Submission No 16
Attachment 2

INQUIRY INTO LEGISLATIVE COUNCIL COMMITTEE SYSTEM

Organisation: Department of the Legislative Council, New South Wales

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PARLIAMENT OF NEW SOUTH WALES, LEGISLATIVE COUNCIL: ORDERS FOR PAPERS FROM BODIES NOT SUBJECT TO DIRECTION OR CONTROL BY THE GOVERNMENT

OPINION

I am asked to advise the Clerk of the Parliaments on questions raised in the brief to me dated 22nd October 2015. In terms, they concern powers of the Council to compel the production of documents, or papers to use the parliamentary expression, by Greyhound Racing NSW, an entity established by the *Greyhound Racing Act 2009*. The questions manifestly have importance beyond the particular occasion initiated by the order for papers made by the Council on 9th September 2015. The matters of principle extend to all entities, groups and persons with official or public functions in the State, but whose conduct and activities in that respect are not statutorily made subject to some form or other of Ministerial direction or control.

2 The provisions of sec 5 of the *Greyhound Racing Act* rendering it supposedly "independent of Government" in fact stipulate that it "does not represent the Crown and is not subject to direction or control by or on behalf of the Government" and that it "cannot render the State liable for any debts, liabilities or other obligations...". (There is, on my understanding, no express provision "otherwise", as contemplated by the decidedly unhelpful standard rider to sec 5.)

3 It should be appreciated that this is but one type of provision to be found in current legislation with the general effect of removing a statutory entity or a person,

group or entity with statutory functions from Ministerial direction or control. My brief contains a useful if incomplete illustration of other such provisions. My opinion below applies as well to cases governed by other variants of such provisions, as to sec 5 specifically.

4 The notion of an entity, group or person with public functions enacted by statute being nonetheless "independent of Government" should not be taken to be true to the extent that a literal reading of that slogan might suggest. (The slogan appears as a printed heading to sec 5, and is thus not part of the Act by reason of subsec 35(2) of the *Interpretation Act 1987*, but may be resorted to in certain circumstances in interpreting the provision, under sec 34 of the *Interpretation Act*.)

5 First, the Government has a deal of influence over the business in both Houses, and particularly the Assembly, as a rudimentary matter of political definition. A government may plausibly obtain the support of the Houses in enacting legislation to correct defects or abuses in the conduct of an entity like Greyhound Racing NSW. In one sense, that possibility shows complete control, albeit not in relation to particular operational activities as they are taking place.

6 Second, financial and organizational accountability of such an entity, in relation to public monies and assets, occurs through parliamentary scrutiny of accounts and reports required to be tabled in the Houses – as is true for Greyhound Racing NSW on an annual basis, under sec 16 of the *Greyhound Racing Act* (which requires Greyhound Racing NSW to furnish its report to the Minister, who is then obliged to table it). It is certainly plausible that such scrutiny could produce legislation to address perceived shortcomings. (The same outcome could also occur

by reason of reports of the Auditor-General to the Houses with respect to the discharge of public functions by an entity such as Greyhound Racing NSW, in cases where that officer's powers are available.)

7 Third, as one would expect, the appointment of members or office-holders in relation to entities, groups or persons carrying out official or public functions pursuant to legislation is often committed to a Minister or the Governor on advice of the Executive Council, being the Ministers. One of the variants of that approach applies to Greyhound Racing NSW, whose members are appointed by the Minister on the recommendation of a Selection Panel itself appointed by the Minister: secs 6 and 7 of the *Greyhound Racing Act*. That power is certainly not direction or control in the ordinary sense, but it is far from showing independence from Government in the broadest understanding of that word.

8 The proliferation of administrative or regulatory schemes enacted by the Parliament of New South Wales to be conducted by entities, groups or persons said to be "independent of Government" is striking over recent decades. A general and, it seems, uncontroversial policy has been advanced to effect some kind of distancing of the Government (in the sense of the ministerial party) from governmental activities carried out by swarms of such entities, groups and persons. It is not tendentious to describe their activities as "governmental", on the clear understanding that this expression refers to the authorized conduct of affairs of a public and official kind by force of statute and for purposes regarded as within Parliament's "power to make laws for the peace, welfare, and good government of New South Wales ...", as enacted in sec 5 of the *Constitution 1902*.

