Appendix 3 Legal advice from Mr Bret Walker SC

24 October 2012

Mr Bret Walker SC
5th Floor
St James Hall
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SYDNEY NSW 000

Dear Mr Walker

Legislative Council committees: statutory secrecy provisions and related matters

As discussed today, I seek your advice in relation to issues arising in connection with a public hearing conducted by General Purpose Standing Committee (GPSC) No. 4 for the Inquiry into Budget Estimates 2012-2013. During the hearing, a witness stated that she could not answer particular questions due to the secrecy provisions of the *Crime Commission Act 2012*. The Committee considered her objections in a private meeting and resolved that I seek legal advice on this matter. Background information and the questions on which I seek your advice are set out below.

Background

The hearing

GPSC No. 4 has been required by the Legislative Council to inquire into and report on the 2012-2013 budget estimates and related papers concerning a number of Ministerial portfolio areas, including Police and Emergency Services (*Resolution - Attachment 1*). One important aspect of the budget estimates hearings is that they must be conducted in public.

The Committee held its hearing into the Police and Emergency Services portfolio on 11 October 2012, at which the Minister for Police, Minister Gallacher, and a number of senior NSW Police Force officers appeared (*Hearing schedule - Attachment 2*). All witnesses appeared voluntarily at the invitation of the Committee.

During the hearing a Committee member asked Deputy Commissioner Catherine Burn a question in relation to the report of Strike Force Emblems. At this point the Minister made a statement about Strike Force Emblems, stating that these matters "should not quite rightly be arbitrated by him as Minister, the Premier or the Committee" (*Transcript – Attachment*

3).[1] The Minister tabled two letters in support of his argument (*Attachment 4*). The first is from the Inspector of the Police Integrity Commission to the Minister, in which the Inspector refers to the hearing and expresses the view that "it is highly desirable that the Emblems Inquiry which you have referred to me not be the subject of public discussion at this stage". The second is from the NSW Ombudsman to the Commissioner of Police, in which the Ombudsman requests the co-operation of the Commissioner and his officers in not communicating or otherwise disclosing to any person information or material relevant to his inquiry.

As the hearing progressed the Committee member asked Ms Burn a specific question about an aspect of the Emblems investigation, to which she responded that she could not answer, stating: "I cannot because of the secrecy provisions of the Crime Commission. It is a criminal offence and I cannot give you a full account; I cannot give an answer to that question".[2] It is presumed that this is a reference to section 80 of the *Crime Commission Act* 2012.

Shortly afterwards another Committee member commenced asking Ms Burn questions about a specific listening device warrant and referred to a memorandum relating to the warrant which he stated was authored by the witness.[3] At the Minister's request to table the document the member expressed a willingness to provide it to Ms Burn, and handed the document to the Minister who was nearest to the witness. The Minister noted that the document was marked 'highly protected' and expressed concern about it being discussed. At this point the Chair adjourned the hearing and the Committee met in private.

During the private meeting I confirmed the Committee's power to ask questions despite statutory secrecy provisions, but noted that it was a separate question for the Committee to decide whether it would be appropriate in the particular circumstances to exercise the power. I counselled that it was appropriate to pause to allow the witnesses and the Committee the opportunity to give due consideration to the matter and to seek legal advice.

After further deliberation the Committee resolved that questions in relation to Strike Force Emblems be adjourned until a supplementary budget estimates hearing on 29 November 2012 in order to provide both Ms Burn and the Committee with the opportunity to obtain legal advice on this matter. The hearing was reconvened and the witnesses were informed of this decision. No further questions on Strike Force Emblems were asked. After the hearing the member in possession of the document decided not to table it with the Committee and instead provided a copy to me for the purposes of seeking this advice.

[1] General Purpose Standing Committee No 4, *Transcript of Proceedings*, 11 October 2012, Examination of proposed expenditure for the portfolio areas of Police and Emergency Services, The Hunter, pp 10 – 11.
[2] Transcript, p 16.
[3] Transcript, p 17.

While only Ms Burn was asked questions in relation to Strike Force Emblems before the hearing was adjourned, it is likely that some of the Committee members also have questions regarding Strike Force Emblems for at least one other of the witnesses.

Statutory secrecy

As you will recall, in November 2000 you provided advice as to, among other matters, whether the secrecy provisions in the *Casino Control Act 1992* apply to witnesses before a parliamentary committee (*Attachment 5*). In summary, your advice was that the provisions did not apply and that:

> "24. In my opinion, the general words of sec 148 ... are not apt to deprive the Council or the Committee of its pre-existing power, both at common law and under the *Parliamentary Evidence Act*, to enquire into public affairs as the Members see fit. ... it would have required express reference to the Houses including their committees, or alternatively a statutory scheme which would be rendered fatally defective, unless its application to the Houses were implied, for the secrecy provisions of the *Casino Control Act* to have this drastic effect."

