

**Prorogation and principle: The Gentrader Inquiry, Government accountability  
and the shutdown of Parliament**

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**Introduction**

The effect of prorogation is generally thought to terminate all business pending before the House until Parliament is summoned again for the next session. However the question of whether committees can continue to sit and transact business during prorogation, without legislative authority, has been a source of contention. While there has been rigorous debate on the issue, the matter remains largely unresolved.

The effect of prorogation on committees in the NSW Legislative Council was considered in late 2010 - early 2011 during an inquiry by the General Purpose Standing Committee No. 1 into the sale of state electricity assets (the 'Gentrader inquiry'). Conflicting opinions were expressed by the Clerk of the Legislative Council and the Crown Solicitor as to whether the Committee could meet, whether it could summon witnesses, and whether statements made or documents provided would be protected by parliamentary privilege.

The issue of committees meeting during prorogation was also considered in a 2010 paper written by the Clerk of the SA Legislative Council, Ms Jan Davis, entitled 'Matters concerning the effect of prorogation: An argument of convenience'.<sup>1</sup> Davis looked at the effect of prorogation on committees in South Australia, Queensland, Western Australia and the Federal Parliament, in considering whether select committees of the SA Legislative Council have the power to meet during prorogation.

This paper will build upon Davis' paper by examining the experiences of the NSW Parliament, in light of the recent Gentrader inquiry.

**Overview of the effect of prorogation on committees**

There are differing views regarding the effect of prorogation on committees.

The power of prorogation originated in the British monarchy, when Parliament was only an advisory council. Prorogation was used by the monarch to terminate the meetings of the Parliament when the monarch no longer required the Parliament's advice, and was often used as a tool to dispense with rebellious parliaments.<sup>2</sup>

There is no record as to whether the House of Commons ever authorised its committees to meet during prorogation (although that is not to say that the House of Commons has no such power, but rather that such a power has not been used).

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<sup>1</sup> Jan Davis, Clerk of the SA Legislative Council, 'Matters concerning the effect of prorogation: An argument of convenience', 41<sup>st</sup> conference of Presiding Officers and Clerks, Darwin, 2010.

<sup>2</sup> Evans H (ed), *Odgers' Australian Senate Practice*, 12th edn, Department of the Senate, Canberra, 2008, p 504.

The view expressed in Erskine May's is that '[t]he effect of prorogation is at once to suspend all business, including committee proceedings, until Parliament shall be summoned again, and to end the sittings of Parliament.'<sup>3</sup>

This view has been adopted by the House of Representatives, which states in *House of Representatives Practice* that committees continue in existence after prorogation, but may not meet and transact business after prorogation.<sup>4</sup> While the House of Representatives has made some exceptions to this,<sup>5</sup> it has not authorised a committee to sit during prorogation since 1959.

The same view has also been adopted by the Queensland Parliament, which advises in its *Parliamentary Procedures Handbook* that standing and select committees appointed for the life of the Parliament continue to exist during prorogation, but may not meet unless expressly authorised to do so by statute, standing orders or resolution.<sup>6</sup> The Queensland Parliament also allowed two exceptions to this, however both were in the early 1900s.

Up until recently, this has also been the view of the NSW Legislative Assembly. *NSW Legislative Assembly Practice, Procedure and Privilege* states that standing committees continue to exist after prorogation but may not meet or transact business unless authorised by legislation.<sup>7</sup> However, as will be discussed later, the Assembly has changed its practice following the Gentrader inquiry.

In contrast, it is standard practice for Senate committees to function notwithstanding any prorogation of the Parliament. Senate committees formed for the life of a parliament continue in existence until the day before the next Parliament first meets. This practice is firmly entrenched in standing orders and has also been confirmed by declaratory resolution. *Odggers' Australian Senate Practice* states that the power of the Senate to authorise its committees to meet derives from the Senate's character as a continuing House and from the Commonwealth Constitution.<sup>8</sup>

The SA Parliament has also authorised its committees to function during prorogation, with numerous examples over a period of 77 years of select committees of both Houses being given leave to sit.<sup>9</sup> However, as discussed in Davis' paper, this practice came into dispute in 2005 when the SA Legislative Council passed a resolution authorising seven select committees to sit during recess. The Government opposed the resolution, and disputed the ability of the Parliament to pass it. The Government sought advice from the Crown Solicitor, who agreed that select committees are not entitled to sit after prorogation, and stated that any privileges attached to committee proceedings cease to exist upon prorogation unless provided by statute.<sup>10</sup>

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<sup>3</sup> Jack M (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24<sup>th</sup> edn, LexisNexis, UK, 2011, p 145.