9 The significance which is evidently attached to this trend in some quarters of public life can be seen in the specific enactment of sec 13A of the *Interpretation Act* which attaches or does not attach "the status, privileges and immunities of the Crown" to a body depending whether a statute provides that they do or do not represent the Crown, etc. Although this consequence is of obvious constitutional importance, it is the somewhat different but also important matter of Ministerial responsibility that underlies the matters about which I have been asked.

10 There is, historically, an intersection between these two notions. For many years and in many cases, one of the prime indicia of an entity with separate legal personality from the Crown nonetheless being what used to be called an emanation of the Crown, or being an entity with the immunities of the Crown, was that the entity was subject to the direction or control of a Minister. And, of course, traditionally and currently departments of the public service are subject to the direction and control of the Ministers whose portfolios those departments are assigned to assist in administering.

11 Over the years, the paradigm case for orders for papers has been the production of documents made or held by departmental officers in the discharge of their duties of administration under the relevant Minister. The clear responsibility of the Minister in question for the administration about which those documents may inform the House well and truly justified the practice of holding that Minister responsible to the House for production in answer to an order for such papers. Considerations of overall governmental efficiency also explain why this aspect of the practice of the Council requires all orders for papers to be communicated by the Clerk

to the Premier's Department, under Standing Order No 52 "Order for the production of documents".

12 In the present case, the Premier's Department has taken the view that the provisions of sec 5 of the *Greyhound Racing Act*, relevantly quoted in 2 above, somehow renders communication to it of the order as ineffective, and has suggested that the Council might deal directly with Greyhound Racing NSW. Although the position of the Premier's Department has not been more precisely elaborated, I think it is tolerably plain that its view amounts to an Executive stance that orders for papers of supposedly "independent" entities such as Greyhound Racing NSW are not the responsibility of any Minister.

13 It need hardly be said that, were this both correct and all that could be said about the subject, a considerable gap in the scrutiny powers of the Council will exist. That gap will enlarge, if it exists at all, as the statutory designation of supposedly "independent" entities to carry out public functions expands and multiplies. The gap hardly fits a view of the functions of Parliament generally addressed by the High Court in *Egan v Willis* (1998) 195 CLR 424.

14 The point raised by the present case was not before the Court in *Egan v Willis*, or in the earlier defamation case of *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 to which a notable reference was made in *Egan v Willis*. No court, to my knowledge, has ruled on the present point, which is not in itself surprising. Questions in the abstract about the privileges (meaning powers) of Parliament are not apt for judicial decision, and matters of the scope of such a power ought be determined by courts of law only when that is necessary as a step in the

determination of a particular and concrete controversy, such as the trespass allegation in *Egan v Willis* itself: see *Egan v Willis* per Gaudron, Gummow and Hayne JJ at 195 CLR 438-439 [5], 455 [54], per McHugh J at 195 CLR 462 [70], 480 [111].

15 However, in my opinion the observations by the plurality in *Egan v Willis* at 195 CLR 451-452 [42] cannot be ignored in considering the present point. Their Honours noted the traditional view that responsible government encompasses the means by which Parliament brings the Executive to account, Mill's point that it is the task of the legislature to watch and control the government and to throw the light of publicity on its acts, and the published observation in Queensland that Parliament has important functions to question and criticize government on behalf of the people. Their Honours then cited from *Lange* at 189 CLR 561, and in particular the following:-

> Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.

16 In my opinion, in the quite different context of the nascent implied freedom or immunity for political communication under the Commonwealth *Constitution*, these comments in *Lange* show a substantive accommodation of fundamental constitutional principle to the changing ways in which public administration may be conducted. That is, in *Lange* the High Court saw no reason to distinguish between public affairs officially conducted by Ministers and their departmental officers on the one hand and public affairs statutorily conducted by statutory authorities on the other hand.

17 Does this dictum in *Lange* permit, however, a relevant distinction to be drawn between statutory authorities which are obliged to report to Parliament or to a

Minister, and those who are not? In my opinion, the High Court's phrasing does not entail any notion that the acts or omissions of statutory authorities of the latter kind would neither be relevant to discussion among voters of the conduct of the executive branch of government nor be susceptible to investigation by a House of the legislature. Any such notion would be quite alien to the general approach taken in *Lange* and later in *Egan v Willis*.

18 In any event, Greyhound Racing NSW is a statutory authority that is obliged to report to Parliament through a Minister. On the approach taken in *Lange* and quoted in *Egan v Willis*, that is enough to make its conduct part and parcel of the topics about which a House might require information.

