

2020 CPD CONFERENCE

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Session 5: Access to information

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Releasing information

Kiri Mattes, Principal Solicitor

Responding to orders for papers by the Legislative Council

Tom Chisholm, Principal Solicitor

Issuing and responding to statutory notices

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Releasing information

Matters to consider when advising about the release of government information

Kiri Mattes, Principal Solicitor



Releasing information

- Framework for analysis:
 - Prohibitions on release?
 - Source of authorisation?
 - Release under GIPAA
- Releasing “personal information”
- Strategic considerations



Framework for analysis

Are there any provisions that constrain or prohibit the release of information?

- Statutory provisions, non-publication orders, suppression orders
- What is the scope of information captured by provision?
- What is the nature of the constraint/prohibition
 - Disclosure?
 - Publication?
 - Use?
- Are any exceptions applicable?



Framework for analysis

What is source of authorisation to release information?

- Executive power of government?
- Statutory provision?
 - What is the extent of authorisation granted – *disclosure, publication*?
 - On whom is the authorisation conferred?
 - Any limitations as to the scope of information subject to authorisation? Purpose for which information may be disclosed?



Framework for analysis

Release of information authorised by the GIPA Act?

- Avenues for release of information under the *GIPA Act*
 - s. 6 – Mandatory to publish “open access” information
 - s. 7 – authorises “proactive release” of government information
 - s. 8 – authorises release in response to informal application
 - s. 9 – formal access applications



Framework for analysis

Release of information authorised by the GIPA Act?

- Authorisation does not extend to where there is an “overriding public interest against disclosure”
 - prejudice effective functioning of government?
 - prejudice law enforcement/security?
 - “personal information”/privacy concerns?
 - prejudice business interests?
- Protections where release authorised under the *GIPA Act*:
 - actions for defamation or breach of confidence
 - certain criminal actions
 - personal liability



Releasing “personal information”

“**personal information**”: “information or an opinion ... about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion”: s. 4 of the *Privacy and Personal Information Protection Act 1998* (PIIP Act)

PIIP Act s. 18 – Limits on disclosure of personal information

- Disclosure not prohibited where:
 - Directly related to purpose for which information collected, and agency has no reason to believe individual concerned would object; or
 - Individual concerned reasonably likely to have been aware, or has been made aware in accordance with s. 10, that information usually disclosed to other person



Releasing “personal information”

