CROWN SOLICITOR
NEW SOUTH WALES

Advice

Prorogation: effect on Standing Committee

Contents

Prepared for: PRE128 Department of Premier & Cabinet

Date: 2 January 2011

Client ref: Paul Miller

CSO ref: 201003768 T08 I V Knight

1. Summary of advice

1.1 You have sought my urgent advice as to the status of the Gentrader Transactions Inquiry being conducted by a standing committee of the Legislative Council ("the committee").

1.2 I remain of the view expressed in my earlier advice that a standing committee of the Council cannot function while the Council is prorogued unless it has legislative authority to do so. That view is consistent with those expressed by text writers, in the judicial authorities and with the established practice in New South Wales.

1.3 To the extent that Standing Order 206 purports to authorise a standing committee to sit (including while the House is prorogued), it is relevantly identical to the standing order considered in my earlier advice and is, I consider, invalid, not being a standing order for the "orderly conduct" of the Legislative Council authorised by s. 15(1)(a) of the *Constitution Act 1902*.

1.4 It follows that the committee has no power, whether under the *Parliamentary Evidence Act 1901* ("*PE Act*") or otherwise, to compel the attendance of witnesses or require them to answer questions.

1.5 I am unable to advise that the committee has the power to compel a person to produce documents to it.

1.6 In my view, there is a risk that statements made and documents provided to the committee would not be protected by parliamentary privilege. This could expose witnesses to claims for defamation and breaches of confidence.

1.7 To seek to compel persons to appear and answer questions, the committee would most likely rely upon the statutory powers in the *PE Act*.

1.8 Although there may be some uncertainty as to what point in time the courts will be able to entertain the issue where it is alleged a committee is acting unlawfully, the authorities suggest that a proposed witness, upon being served with a summons, can seek a declaration and/or an injunction. It would seem that there may not have to be any separate cause of action at law in order for the courts to entertain the issue.

1.9 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

2.1 On 22 December 2010 the Governor, with the advice of the Executive Council, prorogued from that day the Legislative Assembly (until 4 March 2011) and the Legislative Council (until 10 May 2011) – see Government Gazette 139 dated 22 December 2010.

2.2 On 23 December 2010 General Purposes Standing Committee Number 1 ("the committee"), a standing committee of the Legislative Council, announced that it was inquiring into and reporting on certain aspects of the Government Energy Reform Strategy announced on 15 December 2010, including details of the energy reform transactions completed on 14 December 2010, the circumstances leading to the resignation of the directors of Eraring Energy and Delta Electricity and the impact of the transaction on electricity prices, competition in electricity market and the value obtained for NSW tax payers (the "Gentrader Transactions Inquiry").

2.3 The committee has invited written submissions by 14 January 2011 and will conduct public hearings on 17 and 18 January 2011.

2.4 On 13 December 1994 I advised (CS Ref: 94/4/685) the Clerk of the Legislative Assembly 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 a Parliament authorising the transaction of committee business despite the prorogation.

3. Advice sought

3.1 You seek my urgent advice as to the following questions:

"(a) If a standing committee of the Legislative Council were to purport to undertake an inquiry while the Legislative Council itself stands prorogued, what would be the legal status of the inquiry?

(b) In the circumstances described in paragraph (a), should the committee purport to require a person to appear before the committee to give evidence, is that person compelled to appear and/or to answer questions put to him or her?

(c) [Noting that I have previously advised that a committee of a House of Parliament does not, in the absence of specific legislative authority, have the power to compel the production of documents], in the circumstances described in paragraph (a), should the committee purport to require a person to produce documents to the committee, is the person compelled to do so?

(d) In the circumstances described in paragraph (a), if a person were to appear before the committee, would statements made by the person or documents provided to the committee be subject to Parliamentary privilege? What would be the consequences if the statements and/or documents are not subject to such privilege, for example, in terms of potential claims for defamation or breach of confidence.

(e) In the circumstances described in paragraph (a), and if your advice is that a person is not compelled to appear and/or to answer questions put to him or her, what steps might the committee take to seek to compel the person to do so? What remedies would be available to the person should the committee take such steps?"

3.2 Please note that the text of relevant legislation is set out in the Appendix to this advice.

4. Advice as to question (a)

My earlier advice

4.1 In my advice dated 13 December 1994 ("my earlier advice") I advised as follows:

"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 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.

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:

> '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

[1] Browning, p.267.

pass Standing Orders which did not 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 form 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 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 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-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."

4.2 I have reconsidered my earlier advice in light of subsequent developments in the law and practice relating to the effect of prorogation and advise that nothing has caused me to alter my earlier advice.

[2] SG 94/58

The Commonwealth Parliament

4.3 The positions adopted in relation to the Commonwealth Houses of Parliament have not changed since my earlier advice. In *House of Representatives Practice*, 5th edition, 2005, ed. IC Harris, the author refers to the issue at page 227 as follows:

> "Committees of the House and joint committees appointed by standing order or by resolution for the life of the Parliament continue in existence but may not meet and transact business following prorogation. Committees whose tenure is on a sessional basis cease to exist. Statutory committees continue in existence and may meet and transact business if, as is the normal practice, the Act under which they are appointed so provides. The Senate has taken a different approach to that of the House in relation to the effect of prorogation on its committees, and Senate standing orders and resolutions of appointment give most Senate committees the power to meet during recess." (see also page 632)

4.4 In *Odgers' Australian Senate Practice*, 12th edition, 2008, ed. Harry Evans, the author also maintains the position as described in my earlier advice. At pages 150-151 he says:

> "Under section 5 of the Constitution, the Governor-General may by proclamation prorogue the Parliament. Prorogation, on the conventional interpretation, has the effect of terminating a session of Parliament until the date specified in the proclamation or until the Houses are summoned to meet again by the Governor-General, and of terminating all business pending before the Houses.
>
> Prorogation is regarded as dispensing with sittings of the Senate which have been fixed by order of the Senate...Similarly, orders of the Senate directing committees to meet, for example, for estimates hearings, do not operate if a prorogation intervenes. Most committees have the power to meet after a prorogation and could meet if they choose to do so.
>
> The Senate has not met after a prorogation and before the opening of the next session by the Governor-General. The question of whether it could do so has been the subject of differing opinions. ...
>
> The generally accepted view is that a prorogation, as well as terminating a session and pending business, prevents the Houses of the Parliament meeting until they are summoned to meet by the Governor-General or they meeting in accordance with the proclamation of prorogation. ...
>
> A prorogation does not, however, prevent Senate committees meeting if they are authorised by the Senate to do so. It may appear paradoxical that the Senate may authorise its committees to do what it cannot do itself, but the generally accepted view is that this is one of the powers of the Senate under section 49 of the Constitution (see, for example, of the opinion of 9 October 1984 of the Solicitor-General). Most Senate committees are empowered by the Senate to meet after a prorogation."