You also noted that "... another consideration supporting this conclusion is that "...it has been observed elsewhere that the provisions of Article 9 of the Bill of Rights would arguably protect a public servant witness before the Committee from prosecution and punishment in a court".[4]

Your advice has since been accepted as part of NSW Legislative Council practice,[5] as reflected in *Lovelock and Evans* and in the statements made during the hearing by the Chair and other members of the Committee.[6]

I note that no such express reference to the Houses is contained in the *Crime Commission Act 2012*. Nonetheless, due to the seriousness and complexity of this matter, I seek your advice as to whether anything particular to the *Crime Commission Act*, the current fact situation, or any recent legal developments would lead you to a different conclusion in this instance, both in regard to the application of the secrecy provisions and the effect of Article 9.

I note that the recently released 13th Edition of *Odgers'* provides an analysis of various disputes and debates regarding statutory secrecy provisions in the Federal Parliament over the past two decades.[7]

As this matter may also give rise to an objection to questions based on the secrecy provisions in the *Police Integrity Commission Act 1996*, section 56 or any relevant provisions

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[4] At para 31.
[5] *New South Wales Legislative Council Practice*, Lovelock and Evans, The Federation Press 2008, pp 512 – 515.
[6] Transcript, pp 16-17.
[7] *Odgers' Australian Senate Practice*, Evans and Laing, 13th Edition, Department of the Senate, Canberra, pp 65-70.

which go to confidentiality of information in the *Police Act 1990*, I also ask you to consider the application of these provisions to witnesses before a parliamentary committee.

Powers of committees to compel answers to questions; use of summonses

As you are aware, under section 4 of the *Parliamentary Evidence Act 1901*, the Council and its committees have the power to summon persons to give evidence before them. The House and its committees also have the power to compel answers in certain circumstances. In this regard, section 11 provides that if a witness refuses to answer any 'lawful question' the witness is deemed guilty of contempt of Parliament.

Your 2000 advice concluded that a witness before a Council committee does not need to be summonsed in order to attract the protection of parliamentary privilege or for the sanctions in section 11 to apply. Since this advice it has been our practice that witnesses are not routinely issued with a summons on the day of the hearing and are only summonsed when they refuse to appear at the Committee's invitation and the Committee forms the view that the attendance of the witness is necessary.

It has also been our practice (although the matter has arisen rarely) for the Council to advise its committees that a committee should not press a witness who is appearing voluntarily to answer a question to which the witness has raised an objection, on the basis of procedural fairness. In this regard *Odgers'* states: "It would not be fair for a witness who appears voluntarily by invitation to be required to answer a question; only a witness under summons should be so required."[8]

As noted above, all of the witnesses who attended the hearing on 11 October attended voluntarily at the invitation of the Committee, and there is currently no indication that any of the witnesses may refuse the Committee's invitation to return for the November hearing.

However, I seek your advice as to whether it is advisable to issue a summons in relation to a witness whom the Committee intends to compel to answer questions she or he has previously objected to, whether on the grounds of procedural fairness or some other legal basis.

I note that in your 2000 advice you raise the possibility that a witness who is summonsed may raise an 'argument, perhaps in defence to adverse action under section 11 and 13, to the effect that the witness ceased to be a volunteer when he or she received the summons' and you note that 'somewhat reluctantly' you see some force in that argument. I note that these comments were made in relation to the Council's practice at the time which was to serve summonses on persons who appeared voluntarily on the day of the hearing as a matter of course. I therefore ask you to consider your comments in light of the Council's current practices with regard to summonsing, as described above.

[8] *Odgers'*, p 485. A similar statement is made in *Lovelock and Evans* at p 509, although this statement is unfortunately erroneous in conveying that a summons is a necessary requirement.

Use that can be properly made of the document possessed by a member

As noted above, a Committee member produced a document with the intention of providing it to Ms Burn and asking her questions in relation to it. The member described the document as 'a two page memorandum dated 13 April 2002, along with a twelve page annexure'. The document is marked 'highly protected.'

Given the nature of this document questions arise as to whether there are: any restrictions on the member asking questions based on the document or showing it to the witness, or upon the Committee receiving it as a tabled document.