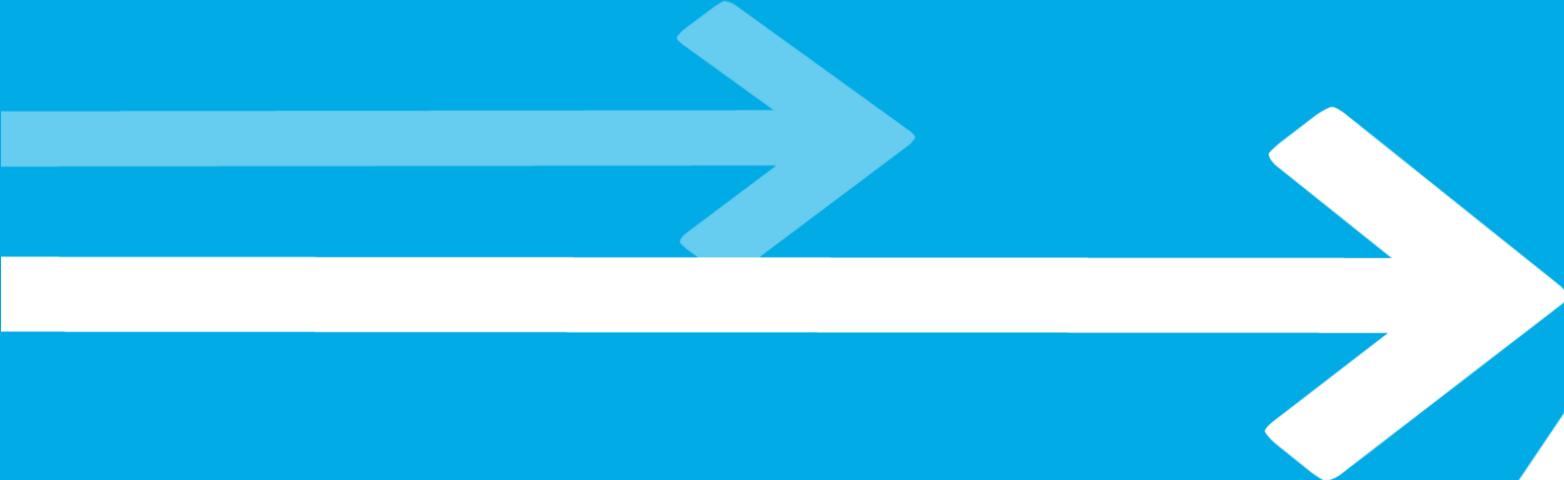
PPIPI Act

- Section 10 notification requirements
 - apply at time information is collected, or as soon as practicable after collection
 - Notification requirements include notifying:
 - purpose for which collected
 - intended recipients of information
- Section 25 – non-compliance lawfully authorised, otherwise permitted (or necessarily implied or reasonably contemplated) under an Act or other law
- Section 26(2) – compliance with s. 18 not required when individual has expressly consented to non-compliance



Strategic considerations

- Will disclosure open up administrative actions to judicial review or some other challenge?
- Will release undermine any argument may wish to make about confidentiality of other information?
- Waiver of privilege?
- Release may meet objectives of open information/transparency etc. – strengthen arguments for not releasing other, more sensitive information



Responding to orders for papers by the Legislative Council

Tom Chisholm, Principal Solicitor

Expulsion from the Legislative Council



Image credit
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Reasonable necessity

“The principle derived from the authorities and not challenged on this appeal is that the Legislative Council has such powers, privileges and immunities as are **reasonably necessary** for the **proper exercise** of its **functions**.”

Egan v Willis (1998) 195 CLR 424 at 453-454; [1998] HCA 71 at [48] (Gaudron, Gummow and Hayne JJ).



The Legislative Council's functions

- Was it reasonably necessary for the exercise of its functions for the Legislative Council to have power to order a Minister, and a member of that House, to produce State papers?
- The Court considered the Council's:
 - law-making functions; and
 - “scrutiny” functions.



Scrutiny functions

- Many aspects of **responsible government**, as it presently exists in the State, are not identified in the *Constitution Act 1902* and depend upon what has come to be fixed by **convention**.
 - *Egan v Willis* (1998) 195 CLR 424 at 449; [1998] HCA 71 at [36].
- One aspect of responsible government “is that Ministers may be members of either House of a bicameral legislature and liable to the **scrutiny** of that chamber in respect of the **conduct** of the **executive branch** of government.”
 - *Egan v Willis* at 453; [45].



Egan v Willis – findings

- The Legislative Council has power to compel a Minister, and Member of that House, to produce State papers.
- The House had power to suspend the Treasurer for a short period, given his non-compliance with the House's order.



Limits of the power

Egan v Chadwick (1999) 46 NSWLR 563; [1999] NSWCA 176.

- Whether the House could compel production of documents subject to public interest immunity (including Cabinet documents) and legal professional privilege.
- Chief Justice Spigelman's analysis of two aspects of ministerial responsibility: collective and individual.
- Two recent articles in the *Public Law Review* discuss *Egan v Chadwick*: (2018) 29 PLR 118, and (2018) 29 PLR 277.



SO 52 – order to produce 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.



SO 52 – “automatic” publication unless privilege claimed

- 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.
 - If the House **is sitting**, the documents are to be laid on the table by the Clerk (SO 52(2)); and are **authorised** to be **published** by the authority of the House (under SO 54(3)).



SO 52 – claim of privilege

- 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.



SO 52– disputing a claim of privilege

- 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.
 - The arbiter is not a delegate, and does not make decisions on behalf of the House.



