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**Principles, Personalities, Politics:
Parliamentary Privilege Cases in
NSW**

by

Gareth Griffith

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Gareth Griffith

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1. INTRODUCTION

This paper presents a survey of the main parliamentary privilege cases in NSW. In addition to dealing with the legal principles for which these cases stand, the paper also looks at the personalities and issues involved.

2. PARLIAMENTARY PRIVILEGE IN NSW

In NSW there is no legislation comprehensively defining the powers and privileges of its Houses of Parliament. In all other Australian jurisdictions, with the limited exception of Tasmania, the privileges of Parliament are so defined either by reference to the British House of Commons or by specific statute, as in the case of the *Parliamentary Privileges Act 1987* (Cth). Certain legislation does operate in NSW in this area, including Article 9 of the *Bill of Rights 1689*. However, by none of these statutes, alone or in combination, does the Legislative Council or the Legislative Assembly possess the full range of powers and privileges enjoyed by the Houses of the Westminster Parliament.

Instead, the powers and privileges of the Houses of the NSW Parliament are founded largely upon the common law and, as such, are a reflection of Australia's colonial history. As expounded in a series of nineteenth-century cases, the fundamental principle is that, at common law, a formerly subordinate legislature such as the NSW Parliament – originally a 'colonial' legislature deriving its authority from Imperial statute – and each House in a bicameral legislature, has only such powers, privileges and immunities as are reasonably 'necessary for the existence of such a body and for the proper exercise of the functions which it is intended to execute'.¹ In particular, it has been held that, in the absence of an express grant, the powers of the NSW Parliament are protective and self-defensive, not punitive, in nature. Further, what is 'reasonably necessary' is not fixed, but changes over time.²

A summary of the law of parliamentary privilege in NSW is found in the decision of McLelland J in *Namoi Shire Council v AG (NSW)*:

The privileges of the respective House of the United Kingdom Parliament do not provide a valid measure of the privileges of the Legislative Assembly of New South Wales. The former are derived from (a) the historical status of the Parliament at Westminster as a court...; (b) the constitutional foundation of the authority of the United Kingdom Parliament, as being ancient usage and prescription, rather than some definitive instrument; and (c) the constitutional struggles in England culminating in the Revolution Settlement.

However, in the case of a legislature established by statute, as was the legislature of New South Wales, the privileges and immunities of the respective Houses and their members are limited to those either expressly conferred by or pursuant to statute; or necessarily incidental to the proper exercise of the functions vested in it.³

Based on advice received from the Solicitor General of the day, in its 1985 report on parliamentary privilege in NSW the Joint Select Committee said that the Parliament's powers and

¹ *Kielly v Carson* (1842) 4 Moo PC 63 at 88; 13 ER 225 at 234; *Barton v Taylor* (1886) 11 App Cas 197; *Willis v Perry* (1912) 13 CLR 592.

² *Armstrong v Budd* (1969) 71 SR (NSW) 386.

³ [1980] 2 NSWLR 639 at 643.

privileges derive from the following sources:

- the common law, as implied by reasonable necessity;
- imported by the adoption of the *Bill of Rights 1689*;
- conferred by the Defamation Act 1974; and
- conferred by other legislation.⁴

The parliamentary privileges in NSW that can be said to derive from a common law source include:

- The right to freedom of speech
- The power to conduct inquiries and order documents
- The power of the Houses to regulate their own internal procedures and constitution
- The power of the Houses to control their own proceedings, and
- The right of the Houses to attendance and service of its members

In 1985 the Joint Select Committee on parliamentary privilege reported that, in addition to absolute protection for statements made in the Parliament, other privileges that flow from the *Bill of Rights 1689* include:

- Right to exclude strangers;
- Right to control publication of debates and proceedings;
- Protection of witnesses before the Parliament and its committees.⁵

The common law and statutory sources of powers and privileges overlap at several points. This is true of the right to freedom of speech in Parliament and the powers that flow as essential incidents from this, including the right of a House to control its own proceedings free of outside interference. The general point is that, in this jurisdiction, these related powers and privileges can be traced back to the twin sources of the common law and Article 9 of the *Bill of Rights 1689*. To place this in perspective, McHugh J commented in *Egan v Willis*, ‘The Bill of Rights, which is in force in NSW, merely confirms the common law’.⁶

3. HISTORICAL NOTE

In 1856 self-government based on responsible parliamentary government was established in NSW. Unlike the Constitution Acts of Victoria and South Australia (and later Western Australia), the NSW Constitution Statute of 1855 (18 & 19 Vic. C 54), which granted the new legislature the power to make laws for the peace, welfare and good government of the Colony, made no mention of parliamentary privilege. Yet, it is now accepted that its application, as formulated under common law principles, to the bicameral NSW Parliament which first met on 22 May 1856 was beyond doubt. It is likely that before

⁴ Parliament of NSW, *Report from the Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege*, 1985, p 6.

⁵ *Report from the Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege*, n 4, p 10.

⁶ (1998) 195 CLR 424 at 462.

the passing of the *Colonial Laws Validity Act of 1865* (Imp) restrictions remained on the power of the NSW Parliament to legislate for the extension of its privileges, at least to the extent that it may have sought to pass laws repugnant to the fundamental laws of England. After 1865 any such limitation was removed and, subject to disallowance by the Monarch, there was nothing to prevent an Australian legislature from ‘conferring on its Houses privileges of a kind unknown in Britain’.⁷ Beyond question was that absolute privilege for freedom of speech in Parliament applied in NSW, ‘from inherent necessity’, as confirmed by the Supreme Court in *Gipps v McElhone*.⁸

The position before 1856 is less clear. According to Professor Campbell:

What the privileges of the early Australian Legislative Councils might have been is largely a matter for speculation. The royal Instructions to the colonial Governors were silent on the point and local politicians apparently were not interested in finding out where they stood. But, in many instances, the Imperial statutes defining the powers and procedures of the Legislative Councils contained provisions which obviously had the effect of denying the colonial legislatures privileges which otherwise would have accompanied the grant of legislative powers.⁹

Because NSW was established as a penal colony in 1788, under the virtual dictatorship of the Governor of the day, the exact date of the reception of British law is in some doubt. Only in 1823, under an Imperial statute (4 Geo. IV, c 96) establishing the first Legislative Council, did NSW become a full colony. Not until 1828, again under British legislation (9 Geo. IV, c 83), was the ‘reception’ question placed beyond doubt, with the Australian Courts Act providing for the application in NSW and Van Diemen’s Land of ‘all Laws and Statutes in force within the Realm of England at the Time of the passing of this Act...so far as the same can be applied’.¹⁰ As later confirmed by the *Imperial Acts Application Act 1969* (NSW), Article 9 of the *Bill of Rights 1689* was in force in the Colony at least from that time.¹¹

That said, this first Legislative Council clearly remained to a significant extent under the direction of the Executive. It was a wholly appointed body in which the Governor alone had the right of initiating legislation and presided over Council sessions. It could not, therefore, claim all the privileges associated with Article 9, including the collective right to control its own business, a right which, in the words of McHugh J, ‘inheres in the very notion of a legislative chamber’ under the Westminster system.¹² Gerard

⁷ E Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press 1966, p 21.

⁸ (1881) 2 LR (NSW) 18.

⁹ E Campbell, n 7, p21.

¹⁰ For all that, the better view is that both the statute and the common law of England were in force in NSW from 1788, although only “so far as they were applicable to local circumstances.” RD Lumb, *The Constitutions of the Australian States*, 5th ed, University of Queensland Press, St Lucia, 1991, p 6.

¹¹ *Imperial Acts Application Act 1969* (NSW), section 6. The reception of Article 9 was discussed in - *Egan v Willis* (1998) 195 CLR 424 at 444-5 (Gaudron, Gummow and Hayne JJ); *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 466-67 (McHugh and Gummow JJ). It was said that the Bill of Rights was in force in the eastern colonies of Australia from 1828 ‘except so far as later altered by local statute’.

¹² *Egan v Willis* (1998) 195 CLR 424 at 478 (McHugh J).

Carney's view was that it is 'unlikely' that Article 9 'was capable of applying' to the Council at this time.¹³

On the other hand, at common law certain powers and privileges would have been inherent to the legislature, as being necessary for its existence and for the proper exercise of its functions. Even at this early stage therefore the Council does seem to have recognised the need to claim certain self-protective rights. Under the Standing Orders adopted on 31 December 1827 questions of privilege were to take 'precedence of every other subject'.¹⁴

In 1843, upon the proclamation of another Imperial statute - the Australian Constitutions Act (No 1) (5 & 6 Vic. c 76) - a partially elected Council was established with the power to elect its own Speaker, admittedly subject to the Governor's veto. A claim of privilege is not reported in the Council's Votes and Proceedings on the presentation of the Speaker to the Governor on 2 August 1843. However, reference was made in the *Sydney Morning Herald* to the fact that the Speaker stated that

he presented himself to his Excellency for His Excellency's approval or disapproval in order that, should he disapprove, the House might proceed to a fresh election. He was not aware that there were any particular privileges attaching to his office; but should there be he solicited His Excellency to concede them, and begged that if at any time during the warmth of debate any expressions might be employed derogatory to the dignity or honor of Her Majesty or to the respect which they owed to His Excellency such expressions might not be considered the sins of the Council at large but that the blame might be imputed to the individual who might use such expressions.¹⁵

Equally ambiguous was the Governor's reply, when, after congratulating the Speaker, he said that while he

recognised the rights and privileges which the Council of New South Wales was to enjoy, he would say to him (the Speaker) that something more than a recognition of rights and privileges would be expected of them, seeing the position which His Excellency and the Speaker stood to each other.¹⁶

Under section 27 of the Imperial Statute the Council was empowered, subject to approval by the Governor, to adopt Standing Rules and Orders best adapted for the orderly conduct of its business. The

¹³ G. Carney, *Members of Parliament: Law and Ethics*, Prospect, Sydney, 2000, p 168.

¹⁴ Legislative Council Standing Orders Committee, *Minute Book, No 1, 1827-1845*. The reference is to Standing Order No 13. A series of letters published in *The Australian* in 1838 suggest such questions were pursued. One letter claimed that a report, appearing in the same newspaper, of a speech made in the Council had contained false allegations concerning a certain Colonel H.C. Wilson. To which the member, Richard Jones, responded that he did not hold himself 'responsible for reports in the newspapers connected with proceedings in Council, nor do I allow that any one has a right to call upon me on account of my opinions expressed therein'. *The Australian* later reported that Jones had 'complained of a breach of privilege' in the publishing of the relevant letters. However, executive control of the matter was asserted when the Governor remarked that no insult had been intended to Colonel Wilson, to which the Attorney-General added that the reporter of the debate was not to blame and that he thought the matter should be dropped: 'Extracts from The Australian of July 31 1838 and 3 August 1838', in *Legislative Council Special Bundles Item 1, Historical - Legislative Council*, pp 1-3.

¹⁵ 'Legislative Council', *Sydney Morning Herald*, 3 August 1843, p 2.

¹⁶ 'Legislative Council', *Sydney Morning Herald*, 3 August 1843, p 2.

Standing Orders approved in 1843 provided for ‘General rules for the conduct of Business, and the Behaviour and Privileges of Members’. Standing Order 38 stated ‘That whenever any matter of privilege arises, it shall be immediately taken into consideration’. Such was the immediate legal background to the first parliamentary privilege case in NSW – *R v MacDermott*.

4. THE INHERENT PRIVILEGE OF FREEDOM OF SPEECH

4.1 *R v MacDermott* (1844) 1 Legge 236¹⁷

4.1.1 Key issues and principles: At issue was the breach of privilege of parliamentary freedom of speech by intimidation. A member of the Legislative Council had been subject to intimidation by strangers for things he had said on the floor of the House. On a common law basis, the case affirmed the application of the privilege of freedom of speech to the Council, as a benefit for the community, and stated that the privilege could not be secured if members were subjected to intimidation. Stephen CJ had this to say:

It would be vain and idle to suppose, that the great duties of a legislator could be discharged, in this colony or elsewhere, with safety to the individual, or advantage to the country, if freedom of speech were not secured to him. But it would be idle to call this secured, if he were afterwards exposed to question for using that freedom (at 241).

He remarked that the privilege claimed by the member was ‘not for his own benefit, but that of the community at large’. On the other hand, he would not hold that to ‘question the proceedings of a legislator, or even to demand an explanation of them, or apology for them, was *indicatable*’.

Erskine May confirms that the molestation and intimidation of members of the UK House of Commons is a contempt.¹⁸

4.1.2 Background: The member in question was Robert Lowe. He was an Oxford educated lawyer, an albino with bad eyesight who was to be appointed Chancellor by Gladstone in 1868, becoming a peer of the realm in 1880 – taking the title Viscount Sherbrooke. Less exalted but no less confident of his powers, Lowe arrived as a commoner in Sydney in 1842 on the *Aden*, which also carried the first copy of the new Constitution Bill to reach the colony. The Bill provided for a Legislative Council comprising 12 appointed and 24 elected members. This reconstituted Council first met in August 1843.

Lowe arrived in a Sydney of about 30,000 people where there were only 18 men qualified to practice in the Supreme Court – a barrister’s Eldorado. Through connections with the Governor, Sir George Gipps, Lowe was appointed as a Government member to the Council in November 1843, resigning in September 1844 after a falling out with the Governor Gipps over local control over Crown lands and the revenue flowing from them. In 1845 Lowe became an elected member and again in 1848 when he was elected for the City of Sydney, with the support of the young radical Henry Parkes. Although

¹⁷ This account is based on Ruth Knight, *Illiberal Liberal: Robert Lowe in NSW, 1842-1850*, Melbourne University Press 1966.

¹⁸ *Erskine May’s Treatise on the Law, Privileges, Proceedings and usage of Parliament*, 22nd ed, edited by Sir D Limon and WR McKay, Butterworths, London, 1997, pp 121-24.

haughty and class conscious, Lowe developed a reputation for radicalism of an illiberal sort, favouring state education and proposing responsible government, yet opposing experiments in local democracy – notably the Sydney Corporation. According to Shirley Fitzgerald, ‘By the time he left Australia, his refusal to support manhood suffrage and his overbearing attitude to lesser mortals had earned him widespread dislike among the working class in Sydney’.¹⁹ Back in England in 1850 he was to oppose any extension of the franchise beyond that established in the 1852 Reform Bill.

An active and prominent member of the Council from the start, in June 1844 Lowe made a seemingly irrelevant reference in debate to the fact that a man called Henry Macdermott had been ‘blackballed’ from membership of the Australian Subscription Library. In a heavily class conscious society, MacDermott was sensitive about any personal remarks, especially ones alluding to his humble origins. He had arrived in 1826 as a sergeant in an infantry regiment; had married well; made money as a wine and spirit merchant; become a city alderman in 1842 and mayor of Sydney four years later (he died in 1848). Still, his social status remained uncertain. In 1838 he had been asked to leave the Queen’s birthday ball at Government House on the ground that he had once been a non-commissioned officer in the 39th Regiment. When he heard about Lowe’s reference to him in the Council he had a Dr Macfarlane deliver a letter to Lowe demanding an explanation. When told that MacDermott’s intentions were pacific, Lowe just laughed and added that any explanation would be a breach of the privileges he enjoyed as a member of the Legislative Council. A second message was then delivered to Lowe by Macfarlane and a Captain Moore, demanding an immediate apology or ‘to propose ulterior measures’ – a duel (the second duel Lowe had been challenged to in three months). Two days later the Police Court bound MacDermott and his friends on bonds of £200 each to keep the peace for a year. But Lowe did not let the matter drop there. Opposed by Gipps, but supported by William Charles Wentworth and William Bland, he insisted that the Council define its privileges and a Select Committee on the Privileges of the Legislative Council was appointed, chaired by the lawyer, Richard Windeyer.²⁰

Windeyer reported on 12 July 1844, taking into account the first report in the *Jurist* (‘a work not of the first authority’) of the landmark decision of the Privy Council in *Kielley v Carson* (1842). Before that decision, he said, there

appeared to be no doubt that – as the branch of the Supreme Legislature of the Colony representing its inhabitants – there was inherent in the constitution of the Council, the privilege of freedom of debate, as a necessary incident to its legislative character; and that circumstances such as have been represented to the Committee by Mr Lowe, constituted a breach of that privilege which would authorise the House summarily to adjudicate upon it.²¹

As noted, *Kielley v Carson* established the powers of colonial legislatures in terms of those limited to self-protection, such as are ‘reasonably necessary for the proper exercise of their functions and duties’. It was decided that the Newfoundland House of Assembly did not possess the power to arrest a person for a breach of privilege committed out of the House.

¹⁹ S Fitzgerald, *Sydney, 1842-1992*, City of Sydney 1999, p 47.

²⁰ Son of Charles Windeyer, first mayor of Sydney; father of future Legislative Assembly member and Supreme Court judge from 1879-96, William Charles Windeyer; great-grandfather to Victor Windeyer, a distinguished soldier in WW2 and High Court judge from 1958-72.

²¹ *Report from the Select Committee on the Privileges of the Council, 1844.*

At any rate, Windeyer thought that the case placed the powers and privileges of the Legislative Council in sufficient doubt 'to refrain from exercising the privilege of summary jurisdiction in the present case'. Instead, it was recommended, first, that 'the Attorney General be requested to move the Supreme Court for leave to file a criminal information against' MacDermott and the others, and secondly that a 'Bill be passed to confer upon the Council, such powers as may be considered necessary to its efficiency'.

R v MacDermott was heard in October 1844. Stephen CJ affirmed the right of the Council to claim the privileges of a legislative assembly, yet dismissed the case and divided the costs equally. Against Lowe's cause was the suggestion that he could not have fought a duel with a man of MacDermott's status, the inference being that had things been otherwise he might have accepted the challenge. At the same time, the letter sent to Lowe was improper and a breach of privilege.

Left undefined by the case was the summary jurisdiction (or lack thereof) of the Council itself to take punitive action in cases of contempt and/or breach of privilege by strangers. The Standing Orders of 1849 (SO 49) maintained a power to punish members and others for contempt by a fine of £20 or, upon failure to pay, imprisonment for up to 14 days. A Select Committee in 1850 chaired by Wentworth claimed, by majority, a power to punish non-Members but only for contempts that 'wilfully or vexatiously interrupt the orderly conduct of the business of the Council'. From *Kielly v Carson*, it was clear that the Council could take reasonable measures to prevent disorderly conduct in the Chamber. The question was whether this stretched as far as punishing members of the public? The initial answer arrived at in NSW was that it did. The Legislative Assembly Standing Orders adopted in 1856 reflected a power to order the arrest of non-members for disorderly conduct, and their retention in custody until the payment of a fine (SO 91) The same power was to be found under the Standing Orders of 1889 (SO 107). Later this came into doubt. In January 1894 the Legislative Assembly received legal advice to the effect that, in the absence of a relevant statutory grant of power, the Standing Order was *ultra vires*.²² The Standing Orders adopted independently in 1894-95 for both Houses reflected that alternative interpretation (SO 390 'Punishment of Members for Contempt' and SO 394 'Removal of Strangers for Disorderly Conduct'). In effect, that interpretation reflects the law as formulated in *Doyle v Falconer* (1866) LR 1 PC 328 and *Barton v Taylor* (1886) 11 App Cas 197, in relation to members, against whom only self-protective powers of removal may be used.

The cost of the *MacDermott* case to the Council was laid by Speaker McLeay before the Standing Orders Committee on 26 December 1844 - £267 7s 8d. 'The privilege prosecution', as it was called, was described by one contemporary as a 'serio-comico-burlesque-extravaganza'. According to Knight, 'For Lowe, the stigma of hauteur, of upholding an elite in a society dedicated to the principle of equality, was to endure'.²³

²² NSW Legislative Assembly, Votes and Proceedings, 1894 Volume 1, pp 487-8 – 'Counsel's Opinion on the Validity of the 107th Standing Order Respecting Punishment of Strangers for Contempt'.

²³ R Knight, n 17, p 101.

4.2 *Gipps v McElhone* (1881) 2 LR (NSW) 18

4.2.1 Key issues and principles: In a defamation case in which a member of the Legislative Assembly was the defendant, it was affirmed that at common law, under the doctrine of inherent necessity, freedom of speech in the Houses of the NSW Parliament is absolutely privileged. No action in defamation could be brought against a member therefore in respect to something said in the course of parliamentary proceedings. Sir William Manning said:

There may have been questions how far privilege extended to newspapers afterwards publishing reports of proceedings in Parliament; but the public interests require that what is said in the Legislature should be absolutely privileged. Doubtless there may be members of strong energy, easy credulity, and impulsive temperament, who, in discussing a question of public interest, may injure an individual by reckless and injudicious statements. But it is of greater importance to the community that its legislators should not speak in fear of actions for defamation. It is most important that there should be perfect liberty of speech in Parliament, even though sometimes it may degenerate into license (at 24).

In respect to the policy behind that privilege, Windeyer J said:

There are no higher duties than those of a member of the Assembly, and legislation would be paralysed if members could be harassed by actions of libel at every turn (at 25-6).

Less certain is whether the case supports the proposition that what was said or done in Parliament could not be used in support of a cause of action for a libel committed outside Parliament. For Manning (at 25) and Martin CJ what was said in Parliament would have been admissible as evidence of malice to defeat a defence of qualified privilege in relation to the libel. Martin CJ observed:

A point was raised at the trial, whether what was said in Parliament, being absolutely privileged could be made use of to show that the Defendant [McElhone], in respect of the words used outside Parliament, was actuated by malicious motives. I think it could, though that is not the question before us now (at 23).

4.2.2 Background: The defamation case concerned a member of the NSW Legislative Assembly from 1875 to 1895, John McElhone (member for the Upper Hunter for most of that time). He had asked questions in the House about the failure of a scheme – the Kenny Hill Scheme - for supplying Sydney with water, the architect of which was the civil engineer, Mr Gipps. One line of argument mounted by counsel for Gipps was that no decision had been made on the question of absolute privilege for freedom of speech in a Colonial legislature. The questions asked in the House, it was claimed, were strong evidence of malice.

The facts were that McElhone, in a conversation with a third party about a scheme for supplying Sydney with water, accused Gipps of inefficiency as a engineer. The third party was George Withers, also a member of the Assembly, an alderman of Sydney and the chairman of the committee to advocate the Kenny Hill Scheme. McElhone afterwards gave notice in Parliament of questions insinuating Gipps' incapacity. Before the questions were actually put, Withers told McElhone that he had been misinformed. Nevertheless McElhone did not withdraw the questions which were asked on his behalf by another member, John Davies.

