

## REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

### Narrandera to Tocumwal Rail Line Reopening Feasibility Study

The Hon Keith Mason AC QC

2 June 2021

On 17 February 2021 the Legislative Council called for papers relating to the Narrandera to Tocumwal Rail Line Reopening Feasibility Study. The required documents were lodged, subject to claims of privilege relating to several of them. Those claims were supported by submissions but have been disputed in total by the Hon Mark Banasiak MLC in his letter of 31 March 2021. The Member accepts that redaction of private phone numbers and contact information is acceptable. The Member's letter raised some new material. At my request it was shown to Transport NSW which has provided further submissions in a letter to the Clerk dated 18 May 2021. The Member has responded in a letter of 26 May 2021.

The rail line is a 180 km stretch located in the Riverina and Murray regions. It has been closed since 1988. At the initiative of the Narrandera Shire Council, Government funded a reopening Feasibility Study. It was carried out by Lycopodium Infrastructure Pty Ltd and completed in June 2018. The objectives of the Study included analysis of the demand for usage of the line in addition to an economic and financial analysis to determine the case for reopening. The lengthy document assesses engineering, land use and environmental factors. Stakeholder engagement included consultation with the Council, key industries that might use the reopened line for freight delivery, and focus groups (see para 3.4).

Copy of the Study has been provided to Council but Councillors and officials have been obliged to maintain secrecy as to its details. An executive summary has been published, suggesting that the benefits did not justify investing to reopen the line. The Council and the Member make no secret of their wish to explore private investment options. The issue remains controversial. In addition, there has been a referral to ICAC stemming from certain allegations.

The Member argues that there is no justification for keeping the Report secret given that the Government has made it clear that the project will not be proceeding. He stated in his original letter that "private sector investors are interested in reviving this vital rail link. Information contained in this report could help them proceed with a project that has the potential for enormous economic benefit to the region". I respectfully endorse the submission of Transport for NSW that this in *itself* is irrelevant to the dispute that I am appointed to report upon given that the focus of my role is the constitutional role of the House, not a freedom of information exercise (see *Register of Buildings Containing Potentially Combustible Cladding Report*, p 5).

Of course, the submissions of one Member, indicating his or her particular interest in full access to the papers will always guide but not limit the scope of the evaluation required of the independent legal arbiter under the Standing Order. My understanding to this effect is reflected in the quotation marks around the words 'the parties' that appear when I discuss the competing submissions being analysed in reports to the House.

In the present matter, the Member has clarified in his latest letter that "the primary reason for releasing this report is not to assist the private sector. It's to enable the public to scrutinise the

investment decision-making processes of the NSW Government, to determine if decisions are made consistent with best practice principles." For what it is worth, I would have inferred the latter consideration to be one of the principal factors underpinning this call for papers and the resistance of the claim of privilege.

The Member has disclosed an additional purpose of his resistance to the claim, namely the desire to debate a particular matter related to what he characterises as "an apparent blackmail threat...in response to Narrandera Shire Councillor's call for the report to be publicly released". (I record this without, of course, indicating any position of that matter.)

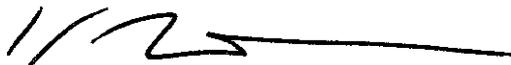
The matters addressed in the two previous paragraphs establish a strong case for the public interest favouring unrestricted access to the Feasibility Study and related documents. Significant sums of money are involved and clear evidence is required to outweigh the public interest in effective parliamentary scrutiny of projections of future needs, costs, options and feasibilities. Cf *Newcastle Education Precinct Report*, p 2, *Dam Infrastructure Projects Report*.

I have not overlooked the Government's submissions invoking "commercial-in confidence" but consider them insufficient to establish a public interest in restricting disclosure and debate. As the member points out, arguments suggesting that potential bidders in other projects might "align their bids" with reference to the "NSW Government's pre-construction and construction requirements" are essentially speculative and indeed cut both ways. The added suggestion that bidders for a public project may be unlikely to put their best foot forward if fearful of appropriate scrutiny by Government and by the House is equally unpersuasive, in my view. Summaries of the attitudes of stakeholders are likely to contain information important to the House and their public disclosure is unlikely to restrict similar co-operation in future feasibility studies of this nature. Information about the cost to the public of the particular feasibility study itself does not attract privilege, in my evaluation, this whether or not such studies are put out to tender.

Accordingly, I report that the claims of privilege have not been established in my estimation.

