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11 January 2011

The Hon. Amanda Fazio MLC
President
Legislative Council, Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

By email: amanda.fazio@parliament.nsw.gov.au

Dear President

Liability in respect of witnesses at Gentrader Transactions Inquiry

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 me on tel: (02) 9224-5238.

Yours faithfully

I V Knight
Crown Solicitor

Encl.



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Liability in respect of witnesses at Gentrader Transactions Inquiry

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Prepared for: LGA087 Parliament of New South Wales

Date: 11 January 2011

Client ref: The Hon Amanda Fazio MLC President, Legislative Council of NSW,

CSO ref: 201100006 T08 Peter Anet/ I V Knight

1. Summary of advice

- 1.1 Neither the President nor the Legislative Council (ie. the Members comprising the Legislative Council) would be vicariously liable for any torts by way of defamation or breach of confidence committed during the course of the activities of the group of Members purporting to inquire into the Gentrader transactions.
- 1.2 Any person who publishes a defamatory or other tortious statement in the context of the inquiry conducted by the group of Members will be liable in tort unless there is a relevant defence. Section 6 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and s. 27(2)(a) of the *Defamation Act 2005* will not provide a defence.
- 1.3 The group of Members cannot administer an oath or affirmation under the *Oaths Act 1900*, but could request those choosing to give it information to confirm the truth of such by statutory declaration pursuant to s. 21 of the *Oaths Act*.
- 1.4 The Parliament has power to enact legislation with retrospective effect to protect "witnesses" from suit in respect of statements made.
- 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 and advice sought

- 2.1 You refer to my advice of 2 January 2011 to the Department of Premier and Cabinet (my ref: 201003768), a copy of which was provided to you and which has also been published. In that advice I concluded that a Standing Committee of the Legislative Council could not function while the Council was prorogued unless that Committee had legislative authority to do so. It followed that the group of Members purporting to inquire into the status of the Gentrader Transactions had no power to compel the attendance of witnesses or require such witnesses to answer questions. There is a risk that statements made and documents provided to that group of Members would not be protected by Parliamentary privilege and that "witnesses" could be exposed to claims for defamation and breaches of confidence.
- 2.2 You say that you are inclined to allow the relevant inquiry to proceed but that there are two matters contained in my advice on which you seek my further advice as follows:

- "1. In view of your advice that parliamentary privilege would most likely not apply, if Committee members ask questions and witnesses appear voluntarily before the Inquiry and are sued for defamation and breach of confidence, what actions can the Legislative Council take to ensure that these Committee

members and witnesses will have no claim on the Legislative Council.

2. In the absence of the ability to summons witnesses and administer the oath or affirmation, what action can be taken by the Committee Chair to ensure that witnesses are aware that they must tell the truth or is it possible for witnesses to voluntarily take an oath or affirmation."
- 2.3 There is a further matter which you raise arising from comments made in the press about enacting retrospective legislation to protect witnesses. You seek my advice as to whether that course of action is legally possible.
- 2.4 Please note that the text of relevant legislation is set out in the Appendix to this advice.

3. Advice as to question 1: The potential liability of the Legislative Council

- 3.1 As noted, there is a risk that witnesses before the Inquiry may be exposed to claims for defamation and breaches of confidence. Those claims are ones in tort. The person primarily responsible in respect of such torts will be the tortfeasor, i.e. the witness making the statement, or the person publishing such.
- 3.2 There are circumstances in which a person or entity not committing the tort is, nonetheless, liable in relation to the tort committed by the primary tortfeasor. Thus, in cases of vicarious liability, the liability in a third person arises because of the relationship between the third person and the tortfeasor: for instance, where the third person is the employer of the tortfeasor. There are other situations where vicarious liability may arise but the common element to cases of vicarious liability has been identified as being that "a man has for his own convenience brought about or maintained some state of things which in the ordinary course of nature may work mischief to his neighbours" (Pollock, *Essays in Jurisprudence and Ethics*, quoted in *Sweeney v Boylan Nominees Pty Limited* (2006) 226 CLR 161 at [23]). Attempts to expand the circumstances in which vicarious liability may arise to situations where a person simply "represents" another were rejected in *Sweeney, supra* (at [26]).
- 3.3 In *Sweeney, supra*, the joint judges (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) noted various considerations arising in the Court's previous decisions dealing with vicarious liability (at [11]) and some "basic propositions" (at [12]):- there is a distinction between employees and independent contractors and the importance of being "in the course of employment". After discussing the concepts of "representative", "represent" and "agent", and rejecting expansion of the circumstances in which vicarious liability will arise, the joint judges noted the Court's decision in *Scott v Davis* (2000) 204 CLR 333 wherein the argument that "a new