<sup>4</sup> Harris I (ed), *House of Representatives Practice*, 5<sup>th</sup> edn, Department of the House of Representatives, Canberra, 2005, p 632.

<sup>5</sup> For example, the House of Representatives gave several committees the power to sit during recess between 1956 – 1959.

<sup>6</sup> QLD Legislative Assembly, *The Queensland Parliamentary Procedures Handbook*, 2000, at 4.3.

<sup>7</sup> NSW Legislative Assembly, *Practice, Procedure and Privilege*, 2007, p 22.

<sup>8</sup> *Odggers'*, 12<sup>th</sup> edn, pp 380-381. n.b. Senate committees also have the power to meet notwithstanding the dissolution of the House of Representatives, however this paper will only consider the power of committees to meet during prorogation, prior to dissolution.

<sup>9</sup> Davis, *op. cit.*, p 1.

<sup>10</sup> Davis, *op. cit.*, p 4.

A similar situation occurred in Western Australia in 1971, when the WA Legislative Council resolved to authorise a select committee to function during prorogation. The WA Solicitor-General subsequently expressed the view that neither House had the power to authorise this action. In response the Clerk of the WA Legislative Council said:

[W]e undertook a great deal of research of whether we had the power to do this, but nothing we could find prevented us from authorising these Committees to continue.<sup>11</sup>

The same issues arose recently in New South Wales as a result of the Gentrader inquiry. Prior to the Inquiry, the NSW Parliament had been largely silent on the prorogation debate. The Gentrader inquiry will be discussed in more detail shortly.

Looking at the practices of different Houses of Parliament, with the exception of the SA House of Assembly (and of course the unicameral Parliament of Queensland), there appears to be a distinct dichotomy between the views of Upper and Lower Houses regarding the power of committees to sit during prorogation. The practice of the SA House of Assembly may perhaps be explained by the fact that the SA Parliament usually prorogues every year (while their select committees usually take longer than a year to complete their inquiries), whereas the Senate and WA Parliament (and NSW Parliament) prorogue less regularly.

Digging a little deeper, it appears that this dichotomy only appears to emerge in Upper Houses with a non-government majority. The 1971 example from Western Australia and 2005 example from South Australia (as well as the 2010-11 example from New South Wales) all occurred as a result of Upper Houses with non-government majorities trying to exert their power to scrutinise the Executive during prorogation. This concept is certainly not new. Odgers (8<sup>th</sup> ed) states:

... prorogation provides the executive government, the ministry, with a handy weapon to use against troublesome upper houses. A government can normally use its compliant party majority in the lower house to adjourn that house, but where such a majority is lacking in the second chamber prorogation may be the only means of avoiding embarrassing parliamentary debate or inquiry.<sup>12</sup>

Similarly, in regard to South Australia, Davis remarked that prorogation had provided a 'convenient vehicle to cease the operations of certain Select Committees of the Upper House, their terms of reference being a source of considerable frustration to the Government of the day'.<sup>13</sup> Davis stated:

Prorogation has been resorted to in an endeavour to stop the Upper House with a non-Government majority from continuing with Select Committee inquiries into sensitive Government issues which would continue to cause disquiet in the public domain prior to elections.<sup>14</sup>

### **Prorogation in New South Wales**

<sup>11</sup> Davis, *op. cit.*, pp 7-8, referring to 5<sup>th</sup> Conference of Presiding Officers and Clerks, Perth, 1972, Transcript.

<sup>12</sup> Evans H (ed), *Odgers' Australian Senate Practice*, 8th edn, Department of the Senate, Canberra, 1997, p 483.

<sup>13</sup> Davis, *op. cit.*, p 11.