McElhone's entry in the *Australian Dictionary of Biography* shows him to be a man of many parts. In 1862 at St Mary's Cathedral he married the daughter of a wealthy squatter, while in 1875 he stood in the Upper Hunter as the champion of the free selectors, describing the squatters as 'the biggest thieves

in creation'. In Parliament he was forever disputing and bickering (so much so that he was criticised by Governor Loftus for using 'violent and abusive language'). Fellow members described him as 'an illiterate mountebank' and worse. According to the *ADB*, 'Repute as a boxer saved McElhone from such attacks, but in 1888 he was beaten in a fight with George Matheson, member for Glen Innes, in the parliamentary smoking room'. He contributed to the Assembly's growing reputation in the 1880s as 'the bear-garden in Macquarie Street' in a Sydney described as 'an uncouth, sprawling seaport of 288,000 people and 3,167 pubs'.²⁴ As to the unruly McElhone, the *ADB* concluded:

Honest, hot-tempered, ribald and at times scurrilous, McElhone was more than a mere rough-neck. His endless questions in parliament exposed many public wrongs, and his vitality and purpose were respected.²⁵

From the legal side, the case was a who's who of the NSW political elite, and is suggestive of the close nexus between law and politics in NSW at this time. Acting for Gipps was Charles Edward Pilcher, a member of the Legislative Assembly from 1875-82. He was later a prominent member of the Legislative Council, an ardent conservative there opposing federation, the vote for women and all 'socialistic' forms of legislation.

On the bench, Sir William Montagu Manning (1811-1895)²⁶ arrived on the Supreme Court via a long career in politics, as a nominated member of the pre-1856 Legislative Council, then after responsible government first as an Legislative Assembly member and Attorney General under Donaldson's brief 1856 Ministry, then in 1861 as a member of the Legislative Council, serving as Attorney General under Robertson (1868-70) and Cowper (1870). In 1875 Governor Robinson asked him to form a Ministry, a request that came to nothing when Robertson and others refused to serve in an administration led from the Upper House. In 1876 Manning was appointed to the Supreme Court, a position he resigned in 1887 when he was reappointed to the Legislative Council.

William Charles Windeyer, the son of Richard Windeyer, was another former politician, serving as Solicitor General in Martin's last Ministry and Attorney General under Parkes in 1877 and again from 1878-81 when he resigned on his appointment to the Supreme Court. The pre-eminent former politician on the Bench was the Chief Justice, Sir James Martin – the plaintiff in *Martin v Nicholson*.

5. DISQUALIFICATION AND JUDICIAL REVIEW

5.1 *Martin v Nicholson* (1850) 1 Legge 618

5.1.1 Key issues and principles: A member of the pre-1856 Legislative Council sued the Speaker for assault. The member had refused to leave the Chamber after he had been disqualified. In its capacity as a Court of Disputed Returns, the Supreme Court exercised its jurisdiction to review the statutory

²⁴ C Pearl, *Wild Men of Sydney*, Angus and Robertson 1977, p 11.

²⁵ B Nairn et al, *Australian Dictionary of Biography, 1851-90*, vol 5, Melbourne University Press 1974, p 151

²⁶ He is not to be confused with Sir William Patrick Manning (1845-1915), the latter a politician of note and the father of the long serving Legislative Councillor, Sir Henry Manning who married one of James Martin's many daughters – Nora Antonia.

disqualification regime. By that regime, the power of the Legislative Council to determine its own composition was denied.

In the UK, the jurisdiction of the House of Commons in disputed elections was passed by law to the courts in 1868.²⁷

5.1.2. Background: The member was James Martin - 'Martin of Martin Place' - Premier on three occasions (1863-65, 1866-68, 1870-72). He had been a member of the pre-1856 Legislative Council, to which he was elected on Wentworth's 'native born' ticket, although he hailed in fact from Cork in Ireland. Before turning to law, Martin was a journalist and, with Lowe as his mentor, edited a publication called the *Atlas* for two years from May 1845. He was said to be influenced by Lowe's 'lordly liberalism'. Martin's own character, his patriotism mixed with a strong anti-egalitarian strand that intensified as his income increased, was complex. He came to oppose manhood suffrage and to favour transportation. Under Lowe's tutelage he is said to have left the Catholic Church, never to return.²⁸ Martin was first elected to the old Legislative Council in 1848, to a seat vacated by the death of Richard Windeyer. He was promptly unseated in June 1849 because he lacked the necessary property qualification and was then re-elected later that year. On taking his seat every member had to swear an oath that he owned freehold property worth £2,000 or returning £100 a year. It was alleged that the properties claimed by Martin were not freehold, but leasehold, and that he was not the lessor.²⁹

Martin's disqualification and the action taken pursuant to it was the matter at issue in *Martin v Nicholson*. On his disqualification, Martin refused to withdraw from the Chamber and was removed by the Sergeant-at-Arms on the direction of the Speaker, Charles Nicholson. Claiming he had been assaulted, Martin brought an action for trespass in the Supreme Court. In three separate judgments, the Court found unanimously on his behalf, with Stephen CJ explaining that the Council's power was restricted to those matters enumerated in section 16 of the *Constitution Act 5 and 6 Vic c 76*, a provision that said nothing about vacancies by reason of property non-qualification. Instead, by s. 16

if any member shall absent himself for two Sessions, or take any oath or declaration of allegiance to any Foreign State, or become Insolvent, or *non compos mentis*, or be convicted of any infamous crime, his seat shall become vacant.

Stephen CJ commented that counsel for Nicholson had argued, on the grounds of inherent necessity, that 'It would be monstrous to suppose...that a Pauper or an Infant could be returned, and the Council have no authority to declare the seat vacant'. According to the Chief Justice:

To such arguments, we need only give this answer: that, however desirable the existence of such a power might be in cases of this nature, we cannot attribute it to the Council, or to the Governor, unless we find it within the four corners of the statute. The necessity for its existence, most certainly, cannot be established; and it is quite possible that, if we do not find the power expressly given, the Legislature may have meant it to be withheld. We are all of the opinion that the power contended for was not given.³⁰

²⁷ Erskine May, 22nd edition, n 18, p 35.

²⁸ R Knight, n 17, p 229.

²⁹ E. Grainger, *Martin of Martin Place*, 1970, p 51.

³⁰ (1850) 1 Legge 618 at 626-7.

It was further argued that under the *Electoral Act 6 Vic 16* exclusive jurisdiction to determine disputed returns was given to the Court.

Only Therry J, formerly an MLC from 1841 to 1845, made any reference to the broader question of privilege, but then only to comment that

it is quite unnecessary to encumber the case by any reference to the privileges and usages of the Parliament of England, or with arguments of analogy derived from them. Many of the ancient privileges and usages of Parliament are, like absolute powers, out of the ordinary line and course of our law and government. Such I conceive to be the power of expulsion, and the judicative power of our two Houses. But it cannot be contended that such powers are incident to the Legislative body of this colony. It is itself a creature of the Parliament of England, and is invested with such jurisdiction alone as is conferred upon it by the Act that created it (at 629-30).

Legally, the lasting interest of the case derives from the Court's uninhibited approach to deciding upon the membership of the House, adopting an interventionist interpretation of its jurisdiction where questions of disqualification and disputed returns had been established under a statutory regime. Politically, it was always a vulnerable issue for Martin, for the case left unresolved the question, 'Did he commit perjury in 1848?'³¹ The judgment of Stephen CJ makes it clear that Martin admitted, 'for the purposes of the cause, that he was not qualified'.³²

6. IMMUNITY FROM CIVIL ARREST

6.1 *Norton v Crick* (1894) 15 LR (NSW) 172

6.1.1. Key issues and principles: A member of the Legislative Assembly (WPCrick) who had been sued for malicious prosecution claimed that he could not be arrested and imprisoned for his failure to pay the damages awarded against him. The NSW Supreme Court found that such immunity could not be justified on grounds of reasonable necessity, specifically in relation to a the writ of *capias ad satisfaciendum* which 'can only issue when it is shewn that the member is about to abscond from the colony, or in the few instances in which a defendant can now be imprisoned for debt'. The Court was

unable to see that any Parliamentary inconvenience is at all likely to arise by allowing plaintiffs to have the same rights and remedies against members of Parliament for the recovery of what may be due on a judgment which they possess against others of Her majesty's subjects (at 177-8).

Erskine May is authority for the proposition that immunity from arrest in civil matters applies to members of the House of Commons while Parliament is sitting, and for forty days before and after such sitting.³³ Its application to the NSW Parliament had long been in doubt, as suggested by the advice of the Attorney General, William Dalley, in 1875 who argued on behalf of the immunity but 'with great diffidence, as I am aware that cases have happened in which Members of Parliament in this Colony have

³¹ Grainger, n 29,p 53.

³² (1850) 1 Legge 618 at 626.

³³ Erskine May, n 18, p 107.

been arrested and imprisoned during the sitting of Parliament'.³⁴

Enid Campbell suggested in 1966 that limited immunity from imprisonment might be permitted in some cases, for example ones concerning civil contempt of court.³⁵ The matter was discussed by Campbell again in 2003 where note was made of section 14(1) of the Commonwealth *Parliamentary Privileges Act 1987* granting limited immunity to members from arrest in a civil cause on any day the House or a committee to which the member belongs meets, or within 5 days before or after that day.³⁶ It is fair to say that the likelihood of such a case arising in the future is remote indeed.

6.1.2 Background: The parties in *Norton v Crick* were among of Cyril Pearl's *Wild Men of Sydney*. Pearl's portrait of John Norton is of a remarkable, litigious, heavy drinking, wife beating, clever, Napoleon-fixated individual. Norton only became a member of the Legislative Assembly in 1898, sitting as a Protectionist candidate for the seat of Sydney-Fitzroy. From 1899 to 1910 he was an Independent member for various electorates. Born in England, at Brighton, in 1858 he arrived in Sydney in 1884 after a spell working as a journalist in what was then Constantinople. Dismissed for repeated drunkenness from the *Newcastle Morning Herald*, in 1891 he joined Taylor, Crick and Willis at *Truth*, becoming editor in 1891 (a position he lost because of his drinking habits), and proprietor in 1896. He claimed to have coined the word 'wowsers'. He was an almost permanent fixture in the courts, forever defending libel suits or pursuing his quest for ownership of *Truth*. On his relations with Crick and Willis, Cyril Pearl commented:

At times they quarrelled violently but the freemasonry of the political freebooter always drew them together again. They were aggressive and accomplished demagogues who made little or no attempt to conceal their complex villainies. But the frequent exposure of these villainies served only to consolidate their position as public heroes.³⁷

Norton's dismissal from *Truth* was the basis of the litigation between himself and Crick that was to last for three years, consuming hundreds of hours of court time. The case at issue was one of many, arising in this instance after Norton had been awarded £700 against Crick for malicious prosecution:

Crick fought back with a stay of proceedings. Norton had it set aside and issued a writ for Crick's arrest. Crick fled to Melbourne, while his counsel, BR Wise, applied for another stay and a new trial, arguing that in the case of *Taylor v Barton* [sic] the Privy Council had decided that a local member of Parliament could not be arrested while Parliament was in session.³⁸

Norton represented himself. Crick's counsel, Bernhard Ringrose Wise, was another lawyer-politician. At 29 years of age he served as Attorney-General under Parkes (1887-88). Pursuing an independent line of inquiry in the early 1890s, he developed views on industrial matters that brought him close to the

³⁴ *Legislative Assembly Votes and Proceedings*, 1875 volume 1, pp 515-6).

³⁵ Campbell, n 7, p 59.

³⁶ E Campbell, *Parliamentary Privilege*, The Federation Press 2003, p 147.

³⁷ Pearl, n 24, p 7.

³⁸ Pearl, n 24, pp 80-1.

Labor Party. A delegate to the Australian Federal Convention of 1897-98, Wise is credited with suggesting the double dissolution proposal for the breaking of deadlocks between the Senate and the House of Representatives. Having crossed the political divide from free trade to protection, he was to serve again as Attorney-General (1899-1904) and Minister of Justice (1901-1904), first in the Lyne Ministry and, subsequently, in the post-federation government of Sir John See. For two brief periods in 1904 – from 27 February to 25 March and from 4 April to 27 May - Wise served as Acting Premier.³⁹

Politically suspect, Wise gained a reputation as a maverick patrician. Overlooked as Premier when See retired from office in 1904, Wise's political career went into decline. In 1908 his seat in the Legislative Council was vacated by absence. That same year he was to appear for Crick again, this time before the Privy Council in *Harnett v Crick*. He and Crick as served as Cabinet Ministers in the See Ministry of 1901-04.

7. THE INHERENT POWER TO DISCIPLINE MEMBERS

7.1 *Barton v Taylor* (1886) 11 App Cas 197

7.1.1 Key issues and principles: It is accepted that legislative assemblies have the power to regulate their own internal procedures and constitution, as well as a power to control their own proceedings. From this there flows the right to discipline members where a breach of privilege or contempt has occurred. The types of sanctions available to the Houses of the NSW Parliament vary in severity from: expulsion; suspension; censure; apology and withdrawal of words spoken; and reprimand and admonishment. The underlying principle is that, under the common law, the power to discipline members cannot be exercised for a punitive purpose. According to Sir James Colville, on behalf of the Privy Council in *Doyle v Falconer*, 'The right to remove for self-security is one thing, the right to inflict punishment is another'.⁴⁰

Barton v Taylor was the first major test of the power of the Legislative Assembly to discipline members and it is authority for the proposition that the Assembly has an inherent power to suspend members guilty of obstruction or disorderly conduct. The test was one of reasonable necessity:

Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes, protective and self-defensive powers only, and not punitive, are necessary (at 293).

In arriving at their decision, both the NSW Supreme Court and the Privy Council followed *Doyle v Falconer* (1866) LR 1 PC 328 where it was held that the Dominican House of Assembly did not have power to punish a contempt though committed in its face and by one of its members. However, a distinction was made between a punitive power to punish for contempt, on one side, and a self-protective power to remove a member who is obstructing the deliberations of the House, on the other. The Privy Council in *Doyle v Falconer* said:

³⁹ J. Ritchie (ed), *Australian Dictionary of Biography, Volume 12 – 1891-1939*, Melbourne University Press 1990, pp 546-49.

⁴⁰ (1866) LR 1 PC 328 at 340.

If the good sense and conduct of the members of Colonial Legislatures prove insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person excluded from the place of meeting, and to keep him excluded...

As to the scope of power to suspend, the Privy Council in that case continued:

The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity. That necessity appears to their Lordships to extend as far as the whole duration of the particular meeting or sitting of the Assembly in the course of which the offence may have been committed. It seems to be reasonably necessary that some substantial interval should be interposed between the suspensory resolution and the resumption of his place in the assembly by the offender, in order to give opportunity for the subsidence of heat and passion, and for reflection of his own conduct by the person suspended; nor would anything less be generally sufficient for the vindication of the authority and dignity of the assembly (at 340).

Delivering the judgment of a unanimous Supreme Court in *Taylor v Barton* [1884] 6 NSWLR 1, Martin CJ said that the House, which had no power to punish, could exclude a member 'as long only as the necessity exists for his exclusion by reason of such obstruction'. He continued:

The only reasonable view to take of this power of exclusion is to limit it to the actual sitting during which the necessity for its exercise arose...The right to exclude 'for a time', which the Privy Council has declared to be the law, cannot in reason be extended beyond the sitting when its exercise is called for. It is a right to be exercised for one sitting only, for the plain reason that, until the contrary appears, a longer exclusion is unnecessary.⁴¹

On appeal, the Privy Council concurred with that interpretation. On its behalf, Lord Selbourne said it could find no standing order of the Legislative Assembly authorizing or justifying the trespass complained of by Taylor (at 202). It was a question therefore of the extent of the inherent power of the Assembly to discipline a member, a matter that was to be judged by the test of reasonable necessity. According to the Privy Council: 'For these purposes, protective and self-defensive powers only, and not punitive, are necessary'.

As to the power to control disorderly members, this was said, by necessity, to 'extend as far as the whole duration of the particular meeting or sitting of the assembly in the course of which the offence may have been committed'. From this, the Privy Council concluded:

The power, therefore, of suspending a member guilty of obstruction or disorderly conduct during the continuance of any current sitting is, in their Lordship's judgment, reasonably necessary for the proper exercise of the functions of any Legislative Assembly of this kind..

In a passage the joint judgment in *Egan v Willis* referred to with approval, the Privy Council continued:

[I]t may very well be, that the same doctrine of reasonable necessity would authorise a suspension until submission or apology by the offending member; which, if he were refractory, might cause it to be prolonged (not by the arbitrary discretion of the Assembly, but by his own wilful default) for some further time. The facts pleaded in this case do not raise the question whether that would be ultra vires or not. If these are the limits of the inherent or implied power, reasonably deducible from the principle of general necessity, they have the advantage of drawing a simple practical line between defensive and punitive action on the part of the Assembly. A power of unconditional suspension, for an indefinite time, or for a definite time depending only on the

⁴¹ *Taylor v Barton* [1884] 6 NSWLR 1 at 21-2.

irresponsible discretion of the Assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse.⁴²

The joint judgment in *Egan v Willis* said that there was no need to say whether *Barton v Taylor* represents ‘an accurate or exhaustive statement of the limits of the powers of the House’. The precise nature of the limited inherent power of suspension remains to be defined therefore. What was confirmed by the High Court was that ‘one of the steps that the House may undoubtedly take is to resolve that the member be suspended for a limited time from the service of the House’.

In a coda to its judgment, the Privy Council went on to say that under a valid Standing Order the Assembly could have the power to punish a member (at 207).⁴³ It said it could not agree with the view expressed by the Supreme Court that the power conferred under the Constitution Act for the making of Standing Orders was itself subject to the common law principles governing the inherent powers of the House which must be implied by reasonable necessity. The question is whether the Standing Orders can confer new powers on a House of the NSW Parliament. In *Egan v Willis* (1996) 40 NSWLR 650 Gleeson CJ in the Supreme Court observed that section 15 of the Constitution Act 1902 ‘is not a source of power’ (at 664).

7.1.2 Background: The Legislative Assembly had never been a very orderly Chamber. Even by its standards, however, the 1880s heralded the start of a tumultuous time where disorderly conduct and the use of unparliamentary language became the order of the day. While much constructive work in exposing maladministration and the like was undertaken by the House, it was itself the source of scandal and comment. Attracted to it were several trouble-makers, some more public-spirited than others, and this at a time when their instinct to disrupt was not curtailed by the forces of party discipline.⁴⁴ The result was a series of cases concerning the power of the House to discipline members.

The first and most important of these, *Barton v Taylor* involved the Speaker, Edmund Barton, who was to become Australia’s first Prime Minister and later a High Court judge (1903–20). He became Speaker in January 1883 at the age of 33 to face a ‘turbulent parliament’ in his dealings with which he is said to have ‘displayed quickness of perception, tact, courtesy and firmness’.⁴⁵ A lawyer by profession, elegant in appearance and manner, by the 1880s he had done enough to earn himself the nickname ‘Toby Tosspost’ in the popular press. As Pearl puts it, he was ‘not a cold water man’.⁴⁶ Few were.

Suing Barton was the notoriously unruly member for Mudgee, Adolphus George Taylor, known

⁴² (1886) 11 App Cas 197 at 204-5; (1998) 195 CLR 424 at 455 (Gaudron, Gummow and Hayne JJ).

⁴³ By its assumption of jurisdiction it also confirmed that ‘judicial review may be available in relation to any punitive action taken by a House, at least where the privileges of the House depend on the principle of necessity’ (G Carney, p 181). *Egan v Willis* is a further confirmation of that approach, as in that case the Legislative Council interpretation of Standing Order 262 (the footpath point) was reviewed by the Court of Appeal.

⁴⁴ The first expulsion of a member (EA Baker) occurred in 1881, although in that instance disorderly conduct was not at issue.

⁴⁵ *ADB, 1891-1939*, Vol 7, p 195.

⁴⁶ Pearl, n 24, p 41.

variously because of his tall gangling physique by such sobriquets as ‘Giraffe’ and ‘The Mudgee Camel’. His background was in journalism, although in the 1870s he had also been a military man, joining the NSW Permanent Artillery as a private. True to character, he was court martialled for ‘insubordination’ in 1878 and, upon his release from Darlinghurst Gaol on 4 December, returned to journalism before being elected for the seat of Mudgee in 1882. He made his mark soon enough as a vigorous, intelligent but often abusive and drunken member. In February 1883 he clashed with McElhone who challenged Taylor (and another member) to meet him ‘anywhere they like out of this Chamber’.⁴⁷ Instead, Taylor took him up on the offer that they both resign their seats, afterwards to put their popularity to the test by contesting the vacancy thereby created in Mudgee. McElhone had claimed that if an election took place ‘a Chinaman’ would beat Taylor. In the ensuing campaign, Taylor claimed to have a list of 35 members who had been drunk in the Assembly during the last six weeks. The *Herald* also reported him as saying that ‘many members were half drunk by tea time’. Upon his re-election, for this libel against the House – ‘a gross insult to it’ – Taylor was ordered by Speaker Barton to apologise to it unreservedly. Taylor complied, although he also showed his keen if untrained legal understanding of the situation by saying he doubted the power of the House to ‘take me to task for that which I said outside the House’.⁴⁸

The events that formed the basis of the litigation that went all the way to the Privy Council occurred on 17 and 22/23 April 1884. On 17 April, in debate on the Supply Bill in Committee of the Whole, Taylor had objected to a vote of £100,000 a year for the NSW military forces. For ‘persistently and wilfully obstructing the business of the House’, he was named by the Committee Chair (Angus Cameron) and a resolution was passed suspending him from the service of the House. That resolution was then reported to the Speaker who said he had the ‘duty to put the same question without amendment, adjournment, or debate’.⁴⁹ In character, Taylor sought to raise a point of order. He was ordered by Barton to resume his seat but ‘continued to stand’. The following altercation took place:

Mr Speaker: The standing order must now be put in force, and I warn him that if the offence of which he has been guilty is committed twice the punishment may be increased. The question is: ‘That Mr Adolphus George Taylor, having been guilty of abusing the rules of the House by persistently and wilfully obstructing the business of the Committee, be suspended from the service of the House’. Those who are of that opinion will say aye.