The New South Wales Parliament

4.5 More relevantly, since my earlier advice, Associate Professor Anne Twomey has, consistently with my view, addressed the issue in relation to this State's Parliament in her authoritative work, *The Constitution of New South Wales*, The Federation Press, 2004 at pages 463-4 as follows:

> "The effect of prorogation is to put an end to every proceeding pending in the House prorogued and to vacate all orders of that House which have not been fully executed.[3]
>
> It was therefore considered 'unconstitutional' for a House to permit a committee to sit during the recess after prorogation, and inappropriate for a statute to be enacted to permit this to occur.[4] A committee derives its powers and authorities either from the House or Houses that established it, or from statute. It cannot exceed the authority of the body which created it. Thus, when the Houses of Parliament are prorogued, committees may not sit unless legislation specifically so provides. A *Parliamentary Committees Enabling Act*[5] may be passed by the Parliament to allow committees to continue to operate after prorogation, or the statute establishing a committee, such as the *Independent Commission Against Corruption Act 1988* (NSW), may provide that the committee may sit and transact business despite the prorogation of the Houses.[6]"

4.6 The first two footnotes referred to above are references to Alpheus Todd's *Parliamentary Government in the British Colonies*, 2nd ed (1894) Longmans, Green & Co, at 695, which I set out as follows:

> "Now, the effect of a prorogation being to put an end to every proceeding pending in parliament – save only judicial business before the house of lords – and to vacate all orders of either house not fully executed, it is highly irregular and unconstitutional for a branch of the legislature to appoint a committee with liberty to sit during the recess after prorogation. Neither would it be consistent with the law and usage of parliament to sanction such a constitutional innovation by statute...
>
> Through ignorance of the principle which forbids such a proceeding, instances have occurred wherein certain colonial legislative chambers have given permission to their select committees to continue sitting after the prorogation of the local parliament."

4.7 As to the third footnote in the passage quoted from Ass. Professor Twomey, I note that it appears to have been the practice in this State, for at least 30 years between 1966 and 1997, for Acts by that name, *Parliamentary Committees Enabling Act*, to be passed. The long title of those Acts was "An Act to enable certain Committees of the

---

[3] A Todd, *Parliamentary Government in the British Colonies* (Longmans, Green & Co, London, 2nd ed, 1893) p 695.

[4] Ibid, p 695.

[5] See, for example, the *Parliamentary Committees Enabling Act 1996* (NSW).

[6] *Independent Commission Against Corruption Act 1988* (NSW), s.68(8).

Legislative Council and Legislative Assembly to function during the prorogation of Parliament...". In the Second Reading Speech for the Bill for the first of these Acts, Mr Willis said (Hansard, Legislative Assembly, 29 March 1966, p. 4744):

> "As I intimated at the introductory stage, the purpose of this bill is to enable certain parliamentary committees to continue to function during the forthcoming prorogation of Parliament and, if necessary, during the next session, without the need to be reappointed... Unless special authority is provided by legislation, all powers given to parliamentary committees will be terminated by the issuing by the Governor of the proclamation proroguing Parliament."

4.8 The last footnote is also consistent with the view taken in this State that legislation is necessary if a committee is to continue to operate after prorogation. Similar provisions are found in other legislation such as s. 56(8) of the *Public Finance Audit Act 1983*, s. 70(8) of the *Health Care Complaints Act 1993*, s. 31F(8) of the *Ombudsman Act 1974*, s. 8(8) of the *Legislative Review Act 1987* and cl. 3(8) of Sch. 1 of the *Commission for Children & Young People Act 1998*.

Whether Standing Order 206 is valid under s. 15

4.9 I note that Standing Order 206(1), adopted in May 2004, provides that "the House may establish standing committees which have power to sit during the life of the Parliament". Standing Order 206 is, relevantly, in identical form to Standing Order 257C considered in my earlier advice at [2.3]. In my view, for the reasons set out in [2.4] and [2.5] of my earlier advice, Standing Order 206 is also invalid.

4.10 In my earlier advice, I noted that s. 15(1)(a) of the *Constitution Act 1902* permits the Legislative Council to prepare and adopt standing orders regulating, relevantly, "the orderly conduct" of the Legislative Council. I noted the then Solicitor General's advice as to the relatively narrow ambit of "orderly conduct", which is consistent with the authority in *Fenton v Hampton* (1858) 14 ER 727 in which Fleming, CJ "defined the power of the Houses to make standing orders for their 'orderly conduct' as extending 'no farther than providing for and regulating the mode of conducting business and forms of procedure, so as to secure method and good order' within the House".

4.11 I would add that the Supreme Court has also considered the scope of s. 15. In *Crick v Harnett* (1907) 7 SR (NSW) 126, the Court considered whether the Legislative Assembly had power under s. 15 of the Act to pass a standing order suspending a member from the House where a criminal trial was pending in respect of the member, and a ruling had been made that the House could not proceed to address the alleged misconduct of the member. The Court was unanimous in its view that the standing order was not one regulating the orderly conduct of the Legislative Council (although Pring J dissented on the question of whether the Court had power to review the validity of the order). The Chief Justice, with whom Cohen J concurred, stated that the fact that a criminal charge was pending against a member "in no way affects the

course of business of the Chamber, is not in itself an obstruction to such business, and in no way affects or has any relation to the orderly conduct of the House" (at 135). For Pring J, it was relevant that the standing order did "not contemplate any obstruction to business, nor indeed anything that would prevent the transaction of business by the Assembly" (at 138). His Honour observed that all matters referred to in s. 15 of the Act "deal with the internal management of the two Houses of Parliament" and that the section "does not profess to confer on either House any power to deal with persons outside the Houses" (at 139). Further, the powers "are conferred separately on each House" and "[n]either has the power in any way of controlling the conduct of the other" (at 139). Instead, "[e]ach is constituted the guardian of its own business and entrusted with the power of determining how that business shall be conducted" (at 140). His Honour similarly stated that "the power conferred on the Assembly is merely for the regulation of the business of the Assembly itself, and not for the purpose of controlling other persons..." (at 141).