<sup>14</sup> *Ibid.*

Turning now to examine the effect of prorogation on the NSW Legislative Council's standing committees,<sup>15</sup> it can be seen that from the beginning of the Council's standing committee system in the 1980s, the standing orders provided (and it was always assumed) that these committees had the power to sit during 'the life of the Parliament'.

The motion to establish standing committees of both Houses was moved by the Government in 1982, following two earlier failed attempts by the Opposition to appoint a system of standing committees in the Legislative Council. To permit the appointment of the committees, the Government moved to adopt a number of new standing orders, including standing order 257C, which read:

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.

In speaking to the motion for the adoption of standing order 257C, the Leader of the Government in the Council, the Hon David Landa, said:

The proposed term of the standing committees is the term of the Parliament and the work will be of a continuing nature.<sup>16</sup>

Consistent with the Government's interpretation of standing order 257C, in early 1993, the President referred to the Privileges Committee an inquiry into a Special Report from the Joint Select Committee Upon Police Administration concerning the unauthorised disclosure of *in camera* evidence, despite the prorogation of the Parliament. In doing so, the President specifically referred to the provisions of standing order 257C. The first two meetings of the Privileges committee to consider the matter, on 2 February 1993 and 8 February 1993, were also held while the House remained prorogued.

It is also notable that from 1966 onwards, a series of Parliamentary Committees Enabling Acts were routinely passed from time to time to enable certain committees to sit during prorogation. Even so, until 1994 the Legislative Council's standing committees were not included in these Acts, as it was seemingly accepted that these committees had the power under standing order 257C to sit during prorogation.

Everything however was turned on its head in 1994, when the Crown Solicitor provided advice to the Legislative Assembly stating that while standing committees continue in existence after prorogation, they may not meet and transact business unless authorised by statute. The advice came about after the Parliament was prorogued on 7 December 1994, several months before the election on 25 March 1995. At the time, the Government (which was minority government) was accused of using prorogation to avoid parliamentary debate on potentially damaging reports on the superannuation payout to a former Government minister.

The Crown Solicitor, who applied the view expressed in *House of Representatives Practice* (outlined earlier), commented:

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<sup>15</sup> Debate during the Gentrader inquiry only concerned the Council's standing committees. Select, sessional and statutory committees were not discussed.

<sup>16</sup> *LC Debates* (17/3/1982) 2681.

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.<sup>17</sup>

The Crown Solicitor acknowledged that a contrary view was expressed in Odgers, however argued that Odgers' view was not applicable to the situation in New South Wales as the NSW Parliament has no equivalent to s 49 of the Commonwealth Constitution (s 49 provides that the power, privileges and immunities of the Australian Parliament and its members and committees shall be such as are declared by that Parliament).

The Crown Solicitor also contested the validity of Legislative Assembly standing order 374A (and its Legislative Council equivalent – standing order 257C), arguing that they went beyond the power conferred by s 15 of the *Constitution Act 1902* (NSW)<sup>18</sup> to the extent which they purport to authorise committees to sit after prorogation. The Crown Solicitor stated:

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.<sup>19</sup>

Upon receipt of the Crown Solicitor's advice, the Premier's Department issued a memorandum indicating that any transfer of documents or submissions to standing committees should cease immediately. The President subsequently wrote to the chairs of the Legislative Council's standing committees advising that in light of the Crown Solicitor's advice committees should not hold deliberative meetings, conduct hearings or table reports, nor should the chairs carry out any functions as committee chair. As a result, several active inquiries were terminated.

As mentioned earlier, until recently, the Crown Solicitor's advice was seemingly accepted by the Legislative Assembly.

The views of the Legislative Council, on the other hand, have been more equivocal.

Following the 1994 advice, on the prorogation of Parliament, the then Clerk of the Legislative Council, Mr John Evans, issued written advice on two occasions to members of the Council drawing attention to the content and effect of the Crown Solicitor's advice. However, as noted in *New South Wales Legislative Council Practice*, both Mr Evans and the current Clerk of the Council, Ms Lynn

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<sup>17</sup> Crown Solicitor's Advice, 'Status of Standing Committees after prorogation of the Parliament', 13 December 1994, p 2.