Mr AG Taylor: I rise to order –

Mr Speaker: I must request the honourable member to resume his seat.

Mr AG Taylor: But I rise to order!

Mr Speaker: The honourable member will now resume his seat, or I shall have to name the honourable member, and I remind him that the punishment for the commission of the second offence is graver than that for the first.

The question is –

Mr AG Taylor: I rise to order!

Honourable members: Chair, chair!

Mr Speaker: The honourable member will resume his seat. I now name the honourable member Adolphus George Taylor as having wilfully disregarded the authority of the Chair. This is the second offence.

The question was put and, on division, resolved in the affirmative by a majority of 17 (26 votes to 9). Taylor was suspended from the service of the House for a week. Within the week, Taylor entered the House twice. On 23 April Hansard reported:

⁴⁷ *NSWPD*, 20.2.1883, p 547.

⁴⁸ *NSWPD*, 9.3.1883, p 909-921.

⁴⁹ *NSWPD*, 17.4.1884, p 2865.

Mr Speaker: I have to call the attention of the House to the presence of Mr Adolphus George Taylor, one of the honourable members for Mudgee, who was on the morning of Friday last suspended by resolution of Committee and of the House from the services of the House. As under the standing orders recently laid on the table by me such suspension must endure for a week from the time of suspension, I have to request that the honourable member will withdraw.

Mr AG Taylor: I claim the right to sit here as one of the members for Mudgee, and also because there is no legal standing order under which I can be suspended.

Mr Speaker: The honourable member has no right to debate the matter. I must call upon the Serjeant-at-Arms to do his duty.⁵⁰

At issue was not a new Standing Order as such. Rather, on 11 March 1884 Speaker Barton had made a statement that referred to the new rules and procedures adopted by the House of Commons. He pointed out that the Assembly's first Standing Order provided that 'in all cases not specially provided for hereinafter, or by sessional or other orders, resort shall be had to the rules, forms and usages of the Imperial Parliament, which shall be followed so far as the same can be applied to the proceedings of this House'. Barton went on to say: 'It follows, therefore, that such of the new rules of the House of Commons as could be applied to our procedure became at once law of this House'. One new House of Commons Standing Order that Barton believed applied to the Assembly concerned the powers of the House to deal with disorderly Members. Under the relevant Standing Order the House of Commons provided itself with a sliding scale of punishment for a disorderly Member, namely, suspension for one week on the first occasion of contempt, two weeks for the second, and thereafter suspension for a month.⁵¹ This was the new power that Barton sought to apply against Taylor.

For his part, Taylor contended that rules made by the House of Commons could not apply to the Assembly unless and until they had been approved by the Governor. The Supreme Court agreed, as did the Privy Council.

According to Pearl's colourful account:

When he [Taylor] had sobered up, he issued a writ against Barton, claiming £1,000 damages. The writ set out that Barton had 'pushed, shoved and expelled' him or 'caused him to be pushed, shoved or expelled', whereby he had been kept for a long time from entering the Legislative Assembly and 'suffered pain of mind, and his good name and reputation had been greatly injured'. The Supreme Court upheld Taylor's contention that an obstructing member could not be excluded for a period longer than the sitting during which the obstruction occurred, and awarded him the £1,000 he had claimed, and costs.⁵²

Taylor v Barton was decided by a three-member bench of the Supreme Court, comprising Chief Justice Martin, Justice Windeyer and another lawyer turned politician and judge, Sir Joseph George Long Innes. Coincidentally, he had first entered the Assembly in 1872 as a member for Mudgee, before transferring a year later to the Legislative Council where he remained till his appointment to the Supreme Court in 1881, serving as Attorney General (1873-75) and Minister for Justice (1880-81).

⁵⁰ NSWPD, 23.4.1884, p 2901.

⁵¹ NSWPD, 11.3.1884, pp 2240-2.

⁵² Pearl, n 24, p 42.

Ever the frustrated lawyer, Taylor actually represented himself before the Supreme Court and the Privy Council, acquitting himself well on both occasions. Geoffrey Bolton takes up the story:

When the New South Wales Supreme Court declared at the end of 1884 that Barton had exceeded his authority in suspending AG Taylor for a week, the decision to appeal against the decision to the Privy Council must have been taken with the expectation that even such a well-read bush lawyer as Taylor would be put in his place by Britain's highest tribunal. Taylor was not deterred. He decided to argue his case himself against the English senior counsel retained by the New South Wales government. Funding the journey from the sale of his stamp collection, he took his wife and mother with him, travelled steerage and found lodgings during a dreary winter in a poor quarter of London's East End. Few of the Australian community in London gave him much encouragement or assistance, but the Privy Council complimented him on his presentation of his case and in February 1886 found in his favour. The standing orders on which Barton, and before him Wigram Allen, had relied were *ultra vires*.⁵³

The case must have irked Barton. However, he could take solace in the fact that it was a small blemish on an otherwise glittering career. For Taylor, on the other hand, it was his finest moment. On his return from London he even refused to pursue his claim for damages before a jury on the ground that any money he received would come from the public purse. Taylor remained a member till 1887 and then briefly from 1890 to 1891. But his attendance grew erratic as ill health and journalistic interests intervened. In 1890 he was to become the first editor of the notorious scandal sheet, *Truth*, where he fell in with 'The Wild Men of Sydney' – Norton, Crick and Willis. Tragically, in 1898 he was taken by Norton to be admitted to the Hospital for the Insane, Callan Park, where he died on 18 January 1900. Taylor's *ADB* entry concluded: 'Rowdy, brilliant, unstable and addicted to the bottle, he sometimes drew attention to real evils'.⁵⁴

7.2 *Toohy v Melville* (1892) 13 LR (NSW) 132

7.2.1 Key issues and principles: It was found that the Assembly has the same inherent power, when in Committee of the Whole, to deal with obstruction or disorderly conduct by members or strangers. Windeyer J said that, when in Committee,

It is the same legislative body simply acting under a special mode of procedure and with a different president, and every reason in favour of the right of removing all persons obstructing its proceedings founded on the right of self-protection applies as forcibly to the House when in committee as when the Speaker is in the chair (at 137).

A resolution of the House is not required for a disorderly member to be suspended. According to Windeyer J:

The Chairman of Committees in Committees of the Whole House, or the Speaker, if the House is sitting, is clothed with every power which is necessary to maintain order (at 139).

7.2.2 Background: The events to which the case related occurred on 25 February 1892 in a debate in committee on estimates. At 5 o'clock in the morning an altercation followed from the moving of a resolution that 'the Chairman do now leave the Chair, report progress, and ask leave to sit again'. By new Standing Order 3 such a motion was defined to be, 'by the ruling of the Chairman without

⁵³ G Bolton, *Edmund Barton*, 2000, p 49.

⁵⁴ *ADB*, 1851-1890, Vol 6, p 246.

debate...of an obstructive character'. Toohey refused to accept the Chair's ruling on the matter. To cries of 'Shame' from other members, the Serjeant-at-Arms was directed to remove Toohey from the Chamber 'until he is prepared to obey the Chair'. At that point JC Neild, member for Paddington from 1885 to 1901, was heard to shout 'Good God, is this a parliament!'⁵⁵

The Chairman of Committees was Ninian Melville Jr, an MLA for Northumberland from 1880 to 1894, described in the *ADB* as a 'cabinet maker, undertaker and politician' and by Parkes in 1887 as 'the veriest charlatan that ever lived'. His religion was Orange, his politics Protectionist. According to his *ADB* entry:

In April 1889 he was elected chairman of committees and in troubled times showed himself more than the excitable partisan. His brushes were usually with wilder members of his own side. In 1892 he was sued without success in the Supreme Court for £2,000 for forcible ejection from the House.⁵⁶

James Matthew Toohey was born in Melbourne in 1850; a member for South Sydney from 1885 to 1893; also Protectionist in politics; a Catholic in religion; and, in business, founder of the Toohey's brewery interests.⁵⁷

7.3 *Harnett v Crick* [1908] AC 470

7.3.1 Key issues and principles: At the forefront here were the Assembly's disciplinary powers under its Standing Orders, in particular the power to suspend a member (WP Crick) while criminal charges were pending against him. In *Harnett v Crick*, the question at issue was the validity of the Standing Order under which the member was suspended. Crick claimed that the standing order was *ultra vires* and that, by removing him from the Chamber, the Serjeant-at-Arms, Harnett, had committed a trespass.

By 1908 the power to adopt Standing Orders for the 'orderly conduct' of each House was found under section 15 of the *Constitution Act 1902*. The making of these rules and orders was made subject to the approval of the Governor. According to Gerard Carney, the statutory basis for the Standing Orders of the Houses of the NSW Parliament 'means that they are liable to judicial review to ensure they fall within the power of the House to prescribe'.⁵⁸ As to the respective roles of the court and Parliament, the Privy Council observed:

Two things seem clear: (1) that the House itself is the sole judge whether an 'occasion' has arisen for the preparation and adoption of a standing order regulating the orderly conduct of the Assembly, and (2) that no Court of law can question the validity of a standing order duly passed and approved, which, in the opinion of the House, was required by the exigency of the occasion, unless, upon a fair view of all circumstances, it is apparent that it does not relate to the orderly conduct of the Assembly

At first instance, the NSW Supreme Court upheld. Chief Justice Darley found for Crick (Cohen J

⁵⁵ *NSWPD*, 25.2.1892, p 5770.

⁵⁶ *ADB*, 1851-1890, vol 5, p 238.

⁵⁷ *ADB*, 1851-1890, vol 6, p 284.

⁵⁸ Carney, n 13, p 181.

concurring), in part on the basis that the House had overstepped its powers by ordering the ‘indefinite suspension’ of a member. Further, he said:

I am of the opinion that the fact that a criminal charge is pending against a member of the Legislature in no way affects the course of business of the Chamber, is not in itself an obstruction to such business, and in no way affects or has any relation to the orderly conduct of the House.⁵⁹

Appearing for Harnett, CE Pilcher argued both that the Court lacked jurisdiction to enquire into the validity of a Standing Order and that ‘the mere presence of the plaintiff in the House prevented the proper exercise of the functions of the Assembly’.

The decision was reversed by the Privy Council. It found for the Serjeant-at-Arms, Laurence Joseph Harnett, and against William Patrick Crick, but not on either of the grounds suggested by Pilcher. Nor was it on the grounds favoured by Pring J, who had held that the Supreme Court’s jurisdiction was blocked in the case of a Standing Order that had been duly approved by the Governor. That requirement for approval was viewed by the Privy Council, not as a source of power, but as a limitation on the powers of the Assembly.

In finding for Harnett, the Privy Council did so by reference to the ‘special circumstances’ of the case, in relation to which it was not prepared to substitute its view for that of the Assembly as to those occasions when a member should be suspended. In the brief judgment delivered by Lord Macnaghten on behalf of the Privy Council, it was accepted that the criminal charge facing Crick bore no relation to the orderly conduct of the Assembly as required under section 15 of the *Constitution Act 1902 (NSW)*⁶⁰. On the other hand, the later circumstances of the case were concerned with Crick’s disruptive behaviour and the view the House took of this when, at the enforcement stage, it decided to remove him. Drawing to its conclusion the judgment said it made no decision as to Crick’s motives, good or bad, in continuing to attend the House. It concluded only that:

If the House itself has taken the less favourable view of the plaintiff’s attitude, and has judged that the occasion justified temporary suspension, not by way of punishment, but in self-defence, it seems impossible for the Court to declare that the House was so wrong in its judgment, and the standing order and the resolution founded upon it so foreign to the purpose contemplated by the Act, that the proceedings must be declared invalid.⁶¹

7.3.2 Background: WP (Paddy) Crick another ‘wild man of Sydney’. He was in fact born in Truro, South Australia in 1862, the son of an English labourer, later farmer and his Irish wife. His entry in the *ADB* stated:

Paddy Crick grew into a stocky man with dark curly hair; he looked and moved like a middle-weight boxer and was handy with his fists, easily provoked.⁶²

⁵⁹ *Crick v Harnett* (1907) 7 SR (NSW) 126 at 135.

⁶⁰ (1908) AC 470 at 475.

⁶¹ (1908) AC 470 at 476.

⁶² *ADB*, 1891-1939, volume 8, p 150.

In February 1889 he won the seat of West Macquarie as an independent protectionist and, fuelled by his addiction to whisky, began to make his mark as ‘a pugnacious parliamentarian’. On 3 October he was found ‘guilty of a contempt of this House’ and arrested by the Serjeant-at-Arms for having called certain members ‘Bloody Orange hounds and thieves’. The occasion for the outburst was a debate on a vote to pay John Davies, since 1887 a member of the Legislative Council, £1102 for services rendered as chairman of the Casual Labour Board, in which context questions of financial impropriety had arisen. In passing Crick said, ‘You cannot blacken the name of the devil, and for that reason you could not hurt the character of Parkes’.⁶³ When members sought to bring him to order, Crick used his mastery of parliamentary procedure to frustrate them. He eventually apologised and resumed his speech, saying ‘When I was interrupted about eight hours ago...’.⁶⁴ Continuing, Crick withdrew descriptions of Parkes as ‘Old Iniquity’⁶⁵ and a ‘colossal and craven cur’.⁶⁶ Likewise he later withdrew another reference to ‘the dirty drivel of the head of the Government’.⁶⁷ A reference to another member (John Haynes) as a ‘dirty hound’, was also withdrawn in these terms, ‘Out of deference to the hound I will withdraw it’.⁶⁸ When the gag was eventually applied, Hansard reported this outburst:

Mr Crick: You are a set of robbers and hounds. You ought to be prosecuted for looting the Treasury. You are led by that dirty Orange hound there. You dirty set of robbers. Get out of it, you robbers. You have got it, you thieves. Look at Stokes, Waddell, and Dickens. I should like to have their photographs taken where they are sitting now.

The Chairman: If the honourable member does not keep order –

Mr Crick: Oh, put me out!

The Chairman: The honourable member will presently find that the rules of the House are sufficiently powerful to preserve order.

Mr Crick: Suspend the Audit Act, and loot the Treasury!

A member singled out for insult was Edward Bulwer Lytton Dickens (a member of the Legislative Assembly from 1889 to 1894), son of the novelist Charles Dickens. In his report to the Speaker (James Henry Young), the Chairman of Committees (Ninian Melville) commented that Crick used the words “‘Bloody Orange hounds and thieves”, rushing at the table at the same time in a menacing attitude’.⁶⁹ A resolution adjudging Crick guilty of contempt was moved and passed. At that time the new Standing Order of 1889 had not been adopted and those of 1870 were still in force. The Speaker activated SO 96:

Every Member adjudged by the House, for any of the causes hereinbefore mentioned, guilty of contempt, shall be committed, by the Warrant of the Speaker, to the custody of the Sergeant-at-Arms, and shall, by the Sergeant-

⁶³ *NSWPD*, 3.10.1889, p 5902.

⁶⁴ *NSWPD*, 3.10.1889, p 5942.

⁶⁵ *NSWPD*, 3.10.1889, p 5953.

⁶⁶ *NSWPD*, 3.10.1889, p 5954.

⁶⁷ *NSWPD*, 3.10.1889, p 5955.

⁶⁸ *NSWPD*, 3.10.1889, p 5971.

⁶⁹ *NSWPD*, 3.10.1889, p 5974.

at-Arms, be detained in custody until released by an Order of the House, upon such conditions for payment of fees as to the House shall seem meet.

When ‘the arrest of Mr Crick’ came to be debated, Parkes commented that Crick had ‘been more conspicuous for interruption, and for insolent observations, than any man that ever sat in this House during his first six months’.⁷⁰ Still that same parliamentary sitting day, it was Parkes who moved that Crick be released from custody upon an expression of regret.⁷¹ In his apology Crick said he had spoken in ‘a very excited moment’. Of him one might say that, while he understood the rules of the law, about the rule of law itself he cared nothing; also, though he was a master of parliamentary procedure, his regard for parliamentary democracy was scant.

Altogether Crick was a member of the Legislative Assembly first from 1889 to 1890, when he was expelled on 13 November before being re-elected at the ensuing by-election on 6 December, then continuously to 1906 when he resigned. According to HV Evatt: ‘During his long parliamentary career, Crick was very prominent in disgraceful scenes inside the Chamber, and in fisticuffs within the precincts of the House’.⁷² Indicative of Crick’s behaviour were the events surrounding his expulsion. When he was called by the Speaker to explain his actions, he entered the Chamber the worse for drink and had to be removed forcibly by the Serjeant-at-Arms, at which time he shouted insults at the Speaker saying he and the Chairman of Committees were ‘both a pair of thieves and robbers of the country’. For good measure, Crick added ‘There, now, put that in your pipe’.⁷³

Crick rose to serve as Minister for Lands under Premier See from 1901 to 1904. In that position he was again embroiled in controversy. Evidence before a Royal Commission set up in 1905 led to him being charged a year later with unlawfully receiving money from various transactions involving Crown lands. Acquitted of that charge, in its subsequent interim report the Royal Commission found Crick had accepted bribes and he was charged with conspiracy. The Speaker ruled that Parliament could not deal with Crick’s misconduct while it was before the courts and, further to this, on 19 July 1906 the Assembly approved Standing Order 295, headed ‘Crime trial pending’.⁷⁴ Its effect was to allow the House to suspend the Member until the end of the criminal trial. Standing Order 295 provides:

If the House decides not to proceed on a matter which has been initiated in the House concerning the alleged misconduct of a Member on the grounds that the Member may be prejudiced in a criminal trial then pending on charges founded on the misconduct, the House may suspend the Member from its service until the verdict of the jury has been returned or until it is further ordered.

Characteristically, Crick persisted in attending the House, at which time the Speaker called upon him to withdraw. Upon Crick’s refusal, the Serjeant-at-Arms was directed to remove him from the House. In

⁷⁰ *NSWPD*, 3.10.1889, p 6024.

⁷¹ *NSWPD*, 3.10.1889, p 6075.

⁷² HV Evatt, *Australian Labour Leader: The Story of WA Holman and the Labour Movement*, Angus and Robertson 1940, p 109.

⁷³ *NSWPD*, 12.11.1890, p 5188.

⁷⁴ Originally inserted as Standing Order 394.

character again, Crick sued in an action for assault.

The NSW Supreme Court found for Crick. The Chief Justice by this time was Sir Frederick Matthew Darley (1830-1910). Nominated in 1868 by Martin to the Legislative Council, he remained very much a lawyer in politics, remaining independent even on becoming Vice-President of the Executive Council in the Parkes Ministry in 1881. Shortly after Martin's death in 1886, Darley was appointed Chief Justice. Of his tenure in office the *ADB* commented: 'Unlike his predecessor he brought no aura of statesmanship or political involvement to that bench; his sole concern was the due administration of the law'.⁷⁵

In Crick's second criminal trial, the jury was unable to agree on a verdict. However, Crick resigned his seat in December 1906 and so could not be expelled. Instead, the Assembly passed a resolution on 11 December that in view of the Royal Commission's findings Crick was 'adjudged guilty of conduct which should render him ineligible to sit as a member of this Assembly'. On 23 August 1907 his career as a solicitor ended when he was struck off the rolls. He died exactly a year later, a matter of days after the Privy Council had handed down its judgment in *Harnett v Crick*.

7.4 *Willis and Christie v Perry* (1912) 13 CLR 592

7.4.1 Key issues and principles: This first High Court of Australia case on the privileges of the Houses of the NSW Parliament is authority for the proposition that, in the absence of statute or a relevant standing order, the Speaker of the Assembly has no power to cause a member who has been disorderly in the Chamber, and has left it in a disorderly manner, to be arrested outside the Chamber and brought back into it. An allegation that the Speaker reasonably believed that the bringing back of the member was necessary to prevent further disorder in the Chamber was irrelevant. During disorderly scenes a member (Perry) had shouted to other members to follow him out of the Chamber and had left with his hat on, and without making obeisance to the Chair. The Speaker had sought to bring Perry back to the Chamber, to be admonished and cautioned. It was held that Perry had been assaulted and falsely imprisoned.

In effect, the limitations on the powers of the Houses of the NSW Parliament were confirmed, as expressed in *Doyle v Falconer* and *Barton v Taylor*. The decision of the NSW Supreme Court was confirmed and the High Court found for the member, John Perry, against the Speaker Henry Willis and the Serjeant-at-Arms William Christie. The case was treated by Griffith CJ with rare impatience. He stated, 'For my part, I have had difficulty in treating the arguments for the defendants with becoming gravity' (at 596). Counsel for Willis (BR Wise) had argued on the Speaker's behalf that if he has 'the power to expel from the precincts of the chamber a man who is interfering with the business in the chamber, he has power to bring that man into the chamber and admonish him'. Griffith CJ found that the Speaker's only purpose in these circumstances was to 'punish' the member, something that was clearly beyond the self-protective powers of the House. The Chief Justice continued:

In my opinion the Speaker had no more authority over the plaintiff [Perry] when he was outside the chamber than he had over a person who was not a member (at 598).

⁷⁵

ADB, 1851-1890, vol 4, p 18.

Edmund Barton himself was a member of the High Court by this time. While his fellow justices (Griffith CJ and Isaacs J) made reference to *Barton v Taylor*, Barton himself pointedly ignored it.

