Return as DPWS Departmental Files marked "Legal" and those documents which include legal advice in the Waterways Authority (Maritime Assets Division) Return are privileged and should not be made public on one or more of the available grounds of privilege pursuant to both common law doctrines and the statutory regime, in that:

1. they are, or contain a record of, confidential communications or documents brought into existence for the purpose of:
 - (a) enabling MWHC and DPWS ("Client") to obtain, or its legal advisers to give, legal advice; or
 - (b) for use in actual litigation or litigation reasonably contemplated by the Client and in respect of which privilege has not been waived (legal professional privilege);
2. they are confidential communications or documents between the Client or its legal advisers and persons with whom the Client shares or shared a common interest in relation to the subject matter of the advice received by one of them (common interest privilege).

Claims for public interest immunity

It is submitted that those documents listed in the Department of Public Works Return and those documents listed in the Waterways Authority (Maritime Assets Division) Return are privileged and should not be made public on the grounds of privilege pursuant to both common law doctrines and the statutory regime, in that:

1. they are the subject of a claim of public interest immunity because the public interest in their disclosure is outweighed by a competing public interest in their suppression (public interest immunity) as:
 - it would involve disclosure of communications made in the course of development and promulgation of policy;
 - disclosure would inhibit frankness and candour in future pre-decision communications;
 - disclosure will lead to confusion and unnecessary debate resulting from disclosure of decisional possibilities considered;
 - it would involve disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken, being unfair to a decision-maker and prejudicial to the integrity of the decision-making process;
 - the disclosure would impede the free flow of commercially sensitive information to the Government; and

- because of all of the above, the ordinary business of Government, which engages in contractual relationships with commercial parties, will be prejudiced by the disclosure.

Mr Dick Persson
Director General
Department of Public Works and Services
Level 21, McKell Building
2- 24 Rawson Place
SYDNEY NSW 2000

Dear Sir

Re: Walsh Bay – Upper House Motion dated 24 November 1990

We refer to the above Motion and to the documents in the possession of Government relating to the redevelopment of Walsh Bay. We request that those documents for which the department intends to make a claim for privilege and/or confidentiality should be kept confidential and not made public.

We believe that public disclosure of those documents would adversely affect the ability of Project to achieve its full potential and reduce our ability to deliver the maximum public benefit.

The making public of the details of commercial arrangements between private enterprise and Government is a dangerous precedent as disclosure of commercially sensitive information will significantly prejudice the future ability of such private enterprise groups to prepare competitive bids and carry out commercial negotiations. Pursuant to that bid process, private participants provide commercially sensitive information to Government and then proceed to treat with Government in reliance upon Government keeping all such information and negotiations confidential. If such information is to be made public, this will discourage the private sector from future dealings with Government which will, of course, be to the ultimate detriment of the New South Wales public.

We believe that we, and the joint venture partners Transfield and Mirvac, will suffer direct and material commercial prejudice in relation to future dealings both with respect to the Walsh Bay Project and to commercial transactions and dealing with other parties should this information come within the public domain.

In particular, disclosure of those materials which contain commercially sensitive information will directly and materially commercially prejudice us by revealing information about project development, delivery methods, transaction structures, "know how", operations and maintenance methods and engineering and construction methods, and, in the context of the Walsh Bay Redevelopment Project, by revealing overall pricings, details

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Chris Durack

From: Don Russell [drdondr@gmail.com]
Sent: Monday, April 25, 2011 1:06 PM
To: Chris Durack
Cc: Narelle Wooden
Subject: Re: Scan Data from FX-7E5D13

Hi Chris,

This has all come together well and the submission is a nice piece of work. Assuming that there are no more developments I think we can circulate it to the Board around noon tomorrow.

Kind regards,

Don

(Mob) 0419 427 269

Sent from my iPhone

On 25/04/2011, at 12:24 PM, "Chris Durack" <chris_durack@statesuper.nsw.gov.au> wrote:

Hi Don

Please find attached a copy of the submission. I will be available today on the mobile (but not on email) if you would like to discuss. I am not in the office tomorrow but Narelle will be calling the Board members to alert them to the paper being distributed at 3pm Tues. She will then email the paper with the scanned attachments (but not the medical report which will only be distributed during the Board meeting).

Regards

Chris

This message is intended for the addressee named and may contain confidential information. If you are not the intended recipient, please delete it and notify the sender. Views expressed in the message are those of the individual sender, except where the message states otherwise and the

Chris Durack

9.

From: Chris Durack
Sent: Monday, April 25, 2011 12:24 PM
To: Don Russell (drdondr@gmail.com)
Cc: Narelle Wooden
Subject: FW: Scan Data from FX-7E5D13
Attachments: img-4251152-0001.pdf

Hi Don

Please find attached a copy of the submission. I will be available today on the mobile (but not on email) if you would like to discuss. I am not in the office tomorrow but Narelle will be calling the Board members to alert them to the paper being distributed at 3pm Tues. She will then email the paper with the scanned attachments (but not the medical report which will only be distributed during the Board meeting).

Regards

Chris

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Chris Durack

From: Brian Matthews
Sent: Wednesday, April 27, 2011 2:28 PM
To: Chris Durack
Subject: FW: Regulation

Chris

Please see email below.

From: Mark Arbuz [mailto:Mark.Arbuz@dpc.nsw.gov.au]
Sent: Wednesday, 27 April 2011 2:20 PM
To: Brian Matthews
Cc: Tony Nicod
Subject: Regulation

Brian, further to our phone conversation, a revised Regulation will be e-mailed to you shortly.

A letter from CEO STC will be required recommending the making of that Regulation. The letter should attach or refer to that Regulation.

The letter should be addressed to

The Hon. Gregory Pearce, MLC
Level 36 Governor Macquarie
Tower
1 Farrer Place
Sydney NSW 2000

Phone 02 9228 5287
Fax 02 9228 5899
Email office@pearce.minister.nsw.gov.au

When the letter is signed please email a copy to myself and tony.nicod@dpc.nsw.gov.au

We have been asked to expedite this, so appreciate STC's assistance.

Regards

Narelle Wooden

Q.

From: Brian Matthews
Sent: Friday, 29 April 2011 12:19 PM
To: Narelle Wooden
Subject: FW: Superannuation Amendment (Breakdown Pensions) Regulation 2011 [s2011-137]
Attachments: s2011-137-d02.pdf; SI Information Sheet.pdf

As requested.

-----Original Message-----

From: Tony Nicod [mailto:Tony.Nicod@dpc.nsw.gov.au]
Sent: Wednesday, 27 April 2011 5:31 PM
To: Brian Matthews
Subject: Fwd: Superannuation Amendment (Breakdown Pensions) Regulation 2011 [s2011-137]

Brian

The final Reg. Please forward the signed letter requesting the Regulation be made.

TONY NICOD
Manager, Legal Services
Public Sector Workforce
Department of Premier & Cabinet
PH:9228 3592
fax: 9228 3102
tony.nicod@dpc.nsw.gov.au

This message is intended for the addressee named and may contain confidential information. If you are not the intended recipient, please delete it and notify the sender. Views expressed in this message are those of the individual sender, and are not necessarily the views of the Department of Premier and Cabinet.

>>> Natasha Mitchell 27/04/2011 17:20 >>>

Please find attached the instrument and Parliamentary Counsel's Opinion. The pdf file may be printed for the official process of making the instrument.

For records purposes, please confirm receipt of this email by replying to it.

For information about the official notification of the instrument once it has been made please see the attached information sheet.

Regards
Parliamentary Counsel's Office
Level 23, AMP Centre
50 Bridge Street
Sydney NSW 2000
Ph: +61 2 9321 3333
Fax: +61 2 9232 4796



PARLIAMENTARY COUNSEL

Opinion

Superannuation Act 1916
Proposed Superannuation Amendment (Breakdown Pensions) Regulation 2011

Your ref: Tony Nicod
Our ref: DC s2011-137-d02

In my opinion the attached draft Regulation may legally be made.

A handwritten signature in black ink, appearing to read "D Colagiuri".

(D COLAGIURI)
Parliamentary Counsel

27 April 2011

The Director-General
Department of Premier and Cabinet



New South Wales

Superannuation Amendment (Breakdown Pensions) Regulation 2011

under the

Superannuation Act 1916

The Administrator, with the advice of the Executive Council and on the recommendation of STC, has made the following Regulation under the *Superannuation Act 1916*.

Minister for Finance and Services

Explanatory note

The object of this Regulation is to amend the *Superannuation Regulation 2006* to enable the SAS Trustee Corporation to cancel a breakdown pension for a particular period at the direction of the person who is receiving the pension and to grant the pension (or some other benefit to which the person is entitled) at the end of that period. The amendment will enable a person to apply for the cancellation of such a pension during the person's term of office as a Member of Parliament and so avoid disqualification under the *Constitution Act 1902*.

This Regulation is made under the *Superannuation Act 1916*, including section 52.

Superannuation Amendment (Breakdown Pensions) Regulation 2011

under the

Superannuation Act 1916

1 Name of Regulation

This Regulation is the *Superannuation Amendment (Breakdown Pensions) Regulation 2011*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

Schedule 1 Amendment of Superannuation Regulation 2006

Clause 11A

Insert after clause 11:

11A Cancellation of breakdown pension at direction of pensioner

- (1) A pensioner in receipt of a breakdown pension that is not payable for the remainder of the pensioner's life may direct STC, by notice in writing, to cancel the pension.
- (2) The notice may direct that the cancellation have effect only for the period stated in the notice and that STC re-determine the grant of the pension at the end of that period. The period stated in the notice may be a period ending on a specified date or ending on the happening of a specified event.
- (3) If STC receives a notice under this clause, the breakdown pension is cancelled on the date of receipt of the notice or, if a future date is specified in the notice for that purpose, on that future date.
- (4) Subject to subclause (5), when the breakdown pension is cancelled, entitlement to a further pension or other benefit under the Act is to be determined on the basis that the pensioner ceased on the cancellation to be on leave of absence without pay as provided by sections 48 and 49 of the Act.
- (5) If the notice directs that the cancellation have effect only for the period stated in the notice:
 - (a) a breakdown pension is not payable to the person concerned during that period (other than a breakdown pension payable for the remainder of the person's life), and
 - (b) at the end of that period STC may, on application, grant a breakdown pension (or other pension or benefit) for which the person concerned is eligible as if the person had continued during that period as an employee on leave of absence without pay in accordance with sections 48 and 49 of the Act.

The person may, at any time during that period, by further notice in writing to STC, extend or reduce that period.

- (6) In this clause, *breakdown pension* means a pension payable under section 29 or section 52E of the Act.



New South Wales

PARLIAMENTARY COUNSEL'S OFFICE

Information sheet on the Online notification of Statutory Instruments (including Environmental Planning Instruments)

Once the instrument has been made or approved by the Governor-in-Council or made by the Minister, send a request to the PCO for online notification on the NSW legislation website.

It is anticipated that the instrument will generally be notified on Friday following the established Wednesday Executive Council meeting at which the instrument is dealt with. However, urgent or delayed notification can be arranged at other times if required.

For normal notification on a Friday the request should be sent by 5.00 pm on the Wednesday of that week. Requests for special notification should be made by telephone as soon as possible, but preferably no later than 1.00 pm on the day in question.

Requests should be sent by email to notification@pco.nsw.gov.au or by fax (02) 9232 4796.

The request should include the full name of the instrument and PCO's file reference (which you can find on the top of the Opinion relating to that instrument or on the bottom left hand side of the instrument itself).

The telephone contact for notification matters is Ms Melissa Low (02) 9321 3323.