SO 52 – report by a legal arbiter

- 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.



“Privilege” under SO 52

- A common meaning of “privilege” is an **immunity** from being compelled to produce documents or provide information.
- The High Court recently confirmed that legal professional privilege is “only an immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications”: *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [12]; see also at [16].
- Public interest immunity is also an immunity in this sense: *HT v R* [2019] HCA 40 (especially at [29]).



“Privilege” under SO 52

- A claim of “privilege” under SO 52 is **not**, however, a claim that documents are immune from production to the House.
 - (*Egan v Chadwick* considered whether certain categories of documents were immune from production.)
- The effect of an undisputed claim of privilege under SO 52 is that documents **produced to the House** may be viewed only by Members and are not made public (SO 52(5)(b)).



“Privilege” under SO 52

- There are no decided cases on the meaning of “privilege” under SO 52, and its history sheds relatively little light.
- Claims of “privilege” are generally made by reference to conventional common law categories (such as legal professional privilege and public interest immunity).
- “Privilege” under SO 52 has been considered in various reports by legal arbiters.

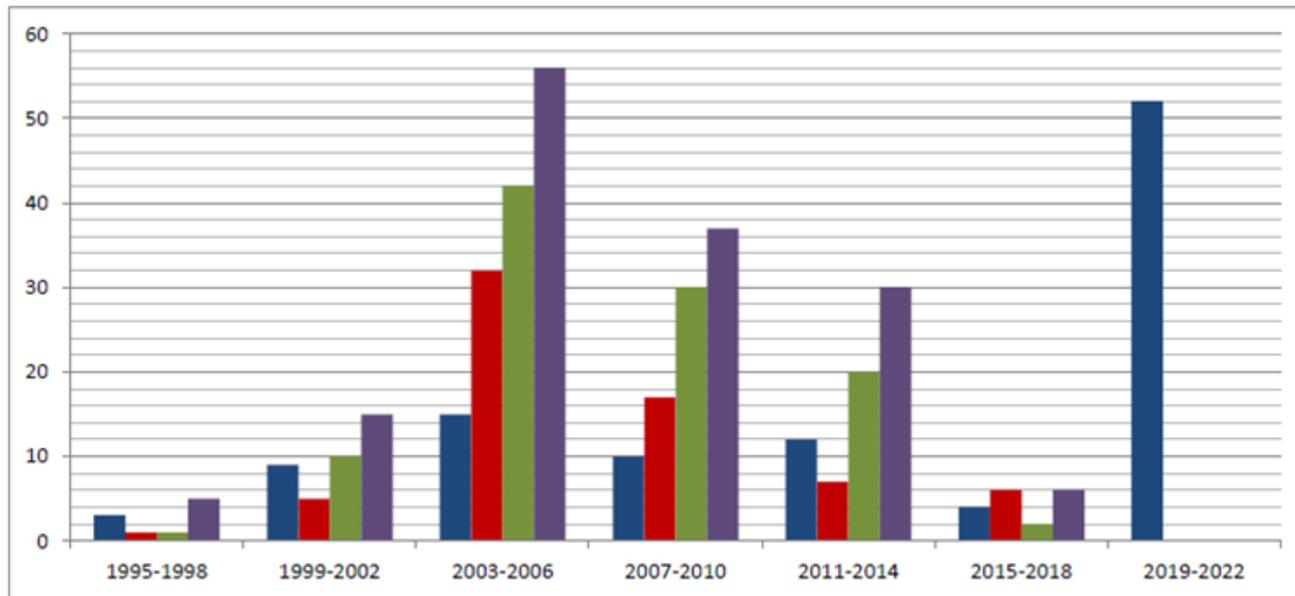


“Privilege” under SO 52

- In a recent report, the arbiter found that documents subject to legal professional privilege at common law may not necessarily be privileged under SO 52.
- Whether such documents are privileged may depend on the weight given to public interest considerations and the need for Members to access information in exercising the House’s “scrutiny” functions”.
- See The Hon. Keith Mason AC QC, *Report under Standing Order 52 on Disputed Claim of Privilege: Landcom Bullying Allegations*, Part 1, 13 September 2019.
- But see also the Hon. J Campbell QC, *Report under Standing Order 52 on Disputed Claim of Privilege: Allegations against the Hon. John Sidoti MP*, 4 November 2019.

