

LEGISLATIVE COUNCIL

MINUTES OF PROCEEDINGS

No. 141

WEDNESDAY, 14 AUGUST 2019

1. Meeting of Council

The Council assembled at 1.00pm pursuant to order.

The President, Hon Kate Doust, took the Chair.

Prayers and an Acknowledgement of Country were read.

2. Ministerial Statement — Consultation on Dog Welfare Standards and Guidelines

The Minister for Agriculture and Food made a Ministerial Statement with respect to the release of the draft Standards and Guidelines for the Health and Welfare of Dogs in Western Australia for public consultation.

3. Statement by President — A Refusal to Comply with a Summons to Produce Documents

The President made the following Statement —

Members, I bring this matter to the attention of the House because I am required to do so by law. Ms Emily Roper, acting director general of the Department of the Premier and Cabinet, has refused to comply with the committee's order to produce documents. That order was conveyed to her by a summons authorised by me. Ms Roper has refused to comply with that summons.

The documents demanded from Ms Roper are required so that the committee can discharge the functions the House delegated to it on 12 June 2019. These functions were to ensure that any documents or data created or received by a current or former Member of the Legislative Council are released to an investigative agency only when: (a) its description falls within the lawful scope of any warrant, notice to produce, or other similar power granted to an investigative agency under a written law; and (b) the documents or data are not proceedings in Parliament within the meaning of article 9 of the *Bill of Rights 1688*, or does not otherwise fall within the scope of parliamentary privilege.

The committee advised Ms Roper that a failure to comply with its summons would result in a legal requirement for me to report that refusal to this House. The need for me to report arises from section 7 of the *Parliamentary Privileges Act 1891*. That section mandates this course of action. It leaves me with no discretion to do otherwise. Ms Roper's response to the committee's order has shocked and appalled all Members of the committee for its cavalier disregard of the committee's lawful right to those documents. This House will only know the full reasons as to why Ms Roper has acted this way after a thorough investigation.

The committee has done everything in its power to maintain the integrity of a Corruption and Crime Commission investigation to which the committee's summons relates. The need to maintain confidentiality of that investigation was the reason behind the resolution of the House made on 12 June 2019, empowering the committee to act on its behalf. The committee has fully cooperated with the CCC in conformity with the functions delegated to it by the House. In providing a full account of the refusal by Ms Roper to comply with its summons and the actions

that led to this point, the committee has redacted certain information in its report in an effort to preserve, as far as possible, the integrity of the CCC investigation and the identity of its targets.

The committee also advises the House of a matter of privilege arising from the conduct of Mr Darren Foster, director general of the Department of the Premier and Cabinet. That conduct sowed the seed for Ms Roper's refusal to comply with the committee's summons. The matter of privilege arises from Mr Foster's decision to devise and execute a procedure to review the private and confidential emails and documents of former Members and their staff sought by the commission. The Department of the Premier and Cabinet manages that sensitive data on the Parliament's behalf. Mr Foster put his procedure in place to determine which of those documents, if any, were subject to parliamentary privilege. In doing so, Mr Foster authorised public servants and other agents of the Executive Government to read the emails of former Members and their staff. Undoubtedly, some of those documents are subject to parliamentary privilege.

The question of what documents are subject to parliamentary privilege is one for this House or its authorised delegate to determine and not Mr Foster or employees of the Executive Government acting under Mr Foster's direction. Mr Foster's procedure was not authorised by the committee or this House and he was expressly advised of that fact when the committee first became aware of his intentions. How the agents of Mr Foster decided whether a document was or was not subject to parliamentary privilege is unknown. Whether documents subject to parliamentary privilege were released by Mr Foster to the commission is unknown. The committee issued its summons to determine through the application of its own procedure whether privileged documents had been released to the commission. It cannot fulfil its obligations to the House without those documents.

Mr Foster undertook his unauthorised procedure in preference to a procedure determined by the committee to deal with the documents. The committee's procedure required an appropriately qualified, independent external party appointed by it to undertake the review task and to determine the question of parliamentary privilege in respect to each document. Under the committee's procedure, none of the committee's Members had access to or could view those confidential documents.

The committee developed its procedure following a personal approach to me by, and with the assistance of, Hon John McKechnie, QC, Commissioner of the Corruption and Crime Commission. Mr Foster chose not to follow the committee's procedure.

These two related matters of privilege and their effect on the sources of information to Parliament and its Members strike at the heart of our democratic institutions. How will a House of Parliament or its committees have the information required if its orders to produce documents are refused? How will elected Members bring the Government to account without sources of information from their constituents, whistle-blowers and other informers? Will those informers speak to a Member of Parliament about their concerns if they believe those working for the Executive Government or an investigative agency will read their privileged documents or other communications? I think not. The chilling effect on parliamentary activities would be palpable and immediate.