Parliamentary Counsel
January 2011

Narelle Wooden

From: Narelle Wooden
Sent: Friday, 29 April 2011 4:24 PM
To: Chris Durack
Subject: RE: Flowers Reg on website around 4:30 today

Chris,

Provided the commencement date provision is in accordance with the draft regulation sent to STC on 27 April 2011, the Regulation will commence on the date of publication on the legislation website.

Regards

Narelle

-----Original Message-----

From: Tony Nicod [mailto:Tony.Nicod@dpc.nsw.gov.au]
Sent: Friday, 29 April 2011 4:05 PM
To: Brian Matthews; Narelle Wooden
Subject: Fwd: Flowers Reg on website around 4:30 today

>>> Mark Arbuz 29/04/2011 16:02 >>>

Parliamentary Counsel rang to say Reg to appear on the legislation website in half hour. Will confirm.

Mark

Narelle Wooden

From: Narelle Wooden
Sent: Friday, 29 April 2011 4:09 PM
To: Chris Durack
Subject: FW: Flowers Reg on website around 4:30 today

-----Original Message-----

From: Tony Nicod [mailto:Tony.Nicod@dpc.nsw.gov.au]
Sent: Friday, 29 April 2011 4:05 PM
To: Brian Matthews; Narelle Wooden
Subject: Fwd: Flowers Reg on website around 4:30 today

>> Mark Arbuz 29/04/2011 16:02 >>>

Parliamentary Counsel rang to say Reg to appear on the legislation website in half hour.
Will confirm.

Mark

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Narelle Wooden

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From: Narelle Wooden
Sent: Friday, 29 April 2011 4:26 PM
To: Chris Durack; Brian Matthews
Subject: RE: Flowers Reg on website around 4:30 today

The Reg has now been published on the website.

Regards

Narelle

-----Original Message-----

From: Narelle Wooden
Sent: Friday, 29 April 2011 4:24 PM
To: Chris Durack
Subject: RE: Flowers Reg on website around 4:30 today

Chris,

Provided the commencement date provision is in accordance with the draft regulation sent to STC on 27 April 2011, the Regulation will commence on the date of publication on the legislation website.

Regards

Narelle

-----Original Message-----

From: Tony Nicod [mailto:Tony.Nicod@dpc.nsw.gov.au]
Sent: Friday, 29 April 2011 4:05 PM
To: Brian Matthews; Narelle Wooden
Subject: Fwd: Flowers Reg on website around 4:30 today

> Mark Arbuz 29/04/2011 16:02 >>>

Parliamentary Counsel rang to say Reg to appear on the legislation website in half hour. Will confirm.

Mark





Premier & Cabinet

13
URGENT

Mr Chris Durack
Chief Executive Officer
SAS Trustee Corporation
Level 17, Suite 1, 83 Clarence Street
SYDNEY NSW 2000

- 9 MAY 2011

BY FACSIMILE AND POST
Facsimile: (02) 9238 5999

Dear Mr Durack

Standing Order 52 – Order for Papers – Election of Mr John Frederick Flowers MP

I write to inform you that on Friday, 6 May 2011, the Legislative Council agreed to the following Resolution:

"That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any document which records or refers to the production of documents as a result of this order of the House.

An extract from the Minutes of the Proceedings of the Legislative Council, Friday, 6 May 2011, entry 9, page 65, is attached.

The resolution requires the documents to be tabled within 14 days, that is, by Friday, 20 May 2011.

The following guidelines apply to your response to the Resolution.

1. Provision of Papers

All papers (other than Cabinet documents) which fall within the terms of the Resolution must be produced. Cabinet documents must not be produced (see section 6 below).

Papers which fall within the terms of the Resolution should be produced in full, even if they contain irrelevant information. That is, material should not be blacked out or



otherwise masked when photocopying papers which fall within the terms of the Resolution.

It may, however, be appropriate to mask some material in documents if a claim for privilege is made (see section 3 below).

Please note that only photocopies of original papers and files are to be provided. All papers should be delivered by close of business on Friday, 13 May 2011 to:

Ms Rachel McCallum
Acting Executive Director, Legal Branch
Department of Premier and Cabinet
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Please contact Ms Jennifer Haling, Senior Project Officer, Legal Branch, on (02) 9228 5871 if you wish to discuss any aspect of this request.

2. Non-privileged papers

Standing Order 52(3) provides that, 'A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document'.

A document showing the standard format to be used when preparing an index under Standing Order 52 is enclosed at Annexure A. Please adhere to the standard format when preparing an index of documents.

Please note that the index should contain the following information:

<i>Document Number</i>	The document number should follow the format '(a)(i) 1', where '(a)' refers to the relevant paragraph of the Resolution, '(i)' refers to the relevant subparagraph of the Resolution, and '1' refers to the first document in the group of documents that fall within subparagraph (a)(i).
<i>Item</i>	The description of the relevant item as per the Resolution. For example, 'Documents relating to concept formulation and cost benefit analyses'.
<i>Document</i>	A short description of the relevant document. For example, 'Letter from X to Y'.
<i>Date of creation</i>	Where the exact date is unknown, insert an estimated date range if possible.
<i>Author</i>	The agency or organisation that created the document.
<i>Privilege Claim</i>	If the index relates to privileged documents, write 'Yes'. If the index relates to non-privileged documents, write 'No'.

3. Claims of Privilege

A document showing the standard format to be used when making claims for privilege is enclosed at Annexure B. Please adhere to the standard format, where appropriate, when making a claim for privilege.

If a privilege claim is subsequently challenged, the question of whether the document is privileged will be referred to a legal arbiter for a ruling.

It is important, therefore, that the basis of the claim is clearly set out in the response to the Resolution so that the arbiter can properly assess the validity of the claim. There will be no opportunity to provide further submissions in support of a claim of privilege if it is challenged.

Please note that a separate index is required for 'non-privileged' and 'privileged' documents as these types of documents are returned separately.

If a document contains only a minor amount of privileged material, it may be appropriate to produce two copies of the document: a full copy of the document as a 'privileged' document, and a copy of the document with the privileged material blacked out or otherwise masked as a 'non-privileged' document.

This approach may be appropriate where, for example, a document contains a relatively small amount of personal information which may be subject to a claim for privilege on the grounds of privacy, but which is not needed for the document to be understood. For example, letters to the Government on a particular issue could be produced on a 'non-privileged' basis with the names and addresses of the authors blacked out, with full copies provided on a 'privileged' basis.

4. Delivery and Identification

As time is critical, it would be appreciated if all papers could be delivered in file record boxes with the corresponding parts of the index affixed to the top of each box. For example, that part of the index which lists the documents contained in Box 1 should be attached to the top of Box 1.

Please place 'privileged' and 'non-privileged' documents in separate boxes.

The Legislative Council has also requested that agencies return documents in standard archive boxes (Type 1 boxes). Further information about this type of box may be obtained from State Records at <http://www.records.nsw.gov.au/grr/docs/storageboxes.doc>

5. Certification by Chief Executive Officer

Papers should be accompanied by a letter signed by you stating, "I certify to the best of my knowledge all documents held by the SAS Trustee Corporation and covered by the terms of the resolution have been provided".

6. Cabinet Documents

Cabinet documents should not be produced or referred to in responding to the Resolution.



All agencies are obliged to protect the confidentiality of Cabinet documents (refer to Premier's Memorandum 2006-08 *Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions*).

7. Agency Contact

Could you please provide the contact details of the officer assigned to coordinate your agency's response to Jennifer Haling as soon as possible.

I seek your assistance in ensuring that your agency's documents are with the Legal Branch of the Department no later than by close of business on **Friday, 13 May 2011**.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Miller', with a stylized, cursive script.

Paul Miller
General Counsel

LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

6 May 2011

Mr Chris Eccles
Director General
Department of Premier and Cabinet
Level 39, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Mr Eccles

Attention: Ms Rachel McCallum, Legal Branch

Order for Papers—Election of Mr John Frederick Flowers MP

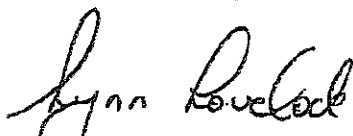
I am writing to inform you that, on Friday 6 May 2011, the Legislative Council agreed to the following resolution:

That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any document which records or refers to the production of documents as a result of this order of the House.

An extract from the Minutes of the Proceedings of the Legislative Council, Friday 6 May 2011, entry 9, page 65, is attached.

The resolution requires the documents to be tabled within 14 days, that is Friday 20 May 2011.

Yours sincerely



Lynn Lovelock

Clerk of the Parliaments

cc: The Hon Michael Gallacher MLC

Parliament House
Macquarie Street Sydney
NSW 2000 Australia

Telephone (02) 9230 2321
Facsimile (02) 9230 2761
council@parliament.nsw.gov.au



9 ORDER FOR PAPERS—ELECTION OF MR JOHN FREDERICK FLOWERS MP

Mr Foley sought the leave of the House to amend private members' business item no. 7 outside the order of precedence by inserting "excluding all personal medical records," after "all documents".

No objection taken.

Leave granted.

Mr Foley moved, according to notice, as by leave amended: That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, and any document which records or refers to the production of documents as a result of this order of the House.

Debate ensued.

Dr Kaye moved: That the question be amended by inserting "excluding all correspondence between Mr Flowers and the SAS Trustee Corporation," before "and any document which records or refers to the production of documents as a result of this order of the House".

Debate continued.

Question: That the amendment of Dr Kaye be agreed to—put and passed.

Original question, as amended: That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any document which records or refers to the production of documents as a result of this order of the House—put and passed.



ENERGYAUSTRALIA

ORDER FOR PAPERS - REDEVELOPMENT OF WALSH BAY

Document No.	Item	Document	Date of Creation	Author	Privilege Claim Y/N?
Item 1 (a)(1)	Any proposal, agreement or tender between Walsh Bay Properties, Walsh Bay Partnership or Walsh Bay Finance Pty Ltd and the Government	Letter from Barry Webb & Associates to EnergyAustralia cc: Walsh Bay Properties	14 May 1996	Steven Markis, Barry Webb & Associates	No
Item 1 (a)(2)	Any proposal, agreement or tender between, Walsh Bay Properties, Walsh Bay Partnership, Walsh Bay Finance Pty Ltd and the Government	Letter from Department of Urban Affairs & Planning to EnergyAustralia	8 July 1996	David Hume, Manager, Sydney South, Department of Urban Affairs and Planning.	No
Item 1 (a)(3)	Any proposal, agreement or tender between, Walsh Bay Properties, Walsh Bay Partnership, Walsh Bay Finance Pty Ltd and the Government	Letter from EnergyAustralia to George Fioth Pty Ltd	15 August 1996	Ian Swords for Manager Network Connections - South, EnergyAustralia	No

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**SUBMISSION IN SUPPORT OF CLAIM FOR CONFIDENTIALITY AND PRIVILEGE
BY THE DEPARTMENT OF PUBLIC WORKS & SERVICES AND
MARINE MINISTERIAL HOLDING CORPORATION
WALSH BAY**

The Marine Ministerial Holding Corporation ("MMHC") has entered into an agreement, for the redevelopment of a 15 hectare waterfront heritage site at Walsh Bay, with Walsh Bay Properties Pty Limited, Transfield (Walsh Bay) Pty Limited, Mirvac (Walsh Bay) Pty Limited and Walsh Bay Finance Pty Limited ("the Walsh Bay parties"). The Department of Public Works & Services ("DPWS") has been appointed MMHC's agent in respect of the project.

All documents and material passing to MMHC from the Walsh Bay parties were provided on the basis that they, and all material arising out of those documents, were, and would continue to remain, "commercial in confidence". Further, under the terms of the Project Delivery Agreement dated October 1997 between MMHC and the Walsh Bay parties, the parties have specifically agreed to maintain confidential all information relating to the project.

