LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

MEMORANDUM

To	**Amanda Fazio** President
From	**Lynn Lovelock** Clerk of the Parliaments
Subject	**Prorogation: effect on Standing Committee**
Date	11 January 2011

Please find attached advice in relation to the ability of GPSC1 to meet and transact business notwithstanding prorogation of Parliament. This advice supports the position set out in Lovelock and Evans, *New South Wales Legislative Council Practice* (Sydney: 2008).

Lynn Lovelock
Clerk of the Parliaments

Advice to the President of the Legislative Council on the power of standing committees to sit during the prorogation of the House

Background

On 21 December 2010, in accordance with paragraph 2 of the resolution of the House of 10 May 2007 establishing the General Purpose Standing Committees, the Clerk Assistant – Committees received correspondence from three members of General Purpose Standing Committee No. 1 (GPSC 1) requesting that the Clerk Assistant convene a meeting of the Committee to consider a proposed inquiry into the "Gentrader" transactions.

On 22 December 2010, the Governor, with the advice of the Executive Council, prorogued the Parliament. The Legislative Council now stands prorogued until 10 May 2011. On the same day, in response to a request from the Chair of the Committee, the Revd the Hon Fred Nile, I provided the following advice:

> The position of the Legislative Council is stated at pages 575-577 of *New South Wales Legislative Council Practice*.[1] There is advice to the Legislative Assembly from the Office of the Crown Solicitor in 1994 which states that committees of either House cannot transact business during prorogation unless authorised by legislation. I believe this is a very restrictive view of the powers of the Legislative Council, especially in light of Senate practice.
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> My advice is that if the committee wishes to meet it is able to do so despite prorogation, with the cautionary note that this view of its powers has yet to be tested before the courts. Committee staff will work on the assumption the meeting is going ahead unless you advise otherwise.

On 23 December 2010, GPSC 1 adopted the following terms of reference:

> That General Purpose Standing Committee No. 1 inquire into and report on the following aspects of the Government Energy Reform Strategy announced on 15 December 2010:
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> 1. The details of the energy reform transactions completed on Tuesday 14 December 2010
> 2. The circumstances that led to the resignation of directors from Eraring Energy and Delta Electricity
> 3. The impact the transaction will have on current and future electricity prices, competition in the electricity market, and the value obtained for NSW taxpayers; and
> 4. Other related matters.

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[1] The Crown Solicitor refers in his recent advice to conflicting views on prorogation expressed in *New South Wales Legislative Council Practice* (2008). The discussion on page 575-577 reflects my views and underlies the position I have taken in this advice. The reference to prorogation on page 531 was taken from the 1994 advice of the Crown Solicitor. Its inclusion in the book is an editing error.

The committee has subsequently invited written submissions by 14 January 2011, and is scheduled to conduct public hearings on 17 and 18 January 2011. The Committee has resolved to report by 31 January 2011.

On 2 January 2011 the Crown Solicitor provided further advice to the Department of Premier and Cabinet confirming his earlier opinion expressed in his 1994 advice that a standing committee of the Council cannot function while the Council is prorogued unless it has legislative authority to do so.

Advice

The Crown Solicitor argues that standing committees of the Legislative Council cannot sit during periods of prorogation. In support of this, he cites practice and precedent, argues that standing order 206 is invalid under section 15 of the *Constitution Act 1902*, and notes the provisions of previous legislation enabling standing committees to meet during prorogation.

I respectfully disagree with the Crown Solicitor.

While the House can be prorogued under section 10 of the *Constitution Act 1902*, the House has the power under section 15 to regulate its own business. Standing order 206 provides that the House can appoint committees with the power to sit during the life of the Parliament. There is no limitation in the standing order on the right of standing committees to sit during any recess of the House. The only constitutional restriction (as opposed to convention or practice) on the dispatch of business by the Council or a committee of the Council is section 22F of the *Constitution Act 1902*, which relates to the suspension of business in the Council before an election. Consequently, the Committee will lawfully be able to exercise its power to summon persons (other than Members) to attend and give evidence, and to examine any witnesses under oath. Furthermore an order by the Chair of the Committee to summon a person to attend and give evidence will be valid.