Transport NSW has indicated minor redactions of particular documents so as to exclude the private information of individuals: see letter dated 18 May 2021, para 30. I do not understand the Member to oppose this.

I thank Ms Lauren Evans for her assistance.



The Hon Keith Mason AC QC

18 May 2021

Mr David Blunt  
Clerk of the Parliaments  
NSW Legislative Council Parliament House  
Macquarie Street Sydney NSW 2000

Dear Mr Blunt

**Standing Order 52 – Order for Papers – Narrandera to Tocomwal Rail Line Reopening Feasibility Study – Privilege claim dispute**

1. I refer to:
  - (a) the order made by the Legislative Council on 17 February 2021 for certain documents in relation to the Narrandera to Tocomwal Rail Line Reopening Feasibility Study (**the Study**) to be tabled in the House pursuant to Standing Order 52 (**the Order**);
  - (b) the submission made by Transport for New South Wales (**TfNSW**) on 12 March 2021 in support of claims for confidentiality and privilege in respect of the whole or part of 24 of the 54 documents produced by TfNSW to the Legislative Council in pursuant to the Order (**the Privileged Documents**);
  - (c) the letter from the Honourable Mark Banasiak MLC to the Clerk of the Legislative Council dated 31 March 2021 requesting a review of the privilege status of the Privileged Documents; and
  - (d) the letter from the Arbiter to TfNSW dated 10 May 2021 inviting TfNSW to respond to Mr Banasiak's letter.
2. This submission sets out TfNSW's response to Mr Banasiak's letter and provides further support for the claim for privilege made over the Privileged Documents.

**Background**

3. The Narrandera to Tocomwal Railway Line (**the Railway Line**) is a 180km stretch of non-operational railway line located in the Riverina and Murray regions of NSW.
4. On 10 August 2018, Lycopodium prepared the Study, which reports on the viability and business case for the reinstatement of the Railway Line. The Narrandera Shire Council applied for funding for the Study from the NSW Government's Fixing Country Rail program. This program provides targeted infrastructure funding from the Restart NSW Fund for regional freight projects. John Holland, which operates and maintains the rail network in regional NSW on behalf of TfNSW, commissioned the Study.
5. The Study concluded that the reinstatement of the Railway Line would not be economical, as any benefits of the project would be outweighed by the upfront construction costs and ongoing costs of operating and maintaining the Railway Line.
6. The Order required TfNSW to table the following documents in the House:
  - (a) the final, complete and unredacted version of the Study;
  - (b) all correspondence relating to the Study; and

- (c) any legal or other advice regarding the scope or validity of the Order created as a result of the Order being made.
7. On 12 March 2021, TfNSW produced 54 documents to the Legislative Council in response to the Order, accompanied by its submission in support of claims of privilege made over the 24 Privileged Documents. This included a claim of privilege over the whole of the Study, as well as a claim for privilege over the parts of the remaining 23 documents that are outlined in red.

#### Challenge to TfNSW's privilege claims

8. Mr Banasiak has requested a review of the privilege claims made by TfNSW in respect of the Study on the basis that:
- (a) there is no public interest in keeping the Study secret in circumstances where the NSW Government has decided that it will not be proceeding with the reinstatement of the Railway Line; and
- (b) there is a public interest in disclosing the Study because information contained in the Study could assist private sector investors interested in reinstating the Railway Line proceed with a project that has the potential to benefit the region.
9. In support of his submissions, Mr Banasiak relies on the decision in *ACCC v Baxter Healthcare Pty Ltd* [2003] FCA 994. TfNSW respectfully submits that this decision does not assist the Arbiter. It involved close consideration of each of the documents over which confidentiality was claimed, such that his Honour Justice Whitlam's findings cannot be extrapolated. Further, privilege is not claimed on the basis that the Privileged Documents disclose evaluative processes as it was in that case. Rather, as set out in further detail in paragraphs 16 to 25 below, because they contain information that could affect the integrity of tenders in existing and future railway projects and disclose the trade secrets of stakeholders, which his Honour distinguished from non-confidential evaluative processes.<sup>1</sup>
10. Mr Banasiak has also requested a review of the privilege claims made by TfNSW over the further 23 documents over which privilege is claimed, but accepts that private phone numbers and other contact information can be redacted.
11. TfNSW's response to Mr Banasiak's submissions are set out below.