Clause 27.16 of the Project Delivery Agreement provides:

- "(a) Each party agrees and undertakes to keep and maintain confidential all the terms covenants and conditions of this agreement any information supplied by one party to another under this agreement including but not limited to information provided by the Contractor to MMHC under clause 3.2(b) and not to disclose those terms, covenants and conditions or any part of them or any information or part of that information to any person, company or organisation except as provided in this clause.
- (b) Nothing in this clause will prohibit the parties from disclosing any term, covenant or condition of this agreement:
1. Which it believes in good faith is required to be disclosed by law or by the ASX Listing Rules; or
 2. Which was already in the lawful possession of the recipient in written form; or
 3. Is generally available to the public otherwise than by disclosure in breach of the terms of this clause; or
 4. To any consultant or contractor of a party, to any proposed assignee or mortgagee or Financier of a party and their consultants, or to any person considering investing in the Project or their consultants for the purposes of or in connection with any matter contemplated by this agreement; or
 5. With the prior written consent of the other party.



- (c) Nothing in this clause will prohibit MMHC from disclosing any term, covenant or condition of this agreement to the Government of the State of New South Wales or any Minister of the Crown.
- (d) Media releases in respect of the Project must be jointly agreed between the parties. Both the Contractor and MMHC must keep each other informed of a name and emergency contact details of their representative who has authority to approve media releases on their behalf. Both parties must ensure their representative is available on 24 hours notice to approve a media release. The Contractor acknowledges that the Minister for Ports has the right to make press releases in respect of the Project and is not bound by the provisions of this clause. MMHC must ensure the Minister is informed of the contents of this clause."

Obligations of confidentiality were also imposed by the terms of the original tender documents. The parties, including MMHC, are therefore bound to keep confidential all documents or information dating from either before or after the date of the Project Delivery Agreement.

Notwithstanding this obligation, the Walsh Bay parties have agreed that MMHC may provide to the Parliament and make available to the public all documents other than those specified in the Return in Support of Claim for Privilege prepared by MMHC and DPWS.

The Walsh Bay parties have indicated that they regard the documents specified in the Returns, whether coming into existence before or after the Project Delivery Agreement, to be of such a commercially sensitive nature that release of the material contained in those documents will have serious adverse commercial implications for the Walsh Bay parties. Those adverse commercial implications include the following consequences:

1. Disclosure to competitors of the methods and costings for the implementation, construction, financing and marketing of the project; and
2. Disclosure to potential purchasers of the costings for the projects.

It is submitted that the documents should not be made public as the following detriment may arise:

1. Breach of contractual promises of confidentiality.
2. Prejudice current or future contractual or other relationships between Government and the private sector.
3. Discourage future dealings with Government.
4. Cause loss of commercial advantage and competitiveness within the private sector.
5. Cause detriment to private sector participants.
6. Reduce Government's ability to deliver the maximum public benefit.

We attach a letter from the Walsh Bay parties in respect of their concerns.

Claims for legal professional privilege

It is submitted that those documents listed in Department of Public Works Return as DPWS Departmental Files marked "Legal" and those documents which include legal advice in the Waterways Authority (Maritime Assets Division) Return are privileged and should not be made public on one or more of the available grounds of privilege pursuant to both common law doctrines and the statutory regime, in that:

1. they are, or contain a record of, confidential communications or documents brought into existence for the purpose of:
 - (a) enabling MMHC and DPWS ("Client") to obtain, or its legal advisers to give, legal advice; or
 - (b) for use in actual litigation or litigation reasonably contemplated by the Client and in respect of which privilege has not been waived (legal professional privilege);
2. they are confidential communications or documents between the Client or its legal advisers and persons with whom the Client shares or shared a common interest in relation to the subject matter of the advice received by one of them (common interest privilege).

Claims for public interest immunity

It is submitted that those documents listed in the Department of Public Works Return and those documents listed in the Waterways Authority (Maritime Assets Division) Return are privileged and should not be made public on the grounds of privilege pursuant to both common law doctrines and the statutory regime, in that:

1. they are the subject of a claim of public interest immunity because the public interest in their disclosure is outweighed by a competing public interest in their suppression (public interest immunity) as:
 - it would involve disclosure of communications made in the course of development and promulgation of policy;
 - disclosure would inhibit frankness and candour in future pre-decision communications;
 - disclosure will lead to confusion and unnecessary debate resulting from disclosure of decisional possibilities considered;
 - it would involve disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken, being unfair to a decision-maker and prejudicial to the integrity of the decision-making process;
 - the disclosure would impede the free flow of commercially sensitive information to the Government; and

- because of all of the above, the ordinary business of Government, which engages in contractual relationships with commercial parties, will be prejudiced by the disclosure.



Mr Dick Persson
Director General
Department of Public Works and Services
Level 21, McKell Building
2- 24 Rawson Place
SYDNEY NSW 2000

Dear Sir

Re: Walsh Bay – Upper House Motion dated 24 November 1999

We refer to the above Motion and to the documents in the possession of Government relating to the redevelopment of Walsh Bay. We request that those documents for which the department intends to make a claim for privilege and/or confidentiality should be kept confidential and not made public.

We believe that public disclosure of those documents would adversely affect the ability of Project to achieve its full potential and reduce our ability to deliver the maximum public benefit.

The making public of the details of commercial arrangements between private enterprise and Government is a dangerous precedent as disclosure of commercially sensitive information will significantly prejudice the future ability of such private enterprise groups to prepare competitive bids and carry out commercial negotiations. Pursuant to that bid process, private participants provide commercially sensitive information to Government and then proceed to treat with Government in reliance upon Government keeping all such information and negotiations confidential. If such information is to be made public, this will discourage the private sector from future dealings with Government which will, of course, be to the ultimate detriment of the New South Wales public.

We believe that we, and the joint venture partners Transfield and Mirvac, will suffer direct and material commercial prejudice in relation to future dealings both with respect to the Walsh Bay Project and to commercial transactions and dealing with other parties should this information come within the public domain.

In particular, disclosure of those materials which contain commercially sensitive information will directly and materially commercially prejudice us by revealing information about project development, delivery methods, transaction structures, "know how", operations and maintenance methods and engineering and construction methods, and, in the context of the Walsh Bay Redevelopment Project, by revealing overall pricings, details

of overheads and profit margins, level of bonding and the overall commercial delivery structure for the Walsh Bay Project.

The overall complexity of the project arrangements, restaging and reordering of the timing of the project, the intricacies of the approvals process and a number of essential commercial terms which have changed in the finalisation of the agreements should very easily give rise to confusion and misinterpretation in relation to the project and could be of material detriment to the Government and the participants.

The feasibilities and any material concerning those feasibilities disclose highly commercially sensitive information about proposed prices for property at Walsh Bay and commercial rent structures allowed for in the feasibilities. Disclosure of any of this information will adversely affect the financial returns for the Walsh Bay Project by prejudicing future negotiations for prices and rentals for the Walsh Bay Precinct.

Accordingly, we support your claim for privilege in respect of all the documents relating to Walsh Bay which contain any commercially sensitive information particularly in respect of costings, financing, economic analysis and marketing.

Yours faithfully
WALSH BAY FINANCE PTY LIMITED

GAVIN D.M. CARRIER
Project Director

ROBERT G. McFEETER
Project Director





STATE SUPER
SAS Trustee Corporation

File No: B1065
Contact: Narelle Wooden
Phone: (02) 9238 5911
Fax No: (02) 9238 5999
ABN: 29 239 066 746

Suite 1, Level 17, 83 Clarence Street, Sydney NSW 2000 Postal: PO Box N259, Grosvenor Place NSW 1220 Ph: 9238 5906 DX: 10152 Syd-Stock Exch

19 May 2011

Ms Rachel McCallum
Acting Executive Director, Legal Branch
Department of Premier and Cabinet
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Ms McCallum

We refer to the letter from Mr Paul Miller, General Counsel of your office to Mr Chris Durack, CEO of SAS Trustee Corporation (the Trustee) dated 9 May 2011 requiring production of certain documents under Standing Order 52 and specifically the Resolution of the Legislative Council on 6 May 2011 (The Resolution). The Resolution requires production of documents relating to the 'eligibility of Mr John Frederick Flowers, MP, Member for Rockdale to be elected and to hold a seat as a member of the Legislative Assembly'.

As you are aware, the Trustee, after discussions with your department, obtained legal advice from the Assistant Crown Solicitor, Mr John McDonnell. The advice sought was whether the Trustee was **permitted** to produce documents to the Department of Premier and Cabinet and the Legislative Council for the purposes of the Resolution. That advice is attached to this letter as Annexure A. Given that this advice considered whether the Trustee was permitted to produce documents in response to the Resolution rather than whether the Trustee was required to produce such documents, SAS Trustee Corporation has relied on this advice when returning documents under the Resolution.

Mr Brian Matthews, Legal and Policy Consultant, SAS Trustee Corporation, had the primary carriage of this matter. Mr Matthews went on annual leave on 29 April 2011 and will not have returned to the office by the date of return of the documents. We attempted to contact Mr Matthews on his personal mobile telephone on 9 and 10 May 2011 after receipt of notice of the Resolution. We are aware that Mr Matthews is holidaying in Canada and Alaska and will not be returning to work at the Trustee's office until or about 6 June 2011. Accordingly, we cannot confirm that all documents in the possession, custody or control of Mr Matthews have been produced. We will interview Mr Matthews promptly on his return to work and if required, will produce any further documents he may have in his possession, custody or control relevant to the Resolution and that we are permitted to produce.

Only that material **directly** relating to the eligibility of Mr John Frederick Flowers MR, Member for Rockdale has been included and only to the extent that SAS Trustee Corporation is aware of the relevance of that material to this issue.

Please find attached a letter from Mr Chris Durack CEO of SAS Trustee Corporation addressing confirmation of the completeness of the documents produced in response to the Resolution and the letter from Mr Miller of 9 May 2011.

Yours sincerely
For and on behalf of SAS Trustee Corporation

Narelle Wooden
General Counsel
SAS Trustee Corporation
Enclosure



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Flowers J F - SO 52 Call for Papers

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Prepared for: SAT722 SAS Trustee Corporation
Date: 18 May 2011
Client ref: Narelle Wooden
CSO ref: 201101382 T08 John McDonnell

1. Summary of advice

- 1.1 You have sought my urgent advice as to whether the SAS Trustee Corporation ("STC"), as Trustee of the STC Schemes under the *Superannuation Administration Act 1996* ("the Act"), is permitted to provide documents purportedly required under a resolution of the Legislative Council made under Standing Order 52 ("SO 52").
- 1.2 In my view, the Legislative Council cannot require production of any documents from the STC under SO 52.
- 1.3 Nor can the Legislative Council require the Minister administering the Act to produce documents "relating to Mr Flowers" as the Minister's power of direction and control does not extend to requiring production of documents relating to an individual member to the Legislative Council, the Minister or the Department of Premier and Cabinet ("DPC").
- 1.4 More importantly, in my view, STC is not permitted to provide these documents in 1.3 above to the Legislative Council, the Minister or DPC by reason of a prohibition in the *Privacy and Personal Information Protection Act 1998* ("PPIP Act") and implications to be drawn from the Act itself.
- 1.5 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Background

- 2.1 You instruct that SAS Trustee Corporation ("STC") is the trustee of the STC schemes as that term is defined under the Act. The STC schemes include the State Authorities Superannuation Scheme, the Police Superannuation Scheme, the State Superannuation Scheme (SSS) and the State Authorities Non-contributory Superannuation Scheme. STC, as the trustee of these superannuation schemes, must comply with all common law duties, obligations and rights of trustees and the obligations, duties and rights of trustees under the *Trustee Act 1925* and the Act. In addition, it has privacy obligations to its members under the *Privacy and Personal Information Protection Act 1998* ("PPIP Act").
- 2.2 The Chief Executive Officer of STC received a letter from Paul Miller, General Counsel of the DPC, on 9 May 2011 requiring production of certain documents under SO 52 by the Legislative Council. The Resolution of the Legislative Council required production of those documents in the possession, custody or control of SAS Trustee Corporation "relating to the eligibility of Mr John Frederick Flowers, MP, and Member

for Rockdale to be elected and to hold a seat as a member of the Legislative Assembly by 20 May 2011".