<sup>18</sup> Section 15 authorises the NSW Parliament to prepare and adopt Standing Rules and Orders regulating the orderly conduct of its Houses.

<sup>19</sup> Crown Solicitor's Advice, 13 December 1994, p 4.

Lovelock, have consistently taken the view that at least in modern times, the Crown Solicitor's 1994 position was based on 'an extremely restrictive view of the powers of the Council'.<sup>20</sup>

Lovelock & Evans further acknowledge in *New South Wales Legislative Council Practice* that '[i]t is possible that another counsel may provide different advice on this matter and that, should the matter ever come before the courts, there may be a different outcome to that suggested by the Crown Solicitor.'<sup>21</sup>

It should also be noted that since 1994, the NSW Parliament has only passed two Parliamentary Committee Enabling Acts (in 1996 and 1997). Both Acts contained, for the first time, reference to the Council's standing committees. It is evident that these references were a direct result of the Crown Solicitor's advice.

The views of the Crown Solicitor and Clerk of the Legislative Council recently came to a head as a result of the inquiry into the Gentrader transactions (the 'Gentrader inquiry').

### **The Gentrader inquiry**

The 'Gentrader transactions' were certain transactions for the trading rights to the electricity generation of nine State-owned power stations to the private sector (the 'Gentrader' model). The transactions, which were finalised at a quarter to midnight on 14 December 2010, resulted in eight directors of the Boards of the State-owned corporations resigning in protest, and the subsequent hasty appointment by the Treasurer of new directors to facilitate the completion of the transactions.

On 22 December 2010, under the self-referencing powers of General Purpose Standing Committees, three members of the Legislative Council's General Purpose Standing Committee No. 1 requested that the Clerk Assistant of Committees convene a meeting of the Committee to consider an inquiry into the transactions.

On the same morning, the Governor, on the advice of the Executive Council, prorogued the Parliament, several months before the election of 26 March 2011. The Government issued a press release indicating, amongst other things, that committees were not able to sit and transact business during prorogation unless empowered by statute. The Government's position reflected the Crown Solicitor's 1994 advice. At the time, the Government was accused in the media of using prorogation in an attempt to avoid the Inquiry.

The Clerk of the Legislative Council subsequently advised the Chair that the Committee could continue to meet and transact business despite prorogation. The Clerk expressed the view that the Committee was not bound by the Crown Solicitor's restrictive view of the powers of the Legislative Council, while acknowledging that the matter had yet to be tested before the courts. Consequently, the Committee met on 23 December 2010 and resolved to proceed with the Inquiry.

On 2 January 2011 the Government received updated advice from the Crown Solicitor, who reiterated his 1994 advice that standing committees of the Council cannot function during prorogation without legislative authority to do so. In support of his argument he pointed out that it

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<sup>20</sup> Lovelock L & Evans H, *New South Wales Legislative Council Practice*, Sydney, The Federation Press, 2008, p 576.

<sup>21</sup> *Ibid.*

had been the practice of the NSW Parliament for at least 30 years between 1966 and 1997 to pass enabling legislation to allow committees to meet.

The Crown Solicitor argued that the successor to standing order 257C (standing order 206) was invalid, insisting that it was not a standing order for the 'orderly conduct' of the Legislative Council under s 15(1)(a) of the *Constitution Act 1902* (NSW). The Crown Solicitor said it followed that the Committee had no power to compel attendance of witnesses or require them to answer questions, and that there was a risk that statements made and documents provided to the Committee would not be protected by parliamentary privilege.

The Clerk of the Legislative Council respectfully disagreed with the Crown Solicitor. The Clerk noted that while the House can be prorogued under s 10 of the *Constitution Act 1902*, the House has the power under s 15 to regulate its own business. The Clerk argued that there is no limitation in standing order 206 regarding the right of standing committees to sit during any recess of the House.

The Clerk said it is common ground that the life of the Parliament does not come to an end on prorogation (only a session comes to an end), and that there is no statutory or judicial warrant for treating prorogation as effectively ending the life of a parliament. She argued that the only constitutional restriction on the dispatch of business by the Council or its committees is s 22F of the *Constitution Act 1902*, which provides that Council's standing committees must cease to meet and dispatch business once the Assembly has been dissolved.

