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CROWN SOLICITOR'S OFFICE

NEW SOUTH WALES

13 December 1994

LGA 87/070

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D.X. 19 SydneyMr Russell D Grove
Clerk of the Legislative Assembly
Parliament of New South Wales
Parliament House
Macquarie Street
SYDNEY NSW 2000

FAX NO: 230 2333

Dear Mr Grove,

RE: STATUS OF STANDING COMMITTEES AFTER PROROGATION OF PARLIAMENT1. Matters for Advice

1.1 You seek urgent advice by letter dated 9 December 1994 and received on 12 December 1994 as to the following questions:

- (1) whether the term "currency of the Parliament" in Legislative Assembly Standing Order 374A and the term "during the life of the Parliament" in Legislative Council Standing Order 257C includes the period following prorogation but prior to dissolution; and
- (2) whether the Standing Committee upon the Environmental Impact of Capital Works, the Joint Standing Committee upon Road Safety and the Standing Committees of the Legislative Council are able to exercise their functions until the date of dissolution of the current Parliament; and
- (3) whether the Standing Orders could provide for Standing Committees to meet, transact business and report following prorogation, given that the Houses themselves cannot meet and transact business; and

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(4) whether it would be appropriate to specifically amend the Standing Orders to enable Standing Committees to transact business during periods of prorogation.

1.2 You enclose copies of relevant extracts from Parliamentary reference materials, together with copies of relevant Standing Orders of both Houses of Parliament, and various terms of reference of Standing Committees.

2. Advice

2.1 The issue is whether a Standing Committee can continue to transact business after prorogation of the New South Wales Houses of Parliament. I consider that a Standing Committee cannot function while the House of Parliament which created it, and to which it is responsible and accountable, stands prorogued, in the absence of an Act of Parliament authorising the transaction of Committee business despite prorogation. I consider that the view expressed in Browning's House of Representatives Practice (2nd edition) in relation to Commonwealth House of Representatives Committees is applicable in the present context. Browning states that Committees of the House of Representatives and joint committees appointed either by standing order or by resolution for the life of the Parliament continue in existence after prorogation but may not meet and transact business following prorogation. The rationale for this view appears to be that a committee only exists, and only has power to act, as far as directed by an order of the House which brings it into being. The committee is subject to the will of the House. The House may at any time dissolve a committee or recall its mandate, and it follows from the principle laid down that the work of every committee comes to an absolute end with the close of the session. At p.266, the author states that:

"In accordance with constitutional and parliamentary theory [committees] are not, as with the House itself, able to meet and transact business in the recess period following a prorogation, even though the standing orders have always contained the words "shall have power to act during recess."

2.2 I note that a contrary view is expressed by Odgers in his work, Australian Senate Practice (6th edition). The author notes the effect of prorogation has traditionally been that all proceedings, including committees, die on prorogation, except where statutorily saved, but argues this is an outmoded convention and is not applicable to the Australian Senate. He argues that when Australian Houses of Parliament write standing orders to allow committees to sit during recess without Act of Parliament, this is an acceptable change from the House of Commons practice. I do not accept that this view is applicable to the situation for the New South Wales Houses of Parliament. It is explained to some extent by the particular intricacies and powers of the Commonwealth Senate. Further, Odgers places some reliance on section 49 of the Commonwealth Constitution which provides that the powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by that Parliament. There is no equivalent section contained in the New South Wales Constitution Act, 1902.

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2.3 Legislative Assembly Standing 374A and Legislative Council Standing Order 257A, provide that each House may appoint Standing Committees from time to time. Legislative Assembly Standing Order 374A(2) states that:

"Such committees shall have authority to report from time to time and have power to sit during the currency of the Parliament in which they are appointed."

Legislative Council Standing Order 257C provides that:

"Such committees shall have authority to report from time to time and have power to sit during the life of the Parliament in which they are appointed."