- 2.3 Mr Flowers was in receipt of a break down pension under the SSS scheme until he requested that pension be cancelled under clause 11A of the *Superannuation Regulation 2006* (NSW).

3. Advice sought

- 3.1 You seek my urgent advice as to whether STC is permitted to provide the documents required under the Resolution to the DPC and, ultimately, the Legislative Council.
- 3.2 Please note that the text of relevant legislation is set out in the Appendix to this advice.

4. Advice

Power of Legislative Council to require production by STC

- 4.1 By letter dated 9 May 2011, General Counsel for the DPC wrote to the STC's Chief Executive Officer informing him of the Legislative Council's Resolution of 6 May 2011, and advising him of the applicable guidelines, including a guideline that copies of all documents falling within the terms of the Resolution be provided to DPC in a certain format.
- 4.2 Standing Order 52(1), made under s.15(1)(a) of the *Constitution Act 1902*, provides that "the Clerk is to communicate to the Premier's Department, all orders for documents made by the House". The Order here requires tabling of "all documents, excluding all personal medical records created since 26 March 2011, in the possession, custody or control of ... the Department of Premier and Cabinet, the Minister for Finance and Services ... and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP ... to be elected and to hold a seat ... excluding all correspondence between Mr Flowers and the SAS Trustee Corporation".
- 4.3 Thus, the Resolution, properly construed, calls for documents created since 26 March 2011, in the possession, custody or control of STC, except personal medical records and correspondence between STC and Mr Flowers.
- 4.4 There is an issue, however, as to whether the Legislative Council has the power to make a resolution addressed to STC. In my view, it does not.
- 4.5 The Legislative Council has the power to compel production of State papers from the Executive Government (*Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563). The High Court has found that such a power is reasonably

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- necessary for the House for the proper exercise of the functions of the House and is given effect to in SO 52. As noted above, SO 52 provides that "[t]he House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House" (cl. (1)).
- 4.6 In holding that there is an implied power in the House to order Ministers to produce State papers, the High Court seems to have accepted the definition of "State papers of Gleeson" CJ in the NSW Court of Appeal, namely, "papers which are created or acquired by ministers, office-holders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of the State of New South Wales" (*Egan v Willis* (1996) 40 NSWLR 650 at 654; *Egan v Willis* (1998) 195 CLR 424 at 442 per Gaudron, Gummow and Hayne JJ).
- 4.7 The STC is constituted as a corporation and is, for the purposes of any Act, a statutory body representing the Crown (s. 48(3)). As a statutory body corporate, the STC's obligations to provide advice and annual reports to the Attorney-General are prescribed by statute.
- 4.8 In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 the High Court stated, in effect, that the executive branch to which the principle of responsible government attaches "is not confined to ministers and the public service", but extends to "the affairs of statutory bodies and public utilities which are obliged to report to the legislature or to a minister who is responsible to the legislature" (at 561). Their Honours referred to Lord Wilberforce in *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1168. After stating that the conduct of the British Steel Corporation's affairs and the disclosures and reports which had to be made were regulated by statute, his Lordship observed that "[t]he legitimate interest of the public in knowing about its affairs is given effect to through information which there is a statutory duty to publish and through reports to the Secretary of State who is responsible to Parliament". That is, to the extent that the Minister responsible to Parliament for the activities of the STC, he is required to rely on the STC's statutory reporting and advice-giving functions.
- 4.9 The High Court identified the executive branch as including "the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature". The joint judgment of Gaudron, Gummow and Hayne JJ in *Egan* at para [56] concluded with the following statement:
- "It is important to emphasise that no question arises in this case about what powers a House of the New South Wales Parliament may have to deal with persons who are not members of the House concerned. Altogether different considerations might arise in such a case."
- 4.10 There is therefore no authority to the effect that a House can order a person other than a Minister who is a member of the House to produce State or other papers to it. Accordingly, I do not think that the House can order the STC to produce State papers



to it. The power of a House to order a Minister to produce documents appears to be confined to documents which are in the custody and control of the Minister or which the Minister is able to obtain (*Egan v Willis* at 444 and 447).

- 4.11 Accordingly, given that the accepted basis of the power in SO 52 is s.15(1)(a) of the *Constitution Act* relating to the "orderly conduct" of the House, I am of the view that the power of the Legislative Council under SO 52 to require production of documents does not extend to statutory corporations such as the STC.

Power to require production by a Minister

- 4.12 The next question is whether the Legislative Council could achieve indirectly what it cannot achieve directly by seeking to obtain the documents through the Minister responsible for the STC. However, that means, for indirect production to be effective, the Minister must have the power to acquire production of papers held by the STC.
- 4.13 In this regard, s. 55 provides that the STC must comply with a direction of the Minister "relating to the exercise by STC of any one or more of its functions, if the Minister is of the opinion that an act or omission, or conduct, by STC has had or could reasonably be expected to have a significant adverse effect on the Consolidated Fund or the financial management of the State" (s. 55(1) and (2)). Such a direction must not be inconsistent with the Act (s. 55(1)) and the Minister, in making the direction, must have regard to the interests of persons entitled to receive benefits under the STC schemes (s. 55(3)(a)). Any direction under s. 55 must be laid before Houses of Parliament (s. 56). In my view, no direction could be given under s.58.
- 4.14 As noted above, s. 55 is to be interpreted subject to the rest of the Act. Section 90 requires the STC to furnish to the Minister administering the Act or the Minister administering the STC fund Acts, such information relating to the general administration and operation of the STC schemes and the STC Fund as the Minister concerned may from time to time require (s. 90(1)), but the STC must not furnish information relating to an individual member of an STC Scheme to a Minister except with the member's consent (s. 90(2)). I assume such consent has not been provided.
- 4.15 Section 97, more generally, authorises the Minister or an "authorised person" to require STC to give to the Minister or authorised person information or a report relating to STC's exercise of its functions, on matters in relation to specified years of income. However, I do not think that the broad authorisation in s. 97 could override the more specific prohibition in s. 90(2).
- 4.16 Accordingly, in my view, the fact that the resolution is also addressed to the Minister for Finance and Services will not enable the Legislative Council to obtain access to those documents as the Minister has no power to direct STC to provide him with the documents falling within the prohibition in s. 90 (2), that is, information relating to an individual member.

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Power to provide documents to the DPC

- 4.17 The legislative scheme of the Act, including the functions of the STC set out in your instructions, suggests strongly that, although there is no general secrecy provision in the Act, disclosure of information relating to individual members or, indeed, any information obtained in the administration and execution of the Act, only occur in the rare circumstances contemplated by ss. 55, 90 and 97.
- 4.18 Likewise, s. 18 of the *PPIP Act* would appear to expressly prohibit disclosure by STC of Mr Flowers' "personal information". I can find no exemption under ss. 18, 19, 23 or 25 which would enable exemption from that prohibition. In particular, whilst DPC co-ordinates the return to be made by the Executive to orders for production and is referred to in Standing Order 52(1) itself, I do not think that disclosure of members' personal information is lawfully authorised, necessarily implied, or even reasonably contemplated within the meaning of s. 25 of the *PPIP Act*.
- 4.19 Nor, having regard to the conclusion I have reached above as to the power of the Legislative Council to compel STC to provide documents, could a power to co-ordinate production by DPC be implied.
- 4.20 Accordingly, in my view, STC has no power to provide the documents to DPC for co-ordinating its response to the call for documents. More importantly, STC is not permitted by the *PPIP Act*, and probably implications in the Act itself, to provide the documents to DPC or the Legislative Council.

Signed:



John McDonnell
A/Crown Solicitor

Appendix: Relevant legislation

Superannuation Administration Act 1996

48 Continuation of STC (formerly the State Authorities Superannuation Board)

- (3) STC is, for the purposes of any Act, a statutory body representing the Crown.

55 STC to be subject to Minister's directions in certain circumstances

- (1) The Minister may give a direction to STC relating to the exercise by STC of any one or more of its functions if the Minister is of the opinion that an act or omission, or conduct, by STC has had or could reasonably be expected to have a significant adverse effect on the Consolidated Fund or the financial management of the State. A direction must not be inconsistent with this or any other Act.
- (2) STC must comply with any such direction.
- (3) In giving a direction the Minister must have regard to:
- (a) the interests of persons entitled to receive benefits under the STC schemes, and
 - (b) the duties and obligations of STC and the members of the STC Board.
- (4) Nothing in this section constitutes the Minister as a trustee of the STC schemes.
- (5) STC is not liable for anything done or omitted for the purpose only of complying with a direction of the Minister under this section.

90 Provision of information to relevant Ministers

- (1) STC must furnish to the Minister administering this Act or the Minister administering the STC fund Acts such information relating to the general administration and operation of the STC schemes and the STC funds as the Minister concerned may from time to time require.
- (2) Despite subsection (1), STC must not furnish information relating to an individual member of an STC scheme to a Minister under this section, except with the member's consent.
- (3) In this section, *STC fund Acts* mean the Acts referred to in the definition of *STC fund* in section 4.

97 Information to be given to Minister and authorised persons

- (1) The Minister or an authorised person may, by written notice to STC, require STC, within a specified period, to give to the Minister or authorised person in relation to a specified year of income the information, or a report on matters, specified in the notice.
- (2) STC must comply with any notice given to it under subsection (1).
Maximum penalty: 50 penalty units.
- (3) The information or report required to be provided under subsection (1) must relate to STC's exercise of its functions.
- (4) If STC gives information or a report to the Minister or authorised person as required by this section, the Minister or authorised person must give to STC a written statement that the information or report has been received.

Constitution Act 1902 No 32

15 Standing Rules and Orders to be laid before Governor

- (1) The Legislative Council and Legislative Assembly shall, as there may be occasion, prepare and adopt respectively Standing Rules and Orders regulating:

- (a) the orderly conduct of such Council and Assembly respectively, and

...

Standing Order No. 52

Order for the production of documents

- (1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.
- (2) When returned, the documents will be laid on the table by the Clerk.
- (3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.
- (4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to have been presented to the House and published by authority of the House.
- (5) Where a document is considered to be privileged:
 - (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,
 - (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:
 - (i) made available only to members of the Legislative Council,
 - (ii) not published or copied without an order of the House.
- (6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.
- (7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.
- (8) A report from the independent legal arbiter is to be lodged with the Clerk and:
 - (a) made available only to members of the House,
 - (b) not published or copied without an order of the House.
- (9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

Privacy and Personal Information Protection Act 1998

18 Limits on disclosure of personal information

- (1) A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:
 - (a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or
 - (b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or

- (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.
- (2) If personal information is disclosed in accordance with subsection (1) to a person or body that is a public sector agency, that agency must not use or disclose the information for a purpose other than the purpose for which the information was given to it.