The Legislative Council has a unique role in the system of responsible government that operates in New South Wales, a role that has changed over time, especially since the reconstitution of the Council in 1978. This has been expressly recognised by the High Court in 1998 in *Egan v Willis*. In my view, the power of modern standing committees to sit after prorogation is based on the common law principle of 'reasonable necessity', and the modern understanding of responsible government in New South Wales, as articulated by the High Court in *Egan v Willis*.[2]

While the traditional legal understanding of prorogation was that committees may not meet, a contemporary reading of the system of responsible government is that the Council, through its standing committees, must be able to exercise its constitutional role of scrutinising the actions of the executive government. It is noted that the Senate committees may continue to sit after prorogation, even though as the Crown Solicitor notes, they do so on a different legal basis. The role

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2 (1998) 195 CLR 424. The Government and the Opposition have both offered conflicting legal opinions in relation to the legality of the committee meeting during prorogation. Associate Professor Anne Twomey, in an article by Justine Ferrari in *The Australian* on Tuesday, 4 January 2011, indicated that "both sides could be right and it would depend on whether a court took a traditional or more modern view of the law."

of the Council and its committees under the system of responsible government in New South Wales is commensurate to that of the Senate committees at the federal level.

In making his arguments in relation to standing order 206, the Crown Solicitor is relying on case law prior to the *Egan* decisions on responsible government and 'reasonable necessity'.[3] I do not concede that standing order 206 is 'invalid', nor that the Council cannot regulate the power of committees to meet during periods of prorogation.

The Crown Solicitor also argues that without enabling legislation standing committees cannot meet and transact business while the House is prorogued. It is my view that such legislation is not required for standing committees, which are appointed for the life of the Parliament, to be able to operate during prorogation.

To understand the powers and immunities of the current Legislative Council, and its authority to regulate its own powers, it is necessary to appreciate the changing nature of responsible government in New South Wales, and the common law doctrine of 'reasonable necessity'.

The changing nature of 'responsible government' in New South Wales

The Westminster system of parliamentary democracy adopted in New South Wales defines the relationship between the legislature and the executive government according to the principles of responsible government. Responsible government embodies the understanding that the executive government is responsible to Parliament, and through Parliament to the people.

In New South Wales, responsible government was established by the *Constitution Act 1855*, and subsequently extended in the *Constitution Act 1902*. As stated by McHugh J in *Egan v Willis*:

> To a person familiar with the history of British parliamentary institutions and the constitutional history of New South Wales, it seems plain enough that the Constitution of 1855 gave the people of New South Wales self government by means of a system of responsible government ... In my opinion, there can be no doubt that from 1855 the system of responsible government existed in New South Wales, as it existed in the United Kingdom, in so far as that system could be adapted to the circumstances of the Colony. The *Constitution Act 1902* (NSW), the current successor of the Constitution of 1855, makes that even plainer.[4]

There are several early judicial statements recognising the importance of the system of responsible government adopted in New South Wales and Australia. As early as 1920 in *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd*[5] the High Court described responsible government as:

> The greatest institution which exists in the Empire, and which pertains to every Constitution established within the Empire – I mean the institution of responsible

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3 See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 and the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

4 *Egan v Willis* (1998) 195 CLR 424 at 475 per McHugh J.

5 (1920) 28 CLR 129.

> government, a government under which the Executive is directly responsible to – nay, is almost the creature of – the Legislature.[6]

Significantly, however, the precise scope of that doctrine, especially the relationship between an executive government and an Upper House of Parliament, was not articulated.

In 1964, Anthony Birch in his authoritative book on *Representative and Responsible Government*, conceptualised responsible government and the proper role of the Parliament in relation to the executive government in two different ways.[7] One is the 'liberal' view of responsible government that speaks of Parliament, and especially the Upper House, as a 'watchdog' scrutinising the executive. This view finds expression in the language of John Stuart Mill in his seminal 1861 work *Considerations on Representative Government*:

> Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts: to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfill it in a manner which conflicts with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors. This is surely ample power, and security enough for the liberty of the nation.[8]

The other 'executive' view of responsible government identified by Birch talks of the responsibility of the Government to govern in accordance with its mandate, in which Parliament's function is primarily the airing of public concerns rather than a scrutiny or watchdog role. Under this model, a fundamental distinction is to be made between the functions of the two Houses of Parliament, with primacy attaching to the Lower House.