7.4.2 Background: With the advent of party politics proceedings in the Assembly reflected a more orderly and disciplined pattern. However, the period from 1911 to 1913, when Willis was Speaker, was an exception to this rule. The setting was the first Labor Ministry, led by McGowen and Holman, which in July 1911 lost its majority, having the same number of seats in the Assembly as the Opposition (45 each). Labor could not nominate a Speaker therefore without losing government. A deal was struck between Henry Willis Liberal member for the Upper Hunter since 1910 and Holman whereby Willis agreed to take the Chair on a number of conditions. Incensed by the treachery of Willis, the Opposition's response was violent and disorder was commonplace. The events that gave rise to the case in question occurred on 29 August.⁷⁶ The ongoing disorder culminated on 19 September in scenes of mayhem when objects were thrown at the Speaker, fights broke out on the floor of the House and Perry, member for Richmond, and others had to be removed with police assistance. Hansard recorded:

At this stage several police constables entered the Chamber, and in spite of resistance on the part of members of the Opposition, removed the honourable member for Bega [WH Wood]. Several members seated on the Ministerial benches cheered enthusiastically, as also did the occupants of the ladies' and strangers' galleries.⁷⁷

Headed 'Pandemonium in Parliament', the *Sydney Morning Herald* wrote of a 'scene unparalleled in the history of the NSW Parliament. According to the report:

Excitement ran high when Mr John Perry, ex-Minister, and member for the Richmond, was in due course 'named' by the Speaker for ejection. It is not clear what Mr Perry intended to do when, as soon as the Speaker ordered his removal, he rushed over to the table, and seized hold of a water bottle. Mr Perry, who in his younger days, was a noted boxer, had figured prominently in the scuffling that had taken place, and possibly felt he wanted a drink, or what boxers call a 'gargle', after all the vigorous exercise. But as several volumes had been thrown in the direction of the Speaker, the head messenger, an elderly man, was evidently determined that that the Speaker should be under no possible risk of a glass of water or, perhaps, something more solid, being hurled at him, and he sprang at the excited member for the Richmond and wrenched the water bottle out of his hand.⁷⁸

The report continued:

Mr Perry's exit was a strenuous two minutes. He came through the door practically in the arms of one of the messengers. His face was white with rage as he struggled to get away. As he was passed out he turned on his assailant in his heat, and it looked as if there was going to be a fight. A constable, however, restrained him, and he presently subsided, realising that the messenger had only carried out orders.⁷⁹

As to Willis's high handed and idiosyncratic interpretation of the Speaker's powers, Geoffrey Hawker commented:

⁷⁶ *Legislative Assembly Votes and Proceedings, 1911-12, volume 1, p 7.*

⁷⁷ *NSWPD, 19, 9 1911, p 604.*

⁷⁸ *Sydney Morning Herald, 20.11.1911, p 19.*

⁷⁹ *Sydney Morning Herald, 20.11.1911, p 20.*

In the House he claimed wider authority than had previous Speakers to remove members, to order them to discontinue speeches, to decide whether their motions were in order, to amend or reject their questions and to exclude to press from the press gallery.⁸⁰

Hawker further wrote that Willis, a member of the House of Representatives for Robertson from 1901 to 1910, had long shown a particular interest in matters of privilege: ‘He had observed parliaments in Europe, developed an admiration for Robert Lowe, and had become a strong defender of the rights, privileges, and dignity of Parliament and its members’.⁸¹ In the event, both his untenable political position and his unyielding manner worked against him. To this Hawker added, ‘Besides, members on both sides were nettled by Willis’ frequent references to the better manners of the Federal Parliament’.⁸² Clearly, in the Perry case his interpretation of the Speaker’s powers was wrong and Willis only made matters worse by mounting a hopeless appeal to the High Court.

John Perry was a member of the Legislative Assembly from 1889 to 1920 and served as a Minister in several administrations – as Minister of Public Instruction and Labour in the Lyne and See Ministries, between 1899 and 1904. In October 1907 he became Secretary for Mines in Wade’s Liberal-Reform Ministry, and Minister of Agriculture in 1908. His opposition to Willis was absolute.⁸³

Willis was born in Port Adelaide, South Australia in 1860, before making his name in Sydney as a successful businessman living in a substantial gentleman’s residence in Castlecrag. Willis was the first mayor of Cabramatta and Canley Vale and is not to be confused with the third of the ‘wild men of Sydney’ – William Nicholas Willis, an Assembly member from 1889 to 1904 when he became embroiled in Crick’s land corruption scandal.

7.5 *Armstrong v Budd* (1969) 71 SR (NSW) 386

7.5.1 Key issues and principles: The power of expulsion is one that has been claimed and exercised by representative and unrepresentative legislative bodies since ancient times. It is a collective privilege, a power enjoyed by a House of Parliament in its collective capacity. The expulsion of a Member is an example of the power of a House of Parliament to regulate its own constitution and composition for the purpose of preserving its dignity and efficiency, as well as to preserve public confidence in the institution of Parliament.

According to the 22nd edition of *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, published in 1997:

The expulsion by the House of Commons of one of its Members may be regarded as an example of the House’s power to regulate its own constitution, though it is treated here as one of the methods of punishment at the disposal of the House. Members have been expelled for a wide variety of causes (at 141).

⁸⁰ G Hawker, *The Parliament of NSW, 1856-1965*, NSW Government Printer 1971, pp 251-55.

⁸¹ Hawker, n 80, p 252.

⁸² Hawker, n 80, p 253.

⁸³ *ADB, 1891-1939*, vol 11, p 204.

The leading case is *Armstrong v Budd*. There the NSW Court of Appeal held:

- That in addition to the powers specifically conferred by the *Constitution Act 1902*, the common law confers on each of the Houses of Parliament such powers as are necessary to the existence of the particular House and to the proper exercise of the functions it is intended to execute.
- That in a proper case a power of expulsion for reasonable cause may be exercised, provided the circumstances are special and its exercise is not a cloak for punishment of the offender.

The grounds for expulsion suggested by the Solicitor General and accepted by the NSW Court of Appeal were as follows:

The Houses of the Legislature of New South Wales have inherent or implied power to exclude temporarily or permanently by suspension or expulsion members whose conduct is resolved to be such:

- (1) As to render them unfit to perform their high responsibilities and functions in the Council as Members.
- (2) As would prevent the Council and other Members thereof from conducting its deliberations and exercising its functions with mutual respect, trust and candour
- (3) As would cause to be suspect its honour and the good faith of its deliberations.
- (4) As would tend to bring the Council into disrepute and would lower its authority and dignity unless it was so preserved and maintained (at 396).

As to the scope of the expulsion power, Herron CJ referred to cases concerning disorderly conduct, on one side, and those dealing with conduct outside the Chamber involving ‘want of honesty and probity’, on the other:

I have already indicated that in my view the power which arises out of necessity arises not only from conduct within the Chamber but may arise also from misconduct outside the House provided it be held to be of sufficient gravity to render the member unfit for service and requiring a decision on the facts that continued membership would tend to disable the Council from discharging its duty and one necessary for protecting that dignity essential to its functions. As to the latter it would seem that conduct involving want of honesty and probity of members is just as relevant a criterion as for example disorderly conduct (at 397).

Sugerman JA observed:

That the proper discharge of the legislative function by the Council demands an orderly conduct of its business is undoubted. That it demands honesty and probity of its members should be equally undoubted. Indeed, the need for removal and replacement of a dishonest member may be more imperative as a matter of self-preservation than that of an unruly member (at 408).

Wallace P summarised the Court’s opinion of the expulsion power in the following terms:

the Legislative Council has an implied power to expel a member if it adjudges him to be guilty of conduct unworthy of a member. The nature of this power is that it is solely defensive – a power to preserve and safeguard the dignity and honour of the Council and the proper conduct and exercise of its duties. The power extends to conduct outside the Council provided the exercise of the power is solely and genuinely inspired by the said defensive objectives. The manner and the occasion of the exercise of the power are for the decision of the Council (at 403).

As to the question of the potential for abuse of the expulsion power, in *Armstrong* the Court’s

response, as formulated by Herron CJ, was twofold. First, it was assumed that the House would not exercise the power ‘irresponsibly or capriciously’. Secondly, it was noted that an expulsion could always be appealed to the Supreme Court which has the power ‘to declare a resolution for expulsion null and void’ (at 397-8).

That the power of expulsion is available at common law was recognised in the 19th century case law. In *Doyle v Falconer* it was said that a member found guilty of disorderly conduct in the House whilst it is sitting may be ‘removed, or excluded for a time, or even expelled’.⁸⁴ The matter was also canvassed in *Barton v Taylor* where, in *obiter*, the power to expel a Member for habitually obstructive or disorderly conduct was confirmed. Comparing the sanctions of suspension and expulsion, the Privy Council added that, in the context of an elected House of Parliament, the rights of constituents may be ‘more seriously interfered with by an unnecessarily prolonged suspension than by expulsion, after which a new election would immediately be held’.⁸⁵

As to the decision of the Supreme Court in *Armstrong v Budd*, Campbell commented that the High Court ‘has not yet had occasion to rule on the soundness of the decision’.⁸⁶ Campbell further suggested several considerations the High Court should have regard to when deciding the ambit of the expulsion power, including the relationship of the power to the statutory regimes in place for the qualification and disqualification of members. Campbell questioned the need for a power ‘to expel members in order to maintain public confidence in the legislature’ (page 219).

Four Members have been expelled from the NSW Parliament, three from the Legislative Assembly (in 1881, 1890 and 1917) and one from the Legislative Council (in 1969). Of the other Australian States, only the Victorian Parliament has used its power of expulsion. The last occasion was in 1901. At the Commonwealth level, the expulsion power has been abolished (*Parliamentary Privileges Act, 1987* (Cth), section 8).

7.5.2 Background: The only expulsion from the NSW Legislative Council is that of AE Armstrong in 1969. By resolution of the House Armstrong was adjudged guilty of ‘conduct unworthy’ of a Member of the Council. This followed ‘judicial strictures’ by Justice Street who had conducted a trial of a matter involving Armstrong and his business associates, Alexander Barton. The strictures were directed at the fact that Armstrong:

- Was a party to an arrangement which he believed to be one to procure false evidence for a court;
- Entertained as a real possibility the bribery of a Supreme Court judge;
- Demonstrated by his documents his views on bribery in general; and
- Would not hesitate if he thought it necessary for his own protection or advantage so to do, to give false evidence.

⁸⁴ (1866) LR 1 PC 328 at 340.

⁸⁵ (1886) 11 AC 197 at 205.

⁸⁶ Campbell 2003, n 36, p 221.

Armstrong's career in public life was summed up in the short obituary that appeared in the *Sydney Morning Herald* on 1 May 1985. It started with the statement that one of the State's 'most colourful characters' had died 'after a lifetime filled with scandal, gossip and intrigue'. Describing Armstrong as a 'wealthy grazier and company director', it continued:

In 1952 he was elected as a Liberal member to the NSW Legislative Council. In 1958 he quietly resigned from the Liberal Party and joined the Country Party. He later denied that he had paid a \$30,000 bribe to secure his seat in the Upper House. If he had, it would have been wasted money because in 1969 the Legislative Council made the unprecedented move of expelling Mr Armstrong from the House. The expulsion came after allegations that Mr Armstrong had forced a company director to buy shares held by the MLC. The director, Mr Alexander Barton, claimed he bought the shares because he feared for his life.⁸⁷

The extraordinary circumstances surrounding the Armstrong case, including the involvement of another MLC, SLM Eskell, were set out in 1970 by the President of the Legislative Council, as follows:

The member, Mr Armstrong, was very active in business affairs in the city. He had been a director of a company and a member of a board, and had associated with a gentleman named Mr Barton as a co-director. In the course of their dealings Mr Barton had entered into a contract to do certain things involving the payment to Mr Armstrong of substantial sums of money. Some time before he had done what he had contracted to do, Mr Barton apparently changed his mind and brought an Equity Court action to obtain relief from the necessity of carrying out the contract into which he had entered. He claimed that he had only signed the contract under duress.

This had nothing to do with Parliament or with Mr Armstrong's position as a member of Parliament. It was during the course of the evidence that things came out which involved Mr Armstrong and threw a smear over his character and status. It was alleged that the man who was the complainant in this action, Mr Barton, through his access to offices which were occupied by directors of the company, including Mr Armstrong, on some occasion when Mr Armstrong was not present, went through Mr Armstrong's papers and extracted information on slips of paper in Mr Armstrong's writing. This information was used by Barton's counsel during the hearing and the main objective of the cross-examination of Mr Armstrong was to discredit him and to influence the court to grant Barton the relief he sought.

Amongst the things found were some ruminations of Mr Armstrong – apparently he had put these down on paper – including whether he ought to bribe a Judge of the Supreme Court. It appeared from what was written on the paper that Mr Armstrong had been entertaining, as a serious possibility, the thought that he should try to bribe a Supreme Court Judge....

The other thing that emerged from the examination of Mr Armstrong's papers was that he had endeavoured or had agreed to co-operate in obtaining false evidence to put before a court which was hearing a divorce case. Strangely, this divorce action concerned one of his parliamentary colleagues, Mr Eskell, MLC, who at the time of the Equity Court proceedings was Leader of the Liberal Party in the Legislative Council and Chairman of Committees. This had nothing to do with Parliament except that it indicated that Mr Armstrong was willing, as the court said, to engage in a course of procuring false evidence to be used in the divorce court. It was just a curious coincidence that the false evidence concerned Mr Eskell's associations with a woman was to be named as the co-respondent in his divorce case.⁸⁸

On 25 February 1969 the expulsion resolution was moved as a matter of privilege by the Leader of the

⁸⁷ 'Controversial former MP dies', *The Sydney Morning Herald*, 1 May 1985.

⁸⁸ Sir H Budd, 'Power of Parliament to expel a member', *3^d Conference of Presiding Officers and Clerks*, Melbourne 1970, p 61. These comments were made in the proceedings following the formal speech.

Government in the Council, JBM Fuller. Mr Armstrong was present in the House and immediately took a point of order that the matter was *sub judice*, the judgment of Justice Street then being subject to appeal. Following discussion, the President disallowed the point of order and declared the motion in order. The case against Armstrong was then put by Fuller. Armstrong spoke next in his own defence, noting that he had declined an invitation to resign. He was followed by the Leader of the Opposition, RR Downing, who moved an amendment that the matter be referred to a Select Committee. He argued that the Government had moved the motion to save it the embarrassment of any inquiry into the conduct of Eskell. Downing maintained that, like Eskell, Armstrong had committed no offence for which he could be charged and that the Justice Street was at least as derogatory of Eskell's conduct as of Armstrong's.

Responding to Downing, Fuller laid on the Table advice from the Crown Solicitor. The opinion stated that the evidentiary matter in the brief for opinion did not disclose evidence of conspiracy to abuse or pervert the due course of justice on the part of Armstrong, Eskell or Mrs Cleary (co-respondent in the Eskell divorce case). Fuller said that his charge was not that Armstrong was engaged in a conspiracy to procure false evidence. Rather, it was that he participated in what he believed to be an arrangement to procure false evidence. There may not have been such an arrangement, but he thought there was. That, it seems, was the basis of the Government's different treatment of Armstrong and Eskell.

The House divided and Downing's amendment was lost on division, 29 votes to 28, Armstrong voting with the Opposition. The original motion was then agreed to on the voices.⁸⁹

There is no doubt that the expulsion of a Member is an inescapably political process. Armstrong saw his own expulsion in that light, comparing the harsh treatment meted out to him, with the more lenient treatment of the Liberal Party 'insider', Eskell. The Government had administered two kinds of justice, he said: 'One kind was for favourites who preserve the Government's voting strength... The other was for 'expendables' like myself, who can be crucified when it suits the Liberal-Country Party Government'.⁹⁰

8. JUDICIAL REVIEW OF LEGISLATIVE PROCESSES

8.1 *Trethowan v Peden* (1930) 31 SR (NSW) 183

8.1.1 Key issues and principles: With reference to *Stockdale v Hansard* it is agreed that 'What is said or done within the walls of a parliamentary chamber cannot be examined in a court of law'.⁹¹ The courts are precluded from intervening in legislative processes on several grounds. These include considerations arising from the separation of powers that require a policy of non-intervention, added to considerations arising from Article 9 of the Bill of Rights that preclude judicial questioning of parliamentary proceedings. Added to this, in *Criminal Justice Commission v Nationwide News Pty Ltd* [1996] 2 QdR 444 Davies JA observed that the reluctance of the courts to intervene in the

⁸⁹ *NSWPD*, 25.2.1969, p 3858-90.

⁹⁰ 'Eskell: it has all been said', *The Sydney Morning Herald*, 7 March 1969, p 1. Eskell, who was Chairman of Committees of the Whole House, was removed from office, but no further action was taken against him.

⁹¹ *Egan v Willis* (1998) 195 CLR 424 at 462 (McHugh J).

legislative process stems from ‘the mutual respect which each branch of government should accord the performance of its functions by the other’ (at 460). Likewise, *British Railway Board v Pickin* [1974] AC 765 is authority for the proposition that a court is barred by the principle of comity from investigating into the manner in which Parliament exercises its legislative function

Trethowan v Peden is of continuing interest as a rare instance of where the courts have intervened in the parliamentary process by the grant of an injunction preventing the presentation of two Bills to the Governor for royal assent. This was on the ground that their presentation would be in contravention of section 7A of the *NSW Constitution Act 1902* and therefore unlawful. The effect of section 7A was that it doubly entrenched the Council – requiring a referendum for the Council to be abolished or its powers altered, and for section 7A itself to be repealed or amended (the words ‘expressly or impliedly’ were inserted later). In respect to the Bill for the abolition of the Council, it was also said that the rights of its members would be ‘injuriously affected’ (Street CJ at 205). According to Street CJ (Ferguson and James JJ concurring):

Dr Evatt’s submission is that the judiciary cannot interfere between Parliament and the King...The plaintiffs’ on the other hand point out, with truth, that it is the duty of the Crown, and of every branch of the Executive, as well as of every citizen, to abide by and obey the law, and they say that all that they are asking is that they may be protected against a threatened breach of a statutory mandate by which they will be injuriously affected. Under the law as it stands today, as now declared by this Court, there is a valid statutory prohibition against the presentation to the Governor of a Bill to repeal s. 7A until it has been approved by the electors. To grant the relief asked for will not in my opinion amount to an interference with the internal affairs of either House of Parliament or with any of the privileges of Parliament, and I think, therefore, upon the whole, that the suit is one which will lie at the instance of a proper plaintiff having a sufficient interest to maintain it (at 205).

In granting special leave to appeal, the High Court confined the issue to whether section 7A was a valid ‘manner and form’ provision. By a majority of three to two, it held in *A-G (NSW) v Trethowan* that the section was valid. In May 1932 that decision was confirmed by the Privy Council. Section 7A was held to be valid and in force and, because of it, the bills to abolish the Council and repeal section 7A itself could not be presented for assent ‘unless and until a majority of electors voting had approved of them’.⁹²

A review of this area of the law was undertaken recently by the Supreme Court of Western Australia in *Marquet v A-G (WA)* [2002] 26 WAR 201. A manner and form provision was at issue in that case and declarations had been sought from the Clerk of the Parliaments whether it would be lawful for him to present two Bills for the Governor’s assent that had not complied with the absolute majority requirements. On the question of jurisdiction, Steytler and Parker JJ concluded (the other members of the Court agreeing):

In the case of legislation...which provides that presentation of a Bill [for the royal assent] ‘shall not be lawful’ unless particular circumstances have been satisfied, the Court has jurisdiction to intervene in order to make a declaration of the kind sought, after the deliberative process in the Houses of Parliament has been completed, but before the Bill is presented to the Governor for Royal Assent (at 160).

It was further held that the Court should, as a matter of discretion, exercise its jurisdiction. On appeal to the High Court the question of justiciability was not considered. Rather, it was the validity of the manner

⁹² *Attorney General (NSW) v Trethowan* (1932) 47 CLR 97 at 106.

and form provision that was the point at issue (*AG (WA) v Marquet* 202 ALR 233).

8.1.2 Background: It was Albert Charles Willis, Lang's Representative in the Council during his 1925-27 Ministries and then from November 1930 to April 1931, that introduced into the Upper House the Constitution (Legislative Council) Amendment Bill on 2 December 1930. Its purpose was to abolish the Council without submitting the matter to a referendum as required by section 7A of the *Constitution Act 1902*. A second Bill was also introduced for the repeal of section 7A itself – the Constitution (Amendment) Bill.

This last provision had been the work of the conservative Bavin Government (1927-30). Its architect was the then Professor of Law and Dean of Law at Sydney University and member of the Upper House since May 1917, Sir John Beverley Peden. He proved his worth as a legislative draftsman of the first order on many occasions, in defence of free speech over the Sedition Bill of 1918 and of freedom of religion by the amendment of the *Ne Temere* Bill of 1924. Section 7A was his crowning achievement, in that it survived legal challenge at the Supreme Court, High Court and Privy Council levels.

By the time those cases were heard Peden had been made President of the Legislative Council. Paradoxically, his presence in the case therefore was not in defence of the second chamber but alongside Lang's Ministers of the Crown, determined as they were on its abolition. As President, Peden was appointed by the Council's Standing Orders to present to the Governor for assent Bills originating in the Upper House after they had been passed by both Houses of the NSW Parliament. In fact, in the Supreme Court neither Peden nor any representative of his appeared before the Court and it was the other defendants in the case that claimed the right to have the Bill presented for Royal Assent. Counsel for the defendants (certain Government Ministers and the Attorney General) were Dr Evatt (an Assembly member for Balmain from May 1925 to September 1930, initially as a Labor member and then as an independent) and soon, at 36 years of age, to be appointed to the High Court by the Scullin Labor Government (from 1930 to 1940), along with another future High Court judge, Frank Kitto.

As noted, special leave was granted on narrow grounds relating to the constitutionality of the 'manner and form' provision to appeal the decision of the NSW Supreme Court to the High Court. Dissenting and finding against the constitutionality of s. 7A were Justices Gavan Duffy and Edward McTiernan. The latter was appointed a day after Evatt to the High Court by the Scullin Government (Evatt was precluded from hearing the matter). McTiernan was another former Labor Assembly member who in 1926, as Attorney General, had played a leading role in Lang's first attempt to abolish the Council, to the extent that he was sent to London to persuade the Secretary of State for the Colonies, LS Amery, that Governor de Chair must accept his ministers' advice on the matter of appointments to the Upper House. In 1929 he represented Parkes in the House of Representatives, before his controversial appointment to the High Court. He was to remain on the Bench till 1976 and died in 1990 at the age of 97.

McTiernan was the son of an Irish policeman; Sir Arthur King Trethowan the son of a Cornish-born auctioneer. Born in Spring Hill, Victoria in 1863, Trethowan started his working life at 14 as a bullock driver and in 1898 selected land at Berrigan in NSW. By the time he was nominated to the Council in 1916 he was a grazier with significant interests in the Upper Hunter and Dubbo districts. He was a founder of the Country Party, serving as chairman of the State central council in 1919-21 and 1925-37. Elected to the reconstituted Legislative Council in 1934, he died at Dubbo in 1937. According to the

ADB:

Trethowan was a 'big man', physically and mentally, and his determined face was a mirror of his strong character.⁹³

8.2 *Clayton v Heffron* (1961) SR (NSW) 768

8.2.1 Key issues and principles: Here the situation was reversed from that encountered in *Trethowan*. The issue was not that the abolition of the Upper House should be put to a referendum, thereby satisfying the requirements of section 7A, but that the submission of the relevant Bill to referendum should be prevented on the ground that the legislative prerequisites had not been satisfied. It was the procedures under s. 5B of the Constitution Act (disagreements between the Houses) that were at issue, notably whether a Bill could be put to a referendum without there being a free conference of managers or a fully authorised joint sitting. These requirements extend to all Bills, including those to which section 7A applies.⁹⁴ Section 5B was inserted into the Constitution Act in 1933, upon the reconstruction of the Legislative Council.

