

2013 ASPG ANNUAL CONFERENCE

Topic

The Parliament of New South Wales and the Independent Commission Against Corruption: Recent interactions on matters of privilege and future issues.

Synopsis

In recent times, two important matters of privilege have arisen as part of the relationship between the Parliament of New South Wales, and the Legislative Council in particular, and the New South Wales Independent Commission Against Corruption (ICAC). Both matters arose out of three high profile ICAC operations: Operations Indus, Jasper & Acacia. Operation Jasper concerned the decision by the former Minister for Primary Industries and Minister for Mineral Resources and a former member of the Legislative Council, Mr Ian Macdonald, to open a mining area at Mt Penny for coal exploration, including whether the decision was influenced by Mr Edward Obeid, also a former member of the Council.

The first matter of privilege arose in 2012. It concerned the proposed use by the ICAC of members' interest disclosure returns for the purposes of its investigations, and ultimately saw the Parliament pass legislation to waive parliamentary privilege attaching to such returns, to allow them to be used by the ICAC. The second matter, which commenced in late 2012 but is still ongoing, involves a possible contempt. It concerns documents made public by the ICAC as part of Operation Jasper, but not provided to the Legislative Council in 2009 in response to an order for papers, when, prima facie, it would appear that they should have been provided. In this matter, the Legislative Council has to date chosen not to waive privilege to allow further investigation by the ICAC, instead referring the matter to its own Privileges Committee.

This paper examines the backgrounds and reasons for these different approaches, and the close level of cooperation between the Parliament and the ICAC on both matters, particularly the second. While undoubtedly there has been tension between the ICAC and the Parliament in the past on matters of privilege, not least after 2004 following ICAC's execution of a search warrant at the Parliament House office of a member, Mr Peter Breen, the matters examined in this paper have been worked through effectively and appropriately by both bodies. However, broader issues remain concerning the relationship between the Parliament and the ICAC where matters of privilege and possible misconduct by members arise.

Introduction

The Independent Commission Against Corruption (ICAC) was established in July 1988 in response to concerns about the integrity of NSW public sector administration. The Commission is the primary agency in New South Wales responsible for investigating matters of bribery, extortion or official misconduct involving public officials, including ministers and members of Parliament.

In 2012, the ICAC began investigations into the granting of mining exploration licences (Operations Jasper and Acacia) and the provision of a motor vehicle to a former government minister (Operation Indus). These investigations included examination of alleged corruption by the former Minister for Primary Industries and Minister for Mineral Resources, Mr Ian Macdonald, in deciding to open the Mount Penny mining tenement in the Bylong Valley for coal exploration, and whether in doing so he was influenced by the Hon Edward Obeid MLC (Operation Jasper). The final report of the ICAC was tabled and made public in July 2013. In it, the ICAC found that Mr Macdonald, Mr Obeid and others had engaged in corrupt conduct, and recommended that consideration be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Macdonald, Mr Obeid and others for various offences. It was a sensational inquiry and report.

While the ICAC processes have been sensational, they have also precipitated consideration of two important matters of parliamentary privilege. Under the *Independent Commission Against Corruption Act 1988*, the ICAC is specifically precluded from using material protected by privilege for the purposes of its investigations. This raises the question, how matters that would normally draw the attention of the ICAC should be examined. In the two matters examined in this paper very different approaches to privilege were taken. In the first matter, the Parliament took the decision to waive privilege to allow investigation by the ICAC. In the second, however, privilege was deliberately not waived, the Legislative Council instead referring the matter to its own Privileges Committee. These varying approaches to managing parliamentary privilege were effective on these particular occasions, however broader issues remain concerning the relationship between the Parliament and the ICAC where matters of privilege and possible misconduct by members arise.

The Independent Commission Against Corruption and parliamentary privilege

Under the *Independent Commission Against Corruption Act 1988*, the powers of the ICAC to conduct investigations are extensive. ICAC has the power to obtain information by service of notice, the power to obtain documents, the power to enter public premises, powers for the compulsory examination and cross-examination of witnesses, powers for the protection of witnesses, and powers for the referral of matters to other bodies.