Significantly, these competing views of responsible government were visited expressly by the High Court in *Egan v Willis* in 1998. In its decision, the High Court explicitly chose the broader, liberal understanding of the system of responsible government in New South Wales emphasising the collective accountability of the executive government to both Houses of Parliament, as against the narrower 'executive' model of responsible government. In their joint judgement, Gaudron, Gummow and Hayne JJ in the High Court defined responsible government in the following terms:

> A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'. The point was made by Mill, writing in 1861, who spoke of the task of the Legislature 'to watch and control the government: to throw the light of publicity on its acts'. It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that to secure accountability of government activity is the very essence of responsible government'.[9]

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6 (1920) 28 CLR 129 at 147.

7 Birch A H, *Representative and Responsible Government*, George Allen and Unwin Ltd 1964.

8 Mill J S, *Considerations on Representative Government*, Lender, Parker, 1861, p 104.

9 (1998) 195 CLR 424 at 451 per Gaudron, Gummow and Hayne JJ.

Since its reconstitution in 1978, the Legislative Council has emerged with a membership and functions distinct from the Assembly, and with relatively equal powers and the legitimacy to use those powers. The executive government's domination of the Assembly is balanced against a Council which holds the government to account for its actions and omissions. The fact that neither of the two major sides of Australian politics has held an absolute majority in the Council since 1988 has enhanced the Council's capacity to provide effective oversight of government through legislative review, scrutiny of government spending and questioning of government ministers and officials.

One aspect of the changing role of the House has been the development of the modern committee system of the Council. In 1988, the Council appointed standing committees on Privilege, State Development and Social Issues. In 1995 the Standing Committee on Law and Justice was appointed, while in 1997 five General Purpose Standing Committees were appointed, with each committee allocated responsibility for overseeing specific government portfolios.

While the House is primarily a legislative body which debates bills and proposed amendments to bills, committees are, by their nature, inquiry bodies. The committees perform a vital scrutiny function through their capacity to compel witnesses to attend and to answer questions, and the protection of parliamentary privilege they afford to inquiry participants.

The common law principle of 'reasonable necessity'

The majority of the powers (as opposed to the immunities) enjoyed by the Houses of the New South Wales Parliament today are conferred as a matter of inherent need under the common law, on the simple basis that those powers are reasonably necessary for the effective functioning of Parliament. As Lord Denman CJ said in *Stockdale and Hansard*:[10]

> If the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament, and justifies all that it requires.[11]

The common law principles of inherent necessity were originally formulated by the Privy Council in a series of 19th century cases dealing with the powers of colonial legislatures.[12] According to these principles, the immunities and powers of the British House of Commons were not inherited by colonial legislatures, including the New South Wales Parliament, when the common law of England was 'received' at settlement. Local legislatures possess only such inherent powers as are 'necessary for the existence of such a body and for the proper exercise of the functions which it is intended to execute'.[13]

Importantly, however, the inherent privileges that are 'reasonably necessary' to Parliament for its existence and proper exercise of its functions have been held to change over time. As Wallace P observed in the New South Wales Supreme Court in *Armstrong v Budd*,[14] the word 'reasonable' must

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10 (1839) 112 ER 1112.

11 (1839) 112 ER 1112 at 1169. Privilege could, he said, be grounded on 'three principles - necessity, - practice, - universal acquiescence'.

12 *Kielley v Carson* (1842) 12 ER 225, *Fenton v Hampton* (1858) 14 ER 727, *Barton v Taylor* (1839) 112 ER 1112.

13 *Kielley v Carson* (1842) 12 ER 225.

14 (1969) 71 SR (NSW) 386.

be given an ambulatory meaning 'to enable it to have sense and sensibility when applied' to contemporary conditions:

> [T]he critical question is to decide what is 'reasonable' under present-day conditions and modern habits of thought to preserve the existence and proper exercise of the functions of the Legislative Council as it now exists.[15]

This was reaffirmed by the High Court in *Egan v Willis* when Gaudron, Gummow and Hayne JJ observed:

> What is 'reasonably necessary' at any time for the 'proper exercise' of the functions of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.[16]

Accordingly, the common law test of the inherent privileges of Parliament is whether any particular immunity or power is reasonably necessary today for the effective functioning of the House in its present form.