4.12 In *Crick v Harnett* (1908) 8 SR (NSW) 451, the Privy Council overturned the Supreme Court's decision. Lord Macnaghten, on behalf of the Council, stated that while "[n]o one probably would contend that the orderly conduct of the Assembly would be disturbed or affected by the mere fact that a criminal charge is pending against a member of the House...in the present case there seems to be special circumstances", to which the Supreme Court failed to give sufficient weight (at 454-455). These "special circumstances" appear to be the particular facts giving rise to the making of the standing order, namely, the gravity of the charges laid against the member by a Royal Commission, the interposition of the Speaker preventing the House from dealing with the matter, the forbearance of the House in acquiescing with the Speaker's ruling, and the member's insistence on appearing in the House and taking part in proceedings. For the Privy Council, the question was whether, "upon a fair view of all the circumstances it is apparent that [a standing order] does not relate to the orderly conduct of the Assembly" (at 455). It appears from this that the Privy Council favoured a test similar to that proposed by the majority of the Supreme Court, although disagreed with the majority's application of it. The Privy Council concluded (at 455-456):

> "If the House itself has taken the less favourable view of the plaintiff's attitude, and has judged that the occasion justified temporary suspension, not by way of punishment, but in self-defence, it seems impossible for the Court to declare that the House was so wrong in its judgment, and the Standing Order and the resolution founded upon it so foreign to the purpose contemplated by the Act, that the proceedings must be declared invalid."

4.13 In my view, the NSW authorities on the scope of s. 15 ("orderly conduct") tend to confirm my view that Standing Order 206 (and its predecessor considered in my earlier advice) is invalid under s. 15(1)(a) to the extent that it purports to authorise the committee to sit after prorogation.

View of Clerk and former Clerk

4.14 I note that apparently conflicting views are expressed in *New South Wales Legislative Council Practice*, The Federation Press, 2008, by Lynn Lovelock and John Evans. The authors state at 531:

> "Standing committees have power to sit during the life of the Parliament in which they are appointed, *except during prorogation*". [my emphasis]

But at 575 they state:

> "The effect of prorogation is to terminate all business pending before the House until Parliament is summoned again for the next session. However, the consequences for committees are not straightforward.
>
> Sessional committees cease to exist on prorogation and must be re-appointed at the commencement of the new session.
>
> Statutory committees have power under the relevant Act constituting each committee to 'sit and transact despite any prorogation of the Houses of Parliament or any adjournment of either House of Parliament'.[7]
>
> Committees appointed for the life of the Parliament, including the Procedure Committee (SO 205), standing committees (SO 206) or select committees (SO 207), have power to sit during the life of the Parliament. As such *these committees have authority under the standing orders to continue to meet and dispatch business after any prorogation of the Council* and up until the dissolution of the Assembly.
>
> The Crown Solicitor takes a different view of the authority of the House to meet and transact business following prorogation. Following prorogation of the Parliament in December 1994, the Crown Solicitor provided written advice to the Clerk of the Legislative Assembly stating that the former Assembly standing order 374A (and the equivalent Council standing order 257C), to the extent to which it purported to authorise the transaction of business by standing committees following prorogation, was invalid.[8] The Premier's Department immediately issued a memorandum indicating that any transfer of documents or submissions to standing committees should cease immediately.[9] The President wrote to the chairs of the Council's standing committees advising that in view of the Crown Solicitor's advice it was not competent for the committees to hold deliberative meetings, conduct hearings or table reports, nor was it competent for the chairs to carry out any functions as committee chair.
>
> The Crown Solicitor's advice was based on an extremely restrictive view of the powers of the Council (and Assembly). It is possible that another counsel may provide different advice on this matter and that,

[7] Similar provisions apply to the Public Accounts Committee.

[8] The advice distinguished those committees established under statute which were specifically provided with statutory authority to meet and transact business after prorogation.

[9] Premier's Department, 'Status of Standing Committees after prorogation of the Parliament', Circular 94-29, 15 December 1994.

> should the matter ever come before the courts, there may be a different outcome to that suggested by the Crown Solicitor. There appears to be *no restriction on* the Council passing a resolution to authorise a committee to sit during prorogation other than in circumstances governed by section 22F, discussed above.
>
> In the absence of contrary advice at this time, on recent prorogations, the Clerk has issued written advice to members of the Council drawing attention to the content and effect of the Crown Solicitor's advice of December 1994. The advice of the Clerk has stated that, assuming the Crown Solicitor's advice is correct, the effect of prorogation on standing committees includes the following:
>
> ...
>
> - The standing committees cannot meet or transact any business until the commencement of the next session. ..." (my emphasis)

4.15 To the extent that the authors assert the authority of standing committees to meet and dispatch business after prorogation, they seem to rely on two arguments. First, Standing Order 206 itself, which I have previously advised is invalid. Secondly, they state that there is "*no restriction on* the Council passing a resolution to authorise a committee to sit during prorogation". If in this passage, the authors are suggesting that, because no statute restricts or prohibits the Council from passing such a resolution, it is therefore entitled to validly do so, I must respectfully disagree. As I noted at [2.4] of my earlier advice, the powers of the Houses of the New South Wales Parliament are derived solely from statute and must be expressly authorised or necessarily implied. It does not suffice that there is no restriction or prohibition on the existence or the exercise of a power.

"Prorogation" - a legal technical word

4.16 Section 10 of the *Constitution Act 1902* provides:

> "The Governor may fix the time and place for holding every Session of the Legislative Council and Assembly, and may change or vary such time or place as he may judge advisable and most consistent with general convenience and the public welfare, giving sufficient notice thereof. *He may also prorogue the Legislative Council and Assembly by proclamation or otherwise whenever he deems it expedient*". [My emphasis]

4.17 I consider "prorogue" to be a legal technical word[10], meaning to terminate a session of a House and that it is in that sense that it is used in s. 10 of the *Constitution Act 1902*.