25 Exemptions where non-compliance is lawfully authorised or required

A public sector agency is not required to comply with section 9, 10, 13, 14, 15, 17, 18 or 19 if:

- (a) the agency is lawfully authorised or required not to comply with the principle concerned, or
- (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the *State Records Act 1998*).

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Narelle Wooden

From: Narelle Wooden
Sent: Friday, 13 May 2011 3:19 PM
To: 'crownsol@agd.nsw.gov.au'
Subject: Urgent request for advice as discussed with Mr John McDonnell
Attachments: img-5131452-0001.pdf

Please see the attached urgent request for advice.

As advised, the request relates to a requirement to produce documents to the Legislative Council on 20 May 2011.

Thank you for your assistance.

Kind regards

Narelle Wooden

*Narelle Wooden
General Counsel
State Super
Suite 1, Level 17
83 Clarence Street
Sydney NSW 2000
Phone: 02 9238 5911
Fax: 02 9238 5999*



STATE SUPER
SAS Trustee Corporation

File No: B1065
Contact: Narelle Wooden
Phone: (02) 9238 5911
Fax No: (02) 9238 5999
ABN: 29 239 066 746

Suite 1, Level 17, 83 Clarence Street, Sydney NSW 2000 Postal: PO Box N259, Grosvenor Place NSW 1220 Ph: 9238 5906 DX: 10152 Syd-Stock Exch

13 May 2011

Mr John McDonnell
Assistant Crown Solicitor
NSW Crown Solicitor's Office
DX 19 Sydney

Also by email crownsol@agd.nsw.gov.au

Dear Mr McDonnell

The Chief Executive Officer of SAS Trustee Corporation received a letter from Mr Paul Miller, General Counsel of the Department of Premier and Cabinet on 9 May 2011 requiring production of certain documents under Standing Order 52, Order for Papers by the Legislative Council. That letter is attached as Annexure A. The Resolution of the Legislative Council required production of those documents in the possession, custody or control of SAS Trustee Corporation *'relating to the eligibility of Mr John Frederick Flowers, MP, and Member for Rockdale to be elected and to hold a seat as a member of the Legislative Assembly by 20 May 2011'*.

SAS Trustee Corporation is the trustee of the STC schemes as that term is defined under the *Superannuation Administration Act 1996 (NSW)* (the Act). The STC schemes include the State Authorities Superannuation Scheme, the Police Superannuation Scheme, the State Superannuation Scheme (SSS) and the State Authorities Non-contributory Superannuation Scheme. SAS Trustee Corporation as the trustee of these superannuation schemes must comply with all common law duties, obligations and rights of trustees and the obligations, duties and rights of trustees under the *Trustee Act 1925* and the Act. In addition, it has privacy obligations to its members under the *Privacy and Personal Information Protection Act 1998 (NSW)*.

The principal functions of the SAS Trustee Corporation are defined under the Act as:-

- (a) to administer the STC schemes, and*
- (b) to invest and manage the STC funds, and*
- (c) to provide for the custody of the assets and securities of the STC schemes, and*
- (d) to ensure that benefits payable to the persons entitled to receive benefits under the STC schemes are paid in accordance with the Acts under which the schemes are established or constituted, and*
- (e) to determine disputes under those Acts, and*
- (f) to exercise such other functions with respect to the STC schemes and STC funds as the Minister may from time to time approve by order in writing.'*

Mr Flowers was in receipt of a break down pension under the SSS scheme until he requested that pension be cancelled under clause 11 A of the *Superannuation Regulation 2006 (NSW)*.

Advice sought

Your advice is requested as to whether the Trustee is permitted to provide the documents required under the Resolution to the Department of Premier and Cabinet and ultimately the Legislative Counsel.

As the documents required to be produced under the Resolution must be provided by 20 May 2011 to the Legislative Counsel and the Department of Premiers and Cabinet have requested that material by Monday, 16 May 2011, it would be appreciated if you could provide your advice on an urgent basis.

Yours sincerely

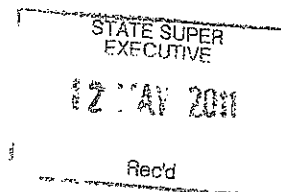


Narelle Wooden
General Counsel

A.



Premier
& Cabinet



URGENT

Mr Chris Durack
Chief Executive Officer
SAS Trustee Corporation
Level 17, Suite 1, 83 Clarence Street
SYDNEY NSW 2000

- 9 MAY 2011

BY FACSIMILE AND POST
Facsimile: (02) 9238 5999

Dear Mr Durack

Standing Order 52 – Order for Papers – Election of Mr John Frederick Flowers MP

I write to inform you that on Friday, 6 May 2011, the Legislative Council agreed to the following Resolution:

“That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any document which records or refers to the production of documents as a result of this order of the House.”

An extract from the Minutes of the Proceedings of the Legislative Council, Friday, 6 May 2011, entry 9, page 65, is attached.

The resolution requires the documents to be tabled within 14 days, that is, by Friday, 20 May 2011.

The following guidelines apply to your response to the Resolution.

1. Provision of Papers

All papers (other than Cabinet documents) which fall within the terms of the Resolution must be produced. Cabinet documents must not be produced (see section 6 below).

Papers which fall within the terms of the Resolution should be produced in full, even if they contain irrelevant information. That is, material should not be blacked out or

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otherwise masked when photocopying papers which fall within the terms of the Resolution.

It may, however, be appropriate to mask some material in documents if a claim for privilege is made (see section 3 below).

Please note that only photocopies of original papers and files are to be provided. All papers should be delivered by close of business on **Friday, 13 May 2011** to:

Ms Rachel McCallum
Acting Executive Director, Legal Branch
Department of Premier and Cabinet
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Please contact Ms Jennifer Haling, Senior Project Officer, Legal Branch, on (02) 9228 5871 if you wish to discuss any aspect of this request.

2. Non-privileged papers

Standing Order 52(3) provides that, 'A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document'.

A document showing the standard format to be used when preparing an index under Standing Order 52 is enclosed at **Annexure A**. Please adhere to the standard format when preparing an index of documents.

Please note that the index should contain the following information:

<i>Document Number</i>	The document number should follow the format '(a)(i) 1', where '(a)' refers to the relevant paragraph of the Resolution, '(i)' refers to the relevant subparagraph of the Resolution, and '1' refers to the first document in the group of documents that fall within subparagraph (a)(i).
<i>Item</i>	The description of the relevant item as per the Resolution. For example, 'Documents relating to concept formulation and cost benefit analyses'.
<i>Document</i>	A short description of the relevant document. For example, 'Letter from X to Y'.
<i>Date of creation</i>	Where the exact date is unknown, insert an estimated date range if possible.
<i>Author</i>	The agency or organisation that created the document.
<i>Privilege Claim</i>	If the index relates to privileged documents, write 'Yes'. If the index relates to non-privileged documents, write 'No'.

3. Claims of Privilege

A document showing the standard format to be used when making claims for privilege is enclosed at Annexure B. Please adhere to the standard format, where appropriate, when making a claim for privilege.

If a privilege claim is subsequently challenged, the question of whether the document is privileged will be referred to a legal arbiter for a ruling.

It is important, therefore, that the basis of the claim is clearly set out in the response to the Resolution so that the arbiter can properly assess the validity of the claim. There will be no opportunity to provide further submissions in support of a claim of privilege if it is challenged.

Please note that a separate index is required for 'non-privileged' and 'privileged' documents as these types of documents are returned separately.

If a document contains only a minor amount of privileged material, it may be appropriate to produce two copies of the document: a full copy of the document as a 'privileged' document, and a copy of the document with the privileged material blacked out or otherwise masked as a 'non-privileged' document.

This approach may be appropriate where, for example, a document contains a relatively small amount of personal information which may be subject to a claim for privilege on the grounds of privacy, but which is not needed for the document to be understood. For example, letters to the Government on a particular issue could be produced on a 'non-privileged' basis with the names and addresses of the authors blacked out, with full copies provided on a 'privileged' basis.

4. Delivery and Identification

As time is critical, it would be appreciated if all papers could be delivered in file record boxes with the corresponding parts of the index affixed to the top of each box. For example, that part of the index which lists the documents contained in Box 1 should be attached to the top of Box 1.

Please place 'privileged' and 'non-privileged' documents in separate boxes.

The Legislative Council has also requested that agencies return documents in standard archive boxes (Type 1 boxes). Further information about this type of box may be obtained from State Records at <http://www.records.nsw.gov.au/grr/docs/storageboxes.doc>

5. Certification by Chief Executive Officer

Papers should be accompanied by a letter signed by you stating, "I certify to the best of my knowledge all documents held by the SAS Trustee Corporation and covered by the terms of the resolution have been provided".

6. Cabinet Documents

Cabinet documents should not be produced or referred to in responding to the Resolution.



All agencies are obliged to protect the confidentiality of Cabinet documents (refer to Premier's Memorandum 2006-08 *Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions*).

7. Agency Contact

Could you please provide the contact details of the officer assigned to coordinate your agency's response to Jennifer Haling as soon as possible.

I seek your assistance in ensuring that your agency's documents are with the Legal Branch of the Department no later than by close of business on **Friday, 13 May 2011**.

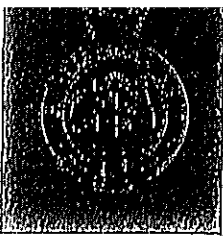
Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Miller', with a stylized, cursive script.

Paul Miller
General Counsel

C

C



6 May 2011

Mr Chris Eccles
Director General
Department of Premier and Cabinet
Level 39, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Mr Eccles

Attention: Ms Rachel McCallum, Legal Branch

Order for Papers—Election of Mr John Frederick Flowers MP

I am writing to inform you that, on Friday 6 May 2011, the Legislative Council agreed to the following resolution:

That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any document which records or refers to the production of documents as a result of this order of the House.

An extract from the Minutes of the Proceedings of the Legislative Council, Friday 6 May 2011, entry 9, page 65, is attached.

The resolution requires the documents to be tabled within 14 days, that is Friday 20 May 2011.

Yours sincerely

Lynn Lovelock
Clerk of the Parliaments

cc: The Hon Michael Gallacher MLC

9 **ORDER FOR PAPERS—ELECTION OF MR JOHN FREDERICK FLOWERS MP**

Mr Foley sought the leave of the House to amend private members' business item no. 7 outside the order of precedence by inserting "excluding all personal medical records," after "all documents".

No objection taken.

Leave granted.

Mr Foley moved, according to notice, as by leave amended: That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, and any document which records or refers to the production of documents as a result of this order of the House.

Debate ensued.

Dr Kaye moved: That the question be amended by inserting "excluding all correspondence between Mr Flowers and the SAS Trustee Corporation," before "and any document which records or refers to the production of documents as a result of this order of the House".

Debate continued.

Question: That the amendment of Dr Kaye be agreed to—put and passed.

Original question, as amended: That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents, excluding all personal medical records, created since 26 March 2011, in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Finance and Services, the Department of Services, Technology and Administration, the Attorney General, the Department of Attorney General and Justice, and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP, Member for Rockdale, to be elected and to hold a seat as a member of the Legislative Assembly, excluding all correspondence between Mr Flowers and the SAS Trustee Corporation, and any document which records or refers to the production of documents as a result of this order of the House—put and passed.