Significantly, however, while the ICAC has wide investigatory powers, under section 122 of the *Independent Commission Against Corruption Act 1988* parliamentary privilege is expressly preserved in relation to the freedom of speech and debates and proceedings in Parliament. Arguably, section 122 is not necessary. As a broad principle, the law of privilege is not altered except through express statutory enactment. However, for the avoidance of doubt, section 122 specifically preserves parliamentary privilege.

Parliamentary privilege consists of the powers and immunities recognised as necessary for Parliament to fulfil its roles in legislating and holding the executive government to account.

By far the most important immunity accorded to members of Parliament is the immunity of freedom of speech and debates, together with other 'proceedings in Parliament', from impeachment or questioning in any court or place out of Parliament. This includes the ICAC.

The significance of this immunity is two-fold. First, it facilitates parliamentary scrutiny of public affairs by allowing members of Parliament to freely raise matters of importance in the public interest. Second, it preserves the political-judicial balance between the separate branches of government, preserving the independence and authority of each House of Parliament from outside interference.

The effect of parliamentary privilege in New South Wales, as expressly preserved under section 122 of the *Independent Commission Against Corruption Act 1988*, is to restrict the jurisdiction of the ICAC with respect to members of Parliament and its ability to obtain evidence in relation to the conduct of members. Matters that trespass on privilege are beyond the jurisdiction of the ICAC.

This limitation on the ICAC's jurisdiction has been recognised on a number of occasions. For example, in 2002, in response to part of a resolution of the Legislative Assembly requesting that the ICAC investigate the regulation of secondary employment by its members, the ICAC advised that it had no authority to investigate matters where parliamentary privilege applies.

The ICAC's constrained jurisdiction has also been a source of contention between the ICAC and the Parliament in the past. Of note, in 2004, relations between the Parliament and the ICAC were strained significantly when the ICAC executed a search warrant on the Parliament House office of the Hon Peter Breen, a cross-bench member of the Upper House. During the execution of the warrant, officers of the ICAC seized a quantity of documents, as well as two computer hard drives and Mr Breen's laptop computer. It later became evident that, despite section 122, and assurances from the officers themselves that they would respect parliamentary privilege, at least one document seized was immune from removal by virtue of being protected by privilege. In addition, some of the material seized was outside the authorisation of the warrant, notably Mr Breen's laptop and desktop computer hard drives, which it later transpired had been 'imaged' by the Independent Commission Against Corruption. Following investigations and recommendations by the Standing Committee on Parliamentary Privilege and Ethics at the time, the ICAC was forced to return to the President the material which was deemed by the House to be privileged. The House subsequently authorised the release of the material back to Mr Breen.

Following the events of 2004, the Legislative Council Privileges Committee investigated the issue of search warrants on a number of occasions. Following extensive consultation, in 2009, the Presiding Officers and the Commissioner of the ICAC entered into a 'Memorandum of understanding on the execution of Search Warrants in the Parliament House Offices of Members of the New South Wales Parliament'

Where the limitation of the jurisdiction of the ICAC as a result of privilege becomes most serious, however, is where the ICAC seeks to investigate members of Parliament in relation to allegations of bribery, extortion, misconduct or breaches of the Code of Conduct for Members, but is effectively unable to do so because key material is protected by privilege. It is acknowledged that such instances are likely to be rare – in most instances, issues of privilege will not arise where matters of bribery, extortion and the like are in play – however, the possibility certainly exists.

In 2003, in a report to the Speaker of the Legislative Assembly,¹ the ICAC proposed various possible models for addressing this issue:

- The appointment of a parliamentary committee, such as the Privileges Committee, to conduct investigations of such issues. However, the ICAC noted that in the past, parliamentary committees in various jurisdictions have made observations on the limited capacity of committees to conduct investigations of this type.
- An amendment to the *Independent Commission Against Corruption Act 1988* to allow the Parliament to waive parliamentary privilege for specified matters which are referred to the ICAC by resolution of the House. This was one option recommended by the ICAC.
- The establishment of a Parliamentary Commissioner to investigate such issues. However, the ICAC noted that in New South Wales, where the ICAC can investigate all corrupt conduct allegations apart from those to which parliamentary privilege applies, the need to call on a Parliamentary Commissioner would seldom arise.
- The appointment of an officer of the Parliament to undertake an investigation on an as needs basis. This was ICAC's preferred option. The Commission suggested that such a procedure 'would provide a means for the Parliament to enforce its own privileges in such a way as to ensure public confidence in the integrity and impartiality of the outcome yet still maintain the independence and self-regulation of the House'. The ICAC also recommended the provision of certain safeguards in the appointment and duties of the investigating officer.