#### The relevant test

12. Pursuant to paragraph (5)(b) of Standing Order 52, documents over which privilege is claimed are to be delivered to the Clerk of the Legislative Council and:
- (a) made available only to members of the Legislative Council; and
- (b) not published or copied without an order of the House.
13. The validity of claims for privilege over such documents are assessed by weighing up whether the public interest in publishing the documents in the exercise of a parliamentary function outweighs the public interest in the documents not being published.<sup>2</sup> Put another way, public debate stemming from documents tabled under Standing Order 52 has been described by the Arbiter as the '*essence of representative democracy*', but that is only '*so long as overriding harm is not done to the proper functioning of the executive arm of Government and of the public service*' as a result of documents being disclosed.<sup>3</sup>
14. Mr Banasiak asserts that there is a public interest in disclosing the Privileged Documents because their disclosure could assist private sector investors interested in reinstating the Railway Line. TfNSW submits that this is not a factor that is relevant to the Arbiter's consideration of these claims as it does not aid the House in considering the Government's decision not to reinstate the Railway Line. That is to say, disclosure for the purpose of assisting potential private sector investment, does not serve the public interest in the exercise of a parliamentary function.

<sup>1</sup> *ACCC v Baxter Healthcare Pty Ltd* [2003] FCA 994 at [19].

<sup>2</sup> Arbiter The Hon Keith Mason AC QC, 'Report Under Standing Order 52 on Disputed Claim of Privilege – WestConnex Business Case' (08 August 2014), 9.

<sup>3</sup> Arbiter The Hon Keith Mason AC QC, 'Report Under Standing Order 52 on Disputed Claim of Privilege – WestConnex Business Case' (08 August 2014), 8.

**Application of the relevant test to the Privileged Documents**  
***Privilege claim over the Study***

15. The overriding public interest is in maintaining confidentiality over the Study for two reasons.

*Disclosure of information that would inhibit the competitive tender process in comparable projects*

16. First, the Study discloses commercially sensitive information in relation to the costing of regional railway projects which, noting that the NSW Government is continuing to actively consider and fund such projects, could have a negative impact on the ability of the NSW Government to obtain competitively priced bids from contractors and other commercial entities in respect of comparable projects in the future for the reasons set out below.
17. Whilst the NSW Government has determined not to fund the reinstatement of the Railway Line, the Fixing Country Rail Program is ongoing and TfNSW is continuing to consider whether and how to grant funding under the that program. Most recently, for example, the NSW Government has announced funding under this program for further design and planning in respect of the extension of the rail passing loop at Cowra (March 2021), the reinstatement of the Blayney Demondrille railway lines (January 2021) and the construction of the master rail siding and the intermodal freight terminal in Wagga Wagga (January 2021).
18. As set out in TfNSW's submissions dated 12 March 2021, the Study discloses commercially sensitive information in respect of the proposed reinstatement of the Railway Line, including the estimated cost of various stages and components of reinstatement and maintenance (pp 98 – 113; 125 – 126; 128 - 129) and cost benefit analyses for each of the nine options considered by Lycopodium for reinstatement of the Railway Line (pp 13 – 16). The Study also discloses how the NSW Government assesses the non-financial benefits of such projects (e.g. pp 16 – 17).
19. The disclosure of this information would remove competitive uncertainty among those tendering for comparable regional rail projects, as it would enable bidders to align their bids to the projected costs set out in the Study. It would grant bidders to such projects with access to detailed information about the NSW Government's pre-construction and construction requirements, as well as the cost / benefit implications of a comparable project, which may influence the price and non-price factors forming the basis of what should otherwise be a highly competitive tender process in order to achieve the best outcome for taxpayers.
20. There is therefore a strong public interest in preventing the disclosure of the Study, as this would adversely affect the NSW Government's ability to obtain competitively priced bids for comparable Fixing Country Rail projects, meaning taxpayers may ultimately have to pay more for contracts than they otherwise would had the information not been disclosed to the public. TfNSW submits that the public interest in the efficient expenditure of taxpayer money that is upheld through non-disclosure of these documents substantially outweighs any public interest in these documents being disclosed beyond the House.