The power of committees to sit after prorogation

The power of modern standing committees to sit after prorogation is based on the common law principle of 'reasonable necessity', and the modern understanding of responsible government in New South Wales, as articulated by the High Court in *Egan v Willis*. These are issues not addressed or considered by the Crown Solicitor in his legal opinion dated 2 January 2011.

While the historic understanding was that a committee of the Council could not meet during a period of prorogation, in recent times, as the membership and operation of the Council has changed, this position has given way to recognition of the modern role of the Council in scrutinising the actions of the executive government. In *Egan v Willis*, the High Court found the power of the House to order the production of state papers to be 'reasonably necessary' to the (newly and more closely defined) system of responsible government. Arguably, the power of committees to conduct inquiries after prorogation is now also 'reasonably necessary' to the system of responsible government. Without it, the executive government can use prorogation effectively to prevent the proper role of the Council in holding the government to account on behalf of the people.

As the nature of responsible government has evolved in New South Wales, the roles and functions of the Council and its committees have also evolved, consistent with the doctrine of 'responsible government'. The modern Council has a responsibility 'to watch and control the government: to throw the light of publicity on its acts'. In order to be able to do so, committees of the Council must be able to conduct proceedings despite prorogation. The Government should not be able to use prorogation as a tool to prevent the proper role of the Council in holding the government to account on behalf of the people.

Standing committees are appointed by the Council for the life of the Parliament. Their powers and functions are determined by standing orders, their resolutions of appointment, relevant statutes,

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15 (1969) 71 SR (NSW) 386 at 402, approved in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 664.

16 (1998) 195 CLR 424 at 454.

sessional orders and precedents and practice of the Council. Under standing order 206 standing committees exist for the life of the Parliament, and are empowered to continue to meet and transact business notwithstanding any prorogation of the House. This was made clear in the 1982 debate on the motion to adopt standing order 257C, the predecessor to standing order 206, by the Hon David Landa:

> *The proposed term of the standing committees is the term of the Parliament and the work will be of a continuing nature.* This contrasts with the work of the select committees to which there have to be specific references. The establishment of standing committees will permit a creative and a continuing contribution for the individual parliamentarian.[17] (emphasis added)

Shortly after the adoption of standing order 257C, on the motion to appoint a joint standing committee on road safety, the Hon Jack Hallam, stated:

> The standing committee will be the first established under the amended standing orders which provide for the setting up of such committees ... *The standing committee will run for the life of this Parliament*, and under the new standing orders will be able to report progress from time to time.[18] (emphasis added)

The legality of standing order 206

Subsection 15(1)(a) of the *Constitution Act 1902* confers on both Houses power to make standing rules and orders 'regulating', among other things, the 'orderly conduct' of business, subject to the approval of the Governor.

In *Egan v Willis and Cahill*[19] in 1996, the plaintiff, the Hon Michael Egan, argued that standing orders 18 and 19 under which the Clerk had transmitted a resolution requiring the production of state papers to the Director-General of the Premier's Department was invalid as a source of power for the production of the papers. The New South Wales Supreme Court dismissed this argument, noting that the standing orders do not operate as a source of power. Rather they assume a power, in this case the power to order the production of state papers, and regulate that power. As stated by Gleeson CJ:

> Section 15 of the *Constitution Act 1902*, which authorises the making of Standing Orders, is not a source of power of the kind presently in question. Standing Order 18 and Standing Order 19 assume the existence of a power, but do not operate as a source of power; rather they regulate in certain respects the exercise of a power which, if it exists, must have some other source.[20]

The Crown Solicitor has suggested that standing order 206 is 'invalid' and not in accordance with section 15(1)(a) of the *Constitution Act 1902* to the extent that it 'purports to authorise the committee to sit after prorogation' when the House does not have the authority to do so.

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17 *LC Debates* (16/3/1982) 2681.

18 *LC Debates* (30/3/1982) 2887.

19 (1996) 40 NSWLR 650.

20 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 664 per Gleeson CJ.

I respectfully disagree with this position. Standing order 206 does not purport to authorise a committee to sit after prorogation. That power derives from the common law principle of 'reasonable necessity'. Rather, standing order 206 regulates the conditions under which committees may sit. Specifically, they may sit 'during the life of a parliament' (SO 206(1)), which may, for example, include any period of prorogation, and their 'functions, sources of references and composition' are to be determined by the House (SO 206(2)).