In *Clayton* the NSW Supreme Court declined to issue an injunction to restrain the holding of a referendum on a bill to abolish the Council. In the joint judgment of Evatt CJ and Sugerman J jurisdiction was accepted for reasons 'of convenience amounting to necessity' in deciding the validity of the proposed change to the constitution of the State. They stated:

The present case is concerned with a measure whose purpose is to alter the constitution of the legislative body itself – to replace a legislature of two Houses by a legislature consisting of one only of such Houses. A degree of convenience amounting virtually to necessity makes it proper to determine at an appropriately early stage whether such a measure, if ultimately enacted, will have been enacted with constitutional validity and in accordance with the forms required for its enactment... (at 799).

The issues involved in the case therefore included those of justiciability (whether the Court should intervene in the legislative process) and the constitutional validity of section 5B. A question was whether non-consideration by the Council constituted rejection or failure to pass, and whether, owing to the Council's non-cooperation, the steps specified in section 5B had been complied with. In the Supreme Court the answer was that the requirements of s. 5B were directory only, not mandatory, and therefore compliance with them was not required for the referendum to proceed.

On an application for special leave to appeal, which was refused, the High Court only accepted jurisdiction reluctantly, basically because the parties had agreed that injunctive relief would be available if the requirements of section 5B had not been satisfied. In their joint judgment, Dixon CJ, McTiernan, Taylor and Windeyer JJ stated that for the court to inquire into the parliamentary process before its completion was

⁹³ *ADB*, 1891-1939, vol 12, p 260.

⁹⁴ *Constitution Act 1902* (NSW), s 5B(5).

an inquiry which according to the traditional view courts do not undertake. The process of law-making is one thing; the power to make the law as it has emerged from the process is another. It is the latter which the court must always have jurisdiction to examine and pronounce upon.⁹⁵

That was the leading judgment in the case. It held that: the supposed rule of privilege that a bill for the abolition of the Council should originate in that chamber is of a parliamentary kind and, as such, cannot touch the validity of a bill passed in accordance with section 5B; on each of the two occasions when the bill had been before the Council it had ‘failed to pass’ within the meaning of section 5B; the requirements of section 5B were merely directory not mandatory; and the abolition bill could be put to a referendum without there being a free conference of managers or a fully authorised joint sitting.

8.2.2 Background: The immediate background to the case was the latest attempt of a Labor Government, headed by RJ Heffron, to abolish the Council, in keeping with official Party policy. Heffron was the main player on one side of the argument, Colonel H.J.R. (Hector) Clayton on the other. In more detail, the defendants in the case before the Supreme Court were the members of Cabinet (headed by Premier Heffron), the Executive Council and Edward Bennetts, the State Electoral Commissioner. Ranged against them were six MLCs headed by Clayton, the unofficial leader of the unofficial Opposition in the Upper House. Colonel H.J.R. (Hector) Clayton was born in 1885 and educated at Sydney Grammar and Sydney University, before the First World War he was to join his father as a partner in the family law firm (later Clayton, Utz and Co). He was a veteran of Gallipoli and also served in the Second World War, commanding the First Australian Movement Control Group between 1943 and 1945. On his election to the Council in 1937 he had, in the spirit of independence, resigned from the then United Australia Party. Basically, under his guidance the Council had refused to participate in the disagreements procedures on the ground that the Bill had not originated in the Council and was therefore contrary to past rulings of Council Presidents that required measures affecting the constitution of a House to originate there. In fact these rulings pre-dated the insertion of section 5B in to the Constitution Act. With Clayton was one MLA (M.F. Bruxner) and a Member of the House of Representatives (F.A. Bland).

The abolition legislation – the Constitution Amendment (Legislative Council Abolition) Bill - was introduced into the Legislative Assembly on 12 November 1959. It proposed both the abolition of the existing Upper House, plus the insertion of a new section 7B into the Constitution Act requiring a referendum for any form of bicameral Parliament to be established in the future. At that point Labor held 34 of the 60 seats in the Council. As the President was an ALP member, the Government effectively had a majority of seven. That majority crumbled when, as a matter of ‘precedence and privilege’, a motion was moved by Clayton that the bill be returned without deliberation to the Lower House with the following message:

The Legislative Council, in accordance with long established precedent, practice and procedure, and for that reason, declines to take into consideration a Bill which affects those sections of the Constitution Act providing for the constitution of the Legislative Council unless such Bill shall have originated in this House...⁹⁶

The motion passed with the support of seven Labor MLCs, all of whom were later expelled from the

⁹⁵ (1960) 105 CLR 214 at 235.

⁹⁶ *NSWPD*, 2.12.59, p 2549.

Party. The Bill was reintroduced on 31 March 1960 into the Legislative Assembly and passed on 5 April. Unlike its 1959 equivalent, this 1960 Bill did not receive the support of the Liberal Party in the Lower House. On 6 April 1960 the Council again refused to consider the abolition bill. RR Downing, the Labor Government's Representative in the Upper House, clarified the point that 'no claim of privilege can prevail against a legal statute, particularly a constitutional statute to which the provisions of section 7A apply'.⁹⁷ Again, the Government lost the division, 34 votes to 24. The number of Labor 'rebels' had by this time climbed to nine. They all voted with the Opposition.

The Government took the Council's refusal to consider the bill as a rejection for the purposes of section 5B. In consequence, on 7 April it took action in the Assembly to institute the deadlock procedures by appointing managers for a free conference. On receipt of this message on the same day in the Upper House, Downing moved that it be considered 'forthwith'. Clayton moved an amendment and in the divisions that followed his view prevailed, the Government losing all four votes (by 32 to 22 or 23), with the 'rebels' voting as a block with the Opposition. The argument now was that the Council had neither rejected nor failed to pass the bill within the meaning of section 5B. The upshot was that a message was sent to the Speaker stating that 'The Legislative Council does not consider that any situation has arisen whereby a Free Conference between Managers of the Legislative Council and the Legislative Assembly is either necessary or proper...'.⁹⁸

On 13 April 1960 when both Houses received messages from the Governor convening a joint sitting of Members for 20 April. Clayton immediately moved a motion 'That His Excellency's Message be considered forthwith', to which Downing took exception on the ground that it was in contravention of section 5B of the Constitution Act. He asked the President, W.E. Dickson, to rule the motion out of order. In keeping with convention, the President said it was not his function to interpret the Constitution but to 'guide honourable members in relation to the rules and procedures of the House'. He ruled that Downing's point of order was itself in order, although he added that, as he was 'not all powerful', the House could dissent from his ruling if it wished. It was certainly the wish of Clayton, who instantly moved a motion of dissent from the President's ruling. That motion was carried, 33 votes to 22, as was Clayton's original motion that the Governor's message be 'considered forthwith'. Eight Labor 'rebels' voted with the Opposition. These initial hurdles surmounted, Clayton moved next that the House

does not consider that a situation has arisen...conferring constitutional power upon your Excellency to convene the said joint sitting...and this House resolves that for this constitutional reason the Members of this House do not attend at nor participate in such joint sitting.⁹⁹

On division, the motion was agreed to by 33 votes to 22. Finally, Clayton moved that, in an Address-in-Reply to the Governor's message, that the Council respectfully inform His Excellency of its decision not to attend the joint sitting. To this Downing moved an amendment to the address 'to make it read that the majority of members of this Chamber deem it their duty not to attend the joint sitting and so on'. He asked Clayton for a copy of the motion so his own amendment could be properly framed and announced that Government members would in any event be attending the joint sitting. Three divisions

⁹⁷ *NSWPD*, 6.4.60, p 3633.

⁹⁸ *NSWPD*, 7.4.60, p 3800.

⁹⁹ *NSWPD*, 13.4.60, p 4006.

followed, all lost by the Government, again by 33 votes to 22. For the Council, 13 April was the last sitting day of the second session of the 39th Parliament, which meant that the Governor's acknowledgment of the Council's address was not reported in the House till 24 August, the first day of the new session.

In the interim, on 20 April 1960, 85 Assembly Members attended in the Council chamber, along with 23 Government Upper House supporters. The President had received legal advice that he was bound by the earlier resolution embodied in the address to the Governor, and therefore should not attend.¹⁰⁰ In his absence, the Speaker presided over the first joint sitting of Members (not of the Houses).

On 12 May the Premier moved in the Assembly that the House resolve itself into a Committee of the Whole to consider a resolution that the abolition bill be submitted to a referendum. The resolution was agreed to and on the same day an interim injunction was issued in the Equity Division of the NSW Supreme Court restraining the defendants from issuing the writs and proceeding with the referendum. On a demurrer to the statement of claim, on 29 September a full bench of the Supreme Court headed by Chief Justice Evatt found for the defendants (headed by Premier Heffron) by a majority of four to one. When the matter was heard again on 10 October Justice McLelland dismissed the suit. Subsequently, special leave to appeal to the High Court was refused. As noted, the leading judgment, handed down on 15 December 1960, was that of Dixon CJ, McTiernan, Taylor and Windeyer JJ.

On 11 January 1961 Clayton confirmed that there would be no appeal to the Privy Council. Six days later the Premier announced that the abolition referendum was to be held on 29 April 1961. He explained, too, that it would take the form of a straightforward decision between 'yes' or 'no': 'There will be no alternative proposals, such as retaining the Upper House on an elective basis'. The abolition referendum was defeated with 57.6% of the formal vote in favour of retention.

8.3 *Namoi Shire Council v AG (NSW)* [1980] 2 NSWLR 639

The question at issue was the validity of the *Local Government Areas Amalgamation Act 1980*. More particularly, the jurisdictional question for the court was whether it could inquire into legislative processes involved in the making of the Act to determine its constitutionality. Invalidity was claimed on the ground that the legislative processes in its making had not complied with the relevant Standing Orders of the Assembly. McLelland J held that in the case of a legislature founded by statute, the validity of a supposed law may be examined by the courts 'notwithstanding that the question may involve the internal proceedings of one of the constituent Houses of the legislature' (at 643). Further, it was found that failure to comply with Standing Orders is not a condition of the validity of legislation (at 645). Standing Orders were held to be 'directory' not 'mandatory' in nature.

In arriving at the view that the court had jurisdiction to determine whether compliance with the Standing Orders was required, McLelland J relied on the two federal 'double dissolution' cases from 1974 and 1975 – *Cormack v Cope* ((1974) 131 CLR 432 and, more directly, *Victoria v Commonwealth* (the 'PMA' case) (1975) 134 CLR 81. In the latter the High Court asserted its jurisdiction to examine whether a law had been passed in accordance with s. 57 of the Commonwealth Constitution.

¹⁰⁰ NSW Legislative Council, *Record of 39th Parliament 1959-1961*, p 43.

A curious feature of the decision in *Namoi Shire Council*, was that McLelland J doubted that Article 9 of the *Bill of Rights 1689* applied to the NSW Parliament, stating that Article 9

does not purport to apply to any legislature other than the Parliament at Westminster. The privileges and immunities associated with the legislature of NSW have their origin elsewhere... (at 644).

Any doubt that Article 9 does apply to the NSW Parliament was set aside by the High Court in *Egan v Willis*.¹⁰¹

8.4 *Eastgate v Rozzoli* (1990) 20 NSWLR 188

8.4.1 Key issues and principles: The case law on the judicial review of legislative processes was reviewed by the NSW Supreme Court in 1990 in *Eastgate v Rozzoli* where Priestley and Handley JA concluded that it is ‘the settled practice’ of the High Court ‘to refuse to grant relief in respect of proceedings within Parliament which may result in the enactment of an invalid law’. The proper time to intervene was after the completion of the law-making process, a conclusion that, it was said, applies ‘with even greater force to this Court in view of the far more limited grounds (if they exist at all) for a legal challenge to legislation of the State Parliament in a case where no federal question is involved’. Kirby P observed that it was ‘now settled practice in Australia that...an injunction will virtually never be issued, nor a declaration be made, at that stage’, that is before a Bill had received the royal assent (at 193).

Cited by Kirby P were various dicta from *Cormack v Cope* (1974) 131 CLR 432 to the effect that ‘the proper time for the Court to intervene is after the completion of the law making process’.¹⁰² In that High Court case the validity of the proclamation calling a joint sitting of the Commonwealth Parliament following a double dissolution election was questioned. The Court held that interlocutory orders should not be made. Only Barwick CJ thought the Court had the jurisdiction to make the declaration sought, and he concluded it should not be made in interlocutory proceedings.¹⁰³

8.4.2 Background: The defendant was the Speaker, Kevin Rozzoli; the plaintiff, a Ms Jan Eastgate who argued that if the Mental Health Bill 1990 became law she and others might be subject to arbitrary arrest and involuntary detention based on ‘a subjective and imprecise definition of mental illness or mental disorder’.¹⁰⁴

¹⁰¹ *Egan v Willis* (1998) 195 CLR 424 at 445 (Gaudron, Gummow and Hayne JJ).

¹⁰² *Cormack v Cope* (1974) 131 CLR 432 at 467 (Gibbs J).

¹⁰³ *Cormack v Cope* (1974) 131 CLR 432 at 460-461 (Barwick CJ).

¹⁰⁴ *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 190.

9. FREEDOM OF SPEECH UNDER ARTICLE 9 OF THE BILL OF RIGHTS 1689

9.1 Two lines of authority

That absolute privilege for freedom of speech in Parliament applies in NSW, ‘from inherent necessity’, was confirmed by the Supreme Court in *Gipps v McElhone* (1881).¹⁰⁵ Thus, parliamentary free speech in NSW can be sourced to the common law. In addition, by the adoption of the *Bill of Rights 1689* under the *Imperial Acts Application Act 1969*, parliamentary free speech has a separate statutory source.

Article 9 of the Bill of Rights 1689 provides:

The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

The legal immunity granted by Article 9 is both wide and absolute.¹⁰⁶ As the UK Joint Committee commented in 1999, it is not confined to members:

Article 9 applies to officers of Parliament and non-members who participate in proceedings in Parliament, such as witnesses giving evidence to a committee of one of the Houses. In more precise legal language, it protects a person from legal liability for words spoken or things done in the course of, or for the purpose of or incidental to, any proceedings in Parliament.¹⁰⁷

Uncertainty exists as to the precise meaning of several aspects of Article 9, notably the phrases: ‘impeached or questioned’; ‘in any court or place out of Parliament’; and ‘proceedings in Parliament’. Three questions must be asked. First, is the material at issue a parliamentary proceeding? If yes, what is the purpose of admitting that material into evidence— is it to impeach or question what was said or done in Parliament? Thirdly, is the material to be dealt with in a ‘court or place out of Parliament’? For example, is the material to be admitted into evidence before a Royal Commission or such a permanent commission of inquiry as the ICAC?

Questions of mixed law and fact are raised in this context. As explained by PA Joseph:

Differences of opinion may arise over the application of article 9 in particular cases. Identifying the purpose for which a party seeks to adduce evidence of proceedings in Parliament involves questions of mixed law and fact. The meaning to be given the words ‘impeached’ and ‘questioned’ involves a question of law, and the application of those words so construed involves a question of fact. In *Prebble v TVNZ Ltd*, the Privy Council doubted

¹⁰⁵ (1881) 2 LR (NSW) 18.

¹⁰⁶ The prohibition against the use of parliamentary proceedings in court is not absolute. An important exception relates to the use of extrinsic materials as an aid to statutory interpretation, in NSW under s. 34 of the *Interpretation Act 1987*. It makes provision for the use of extrinsic materials for the aid of statutory interpretation, among them parliamentary committee reports, Second Reading speeches and any relevant material in Hansard. The use made of such extrinsic materials must be confined to the ‘ascertainment of the meaning of the provision’ and is restricted to such defined conditions as where the provision is ‘ambiguous’ or ‘obscure’.

¹⁰⁷ Joint Select Committee Upon Parliamentary Privilege, *Report: Volume 1 – Report and Proceedings of the Committee*, UK Parliament, Session 1998-99, HL Paper 43-1, HC 214-1, p 17.

whether the court in *Rost v Edwards* had drawn the correct factual inference in excluding evidence under article 9.¹⁰⁸

A general rule of admissibility has proved notoriously elusive. Two lines of authority can be noted: one mainstream and concerned to limit the admissibility of parliamentary proceedings to the proof of fact—to prove what was done or said in Parliament ‘as a matter of history’;¹⁰⁹ the other more expansive in nature, less categorical about prohibiting the questioning or impeaching of intentions, motives or reasons found in parliamentary proceedings.

This last and minority line of authority is associated with the judgment of Hunt J in *R v Murphy* (1986) 5 NSWLR 18. The uncertainty raised by these comments resulted in the passing of the federal *Parliament Privileges Act 1987*, section 16 (4) of which prevents absolutely the admission in court proceedings of any evidence relating to parliamentary evidence taken *in camera*. The Act makes it clear that *R v Murphy* does not represent the law at the Commonwealth level.

The narrow interpretation of the immunity granted under Article 9 associated with Hunt J was rejected by the Privy Council in *Prebble v TV New Zealand*.¹¹⁰ For the present, it is the *Prebble* interpretation that represents the prevailing judicial view.¹¹¹ It holds that there is no objection to the use of Hansard to prove what was done and said in Parliament as a matter of historical fact; what is not permissible is for the courts to rely on matters said and done in the House for the purpose of calling those matters into question. The distinction is between the right to prove the occurrence of parliamentary events, on one side, and the prohibition on questioning their propriety, on the other. In particular, it was found in *Prebble* that parties to litigation ‘cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, interference or submission) that the actions

¹⁰⁸ PA Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd edition, Brookers Ltd 2001, p 409.

¹⁰⁹ *Della Bosca v Arena* [1999] NSWSC 1057 (unreported 27 October 1999) at para 27.

¹¹⁰ [1994] 3 All ER 407; [1995] 1 AC 321. In that case a former Labour Minister, Richard Prebble, alleged that a TVNZ program had cast him as having conspired with business leaders and public officials to sell state assets at fire-sale prices in return for donations to the Labour Party. TVNZ pleaded truth and fair comment and mitigation of damages on the basis of the plaintiff’s reputation as a politician and sought to refer to speeches in the House by the plaintiff and other Ministers. The Privy Council struck out the evidence TVNZ was seeking to rely on, holding that to impugn, or even simply to inquire into, a Member’s motives is to ‘impeach’ or ‘question’ and is prohibited. It made no difference that the plaintiff in the case was an MP. On the other hand, Hansard could be used to prove what Mr Prebble had said in the House on certain days, or that the *State-Owned Enterprises Act 1986* (which facilitated the sale of state assets) had passed the House and received the Royal Assent.

¹¹¹ In *Laurence v Katter* (1996) 141 ALR 447, admittedly in the specific context of s. 16(3) of the Commonwealth parliamentary privileges legislation, Davies JA was especially unenthusiastic, suggesting that a case by case approach to admissibility should be adopted (at 490). This was rejected in *Rann v Olsen* (at 471) and *Prebble* approved. Likewise, in the Western Australian case of *Halden v Marks* [1995] 17 WAR 447 at 461 it was agreed, by reference to *Prebble*, that “it is settled that Article 9 is to be given a wide interpretation”. This was followed in the later case of *Re the Royal Commission into the Use of Executive Power; R v Parry and Others* (WASC, unreported, 1 May 1997).

or words were inspired by improper motives or were untrue or misleading'.¹¹²

As Kirby J said in *Egan*:

it is important to avoid confusion between the right to prove the occurrence of parliamentary events and the prohibition on questioning their propriety, as for example, suggesting that a member had misled the House or acted wrongly or from improper motives.¹¹³

What is to be avoided is not the admission into evidence of parliamentary proceedings *per se*, but any action by a court that may hinder, impede or impair freedom of speech or debate in Parliament, by the questioning of motives or by other means. Under the *Prebble*, 'questioning' would include establishing the accuracy of what was said in parliamentary proceedings or, presumably, offering differing interpretations of what was said in a parliamentary speech or in evidence before a committee. A further consideration is the potential 'chilling effect' on free speech in Parliament. In the words of the Privy Council in *Prebble*, the basic concept underlying Article 9 is the 'need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they will say will later be held against them in the courts'.¹¹⁴

9.2 The case law in NSW - the narrow interpretation of the immunity against impeaching or questioning proceedings in Parliament

9.2.1 *R v Murphy* (1986) 5 NSWLR 18 *R v Murphy* (unreported, 5 June 1985) *R v Foord* (unreported, 1985)

9.2.1.1 Key issues and principles: The case law in NSW is balanced precariously between the competing interpretations.¹¹⁵ The leading case for the narrow construction of the immunity against impeaching or questioning proceedings in Parliament is the judgment of Hunt J in *R v Murphy* (1986) 5 NSWLR 18. In that case a High Court judge, Lionel Murphy, was being prosecuted for an alleged offence and the principal Crown witness, the NSW Chief Stipendiary Magistrate Clarence Briese, had previously given evidence to a Select Committee of the Senate to matters in issue in the trial.

Hunt J ruled that witnesses could be cross-examined in relation to the evidence which they had given before a Senate Select Committee and that this evidence could be the subject of comment or used to draw inferences or conclusions. Hunt J held that the only protection given by Article 9 is to prevent court or similar proceedings having *legal consequences* against a Member of Parliament (or a witness before a parliamentary committee) where those legal consequences have the effect of preventing that Member (or committee witness) from exercising their freedom of speech in Parliament (or before a committee), or of punishing them for having done so.¹¹⁶ That conclusion was reached after an analysis of

¹¹² [1994] 3 All ER 407 at 417-418.

¹¹³ (1998) 195 CLR 424 at 490.

¹¹⁴ [1994] 3 All ER 407 at 415 (Lord Browne-Wilkinson).

¹¹⁵ Hunt J's view was followed in *Wright v Advertiser Newspapers Ltd* (1990) 53 SASR 416.