Advice sought

The questions on which advice is sought are as follows:

1. Would a person who is bound by the secrecy provisions in section 80 of the *Crime Commission Act 2012* or section 56 of the *Police Integrity Commission Act 1996*, or any relevant provisions which go to confidentiality in the *Police Act 1990*, be in breach of those provisions if that person disclosed information to a committee of the Legislative Council in answer to questioning by the committee?

2. Is it advisable, whether on the grounds of procedural fairness or some other legal basis, to issue a summons in relation to a witness whom the Committee intends to compel to answer questions she or he has previously objected to?

3. In relation to the document in the possession of the member:
    a. Are there any restrictions on the member asking questions of witnesses based on the document or showing the document to the witness?
    b. Are there any restrictions on the Committee receiving the document as a tabled document?

I would be most grateful if you would be able to provide this advice by Tuesday 6 November 2012.

Should you require further information in regard to these instructions please contact me on , or by email: .

Sincerely

David Blunt
Clerk of the Parliaments

LEGISLATIVE COUNCIL COMMITTEE – SECRECY PROVISIONS

OPINION

I am asked to advise the Clerk about the effect, if any, on the powers of General Purpose Standing Committee No 4 to compel witnesses to answer questions, of provisions such as sec 80 of the *Crime Commission Act 2012* (NSW), sec 56 of the *Police Integrity Commission Act 1996* (NSW) and eg sec 211E of the *Police Act 1990* (NSW).

2 The provisions of sec 211E of the *Police Act* expressly limit the secrecy imposed by them so as to permit answers to lawful questioning. Questioning under authority of sec 4 of the *Parliamentary Evidence Act 1901* (NSW), sanctioned by the offence created by sec 11 of the Act, is an example of that exception to such secrecy. Provisions modelled like this *Police Act* secrecy or non-disclosure régime present no inhibition at all to the proceedings of GPSC No 4. The rest of this Opinion concerns the different model used in the *Crime Commission Act* and the *Police Integrity Commission Act.*

3 That model uses the inclusive definition of "… any … authority or person having power to require … the answering of questions …" within the meaning of "court". In turn, the expression "court" is used to describe where a relevant officer must not, on pain of criminal penalty, disclose certain kinds of information. The wording, it is suggested, raises the question whether GPSC No 4 (and, by extension,

the Legislative Council itself) is a "court" in which eg a Deputy Commissioner of Police cannot be compelled to answer questions if the answers would reveal those kinds of information.

4 For the following reasons, in my opinion the statutory provisions to this effect should not and will not be construed by a court of law to deny Parliament (and one of its Houses' delegates, GPSC No 4) the power to compel such answers.

5 It is noted that these provisions explicitly permit certain senior officers to lift the obligation of secrecy if in their opinion the public interest so requires. To put it mildly, it would be surprising if that overarching judgement had been reposed by legislation in those officers by provisions which denied the legislators themselves the responsibility to judge the public interest in requiring answers to questions deemed proper to be asked. The more so, given that the parliamentary rôle of securing accountability of government activity has been described as "the very essence of responsible government" according to a view cited approvingly in the High Court of Australia: *Egan v Willis* (1998) 195 CLR 424 at 451.

6 A further important feature of the *Crime Commission Act* and the *Police Integrity Commission Act* is that both agencies are, as would be expected given their functions, required to report (directly or indirectly) to the Houses of Parliament. It would be odd, bordering on perverse, if these provisions were to be read as somehow informing Members of matters they could not pursue further through means such as

7 Against this setting of the matters of present relevance in context, I affirm the reasoning and conclusions I expressed in my Opinion dated 2nd November 2000 given to the Clerk, also for GPSC No 4, on that occasion in relation to the secrecy provisions of the *Casino Control Act 1992* (NSW).

8 *1. Would a person who is bound by the secrecy provisions in section 80 of the Crime Commission Act 2012 or section 56 of the Police Integrity Commission Act 1996, or any relevant provisions which go to confidentiality in the Police Act 1990, be in breach of those provisions if that person disclosed information to a committee of the Legislative Council in answer to questioning by the committee?*

No.

9 *2. Is it advisable, whether on the grounds of procedural fairness or some other legal basis, to issue a summons in relation to a witness whom the Committee intends to compel to answer questions she or he has previously objected to?*

Yes. The advantage of a summons is to signify the compulsion under which the witness attends and answers. As I have previously advised, in my opinion a summons is not strictly necessary in order to compel answers, but is necessary to compel attendance, without which a witness cannot be compelled if he or she chooses to leave the premises.

10 *3. In relation to the document in the possession of the member:*

a. Are there any restrictions on the member asking questions of witnesses based on the document or showing the document to the witness?

b. Are there any restrictions on the Committee receiving the document as a tabled document?