The meaning of prorogation and section 22F of the *Constitution Act 1902*

Under section 10 of the *Constitution Act 1902*, the Governor may prorogue the Legislative Council and Legislative Assembly by proclamation or otherwise whenever he or she deems it expedient. In reality, the Governor prorogues Parliament on the advice of the executive government, although the Governor may exercise discretion to prorogue Parliament in certain circumstances without advice.

Traditionally, the act of proroguing the Parliament has brought the parliamentary session to an end. This is distinct from a dissolution of the Assembly, which terminates a Parliament and precedes an election. On prorogation, all business pending before the House is in practice terminated, and the House is said to be in recess. Accordingly:

- the House may not meet again until the date nominated in the proclamation;
- all business on the Notice Paper lapses;
- all sessional orders cease to have effect;
- resolutions or orders of the House cease to have any force unless there are explicit provisions to give them continuing effect.

Historically prorogation was used by the Monarch to prevent the House from meeting to legislate. The conventions of the House today with regard to prorogation are largely a matter of practice. There is no statute defining prorogation or covering the impact of prorogation on Parliament.

The only constitutional restriction (as opposed to convention or practice) on the dispatch of business by the Council or a committee of the Council is section 22F of the *Constitution Act 1902*, which provides:

> **22F Suspension of Legislative Council business for general election of the Legislative Assembly**
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> The Legislative Council shall not be competent to dispatch any business during the period commencing on the day of the termination, either by dissolution or expiry, of any Legislative Assembly and ending on the day fixed for the return of the writ for the periodic Council election held next after that termination.

This provision was inserted into the *Constitution Act* in 1978, at the time of the reconstitution of the Council.

It is an important constitutional principle that it is for the Houses of the Parliament to determine their own sitting times and sitting patterns. As McHugh J stated in the High Court in *Egan v Willis*:

> The history of the procedures of the House of Commons and its effect upon our Westminster system makes it clear that it is a matter for the Council as to the way in

> which it conducts business and the order of its business ... Of all the great privileges of the House of Commons, none played a greater role in the Commons achieving influence than its capacity to control its own business and to set its own agenda. The view of the Tudor and Stuart monarchs was that the House of Commons was summoned only to vote on the appropriations asked of them, to approve legislation submitted to them and to express opinions on matters of policy only when asked. The House of Commons would not have become the powerful institution that it is if the views of those monarchs had prevailed. The importance of Parliament under the Westminster system is in no small part due to the seemingly inconsequential right of the House of Commons to control its business. The right of any legislative chamber under the Westminster system to control its business has existed for so long that it must be regarded as an essential part of its procedure which inheres in the very notion of a legislative chamber under that system.[21]

It may well be argued that in modern times, with the changing understanding of the system of responsible government, that it is section 22F of the *Constitution Act 1902* which is the proper basis for the ceasing of all business of the Council, and not prorogation.

For this reason, it may not necessarily be conceded that in modern times, the House does not have the power to sit during prorogation, as has traditionally been practice.

Conclusion

A contemporary reading of the power of standing committees to meet during a period of prorogation must be based on the current understanding of the system of responsible government that operates in New South Wales, as most recently articulated by the High Court in *Egan v Willis* in 1998.

The power of modern standing committees to sit after prorogation is based on the common law principle of 'reasonable necessity'. Standing order 206 derives its authority from that principle, and simply regulates the conditions under which committees may sit. While the traditional understanding of prorogation was that committees may not meet, a contemporary reading of the system of responsible government is that the Council, through its standing committees, must be able to exercise its constitutional role of scrutinising the actions of the executive government and holding it to account. This includes during any period of prorogation.

It follows that, in contrast to the views of the Crown Solicitor, the *Parliamentary Evidence Act 1901* will apply. Consequently, the Committee will lawfully be able to exercise its power to summon persons (other than Members) to attend and give evidence (section 4) and to examine any witnesses under oath (section 10). Furthermore an order by the Chair of the Committee under section 4 (2) of the Act summoning a person to attend and give evidence will, in fact, be valid.

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[21] *Egan v Willis* (1998) 195 CLR 424 at 478 per McHugh J.