19 Further, it is to be doubted whether there is in truth any entity, group or person with public functions and statutory authority that has no obligations to report either to Parliament or to a Minister. My incomplete researches have thrown up none in New South Wales. It could be that, indirectly through the Auditor-General, our present system of responsible government and legislation in support of that system prevent the existence of any such entity, group or person.

20 And, it should be recalled, the Houses themselves can always examine the implementation of legislation, and could not possibly be prevented from doing so by the legislation not providing for regular reports to them or to a Minister by the statutory authority in question.

21 Thus, it can be seen that the scrutiny function of the Council provides the true foundation of its power to obtain information about public affairs. That power cannot

depend on the specific provision or non-provision of a reporting obligation on the part of the statutory authority involved in the public affairs in question. Parliament enacts such reporting obligations in aid of its scrutiny function, and not so as to abolish or supplant that function. It continues to have that function regardless whether it has so legislated or not.

22 The scrutiny function of the Council, as a House of Parliament, is incontestable – witness *Egan v Willis*. The powers that are entailed by that function have not been exhaustively catalogued either by the Council itself or by the courts of law. That incompleteness is inherent in the nature of an organ of representative democracy and responsible government that must adapt as occasions arise, so that delineation of powers occurs case by case and only to the extent thought necessary for the particular occasion.

23 But the general nature of the scrutiny function will continue to provide the departure point for consideration of the existence and extent of the powers necessary for its appropriate performance. In my opinion, notwithstanding the lack of a House of Commons equivalency provision for the privileges of the Legislative Council in the Parliament of New South Wales, and notwithstanding the former technical description of the colonial Parliament of New South Wales as an inferior legislature, there is valuable contemporary guidance to be obtained in relation to the powers of the Council from consideration of the received understanding of parliamentary matters in Westminster. Furthermore, given the commencement of responsible government in New South Wales following 1855 Imperial enactment, there is considerable value still to be had from the substantial body of exposition and justification to be found in scholarship about the Parliament at Westminster from the middle of the 19th century.

24 In his preface to the 1908 translation of Prof Josef Redlich's treatise on *The Procedure of the House of Commons – A Study of its History and Present Form*, Sir Courtenay Ilbert, then Clerk of the House of Commons, described that House as not itself "a governing body". He continued, at vii in Vol I of Redlich:-

> It provides the money required for administrative purposes by authorising taxation; it appropriates, with more or less particularity, the purposes to which the money so provided is to be applied; it criticises the mode in which money is spent and in which public affairs are administered; its support is indispensable to those who are responsible for administration; but it does not administer. That task is left to the executive, that is to say, to Ministers of the Crown, responsible to, but not appointed by, Parliament.
>
> It is this separation but interdependence of the criticising and controlling power, and the executive power on the other, that constitutes the parliamentary system of government.

25 Care is nonetheless required before simply transposing to New South Wales the large assertions of power made for the Houses at Westminster. By way of example, a presently relevant statement by Redlich (at 39-40 in Vol II) is as follows:-

> The House of Commons has long maintained as a principle of its customary law that it is entitled to demand the use of every means of information which may seem needful, and, therefore, to call for all documents which it requires. This claim may be enforced without restriction. In its most general form it is displayed in the right of the House to summon any subject of the state as a witness, to put questions to him and to examine any memoranda in his possessions. Practically speaking, in its constant thirst for information upon the course of administration and social conditions, the House generally turns to the Government departments as being the organs of the state which are best, in many cases exclusively, able to give particulars as to the actual conditions of the life of the nation, and as to administrative action and its results from time to time.

A supplementary explanation, in relation to select committees, of this power is given by Redlich (at 187 in Vol II) as follows:-

> ... they ... have regularly entrusted to them a group of powers which as a rule are retained for exercise by the House itself, namely, the right to require the attendances of witnesses and to examine upon oath, the power of sending for all documents, papers, and records

> relevant to the matters referred to them, and that of insisting upon the production of any such papers by witnesses.

26 By 1893, the somewhat self-satisfied note in the Introduction to the 10th Edition of Erskine May's *Law and Usage of Parliament* remarked that "Parliament has done much by way of self-reformation" in the 50 years since the original author's first edition. In relation to select committees, it appears by way of the illustrations given (at 385) that they had the power to call for papers from bodies and officers not within departmental control, such as from local authorities. In relation to papers generally, Ch XXI (at 507 ff) commenced thus – "Parliament is invested with the power of ordering all documents to be laid before it, which are necessary for its information." In relation to the so-called subjects of returns on orders for papers, the treatise (in this part edited by Sir Reginald Palgrave, then Clerk of the House of Commons) further explained (at 509) as follows:-

> Returns may be moved for … relating to any public matter, in which the house or the Crown has jurisdiction. They may be obtained from all public offices, and from corporations, bodies, or officers constituted for public purposes, by Acts of Parliament or otherwise: but not from private associations, such as Lloyds', for example, nor from individuals not exercising public functions. The papers and correspondence sought from government departments should be of a public and official character.