Both at Commonwealth and State level, it is true that Australian parliamentary practice on committees in relation to prorogation has been characterised by considerable variation, and there are a number of instances where a resolution appointing a committee has purportedly empowered the committee to sit during any recess.¹ The Standing Orders in question, however, purport to authorise such Committees to report "from time to time" and to sit "during the life of the Parliament". On one view the Standing Orders may purport to do no more than reflect the traditional view expressed by Browning. I suspect the better view is that the intention was to purport to give such Committees authority to report and sit while each House stood prorogued but "the Parliament" remained in existence. There would have been little reason to pass Standing Orders which did no more than repeat the traditional understanding.

2.4 Insofar as these Standing Orders purport to authorise Committee business after prorogation, I consider they are beyond the power conferred by section 15 of the Constitution Act, 1902. It is well established that the State Houses of Parliament derive their existence solely from statutory authority, which also defines their respective powers and functions. The legality of any act of either House must therefore be determined by reference to some express statutory authority from which its powers are derived or arise necessarily as an incident of those powers: see *Kielley -v- Carson* (1842) 4 Moo PC 63, 13 ER 225; *Armstrong -v- Budd* (1969) 71 SR (NSW) 386. Section 15(1) of the Constitution Act sets out the matters with respect to which the Council and the Assembly may make Standing Rules and Orders. The clear implication from s15(2) of the Act is that s15(1) is the sole source of the power to make standing orders, and that such power is limited as set out in s15(1).

2.5 Only para (a) of s15(1) is relevant and it provides that Standing Orders may be made regulating "the orderly conduct of the Council and Assembly respectively". The Solicitor General has recently advised that para(a) does not go beyond authorising standing orders

¹Browning, p.267.

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which regulate "orderly conduct" of the Houses. This relates to the orderly way in which business is conducted in the respective Houses. It is not a source of general power to authorise conduct designed merely to assist in the more effective functioning of those Houses. Whilst Governor's approval of Rules and Orders makes them "binding and of force" (s(15)(2)), this does not make them part of the general law. *Clayton -v- Heffron* (1960) 105 CLR 214 at 240.² I cannot see how the continuation of the transaction of business by Standing Committees could be regarded as relevant to the "orderly conduct" of the Council and Assembly within the meaning of para (a) once Parliament is prorogued. It is difficult to accept the argument that Standing Committees can continue to function given that the bodies to which they owe their existence, the two Houses of Parliament, cannot themselves transact business.

2.6 I now turn to consider the terms of reference of certain committees which you forwarded to me. The Joint Standing Committee upon Road Safety and the Standing Committee on the Environmental Impact of Capital Works in their Terms of Reference both state at paras (4) that the relevant committees "have leave to sit during the sittings or any adjournment of either or both Houses". Those committees are thus not authorised by their own Terms of Reference to sit beyond prorogation. The Terms of Reference of the Standing Committees of the Legislative Council (see Minutes of the Proceedings of the Legislative Council, Tuesday 2 July 1991) do not purport to address the issue of whether the relevant committees have leave to sit or otherwise transact business during recess of the Council.

3. Conclusion

In summary, I answer your questions as follows:

- (1) It is not necessary to decide whether the term "currency of the Parliament" in Legislative Assembly Standing Order 374A and the term "during the life of the Parliament" in Legislative Council Standing Order 257C includes the period following prorogation but prior to dissolution. This is because to the extent these Standing Orders purport to authorise transaction of business by Standing Committees following prorogation, the Orders are invalid. The only relevant paragraph of s15(1), Constitution Act, permits Standing Orders directed at the orderly conduct of the Houses and this would not include conduct of Committees at a time when the Houses themselves stand prorogued.
- (2) The Standing Committee upon the Environmental Impact of Capital Works, the Joint Standing Committee upon Road Safety and the Standing Committees of the Legislative Council are not able to exercise their functions after prorogation of the Houses of Parliament.

²SG 94/58

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(3) The Standing Orders which provide for Standing Committees to meet, transact business and report following prorogation are invalid to the extent that they purport to authorise such conduct after prorogation, that is, at a time when the Houses themselves cannot meet and transact business.

(4) Amendments to the Standing Orders to enable Standing Committees to transact business during periods of prorogation would be beyond the power conferred by s15(1) of the Constitution Act.

Yours faithfully,

J. V. Knight

J V KNIGHT
Crown Solicitor