LEGISLATIVE COUNCIL'S GENERAL PURPOSE STANDING COMMITTEE No 1 – EFFECT OF PROROGATION

OPINION

I am asked to advise the Clerk of the Parliaments whether a committee of the Legislative Council may meet and transact business after the Council has been prorogued. The occasion for this advice concerns the current Inquiry into Gentrader transactions being undertaken by General Purpose Standing Committee No 1.

2. Given the limited time available for preparation of this Opinion, I am taking the course of referring generally to the two Opinions already delivered on this topic. They are the Opinion of the Crown Solicitor dated 2nd January 2011 (supplemented by and referred to in the Crown Solicitor's advice to the President of the Legislative Council dated 11th January 2011) and the advice by the Clerk of the Parliaments to the President of the Legislative Council dated 11th January 2011. In the interests of brevity as well, I note that the expositions and discussions of the question in its various aspects by each and both of Mr Knight and Ms Lovelock are, with great respect, thorough, learned and cogent. In particular, again given the exigencies of time, their labours have spared me the necessity of setting out the statute law and case-law, and parliamentary practice, relevant to the question. In short, they have done so more than adequately.

3 Unfortunately, as happens not infrequently in borderline issues concerning the powers of parliamentary chambers with such little explicit statutory stipulation as the Parliament of New South Wales enjoys, these two learned advisers disagree as to the fundamental question. The Crown Solicitor considers that the Standing Committee lacks power to be doing what it is doing, while the Clerk of the Parliaments considers that it has all requisite power.

4 The importance of the issue extends, in the nature of things, to the position of persons, both governmental and private, whom the Standing Committee seeks to compel to give evidence or produce papers. The question of penalty (including imprisonment) for failing to obey a purported summons is not the end of it. There is also the substantial question whether statements by persons acting as witnesses, as well as by Members participating in the Inquiry, would attract parliamentary privilege against eg actions for defamation or suits for breach of confidence.

5 It seems to be common ground that Standing Order 206(1) purports to authorize committees such as the Standing Committee to be established, which have power to sit "during the life of a parliament". It also seems that it is common ground that if Standing Order 206 be valid, then the Standing Committee does have the power in this case to be doing what it is doing. The Crown Solicitor treats this purported effect as a mark of the invalidity of the Standing Order. The Clerk of the Parliaments regards the words as meaning what they say.

6 In my opinion, the key difference between these two learned advisers, and the point which I regard as decisive in the controversy, is whether Standing Order 206 is within the power bestowed by para 15(1)(a) of the *Constitution Act 1902* (NSW).

That provision requires the Legislative Council "as there may be occasion" to adopt Standing Orders "regulating ... the orderly conduct of such Council ... ", Standing Order 206 was so adopted, was "laid before the Governor", was "approved" by the Governor and thus – in terms of subsec 15(2) of the *Constitution Act* – became "binding and of force".

7 It is clear from all the authorities discussed by Mr Knight and Ms Lovelock, and especially the near panoptic survey of them by the various judgements in the High Court in *Egan v Willis* (1998) 195 CLR 424, that the practice of and within a parliamentary chamber in Australia, specifically in New South Wales, is expected by the courts to evolve from time to time according to the practices and perceptions of parliamentarians – not of judges let alone lawyers. That is not to say that the authorities come anywhere near rendering the conduct of the Legislative Council in some way lawless or not subject in some respects to the adjudication of the civil courts – *Egan v Willis* itself displays the continued observance by the judiciary of the distinction between a necessary and appropriate judicial determination of the existence of a parliamentary power and the lack of jurisdiction in a court to adjudicate on the merits of the exercise of an existence parliamentary power: and see also *Fitzpatrick and Browne* (1955) 92 CLR 157.

8 I have no doubt that the concept of "orderly conduct" is by no means restricted to trivial (if necessary) matters such as regulating the sequence, language and decorum of Members speaking during proceedings. It is established, as noted by the Crown Solicitor, that the concept extends to the internal regulation of participation in proceedings by a Member under a cloud (ie serious criminal allegations) as well as

that which the distinct but related concept of "reasonable necessity" may impart from time to time.

9 Among the matters conceivably within the power of Standing Orders to regulate under para 15(1)(a) of the *Constitution Act* is the way in which business unfinished at the time of a prorogation may be taken up in the next session. Colourful metaphors such as "wiping the slate clean with a sponge" to convey the legal and constitutional effect of proroguing a parliamentary chamber simply confuse analysis. The fact is that parliamentary practice, by the likes of those involved as parliamentarians, and embodied in their Standing Orders, have seen fit to restore the "slate" in specified manners. In my opinion, this important example in relation to the legislative powers of the Legislative Council puts paid to the notion that former English generalizations about the effect of proroguing a chamber are adequate or complete for contemporary New South Wales purposes. They are not.