ENERGYAUSTRALIA

ORDER FOR PAPERS - REDEVELOPMENT OF WALSH BAY

Document No.	Item	Document	Date of Creation	Author	Privilege Claim Y/N?
Item 1 (a)(1)	Any proposal, agreement or tender between Walsh Bay Properties, Walsh Bay Partnership or Walsh Bay Finance Pty Ltd and the Government	Letter from Barry Webb & Associates to EnergyAustralia cc: Walsh Bay Properties	14 May 1996	Steven Markis, Barry Webb & Associates	No
Item 1 (a)(2)	Any proposal, agreement or tender between, Walsh Bay Properties, Walsh Bay Partnership, Walsh Bay Finance Pty Ltd and the Government	Letter from Department of Urban Affairs & Planning to EnergyAustralia	8 July 1996	David Hume, Manager, Sydney South, Department of Urban Affairs and Planning.	No
Item 1 (a)(3)	Any proposal, agreement or tender between, Walsh Bay Properties, Walsh Bay Partnership, Walsh Bay Finance Pty Ltd and the Government	Letter from EnergyAustralia to George Fioth Pty Ltd	15 August 1996	Ian Swords for Manager Network Connections - South, EnergyAustralia	No

**SUBMISSION IN SUPPORT OF CLAIM FOR CONFIDENTIALITY AND PRIVILEGE
BY THE DEPARTMENT OF PUBLIC WORKS & SERVICES AND
MARINE MINISTERIAL HOLDING CORPORATION
WALSH BAY**

The Marine Ministerial Holding Corporation ("MMHC") has entered into an agreement, for the redevelopment of a 15 hectare waterfront heritage site at Walsh Bay, with Walsh Bay Properties Pty Limited, Transfield (Walsh Bay) Pty Limited, Mirvac (Walsh Bay) Pty Limited and Walsh Bay Finance Pty Limited ("the Walsh Bay parties"). The Department of Public Works & Services ("DPWS") has been appointed MMHC's agent in respect of the project.

All documents and material passing to MMHC from the Walsh Bay parties were provided on the basis that they, and all material arising out of those documents, were, and would continue to remain, "commercial in confidence". Further, under the terms of the Project Delivery Agreement dated October 1997 between MMHC and the Walsh Bay parties, the parties have specifically agreed to maintain confidential all information relating to the project.

Clause 27.16 of the Project Delivery Agreement provides:

- "(a) Each party agrees and undertakes to keep and maintain confidential all the terms covenants and conditions of this agreement any information supplied by one party to another under this agreement including but not limited to information provided by the Contractor to MMHC under clause 3.2(b) and not to disclose those terms, covenants and conditions or any part of them or any information or part of that information to any person, company or organisation except as provided in this clause.
- (b) Nothing in this clause will prohibit the parties from disclosing any term, covenant or condition of this agreement:
1. Which it believes in good faith is required to be disclosed by law or by the ASX Listing Rules; or
 2. Which was already in the lawful possession of the recipient in written form; or
 3. Is generally available to the public otherwise than by disclosure in breach of the terms of this clause; or
 4. To any consultant or contractor of a party, to any proposed assignee or mortgagee or Financier of a party and their consultants, or to any person considering investing in the Project or their consultants for the purposes of or in connection with any matter contemplated by this agreement; or
 5. With the prior written consent of the other party.

- (c) Nothing in this clause will prohibit MMHC from disclosing any term, covenant or condition of this agreement to the Government of the State of New South Wales or any Minister of the Crown.
- (d) Media releases in respect of the Project must be jointly agreed between the parties. Both the Contractor and MMHC must keep each other informed of a name and emergency contact details of their representative who has authority to approve media releases on their behalf. Both parties must ensure their representative is available on 24 hours notice to approve a media release. The Contractor acknowledges that the Minister for Ports has the right to make press releases in respect of the Project and is not bound by the provisions of this clause. MMHC must ensure the Minister is informed of the contents of this clause."

Obligations of confidentiality were also imposed by the terms of the original tender documents. The parties, including MMHC, are therefore bound to keep confidential all documents or information dating from either before or after the date of the Project Delivery Agreement.

Notwithstanding this obligation, the Walsh Bay parties have agreed that MMHC may provide to the Parliament and make available to the public all documents other than those specified in the Return in Support of Claim for Privilege prepared by MMHC and DPWS.

The Walsh Bay parties have indicated that they regard the documents specified in the Returns, whether coming into existence before or after the Project Delivery Agreement, to be of such a commercially sensitive nature that release of the material contained in those documents will have serious adverse commercial implications for the Walsh Bay parties. Those adverse commercial implications include the following consequences:

1. Disclosure to competitors of the methods and costings for the implementation, construction, financing and marketing of the project; and
2. Disclosure to potential purchasers of the costings for the projects.

It is submitted that the documents should not be made public as the following detriment may arise:

1. Breach of contractual promises of confidentiality.
2. Prejudice current or future contractual or other relationships between Government and the private sector.
3. Discourage future dealings with Government.
4. Cause loss of commercial advantage and competitiveness within the private sector.
5. Cause detriment to private sector participants.
6. Reduce Government's ability to deliver the maximum public benefit.

We attach a letter from the Walsh Bay parties in respect of their concerns.

Claims for legal professional privilege

It is submitted that those documents listed in Department of Public Works Return as DPWS Departmental Files marked "Legal" and those documents which include legal advice in the Waterways Authority (Maritime Assets Division) Return are privileged and should not be made public on one or more of the available grounds of privilege pursuant to both common law doctrines and the statutory regime, in that:

1. they are, or contain a record of, confidential communications or documents brought into existence for the purpose of:
 - (a) enabling MMHC and DPWS ("Client") to obtain, or its legal advisers to give, legal advice; or
 - (b) for use in actual litigation or litigation reasonably contemplated by the Client and in respect of which privilege has not been waived (legal professional privilege);
2. they are confidential communications or documents between the Client or its legal advisers and persons with whom the Client shares or shared a common interest in relation to the subject matter of the advice received by one of them (common interest privilege).

Claims for public interest immunity

It is submitted that those documents listed in the Department of Public Works Return and those documents listed in the Waterways Authority (Maritime Assets Division) Return are privileged and should not be made public on the grounds of privilege pursuant to both common law doctrines and the statutory regime, in that:

1. they are the subject of a claim of public interest immunity because the public interest in their disclosure is outweighed by a competing public interest in their suppression (public interest immunity) as:
 - it would involve disclosure of communications made in the course of development and promulgation of policy;
 - disclosure would inhibit frankness and candour in future pre-decision communications;
 - disclosure will lead to confusion and unnecessary debate resulting from disclosure of decisional possibilities considered;
 - it would involve disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken, being unfair to a decision-maker and prejudicial to the integrity of the decision-making process;
 - the disclosure would impede the free flow of commercially sensitive information to the Government; and

- because of all of the above, the ordinary business of Government, which engages in contractual relationships with commercial parties, will be prejudiced by the disclosure.

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Mr Dick Persson
Director General
Department of Public Works and Services
Level 21, McKell Building
2- 24 Rawson Place
SYDNEY NSW 2000

Dear Sir

Re: Walsh Bay – Upper House Motion dated 24 November 1999

We refer to the above Motion and to the documents in the possession of Government relating to the redevelopment of Walsh Bay. We request that those documents for which the department intends to make a claim for privilege and/or confidentiality should be kept confidential and not made public.

We believe that public disclosure of those documents would adversely affect the ability of Project to achieve its full potential and reduce our ability to deliver the maximum public benefit.

The making public of the details of commercial arrangements between private enterprise and Government is a dangerous precedent as disclosure of commercially sensitive information will significantly prejudice the future ability of such private enterprise groups to prepare competitive bids and carry out commercial negotiations. Pursuant to that bid process, private participants provide commercially sensitive information to Government and then proceed to treat with Government in reliance upon Government keeping all such information and negotiations confidential. If such information is to be made public, this will discourage the private sector from future dealings with Government which will, of course, be to the ultimate detriment of the New South Wales public.

We believe that we, and the joint venture partners Transfield and Mirvac, will suffer direct and material commercial prejudice in relation to future dealings both with respect to the Walsh Bay Project and to commercial transactions and dealing with other parties should this information come within the public domain.

In particular, disclosure of those materials which contain commercially sensitive information will directly and materially commercially prejudice us by revealing information about project development, delivery methods, transaction structures, "know how", operations and maintenance methods and engineering and construction methods, and, in the context of the Walsh Bay Redevelopment Project, by revealing overall pricings, details



of overheads and profit margins, level of bonding and the overall commercial delivery structure for the Walsh Bay Project.

The overall complexity of the project arrangements, restaging and reordering of the timing of the project, the intricacies of the approvals process and a number of essential commercial terms which have changed in the finalisation of the agreements should very easily give rise to confusion and misinterpretation in relation to the project and could be of material detriment to the Government and the participants.

The feasibilities and any material concerning those feasibilities disclose highly commercially sensitive information about proposed prices for property at Walsh Bay and commercial rent structures allowed for in the feasibilities. Disclosure of any of this information will adversely affect the financial returns for the Walsh Bay Project by prejudicing future negotiations for prices and rentals for the Walsh Bay Precinct.

Accordingly, we support your claim for privilege in respect of all the documents relating to Walsh Bay which contain any commercially sensitive information particularly in respect of costings, financing, economic analysis and marketing.

Yours faithfully
WALSH BAY FINANCE PTY LIMITED

GAVIN D.M. CARRIER
Project Director

ROBERT G. McFEETER
Project Director



Brian Matthews

From: Brian Matthews
Sent: Friday, 29 April 2011 12:19 PM
To: Narelle Wooden
Subject: FW: Superannuation Amendment (Breakdown Pensions) Regulation 2011 [s2011-137]
Attachments: s2011-137-d02.pdf; SI Information Sheet.pdf

As requested.

-----Original Message-----

From: Tony Nicod [mailto:Tony.Nicod@dpc.nsw.gov.au]
Sent: Wednesday, 27 April 2011 5:31 PM
To: Brian Matthews
Subject: Fwd: Superannuation Amendment (Breakdown Pensions) Regulation 2011 [s2011-137]

Brian

The final Reg. Please forward the signed letter requesting the Regulation be made.

TONY NICOD
Manager, Legal Services
Public Sector Workforce
Department of Premier & Cabinet
PH:9228 3592
fax: 9228 3102
tony.nicod@dpc.nsw.gov.au

This message is intended for the addressee named and may contain confidential information. If you are not the intended recipient, please delete it and notify the sender. Views expressed in this message are those of the individual sender, and are not necessarily the views of the Department of Premier and Cabinet.

>>> Natasha Mitchell 27/04/2011 17:20 >>>
Please find attached the instrument and Parliamentary Counsel's Opinion. The pdf file may be printed for the official process of making the instrument.

For records purposes, please confirm receipt of this email by replying to it.

For information about the official notification of the instrument once it has been made please see the attached information sheet.

Regards
Parliamentary Counsel's Office
Level 23, AMP Centre
50 Bridge Street
Sydney NSW 2000
Ph: +61 2 9321 3333
Fax: +61 2 9232 4796

SUBMISSION IN SUPPORT OF CLAIM FOR CONFIDENTIALITY AND PRIVILEGE BY SAS TRUSTEE CORPORATION

SAS Trustee Corporation (Trustee) is constituted by the *Superannuation Administration Act 1916* (the Superannuation Act) and is the trustee of four closed defined benefit superannuation schemes – the State Authorities Superannuation Scheme, the State Superannuation Scheme, the Police Superannuation Scheme and the State Authorities Non-contributory Superannuation Scheme. Whilst SAS Trustee Corporation is a statutory body representing the Crown under section 48(3) of the Superannuation Act, it is also in a unique position as the trustee of these four superannuation schemes because it has trustee and fiduciary obligations to the members of those schemes. It is on this basis that privilege is claimed in respect of both the confidential records and material of a member of the State Superannuation Scheme and the processes and affairs of that scheme and the Trustee.