[10] See O'Connor J in *Attorney-General (NSW) v Brewery Employees' Union of New South Wales* (1908) 6 CLR 469 at 531: "Where words have been used which have acquired a legal meaning it will be taken, *prima facie*, that the legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context. To use the words of Denman J in *R v Slator* ((1881) 8 QBD 267 at 272): 'but it always requires the strong compulsion of other words in an Act to induce the Court to alter the ordinary meaning of a well known legal term'."

4.18 The commentators referred to above do not appear to suggest a different meaning; rather, they disagree only as to the effect of terminating a session on the business of a committee.

4.19 In a joint advice with Leslie Katz dated 28 November 1994 (CS Ref : GOV07200021), I advised that "the exercise of the power of prorogation, whether by the Governor-General or by the Governor, has the effect of terminating a session of the legislative chambers prorogued, but not of terminating the life of those chambers".

Only proceedings then pending lapse on Prorogation

4.20 In another advice dated 1 June 2001 (CS Ref: PAH11900066), I quoted from my predecessor who in turn quoted Sir Gilbert Campion in his *Introduction to the Procedure of the House of Commons* at p. 105: "The effect of a prorogation is to pass a sponge over the parliamentary slate. All proceedings which have not been completed – as e.g. all Bills which have failed to obtain the Royal Assent ...lapse" (at [2.3]).

4.21 In *Western Australia v Commonwealth* (1975) 134 CLR 201, the High Court made a number of comments about prorogation. Barwick CJ said that, once Parliament had been prorogued, "all incomplete bills lapsed, though standing orders of the House provided for the reactiviation of bills which at the time of prorogation had not reached their final stage ..." (at 215–16). Gibbs J stated at 238–9:

> "The right to prorogue the Parliament is given to his Excellency by s. 5 of the Constitution. At the time when the Constitution was enacted the effect of a prorogation was well recognized. In Hatsell, Precedents of Proceedings in the House of Commons (1818), vol. 2, at pp. 335-336, it was said that a prorogation concludes a session and (subject to some immaterial exceptions) has the effect that 'all Bills, or other proceedings, depending in either House of Parliament, in whatever state they are, are entirely put an end to, and must, in the next session be instituted again, as if they had never been'. This is still the rule of parliamentary procedure in England: Erskine May's Parliamentary Practice, 18th ed. (1971), pp. 255-256; Halsbury's Laws of England, 3rd ed., vol. 28, p. 372. The rule is not immutable; it is competent for a legislature to provide by statute, or for a legislative chamber to provide by its standing orders, that after a prorogation consideration of a bill may be resumed as if no prorogation had taken place."

Stephen J said at 254:

> "It is very well established—Blackstone's Commentaries, 8th ed. (1778), vol. 1, p. 186—that the prerogative act of prorogation quashes all pending proceedings—May, op. cit., p. 256—although, as appears from Hale's Jurisdiction of the Lords House or Parliament, ed. F. Hargrave (1796), p. 167, this was a matter of doubt as late as the reign of James I. Coke however had no such doubts—Fourth Institutes, p. 27—he explained it by saying that it was because 'every several session of parliament is in law a several parliament', and on this

> ground contrasted the effect of prorogation with that of mere adjournment".

Stephen J also noted the difference between prorogation and dissolution at 253:

> "The two were in origin, and in the United Kingdom still are, distinct prerogative powers, one employed to bring to an end a parliamentary session, the other to bring the existing Parliament itself to an end, to be followed by a general election in the case of elective chambers. Their consequences are different but by no means in conflict ...".

(see also Mason J at 266)

4.22 In *Attorney General (WA) v Marquet* (2003) 217 CLR 545; HCA 67, a joint majority of the High Court (Gleeson CJ, Gummow, Hayne and Heydon JJ) considered, in obiter dicta and in the context of the legislative process, whether a Bill could be assented to after prorogation. Their Honours distinguished *Western Australia v Commonwealth* and the contrary English view of Erskine May and said at [82] to [85]:

> "[82] Reduced to its essentials, the submission of the amici on this issue was that once the two Houses of the Western Australian Parliament were prorogued (as they were by proclamation made on 9 August 2002), any Bills to which the Royal Assent had not then been given lapsed and, for that reason, could not lawfully be presented for or given the Royal Assent.
>
> [83] The argument depended upon giving a meaning and effect to proroguing a House of the Western Australian Parliament that, in turn, depended upon parliamentary practice in Britain. This practice was said to be sufficiently described in *Western Australia v The Commonwealth*. There, Gibbs J said, quoting Hatsell, that the rule of parliamentary practice in Britain was that 'all Bills, or other proceedings, depending in either House of Parliament, in whatever state they are, are entirely put an end to, and must, in the next session be instituted again, as if they had never been'. In the same case, Stephen J described the effect of prorogation as 'wiping clean the parliamentary slate'.
>
> [84] In Britain, the practice has developed of prorogation being effected by an announcement to both Houses being made in the House of Lords of the Queen's command that Parliament should prorogue. The announcement is made by one of the commissioners of a royal commission. That commission authorises the signification of the Royal Assent to any Bills then pending and that assent is pronounced before the prorogation. Accordingly, the circumstances which arise in this case would not arise in Britain. The British practice ensures that, if legislation has passed both Houses, assent is given before the Houses are prorogued.
>
> [85] The power to prorogue given by s 3 of the 1889 Constitution is a power 'to prorogue the Legislative Council and Legislative Assembly from time to time'. The power may be exercised with

> respect to each House at different times or at the one time. When it is said that prorogation wipes the parliamentary slate clean, what is meant is that proceedings *then pending* in the House that has been prorogued must be begun again unless there is some contrary provision made by statute or Standing Order. (Here, the Standing Orders of each House provided for proceedings to be taken up after prorogation at the point they had reached when the House was prorogued.) But here, if the Bills had been passed by both Houses, there was no proceeding then *pending* in either House. Each House would have completed its consideration of the Bills. There being no proceeding *pending* in the Houses, proroguing the Houses would have had no relevant effect on the Bills. They could lawfully have been presented for and could lawfully have received Royal Assent. " [Footnotes omitted]

Justice Kirby said at [115]:

> "[115] It must be acknowledged that the reference to English practice, cited by the amici, lend a measure of support to their submission. However, Australian practice and, it seems, practice in other countries of the Commonwealth of Nations that have generally followed English parliamentary traditions, have not observed the same strictness with respect to the rule that prorogation has the effect of extinguishing Bills that have not been signed into law." [Footnotes omitted]

4.23 The dicta in Marquet, while making clear prorogation only affects pending proceedings and that proceedings are not pending in relation to a bill which has been passed, are consistent with the traditional view of the effect of prorogation upon pending proceedings of a committee.

