OPINION ON COMMENTS OF THE NSW PREMIER IN RELATION TO AN INQUIRY TO BE CONDUCTED BY A COMMITTEE OF THE NSW LEGISLATIVE COUNCIL

1. We are instructed to advise the NSW Leader of the Opposition as to the possible legal implications of comments made by the NSW Premier in relation to a Legislative Council Inquiry ("the Inquiry") being conducted by the General Purpose Standing Committee No.1 ("the Committee"). The Inquiry was initiated on 23 December 2010 to inquire into the Gentrader transactions that had been the subject of an announcement by the NSW Treasurer.

2. We are instructed that the Premier's decision to advise the NSW Governor to prorogue the NSW Parliament was made on the basis of an understanding by the Government that this would prevent the Inquiry from being conducted. In taking this step, the Government appears to have relied on an advice dated 13 December 1994 provided by Mr I V Knight, the Crown Solicitor, in relation to another matter.

3. There is real doubt as to whether the proroguing of the Parliament had the effect intended by the NSW Government. We note a report that the Clerk of the NSW Legislative Council, Ms Lynne Lovelock, recently advised the Chairman of the Committee, the Reverend F J Nile MLC, to the contrary.

4. Whilst we have not sighted any written opinion by Ms Lovelock to the Chairman of the Committee, we have reviewed the observations made in relation to this topic in *New South Wales Legislative Council Practice*, co-authored by Ms Lovelock and Mr John Evans PSM, the retired Clerk of the NSW Legislative Council, published in 2008[1].

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[1] At pp. 575-577.

5. In our opinion, the views expressed by the learned authors Ms Lovelock and Mr Evans in *New South Wales Legislative Council Practice,* is preferable to the Crown Solicitor's 1994 advice, which as noted by the learned authors, is based on an extremely restrictive view of the powers of the NSW Legislative Council[2]. If instructed to do so, we can provide a more detailed opinion on that issue.

6. We are advised that on 29 December 2010, the Department of Premier and Cabinet wrote to the Crown Solicitor seeking confirmation that the views expressed in his advice dated 13 December 1994 remained the same. It is unclear why the Department of Premier and Cabinet only sought this confirmation on 29 December 2010 when the Premier informed journalists on 23 December 2010 that she had advice that the Inquiry being conducted by the Committee was illegal. It has now become apparent that the Government did not have any advice in its possession other than the advice dated 13 December 1994 from the Crown Solicitor. However, in our opinion, in light of the present controversy surrounding the legal effect of the proroguing of the Parliament on the functions and powers of the Inquiry, the appropriate and responsible course is for the Government to seek a declaration from the Supreme Court of NSW to state the law on the issue and to determine unequivocally whether the proroguing of the Parliament has had the legal effect which the Premier has asserted. The Supreme Court of NSW plainly has jurisdiction to determine this issue. A binding determination by the Supreme Court of NSW is preferable to the uncertainty of competing legal advices being debated in the public arena.

7. Our conclusion that the Crown Solicitor's 1994 advice may have adopted an unduly restrictive approach is reinforced by our reading of the decisions

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[2] At p. 576.

of the High Court of Australia in *Egan v Willis*[3] and the NSW Court of Appeal in *Egan v Chadwick*[4], both of which emphasised the importance of parliamentary scrutiny of the actions of the executive branch of government in order to ensure that a Government is acting in the public interest.

Comments by the Premier

8. We are instructed that since the Committee announced that it would be conducting the Inquiry, the Premier has made a number of public comments concerning the legality of the Inquiry. The comments that we are instructed that the Premier has made are extracted in annexure "A" to this Opinion.

9. At the outset, it must be recorded that the Premier is entitled to freedom of speech, like every other person in Australia, to discuss political and governmental affairs[5]. And offering an opinion on perceptions of the effect of government legal advice in relation to a matter of public interest is a topic about which the Premier is entitled to have an opinion.

10. But the Premier cannot say whatever she likes about the Inquiry and the people who may choose or be invited to participate in it. On the basis of our advice above that the Inquiry is a validly constituted parliamentary inquiry (and, correlatively, that it enjoys the powers and privileges associated with that status), the Premier may not make comments that deter people from participating in it, as to do so may well result in a contempt of parliament.