No.

FIFTH FLOOR,

ST JAMES' HALL.

LEGISLATIVE COUNCIL:
PARLIAMENTARY PRIVILEGE AND WITNESSES
BEFORE GENERAL PURPOSE STANDING COMMITTEE No 4

MEMORANDUM

I refer to the Opinion delivered on 2nd November 2000. My attention has been drawn to the way I expressed one of my conclusions in para 17 and in para 42, (in answer to question 5(b) in particular).

2. I adhere to the answers I gave to Question 5 in para 42 of my Opinion. My reasons remain those noted in paras 43 and 45 of my Opinion.

3. However, my paraphrase of sub-sec 11(1) of the *Parliamentary Evidence Act 1901* in para 17 of my Opinion was incomplete, in light of those answers and reasons.

4. My Opinion, should, therefore, be read on the basis that, in place of the expression *"a summoned witness"* in the first line of para 17, there should be read the expression *"a summoned **and sworn/affirmed** witness"*.

FIFTH FLOOR,
ST JAMES' HALL.
9th November 2000

Bret Walker

LEGISLATIVE COUNCIL:
PARLIAMENTARY PRIVILEGE AND WITNESSES
BEFORE GENERAL PURPOSE STANDING COMMITTEE No 4

OPINION

I am asked to advise the Clerk in relation to a number of matters arising from the summoning of public servants as witnesses to answer questions before the Committee, in circumstances where the witnesses claimed that statutory secrecy provisions prevented them from answering certain questions.

2. By reason of secs 106 and 107 of the *Commonwealth Constitution*, whatever power the Houses of the Parliament of New South Wales possessed immediately before Federation gained a measure of federal constitutionality. The pre-existing limits on the powers of the Council to convene a committee of its Members and to summon witnesses and to compel them to answer questions put by the Committee must be somewhat uncertain. For one thing, in my opinion, the rôle of the Parliamentary chambers in this general regard can be seen to have evolved since responsible self-government in 1855: see generally *Egan v Willis* (1996) 40 NSWLR 650 and (1998) 195 CLR 424, and *Egan v Chadwick* (1999) 46 NSWLR 564. For another thing, the rôle of the Houses as the grand inquest of the nation, so-called, has not been declared by judicial decisions in Great Britain or Australia in terms which are precise as to the scope or limits of the powers to compel or punish witnesses.

3. However, in my opinion it cannot be doubted, in light of these authorities, that there is some measure of power, from the nature of the Houses of Parliament as such, for a House to obtain information concerning public affairs germane to legislation, whether contemplated or operative. This power, whatever its precise limits, and whatever incidental powers it may or may not imply concerning the compulsion of witnesses, is sometimes included in the general expression "the privileges of Parliament".

4. For present purposes, these areas of scholarly dispute are not critical. Such constitutionalization of the privileges or powers of the Houses of the Parliament of New South Wales as was accomplished by secs 106 and 107 of the *Commonwealth Constitution* does not, in my opinion, prevent the Parliament itself from legislating to define (including by way of diminution) the powers and privileges of the Houses. It is not necessary, in order to answer the questions I am asked in this brief, to consider whether there are some limits on this legislative competence of the Parliament of New South Wales. If there were, they might be imposed by the *Commonwealth Constitution*, and may be revealed by an examination of what attributes are necessary in order for a body to remain, in substance, a *"Parliament"* as that expression is found in the *Commonwealth Constitution*, including in Parts II, III and IV of Chapter I, sec 51(xxxvii.) and (xxxviii.) and secs 107, 108 and 111. It suffices in this Opinion to assert that none of the considerations discussed below comes anywhere near such limits as may be speculated to exist in this regard. In this case, the essential question will be answered by construing legislation. As Byrne J held in *R v Smith ex parte Cooper* (1992) 1 QR 423 at 430, *"the privilege yields to the extent it conflicts with an Act"*.

5. The importance of this constitutional background for present purposes therefore lies, not in its immediate relevance, but rather in the fundamental nature of the attributes in question. Those attributes are the powers and privileges of a House of the Parliament. It does not require elaboration to state that all legislation defining, affecting or diminishing such attributes have direct constitutional implications, concerning the most important institution of a free democracy under the rule of law. For this reason, an accepted canon of statutory interpretation is to expect that significant constitutional implications would follow only from tolerably plain statutory language. The learned Clerk of the Senate has argued to similar effect: see *Odgers' Australian Senate Practice* (9th ed) at 47- 50. Somewhat similar observations are made in the *House of Representatives' Practice* (3rd ed) at 642. See also the brief discussion in Lindell, *"Parliamentary Inquiries and Government Witnesses"* (1995) 20 MULR 383 at 408-409.