27 A brief historical explanation of the power to call for the production of papers was given in 1989 in the 21st edition of *Erskine May* at 213, 214. The suggestion was made that the power was frequently exercised until about the middle of the 19th century, but was "rarely resorted to in modern circumstances" given what amounts to legislative requirements for reports and departmental responsibility. However, the same source notes the "continuing importance" of the power, "since it may be

delegated to committees". As I see it, that is a view taken in England similar to my opinion in 21 above.

28 Significantly, the 21st edition of *Erskine May* includes this remark about the topic of present concern, in the same passage quoted in 27 above:-

> Formerly the two Houses required the production of papers from local and other authorities not in the service of the Crown and in general such bodies may be said to be under an ill-defined obligation to produce papers to the order of either House. It cannot, however, be said that this requirement is absolute, either in the case of government departments or public or private bodies since there are cases recorded in which obedience to an order for papers has not been insisted upon. There is, however, a general rule that papers should only be ordered on subjects which are of a public or official character.

(The details of the "cases recorded" referred to in the above extract do not cast further light on the matters of principle involved.)

29 In my opinion it follows from the nature of the Council as one of the Houses of Parliament, and from its scrutiny function, that the fashion for committing public administration to entities, groups or persons who are not subject to ministerial direction or control, is not capable of shrinking the scope of papers within the desirable grasp of the Council to compel production. It would be perverse to suppose that Parliament has enacted the existence and nature of such authorities in order to remove the public affairs for which they are responsible from Parliament's own scrutiny. At least, plain language or necessary intendment would be called for before reaching such a startling conclusion.

30 The making of standing orders is not a means of surrendering fundamental constitutional power, even if there may be strict regulation by that means. Standing orders may be dispensed with by resolution of the House, as well as changed.

31 Nonetheless, for what it is worth, I would reject the notion that Standing Order No 52 has somehow restricted the power of the Council on the scope of papers it may order to produce so as to confine them to those which are under the control of a department answerable to a Minister, or to some other authority also under the direction and control of a Minister. Communication to the Premier's Department is no doubt highly convenient in those kinds of cases, but also has substantial informational value in other cases. After all, the Premier's Department is an ideal location for what may be called a whole of government approach.

32 By way of contrast, subject to what follows the powers of the Council can be altered by statute. However, by reason of para 7A(1)(a) of the *Constitution Act 1902*, the powers of the Legislative Council shall not be "altered" except after a favourable referendum. This specific provision qualifies the general power redundantly made explicit in sec 7 of the *Constitution Act* that confirms the legislative competence to "alter the laws in force for the time being ... concerning the Legislative Council ... ". In *Arena v Nader* (1997) 42 NSWLR 427, which concerned an expansion (on one view) of what might have been called the powers of the Council, the Court of Appeal construed the word "powers" in sec 7A to mean the powers of the Council as part of the legislature and which relate to its lawmaking function, rather than the privileges that govern the manner in which it transacts its business (and see also remarks in the refusal of special leave to appeal to the High Court at (1997) 71 ALJR 1605).

33 In any event, sec 7A was enacted in 1929, well after the first enactment of the *Parliamentary Evidence Act 1901*. On my researches, no post-1929 amendment of the *Parliamentary Evidence Act* presents the need to consider whether *Arena v Nader* should be revisited on this point.

34 The question is simply, therefore, whether the relevant provisions of the *Parliamentary Evidence Act* detract from what would otherwise appear to be the position flowing from the historical and institutional considerations described above. Does this statute, properly interpreted, deprive the Council of what would otherwise be a power to order production to it of papers considered necessary or desirable by it for its scrutiny of government and public affairs? The only way in which, in my opinion, the provisions of the *Parliamentary Evidence Act* could do so, given their terms, is by the omission from the powers and procedures enacted in them of an explicit (perhaps any) power to compel the production of documents.