11. In our opinion, the Premier's reported comments have an inherent tendency to deter witnesses from participating in the Inquiry. The reported

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3 (1998) 158 CLR 424

4 (1999) 46 NSWLR 563

comment that the Committee has: "*no legal standing and they cannot afford parliamentary privilege or parliamentary protection*", has the tendency to place pressure on potential witnesses[6]. The implication is that if a witness provides evidence that is either critical of the Treasurer (or any other Minister) or discloses confidential information, then the witness may be sued by the Government.[7] For similar reasons, the comments could intimidate Members of the Legislative Council who are members of the Committee from carrying out their role on the Committee and publishing a report that may be critical of a Minister or individuals.

12. We note that it has been the subject of public reports that, following the comments of the Premier:

    a. Members of the Committee belonging to the Australian Labor Party have to date declined to sit on the Committee and have sought a "guarantee" from the Clerk of the Legislative Council that parliamentary privilege applies to the Committee;

    b. Potential witnesses have sought legal advice concerning the provision of evidence to the Committee; and

    c. The President of the Legislative Council has commented that she has concerns about potential exposure of the Parliament for damages from witnesses if they are sued for defamation or breaches of commercial in confidence matters. To date the President has not given any direction to the Clerk of the Legislative Council concerning the Inquiry but has indicated that she will be seeking advice upon her return to Australia from Pakistan.

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5 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 51.

6 Standing Committee on Parliamentary Privilege Ethics, *Report on special report from General Purpose Standing Committee No.2 concerning a possible contempt*, Report No.9, November 1998 at p.23.

7 Erskine May, 23rd (Ed), Ch.8.

13. There are circumstances in which it is necessary to prevent a politician from engaging in contemptuous commentary about proceedings before a public institution in order to ensure that it is not the subject of undue interference.[8]

14. The ambit of permissible public commentary on court cases is settled by the *Bread Manufacturers* principle[9] (see the discussion of this in *Harkianakis v Skalkos*)[10] and *Gallagher v Durack*[11]. In our opinion, these principles equally apply to proceedings being conducted by a Committee.

15. In this area, the law seeks to balance the competing interests of freedom of speech and the confidence of the public in the integrity of the operation of a public institution; here, the Committee conducting the Inquiry, and its capacity to operate with the full and unfettered co-operation of witnesses[12].

16. To be contemptuous, statements may be intended or made for a particular purpose; but it is sufficient if they have an inherent tendency to effect a purpose[13]. In *John Fairfax & Sons Pty Ltd v McRae* the High Court held that "the actual intention or purpose lying behind a publication in cases of this kind is never a decisive consideration. The ultimate question is as to the inherent tendency of the matter published. But intention is always regarded as a relevant consideration, its importance varying in the circumstances": (1955) 93 CLR 351 at 371.

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8 *North Australian Aboriginal Legal Aid Service v Bradley* [2001] FCA 908 is a notable example.

9 *Bread Manufacturers, Ex parte; Re Truth and Sportsman* (1937) 37 SR (NSW) 242 at 249-250 (54 WN (NSW) 98 at 99-100).

10 *Harkianakis v Skalkos* (1997) 42 NSWLR 22 (particularly at 30-32).

11 (1983) 152 CLR 238.

12 *Gallagher v Durack* (1983) 152 CLR 238; *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443 at [210].

13 *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554 at 558; *Global Custodians Ltd v Mesh* [2000] NSWSC 845 at [25].

17. In our opinion the Premier's comments had an inherent tendency to interfere with the due administration of the Inquiry being conducted by the Committee[14]. Indeed, it is difficult to imagine the statements made as having anything other than a serious impact on would-be participants[15].

18. The purpose of parliamentary committees, protected by parliamentary privilege, is to ensure freedom of speech and absolute candour in deliberations about matters in the public interest, including concerns about maladministration by a Government. The comments of the Premier in our view have the tendency to interfere with the purpose of the Committee, and may constitute a contempt of the NSW Parliament. It is a matter for the NSW Parliament to determine whether the conduct of the Premier constitutes contempt of the NSW Parliament and if so, what sanctions, if any, it determines to impose upon the Premier.

ARTHUR MOSES SC **PROFESSOR PATRICK KEYZER**

30 December 2010

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14 *Willshire-Smith v Votino Bros Pty Ltd* (1993) 41 FCR 496.

15 *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 310*; Willshire-Smith v Votino Bros Pty Ltd* (1993) 41 FCR 496 at 505.