The two matters of privilege that arose during the last year in New South Wales out of Operation Jasper were resolved by the adoption of the first two of the four approaches outlined above: waiver of privilege and the appointment of the Privileges Committee to investigate the relevant matter. This is discussed below.

The 2012 waiver of privilege over members' interest disclosure returns

There is one exception to the specific preservation of parliamentary privilege under section 122 of the *Independent Commission Against Corruption Act 1988*. In 2012, the Parliament waived privilege attaching to the Register of Disclosures by Members of the Legislative Council and the Register of Disclosures by Members of the Legislative Assembly to allow the ICAC to make use of either Register for the purposes of any investigation or for the purposes of any finding or recommendation concerning the disclosure or non-disclosure of a matter in the Registers.

By way of background, over the course of 2012, during its investigations as part of Operations Jasper and Acacia, the ICAC on a number of occasions sought from the Clerk of the Legislative Council by notice under section 22 of the *Independent Commission Against Corruption Act 1988* various interest disclosure returns prepared by members of the Legislative Council pursuant to the Parliament's interest disclosure regime.

Given that the register is available for inspection by members of the public, the Clerk of the Legislative Council made copies of the returns available to officers of the ICAC on each

occasion as required under the section 22 notice. However, on each occasion, the Clerk cautioned the ICAC officers concerned that privilege may attach to the returns, and that the Clerk should be informed if any use were proposed to be made of the returns by the ICAC for the purposes of evidentiary proceedings.

On 10 October 2012, the ICAC did indeed advise the Clerk that information in the members' returns would be 'referred to' in a brief of evidence being prepared by the ICAC for the investigations. Public hearings were due to commence on 1 November 2012. In separate correspondence, the ICAC indicated its own belief that privilege did not attach to returns in the Register.

The Commission's advice and proposed course of action necessitated consideration whether the Register of Disclosures by Members of the Legislative Council attracted the protection of parliamentary privilege as a 'proceeding in Parliament' within the meaning of Article 9 of the *Bill of Rights 1689*. If it did, the privilege would need to be asserted in response to the Commission's stated intention to use members' returns for the purposes of their proceedings.

In his own advice on the matter, the Clerk cited various judicial and parliamentary authorities, including *Rost v Edwards*,² the 1999 UK Joint Committee on Parliamentary Privilege, the *Constitution Act 1902* (NSW), Professor Gerrard Carney and Professor Anne Twomey. Together, they gave no clear basis for concluding one way or the other whether the interest disclosure returns were protected by privilege. A reasonable argument could be made either way.

In separate advice, the Crown Solicitor also found it hard to come to a definitive answer, arguing that there are 'competing arguments' which are 'relatively finely balanced' as to whether the Register of Disclosures by Members of the Legislative Council is protected by parliamentary privilege. Ultimately, however, he was inclined to think that the arguments in favour of the view that the Register forms part of the 'proceedings in Parliament' outweighed the arguments against.

The Crown Solicitor further advised that if it could not be conceded that privilege does not apply to members' returns in the Register, it was the responsibility of the President of the Legislative Council to seek to uphold the privileges of the House, including by intervening in the ICAC proceedings if necessary.

Following careful, but expedited consideration of the matter, including briefing for the Premier, it was concluded that legislation should be introduced to waive privilege attaching to the Register of Disclosures by Members of the Legislative Council and the Register of Disclosures by Members of the Legislative Assembly. The Independent Commission Against Corruption Amendment (Register of Disclosures by Members) Bill 2012 was introduced expeditiously and passed by the Parliament in the last sitting week prior to the commencement of the ICAC hearings. It inserted into the *Independent Commission Against Corruption Act 1988* the following provision (not the full provision):

- (2) The Commission may use a relevant register:
 - (a) for the purpose of any investigation into whether or not a member of Parliament publicly disclosed a particular matter or as to the nature of any matter disclosed, and

- (b) for the purpose of any finding, opinion or recommendation concerning the disclosure or non-disclosure,

and for that purpose Parliament is taken to have waived any parliamentary privilege that may apply to the register.