Orders for papers – some statistics

Legislative Council: Orders for papers made per calendar year since 1995



Total orders for papers made in 51st Parliament (1995-1998): 10

Total orders for papers made in 52nd Parliament (1999-2002): 39

Total orders for papers made in 53rd Parliament (2003-2006): 145

Total orders for papers made in 54th Parliament (2007-2010): 94

Total orders for papers made in 55th Parliament (2011-2014): 69

Total orders for papers made in 56th Parliament (2015-2018): 18

Total orders for papers made in 56th Parliament (2015-2022): 52



SO 53 – requesting documents from the Governor

Standing Order 53 provides that the production of documents concerning:

- the royal prerogative,
- dispatches or correspondence to or from the Governor, or
- the administration of justice;

will be in the form of an address presented to the Governor requesting that the document be laid before the House.



Statutory non-disclosure provisions

Could a statutory non-disclosure (or “secrecy”) provision apply so as to prevent a Minister from being compelled to produce documents under SO 52?

- There are authorities supporting the view that legislation will only limit the powers or privileges of Parliament if it does so **expressly** or by **necessary implication**.
 - See *Aboriginal Legal Service of Western Australia Inc. v State of Western Australia*; (1993) 9 WAR 297 at 304; (1993) 113 ALR 87 at 108; and *Criminal Justice Commission v Parliamentary Criminal Justice Commission* (2002) 2 Qd R 8 at 23; [2001] QCA 218 at [26].



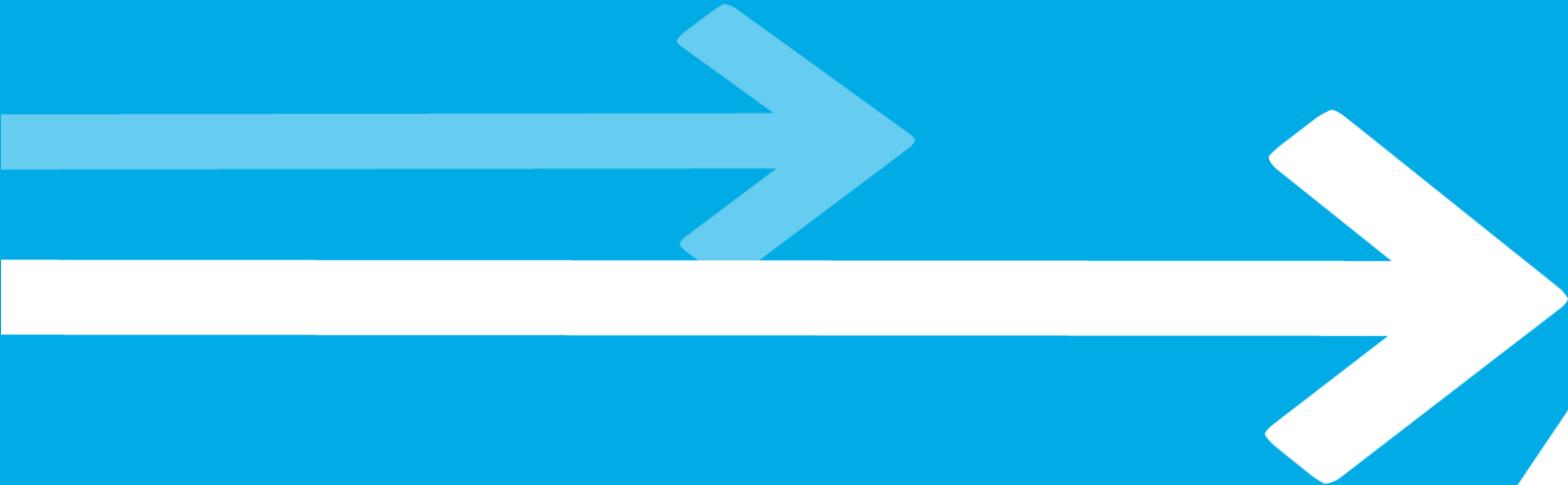
Who can be ordered to produce documents?