10 In my opinion the capacity for Standing Orders to affect, even reverse, what former English thinking suggested as some effect of proroguing a parliamentary chamber is clearly recognized by the High Court: thus, see the passages cited by the Crown Solicitor in his advice at 4.20, 4.21, 4.22.

11 It would be intuitively odd to exclude the power of Standing Orders to permit Bills affected by prorogation being taken up in the next session, on the basis that such provision would not be for "the orderly conduct" of the Legislative Council. Outsiders could well regard any such legal approach as impractical to the point of bizarre, and certainly not such as a purposive approach to para 15(1)(a) would require. But this is a straw man, I admit, because the Crown Solicitor does not appear to go

anywhere so far. It seems to be conceded by him, and with respect properly so, that Standing Orders can affect at least this aspect of prorogation in its consequences for the business of the Legislative Council.

12 If so, why would not the same flexible and beneficial concept easily authorize, as Members thought fit from time to time and the Governor approved, provisions such as Standing Order 206? Just as a Bill could be taken up in the next session, so a Standing Committee could report to the next session.

13 At the risk of myself taking metaphor too far in legal analysis, it is worth noting that the stock expression, repeated in Standing Order 206, refers to "the life of a Parliament". It is, plainly and for good reason, common ground that the Parliament has not lost its "life" by being prorogued. But, somewhat facetiously, I may wonder whether underlying the reasoning of the Crown Solicitor is a willingness to contemplate a state of suspended animation instead. It suffices, in my opinion, that there is no statutory or judicial warrant for treating prorogation as effectively ending the "life" of a parliamentary chamber, nor for preserving "life" without animation or powers.

14 It follows, in my opinion, that Standing Order 206 is valid, and in terms empowers the Standing Committee (which was constituted as contemplated by the Standing Order) to transact business during the life of the Parliament which presently continues. That, in my opinion is the end of the question. All other matters flow consequentially, in favour of the ancillary powers to compel attendance of and answers from witnesses, and for the production of papers (in accordance with rules such as discussed in *Egan v Willis* and *Egan v Chadwick* (1999) 46 NSWLR 563.

15 However, it is impossible not to pause for doubt by reason of the essential character of any committee of a chamber, being a delegate inherently incapable of exceeding the chamber's own powers. The point is well made, with respect, by the Crown Solicitor. An argument contrary to my opinion can respectably be made that a Standing Committee has no proper business to be inquiring into matters upon which it cannot report to the chamber and the chamber can take no further step (including possibly legislative initiative) because the chamber will not sit itself before the end of the life of the parliament.

16 Upon first consideration, I was inclined to accept the force of this argument as decisive. Upon further reflection, however, I think it is essentially flawed for the following reasons.

17 The supervisory function over the Executive which is such an important rôle of the Legislative Council (see *Egan v Willis*) emphatically need not result in legislation. The means of obtaining and publishing information about the doings of the Executive quite often become an end, and usefully so. The social and hence political significance of compelling disclosure of matters which may attract approbation or reprobation, in turn affecting voting intention of electors, seems to me a very strong indicator of the beneficial advantage in the public interest in relation to responsible government of a continued rather than truncated rôle for the Standing Committee in this case.

18 In other words, in the absence of any statutory or judicial pronouncement not susceptible to being superseded by parliamentary practice, in my opinion "the orderly conduct of [the Legislative] Council" certainly includes providing for continued

inquiry, possibly in public proceedings, into the doings of the Executive notwithstanding prorogation.

19 It is clear from the reasoning of all justices in the High Court in *Egan v Willis*, various as their approaches were, that questions of parliamentary power depend not only on statutory wording but also on a broad, beneficial and purposive reading of provisions for such a central institution. And at the heart of that functional approach, in my opinion, lies a paramount regard for responsible government in the sense of an Executive being answerable to the people's elected representatives. It is not possible, in my view, to read any of the historical and especially English accounts and explanations of prorogation without noting the radical shift from a King against Parliament to Ministers responsible to democratically elected representatives of the people. What possible justification could there be, in modern terms, for permitting the Executive to evade parliamentary scrutiny by taking care to time controversial or reprehensible actions just before advising the Governor to prorogue the chambers?

20 Accordingly, I agree with the answer to the questions raised as given by the Clerk of the Parliaments, with great respect, and acknowledging the force of his reasoning, I disagree with the answers proposed by the Crown Solicitor.

FIFTH FLOOR,

ST JAMES' HALL.

21st January 2011

Bret Walker