Parliament is rightly reluctant to waive privilege and restrict the privileges of members. However, in this instance, it was considered by the Presiding Officers and the Clerks that there was no sound policy reason why privilege should attach to members' interest returns. Of note, waiving of privilege over interest returns in relation to the ICAC in no way would inhibit the freedom of speech in Parliament. Indeed, the measure could be seen as enhancing the accountability of members and thereby public confidence in the Parliament.

The Parliament took the same view, passing the Independent Commission Against Corruption Amendment (Register of Disclosures by Members) Bill 2012 without amendment.

It is notable, however, that a different approach was taken when issues of privilege arose again in early 2013.

The Mt Penny matter

In 2008/2009, the then New South Wales Department of Primary Industries (DPI) conducted an expression of interest (EOI) process for the exploration of 11 medium and small coal exploration areas in New South Wales, including the Mt Penny expression of interest area in the Bylong Valley in the Western Coalfield.

The process formally began in September 2008 when an EOI package was released by DPI. Following a lengthy process, an Exploration Licence was granted in late 2009 to Mt Penny Coal Pty Ltd nominated by Cascade Coal Pty Ltd.

The EOI process was controversial. Concerns were raised publicly and in Parliament regarding the probity of the EOI process, after the process was closed and later reopened to allow additional companies to express interest in mining tenement.

In response, on 10 November 2009, the then Deputy Leader of the Opposition in the Legislative Council, the Hon Duncan Gay, gave notice of motion for an order for the production of State papers in relation to the Mt Penny mining exploration licence and tender process.

Since the famous *Egan* decisions of the mid to late 1990s, orders for the production of papers have become one of the principal means by which the Legislative Council in New South Wales holds the executive government to account. Put simply, the House may order the production of State papers held by a minister in the Government. The minister is legally obliged to comply in full, although various claims of privilege are routinely made. The power is based on the common law principle that the Houses of Parliament in New South Wales have such powers as are reasonably necessary for their effective functioning.

The order for the production of State papers in relation to the Mt Penny mining exploration licence and tender process was agreed to by the House two days after notice was given by Mr Gay. It stated:

That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer, NSW Treasury, in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any document relating to the tender process, and any document which records or refers to the production of documents as a result of this order of the House.

The return to the order was received by the Clerk from the Department of Premier and Cabinet, which coordinates all returns to order on behalf of the relevant minister, and tabled in the House on 26 November 2009. The return consisted of one box of public documents and one box of documents over which privilege was claimed.

There the matter rested for several years.

Possible non-compliance with the 2009 Mt Penny order for papers

In August 2012, the ICAC announced that it was undertaking Operation Jasper, investigating the circumstances surrounding the decision by Mr Macdonald to open the Mt Penny expression of interest area in the Bylong Valley for coal exploration, including whether the decision was influenced by Mr Obeid.

As part of its investigations, ICAC subsequently published on its website a range of documents obtained by the Commission using its extensive powers to obtain information.

In late 2012, a member of the Legislative Council cross bench, the Hon Jeremy Buckingham raised concerns with the Clerk that the documents made public by the ICAC on its website included documents that appeared relevant to the 2009 Mt Penny return to order, but had not been provided to the House. In short, the 2009 Mt Penny order for papers had potentially not been fully complied with.

On receipt of the correspondence from Mr Buckingham, the Clerk referred the matter to the Director-General of the Department of Premier and Cabinet. The Director-General of DPC subsequently alerted the ICAC to the matter.

In February 2013, a senior investigator at the ICAC in turn approached the Clerk on the matter, indicating that the ICAC was intending to launch its own investigation into the matter. Once again, issues of privilege came to the fore.

I immediately wrote to the Commissioner of the ICAC seeking formal advice of the Commission's intentions in relation to the matter, and indicating that papers in the 2009 return to order, including the indexes to the documents and associated certification letters, were undoubtedly protected by privilege as 'proceedings in Parliament'.