35 This omission most obviously appears in the terms of subsec 4(1) of the Act, which provides that a person (not being a Member) "may be summoned to attend and give evidence before the Council ... ". There is no other textual element one way or the other beyond the notion of giving evidence, if it were to be understood as a concept not including providing evidence in the form of documents.

36 Certainly, in ordinary parlance and legal usage, the language of "attend and give evidence before the Council" tends rather to convey the notion of spoken testimony as opposed to the producing of documents. Some care should be taken not to overlook the substance of the matter. That substance appears to me to be the idea of "evidence", being information which may be considered by the Council (including

by a committee). It almost goes without saying that information may be written as well as spoken, and certainly so with respect to government and public affairs. It certainly goes without saying that contemporaneous written records often have advantages as to cogency and accuracy compared with spoken recollections. Overall, of course, the combination of documents and recollections, including enquiries about the documents and the testing of recollections by reference to documents, is universally considered to be a usual and optimal way of gathering "evidence".

37 Thus, the word "evidence" itself plainly includes written as well as spoken information, as shown on innumerable occasions in reports to the Council by its committees over many years. In the courts of law, of course, the term "evidence" has always included documents which become exhibits upon tender, as well as spoken testimony (or affidavits and witness statements, being the written equivalent of testimony). It is, probably, the word "give" in the phrase "give evidence before the Council", and the preposition "before" (as opposed, say, to the preposition "to") that combine to raise the possibility of interpreting subsec 4(1) of the Act as a provision which has confined the power with respect to evidence to spoken rather than written information.

38 In my opinion, the better view is the one that advances the evident purpose of these provisions. There is no sensible justification for confining the nature of "evidence" which may become available to the Council under the Act to spoken material only, given the considerations noted in 36 above. Nothing in the legislative history of the Act reveals it to be a self-denying ordinance by the Parliament of New South Wales, with such a substantial diminution of the powers it already possessed to order the production of papers. The Act, after all, is described in its long title as "[a]n

Act to consolidate the law relating to the summoning, attendance, and examination of witnesses before either House of Parliament or Committee thereof". The project of consolidation can scarcely be understood to involve a considerable diminution of what "the law" already provided. Either that law should be understood as including the established requirement for papers to be produced by persons summoned to attend to be examined, or else those expressions should be understood as leaving unaffected by the terms of the Act the already well-established power to order the production of papers. Either way, I do not read the Act as containing an implication by omission that the Council would no longer have the power to order papers.

39 That leaves a further question, nonetheless, whether the Act does provide by its express provisions a power to require persons to bring documents with them upon their summoned attendance so as to "give" those documents as part of their "evidence before the Council …". In my opinion, for the reasons set out above, that is the better reading of these provisions.

40 For these reasons, I respectfully doubt the commonly held view that the *Parliamentary Evidence Act* does not empower the Council to require the production of documents by a person attending to give evidence, including by producing those very documents.

41 My conclusion overall is that these so-called "independent" entities, groups or persons with public functions, such as Greyhound Racing NSW, are amenable to orders for papers addressed to them by the Council. The suggestion by the Premier's Department is therefore sound: the Council's order may be given directly to Greyhound Racing NSW. It follows that Greyhound Racing NSW is compelled to

comply with the order on pain of its responsible officers being in contempt of the House. Further, and paralleling that power of the Council, resort may be had to the statutory summons under the *Parliamentary Evidence Act*, by which a responsible officer of Greyhound Racing NSW may be compelled to attend to give evidence including by the production of documents, to the Council or a committee (and see subsec 4(2) as to the latter).

42 My short answers to the specific questions asked in the brief to me are as follows, for the reasons explained above.

1 Is Greyhound Racing NSW, established under a NSW statute and required to produce an annual report to the relevant minister for tabling in Parliament, but not representing the Crown and not subject to direction or control by or on behalf of the Government, required to produce papers in response to an order of the Legislative Council?

Yes.

2 Do you envisage any problems arising from direct communication of this order by the Clerk to Greyhound Racing NSW rather than through DPC? Would such direct communication diminish ministerial responsibility for compliance with this order?

No, and no.

3 What sanctions are available in the event of continued non-production of papers by Greyhound Racing NSW?

Proceedings for contempt of Parliament; and the procedures under secs 7, 8 and 9 of the *Parliamentary Evidence Act*.

4 Are there any other options that should be considered in order to resolve this matter and ensure the production of papers by Greyhound Racing NSW?

See 41 above.

Fifth Floor St James' Hall

18th November 2015

Bret Walker