- In *Egan v Willis* the High Court was not required to consider whether the Legislative Council could require persons other than ministers to produce documents.
- There have been a few instances of orders being directed to statutory bodies or officers not subject to ministerial direction (e.g. the order directed to Greyhounds Racing NSW in 2016).



Can a committee order the production of documents?

- On 8 May 2019 the Legislative Council passed a new sessional order authorising committees to order the production of documents under SO 208(c).
- The sessional order establishes procedures similar to SO 52, including for privilege claims and review by a legal arbiter.



Issuing and responding to statutory notices

Christopher Frommer, Senior Solicitor



Just one or two examples ...

- *Ageing and Disability Commissioner Act 2019*
- *Apprenticeship and Traineeship Act 2001*
- *Architects Act 2003*
- *Associations Incorporation Act 2009*
- *Betting and Racing Act 1998*
- *Biodiversity Act 2015*
- *Biodiversity Conservation Act 2016*
- *Boarding Houses Act 2012*
- *Building and Construction Industry Security of Payment Act 1999*
- *Building and Development Certifiers Act 2018*
- *Building Professionals Act 2005*



Just one or two examples ...

- *Children (Education and Care Services) National Law Conveyancers Licensing Act 2003*
- *Coroners Act 2009*
- *Crime Commission Act 2012*
- *Crown Land Management Act 2016*
- *Dams Safety Act 2015*
- *Electoral Funding Act 2018*
- *Emergency Services Levy Insurance Monitor Act 2016*
- *Fair Trading Act 1987*
- *Fisheries Management Act 1994*
- *Gaming and Liquor Administration Act 2007*
- *Greyhound Racing Act 2017*



Just one or two examples ...

- *Health Care Complaints Act 1993*
- *Health Practitioner Regulation National Law*
- *Hemp Industry Act 2008*
- *Independent Commission Against Corruption Act 1988*
- *Law Enforcement Conduct Commission Act 2016*
- *Legal Professional Uniform Law*
- *Mining Act 1992*
- *Paintball Act 2018*
- *Petroleum (Onshore) Act 1991*
- *Protection of the Environment Operations Act 1997*
- *Royal Commissions Act 1923*
- *Strata Schemes Management Act 2015*
- *Taxation Administration Act 1996*
- *Water Management Act 2000*



Paintball Act 2018

53 Powers of authorised officers to require information and records

- (1) An authorised officer may, by notice in writing given to a person, direct the person to furnish to the officer such information or records (or both) as he or she may require for an authorised purpose.
- (2) A notice under this Division must specify the manner in which information or records are required to be furnished and a reasonable time by which the information or records are required to be furnished.
- (3) A notice under this Division may only require a person to furnish existing records that are in the person's possession or that are within the person's power to obtain lawfully.

...

It is an offence to fail to comply with a direction given under s. 53: see section 63



What grounds for review are available?

- Ordinary judicial review grounds:
 - ultra vires
 - exercise of power not in good faith or for improper purpose
 - actual or apprehended bias
 - decision-maker took into account impermissible irrelevant considerations or failed to take into account mandatory relevant considerations
 - legal unreasonableness or irrationality



Broad investigative discretion

MF1 v National Crime Authority (1991) 33 FCR 449 at 461

“... it follows in my opinion from the nature of a power to compel disclosure of information, by evidence and the production of documents, in aid of an investigative function that the evaluation of probabilities concerning the usefulness of the information is, within limits, for the investigator, and certainly not for the persons from whom disclosure is sought.”



Hardship or oppression?

Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3) (1980) 47 FLR 163 at 174-175

“The court's jurisdiction is not to set the course of an investigation but to call a halt if it is shown that the investigation exceeds the powers conferred. Short of that point, the protection of the corporate citizen from harassment rests in the good sense of the repository of the power. To say that an undue or oppressive burden is imposed by a notice is not legally significant unless what is meant is that the powers conferred by s 155 have been exceeded in the particular case.”

- But where an exercise of the power imposes an unduly significant burden, there may be an argument that it has not been exercised in good faith for a proper purpose.



Does the notice abrogate privileges?

Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543 at [43]

“Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities that the courts have recognised as fundamental unless the legislation does so in unambiguous terms.”

What information is required to be provided in a notice?





Pyneboard Pty Limited (1982)

57 FLR 368

Two standard implied conditions of validity for a statutory notice to produce:

1. "... the notice must convey, with reasonable clarity, to the recipient what information he is required to furnish or what documents he is required to produce."
2. "the notice must disclose that the Commissioner is entitled to require that the recipient furnish the information or produce the documents which the notice describes."

Drawing on earlier decision of the High Court in *Federal Commissioner of Taxation v ANZ Banking Group Ltd* (1979) 143 CLR 499



D'Anastasi v Environment, Climate Change & Water NSW (2011) 81 NSWLR 82

- “*Pyneboard* in the Federal Court has been cited on many occasions since. Apart from situations where the court has declared the governing statute to operate in a special manner ... it has not been doubted on this point.”



Statute operating in a “special manner”?

EHRKE v Australian Building and Construction Commissioner
[2020] FCA 267

“... the application of [the principle that a notice must disclose the basis on which it is issued] depends upon the particular statutory scheme in question and must yield to any contrary intention. ... Section 61D(a) of the *BCI Act* and s 7 of the *BCI Regulations* make it clear that an examination notice that requires a person to attend before the Commissioner to answer questions relevant to an investigation must be in Form 3. Form 3 expressly and comprehensively sets out the matters required to be included. **There is no room for any implication of unstated requirements by reference to a general principle applicable to different statutory regimes.**”



Different rule where power not limited by reference to a particular subject matter?

- *Pyneboard* considered s. 155 of the *Trade Practices Act 1974*, which applied when the issuer had “reason to believe” that the recipient was capable of furnishing information “relating to a matter that constitutes, or may constitute, a contravention of [the] Act”
- Does a different principle apply when the statute does *not* confine the scope of documents that may be requested to only documents “relating” to a particular matter, but rather permits the issue of a notice for broad purposes (e.g. for the enforcement of an Act)?



Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority [2018] VSCA 165

- Power under s. 9 of the *Occupational Health and Safety Act 2004 (Vic)* could be exercised for the purpose of investigating compliance with the Act.
- Majority decision of Tate and Kaye JJA at [90]-[91]
 - The “fundamental principle” in *Pyneboard* applies
 - “what is necessary is that the notice sufficiently inform the recipient of the nature of the particular suspected contravention or contraventions so that the recipient can sensibly assess whether the Authority has the power to require the provision to it of documents and information”



Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority [2018] VSCA 165

- Contrary reasoning by Maxwell P at [17]-[18]

“[A] notice under s 9(1) is the means by which the Authority communicates to the recipient its decision to exercise the coercive power which the subsection confers on it. **It is no part of the statutory purpose of such a notice to assert, less still to verify, the existence of facts on which the exercise of the coercive power itself is founded.** The existence of such facts would be a matter for investigation, if at all, in a proceeding by way of judicial review ...”



Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority [2018] VSCA 165

- Contrary reasoning by Maxwell P at [30]-[31]

“... s 9(1) contains no requirement that the information or documents specified in the notice ‘relate to’ any subject-matter. ... The only limitation is one of purpose. That is, the power under s 9(1) can only be exercised for one or other of the specified purposes.

It follows, in my view, that the authorities relied on do not — cannot — determine what content is required for a notice under s 9(1) of the OHSA to be valid.