The Commissioner of the ICAC replied the following day, indicating that the ICAC was comparing its holding of material as part of operations Jasper and Acacia with the material produced to the House in response to the order for papers in 2009, and that the ICAC would

provide advice to the House if it appeared that documents were not provided in the 2009 return. The Commissioner also gave the assurance that ‘the Commission will not take any action in this matter which affects the rights and privileges of the House unless there is a clear waiver of privilege entitling the Commission to do so’.

Subsequently, the Commissioner sent by further correspondence a ‘document comparison matrix’. The ‘document comparison matrix’ listed documents which the ICAC ‘considered as being possibly relevant to the order for papers but which do not appear to have been included in the production to Parliament’.

The same day, I tabled in the New South Wales Legislative Council the correspondence from the Commissioner and associated ‘document comparison matrix’ in the House. I subsequently made the following statement:

... This is an extremely grave matter. Since the High Court of Australia reaffirmed the power of this House to order the production of State papers, the exercise of that power has been a fundamental part of the work of this House, in holding the Executive Government to account, and the House has made 293 orders for the production of documents. We appear now to be faced with the possibility that one of the orders of the House was not complied with. It is ultimately for the House to determine whether or not its order has been complied with and the consequences that flow.

Immediately following the statement above, the House resolved to refer the matter to the Privileges Committee for inquiry and report.

The first Privileges Committee inquiry

The first Privileges Committee inquiry into the 2009 order for papers was called the Inquiry into possible non-compliance with the 2009 Mt Penny order for papers. The Committee reported on 30 April 2013.

In its report, the Committee found that at least 124, if not all, of the documents identified by the ICAC in the ‘document comparison matrix’ as not having been provided to the House in 2009 should, *prima facie*, have been provided. The Committee reached this conclusion independently, but with the benefit of advice from Mr Bret Walker SC, who was engaged by the Committee to provide an independent assessment of the documents identified and provided by the ICAC.

It goes without saying that this was an extremely serious finding. The power of the Legislative Council to order the production of State papers is fundamental to the constitutional role of the Parliament in holding the Government to account under the system of responsible government that operates in New South Wales. The power was confirmed by the High Court of Australia and the New South Wales Court of Appeal in the *Egan* decisions.

Since the final *Egan* decision in 1999, the House has passed almost 300 orders for the production of State papers. While questions have arisen from time to time about the content of some returns, and why particular documents have not been provided to the House, this was the first time that the House had decided that evidence before it of non-provision of documents warranted formal investigation and report, and that the Privileges Committee had reached a conclusion of non-compliance.

The Committee then went on to consider in its report how best to investigate this matter further. The Committee considered two practical alternatives:

- Reference of this matter by the House to the ICAC for further investigation, together with the introduction of legislation to waive privilege to allow the ICAC to proceed.
- Full investigation of this matter by the Privileges Committee, requiring the House to refer new terms of reference to the Committee.

The first option for the further investigation of this matter by the ICAC would have required the Parliament to again pass legislation waiving privilege over the documents provided in the 2009 Mt Penny return to order to enable their use by the ICAC.

On this occasion, the Privileges Committee recommended against this approach. The Committee accepted that in some circumstances the waiver of privilege may be justified to permit an external inquiry to be made into parliamentary proceedings, as indeed occurred with the waiving of privilege over interest returns in 2012. However, the Committee argued that a compelling public interest needs to be established to do so. The Committee found that the potential ramifications of waiving parliamentary privilege include:

- A chilling effect on future proceedings in Parliament, if there is an increased likelihood that privilege will be waived more often.
- Abuse of the waiver by parliamentary majorities for political purposes.
- The creation of public expectations that privilege can be routinely waived whenever an issue becomes one of public concern in the future, and the exposure of Parliament to criticism in the event that privilege is not waived.
- An undermining of Parliament's constitutional role as the principal body responsible for superintendence of the executive government if matters are routinely referred to bodies such as the ICAC.

The second option considered by the Committee for the further investigation of this matter involved the referral of new terms of reference by the House to the Privileges Committee to investigate the reasons why documents were not provided in the 2009 return to order.

This was the Committee's preferred approach. The Committee took the view that ultimately it is the responsibility of the House to determine issues of compliance and non-compliance with orders for papers. As I stated in the House on 14 March 2013:

It is ultimately for the House to determine whether or not its order has been complied with and the consequences that flow.