5. Advice as to question (b)

5.1 It follows from my conclusion above that, should the committee sit and purport to exercise powers under the *PE Act*, it will not be doing so legally. The committee will not lawfully be able to exercise power to summon persons (other than Members) to attend and give evidence (s. 4) or examine any witnesses under oath (s. 10). In particular, an order by the Chair of the Committee under s. 4(2) summoning a person to attend and give evidence will be invalid and the Chair will not be lawfully authorised to administer an oath under s. 10(2).

5.2 The obligation to answer questions arises by implication from ss. 4, 10 and 11. Section 11(1) relevantly provides that, except as provided by s. 127 (religious confessions) of the *Evidence Act 1995*, if any witness before a Committee refuses to answer any lawful question during the witness's examination, the witness shall be deemed guilty of a contempt of Parliament and may be committed to gaol if the House so orders. Section 11 applies regardless of whether a witness appears before

the Committee under summons. Section 11 only arises if the witness refuses to answer a "lawful question".

5.3 In *Crafter v Kelly* (1941) SASR 237 the Full Court of the South Australian Supreme Court considered a provision of the *Primary Producers Debts Act 1935* which made it an offence to refuse to answer "any lawful question" of a person authorised by the Farmers Assistance Board. Angas Parsons J with whom Murray CJ agreed referred to the normal privileges available to a witness at common law and went on:

> "My conclusion on the matter is that Parliament, when it demanded an answer to what it termed a lawful question, must be taken to have had in mind the privileges to which I have referred, and intended to preserve them. The expression 'lawful question', in my view, connotes one which calls for an answer according to law, one that the witness is compellable to answering according to the established usage of the law" (at 242).

5.4 I have elsewhere concluded (CSO ref: 200600862) that a "lawful question" is one which a person is compellable to answer according to the established usages of law, that is, a question that a person would be compellable to answer in a court. A question is not a "lawful question" if the answer is privileged (on the basis of legal professional privilege, public interest immunity or the privilege against self-incrimination), if the question falls outside of the Committee's terms of reference or the person is under a statutory obligation not to reveal to a body such as the Committee the information required.

5.5 As I am of the view that witnesses cannot be summoned to attend and give evidence or be sworn, it follows that they cannot be compelled to answer questions and I do not need to consider whether the reference in s. 11(1) to a "lawful question" extends to the circumstances here, although I incline to the view where the committee's proceedings are not lawful, a question asked in those proceedings would not be a lawful question within the meaning of s. 11(1).

6. Advice as to question (c)

The *PE Act*

6.1 The *PE Act* sets out the powers of a committee to take evidence from witnesses. I have consistently advised that a person cannot be compelled to produce documents under the *PE Act*. Section 4(1) and (2) authorise the summoning of any person "to attend and give evidence". Similarly the sanctions under ss. 7 – 9 apply where a witness so summoned "fails to attend and give evidence". Section 11 is concerned only with answering questions and s. 12 protects a witness who has "given evidence, whether on oath or otherwise". Section 13 renders criminal and/or any "false statement" made by a witness.

6.2 It can be seen that, while the *PE Act* empowers a committee to compel a person to attend and give evidence before it where it has issued a summons, there is no corresponding power in the *PE Act* for a committee to compel the production of documents.

State papers

6.3 The Houses of Parliament themselves do, however, have the power to compel the Executive Government to produce State papers. The High Court (McHugh J dissenting) found that such a power was "reasonably necessary" for the Legislative Council to properly exercise its functions in the matter of *Egan v Willis* (1998) 195 CLR 424. The term "State papers" has been taken to refer to "papers which are created or acquired by ministers, office-holders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of the State of New South Wales."[11] The procedures by which this power may be exercised are set out in the Legislative Council Standing Order 52, and the Legislative Assembly Standing Order 310.

6.4 Papers that are subject to public interest immunity or legal professional privilege are not protected from a request for production by the House (although there is a procedure by which documents over which privilege is claimed may be identified, and the claim for privilege considered, in Legislative Council Standing Order 52). However, Cabinet documents are protected, as production would be incompatible with collective ministerial responsibility.[12]

6.5 However, there is no authority to the effect that reasonable necessity requires that a House should have the power to delegate to committees its power to order the Executive to produce State papers.

Standing Order 208(c)

6.6 I have previously advised in relation to the suggestion that the power to order witnesses to produce documents can be delegated to committees by the House by resolution in terms that the committee has power "to send for and examine persons, papers, records and things". That power has, since 2004, been inserted in Standing Order 208(c) of the Legislative Council.

6.7 In order for the House to be able to delegate to a committee the power to order a witness to produce documents to the committee, the House itself must possess such a power and must possess the power to delegate that power. The power to order the Executive to produce State papers is not, however, a general power to order

[11] *Egan v Willis* (1998) 195 CLR 424, Gaudron, Gummow and Hayne JJ at 442, adopting the definition given by Gleeson CJ in the NSW Court of Appeal in *Egan v Willis* (1996) 40 NSWLR 650 at 654.

[12] *Egan v Chadwick* (1999) 46 NSWLR 563

witnesses to produce documents and, in particular, a power to order witnesses at a committee hearing to produce documents to the committee. Nor would it seem to be a power to order immediate production. It is a power to order the Executive to produce State papers to the House. The High Court in *Egan v Willis* expressly left open the question of whether the House has power to order persons other than Ministers who were members of the House to produce documents.

6.8 Even if the relevant power is the power of the House to order the Executive to produce State papers, there is a real issue as to whether the House has the power to delegate that power to some of its members. In the context of administrative law, a power to delegate a power conferred upon a particular person is not readily implied. It is not clear that "reasonable necessity" (an expression containing contradictory concepts but favoured by the majority in *Egan v Willis*) requires that, for the exercise of its functions, the House should be able to delegate to some of its members the power of the House to order the Executive to produce State papers.