*Disclosure of information that would disincentivise future engagement with Government*

21. Secondly, the Study reveals commercially sensitive information belonging to non-government stakeholders that contributed to the Study on a commercial-in-confidence basis. There is a genuine concern that such stakeholders are less likely to respond with candour or provide commercially sensitive information to future government inquiries if that information is able to be disclosed without notice or consultation.
22. As the Arbiter has previously acknowledged, there is a balance to be struck between the
- 'Government's need to garner and process information from third parties under assurances of confidentiality that will not be lightly overridden by the House, and the House's need to stimulate the production of information from the public by broadcasting or allowing the media to broadcast the papers it has had returned'.<sup>4</sup>*
23. The types of commercially sensitive information included in the Study include:
- (a) the names and details of stakeholder organisations that contributed to the Study;

<sup>4</sup> Arbiter The Hon Keith Mason AC QC, 'Report Under Standing Order 52 on Disputed Claim of Privilege – WestConnex Business Case' (08 August 2014), 8.

- (b) their current and projected tonnage;
  - (c) how that tonnage is moved across Australia; and
  - (d) details of their commercial operations and / or interests;
- (pp 8-9; pp 129 - 130; Appendix C; and Appendix F of the Study).

24. Private sector cooperation and engagement is essential to the proper functioning of government. In the present context, as in others, stakeholder consultation is pivotal to the conduct of the Study, which concluded at page 9 that:

*"The business case is driven by the results of the stakeholder consultation and potential volume commitments rather than statistical demand."*

25. TfNSW submits that there is a genuine public interest in ensuring that the candour of stakeholders in future studies is not impeded by the disclosure of commercially sensitive information collected in confidence. Disclosing the Study would prejudice the ability of TfNSW to obtain such information from stakeholders for the purpose of assessing the viability of future projects, a harm which far outweighs any public benefit of having the Study disclosed. This is particularly so in circumstances where the NSW Government continues to consult with stakeholders in respect of key rail network strategies and regional rail projects.

#### ***Part-privilege claims over non-Study documents***

##### *Disclosure of information that would inhibit the competitive tender process in comparable projects*

26. Documents (b) 4 (summary of the Study), (b) 24 (email from Lycopodium containing updated sensitivities), (b) 52 and (b) 54 (excerpts from the Study) disclose cost estimates and cost-benefit analyses in respect of reinstating the Railway Line. TfNSW submits that the parts of those documents that are outlined in red should not be disclosed outside of the Council for the reasons set out in paragraphs 16 to 20 above.

##### *Disclosure of information that would disincentivise future engagement with Government*

27. Document (b) 26 reveals the commercially sensitive information of various stakeholders who contributed to the Study on a commercial-in-confidence basis. TfNSW submits that the parts of those documents that are outlined in red should not be disclosed outside of the Council for the reasons set out in paragraphs 21 to 25 above.

##### *Disclosure of the commercial information of Lycopodium*

28. Documents (b) 12, 21, 28, 30, 42, 44, 45, 47, 48, 50 and 51 reveal commercially sensitive information belonging to Lycopodium, including its own budgets and costs for preparing the Study, the hourly rates of the various personnel involved in the preparation of the Study and payments made by John Holland (TfNSW's contractor) to Lycopodium.
29. It is not in the public interest to disclose this information because it could be used by Lycopodium's competitors to obtain a competitive advantage in future projects, including tenders for government projects. It would also indicate that commercially sensitive information provided to the Government on a confidential basis can be released to the public without notice or consultation, which is against the public interest for the reasons set out in paragraphs 21 to 25 above.

##### *Disclosure of the private information of individuals*

30. TfNSW has redacted personal information of individuals in documents (b) 1, 5, 6, 11, 14, 19, 24, 26, 30, 39, 43 and 53, being the mobile phone numbers of stakeholders who made contributions to the Study and of Lycopodium staff members.
31. Mr Banasiak does not object to private phone numbers and contact information being redacted. However, for completeness, I note that the Arbiter has previously stated that there is a demonstrable public interest in personal privacy, which has been accommodated in the past through 'a regime of agreed, recommended or accepted redactions such as with private email

*addresses and the like*.<sup>5</sup> Consistent with that regime, TfNSW has not redacted work email addresses and work phone numbers, but only redacted the private information of individuals.

Please do not hesitate to contact me if you have any queries in relation to the above.

Yours sincerely



Sally Webb  
**Group General Counsel**

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<sup>5</sup> Arbitrator The Hon Keith Mason AC QC, 'Report Under Standing Order 52 on Disputed Claim of Privilege – Landcom Bullying Allegations 2019 Part 1: Treasury Return of Papers' (13 September 2019), 3.