¹¹⁶ (1986) 5 NSWLR 18 at 30. Hunt J's formulation of the purpose of Article 9 was approved by the Full

the original intention and purpose – ‘the relevant mischief’ - behind Article 9, defined by Hunt J as the ‘previous availability in the courts of processes whereby legal consequences were visited upon members of Parliament for what they had said and done in Parliament’ (at 30). For Hunt J that was the purpose for which Article 9 was formulated and should now provide the context for its proper construction. He argued:

Freedom of speech in Parliament is not now, nor was it in 1901 or even in 1688, so sensitive a flower that, although the accuracy and the honesty of what is said by members of Parliament (or witnesses before parliamentary committees) can be severely challenged in the media or in public, it cannot be challenged in the same way in the courts of law. It is only where legal consequences are to be visited upon such members or witnesses for what was said or done by them in Parliament that they can be prevented by challenges in the courts of law from exercising their freedom of speech in Parliament.

He continued:

I cannot accept that any parliament – even one in 1688 – would seriously have intended parties to curial proceedings to be disadvantaged in this way by denying to them that ordinary incident of litigation simply because the witness whose credit is attacked, and who will suffer no greater embarrassment than any other witness, had previously given evidence to a parliamentary committee (at 34).

Hunt J’s decision followed two previous Supreme Court cases: in the first trial of *R v Murphy* (unreported, 5 June 1985)¹¹⁷ Cantor J had allowed cross-examination of witnesses in the same circumstances as Hunt J in the second trial; in *R v Foord*¹¹⁸ Maxwell J had allowed similar cross-examination, to compare evidence given to a committee with that given by a prosecution witness in criminal proceedings.

Hunt J acknowledged that his own reasons for admitting the evidence in question were different to those expressed by Cantor J in the first *Murphy* trial. According to Hunt J, Justice Cantor had taken a ‘more conservative view of article 9’ (at 40).¹¹⁹ Cantor J had in fact suggested an ‘adverse effect test’ for the admissibility of parliamentary evidence, a test that could encompass the idea of the ‘chilling effect’ on Article 9. It was formulated as follows:

Court of the South Australian Supreme Court in *Wright and Advertiser Newspaper s Ltd v Lewis* (1990) 53 SASR 416. The plaintiff, a Member of the South Australian House of Assembly, made an allegation in the House that the first defendant, Wright, had obtained an advantage as a result of a close association with a former Government. Wright wrote a letter to the second defendant, a newspaper, which published it. The letter accused the MP (the plaintiff) of abusing his parliamentary privilege and of cheap political opportunism. The MP sued alleging that the letter was libellous. The defendant pleaded justification, qualified privilege and fair comment. The case was therefore one in which the plaintiff’s integrity in making statements in the House was determinative of the action: the letter was plainly defamatory and unless the defendants could challenge the truthfulness of what the plaintiff had said in Parliament, they had no defence.

¹¹⁷ The date on which the first trial commenced.

¹¹⁸ (unreported, 1985).

¹¹⁹ For a commentary on the two cases see – H Evans, ‘Parliamentary privilege: reasons of Mr Justice Hunt’ (Autumn 1987) *Legislative Studies* 24. H Evans, ‘Parliamentary privilege: the reasons of Mr Justice Cantor’ (Autumn 1986) *Legislative Studies* 24.

the words 'impeached or questioned' carry with them a concept of having an adverse effect upon the freedom of speech or upon debate in Parliament or upon proceedings in Parliament.

He went on to say:

I am of the view that the revelation in a Court of Law of what was said in a House of Parliament does not necessarily impeach or question what was said in Parliament. This is so whether the revelation occurs by the introduction into evidence of a copy of Hansard or by a question put to a witness in cross-examination.

On the questions of law and fact at issue, Cantor J had this to say:

I have reached the conclusion that the questioning of witnesses called in this trial as to what they said before the committee of the Senate does not necessarily amount to a breach of parliamentary privilege as being necessarily contrary to the Bill of Rights 1688. In respect of each question put to each witness I would have to reach a conclusion whether, on the construction I have given to Article 9, the question does impeach or question the evidence given by the witness before the Senate committee.

He ended on a reassuring note, stating:

I do not mean to convey by what I have already said that I will countenance evidence being introduced into the trial which clearly impeaches or questions the freedom of speech or debate or of proceedings in Parliament in breach of Article 9 of the Bill of Rights.

Another arm to Cantor J's reasoning concerned the need to balance the prohibition contained in Article 9 against the requirements of court proceedings. Of the competing interests at stake, he commented:

It seems clear to me that if I balance these competing interests one against the other the harm likely to be done to the administration of criminal justice in this trial would far outweigh any harm which might be done to the institution of the Senate.

The comment was made in *Odgers' Australian Senate Practice* that the effect of both judgments in the Murphy matter 'was that the prosecution and the defence made free use of the evidence given before the Senate committees for their respective purposes'.¹²⁰

9.2.1.2 Background: This chain of events was set in motion by the publication in the *Age* on 2 February 1984 of an article titled 'Secret tapes of judge', featuring transcripts of tapes that referred to a conversation held in 1979 between Murphy, the solicitor Morgan Ryan and Abe Saffron. In March 1984 the first of two Senate Select Committees (the Senate Select Committee on the Conduct of a Judge) was established to decide on the authenticity of the *Age* tapes and whether Murphy's conduct involved 'misbehaviour' that could provide grounds for removal from judicial office under s. 72 of the Commonwealth Constitution. Briesse gave evidence before this Committee that alleged that Murphy had attempted to pervert the course of justice. Specifically, Briesse alleged that Murphy had sought to influence him to cause the Stipendiary Magistrate, Kevin Jones, to act otherwise than in accordance with his duty in respect to the hearing of committal proceedings against Morgan Ryan on charges of forgery and conspiracy. With the first Select Committee divided, a second was established and this reported on 31 October 1984. By this time a further allegation had been made by Judge Paul Flannery of the NSW District Court, the presiding judge at Ryan's trial in July 1983. Four of the six members of the second

¹²⁰ *Odgers' Australian Senate Practice*, 9th edition, p 36.

Select Committee concluded that Murphy could not be guilty of any criminal offence, but five found he could be guilty of 'misbehaviour' warranting removal. In November 1984 the decision was taken by the Commonwealth DPP, Ian Temby, to prosecute Murphy on two charges of attempting to pervert the course of justice, one arising from the Briese allegation, the other from Flannery's.¹²¹ The trial before Cantor J began on 5 June 1985 and on 5 July the jury returned verdicts of guilty on the first (Briese) count and not guilty on the second (Flannery) count. The guilty verdict went on appeal to a specifically constituted five judge bench of the NSW Supreme Court (sitting as both a Court of Appeal and a Court of Criminal Appeal). On 28 November 1985 it quashed Murphy's conviction and ordered a new trial.¹²² On 28 April 1986, the jury at the second trial (presided over by Justice Hunt) acquitted Murphy on the Briese charge.¹²³

It was in advance of that second trial, on 8 April 1986, that Hunt J handed down his judgment. As noted, his decision followed two previous Supreme Court cases: in the first trial of *R v Murphy* (unreported, 5 June 1985)¹²⁴ Cantor J had allowed cross-examination of witnesses in the same circumstances as Hunt J in the second trial; in *R v Foord* (unreported, 1985) Maxwell J had allowed similar cross-examination, to compare evidence given to a committee with that given by a prosecution witness in criminal proceedings. These cases had a common background, in that they arose from charges alleging to attempts to pervert the course of justice. Judge Foord of the NSW District Court was charged on 21 November 1984 on two counts of attempting to pervert the course of justice in relation to the committal proceedings and trial of Morgan Ryan. He was alleged to have approached Briese and Flannery in circumstances similar to those alleged in the Murphy case.

Foord was acquitted of such charges in October 1985. In September 1986 Professor Tony Vinson released his report dealing with the sentencing of drug cases in the District Court between 1980 and 1982, which purported to find that a particular judge had exercised leniency in dealing with clients of a particular solicitor. It was revealed later that Justice Foord was the judge in question. He was stood down from the District Court for a third time in September 1986 and resigned on medical grounds later that year.¹²⁵ One consequence of these and other events was the passing of the *Judicial Officers Act 1986*, establishing a formalized system of judicial accountability.¹²⁶

¹²¹ *Crimes Act 1914* (Cth), s.43.

¹²² *R v Murphy* (1985) 4 NSWLR 42.

¹²³ This account is based on – AR Blackshield, 'The Murphy Affair' in *Lionel Murphy: A Radical Judge*, edited by JA Scutt, McCulloch Publishing 1987, pp 230-57.

¹²⁴ The date on which the first trial commenced.

¹²⁵ E Whitton, *Can of Worms*, The Fairfax Library 1986, p 280.

¹²⁶ This account is based on - V Morabito, 'The Judicial Officers Act 1986 (NSW): A dangerous precedent or a model to be followed?' (1993) 16 *UNSW Law Journal* 481 at 482-85.

9.2.2 *R v Saffron* (unreported, 21 August 1987)

Subsequent to the 1986 decision of Hunt J, in *R v Saffron* (unreported, 21 August 1987) the District Court allowed *in camera* evidence of the select committee of the NSW Legislative Assembly to be subpoenaed and made available for use by the defence, specifically to impeach the credit of a witness at the trial. The Select Committee in question was that upon Prostitution that reported in April 1986 to which *in camera* evidence was submitted by a Mr James McCartney Anderson, a former business partner of Abe Saffron. It was reported that Anderson ‘made serious allegations concerning criminal aspects of prostitution’.¹²⁷ On 19 August counsel instructed by the Speaker was granted leave to appear as *amici curiae* before Loveday J to argue that the subpoena issued on behalf of the National Crime Authority should be set aside. The arguments that the production of the *in camera* evidence would breach Article 9 and, in the alternative, that it should not be produced on the grounds of public interest immunity were rejected. The approach of Hunt J was adopted and the decision of Carruthers J in *Jackson* (see below) was distinguished on the ground that in that case the ‘Crown intended directly to question what was said in proceedings in the House’. Remarkably, Loveday J did not think this would apply in *Saffron*, despite that fact that

what is sought to be achieved is to attack the credit and to allege by inference therefore that what was said by Mr Anderson in the committal proceedings and presumably at the trial was not of truth and to do this by reference to what he had said on a prior occasion, namely, before the Select Committee.

9.3 The case law in NSW – the broad interpretation of the immunity against impeaching or questioning proceedings in Parliament

9.3.1 *Mundey v Askin* [1982] 2 NSWLR 369

9.3.1.1 Key issues and principles: Tending to support the more mainstream interpretation of the immunity granted by Article 9 is *Mundey v Askin*.¹²⁸ This is an instance from NSW of a defamation action arising from an election speech. Although reported in 1982, it was in fact heard in July 1975. In that case, Hansard was admitted into evidence to prove, as a fact, that certain things had been said in the course of a debate in the NSW Legislative Assembly. The NSW Court of Appeal said that ‘there was no question of any further examination of the circumstances in which the debate had taken place or the motives of the participants, or of anything else which might infringe the privilege...’.¹²⁹ Distinguished was the UK case of *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 where it was ‘held that what was said or done in Parliament in the course of proceedings there could not be examined outside Parliament for the purpose of supporting a cause of action, even though the cause of action itself arose out of something done outside Parliament’.¹³⁰ The Court of Appeal said that that ‘principle had nothing to do with the present case... The ratio of *Johnson-Smith’s case* therefore does

¹²⁷ *Select Committee of the Legislative Assembly upon Prostitution*, p 219.

¹²⁸ [1982] 2 NSWLR 369.

¹²⁹ [1982] 2 NSWLR 369at 373.

¹³⁰ [1982] 2 NSWLR 369at 373.

not apply'.¹³¹ Quoted with approval from that case was the statement of Browne J that Hansard could be admitted 'simply as evidence of fact, what was in fact said in the House, on a particular day by a particular person'.

In *Munday* Hansard was admitted on behalf of Askin who sought to prove that the subject of industrial violence and lawlessness in aid of political demands had been debated in the Legislative Assembly, a fact that was relevant to his defence of qualified protection under s. 17 (h) of the *Defamation Act 1958* (NSW).

9.3.1.2 Background: The parties were the Premier from 1965 to 1975, Sir Robert Askin, and the high-profile trade unionist Jack Munday, leader of the 'green bans movement'. Munday was from the Atherton Tableland in North Queensland where he born in 1932. In 1952 he came down to Sydney to play rugby league for Parramatta and found work as a builder's labourer. By 1968 he was elected Secretary of the NSW branch of the BLF, a position he held till 1973. He was also an active member of the Australian Communist Party. The green bans movement in NSW, where the BLF refused to work on environmentally undesirable projects, ran from 1971 to 1975 (it had originated in 1970 in Victoria). The first campaign was to save Kelly's Bush on the harbour foreshore at Hunter's Hill from development.¹³² Askin and his government were a constant target of Munday's. The hostility was reciprocated. In the 1972 election campaign, at a meeting held at Sydney Town Hall, Askin referred to Munday and other labor leaders as 'vermin' and the imputation was made that he and others would threaten the then Prime Minister (Gough Whitlam) if their demands were not met.

9.3.2 *Henning v Australian Consolidated Press* [1982] 2 NSWLR 374

The doctrine in *Munday* was approved by Hunt J in *Henning v Australian Consolidated Press* [1982] 2 NSWLR 374. This was a defamation case concerning what had been said in the House of Representatives, in relation to which counsel for Australian Consolidated Press sought to tender the relevant part of Hansard. Of the immunity afforded by parliamentary privilege, Hunt J said:

Parliamentary privilege is properly invoked to prevent any inquiry into the motives and intentions of members of Parliament in relation to anything they said or did in Parliament... But that principle, as the Court of Appeal said in *Munday v Askin*, has nothing to do with the case where all that the copy of Hansard was tendered to prove was the very fact which it proclaimed to the world, namely that a particular statement had been made by a particular Members in the House (at 375).

On the other hand, Hunt J wrote scathingly about the report of the Privileges Committee of the House of Representatives (PP No 154/1980) dealing with *Uren v John Fairfax and Sons Ltd* [1979] 2 NSWLR 287. Concerns expressed by the Committee about the circumstances in which Uren had answered interrogatories, that reference to Hansard 'could have been used as a spring-board', were swept aside with the statement:

¹³¹ [1982] 2 NSWLR 369 at 373.

¹³² V Burgmann, *Unions and the Environment*, ACF 2002, p 7. For a full account see M and V Burgmann, *Green Bans, Red Union*, UNSW Press 1998.

The Privileges Committee, learned no doubt though those gentlemen maybe in matters other than the law, does not appear to have considered the decision of the Court of Appeal in *Mundey v Askin*... which held that the tender of such a Hansard report to prove as a fact that something was said in Parliament did not constitute a breach of parliamentary privilege (at 375).

9.3.3 *R v Jackson* (1987) 8 NSWLR 116

9.3.3.1 Key issues and principles: More clearly supportive of the mainstream interpretation is *R v Jackson*. This is an instance of a case where a former member of the NSW Legislative Assembly had been charged with a criminal offence involving proof of corruption, an offence committed outside the course of parliamentary proceedings. The Crown Prosecutor proposed to tender two extracts from Hansard: one from 20 October 1983, recording a question without notice to Jackson as Minister regarding his relationship with his co-accused, Keith Harris; the second from 1 November 1983, by which time Jackson had resigned from the Wran Ministry, concerning a speech in the House by Jackson upon a motion by the Leader of the Opposition (Nick Greiner) for the adjournment of the House to discuss Jackson's resignation. Carruthers J commented that the prosecution argued that evidence of what had been said in Parliament was admissible:

In support of the tender, the Crown submitted that the evidence was admissible in that the statements made by Jackson in the House on both occasions related to material issues in trial and were, by reference to the other evidence in the trial, patently untrue... Counsel for Jackson objected to the tender and counsel for the Speaker of the House of Legislative Assembly appeared before me as amici curiae to argue that the admission of such evidence would offend against parliamentary privilege (at 117).

Rejecting the submission, Carruthers J distinguished the case from *Mundey*, stating 'Here the prosecution sought to do far more than merely prove what Jackson said in the House. It sought in support of its case to establish that Jackson told lies in the House in relation to matters which were material issues in the trial..'.¹³³ According to Carruthers J, this would have involved an inquiry into Jackson's 'motives and intentions in what he said in the House', something which, in turn, would necessarily involve 'an impeaching or questioning' by the court of debates or proceedings in Parliament.¹³⁴

Reliance was placed on overseas jurisprudence, notably *R v Secretary of State for trade; Ex parte Anderson Strathclyde plc* [1983] All ER 233, said to be authority for the proposition that 'what has been said or done in Parliament cannot be used to support a ground for relief in proceedings for judicial review in respect of something which occurred outside Parliament' (at 119). On the basis of this jurisprudence Carruthers J concluded that Article 9 should be 'widely construed' to ensure that 'a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences' (quoting Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1). It was noted that English and American authorities stress both the 'immense historical importance of article 9' and that 'the privileges and rights of Parliament go beyond the interests of an individual member of Parliament and are necessary to represent the interests of Parliament as a whole' (at 121). Article 9 was said to go 'to the very heart of the democratic system of government' (at 121). Carruthers J could not agree with the interpretation suggested by Hunt J in *Murphy* of the mischief that Article 9 sought to cure, stating:

¹³³ (1987) 8 NSWLR 116 at 120.

¹³⁴ (1987) 8 NSWLR 116 at 120.

The ambit of article 9 is a matter upon which minds may readily differ. With unfeigned respect to the views of Hunt J, I am unable to adopt the narrow construction of article 9 which he propounds.

In my view the mischief which article 9 sought to cure encompasses the use of Hansard in circumstances such as the present, ie, the assertion by the Crown that a member of Parliament told lies in the House which were eloquent of his guilt of a criminal offence, the foundation for which was not something done or said in the Parliament (at 121).

9.3.3.2 Background: Born in Wagga Wagga in 1928, before entering Parliament Rex Frederick Jackson was a professional boxer (under the name Tommy Jackson). He was a member of the Legislative Assembly from 1955 to 1986, initially for Bulli, then from 1971 for Heathcote. In October 1981 he was made Minister for Corrective Services, a post he retained till 27 October 1983 (from 1 February 1983 he was also Minister for Roads). In his capacity as Minister for Corrective Services he introduced a prisoner early release scheme. Following media claims that some prisoners were buying their way out of gaol, the production of disturbing taped evidence by the federal police and a public inquiry headed by Justice Slattery, Jackson and four others were charged with conspiracy relating to the release of prisoners from Broken Hill gaol between October 1982 and June 1983. At his first trial the jury failed to reach a verdict.¹³⁵ At his second trial he was convicted and served a term of imprisonment.

9.3.4 *NSW AMA v Minister for Health* (1992) 26 NSWLR 114

The case is an instance from NSW of where permission to adduce in evidence a report of the Public Accounts Committee was sought by the Minister of Health and Community Services in the context of arbitration proceedings to determine pay and conditions for visiting medical officers. The report in question was the PAC's *Report on Payments to Visiting Medical Officers* No 45 of June 1989. For its part, the Australian Medical Association argued that, if the report were admitted into evidence, it would criticise its reasoning and findings. Hungerford J answered at least three questions relevant to parliamentary privilege.

One was that the committee report was a 'proceeding in Parliament'. In arriving at that view he rejected the submission, made on the Minister's behalf, that 'there had to be a geographical nexus between the proceedings in question and with the House as being 'in' that place' (at 123). It was submitted that the committee was not restricted to hearing witnesses and carrying out its functions within the walls of the House so that it could not be a proceeding in Parliament.

Secondly, it was found that parliamentary privilege is not breached by the examination of a committee report on a provisional basis to determine whether its admission into evidence might involve a breach of parliamentary privilege.

Thirdly, as to the admissibility of the committee report, Hungerford J applied a purposive test. That is, he found that the report was admissible in evidence to prove objective events, but not for the purpose of establishing the accuracy of the report's facts and conclusions. Rejecting Hunt J's interpretation in

¹³⁵ E Whitton, n 125, pp 213-5.

Murphy, Hungerford J ruled:

My own view is that the tender of the PAC Report would inevitably result in a direct and critical challenge to the material contained in it as finalized by the committee. That would represent a challenge to the functions of the committee and the way in which it has performed those functions. Such a process would strike, in my view, at the whole basis for Parliamentary privilege as it has evolved, and would result in the Public Accounts Committee report being impeached and questioned contrary to art 9 of the Bill of Rights...¹³⁶.

In summary, he concluded:

I would be prepared to admit into evidence, if otherwise admissible, the PAC Report as relevant evidence of an event in the manner indicated in these reasons. I reject the PAC Report from evidence for the purposes of establishing the facts and opinions therein as being contrary to parliamentary privilege.¹³⁷

Noted by Hungerford J was that the AMA had petitioned the Speaker and the members of the Legislative Assembly for Parliament to waive its privilege to the extent necessary to avoid any breach of privilege by its proposed examination and comment upon the PAC Report. Noted, too, was that the Legislative Assembly had declined to waive its privileges.¹³⁸ The question of waiver of privilege is discussed below, in relation to *Arena v Nader*.

9.4 'Proceedings in Parliament' – Members' informants

9.4.1 *R v Grassby* (1991) 55 A Crim R 419

Unusual is the NSW Supreme Court case of *R v Grassby* here a charge of criminal defamation was brought against a former federal Minister who, it was claimed, had supplied a defamatory document to Michael John Maher, a member of the NSW Legislative Assembly for Drummoyne from 1973 to 1982. Albert Jaime Grassby was also at one time a member of the NSW Legislative Assembly for Murumbidgee from 1965 to 1969, when he resigned to serve as a member of the House of Representatives for the Riverina. He served in that capacity from 1969 to 1974, acting as Minister for Immigration from 1972 to 1974 in the Whitlam Ministry.

Controversy dogged Grassby's career in the 1980s. Among other things, the charge of criminal defamation related to the publication by him of a three and a half page document to Maher, which included a number of defamatory imputations concerning the murder of Donald MacKay. Grassby was subsequently called to give evidence before the Nagle inquiry into circumstances surrounding the NSW police investigation into that murder. There he was examined as to the source of the documents he had given Maher and related matters.

In the case of *Grassby* he then sought a stay of proceedings on a number of grounds, including the argument that he could not receive a fair trial because parliamentary privilege would prevent the

¹³⁶ (1992) 26 NSWLR 114 at 128.

¹³⁷ (1992) 26 NSWLR 114 at 129.