6. The other obvious canon of statutory interpretation in this area arises from the nature of the exercise when it is supposed that Parliament has by legislation diminished the powers and privileges of its Houses. As Helman J of the Supreme Court of Queensland has recently observed in *CJC v Dick* [2000] QCS 272 (25th July 2000) at [13], there is *"implausibility"* in *"the proposition that Parliament should have intended by... indirect means to surrender by implication part of the privilege attaching to its proceedings"*.

7. In the present case, this approach is to be applied to the problem presented by the existence of statutory secrecy provisions, of a generally familiar kind, in sec 148 of the *Casino Control Act* 1992. By sub-sec 148(1), a criminal offence is created of recording or divulging information which was acquired in the exercise of functions

under that Act, except if the recording or divulging was itself an exercise of functions under that Act. Importantly, the prohibited divulging of information is expressed as being divulging it *"to another person"*. The question arises in this case, then, whether the Committee or the Council is such a *"person"*, or whether their respective Members are such persons. There is no doubt, I assume from my brief, that the public servants who were summonsed before the Committee had acquired information in the exercise of functions under the *Casino Control Act*.

8. By sub-sec 148(2) of the *Casino Control Act*, an exception provides that information may be divulged in three specified cases, none of which appears to apply in the circumstances I have been asked to consider. Briefly, the first case is divulging to *"a particular person or persons"* upon a certificate by the Casino Control Authority that this action is necessary in the public interest. The second case is divulging information to *"a prescribed person or prescribed authority"*. The third case is divulging information to *"a person"* authorized to obtain information by *"the person to whom the information relates"*. Although on my instructions none of these three cases of exceptions from the general offence under sub-sec 148(1) applies to the circumstances about which I have been consulted, it is relevant to note the consistent use of the expression *"person"* in these provisions.

9. By sub-sec 148(3), public servants or the like who come to have or know of information as a result of the exercise of functions under the *Casino Control Act* are dispensed from any requirement to produce documents or divulge information obtained in such circumstances, to *"any court"*. An expansive definition of the

answering of questions". Thus, the question also arises in this case whether the Committee or the House is within that category of *"any tribunal, authority or person... etc*".

10. An exception to this dispensation is enacted by sub-sec 148(4) of the *Casino Control Act*, in terms similar to the first and third cases provided by sub-sec 148(2) as noted in 8 above. Ancillary provisions in sub-sec 148(5) pass on, as it were, the position created by sec 148 so as to apply it to an authority or *"person*" to whom information may be divulged under sub-sec 148(2), as well as to people *"under the control of*" such an authority or person, on a basis which deems them all to be *"a person exercising functions under"* that Act who *"had acquired the information in the exercise of those functions*". Part of the statutory interpretation exercise involved in this case, therefore, raises the question whether Members of the Committee or of the Council, or the Council itself, are to be supposed as comprehended within this class of people bound to conduct themselves as if they were public servants exercising functions under the *Casino Control Act*.

11. The provisions of sub-sec 148(6) prevent the application of sec 148, including the offence created by sub-sec 148(1), to the divulging of information to the New South Wales Crime Commission, the Independent Commission Against Corruption, the National Crime Authority or *"any other person or body prescribed for the purposes of this subsection*". I understand that the Committee and the Council have not been so prescribed. In any event, the question arises whether they or their Members fall within the category of *"any other person or body...*".

12. Express provision for access to a limited class of documents under the *Freedom of Information Act 1989* is made in sub-sec 148(7) of the *Casino Control Act,* in presently immaterial terms.

13. Ninety-one years before these provisions were enacted the Parliament had prescribed certain of its Houses' own procedures by the *Parliamentary Evidence Act 1901*. For present purposes, the following provisions may be noted. The combination of secs 4 and 5 preserve what might be called a privilege, or perhaps a courtesy, of Members, setting them apart from the general procedure by which any other person may be summoned to attend and give evidence before a Committee or the Council. In my opinion, this is a relevant consideration, as part of the pre-existing law, when construing the *Casino Control Act*.

14. The provisions of sub-sec 6(1) of the *Parliamentary Evidence Act* entitle a summoned witness to be paid, *"at the time of service"*, reasonable expenses of attendance in accordance with rates applicable to witnesses in the Supreme Court.

15. The non-attendance of a summoned witness brings into play the procedure laid down by secs 7, 8 and 9 of the *Parliamentary Evidence Act*, by which the Supreme Court is enlisted by the President to issue a warrant pursuant to which the delinquent can be delivered to the Council or Committee.

