THIRTY-NINTH PARLIAMENT

REPORT 41

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

RECALL OF THE LEGISLATIVE COUNCIL

Presented by Hon Barry House MLC (Chair)

September 2016

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Date first appointed: 24 May 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'**1. Procedure and Privileges Committee**

1.1 A *Procedure and Privileges Committee* is established.

1.2 The Committee consists of 5 Members, including the President and the Chair of Committees, and any Members co-opted by the Committee whether generally or in relation to a particular matter. The President is the Chair, and the Chair of Committees is the Deputy Chair, of the Committee.

1.3 With any necessary modifications, SO 163 applies to a co-opted Member.

1.4 The Committee is to keep under review the law and custom of Parliament, the rules of procedure of the Council and its Committees, and recommend to the Council such alterations in that law, custom, or rules that, in its opinion, will assist or improve the proper and orderly transaction of the business of the Council or its Committees.'

Members as at the time of this inquiry:

Hon Barry House MLC (Chair)

Hon Adele Farina MLC (Deputy Chair)

Hon Martin Aldridge MLC

Hon Kate Doust MLC

Hon Nick Goiran MLC

Staff as at the time of this inquiry:

Nigel Pratt (Clerk of the Legislative Council)

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IN RELATION TO THE RECALL OF THE LEGISLATIVE COUNCIL

1 REFERENCE AND PROCEDURE

1.1 On 7 September 2016 the *Procedure and Privileges Committee* ("the PPC") met to consider the referral from the President in relation to the provisions for the recall of the Legislative Council.

1.2 The referral arose as a result of the manner in which the Executive attempted to exercise a questionable power to recall the parliament for the purpose of holding a joint sitting of the Council and Assembly to choose a person to hold the place of a Senator whose place had become vacant under section 15 of the *Commonwealth of Australia Constitution Act*.

1.3 This report canvasses the PPC's deliberations and recommendation in relation to a provision for the recall of the Legislative Council.

2 RECALL OF THE LEGISLATIVE COUNCIL

Background

2.1 On 1 March 2016 during an adjournment debate speech Senator Joe Bullock announced that he would shortly resign from the Senate.[1] The resignation foreshadowed by Senator Bullock did not formally occur until 13 April 2016, at which time the resignation caused a vacancy to occur in Western Australia's representation in the Senate.

2.2 On 21 April 2016 the Premier of Western Australia, Hon Colin Barnett MLA, subsequently announced in the media that the two Houses would conduct a special joint sitting to choose a person to fill the Senate vacancy.[2]

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1 Commonwealth, *Parliamentary Debates*, Senate, 1 March 2016, 1521-1526.

2 *WA Parliament to be recalled to endorse Pat Dodson as Bullock replacement*, ABC Online, 21 April 2016, p1 (http://www.abc.net.au, accessed 2 July 2016). Premier's Press Release, 21 April 2016.

Joint Standing Rules and Orders of the Legislative Council and Legislative Assembly

2.3 The Joint Standing Rules and Orders of the Legislative Council and Legislative Assembly for the Election of a Senator to the Federal Parliament were adopted by the Council on 21 July 1903 and approved by His Excellency the Governor on 25 July 1903. To comply with the Joint Standing Rules and Orders for the choosing of a person to hold the place of a Senator, the Council and the Assembly must first meet separately to pass the necessary resolutions to convene a joint sitting.

2.4 In this instance the Legislative Council was not in a position to resume its sittings as it had adjourned its proceedings on 7 April 2016 and was not scheduled to resume until 10 May 2016. The Standing Orders of the Assembly provides a capacity for the Speaker to vary a date of an adjournment on request from the Leader of the Government.[3] The Standing Orders of the Council, however, do not contain an equivalent express capacity and alterations to the sitting schedule require a resolution supported by an absolute majority[4] of members.

Joint Sitting

2.5 To overcome this obstacle, the Western Australian Executive, acting on advice, recommended to Her Excellency the Governor in Executive Council to publish a proclamation for the Legislative Council and Legislative Assembly to abridge their existing adjournment and meet to facilitate a joint sitting. This proclamation was not authorised by s. 3 of the *Constitution Acts Amendment Act 1899*, any other written law or any Crown prerogative.

2.6 To avoid giving legitimacy to a proclamation of dubious validity, the President proceeded with a recall of the Legislative Council based on independent legal advice received from Mr Bret Walker SC.

2.7 Mr Walker's advice was that the presiding officers of the Parliament of Western Australia may abridge an earlier adjournment by reason of the power exercisable by the Speaker of the House of Commons to recall that House. This power is one possessed by each House of the Western Australian Parliament and exercisable by their presiding officers by the operation of s. 1 of the *Parliamentary Privileges Act 1891* which provides:

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[3] SO 25, *Standing Orders of the Legislative Assembly of the Parliament of Western Australia*.

[4] SO 6(2), *Standing Orders of the Legislative Council of the Parliament of Western Australia*.

1. Privileges, immunities and powers of Council and Assembly

The Legislative Council and Legislative Assembly of Western Australia, and their members and committees, have and may exercise —

(a) the privileges, immunities and powers set out in this Act; and

(b) to the extent that they are not inconsistent with this Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989.

2.8 The Legislative Council, pursuant to the President's notice to all members, was reconvened at 10.00am on Thursday, 28 April 2016, and at the joint sitting held later that morning Mr Patrick Lionel Dodson, being the only nominee, was chosen to fill the vacancy.