6.9 A further issue is that it is not clear what is meant by the words "send for and examine persons, papers, records and things". Those words may not be a conferral of power but may only indicate the range of activities intended to be pursued, in accordance with whatever power is available. The power for committees to "send" for and examine persons is actually conferred by the *PE Act*. Furthermore, so far as delegating the House's power to order the production of documents is concerned, the word "send" is used, not "order", and there is no accommodation of the procedure which the House has adopted in Standing Order 52 and applies when the House orders the production of State papers.

6.10 Having the power to order the production of documents is one thing; it is another to have the power to punish for non-compliance with the order or to do an act to secure compliance with such an order. It is clear that the House (and thus a committee) has no implied power to punish for "contempts", such as non compliance with orders, but does have the power to, inter alia, suspend a Minister who is a member, to secure compliance with an order by it for production of State papers (*Egan v Willis)*. It is not, however, suggested that the power of the House to take action against a Minister who is a member has been delegated to committees. Presumably, if the power to order production of State papers has been validly delegated to committees, it would be asserted that the House has the power to take action to secure compliance with a committee's order. If there has been a valid delegation, it is likely that the House would have implied power to take action to secure compliance with an order made by the committee.

Conclusion

6.11 It seems to me that, given that these matters are not clear, it cannot be conceded that the committee would, assuming the Gentrader Transactions Inquiry were otherwise

lawful, have power to order witnesses to produce documents. The fact that committees purport to make such orders or that some witnesses have volunteered documents in the past does not, of course, establish that committees have the power to order production of documents.

7. Advice as to question (d)

7.1 Article 9 of the *Bill of Rights,* which continues in force in New South Wales pursuant to s. 6 and Pt 1 of Schedule 2, *Imperial Acts Application Act 1969*, provides:

> "That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

7.2 There are two aspects of the protection afforded by the Bill of Rights. Firstly, there is the immunity from civil or criminal action and examination in legal proceedings of members of the Houses and of witnesses and others taking part in proceedings in Parliament. This is usually referred to as the right of freedom of speech in Parliament. Secondly, there is the immunity of parliamentary proceedings as such from impeachment or question.

7.3 The primary meaning of "proceedings" as a technical parliamentary term is said in Erskine May's *Treatise on Law, Privileges, Proceedings and Usage of Parliament,* 1997, 22nd ed., p. 95, to be:

> "some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking."

7.4 Erskine May's *Treatise on Law, Privileges, Proceedings and Usage of Parliament*, supra (at p. 128) notes that proceedings of Parliamentary committees have long been recognised as being protected by Parliamentary Privilege:

> "Both Houses will treat the bringing of legal proceedings against any person on account of any evidence which he may have given in the course of any proceedings in the House or before one of its committees as a contempt.
>
> The House of Commons resolved on 26 May 1818, 'That all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House in respect of anything that may be said by them in their evidence'. Both Houses have taken actions for slander in respect of evidence given before either House or a committee. The courts have refused to entertain such actions based on statements made in evidence before a committee." [footnotes excluded]

7.5 I have previously considered the question as to "whether the privilege in Article 9 as it applies to a witness before a parliamentary committee, is, having regard to s. 12 of the *PE Act*, limited to immunity from an action in defamation" and I have advised as follows:

> "The relevance of the reference to parliamentary privilege in the Premier's Memorandum is that where a witness has been summoned and gives evidence before the Committee, then the hearing of that evidence is considered to be a proceeding in Parliament.[13] As such, that hearing attracts the protection of parliamentary privilege. That is, the evidence given to the Committee by a witness attracts those privileges provided under the *Defamation Act 1974*, the *Parliamentary Evidence Act 1901*, those privileges under Article 9 of the *Bill of Rights 1688*[14], as well as such powers and privileges implied by reason of necessity.[15] For the present purposes it is sufficient to note that the consequences of a witness's evidence attracting parliamentary privilege may include, for instance, restriction on publication of a record of the evidence given, and protection from libel and/or defamation actions."[16]

7.6 Twomey at 483 addresses the application of parliamentary privilege to a committee which lacked a quorum and states:

> "While the existence of a quorum is a matter of internal parliamentary procedure which a court would not normally inquire into, it may be an issue in relation to the application of parliamentary privilege. If, for example, a parliamentary committee were to hold a hearing without the requisite number of Members in attendance to provide a quorum, then there is a risk that parliamentary privilege would not apply because it was not a properly constituted parliamentary proceeding".

7.7 While noting different views as to the effect of prorogation on committees, the author of *House of Representatives Practice* refers at 634 to a Solicitor General's opinion of 23 October 1972 as to the consequences of committees meeting without having the constitutional authority to do so as follows:

> "...witnesses who gave evidence would not be entitled to the protection of the House and their evidence could be actionable at the suit of the third parties or could be used to incriminate them. Likewise statements by [committee members] during hearings would lack the protection which the privileges of the House normally afford to [Members]. In camera hearings may be no protection.Witnesses who were summoned to give evidence would, of course, be well advised to refuse to do so. If they did, the [House] clearly could not meet to

[13] See *NSW AMA v Minister for Health* (1992) 26 NSWLR 114- in which proceedings of the Public Accounts Committee were held to be a proceeding in Parliament.

[14] Article 9 declares "that the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

[15] This last basis of parliamentary privilege has mainly been used for such things as expelling or suspending members of Parliament.

[16] Note: *Defamation Act 1974* is now the *Defamation Act 2005*.

> punish them. When ultimately it did meet there may be little purpose served in committing them for contempt because by then the [House's] authority and protection would be available and they would, no doubt, willingly answer questions."

7.8 In my view, there is a real risk that "proceedings" in Art. 9 means validly authorised proceedings and that the committee conducting the Gentrader Transactions Inquiry will therefore be "unconstitutional" if it purports to sit during prorogation.

7.9 Although I have not, in the time available, found any direct authority on the consequences of statements of witnesses made where a committee is not validly conducting an inquiry, it would seem to me that there is at least a risk that such statements and documents will not obtain the protection of parliamentary privilege.

7.10 It follows that if any such statements are made and documents provided by witnesses to the committee, potential claims for defamation and breach of confidence may be available.

8. Advice as to question (e)

Committee steps to compel witnesses

8.1 The steps that might be taken by the committee to seek to compel witnesses to appear and answer questions will likely be under the *PE Act* which relates to "the summoning, attendance, and examination of witnesses before either House of Parliament or any Committee thereof" (see long title of the *PE Act*).