¹³⁸ (1992) 26 NSWLR 114 at 117 and 129.

adducing of evidence relating to the performance by Maher of his parliamentary functions. Allen J was not persuaded, stating:

What in fact Mr Maher did say in the House is recorded in Hansard. Parliamentary privilege does not preclude evidence of what it is that Hansard records as having been said. What, at most, it precludes the Court from doing, so far as relevant, is subjecting what a member said in the House to scrutiny to determine or examine the member's motives, intentions, honesty or truthfulness in what he said in other words, to adopt the language of Article 9, to impeach or question that is said.¹³⁹

As to the question of fact before him, Allen J concluded:

It has not been shown that any such impeachment or questioning of what Mr Maher said in the House is likely to be relevant to any issue in the trial in the present case.¹⁴⁰

In the alternative, counsel for *Grassby* had argued that the information provided to Maher was itself protected as a 'proceeding in Parliament' and that, as the informant, he should be granted absolute privilege. This, too, was rejected by Allen J who held that privilege did not attach to communications between informants and members, even if the information is subsequently used in proceedings in Parliament and irrespective of whether the information was actively sought by the member or otherwise. Allen J said:

Thus it is appropriate that a parliamentarian has absolute immunity in respect of what he does in the exercise of his duties in the course of proceedings in the House. There is no warrant to give such an absolute immunity to any person who seeks to persuade him to say something in the House. To the extent that immunity to such person is appropriate and recognized by the law it is one of qualified privilege – that is privilege defeasible by malice.¹⁴¹

He continued:

The conduct in the House of a parliamentarian cannot be impugned in any court. The fearless performance of his high office requires that he enjoys that protection. It is his freedom of speech which Article 9 outs beyond impeachment or questioning in any court. It is not the freedom of speech of anyone else.¹⁴²

The impact, if any, of the majority decision of the Queensland Supreme Court in *O'Chee v Rowley*¹⁴³ on this conclusion is in doubt, in part because the protection provided by Article 9 may not be

¹³⁹ (1991) 55 A Crim R 419 at 432.

¹⁴⁰ (1991) 55 A Crim R 419 at 432.

¹⁴¹ (1991) 55 A Crim R 419 at 428.

¹⁴² (1991) 55 A Crim R 419 at 429.

¹⁴³ There a Senator was sued for remarks made outside Parliament about a matter he had previously raised in the House. At first instance, the Queensland Supreme Court had ordered that he produce for inspection documents for which the Senator claimed the protection of parliamentary privilege (including communications from constituents, none of which had been tabled in the House or submitted to any parliamentary committee). On appeal it was held that both Article 9 and s. 16(2) of the Commonwealth Act exempted from discovery those documents forming part of parliamentary proceedings. However, what constituted such proceedings depended in this case on the statutory definition.

equivalent to that provided under the federal statute. In that case it was held that paragraph (c) of s. 16(2) of the Commonwealth *Parliamentary Privileges Act 1987* – ‘the preparation of a document for purposes of or incidental to the transacting of any such business’ - covers documents sent by strangers to Federal MPs but only if the member chooses to keep the documents and uses them for the purpose of transacting parliamentary business. On the interpretation of the section, McPherson JA stated:

By s 16(2) of the 1987 Act proceedings in Parliament include the preparation of a document for purposes of or incidental to the transacting of any business of a House. More generally, such proceedings include all acts done for such purposes, together with any acts that are incidental to them. Bringing documents into existence for such purpose; or, for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to “proceedings in Parliament”.¹⁴⁴

Contrast the above decision with *Rowley v Armstrong* (2000) QSC 88 where a single judge of the Queensland Supreme Court held that, in making a communication to a member of Parliament, informants are protected by qualified privilege only. Jones J did not ask whether an act had been done with respect to the relevant documents, but declared that an informant in making a communication to a member is not regarded as participating in ‘proceedings in Parliament’. *Grassby* was cited with approval. As noted by Campbell, the decision in *Rowley v Armstrong* has met with criticism from the Clerk of the Senate and others.¹⁴⁵ In effect, communications between members and others remains an uncertain area in the law of parliamentary privilege.¹⁴⁶

9.5 ‘Proceedings in Parliament’ and the disclosure and production of documents

9.5.1 *Police v Dyers* (unreported 1994)

The outcome in the *Saffron* case can be contrasted with that in *Police v Dyers* where immunity from subpoena was granted to documents in the possession of a member of the Legislative Council, Stephen Bruce Mutch. In terms of the scope of the immunity granted to ‘proceedings in Parliament’, the case is an instance of where documents that had been used by a member to transact parliamentary business were accorded protection by Article 9 of the *Bill of Rights 1689*.

The case involved proceedings against the religious group known as Kenja and the subpoenaed documents included records of interview, statements, correspondence, diary notes, memorandums, tape recordings and facsimilies. The member had raised matters relevant to the group on at least three occasions in the House and he claimed both parliamentary privilege and public interest immunity as

¹⁴⁴ (1997) 150 ALR 199at 215. A disputed application of the *O’Chee* approach, admittedly to the Commonwealth Act, is found in *Rowley v Armstrong* [2000] QSC 88 where Jones J did not ask whether an act had been done with respect to the relevant documents, but declared that an informant in making a communication to a member is not regarded as participating in “proceedings in Parliament”.

¹⁴⁵ Campbell, n 36, p 239. For a critical commentary on the decision see – The Senate Committee of Privileges, *92nd Report - Matters Arising from 67th Report of the Committee of Privileges*, The Parliament of the Commonwealth of Australia, 2000.

¹⁴⁶ For a discussion of the case law see - Parliament of NSW, Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and Seizure of Documents by ICAC*, Report 25, December 2003,

grounds for refusing to deliver the relevant documents to the court. The President, Max Willis, informed the House:

I view this matter most seriously as it has the potential to impair the privileges of every individual member of the House and to jeopardise the continued performance of the constitutional duties of honourable members that are so vital to the workings of our democratic system. The acquisition of information by honourable members for use in proceedings in the House is necessary and essential to the proper functioning and exercise of the powers and functions that the House is required to execute.¹⁴⁷

In the event, privilege was granted to the documents on the two grounds requested, albeit reluctantly. According to the President, the Crown Solicitor who represented the member said that the magistrate had commented that his decision ‘was reached with some difficulty’ and that ‘other magistrates may well have come to a different view in this case’.¹⁴⁸ Later cases from other jurisdictions, notably *O’Chee v Rowley* (1997) 150 ALR 199 and *Crane v Gething* (2000) 169 ALR 727¹⁴⁹ tend to support the observation that the protection offered to ‘proceedings in Parliament’ remains as unsettled area of the law of parliamentary privilege.

9.6 Repetition of statements made in Parliament outside Parliament

9.6.1 *Commonwealth Bank of Australia v Malouf and Davridge Pty Ltd* (unreported 10 December 1996)

The rule is that parliamentary privilege does not extend to provide absolute protection for the repetition outside Parliament of what was said in Parliament. This applies both to members and others who may seek to republish extracts from Hansard, as was the point at issue in *Commonwealth Bank of Australia v Malouf and Davridge Pty Ltd* where a non-member sought to republish such extracts in the course of litigation. In these circumstances it is qualified, not absolute, privilege that applies.

In this case Justice Levine of the NSW Supreme Court issued an interlocutory injunction suppressing the distribution of extracts from Hansard of 12 November 1996 in which a member of the Legislative Assembly, Peter Nagle, had set out the details of a long-running dispute between the parties to the case. The Commonwealth Bank was granted an order preventing Mr Malouf from republishing, in whole or in part, the extract of Hansard. Justice Levine emphasised that ‘It is the defendant’s proposed dissemination of this publication that is the nub of the application not, as it cannot be, any conduct on the part of the Member of Parliament’. He confirmed that the repetition outside Parliament of statements made in it are only protected by qualified privilege, stating:

It is trite to observe that a Member of Parliament is protected by absolute privilege in relation to what he says in Parliament. That privilege does not extend to a person who reports or repeats outside Parliament that which is said in Parliament. The privilege available to a publisher of a report of the proceedings of Parliament is qualified. It has been so at common law and in my view clearly is in the light of the provisions of the Defamation Act 1974.

¹⁴⁷ NSWPD, 22.9.94, p 3495.

¹⁴⁸ 26th Presiding Officers and Clerks Conference, Port Morseby, Report of Proceedings, p 25.

¹⁴⁹ Documents held by a Senator in his electorate and parliamentary offices, relating to his travel arrangements, were found by a single judge of the Federal Court not to constitute proceedings in Parliament.

What is it that qualifies that privilege? Shortly stated, it is that the publication of the report...must be in good faith for public information or the advancement of education.

It was found that Mr Malouf's proposed republication of Hansard was not in good faith and, for that reason, the Commonwealth Bank was entitled to the order it sought.¹⁵⁰

9.6.2 *Della Bosca v Arena* [1999] NSWSC 1057 (unreported, 27 October 1999)

While there are no decided cases in NSW, the rule that parliamentary privilege does not extend to protect a member who repeats outside Parliament allegations made about a named person in the course of parliamentary debates has been confirmed by several out of court settlements in this State. Most recent is the reported settlement of the defamation case brought by John Della Bosca against former MLC, Franca Arena for repeating, during a Labor Party caucus meeting and in radio and TV interviews, claims first made in the Council of a 'high level pedophile cover up'.¹⁵¹ At a preliminary stage, in *Della Bosca v Arena* the plaintiff pleaded that during a meeting of the NSW Parliamentary Labor Caucus, while not naming specific persons, Mrs Arena said '*I stand by the comments that I made over this matter and I believe that there has been a massive cover up to protect certain paedophiles organised through the Wood Royal Commission involving meetings with various parties*'. The relevant issues were considered, though not decided upon, by Justice Levine who was not persuaded that the proceedings should be stayed at that point on the ground that the particular cause of action would 'canvass Hansard'.¹⁵²

As to whether proceedings in Caucus are 'parliamentary proceedings', Levine J concluded that 'the question of whether or not proceedings of "Caucus" are embraced by the doctrine of absolute privilege in relation to the proceedings of Parliament is clearly an arguable one'.¹⁵³ In arriving at this view he relied mainly on *Rata v Attorney-General*, a High Court of New Zealand case from 1997 where Master Thompson held that, Caucus being integral to the parliamentary system, in the interest of 'robust debate' what is said there must be absolutely privileged. He concluded:

- (a) As a matter of principle the caucus system as it has developed in New Zealand is an integral part of the parliamentary process and that all matters transacted in caucus are inextricably linked to Parliament...
- (b) If that general proposition is wrong then any discussion and related papers will be privileged when they relate to the passage of legislation (present or future) or any matter which is before the House...¹⁵⁴

¹⁵⁰ Of the decision it has been said that it was the first time an Australian court had agreed that an organization has 'the power to apply to a court to gag a person who wants to use outside Parliament what was said in Parliament if it can make out a case of contempt, defamation or bad faith': 'Aggrieved bank customer stopped from publishing Hansard extract', *The Sydney Morning Herald*, 11 December 1996.

¹⁵¹ 'Arena to pay Della Bosca \$25,000', *The Sydney Morning Herald*, 7 February 2001.

¹⁵² *Della Bosca v Arena* [1999] NSWSC 1057 (unreported, 27 October 1999) at para 31.

¹⁵³ [1999] NSWSC 1057 (unreported, 27 October 1999) at para 24.

¹⁵⁴ *Rata v A-G* (1997) 10 PRNZ 304 at 313.

This is contrary to the traditional view that party caucuses are not regarded as proceedings in Parliament even though they occur within its precincts.¹⁵⁵ In fact, the decision in *Rata* has been criticized by David McGee, Clerk of the New Zealand House of Representatives who called it a ‘perverse interpretation’.¹⁵⁶ Equally critical of the approach taken in *Rata* is PA Joseph, for whom the decision was ‘without precedent or support’. According to Joseph:

Caucus meetings do not qualify as ‘proceedings in Parliament’. Caucus does not transact the business of the House but is a party-political meeting for coordinating strategies that may or may not relate to proceedings in Parliament....The correct view is that political meetings are not proceedings in Parliament and lack protection of parliamentary privilege.¹⁵⁷

9.7 Waiver of parliamentary privilege

9.7.1 *Arena v Nader* (1997) 42 NSWLR 427; *Arena v Nader* (1997) 71 ALJR 1604

9.7.1.1 Key issues and principles: It is accepted that neither an individual member nor a House of Parliament can waive the protection granted by Article 9. The exception is where legislation is in place authorizing waiver, as in the case of s. 13 of the *Defamation Act 1996* (UK) and under the *Special Commissions of Inquiry Amendment Act 1997* (NSW).

This last piece of legislation inserted a new Part 4A (ss. 33A-33H) into the principal Act. Section 33B(1) provided that a House of Parliament may, by resolution, authorise an inquiry into a ‘matter relating to parliamentary proceedings within or before the House or one of its committees...’. Section 33D(1) then provided that a House of Parliament that passes such a resolution may, ‘by the same or any later resolution, declare that parliamentary privilege is waived in connection with the Special Commission to such extent as is specified in the declaration’. This waiving of privilege is qualified by s. 33D(3), which would permit a member of Parliament to assert parliamentary privilege on their own behalf. Then s. 33G provides that Part 4A ‘has effect despite any other Act, any Imperial Act or any other law’. The 1997 Act was intended, therefore, to operate despite any possible infringement of the freedom of parliamentary speech, as enshrined under Article 9. However, this new Part 4A was, by s. 33H, to expire at the end of the period of six months commencing from the date of enactment.

As formulated by Campbell, Part 4A was designed to ensure:

- The Government could not proceed with its plans to have a special commission of inquiry appointed to inquire into and report on Mrs Arena’s accusations unless the Legislative Council

¹⁵⁵ Explanatory Note, *Parliamentary Privilege Bill 1994* (NZ), p 9; *R v Turnbull* [1958] Tas SR 80 at 84.

¹⁵⁶ D, McGee, ‘Parliament and Caucus’, *New Zealand Law Journal*, April 1997, p 138. According to McGee, ‘The Master’s conclusion that caucus is now legally an integral part of Parliament in New Zealand is a radical one indeed. As he acknowledges, this is not the view of textbook writers in New Zealand who have commented on the meaning of proceedings in Parliament (McGee, *Parliamentary Practice in New Zealand* (2nd ed., 1994), pp 69-70 and Joseph, *Constitutional and Administrative Law in New Zealand* (1993), p 363). Nor is it the view in Canada (Maginot, *Parliamentary Privilege in Canada* (1982), p 87)’.

¹⁵⁷ PA Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed, Brookers, Wellington, 2001, pp 402-3.

resolved to authorise the Governor to issue such a commission, and did so by vote of at least two-thirds of the members present and voting.

- If the Legislative Council so resolved, it could also make a declaration waiving parliamentary privilege, to the extent specified in the declaration.
- Such a declaration by the Council would authorise Mrs Arena to give evidence before the special commission if she chose to do so, unless that declaration provided otherwise.
- Such a declaration would not, however, operate to waive parliamentary privilege to the extent that Mrs Arena could assert it in relation to what she had said or done in parliamentary proceedings.
- The report of the special commission would have to be furnished to the Legislative Council as well as to the Governor.¹⁵⁸

In *Arena v Nader* the Court of Appeal upheld the constitutional validity of the 1997 Act and subsequently special leave to appeal to the High Court was refused. Before the Court of Appeal several grounds of invalidity were asserted, including

- The State Parliaments are an integral part of the federal system and their institutional integrity must be preserved. Relying on *Kable v DPP*, it was claimed the Act breached that integrity.
- The Act breached the constitutional freedom of political communication implied in the Commonwealth Constitution.¹⁵⁹
- Contrary to s 106 of the Commonwealth Constitution, the Act amounted to an attempt to alter a State Constitution retrospectively.
- The Act altered the powers of the Legislative Council which, under s. 7A of the *Constitution Act 1902* (NSW), had to be the subject of a referendum. A purposive construction of the section was applied by the Court in response, arguing that the word ‘altered’ was only intended to refer to the ‘diminution or limitation’ of the Council’s powers. The alteration under the Act, on the other hand, increased the Council’s power in respect to parliamentary privilege.
- A member’s individual right to parliamentary privilege enabled a member to veto any inquiry as to what has been said in the House. Against this, the Court confirmed that the immunity provided by parliamentary privilege to individual members is not a ‘personal privilege’ but an ‘attribute of their office’.¹⁶⁰ In other words, although it may be exercised by an individual member, parliamentary privilege is a right of the Parliament. The Court of Appeal found, ‘nothing incongruous in a House of Parliament being able to waive the...privilege and thus permitting an external inquiry into statements made inside the House while at the same time the

¹⁵⁸ E. Campbell, ‘Investigating the truth of statements made in Parliament’ [1998] *Public Law* 125 at 128.

¹⁵⁹ The landmark case is *Lange v Australian Broadcasting Company* (1997) 189 CLR 520.

¹⁶⁰ *Arena v Nader* (1997) 42 NSWLR 427 at 437, citing *Re Royal Commission into the use of Executive Power; R v Parry, Saxon and Smith* (WASC, unreported 1 May 1997).

statute operates not to waive a member's privilege'.¹⁶¹

As to the argument that the 1997 Act violated the constitutional freedom of political communication implied in the Commonwealth Constitution, the Court of Appeal did not rule directly on the coverage of the implied freedom, in particular whether it operates to restrict the exercise of State legislative power,¹⁶² both as this might relate to parliamentary privilege and in relation to communications about purely State-type political matters.¹⁶³ It said only:

Counsel for the plaintiff sought to demonstrate the existence of an implied guarantee of freedom of political discussion, but whether the plaintiff did this or not, it does not in any event seem to us that freedom of political discussion is impaired by the 1997 Act.¹⁶⁴

The Court found that the Act did not touch the immunity of individual members: 'What the Act does is to increase the power of each House of Parliament in the way each House may deal with its parliamentary privilege'.¹⁶⁵

It was acknowledged that the Act had introduced 'a new deterrent to the exercise of' a member's right of parliamentary free speech, namely 'the possibility, not previously available, that what a member says in Parliament may become the subject of an executive inquiry and criticism of a quasi authoritative kind'. According to the Court there were at least three answers to this argument:

First...the member remains free to say anything in Parliament with complete immunity from legal consequences outside the House. Secondly, the fact is that a member may always be criticised in the House. A Member of Parliament is protected in respect of anything said in Parliament, but another aspect of such speaking is its (almost invariably) public nature and instant availability for criticism inside and outside Parliament, notably by the media. Thirdly, the courts should assume that Special Commissions will only be appointed in appropriate circumstances, that Commissions will act responsibly, and that any criticism from a Commissioner would be of a

¹⁶¹ *Arena v Nader* (1997) 42 NSWLR 427 at 437.

¹⁶² Not considered was the possible impact of the implied freedom on parliamentary privilege at common law, an issue that might have arisen if *Arena* had subsequently been expelled.

¹⁶³ The difficulty arises because in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 the High Court failed to confirm the earlier view that the implied freedom restricted the exercise of State legislative power in relation to communications about purely State-type political matters – G Lindell, 'The constitutional and other significance of *Roberts v Bass – Stephens v West Australian Newspapers Ltd* reinstated' (2003) 14 *Public Law Review* 201 at 202. G Carney, *Members of Parliament: Law and Ethics*, Prospect 2000, p 198. Carney commented that the implied freedom 'operates as a restriction on the legislative and executive powers of the Commonwealth and the States' (page 197), but added that *Arena v Nader* left open the issue 'as to whether the implied freedom operated as a restriction on the power of the NSW Parliament to enact laws with respect to parliamentary privilege' (page 198). Contrast this interpretation with Campbell's conclusion that 'The New South Wales Court of Appeal upheld the legislation and in so doing accepted that the freedom implied in the federal Constitution limited the legislative powers of State Parliaments, even to enact legislation affecting the application of Article 9 of the Bill of Rights 1689 as a matter of State law. By its decision to refuse special leave to appeal in the case the High Court seems to have endorsed this view': Campbell 2003, n 36, p 63.

¹⁶⁴ (1997) 42 NSWLR 427 at 434.

¹⁶⁵ (1997) 42 NSWLR 427 at 434.

responsible kind. The possibility of irresponsible criticism, no matter what its source, cannot in our opinion be regarded as an impediment to free speech.¹⁶⁶

Before the High Court counsel for Arena submitted that the 1997 Act infringed the parliamentary freedom of speech declared by Article 9. There it was argued that ‘freedom of speech is an essential characteristic of a Parliament’ which could not be diminished in the way it had been under the 1997 Act. In response, the High Court observed:

The critical question on the present application is whether the Act so affects the parliamentary privilege of free speech that it invalidly erodes the institution of Parliament itself. If an affirmative answer could be given to that question, the applicant would have made a case for the grant of special leave. But whatever limits there might be upon the powers of Parliament legislatively to affect its privilege, it is not possible to regard this Act as exceeding those limits.

A House of Parliament in which allegations are made has a legitimate interest in knowing, and perhaps a duty to ascertain, whether there is substance in allegations made by a member on a matter of public interest. It is within the power of the Parliament to authorise that House to engage, or to authorise the engagement of a Commissioner to inquire into such allegations, and to report to the House. That is in substance what the Act – and the Commission issued in the instant case – seek to achieve.¹⁶⁷

As to the s. 7A argument, the High Court concluded:

The Act does not alter the powers of the House; rather, it affects the privileges which govern the manner in which the House transacts its business. So much appears from the judgment of the Privy Council in *Chenard v Arissol* [1949] AC 127.¹⁶⁸

Chenard is a Privy Council case concerning the validity of a section of the *Seychelles Penal Code* 1904, granting absolute privilege to members of the Legislative Council. The Council was, by s 5 of the *Colonial Laws Validity Act* 1865 (Imp),¹⁶⁹ prevented from making laws respecting its own ‘constitution, powers and procedure’.¹⁷⁰ The question for the Privy Council was whether a law on privilege was a law of this sort. The Privy Council said it was not, stating: ‘None of these words is apt to include privileges or immunities of individual members of the legislature which protect them against actions in respect of their conduct as members’.¹⁷¹ By an application of this reasoning to the New South Wales *Constitution Act*, questions of privilege are excluded from the alteration of either the Council’s ‘constitution’ or its ‘powers’.

¹⁶⁶ *Arena v Nader* (1997) 42 NSWLR 427 at 435.

¹⁶⁷ *Arena v Nader* (1997) 71 ALJR 1604 at 1605.

¹⁶⁸ *Arena v Nader* (1997) 71 ALJR 1604 at 1605.