The committee's procedure was carefully developed to preserve Members' privileged information and other privileges of the House and its Members whilst permitting the CCC to obtain non-privileged documents relevant to its investigation. The decision made by Mr Foster to refuse to follow the procedures stipulated by the committee and Ms Roper's refusal to comply with the committee's summons have raised significant issues of parliamentary privilege that are now required to be addressed by the House.

4. **Standing Committee on Procedure and Privileges — Report 55 — A Refusal to Comply with a Summons to Produce Documents**

The President presented Report 55 of the Standing Committee on Procedure and Privileges, *A Refusal to Comply with a Summons to Produce Documents*. (Tabled Paper 2929).

Hon Simon O'Brien moved, without notice —

That consideration of Recommendation 1 to 4 contained in Report No. 55 of the Standing Committee on Procedure and Privileges, *A Refusal to Comply with a Summons to Produce Documents*, be made an Order of the Day for consideration in the Committee of the Whole House.

Question — put and passed.

5. **Papers**

The following Papers were laid on the Table by —

President

Auditor General's Papers —

Access to State-Managed Adult Mental Health Services (Report No. 4)
(14 August 2019-20) 2925

Minister for Environment

Annual Reports —

Land Surveyors Licensing Board (2018) (Date received 13/08/2019)..... 2926

Notices —

Variation notice and agreement — individual management plans for the Acacia Prison
Services Agreement..... 2927

Reports —

Western Power — Statement of Corporate Intent (2019-20) 2928

6. **Machinery of Government Impacts on the Department of Primary Industries and Regional Development**

Motion No. 1 having been called, Hon Colin de Grussa, pursuant to notice, moved —

That this House —

- (a) recognises the lengthy timeline for implementation of the McGowan Government's Machinery of Government (MoG) changes;
- (b) notes the effect of the MoG changes on the Department of Primary Industries and Regional Development (DPIRD); and
- (c) calls on the Premier and the Minister for Regional Development to immediately take action to stem job losses and mental health concerns within DPIRD.

Debate ensued.

The Minister for Agriculture and Food moved, without notice to amend the motion as follows —

To delete all words after "House" and insert instead:

recognises that the McGowan Government has:

- (a) ruled a line under the years of budget cuts and dysfunction in the Agricultural portfolio;
- (b) made the important strategic decision to bring together the Government's primary industry and regional development functions; and
- (c) worked with the unions to ensure the Machinery of Government changes are completed in a timely and equitable manner.

Point of Order

Hon Peter Collier raised the following Point of Order —

That completely changes the context of the motion. I seek a ruling on that. We had exactly this situation last week and Members opposite complained. This one completely changes the context of the motion.

President's Ruling

The President ruled as follows —

Having had a look at Standing Order 87, “Amendment to be Relevant and Not a Direct Negative”, which deals with amendments, in relation to the point of order made by the Leader of the Opposition, the amendment is not itself a direct negative under that Standing Order. The other part of the Standing Order says that the amendment shall be relevant to the question before the Legislative Council. This amendment does pick up on matters that are canvassed in the earlier motion moved by Hon Colin de Grussa. I do take on board, however, the comments made by the Leader of the Opposition and the debate last week about the nature of amendments that seek to change entirely a motion, which would seem to defeat the purpose of the original motion in some ways. I am not going to rule against this particular amendment on this occasion. I might seek some further advice, because I would hate to see a pattern of behaviour emerge in the Chamber when we are dealing with these motions, which, I must admit, did occur from time to time in a previous Parliament, and I would not want to see that behaviour repeated. It is one thing to modify an amendment to a certain extent, but another to change it significantly. I will allow on this occasion for this amendment to be moved. I am sure the House will determine whether it will accept or reject it. However, I will say to Members that I will have a further look at how we manage the nature of amendments during this period of debate, and I will provide a further ruling at a later stage.

Debate ensued.

Amendment — put and negatived.

Debate resumed.

Question — put.

The Council divided.

Ayes (16)

Hon Jacqui Boydell
 Hon Tim Clifford
 Hon Peter Collier
 Hon Colin de Grussa
 Hon Diane Evers
 Hon Donna Faragher
 Hon Nick Goiran
 Hon Colin Holt

Hon Rick Mazza
 Hon Michael Mischin
 Hon Simon O'Brien
 Hon Robin Scott
 Hon Tjorn Sibma
 Hon Charles Smith
 Hon Colin Tincknell
 Hon Ken Baston (*Teller*)

Noes (10)

Hon Alanna Clohesy
 Hon Sue Ellery
 Hon Adele Farina
 Hon Laurie Graham
 Hon Alannah MacTiernan

Hon Kyle McGinn
 Hon Martin Pritchard
 Hon Samantha Rowe
 Hon Dr Sally Talbot
 Hon Pierre Yang (*Teller*)

Motion thus passed.

7. Consideration of Committee Reports

Pursuant to order for the consideration of Committee Reports.