16. Upon attendance, every witness is required by sub-sec 10(1) of the Act to be sworn, unless an alternative to the oath is permitted under sub-sec 10(3).

17. The penalty for a refusal of a summoned witness *"to answer any lawful question"* is provided by sub-sec 11(1) of the *Parliamentary Evidence Act*, by deemed guilt of contempt of Parliament, potentially with gaol for one month if the Council so orders.

18. The penalty for wilfully making a false statement, perjury or not, as a summoned witness may be five years penal servitude, for the criminal offence created by sec 13 of the Act.

19. Finally, something of the nature of the privilege granted by Article 9 of the *Bill of Rights* is given to a summoned witness by sec 12 of the *Parliamentary Evidence Act* albeit only *"for or in respect of any defamatory words..."*.

20. It has been suggested that the provisions of sec 148 of the *Casino Control Act* apply to prevent questions being asked, or perhaps more accurately answers being compelled, by the Committee of the public servants who have information called for by such questions where that information is obtained in the exercise of their functions under that Act. Put another way, the suggestion is that the obligation imposed by sec 11 of the *Parliamentary Evidence Act*, viz to answer *"any lawful question"*, cannot apply where divulging such information would constitute an offence under the *Casino Control Act.*

21. At the outset, I advise that **in principle** it is quite correct to say that a question will not be *"lawful"* within the meaning of sec 11 of the *Parliamentary Evidence Act* if answering it would indeed constitute an offence under another statute such as the *Casino Control Act.* To hold otherwise would be to impose an intolerable burden on

any citizen. In my opinion, this approach is within or is an appropriate extension of the principle adopted by the Full Court of the Supreme Court of South Australia in *Crafter v Kelly* (1941) SASR 237, where their Honours held that *"a lawful question"* is one which the person of whom it is asked may be compelled by law to answer. Tangential support can be gained for this approach as well in the decision of the High Court in *Police Service Board v Morris* (1985) 156 CLR 397, concerning the meaning of a *"lawful order"* in a case where a subordinate had been ordered to answer a question.

22. The other legislation necessary for the present consideration is, of course, Article 9 of the *Bill of Rights 1688*, which continues in force nowadays by reason of sec 6 of the *Imperial Acts Application Act 1969*. Notwithstanding its high constitutional function, its provisions are susceptible to legislative amendment, both inherently and explicitly by reason of the opening words of para 6(b) of the *Imperial Acts Application Act*. Article 9 provides that *"the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any Court or place out of Parlyament"*. Notwithstanding the self-evident meaning of those words in 1688 as a reference to the Parliament whose chambers were the House of Lords and the House of Commons, long before New South Wales had a Parliament, the *1969* constitutional legislation applies *"the constitutional norms prescribed by the Bill of Rights ... in New South Wales ..."*, evidencing the intention *"that there should be some limits upon the extent to which events happening in the New South Wales legislature may be considered in the courts"*: see *Egan v Willis* 195 CLR 424 at [22], [23].

23. In this legal setting, I answer the questions I have been asked, as follows.

1. Does sec 148 of the Casino Control Act 1992 apply to a witness before a parliamentary committee?

No.

24. In my opinion, the general words of sec 148, as discussed in 7-11 above, are not apt to deprive the Council or the Committee of its pre-existing power, both at common law and under the *Parliamentary Evidence Act*, to enquire into public affairs as the Members see fit. Bearing in mind the correct approach, which I advise would be in accordance with 5 and 6 above, in my opinion it would have required express reference to the Houses including their committees, or alternatively a statutory scheme which would be rendered fatally defective unless its application to the Houses were implied, for the statutory secrecy provisions of the *Casino Control Act* to have this drastic effect.

25. With respect to those who have advised to the contrary, as briefed to me, I strongly disagree with an approach which simply concludes by noting the generality of the provisions of sec 148. In my opinion, in accordance with principle and authority, that aspect of the exercise is the beginning rather than the end of the reasoning process.

26. And it should not be doubted that the effect is drastic. It would remove important matters of administration from the scrutiny of the electors' representatives. That is no mere incidental or relatively unimportant consequence.

27. The fact that scrutiny by, eg, ICAC is preserved by sec 148 is telling. Ultimately, ICAC reports to the Houses of Parliament: see Part 8 of the *Independent Commission Against Corruption Act 1988*. It would be odd if the Houses could learn of matters by a report by ICAC but not directly by their own Members' questioning. If it were so important to deprive Members of the right to obtain such information from public servants engaged in administering the *Casino Control Act*, it is somewhat puzzling that they can do so by examining a report from ICAC.