¹⁶⁹ That section granted ‘every Representative Legislature’ the power to ‘make Laws respecting the Constitution, Powers, and Procedure of such Legislature’, provided that such laws conform with any relevant manner and form provisions. Under s 6 of the *Australia Act* 1986 (Cth), which refers to laws made after the commencement of the Act, a State law ‘respecting the constitution, powers or procedure of the Parliament of the State must also conform with any relevant manner and form provisions, whether made before or after the commencement of the *Australia Act*’.

¹⁷⁰ This is because the Seychelles Legislative Council was not a “representative legislature”, as required by s 5 of the *Colonial Laws Validity Act* 1865 (Imp).

¹⁷¹ *Chenard v Arissol* [1949] AC 127 at 133.

9.7.1.2 Background: The *Special Commissions of Inquiry Act* was passed in 1983 by the then Wran Government in order to deal more expeditiously with certain allegation of corruption than would normally be possible if inquiry was undertaken by a royal commission. Effectively, a Commissioner appointed under the legislation would have the same powers as a royal commissioner.

The amending Act was passed in response to allegations made in the NSW Legislative Council by Franca Arena on 17 September 1997. In a speech in the Council allegations of a ‘cover-up’ were made by Mrs Arena against certain persons, including the Premier and the Leader of the Opposition. The alleged cover-up related to the report of the Royal Commission into the NSW Police Service. Six days later the *Special Commissions of Inquiry Amendment Act 1997* was assented to.

On 25 September, consistent with the terms of the Act, by resolution the Legislative Council authorised the establishment of a Special Commission of Inquiry to investigate Mrs Arena’s claims and the basis on which she had made them. The resolution waived parliamentary privilege in connection with the inquiry. A Special Commissioner was appointed to conduct the inquiry, John Nader RFD QC. On 29 September the Commissioner issued a summons to Mrs Arena requiring her to give evidence and produce documents in support of her claims. Mrs Arena filed proceedings in the Supreme Court of NSW and then in the Court of Appeal challenging the validity of the Special Commissions of Inquiry Act. That challenge failed, as did a subsequent application for leave to appeal to the High Court against the Court of Appeal’s decision.

When the Special Commission of Inquiry resumed on 16 October 1997, Mrs Arena exercised her right not to participate. All other witnesses gave evidence as required, including all the alleged parties to the alleged ‘cover-up’.¹⁷² The Nader Inquiry found that Arena’s allegations were ‘false in all respects’.¹⁷³

On 11 November 1997, Arena’s allegations and the Nader report were referred to the Legislative Council Privilege and Ethics Committee to investigate and report on what sanctions should be imposed. When the Committee’s report was released on 29 June 1998 it found, among other things, that Arena’s allegations ‘were untrue’. On 1 July the Council passed a resolution requiring Arena to apologise for the allegations made in her speech of 17 September 1997. On 16 September the House voted by 20 votes to 16 to accept her ‘statement of regret’ as a sufficient response to the House’s original resolution.

¹⁷² Legislative Council Standing Committee on Parliamentary Privileges and Ethics, *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC*, Report No 6, Parliament of NSW, June 1998, pp 4-5.

¹⁷³ JA Nader, *A Report of the Special Commission of Inquiry into Allegations made in Parliament by the Hon F Arena MLC*, 1997, pp 40-43.

10. THE POWER TO ORDER DOCUMENTS

10.1 *Egan v Willis* (1998) 195 CLR 424

10.1.1 Key issues and principles: At issue in *Egan v Willis* was the power at common law of the Legislative Council to order the production of state papers. The underlying principle behind that power is that, under the Westminster system of responsible government, the Executive remains accountable to Parliament. The power to order the production of state papers, therefore, can be defined as a reasonably necessary incident flowing from the legislative and scrutiny functions played by the Houses of the NSW Parliament, in particular their superintendence and review of Executive conduct. That power can be assumed at common law to extend from the Houses to their committees. More doubtful is whether it extends to a power to order papers generally, either from members of the other House of Parliament or from ordinary citizens. On this matter, the joint judgment of Gaudron, Gummow and Hayne JJ had this to say:

It is important to emphasise that no question arises in this case about what powers a House of the NSW Parliament may have to deal with persons who are not members of the House concerned. Altogether different considerations might arise in such a case.¹⁷⁴

As to the facts of the case, the joint judgment commented:

Reduced to its essentials, what happened in the present case involved the determination by the Legislative Council to seek the provision to it by a member, who is a Minister and who 'represented' another Minister in the Legislative Assembly, of State papers which, as Gleeson CJ described them, 'related 'to matters of government business which the Council wished to debate'. The appellant had in his custody and control certain documents which fell within the description of those sought in the relevant resolution. The Minister chose not to produce the papers, claiming consistently with the position taken by the cabinet, that the Legislative Council had no power to call for them. He was then suspended for the balance of the day's sitting.¹⁷⁵

The power of the Houses to suspend a member for a limited time was confirmed. It was further confirmed that each House may impose sanctions on a member for the purpose of coercing that member to induce compliance with the wishes of the House, but not for the purpose of punishing a member.¹⁷⁶

The NSW Court of Appeal, in its decision handed down in 1996, dismissed Mr Egan's claims on all substantive issues.¹⁷⁷ While it was found that Mr Egan's removal into Macquarie Street constituted a trespass and was *ultra vires* of Standing Order 262, the Council's power to order state papers and to use limited coercive power to enforce that order was upheld. An appeal against that decision was disallowed by the High Court in 1998.¹⁷⁸ Both courts found that the production of documents by

¹⁷⁴ (1998) 195 CLR 424 at 456. McHugh J argued strongly against the power to order the production of documents from ordinary citizens (at 472).

¹⁷⁵ (1998) 195 CLR 424 at 454-5.

¹⁷⁶ (1998) 195 CLR 424 at 455.

¹⁷⁷ *Egan v Willis and Cahill* (1996) 40 NSWLR 650.

¹⁷⁸ *Egan v Willis* (1998) (1998) 195 CLR 424.

Ministers is ‘reasonably necessary’ for the performance by the House of its functions, which were identified as being the making of laws in accordance with the *Constitution Act 1902* (NSW),¹⁷⁹ and the review of Executive conduct, as this is derived from the doctrine of responsible government.¹⁸⁰ The implications of that doctrine for the power of the Legislative Council, in particular, to order the production of state papers was defined in the joint judgment in the following terms:

The consideration that the government of the day must retain the confidence of the lower House and that it is there that governments are made and unmade does not deny what follows from the assumption in 1856 by the Legislative Council of a measure of superintendence of the conduct of the executive by the production to it of State papers.¹⁸¹

Requests for the production of state papers have a long history in NSW. It has been said in this respect that, since 1856, ‘there have been scores, if not hundreds, of resolutions of both Houses calling for the production of documents’.¹⁸² Building on that, the joint judgment went on to say:

What is ‘reasonably necessary’ at any time for the ‘proper exercise’ of the ‘functions’ of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.¹⁸³

Precisely what, if any, implications flow from this is unclear. The suggestion appears to be that the law relating to Parliament is, to a significant extent, a creature of parliamentary practice itself. The idea that parliamentary conventional practice is itself a source of law may derive, by analogy, from the position in the United Kingdom where the ‘law of Parliament’ – the *lex parliamenti* – is part of the common law of the land and, in which context only, the law of parliamentary privilege is the product of ‘long usage’.¹⁸⁴ Whether the same argument can apply in Australia is doubtful at best.

Also in doubt is whether the established and maintained ‘conventional practices’ noted in the joint judgment are equivalent, for logical and/or practical purposes, to the constitutional conventions that adhere to responsible government, including collective Cabinet responsibility.¹⁸⁵ Of these it can be said

¹⁷⁹ Section 5 of the *Constitution Act 1902* (NSW) provides that the Legislature shall have power to make laws for the peace, welfare and good government of NSW.

¹⁸⁰ As noted, they further found that ‘reasonable necessity’ extends to the House imposing sanctions, including temporary suspensions, on a Minister or other Member of the House.

¹⁸¹ (1998) 195 CLR 424 at 453.

¹⁸² *NSWPD*, 2 May 1996, p 706.

¹⁸³ (1998) 195 CLR 424 at 454.

¹⁸⁴ McHugh J in *Egan* (at 463) quoting AB Keith, *Responsible Government in the Dominions*, 2n ed, 1928, vol 1, p 366.

¹⁸⁵ *Egan v Chadwick* (1999) 46 NSWLR 563 at 572 (Spigelman CJ). Based on Professor Colin Munro’s work, Spigelman CJ noted Maitland’s view that non-legal rules are ‘of every degree of stringency and definitiveness’. According to Spigelman CJ, ‘A “convention” in this sense is no less such because it is not rigorously observed. Nor indeed, does a law lose its character as such because it is sometimes breached’. On the other hand, the ‘conventional practices’ referred to in the joint judgment are to be ‘established and maintained’.

that such constitutional conventions are indirectly enforced when a legal power is derived, by implication, as a matter of reasonable necessity from them. Put another way, the test of 'reasonable necessity', which is legal in nature, requires for its application recognition of certain constitutional conventions associated with responsible government. It is not a question of the *enforcement* of those conventions by a court, but of how that aspect of responsible government should be *recognised* in the application of a rule of the common law upon which it impinges.¹⁸⁶ Whether the joint judgment in *Egan* intended to convey more than this by its reference to 'conventional practices' is unclear.

In a powerful dissenting judgment in *Egan*, McHugh J argued that the case should have been dealt with on narrow grounds, limited to the validity of the order to suspend a member who is obstructing the business of the Council. Beyond that, he argued, the matters raised in the case were not justiciable, based on the principle of non-intervention of the courts in the internal business of the Parliament. Further, McHugh J did not agree that the power to order documents was an implied power deriving as a matter of reasonable necessity from the functions of the Council. Instead, he argued:

the power exists not because the functions of the Council make it necessary in the relevant sense to imply it, but because the appellant, by reason of his membership of the Council and his position as a Minister of the Crown, has a special relationship with the House which entitles it to obtain the information. When the nature of parliamentary government under the Westminster system of responsible government is properly understood, it is apparent that the power which the respondents claim is one that inheres in the very notion of a parliamentary chamber which is a co-ordinate part of a legislature in such a system.¹⁸⁷

By way of a footnote to the case, for practical purposes the power to conduct inquiries in NSW is not primarily a creature of the common law. The key piece of legislation that extends the power of the Houses to conduct inquiries beyond that basis is the *Parliamentary Evidence Act 1901*, where provision is made for either the Council or Assembly, or a committee, to call witnesses and for evidence to be given on oath or upon the making of a solemn declaration. However, the *Parliamentary Evidence Act 1901* does not contain an express power to compel witnesses, either before a House or a committee, to produce documents.¹⁸⁸ Limited express statutory power to order documents is in place, notably in relation to the Parliamentary Joint Committees on the ICAC¹⁸⁹ and the Ombudsman.¹⁹⁰

¹⁸⁶ *Egan v Chadwick* (1999) 46 NSWLR 563 at 572 (Spigelman CJ); G Griffith, *Egan v Chadwick and other recent developments in the powers of elected Upper Houses*, NSW Parliamentary Library Briefing Paper No 15/1999, pp 16-18.

¹⁸⁷ (1998) 195 CLR 424 at 472.

¹⁸⁸ Is it the case therefore that no such statutory grant of power exists? Not necessarily. It can be argued that the documents power is implied in the statutory grant of power to conduct inquiries, as a necessary incident of the power to take evidence. The case can be made that the statutory power to conduct inquiries cannot function effectively without the concomitant power to order witnesses to produce relevant documents. Although his comment was *obiter*, McHugh J accepted as much in *Egan v Willis* - (1998) 195 CLR 424 at 468.

¹⁸⁹ *ICAC Act 1988*, s. 69(1).

¹⁹⁰ *Ombudsman Act 1974*, s. 31G.

10.1.2 Background: The background to the case was the long-running conflict between the Council and the Government over the production of state papers. This originated in October/November 1995 when the Council passed a number of resolutions requiring certain documents held by the Government to be tabled in the House by certain specified times. Three of the six resolutions required the documents to be tabled by Mr Egan, in his capacity as Leader of the Government in the House. In two of the resolutions the House expressed its displeasure with Mr Egan for his failure to comply with the orders of the House. By resolution of 13 November 1995 the Council adjudged Mr Egan guilty of contempt for his failure to comply with several orders. The resolution also referred the matter to the Privileges Committee for inquiry and report on what sanctions should be enforced in these circumstances. The Committee's report, ordered to be printed on 10 May 1996, found that as the House's powers to order documents were at that time 'so uncertain and ill-defined' it would 'not be appropriate for the Committee to recommend the imposition of particular sanctions'.¹⁹¹

Events had already moved on. Prior to the publication of the Committee's report, on 1 May 1996 Mr Egan was ordered by a resolution of the House to table certain papers in the Council or deliver them to the Clerk. Consistent with a course of action earlier agreed upon by the Cabinet, Mr Egan did not comply with the order. On 2 May 1996, the Council passed a resolution: adjudging Mr Egan guilty of contempt of the House (paragraph 2 of the resolution); suspending him from the service of the House for the remainder of the day's sitting (paragraph 3(a) of the resolution); and ordering him to attend in his place at the Table of the House on the next sitting day to explain his reasons for not complying with the orders of the House to table documents (paragraph 3(b) of the resolution). When Mr Egan refused to leave the House, pursuant to Standing Order the President directed the Usher of the Black Rod to escort Mr Egan from the Chamber and the parliamentary precincts. Mr Egan was duly removed on to the footpath of Macquarie Street.¹⁹²

In brief, while the NSW Court of Appeal found that Mr Egan's removal into Macquarie Street constituted a trespass and was *ultra vires* of Standing Order 262, the Council's power to order state papers and to use limited coercive power to enforce that order was upheld.

The judgment of the High Court in *Egan v Willis* was handed down on 19 November 1998. Before then, on 24 September 1998, the Council passed a resolution directing the Government to produce by 29 September all documents relating to the contamination of Sydney's water supply. On 29 September the Clerk received a letter from the Director General of the Cabinet Office. Mr R. Wilkins, stating that, further to advice sought from the Crown Solicitor, the Government would not be table some documents on the grounds of legal professional privilege and public interest immunity. On 13 October a further resolution was passed again demanding that all documents be produced but providing that those that the Government claimed were subject to immunity be made available to members of the Council only and not published or copied without an order of the House. If any member disputed the Government's claim an independent arbiter would be appointed to adjudicate and report back to the House. Under this resolution, a document claimed and identified as a Cabinet document would not be made available to Council members, although again the claim would be subject to a right of appeal to an independent legal

¹⁹¹ Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into Sanctions where a Minister Fails to Table Documents*, Report No 1, Parliament of NSW, 1996.

¹⁹² *NSWPD*, 2.5.1996, pp 690-696, 703-713.

arbiter. The Government once more refused to comply. As a consequence, on 20 October Mr Egan was adjudged guilty of contempt and suspended for 'five sitting days or until he fully complies with the order of the House of 13 October 1998, whichever occurs first'. The President ordered Mr Egan to be excluded from the Chamber, but not from Parliament House.¹⁹³

On 24 November, subsequent to the decision of the High Court in *Egan v Willis*, the Council passed a resolution ordering Mr Egan to produce documents that were the subject of four previous disclosure resolutions: the closure of veterinary laboratories; the negotiations with Twentieth Century Fox over the Sydney Showground; the decentralisation of the Department of Education; and the Lake Cowal gold mine project. Similar provisions were included referring to legal professional privilege, public interest immunity and Cabinet confidentiality to those in the resolution ordering production of the water contamination documents. The Government responded by asking Sir Laurence Street to make an independent assessment of which documents were privileged and should not be tabled, as result of which over 200 documents were withheld from the House. On 26 November, the Council passed a further resolution, adjudging Mr Egan to be in contempt of the House and giving him until the following day to produce all documents as specified.¹⁹⁴ On his failure to comply, Mr Egan was suspended for the remainder of the session (or until he fully complied with the order of the House) and removed from the Chamber.¹⁹⁵ The resulting case of *Egan v Chadwick* is discussed next.

10.2 *Egan v Chadwick* (1999) 46 NSWLR 563

10.2.1 Key issues and principles: One issue left open by the Court of Appeal and the High Court in *Egan v Willis* was 'whether or not the power of the Legislative Council to call for documents extends to documents for which claims of legal professional privilege or of public interest immunity, could be made at common law'. In other words, does the principle of reasonable necessity, which defines the scope of the implied powers, extend to orders for the tabling of documents subject to claims of privilege or immunity recognised at common law?

In *Egan v Chadwick*¹⁹⁶ all three members of the Court of Appeal (Spigelman CJ, Meagher JA and Priestly JA) found that it is reasonable necessary for the performance of the functions of the Legislative Council to compel the Executive to produce documents in respect of which a claim of legal professional privilege or public interest immunity is made, and that the power upheld by the High Court in 1998 extended to such documents. The majority (Spigelman CJ and Meagher JA) found that the power was limited in the case of cabinet documents, while Priestly JA found that there was no limitation to the power. Central to all three judgments were considerations relevant to responsible government, notably ministerial accountability in its collective and individual forms.

In relation to public interest immunity, Spigelman CJ noted that the claim to immunity is 'not absolute',

¹⁹³ NSWPD, 20.10.1998, pp 8485-8497, 8508-8526.

¹⁹⁴ NSWPD, 26.11.1998, pp 10746-10749, 10766-10775, 10797-10802

¹⁹⁵ NSWPD, 27.11.1998, p 10827.

¹⁹⁶ [1999] 46 NSWLR 563.

but that it requires the balancing by a court of ‘conflicting public interests’, in particular, at trial a judge must weigh incommensurable factors - ‘the significance of the information to the issues in the trial, against the public harm from disclosure’. However, in keeping with the non-intervention of the courts in the internal affairs of the Parliament, his Honour acknowledged:

Where the public interest to be balanced involves the legislative or accountability functions of a House of Parliament, the courts should be very reluctant to undertake any such balancing... It is because the court should respect the role of a House of Parliament in determining for itself what it requires and the significance or weight to be given to particular information.¹⁹⁷

To this ‘hands-off’ statement, Spigelman CJ added the more positive observation on the powers of the Council:

The high constitutional functions of the Legislative Council encompass both legislating and the enforcement of the accountability of the Executive. Performance of these functions may require access to information the disclosure of which may harm the public interest. Access to such information may, accordingly, be ‘reasonably necessary for the performance of the functions of the Legislative Council’.¹⁹⁸

The next step in the argument was to place a limitation on the Council’s power in relation to Cabinet documents. This limitation arose from considerations relevant to the conventions of responsible government, in particular the doctrine of ministerial responsibility. Spigelman CJ was concerned ‘to avoid inconsistency between the power to call for documents and one of the bases on which it has been determined that the power is reasonably necessary (namely executive accountability derived from responsible government)’.¹⁹⁹ For this reason, ‘the power should, at least, be restricted to documents which do not, directly or indirectly, reveal the deliberations of Cabinet’. This would include records of meetings of Cabinet or of a Cabinet committee.²⁰⁰ On the other hand, Spigelman CJ thought that ‘Documents prepared outside Cabinet for submissions to Cabinet may, or may not, depending on their content, manifest a similar inconsistency’.²⁰¹

Meagher JA adopted a more general formulation of the immunity of Cabinet documents, one that does not appear to distinguish between different types of documents within that class:

The Cabinet is the cornerstone of responsible government in a New South Wales, and its documents are essential for its operation. That means their immunity from production is complete. The Legislative Council could not compel their production without subverting the doctrine of responsible government, the doctrine on which the Legislative Council also relies to justify its rights to call for documents.²⁰²

¹⁹⁷ (1999) 46 NSWLR 563 at 573-4.

¹⁹⁸ (1999) 46 NSWLR 563 at 574.

¹⁹⁹ (1999) 46 NSWLR 563 at 576.

²⁰⁰ Campbell 2003, n 36, p 161.

²⁰¹ (1999) 46 NSWLR 563 at 575.

²⁰² (1999) 46 NSWLR 563 at 597.

Either way, as Campbell noted, the exception made in respect to Cabinet documents leaves ‘open the possibility that a court might have to decide whether documents a minister refused to produce to a house (or a parliamentary committee) fell into that category’.²⁰³ More generally, she concluded that the *Egan* cases were of ‘considerable constitutional significance’, stating in respect to the issue of public interest immunity:

The decisions also support the claim the public interest immunity doctrine applicable in judicial proceedings does not, in the main, control parliamentary inquiries and that it is ultimately for the houses to decide whether it be contrary to the public interest for them to insist on the giving or production of evidence. By these decisions the courts have made it apparent that they do not consider themselves an appropriate forum within which disputes between parliamentary and executive arms of government about the former’s claims against the latter for production of information should be adjudicated or resolved.²⁰⁴

As to legal professional privilege, Meagher JA agreed with the Chief Justice who observed

The applicability of the doctrine...depends upon the relationship between the persons in the context in which the issue of access arises.²⁰⁵

In the context of the ‘special relationship’ between the parties in the case at issue, for the Chief Justice it was the public law principles that flow from the accountability function of the Legislative Council that was to be applied. In essence, was it reasonably necessary for the Legislative Council to claim right of access to legal advice upon which the Executive had acted? Spigelman CJ answered:

In performing the accountability function, the Legislative Council may require access to the legal advice on the basis of which the Executive acted, or purported to act. In many situations, access to such advice will be relevant in order to make an informed assessment of the justification for the Executive decision. In my opinion, access to legal advice is reasonably necessary for the exercise by the Legislative Council of its functions.²⁰⁶

In respect to the scope of this finding, Campbell commented:

While this passage refers only to legal advice given to an agency of government, it cannot be assumed that courts would take a different view if the legal advice to which a house or a parliamentary committee sought access had been provided to a person or body in the private sector. The advice given by a legal adviser to a corporate client could be most relevant to a parliamentary inquiry into whether legislation dealt adequately with what had been perceived to be abuses of corporate powers.²⁰⁷

As to the validity of the resolution suspending Mr Egan for ‘the remainder of the session or until he fully complies with this Order, whichever occurs first’, this was not decided upon. This was ‘In view of the election of a new parliament’.²⁰⁸

²⁰³ Campbell 2003, n 36, p 161.

²⁰⁴ Campbell 2003, n 36, p 163.

²⁰⁵ [1999] 46 NSWLR 563 at 577-8.

²⁰⁶ [1999] 46 NSWLR 563 at 578.

²⁰⁷ Campbell 2003, n 36, p 165.

²⁰⁸ [1999] 46 NSWLR 563 at 579.

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