In Committee

(Hon Simon O'Brien in the Chair)

Standing Committee on Environment and Public Affairs — Report 49 — Mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material

Hon Diane Evers moved, That consideration be postponed until the next sitting.

Question — put and passed.

Select Committee into Elder Abuse — Final Report — 'I never thought it would happen to me': When trust is broken

Debate resumed on the motion of Hon Nick Goiran, That the Report be noted.

Pursuant to Temporary Order No. 4, consideration of the report was postponed.

Standing Committee on Estimates and Financial Operations — Report 77 — 2017-18 Budget Cycle — Part 2: Annual Report Hearings

Debate resumed on the motion of Hon Alanna Clohesy, That the Report be noted.

8. Questions Without Notice

Questions without notice were taken.

The Minister for Environment representing the Minister for Transport, in accordance with Standing Order 108(2), advised that an answer to questions on notice 2205 asked by Hon Dr Steve Thomas will be provided on 20 August 2019.

9. Consideration of Committee Reports

Pursuant to order for the consideration of Committee Reports (*see item 8 above*).

In Committee

(Hon Adele Farina in the Chair)

Standing Committee on Estimates and Financial Operations — Report 77 — 2017-18 Budget Cycle — Part 2: Annual Report Hearings

Debate resumed on the motion of Hon Alanna Clohesy, That the Report be noted.

Interruption pursuant to order.

The President resumed the Chair.

The Deputy Chair of Committees reported that the Committee of the Whole House had considered the —

- (1) Standing Committee on Environment and Public Affairs — Report 49 — *Mechanisms for compensation for economic loss to farmers in Western Australia caused by contamination by genetically modified material* and postponed consideration to the next sitting.
- (2) Select Committee into Elder Abuse — Final Report — *'I never thought it would happen to me': When trust is broken*, made progress and seeks to sit again.
- (3) Standing Committee on Estimates and Financial Operations — Report 77 — *2017-18 Budget Cycle — Part 2: Annual Report Hearings*, made progress and seeks to sit again.

Report adopted.

10. Suspension of Standing Orders

Hon Simon O'Brien moved, without notice —

That so much of Standing Orders be suspended to enable Hon Simon O'Brien to move a motion without notice.

The motion requiring the concurrence of an absolute majority.

Question — put.

The President having counted the Council, and there being an absolute majority present, and no dissentient voice, declared the motion carried with the concurrence of an absolute majority.

11. Order of Business

Hon Simon O'Brien moved without notice —

That the Order of the Day regarding Report No. 55 of the Standing Committee on Procedure and Privileges, *A Refusal to Comply with a Summons to Produce Documents*, be made Order of the Day No. 1 for the next sitting of the House, and to remain as Order of the Day No. 1 until resolved.

Question — put and passed.

12. Order of Business

Ordered — That Bills for Introduction No. 5, *Reserves (Marmion Marine Park) Bill 2019*, be taken forthwith. (Minister for Environment).

13. Reserves (Marmion Marine Park) Bill 2019

The Minister for Environment, pursuant to notice, moved —

That a Bill for "An Act to excise an area from Marmion Marine Park to facilitate the development of the Ocean Reef Marina." be introduced and read a first time.

Question — put and passed.

Bill read a first time.

The Minister for Environment moved, That the Bill be read a second time.

The Minister for Environment tabled an Explanatory Memorandum relating to the Bill. (Tabled Paper 2930).

Debate stands adjourned.

14. Wittenoom Closure Bill 2019

The Acting President reported the receipt of Message No. 137 from the Legislative Assembly forwarding the Bill for concurrence.

The Minister for Environment moved, That the Bill be read a first time.

Question — put and passed.

Bill read a first time.

The Minister for Environment moved, That the Bill be read a second time.

The Minister for Environment tabled an Explanatory Memorandum relating to the Bill. (Tabled Paper 2931).

Debate stands adjourned.

15. TAB (Disposal) Bill 2019 and Betting Control Amendment (Taxing) Bill 2019

The Orders of the Day having been read for the adjourned debate on the second reading of these Bills cognately.

Debate resumed.

The Minister for Environment representing the Treasurer tabled letters from various Western Australian racing clubs to the Minister for Racing and Gaming concerning the *TAB (Disposal) Bill 2019*. (Tabled Paper 2932).

Debate resumed.

Interruption pursuant to order.

16. Members' Statements

Statements were taken.

Hon Robin Scott, by leave, tabled documents. (Tabled Paper 2933).

17. Adjournment

The Council adjourned at 6.46pm until Thursday, 15 August 2019 at 10.00am.

Members present during the day's proceedings

Attendance: Present all Members except Hon Jim Chown and Hon Darren West.

NIGEL PRATT
Clerk of the Legislative Council

HON KATE DOUST MLC
President of the Legislative Council

Uncorrected Draft