8.2 Section 4 provides that any person, who is not a Member of the Legislative Council or Legislative Assembly, "may be summoned to attend and give evidence before" the Council, Assembly or a committee of the Council or Assembly. The section contains specific notice and service requirements for summoning a person. Section 5 provides that Members of Parliament can be called to give evidence to Council, Assembly or a committee "in conformity (so far as practicable) with the mode of procedure observed in the British House of Commons".

8.3 If a witness is summoned, pursuant to s. 4 and fails to attend and give evidence as required by the notice or order summoning him/her, the President or Speaker "may certify such facts under the President's or the Speaker's hand and seal to a Judge of the Supreme Court, according to the form in Schedule 2, or to the like effect". To do so, the President or Speaker must be "satisfied of the failure of such witness so to attend and that the witnesses' non-attendance is without just cause or reasonable excuse" (s. 7).

8.4 Section 8 provides that: "Upon such certificate any Judge of the said Court shall issue a warrant in the form in Schedule 3, or to the like effect, for the apprehension of the person named in such a certificate, for the purpose of bringing the person before the

Council, Assembly, or Committee to give evidence". A s. 8 warrant provides "sufficient authority for all persons acting thereunder" to apprehend the person named in the warrant and retain the person in custody "to the intent that the person may from time to time be produced for the purpose of giving evidence, or be remanded and finally be discharged from custody, pursuant to any order under the hand and seal of the President or Speaker, as the case may be" (s. 9).

8.5 Section 11(1) provides that if any witness refuses to answer any lawful question during his or her examination, he or she shall be deemed guilty of a contempt of court. In this case, the witness:

> "may be forthwith committed for such offence into the custody of the usher of the black rod or sergeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be".

Entertaining of justiciable issue and Remedies

8.6 Twomey describes three limitations on the power of the courts to deal with matters that may interfere with Parliament and its privileges. "First, art 9 of the *Bill of Rights* 1688 limits the extent to which the courts may examine what has occurred in a House of Parliament or otherwise in Parliamentary proceedings" (at p. 521). Secondly, "the courts have been reluctant to interfere with the legislative procedures or the exercise of privilege by the Parliament" (at pp. 521, 523). So, for example, matters which are internal to the proceedings of the Parliament will not be examined by a court (at p. 523). Twomey notes that this arises from a tradition of separation of powers, even though this is not recognised in the *Constitution Act 1902* (at p. 521). Thirdly, "courts will decline to become involved in a conflict between the Executive and House of Parliament over privilege, unless some other cause of action arises under general law" (at p. 523).

8.7 Twomey states that there are two qualifications to this principle of non-intervention. First, courts will still hear cases which cover the same areas as a parliamentary inquiry. "The court would only decline to hear a common law claim if it were persuaded that the possibility of a result different from that of a parliamentary committee inquiry would 'undermine the authority of Parliament' (at p. 522). Secondly, "courts will address the issue of whether a privilege exists and the extent of that privilege. Once the privilege is established, the discretion in the exercise of that privilege rests with the House concerned" (at p. 522); see e.g. *The Queen v Richards*; *Ex parte Fitzpatrick and Brown* (1955) 92 CLR 157. In *Egan v Willis* (1996) 40 NSWLR 650 at 653 in the Court of Appeal Gleeson CJ said:

> "As the High Court observed in *R v Richards*; *Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162, after a long period of controversy in England, it was established that disputes as to the existence of a power, privilege or immunity of a House of Parliament are justiciable in

> a court of law. The same principle applies in Australia. However, whilst it is for the courts to judge the existence in a House of Parliament of a privilege, if a privilege exists it is for the House to determine the occasion and the manner of its exercise.[17]"

8.8 In *Egan v Willis* (1998) 195 CLR 424 in the High Court, the justiciability of the matter was not in issue - the issue was whether certain paragraphs of a resolution by the Legislative Council were invalid. These paragraphs declared the plaintiff guilty of contempt of the Legislative Council and suspended him from the service of the Legislative Council for the remainder of the day's sitting. However, in their joint judgment, Gaudron, Gummow and Hayne JJ reiterated:

> "Questions respecting the existence of the powers and privileges of a legislative chamber may present justiciable issues when they are elements in a controversy arising in the courts under the general law but they should not be entertained in the abstract and apart from a justiciable controversy" (at [5]).

8.9 A "justiciable" issue seems to refer to an issue which is "capable of adjudication by a court", that is, the subject matter is of a type which a court is capable of determining. Not every justiciable issue will be entertained. In *Egan*, it appears that mere justiciability, in the absence of a controversy, would not be enough. The controversy appears to have been the alleged assault to which the House pleaded justification based on its resolutions.

8.10 The cases seem to fall into two main groups – those involving Members of Parliament seeking to assert or challenge parliamentary privilege either in the absence of any other cause of action or with such a cause of action and, on the other hand, those involving ordinary witnesses summoned to attend and/or produce documents.

8.11 In *Attorney-General (Commonwealth) v MacFarlane* (1971) 18 FLR 150, a resolution had been passed establishing the Committee for the Investigation of Administrative Actions. Following the passing of the resolution, the Committee met, received complaints and issued summonses requiring persons to appear before it to give evidence and produce documents. The persons summoned refused and failed to appear upon the grounds that the resolution appointing the committee was ultra vires the powers of the Council, that the Committee was not a committee within the meaning of the *Legislative Council (Powers and Privileges) Ordinance 1963–1966* and that Committee members were not authorised by law to summon persons. The plaintiff successfully sought a declaration that the resolution was invalid and consequential declarations and injunctions preventing the defendants from acting pursuant to the resolution and from ordering summonses to be issued (at 154). It is not clear from the report whether the plaintiff was one of those served with a summons.

[17] (1996) 40 NSWLR 650 at 653; see also *Egan v Willis* (1998) 195 CLR 424 at 446; see also *Halden v Marks* (1996) 17 WAR 447 at 462.