Claim for public interest immunity

A claim for privilege is made pursuant to public interest immunity under general law doctrines. The material is subject to a claim of public interest immunity because the public interest in its disclosure is outweighed by a competing public interest in its suppression (public interest immunity). The grounds supporting this claim are as follows:

- (i) Section 49 of the Superannuation Act, specifically provides that the Trustee is a trustee for the purposes of the *Trustee Act 1925* (Trustee Act) and accordingly the Trustee has the '*obligations, rights and duties of a trustee under Division 2 of Part 2 of the Trustee Act 1925*'. The effect of this provision is to subject the Trustee to both general law and statutory duties in relation to its administration of the schemes. At general law, a trustee owes a duty of confidence to beneficiaries of the trust which prevents a trustee from disclosing confidential information about the affairs of the trust generally or the interests of particular beneficiaries. The Trustee has received or created this material as a trustee of four schemes and to require the Trustee to produce this material for consideration by the public would undermine established principles of trust law;
- (ii) Any erosion of the member's rights to confidentiality, including relating to the affairs of the trust, may reduce member confidence in the Trustee's ability to safeguard member's personal information and raise public concern as to the protections afforded by legislation and trust law;



- (iii) The commercial disadvantage of public disclosure of the procedures and affairs of the Trustee, including the decision making process of the Trustee's board and its Executive;
- (iv) Disclosure would inhibit frankness and candour in future pre-decision communications;
- (v) Disclosure would lead to confusion and unnecessary debate resulting from disclosure of possible decisions considered;
- (vi) It would involve disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken, being unfair to a decision – maker and prejudicial to the integrity of the decision-making process; and
- (vii) The disclosure would impede the free flow of commercially sensitive information to the Government.

Whilst the *Government Information (Public Access) Act 2009* (NSW) addresses requests from the public for government information, it does provide some guidelines as to the balancing of public interest considerations in the disclosure of government information. Section 14(2) of the Act provides that there is a public interest consideration against disclosure if that information could reasonably be expected to-

- (i) *Reveals a deliberation or consultation conducted or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or agency; and*
- (ii) *Prejudice the effective exercise by an agency of the agency's functions.* It is of concern that disclosure of the internal processes of the Trustee will undermine the effectiveness of the Trustee.

Claim for legal professional privilege

It is submitted that those documents marked 'Legal Professional Privilege' are privileged and should not be made public on one or more of the available grounds:

- (i) They are or contain a record of confidential communications or documents brought into existence for the dominant purpose of enabling SAS Trustee Corporation to obtain or SAS Trustee's internal or external legal advisers to give legal advice; or
- (ii) They are confidential communications or documents between the Trustee and persons with whom the Trustee shared a

common interest in relation to the subject matter of the advice received by one of them (common interest privilege).

Legal advice has been obtained internally by the Trustee from Narelle Wooden and Brian Matthews, both of whom hold current legal practising certificates. Ms Wooden is employed by the Trustee in the capacity as General Counsel and Mr Matthews is employed as the Legal and Policy Consultant providing legal advice on the interpretation of the four superannuation schemes administered under the Superannuation Act by the Trustee. External legal advice was sought from the Parliamentary Counsel, the Crown Solicitor and Minter Ellison.

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- (ii) Any erosion of the member's rights to confidentiality, including relating to the affairs of the trust, may reduce member confidence in the Trustee's ability to safeguard member's personal information and raise public concern as to the protections afforded by legislation and trust law;



- (iii) The commercial disadvantage of public disclosure of the procedures and affairs of the Trustee, including the decision making process of the Trustee's board and its Executive;
- (iv) Disclosure would inhibit frankness and candour in future pre-decision communications;
- (v) Disclosure would lead to confusion and unnecessary debate resulting from disclosure of possible decisions considered;
- (vi) It would involve disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken, being unfair to a decision – maker and prejudicial to the integrity of the decision-making process; and
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It is submitted that those documents marked 'Legal Professional Privilege' are privileged and should not be made public on one or more of the available grounds:

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common interest in relation to the subject matter of the advice received by one of them (common interest privilege).

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Narelle Wooden

From: Carolyn_Bernhardt@agd.nsw.gov.au
Sent: Wednesday, 18 May 2011 6:12 PM
To: Narelle Wooden
Subject: Crown Solicitor's Advice - SO 52 Call for Papers
Attachments: 201101382 advltr.pdf; 201101382 Advice 1.pdf

Dear Ms Wooden,

I refer to your request for Crown Solicitor's advice in this matter. Attached herewith is advice and covering letter of today's date.

If I can be of any further assistance please do not hesitate to contact me.

Regards,

Carol

Carol Bernhardt
PA to Crown Solicitor/Administrative Assistant Government Law

NSW Crown Solicitor's Office | Level 5, 60-70 Elizabeth Street, Sydney NSW 2000
GPO Box 25 SYDNEY 2001 | DX 19 SYDNEY | www.cso.nsw.gov.au
Email: carol_bernhardt@agd.nsw.gov.au | Tel: (02) 9224 5240 | Fax: (02) 9224 5244

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C

C



**Crown
Solicitor's
Office**

Your Ref:
My Ref: 201101382
T08 John McDonnell
Tel: (02) 9224-5238
Fax: (02) 9224-5244
Email: crownsol@agd.nsw.gov.au

18 May 2011

Ms Narelle Wooden
General Counsel
State Super (SAS Trustee Corporation)
DX 10152 SYDNEY STOCK EXCHANGE

By email: narelle_wooden@statesuper.nsw.gov.au

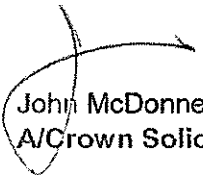
Dear Ms Wooden

Flowers J F - SO 52 Call for Papers

I enclose my advice in relation to the above matter.

Should you have any queries in relation to the matter, or if you require any further assistance, please do not hesitate to contact John McDonnell on tel: (02) 9224-5238.

Yours faithfully


John McDonnell
A/Crown Solicitor

Encl.





CROWN SOLICITOR
NEW SOUTH WALES

Advice

Flowers J F - SO 52 Call for Papers

Contents

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Prepared for: SAT722 SAS Trustee Corporation
Date: 18 May 2011
Client ref: Narelle Wooden
CSO ref: 201101382 T08 John McDonnell

1. Summary of advice

- 1.1 You have sought my urgent advice as to whether the SAS Trustee Corporation ("STC"), as Trustee of the STC Schemes under the *Superannuation Administration Act 1996* ("the Act"), is permitted to provide documents purportedly required under a resolution of the Legislative Council made under Standing Order 52 ("SO 52").
- 1.2 In my view, the Legislative Council cannot require production of any documents from the STC under SO 52.
- 1.3 Nor can the Legislative Council require the Minister administering the Act to produce documents "relating to Mr Flowers" as the Minister's power of direction and control does not extend to requiring production of documents relating to an individual member to the Legislative Council, the Minister or the Department of Premier and Cabinet ("DPC").
- 1.4 More importantly, in my view, STC is not permitted to provide these documents in 1.3 above to the Legislative Council, the Minister or DPC by reason of a prohibition in the *Privacy and Personal Information Protection Act 1998* ("PPIP Act") and implications to be drawn from the Act itself.
- 1.5 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Background

- 2.1 You instruct that SAS Trustee Corporation ("STC") is the trustee of the STC schemes as that term is defined under the Act. The STC schemes include the State Authorities Superannuation Scheme, the Police Superannuation Scheme, the State Superannuation Scheme (SSS) and the State Authorities Non-contributory Superannuation Scheme. STC, as the trustee of these superannuation schemes, must comply with all common law duties, obligations and rights of trustees and the obligations, duties and rights of trustees under the *Trustee Act 1925* and the Act. In addition, it has privacy obligations to its members under the *Privacy and Personal Information Protection Act 1998* ("PPIP Act").
- 2.2 The Chief Executive Officer of STC received a letter from Paul Miller, General Counsel of the DPC, on 9 May 2011 requiring production of certain documents under SO 52 by the Legislative Council. The Resolution of the Legislative Council required production of those documents in the possession, custody or control of SAS Trustee Corporation "relating to the eligibility of Mr John Frederick Flowers, MP, and Member

for Rockdale to be elected and to hold a seat as a member of the Legislative Assembly by 20 May 2011".

- 2.3 Mr Flowers was in receipt of a break down pension under the SSS scheme until he requested that pension be cancelled under clause 11A of the *Superannuation Regulation 2006* (NSW).

3. Advice sought

- 3.1 You seek my urgent advice as to whether STC is permitted to provide the documents required under the Resolution to the DPC and, ultimately, the Legislative Council.
- 3.2 Please note that the text of relevant legislation is set out in the Appendix to this advice.

4. Advice

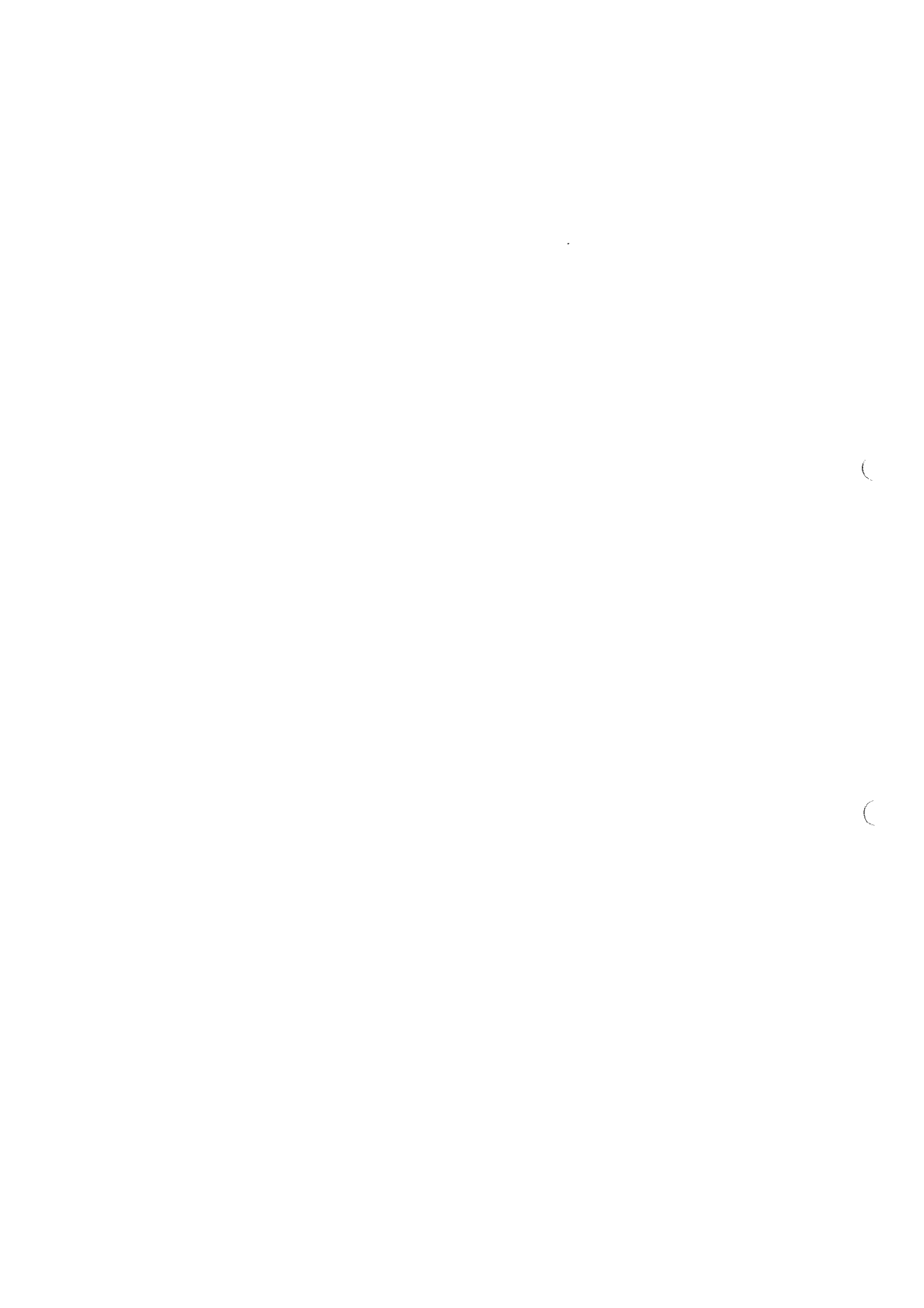
Power of Legislative Council to require production by STC