28. It is also odd, in my opinion, to contemplate the application of sub-sec 148(5) to the Council, the Committee and their Members. The notion that information concerning the administration of the *Casino Control Act* could be supplied to the Committee pursuant to sub-sec 148(2), eg by permission of the Casino Control Authority, and that the Members and thus the Council and the Committee would then be subject to the same embargo as originally applied to the public servant witnesses under sub-sec 148(1), is bizarre. It would render nugatory and derisory the power of the Council, including by the Committee, to examine matters of public administration. It would render a mockery the very condition of any permission given by the Casino Control Authority viz necessity in the public interest.

29. Finally, I doubt whether the word *"person"* is apt to include the constitutional organ which is the Council, and it appears no more apt to include the Committee composed of Members of the Council. True it is that, like all human institutions, the Council is ultimately composed of persons, and certainly acts both in fact and in law by the conduct of persons, both Members and staff. But this is almost banal. Furthermore, the same truism applies to any entity described by the words *"authority"*, *"court"*, *"tribunal"* or *"body"* - being other words used in sec 148. It thus

appears that the word *"person"* should not be regarded in sec 148 as apt to include every institution or entity which is composed of or operates by natural persons. There is thus very little force, in my opinion, in the argument that the word *"person"*, being general, literally applies to each and every Member or staff of the Council or the Committee.

30. For these constitutional, interpretative and textual reasons, I therefore advise that sec 148 does not create any offence constituted by public servants summoned before the Committee to answer questions about the administration of the *Casino Control Act*, notwithstanding that full and proper answers would divulge to the Committee, and thus eventually to the House, and incidentally to members of staff assisting Members, information which in every other forum or context (apart from the Legislative Assembly) would be information within the embargo imposed by sub-sec 148(1) of the *Casino Control Act*.

31. There is another consideration supporting this conclusion. It has been observed elsewhere that the provisions of Article 9 of the *Bill of Rights* would arguably protect a public servant witness before the Committee from prosecution and punishment in a court, if the public servant were to answer a question in such a way as to divulge information falling within that which it is an offence to divulge by reason of sub-sec 148(1) of the *Casino Control Act*. Ironically, this kind of suggestion has been made in the past, in relation to other legislation, even by those who have formed the view that general statutory secrecy provisions have effectively muzzled a House of Parliament (and see the references cited in 5 above).

32. In my opinion, there are unresolved difficulties in this view. On the other hand, it is no doubt satisfying as a matter of social justice that a public servant who answers questions apparently in deference to compulsion in the Committee should not have that conduct proved against him or her in a court so as to convict and punish him or her for that very conduct. In this sense, I can sympathize with the suggestion that Article 9 will protect a witness even if sub-sec 148(1) were to apply, contrary to my prime Opinion.

33. Be that as it may, in my view the significance of this consideration of the position of a witness in light of Article 9 highlights the special status of proceedings in Parliament, including questioning of public servant witnesses by Members of the Council and the Committee. The point concedes the peculiar nature of such proceedings, setting them apart from the other multifarious ways in which information may be divulged. The constitutional history of Article 9 conveys the radical separation between transactions in Parliament and general social intercourse. It thereby accepts that statutory secrecy provisions can be sensibly enforced by the criminal sanctions provided, without thereby losing their intended efficacy, despite the special protection given to persons with respect to their speech in Parliamentary proceedings.

34. ***2. What is the meaning of "lawful question" in sec 7 of the Parliamentary Evidence Act 1901? In particular, is a question which seeks information the disclosure of which is, on the face of it, prohibited by sec 148 of the Casino Control Act a "lawful question"?***

A *"lawful question"* must have the quality that an answer to it may be compelled by lawful means. A question may be *"lawful"* notwithstanding an answer to it requires information to be divulged which would, anywhere else, be prohibited by sub-sec 148(1) of the *Casino Control Act*.

35. Under the *Parliamentary Evidence Act*, those means include the threat or visitation of the contempt sanctions imposed by sec 11, viz gaol by order of the Council. I refer also to my reasoning in 21 above.

36. The relation of sec 148 of the *Casino Control Act* to question in the Council or the Committee is described in my answer and reasoning set out in 23-33 above.

37. ***3. Is there any relevance in that fact that the Casino Control Act does not expressly preserve Parliamentary privilege, compared with sec 122 of the Independent Commission Against Corruption Act?***

No.