8.12 *Aboriginal Legal Service of Western Australia (Inc) v Western Australia* (1993) 9 WAR 217 ("*ALS*") related to the power of the Western Australian Legislative Council to call for documents in the Aboriginal Legal Service of Western Australia's ("ALSWA") possession and to call individual officers of ALSWA. ALSWA and its officers sought "a declaration that, insofar as the resolutions order the plaintiff to deposit the documents, they are beyond the power of the Parliament ... and the plaintiffs are therefore under no legal obligation to comply with the resolutions" (at 309). The main issue before the Supreme Court of Western Australia was whether notices demanding the attendance of ALS and the individual officers before the Legislative Council were invalid for not being formulated properly, for being beyond the scope of State power, for interfering with the exercise of Commonwealth power and being inconsistent with Commonwealth legislation (at 309). The validity of these notices on the basis of the scope of the Council's power involved consideration of case law, including *MacFarlane*, *Lockwood* and *CSR*, which were distinguished (at 316–17) on a presently irrelevant basis. Rowland J said at 304 and 305:

> "If one accepts at this stage that the resolutions in issue cannot be impugned in a court, then the question remains whether the powers and procedural provisions set out in ss 4, 5 and 7 of the *Parliamentary Privileges Act* relevant to the present matter are the only procedures whereby the House can demand the attendance of the plaintiffs and, if so, has the House complied with those procedures? ...
>
> There can ... be little dispute now that the courts retain the jurisdiction to construe any Act which is said to be the basis of a privilege so as to define the extent, if any, of the privilege so given.
>
> The extent of the powers, privileges and immunities enjoyed by the House of Commons from time to time are founded on usage, custom and statute. To the extent that they are said to arise from statute, the courts will exercise jurisdiction to decide whether the statute authorises the privilege claimed. In Western Australia the grant of privilege is wholly by statute [*Parliamentary Privileges Act*]. ... This Court has jurisdiction, in my opinion, to construe the Act so as to ascertain the extent of such powers and privileges, and their manner of exercise if it be governed by the statute".

8.13 It would appear from these cases that the courts will not interfere where an otherwise justiciable issue relates to matters involving conflict between the Executive and the Parliament, except where there is a controversy under the general law, but are willing to entertain proceedings by proposed witnesses (probably including public servants). It cannot be stated with certainty whether the courts will be prepared to entertain such proceedings by reason of the issue of the summons, the service of the summons or some other event such as the execution of a warrant, although the cases suggest that service of a summons will be sufficient.

Signed:

I V Knight

I V Knight
Crown Solicitor

Appendix: Relevant legislation

Constitution Act 1902

10 Time and place for holding sessions, and prorogation, of Parliament

The Governor may fix the time and place for holding every Session of the Legislative Council and Assembly, and may change or vary such time or place as he may judge advisable and most consistent with general convenience and the public welfare, giving sufficient notice thereof. He may also prorogue the Legislative Council and Assembly by proclamation or otherwise whenever he deems it expedient.

15 Standing Rules and Orders to be laid before Governor

(1) The Legislative Council and Legislative Assembly shall, as there may be occasion, prepare and adopt respectively Standing Rules and Orders regulating:

(a) the orderly conduct of such Council and Assembly respectively, and

(b) the manner in which such Council and Assembly shall be presided over in case of the absence of the President or the Speaker, and

(c) the mode in which such Council and Assembly shall confer, correspond, and communicate with each other relative to Votes or Bills passed by, or pending in, such Council and Assembly respectively, and

(d) the manner in which Notices of Bills, Resolutions and other business intended to be submitted to such Council and Assembly respectively at any Session thereof may be published for general information, and

(e) the proper passing, entitling, and numbering of the Bills to be introduced into and passed by the said Council and Assembly, and

(f) the proper presentation of the same to the Governor for His Majesty's Assent, and

(g) any other matter that, by or under this Act, is required or permitted to be regulated by Standing Rules and Orders.

(2) Such Rules and Orders shall by such Council and Assembly respectively be laid before the Governor, and being by him approved shall become binding and of force.

Parliamentary Evidence Act 1901

4 Witnesses how summoned

(1) Any person not being a Member of the Council or Assembly may be summoned to attend and give evidence before the Council or Assembly by notice of the order of the Council or Assembly signed by the Clerk of the Parliaments or Clerk of the Assembly, as the case may be, and personally served upon such person.

(2) Any such person may be summoned to attend and give evidence before a committee by an order of such committee signed by the Chair thereof and served as aforesaid.

5 Members of Parliament

The attendance of a Member of the Council or Assembly to give evidence before the Council or Assembly or a committee shall be procured in conformity (so far as practicable) with the mode of procedure observed in the British House of Commons.

...

7 Non-attendance of witness to be certified to a Judge

If any witness so summoned fails to attend and give evidence in obedience to such notice or order, the President or the Speaker, as the case may be, upon being satisfied of the failure of such witness so to attend and that the witness's non-attendance is without just cause or

reasonable excuse, may certify such facts under the President's or the Speaker's hand and seal to a Judge of the Supreme Court, according to the form in Schedule 2, or to the like effect.

8 Issue of warrant

Upon such certificate any Judge of the said Court shall issue a warrant in the form in Schedule 3, or to the like effect, for the apprehension of the person named in such certificate, for the purpose of bringing the person before the Council, Assembly, or Committee to give evidence.

9 Warrant and order of President or Speaker to be sufficient authority for acts thereunder

(1) Such warrant shall be a sufficient authority for all persons acting thereunder to apprehend the person named in such warrant, and to retain the person in custody, to the intent that the person may from time to time be produced for the purpose of giving evidence, or be remanded and finally be discharged from custody, pursuant to any order under the hand and seal of the President or Speaker, as the case may be.

(2) Every such order shall be a sufficient warrant for all persons acting thereunder.

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.

11 Penalty for refusal to answer

(1) Except as provided by section 127 (Religious confessions) of the *Evidence Act 1995*, if any witness refuses to answer any lawful question during the witness's examination, the witness shall be deemed guilty of a contempt of Parliament, and may be forthwith committed for such offence into the custody of the usher of the black rod or serjeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be.

...

12 Privilege of witness

(1) No action shall be maintainable against any witness who has given evidence, whether on oath or otherwise, under the authority of this Act, for or in respect of any defamatory words spoken by the witness while giving such evidence.

(2) This section operates in addition to, and not in derogation of, any defence available to any such witness under the *Defamation Act 2005* for the publication of defamatory matter.

> **Note.** For example, section 27 (2) (a) (iii) of the *Defamation Act 2005* provides that the publication of defamatory matter while giving evidence before a parliamentary body attracts the defence of absolute privilege in defamation proceedings. Section 4 of that Act defines a ***parliamentary body*** to include a parliament or legislature, a house of a parliament or legislature and committees of any such parliament, legislature or house.