- 4.1 By letter dated 9 May 2011, General Counsel for the DPC wrote to the STC's Chief Executive Officer informing him of the Legislative Council's Resolution of 6 May 2011, and advising him of the applicable guidelines, including a guideline that copies of all documents falling within the terms of the Resolution be provided to DPC in a certain format.
- 4.2 Standing Order 52(1), made under s.15(1)(a) of the *Constitution Act 1902*, provides that "the Clerk is to communicate to the Premier's Department, all orders for documents made by the House". The Order here requires tabling of "all documents, excluding all personal medical records created since 26 March 2011, in the possession, custody or control of ... the Department of Premier and Cabinet, the Minister for Finance and Services ... and the SAS Trustee Corporation relating to the eligibility of Mr John Frederick Flowers MP ... to be elected and to hold a seat ... excluding all correspondence between Mr Flowers and the SAS Trustee Corporation".
- 4.3 Thus, the Resolution, properly construed, calls for documents created since 26 March 2011, in the possession, custody or control of STC, except personal medical records and correspondence between STC and Mr Flowers.
- 4.4 There is an issue, however, as to whether the Legislative Council has the power to make a resolution addressed to STC. In my view, it does not.
- 4.5 The Legislative Council has the power to compel production of State papers from the Executive Government (*Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563). The High Court has found that such a power is reasonably



necessary for the House for the proper exercise of the functions of the House and is given effect to in SO 52. As noted above, SO 52 provides that "[t]he House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House" (cl. (1)).

- 4.6 In holding that there is an implied power in the House to order Ministers to produce State papers, the High Court seems to have accepted the definition of "State papers of Gleeson" CJ in the NSW Court of Appeal, namely, "papers which are created or acquired by ministers, office-holders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of the State of New South Wales" (*Egan v Willis* (1996) 40 NSWLR 650 at 654; *Egan v Willis* (1998) 195 CLR 424 at 442 per Gaudron, Gummow and Hayne JJ).
- 4.7 The STC is constituted as a corporation and is, for the purposes of any Act, a statutory body representing the Crown (s. 48(3)). As a statutory body corporate, the STC's obligations to provide advice and annual reports to the Attorney-General are prescribed by statute.
- 4.8 In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 the High Court stated, in effect, that the executive branch to which the principle of responsible government attaches "is not confined to ministers and the public service", but extends to "the affairs of statutory bodies and public utilities which are obliged to report to the legislature or to a minister who is responsible to the legislature" (at 561). Their Honours referred to Lord Wilberforce in *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1168. After stating that the conduct of the British Steel Corporation's affairs and the disclosures and reports which had to be made were regulated by statute, his Lordship observed that "[t]he legitimate interest of the public in knowing about its affairs is given effect to through information which there is a statutory duty to publish and through reports to the Secretary of State who is responsible to Parliament". That is, to the extent that the Minister responsible to Parliament for the activities of the STC, he is required to rely on the STC's statutory reporting and advice-giving functions.
- 4.9 The High Court identified the executive branch as including "the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature". The joint judgment of Gaudron, Gummow and Hayne JJ in *Egan* at para [56] concluded with the following statement:
- "It is important to emphasise that no question arises in this case about what powers a House of the New South Wales Parliament may have to deal with persons who are not members of the House concerned. Altogether different considerations might arise in such a case."
- 4.10 There is therefore no authority to the effect that a House can order a person other than a Minister who is a member of the House to produce State or other papers to it. Accordingly, I do not think that the House can order the STC to produce State papers



to it. The power of a House to order a Minister to produce documents appears to be confined to documents which are in the custody and control of the Minister or which the Minister is able to obtain (*Egan v Willis* at 444 and 447).

- 4.11 Accordingly, given that the accepted basis of the power in SO 52 is s.15(1)(a) of the *Constitution Act* relating to the "orderly conduct" of the House, I am of the view that the power of the Legislative Council under SO 52 to require production of documents does not extend to statutory corporations such as the STC.

Power to require production by a Minister

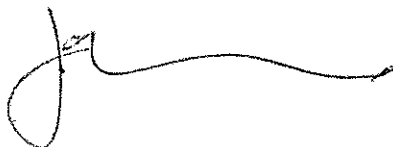
- 4.12 The next question is whether the Legislative Council could achieve indirectly what it cannot achieve directly by seeking to obtain the documents through the Minister responsible for the STC. However, that means, for indirect production to be effective, the Minister must have the power to acquire production of papers held by the STC.
- 4.13 In this regard, s. 55 provides that the STC must comply with a direction of the Minister "relating to the exercise by STC of any one or more of its functions, if the Minister is of the opinion that an act or omission, or conduct, by STC has had or could reasonably be expected to have a significant adverse effect on the Consolidated Fund or the financial management of the State" (s. 55(1) and (2)). Such a direction must not be inconsistent with the Act (s. 55(1)) and the Minister, in making the direction, must have regard to the interests of persons entitled to receive benefits under the STC schemes (s. 55(3)(a)). Any direction under s. 55 must be laid before Houses of Parliament (s. 56). In my view, no direction could be given under s.58.
- 4.14 As noted above, s. 55 is to be interpreted subject to the rest of the Act. Section 90 requires the STC to furnish to the Minister administering the Act or the Minister administering the STC fund Acts, such information relating to the general administration and operation of the STC schemes and the STC Fund as the Minister concerned may from time to time require (s. 90(1)), but the STC must not furnish information relating to an individual member of an STC Scheme to a Minister except with the member's consent (s. 90(2)). I assume such consent has not been provided.
- 4.15 Section 97, more generally, authorises the Minister or an "authorised person" to require STC to give to the Minister or authorised person information or a report relating to STC's exercise of its functions, on matters in relation to specified years of income. However, I do not think that the broad authorisation in s. 97 could override the more specific prohibition in s. 90(2).
- 4.16 Accordingly, in my view, the fact that the resolution is also addressed to the Minister for Finance and Services will not enable the Legislative Council to obtain access to those documents as the Minister has no power to direct STC to provide him with the documents falling within the prohibition in s. 90 (2), that is, information relating to an individual member.



Power to provide documents to the DPC

- 4.17 The legislative scheme of the Act, including the functions of the STC set out in your instructions, suggests strongly that, although there is no general secrecy provision in the Act, disclosure of information relating to individual members or, indeed, any information obtained in the administration and execution of the Act, only occur in the rare circumstances contemplated by ss. 55, 90 and 97.
- 4.18 Likewise, s. 18 of the *PIIP Act* would appear to expressly prohibit disclosure by STC of Mr Flowers' "personal information". I can find no exemption under ss. 18, 19, 23 or 25 which would enable exemption from that prohibition. In particular, whilst DPC coordinates the return to be made by the Executive to orders for production and is referred to in Standing Order 52(1) itself, I do not think that disclosure of members' personal information is lawfully authorised, necessarily implied, or even reasonably contemplated within the meaning of s. 25 of the *PIIP Act*.
- 4.19 Nor, having regard to the conclusion I have reached above as to the power of the Legislative Council to compel STC to provide documents, could a power to coordinate production by DPC be implied.
- 4.20 Accordingly, in my view, STC has no power to provide the documents to DPC for coordinating its response to the call for documents. More importantly, STC is not permitted by the *PIIP Act*, and probably implications in the Act itself, to provide the documents to DPC or the Legislative Council.

Signed:



John McDonnell
A/Crown Solicitor

Appendix: Relevant legislation

Superannuation Administration Act 1996

48 Continuation of STC (formerly the State Authorities Superannuation Board)

- (3) STC is, for the purposes of any Act, a statutory body representing the Crown.

55 STC to be subject to Minister's directions in certain circumstances

- (1) The Minister may give a direction to STC relating to the exercise by STC of any one or more of its functions if the Minister is of the opinion that an act or omission, or conduct, by STC has had or could reasonably be expected to have a significant adverse effect on the Consolidated Fund or the financial management of the State. A direction must not be inconsistent with this or any other Act.
- (2) STC must comply with any such direction.
- (3) In giving a direction the Minister must have regard to:
- (a) the interests of persons entitled to receive benefits under the STC schemes, and
 - (b) the duties and obligations of STC and the members of the STC Board.
- (4) Nothing in this section constitutes the Minister as a trustee of the STC schemes.
- (5) STC is not liable for anything done or omitted for the purpose only of complying with a direction of the Minister under this section.

90 Provision of information to relevant Ministers

- (1) STC must furnish to the Minister administering this Act or the Minister administering the STC fund Acts such information relating to the general administration and operation of the STC schemes and the STC funds as the Minister concerned may from time to time require.
- (2) Despite subsection (1), STC must not furnish information relating to an individual member of an STC scheme to a Minister under this section, except with the member's consent.
- (3) In this section, *STC fund Acts* mean the Acts referred to in the definition of *STC fund* in section 4.

97 Information to be given to Minister and authorised persons

- (1) The Minister or an authorised person may, by written notice to STC, require STC, within a specified period, to give to the Minister or authorised person in relation to a specified year of income the information, or a report on matters, specified in the notice.
- (2) STC must comply with any notice given to it under subsection (1).
Maximum penalty: 50 penalty units.
- (3) The information or report required to be provided under subsection (1) must relate to STC's exercise of its functions.
- (4) If STC gives information or a report to the Minister or authorised person as required by this section, the Minister or authorised person must give to STC a written statement that the information or report has been received.

Constitution Act 1902 No 32

15 Standing Rules and Orders to be laid before Governor

- (1) The Legislative Council and Legislative Assembly shall, as there may be occasion, prepare and adopt respectively Standing Rules and Orders regulating:



- (a) the orderly conduct of such Council and Assembly respectively, and

...

Standing Order No. 52

Order for the production of documents

- (1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.
- (2) When returned, the documents will be laid on the table by the Clerk.
- (3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.
- (4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to have been presented to the House and published by authority of the House.
- (5) Where a document is considered to be privileged:
- (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,
 - (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:
 - (i) made available only to members of the Legislative Council,
 - (ii) not published or copied without an order of the House.
- (6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.
- (7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.
- (8) A report from the independent legal arbiter is to be lodged with the Clerk and:
- (a) made available only to members of the House,
 - (b) not published or copied without an order of the House.
- (9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

Privacy and Personal Information Protection Act 1998

18 Limits on disclosure of personal information

- (1) A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:
- (a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or
 - (b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or

- (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.
- (2) If personal information is disclosed in accordance with subsection (1) to a person or body that is a public sector agency, that agency must not use or disclose the information for a purpose other than the purpose for which the information was given to it.

25 Exemptions where non-compliance is lawfully authorised or required

A public sector agency is not required to comply with section 9, 10, 13, 14, 15, 17, 18 or 19 if:

- (a) the agency is lawfully authorised or required not to comply with the principle concerned, or
- (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the *State Records Act 1998*).