The Clerk highlighted the unique the system of responsible government in New South Wales, which she emphasised has changed over time. This was expressly recognised in *Egan v Willis*, where the High Court observed:

A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament' ... It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that to secure accountability of government activity is the very essence of responsible government.<sup>22</sup>

The Clerk stated:

While the traditional understanding of prorogation was that committees may not meet, a contemporary reading of the system of responsible government is that the Council, through its standing committees, must be able to exercise its constitutional role of scrutinising the actions of the executive government.<sup>23</sup>

The Clerk concluded that under this contemporary system of responsible government, standing committees must have the power to conduct inquiries after prorogation as a matter of 'reasonable necessity', and further, that enabling legislation is not required for standing committees, which are appointed for the life of the Parliament, to be able to operate during prorogation.

<sup>22</sup> (1998) 195 CLR 424 at 451 per Gaudron, Gummow and Hayne JJ.

<sup>23</sup> Clerk of the NSW Legislative Council, 'Advice to the President of the Legislative Council on the power of standing committees to sit during the prorogation of the House', 11 January 2011, p 2.

The Clerk's views were subsequently supported in an independent legal advice by Mr Bret Walker SC. Walker agreed with the Clerk's argument regarding the system of responsible government, commenting:

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 their 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?<sup>24</sup>

In response to the Crown Solicitor's argument regarding the validity of standing order 206, Walker pointed out that the standing order, having been 'laid before the Governor' and 'approved' by the Governor, was therefore 'binding and of force' under s 15(2) of the *Constitution Act 1902*.<sup>25</sup>

He noted that it was not in question that the standing orders may regulate some aspects of prorogation, such as the revival of bills in a new session of parliament, and that such matters legitimately fall within the 'orderly conduct' of proceedings. He suggested that by extension, there is no reason why the standing orders should not be held to regulate other aspects of prorogation, such as allowing a committee to sit 'during the life of a Parliament' (including any period of prorogation) and to report in the next session.

Walker concluded that the 'orderly conduct' of the LC certainly includes providing for continued inquiry into the doings of the Executive notwithstanding prorogation.<sup>26</sup>

Despite these differing legal opinions, and the Government's position that the Committee did not have authority to proceed, the Premier, Treasurer and Leader of the Opposition all appeared voluntarily before the Committee and gave evidence. However, the key witnesses – the resigned directors of the State-owned corporations – refused to appear before the Committee, even after being issued with summonses under the *Parliamentary Evidence Act 1901 (NSW)*, citing concerns as to whether their evidence would be protected by privilege.

The Committee subsequently wrote to the President requesting that she seek a warrant from a judge of the Supreme Court for the apprehension of the eight former directors under s 7 of the *Parliamentary Evidence Act*, with a view to compelling them to appear. However the President refused this request, indicating her view that the refusal of the witnesses to attend was, in the

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<sup>24</sup> Walker B, 'Legislative Council's General Purpose Standing Committee No. 1 – Effect of Prorogation', (authorised to be published by resolution of the Committee on 24 January 2011), 21 January 2011, p 7.

<sup>25</sup> *Ibid*, p 3.

<sup>26</sup> *Ibid*, pp 6-7.



circumstances, with 'just cause or reasonable excuse',<sup>27</sup> given that the witnesses had no guarantee that they would be protected by privilege should they appear and give evidence.

As the matter did not go to the courts for resolution, the issue of whether the Committee's proceedings were properly constituted and had the protection of parliamentary privilege remain unresolved.

### **Preventing the 'misuse' of the prorogation power**

If state parliaments wish to prevent prorogation being 'misused' for political purposes to shut down or prevent committee inquiries, there are several steps that can be taken.

One is to pass enabling legislation in individual instances (as per the past practice of the NSW Parliament) authorising committees to function during prorogation. In the case of the NSW Legislative Council, while the Clerk does not consider such legislation necessary for standing committees (which are appointed for the life of the Parliament), it would at least eliminate any doubt over the matter.