- species of actor, one who is not an employee, nor an independent contractor, but an 'agent' in a non-technical sense" should be identified as relevant to determining vicarious liability, was rejected (at [28]).
- 3.4 When General Purposes Standing Committee Number 1 is authorised to transact business it does so as a Committee of the Legislative Council constituted under the Standing Orders. But where it is not so authorised (as is the case where Parliament has been prorogued) activities undertaken are not as the Committee, but as a group of members of Parliament. Those activities will not, in my opinion, be "proceedings of Parliament" for the purposes of privileges and immunities; nor will the group be undertaking those activities as a Committee of the Legislative Council under the Standing Orders. If it were, of course, the privileges and immunities of Parliament would apply.
- 3.5 In the case of the relationship between you as President of the Legislative Council and the subject group of Members, the relationship is not one of control, nor do those Members carry out any "enterprise" on your or the Legislative Council's behalf in the sense described. Those Members will be acting independently as Members of Parliament. There will be no relationship between the Legislative Council or you as President and "witnesses" who may attend before those Members.
- 3.6 Accordingly, I doubt that you as President of the Legislative Council and its representative (s. 22G(1), *Constitution Act*) or the Legislative Council (ie. the Members comprising the Legislative Council) would be vicariously liable for any tort of defamation or breach of confidence committed in the course of the activities of the subject Members. I note that the Legislative Council is not itself an entity which is capable of being sued or suing.
- 3.7 It is true that the Presiding Officers of the respective Houses have certain functions in relation to the respective Houses and their precincts under the *Parliamentary Precincts Act 1997*. But nothing in that Act derogates from the powers, privileges and immunities of, *inter alia*, each House and the Presiding Officers under any other law (s. 26), and further, no person is liable in criminal or civil proceedings for anything done or omitted, or purported to be done or omitted, in good faith, in pursuance of the *Parliamentary Precincts Act* (s. 28). Accordingly, to the extent that any liability might be thought to arise because you make available Parliamentary precincts for activities of the subject group of Members (in the exercise of your control and management of the Parliamentary precincts pursuant to s. 7 of the *Parliamentary Precincts Act*) I think it is likely that s. 28 of that Act will apply to protect you from any civil proceedings. I do not think that simply making premises available for the activities of the subject group of Members, despite the view I have expressed that those activities are not those of a lawfully authorised committee, constitutes other than "good faith" as referred to in s. 28.

3.8 Any person who publishes a defamatory or other tortious statement, such as by publishing a transcript of "evidence" given to the group of Members or by publishing a report in relation to the inquiry, will be liable in tort unless there is a relevant defence. Section 6 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* would not provide a defence as the publication would not be authorised under s. 4 or s. 5 of that Act as only a committee can give the relevant authority or order. So far as defamatory statements are concerned, the defence of absolute privilege in s. 27(2)(a) of the *Defamation Act 2005* will not be available in the case of a publication in respect of what takes place before the subject group of Members as that group will not be a "parliamentary body" within the meaning of s. 27(2)(a) (see definition, s. 4).

4. Advice as to question 2: Administration of oaths or affirmations

4.1 Power to administer an oath or affirmation is conferred on the chairman of a committee by s. 10(2) of the *Parliamentary Evidence Act 1901*. A witness attending before the subject group of Members will not be giving evidence before a committee with a chairman empowered to administer an oath. No power to administer an oath or affirmation is conferred upon the subject group of Members.

4.2 It is, of course, a matter for the group of Members to determine the steps which they should take in order to satisfy themselves that those providing them with information tell the truth. One way in which that may be done is for the group to request such persons to confirm their statements by statutory declaration pursuant to s. 21 of the *Oaths Act 1900*. Such a declaration may be taken before a Justice of the Peace or other person specified under the *Oaths Act 1900*.

5. Advice as to question 3: Retrospective legislation

5.1 The legislatures of the State and the Commonwealth have power to pass retrospective legislation: see *Winstone v Kelly* (1987) 46 SASR 461, *Millner v Raith* (1942) 66 CLR 1 at 9, per Williams J, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 and *R v Kidman* (1915) 20 CLR 425. Thus, in *Kidman*, Higgins J noted that "there are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and making acts unlawful which were lawful when done; but these proceedings do not raise any doubt as to the power of the legislature to pass retroactive legislation, if it sees fit" (at 451).

5.2 The form of any such legislation to protect "witnesses" would be a matter for the Parliamentary Counsel but it might seek to preclude legal proceedings based upon what a "witness" has said or deemed statements to have been the subject of privilege at the time they were made.