In advocating this approach, the Committee argued that the outcomes of any further inquiry by the Privileges Committee should be not only the identification of any individuals whose actions may have resulted in the non-provision of documents in 2009, but the investigation of processes within government for coordinating responses to orders for papers, and the development of guidelines and policies to ensure full compliance with orders for papers in the future.

The second inquiry of the Privileges Committee

Following the tabling of the first report of the Privileges Committee, on 30 April 2013, the Leader of the House, the Hon Duncan Gay, gave notice for the referral of new terms of reference to the Privileges Committee, as the Privileges Committee recommended in its first report. The terms of reference required the Committee to examine both:

- the reasons for and circumstances leading to the failure to provide documents in the 2009 return to order and the identity of the person or persons whose actions resulted in the failure to provide documents in the return; together with
- any deficiencies in processes or policies of a minister, ministerial office, department or other agency regarding the identification of documents captured by orders for the production of documents under standing order 52, or the inclusion of documents in a return.

At the time of writing, the inquiry is still ongoing. However, it is notable that the Committee has again worked closely in cooperation with the ICAC during the inquiry, with the Commissioner providing to the Committee a further document listing the documents previously identified in the 'document comparison matrix', and indicating how they were sourced and from whom. The Commissioner did so in accordance with section 111 of the *Independent Commission Against Corruption Act 1988*, which provides that the Commissioner may divulge information if the Commissioner certifies that it is necessary to do so in the public interest.

Future investigations into the conduct of members and privilege

The two matters outlined above arising out of Operations Indus, Jasper and Acacia are good examples of effective cooperation between the Parliament and the ICAC on matters of privilege and accountability. Arguably, the Parliament and the Commission have worked through these matters appropriately, with different horses-for-courses approaches taken to each:

- In the first instance, the Parliament was willing to waive privilege expediently, on the basis that there was no sound policy reason why privilege should attach to members' interest returns, and that waiving of privilege over interest returns in relation to the ICAC in no way would inhibit the freedom of speech in Parliament.
- In the second instance, the matter was more appropriately addressed by the Legislative Council choosing to investigate the matter itself through its own Privileges Committee, as the matter involved compliance with an order of the House.

However, the issue of ICAC's limited jurisdiction where matters of privilege arise remains. As before, this issue is of particular seriousness in the event that issues of privilege arise in relation to allegations against members of Parliament of bribery, extortion, misconduct or breaches of the Code of Conduct for Members.

Arguably, the two different approaches adopted in the matters outlined above may not be nearly so palatable in the future. The expedient of the Parliament simply waiving privilege may not be appropriate should circumstances arise, for example, where the ICAC sought to use statements made by a member in the House. As discussed, there are good reasons why privilege should not be waived, and a compelling public interest needs to be established to do so.

Equally, while the ICAC did not contest the right of the Legislative Council through its Privileges Committee to investigate the 2009 return to order, no doubt this is in part because the matter was very specific to Parliament, and the ICAC already had its own extensive investigation into the conduct of Mr Macdonald, Mr Obeid and others already underway. However, were the circumstances different, and serious allegations of bribery or corruption were made against a member of Parliament, the ICAC may be less willing in the future to give way to the Parliament in such a manner.

Accordingly, there is still an imperative to develop other mechanisms to address the issue of privilege where members may be accused of bribery, extortion, misconduct or breaches of the Code of Conduct for Members.

Conclusion

In the last year, the Parliament of New South Wales has been obliged on two separate occasions to grapple with issues of privilege and the jurisdiction of the ICAC. On both occasions, the two bodies worked together effectively to come to resolutions of the issues involved that were workable and appropriate. Arguably, however, such approaches cannot always be expected to work in the future.

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- ¹ ICAC, *Regulation of secondary employment for Members of the NSW Legislative Assembly*, Report to the Speaker of the Legislative Assembly, September 2003, pp 16-17. The report was prepared by the ICAC in response to a resolution of the Legislative Assembly requesting the ICAC to review the Code of Conduct of Members in respect of limiting secondary employment in the field of 'public affairs'.
- ² [1990] 2 WLR 1280