38. Sec 122 effectively ensures that Article 9 of the *Bill of Rights*, and associated doctrines, prevent ICAC from interrogating Members or commenting upon Members' conduct, in relation to their Parliamentary duties so far as proceedings in Parliament are concerned. It does not provide, in my opinion, any convincing form of argument by contrast that the absence of a similar provision in sec 148 of the *Casino Control Act* somehow shows the latter provision to have abrogated another important power of the Houses of Parliament. Simply, sec 148 has nothing to do with the possibility of

interrogating Members of Parliament or casting aspersions on their Parliamentary conduct - thus there was no call whatever for some equivalent of sec 122.

39. ***4. What are the appropriate procedures for serving a summons issued under the Parliamentary Evidence Act 1901? In particular, what is the propriety of serving a summons within the Parliamentary precincts?***

Ordinary means of service may be used. There is no reason why persons who are not Members should not be served within the Parliamentary precincts.

40. The *Parliamentary Evidence Act* requires no special procedure for service: sec 4(1) simply requires notice of the order summoning the witness to be *"personally served"*.

41. Persons to be served are, by definition, not Members. In my opinion, therefore, none of the law or lore concerning the privilege or courtesy extending to Members in relation to service of process within the Parliamentary precincts has any possible application.

42. ***5. Is a witness before a duly constituted Committee of the Parliament liable to the penalty in sec 11 of the Parliamentary Evidence Act if the witness:***

(a) has not been summonsed or sworn or affirmed under the Act;

(b) has been validly summonsed, but has not been sworn or affirmed;

(c) has been sworn or affirmed, but not summonsed under the Act and

(d) has attended pursuant to an invitation from the Committee but has been given a summons on arriving at the hearing by a staff member of the Committee and no reasonable expenses are paid?

(a) No (b) No (c) Yes (d) Yes.

43. In my opinion, the provisions of sec 10 of the *Parliamentary Evidence Act* impose a prerequisite of an oath or affirmation (relevantly). It follows that the *"examination"* referred to in sec 11 is one which involves questions put following that compulsory oath or affirmation. If that prerequisite has not been observed, what ensues is not an *"examination"* within the meaning of sec 11, and thus there will be no statutorily deemed contempt of Parliament for a refusal to answer.

44. This leaves aside the possibility of an actual contempt committed by disrespect, disruption or the like, but my present brief does not extend to such hypothetical or extreme circumstances.

45. On the other hand, although a witness *"attending to give evidence"* must be sworn or affirmed under sec 10, in my opinion the need for a summons by order is not mandatory. The language of sec 4 empowers rather than obliges the issue of a summons. Furthermore, it would be curious if a citizen could not demonstrate respect for and co-operation with the Houses by attending voluntarily to give evidence. Thus, the lack of a summons will not prevent the sanctions under sec 11 being imposed. There is a broad analogy in a court of law, where a witness is not entitled to refuse to answer questions simply because he or she did not require a subpoena in order to step into the witness box.

46. It follows that a summons given to a witness who has attended voluntarily is supererogatory. In my opinion, it should be avoided as a practice, lest it later unmeritoriously be used to bolster an argument, perhaps in defence to adverse action under secs 11 and 13, to the effect that the witness ceased to be a volunteer when he or she received the summons. I am inclined, somewhat reluctantly, to see some force in that argument.

47. The reason why the practice about which I am asked should not continue is that, without the proffer of conduct money as required by sec 6, a summons need not be obeyed. In order to avoid such complications, either an acceptable sum should be supplied with the summons, or alternatively no summons should be served at all.

48. ***6. What protections are afforded to a witness before a Committee not summonsed under the Parliamentary Evidence Act?***

The full protection of sec 12, as well as Article 9.

49. In my opinion, the character of a witness as one *"who has given evidence ...under the authority of this Act*", is not confined to those who have been summonsed under the authority of sec 4. It also extends to those who have been *"attending to give evidence*" within the meaning of sec 10, and who is subject to the obligation imposed by sec 11 *"to answer any lawful question*".

50. In any event, Article 9 is broad enough to protect a witness notwithstanding any arguable non-application of the statutory privilege against actions for defamation given by sec 12.

51. I am also asked a question about the responsibilities of Members under the *Casino Control Act* or other legislation such as the *Crimes Act 1900* when they are made aware of possible illegal or criminal matters, including *"leaked operational material presumably obtained contrary to the express provisions of sub-sec 148(1) of the Casino Control Act*". The whole topic of the particular Parliamentary obligations of Members, and their general civil or criminally-sanctioned duties as citizens, with respect to the use of leaked material is fraught with constitutional and particularly privilege problems. I will address them in a separate Memorandum, in light of some further instructions which I will seek separately.

FIFTH FLOOR,

ST JAMES' HALL.

2nd November 2000 Bret Walker