021/26378

26 May 2021

Mr David Blunt  
Clerk of the Parliaments  
Legislative Council  
Parliament of New South Wales

Via email: [david.blunt@parliament.nsw.gov.au](mailto:david.blunt@parliament.nsw.gov.au)

Dear Mr Blunt,

I write in response to Transport for NSW's letter to you titled "Standing Order 52 – Narrandera to Tocumwal Rail Line Reopening Feasibility Study – Privilege claim dispute", dated 18 May 2021.

I will respond to Transport for NSW's three reasons to keep the report and associated documents secret, explaining why these reasons are not valid.

**1. Assisting private sector investors interested in reinstating the Railway Line "does not serve the public interest"**

The primary reason for releasing this report is not to assist the private sector. It's to enable the public to scrutinise the investment decision-making processes of the NSW Government, to determine if decisions made are consistent with best practice principles.

Nevertheless, the revival of this rail line would deliver enormous social and economic benefits to two towns that have been declined since the NSW Government decommissioned the rail line. This is also in the public interest.

Given the NSW Government has broken its election promise to reactivate the line, the private sector should be given all the information and opportunities they need to commence work on a project that has immense flow on benefits to other industries and the general population.

**2. Disclosure of information that would inhibit the competitive tender process in comparable projects**

Transport for NSW claim the disclosure of information in this study would impact on similar tendering projects, as it would "enable bidders to align their bids to the projected costs set out in the study" and inform future bidders about the "NSW Government's pre-construction and construction requirements".

This is actually a something positive and a reason the study should be publicly released.

Providing private sector investors with more information about government tendering processes and government construction costs – so they can devise better, more targeted tenders – is very much in the public interest.





Moreover, if the report is publicly released, all private sector operators would have equal access to the same information. It would not give one company an advantage over another.

Currently, certain companies with a close relationship to government have a comparative advantage when it comes to accessing government information and tendering for projects.

Attachment A spells out the reason why Narrandera Shire Council's Mayor and other rail experts believe this rail study did not provide value for taxpayers' dollars.

Providing information to the public on NSW Government construction requirements would allow for better tender documents in the future.

### **3. Disclosure of information would dis-incentivise future engagement with Government**

Transport for NSW claim that the public release of this report would discourage "the candour of stakeholders in future studies".

This laughable claim is not supported by any evidence whatsoever.

Less than 1 per cent of the report includes information about private providers' commercial operations.

Moreover, any data contained in the report is now three years old and would be out of date.

If necessary, any data on private commercial operations can be redacted. This is not a reason to keep the entire report and associated documents secret.

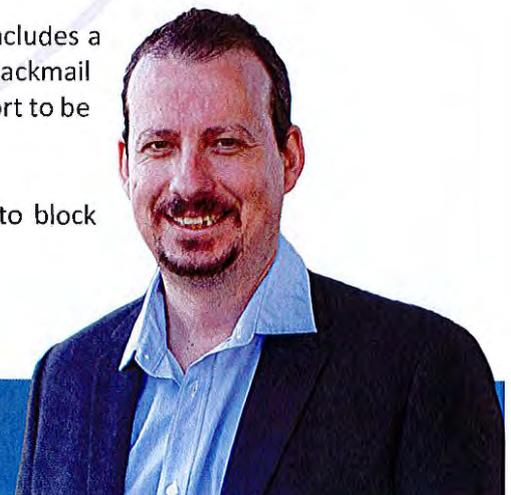
A small number of select companies tend to get all the rail contracts with the NSW Government. Providing more information publicly would encourage more engagement with government from stakeholders, not discourage it.

#### **Why the case for public release of documents is strengthened**

The NSW Government's determination to keep this report and associated documents secret – based on spurious grounds – further highlights the need for transparency.

Attachment B is Helen Dalton MP's referral of this matter to ICAC. It includes a letter from Narrandera mayor Neville Kschenka, where an apparent blackmail threat is made in response Narrandera Shire Councillor's call for the report to be publicly released.

It's hard to understand why the NSW Government is so determined to block transparency.





This release of this report and associated emails could shed light on misuse of taxpayers' money and possible corruption. This is in the public interest.

I therefore reiterate my call for the privilege status of all privileged documents to be revoked.

At best, Transport for NSW has only made the case to redact private phone numbers, contact information and some data on the commercial operations of private providers.

Yours sincerely,

Mark Banasiak MLC