Another option is to pass more permanent legislation making it clear that committees have the power to sit during prorogation. This occurred, for example, in the SA Parliament in relation to standing committees. Section 25(1) of the *Parliamentary Committees Act 1991 (SA)* provides that standing committees 'may sit and transact business during any recess or adjournment of Parliament and during an interval between Parliaments'. Following the Gentrader inquiry the Greens did in fact move such a motion in the Legislative Council, however the motion was negatived.<sup>28</sup>

Alternatively the Parliament could pass a resolution authorising committees to function during prorogation. This option was taken by the NSW Legislative Assembly in the new Parliament following the Gentrader inquiry. On 22 June 2011, in the resolution appointing committees, the Assembly expressly authorised standing committees (and any of their sub-committees) to meet and transact business 'despite any prorogation of the Houses of Parliament.'<sup>29</sup>

A fourth option would be to introduce legislation limiting the period in which the Government can advise the Governor to prorogue the Parliament. As discussed, as a result of the Gentrader inquiry, the Governor (on advice of the Executive Council) prorogued the Parliament three months before the state election. In the past, most prorogations of the NSW Parliament have been timed so as to provide only a brief interval between sessions.

This option has also been taken in the NSW Parliament. On 10 May 2011, the newly elected Coalition Government amended the *Constitution Act 1902* to prevent the Government from advising the Governor to prorogue the Parliament at any time after the fourth Saturday in September and before 26 January in the lead up to a general election (held the fourth Saturday in March every four years).

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<sup>27</sup> Under s 7 of the *Parliamentary Evidence Act 1901*, if any summoned witness 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.

<sup>28</sup> LC Minutes, 10 May 2011.

<sup>29</sup> NSW Legislative Assembly, 22 June 2011, Votes and Proceedings No 23. Item 12.

A final, more controversial option, would be not to prorogue at all. This option was supported in Odgers (6<sup>th</sup> ed) which states:

In the evolution of parliamentary government, one ponders, too, the need for retaining the device of prorogation. In its early use, prorogation was a device unemployed by English monarchs to rid themselves of troublesome Parliaments and unwelcome legislation. A lost head or two changed all that and the parliamentary time-table is now, in practice, very much in the control of the elected representatives. Certainly the Australian Federal Parliament has not suffered by at times continuing a session of Parliament for the three years' life of the House of Representatives, without prorogation ... So perhaps prorogation could be discontinued and the Houses of Parliament left unhampered to get on with their work between periodical elections.<sup>30</sup>

Odgers goes on to say:

But, if the practice of prorogation is still useful and is to continue, let its interference with the work of Parliament be minimal and not more than the Houses of Parliament may determine.<sup>31</sup>

However, this option is a topic for a whole other paper!

### **A continuing debate**

The Gentrader inquiry has merely added fuel to the ongoing debate about the effect of prorogation on committees. It is somewhat of a shame that the matter remains ultimately unresolved in New South Wales, having not gone to the courts for resolution, however at least steps have been taken by the NSW Parliament to prevent these issues from arising again.

Apart from some minor deviations following the Crown Solicitor's 1994 advice, the NSW Legislative Council's practice has followed the path already laid by a number of other Upper Houses. That is not to say though that Lower Houses have not been justified in following a different path. The different positions may just reflect the different roles of Upper and Lower Houses – i.e. Lower Houses form Government, while Upper Houses provide checks and balances as a House of Review.

As noted there have been some exceptions to Lower House practices in Australia, with the SA House of Assembly and now the NSW Legislative Assembly. While the SA House of Assembly's position might be explained by its almost annual prorogations, the NSW Legislative Assembly's recent change in practice provides a new twist to the debate. It would appear however that the Assembly's move is more likely to be a political response to the Gentrader controversy, rather than a general shift in the practice of Lower Houses.

Nevertheless it will certainly be interesting to see if prorogation continues to be 'misused' as a tool to prevent Upper Houses from holding governments to account, and whether any other parliaments will take steps to prevent this from occurring.

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<sup>30</sup> *Odgers' Australian Senate Practice*, 6th edn, Royal Australian Institute of Public Administration, ACT Division, 1991, p 974.

<sup>31</sup> *Ibid.*