- 5.3 I should note that it is not the case that a law (even a criminal law) that operates retroactively thereby offends Chapter III of the *Commonwealth Constitution*. It is only if a law purports to operate in such a way as to require a court to act contrary to accepted notions of judicial power that a contravention of Chapter III may be involved. A law framed as in [5.2] above would not contravene Chapter III.

6. Final comments

- 6.1 This advice is provided to you in your capacity as President of the Legislative Council and Members should rely upon their own legal advice in relation to any possible legal liability they may have.
- 6.2 By providing you with advice on the particular questions asked I do not consider I am precluded from acting in future on behalf of any public official aggrieved by the actions of the subject group of Members.

Signed:



I V Knight
Crown Solicitor

Appendix: Relevant legislation

Oaths Act 1900

21 Declarations in cases not specifically provided for

- (1) The Registrar-General, a Deputy Registrar-General or any justice of the peace, notary public, commissioner of the court for taking affidavits, Australian legal practitioner authorised by section 27 (1) to take and receive any affidavit, or other person by law authorised to administer an oath, may take and receive the declaration of any person voluntarily making the same before him or her, in the form or to the effect of the form in either the Eighth or the Ninth Schedule.
- (2) Any statutory declaration taken and received prior to the commencement of the *Oaths (Amendment) Act 1916* before any commissioner of the court for taking affidavits, shall be deemed to have been duly taken and received.

24 Form of declaration

In all cases where by this Part, or under the authority thereof, or by virtue of any power or authority hereby given, a declaration:

- (a) is substituted in lieu of an oath or affidavit, or
- (b) is directed or authorised to be made and subscribed, although not substituted in lieu of an oath or affidavit,

such declaration, unless otherwise directed by the powers hereby given, shall be in the form, or to the effect of the form, in either the Eighth or the Ninth Schedule.

Parliamentary Evidence Act 1901

10 Administration of oath

- (1) Every witness attending to give evidence before the Council, Assembly, or a Committee of the Whole shall be sworn at the bar of the House; and the customary oath shall be administered by the Clerk of the Parliaments or Clerk of the Assembly, as the case may be (or in the Clerk's absence by the officer acting for the Clerk).
- (2) Every witness attending to give evidence before a Committee other than a Committee of the Whole shall be sworn by the Chair of such Committee.
- (3) Provided that in any case where a witness, if examined before the Supreme Court, would be permitted to make a solemn declaration or to give evidence in any other way than upon oath, a witness summoned under this Act shall be in like manner allowed to give evidence upon declaration or otherwise, as aforesaid.

Parliamentary Precincts Act 1997

7 Control and management of Parliamentary precincts

- (1) Subject to this Act:
 - (a) the Parliamentary precincts are under the control and management of the Presiding Officers, and
 - (b) the Presiding Officers may take any action they consider necessary for the control and management of the Parliamentary precincts.
- (2) Subsection (1) does not affect:
 - (a) the powers of each House to control and manage its own affairs and proceedings, and
 - (b) the orders of each House in relation to its own affairs and proceedings, and

- (c) the powers of each House in relation to the control and management of so much of the Parliamentary precincts as constitute the chamber of the House concerned or as are used exclusively or principally for the purposes of the House.

...

26 Saving of powers, privileges and immunities

- (1) Nothing in this Act derogates from the powers, privileges and immunities of:
- (a) Parliament, and
 - (b) each House, and
 - (c) the members and committees of each House, and
 - (d) the joint committees of Parliament, and
 - (e) the Presiding Officers and each of them and their employees, agents or delegates, under any other law.
- (2) However, the Presiding Officers do not have (in connection with the control and management of the Parliamentary precincts under this Act) and the Corporation does not have (in its capacity as owner of the Parliamentary precincts under this Act) power:
- (a) to give a direction to a member of either House to leave or not enter the Parliamentary precincts, or
 - (b) to give a direction that a member of either House be removed from, or prevented from entering, the Parliamentary precincts, or
 - (c) to remove a member of either House from the Parliamentary precincts, or
 - (d) to prevent a member of either House from entering the Parliamentary precincts.
- (3) Nothing in this Act affects the extent (if any) to which a function of police officers (other than a function under this Act) is exercisable in relation to the Parliamentary precincts or the Parliamentary zone. It is intended that such functions will be the subject of a memorandum of understanding referred to in section 27.

...

28 Protection from liability

No person is liable in criminal or civil proceedings for anything done or omitted, or purported to be done or omitted, in good faith, in pursuance of this Act.