3 RECOMMENDATION

3.1 In considering the referral from the President the PPC noted the instructive evaluation of the related issues addressed in a paper delivered by the Clerk of the House at the *47th Presiding Officers and Clerks Conference* in July 2016.

3.2 Rather than repeat this evaluation in the body of its report, the PPC has appended the Clerk's edited paper at Appendix 1 and makes the following recommendation —

Recommendation 1:

That **Standing Order 6** be amended as follows —

To insert after (2) —

(3) When the Council is adjourned, the President may, on the request of the Leader of the House and after consultation with the Leader of the Opposition vary the day and time at which the Council will next meet.

3.3 The recommendation above reflects the discretionary power granted to the Speaker by SO 25 of the Standing Orders of the Legislative Assembly of Western Australia.

Hon. Barry House MLC
Chair
13 September 2016

APPENDIX 1

IRRECONCILABLE DIFFERENCES AND THE FATHER OF RECONCILIATION

By Nigel Pratt

Clerk of the Legislative Council of Western Australia

This paper is only indirectly about Patrick Dodson, widely accepted as the father of aboriginal reconciliation in Australia, and an eminent Australian. On Thursday, 28 April 2016 Mr Dodson was selected unopposed at a joint sitting of the two Houses of the Parliament of Western Australia to fill the vacancy in the Australian Senate resulting from the resignation of Senator Joe Bullock. Mr Dodson was sworn in and took his seat in the Senate on Monday, 2 May 2016. Six days later on a chilly Mothers' Day in Canberra, the Governor-General of Australia was advised by the Prime Minister to dissolve the two Houses of the Federal Parliament effective from 9.00am the next day, Monday, 9 May 2016. That Mothers' Day the PM announced that a double dissolution Federal election would take place on Saturday, 2 July 2016.[5] Mr Dodson is in a select group of Senators having served for less than two weeks before becoming a political 'feather duster'.[6] Being number three on the Western Australian Senate ticket for the Australian Labor Party in the recent July 2 poll guaranteed him a reprise as Senator for Western Australia.[7]

But this isn't about Mr Dodson or his famous black Akubra. He is a minor player in the story that follows. His is the object and precipitant of action by the Western Australian Executive for reasons still unclear. This action was to require the Houses of the WA Parliament to convene a joint sitting at a time of the Executive's choosing to fill a Senate vacancy where the person chosen to fill that vacancy would be a Senator for a matter of days. This story is about the powers and privileges of a House of Parliament and its capacity to resist the seemingly irresistible force of Executive will.

Political theory occasionally founders on the rocks of political reality. Political theory tells us that Parliament is supreme and that in accordance with the privilege of exclusive cognisance it determines its own business and when it adjourns and reconvenes. The privilege of a House of Parliament to determine its own adjournments is of course subject to any statutory power granted to the Crown or any Crown prerogative. The most common exercise by the

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5 *Federal Election 2016: Malcolm Turnbull calls July 2 double dissolution poll*, *The Sydney Morning Herald* online, James Massola, Sunday, 8 May 2016 (http://www.smh.com.au, accessed 28 June 2016).

6 Pat Dodson served 12 days as Senator for Western Australia from date of being chosen to date of dissolution of the Senate on 9 May 2016.

7 As an interesting aside, Louise Pratt, the Senator who lost her place in the Senate in the ALP factional deal that installed Joe Bullock was also elected once more as a Senator for Western Australia.

Crown of a statutory power to determine adjournments is the power of the Crown's representative to prorogue the Houses of Parliament, to dissolve a House of Government and to fix a date for the Legislature to convene for a new session of Parliament.

In parliaments that comprise a single chamber where the governing Executive commands the majority of votes and party discipline is strong, political theory and political reality converge and coalesce. In these cases the Parliament chooses to adjourn and reconvene its sittings at the time effectively determined by the Executive. To a casual observer this raises no concerns. However, in bicameral legislatures where an Executive does not command a majority of votes in a chamber it is the membership of the House and not the Executive which ultimately determines the dates and times of sittings. In some select cases, as will be shown, a Presiding Officer has the capacity to unilaterally alter an adjournment notwithstanding the absence of an express power in the Standing Orders or in statute.

The resignation of Senator Joe Bullock – A conundrum created

Senator Joe Bullock announced that he would resign from the Senate in an adjournment debate speech given on 1 March 2016.[8] However, Senator Bullock did not formally resign until 13 April 2016. Whether the timing was deliberate or not, the effect was that if a person was to fill the vacancy in the Senate there would need to be a joint sitting of the Houses of the WA Parliament. The problem was that the two WA Houses had on 7 April 2016 each adjourned their proceedings until 10 May 2016. There was to be a double dissolution Federal election on 2 July 2016. The timing of the Federal election meant that under s.57 of the Commonwealth *Constitution* the Federal Houses had to be dissolved by no later than 11 May 2016. This was to comply with the constitutional requirement that a simultaneous dissolution of the Senate and House of Representatives "*shall not take place within 6 months before the date of expiry of the House of Representatives by effluxion of time*."[9]

In Western Australia, joint sittings to fill a casual vacancy in the Senate occur on a day that the Houses would usually sit to conduct other business. This is both convenient to Members given they are already in Perth for an ordinary sitting and also minimises the cost to taxpayers. This cost is approximately $63,000 per sitting day. The obvious difficulty arising from the timing of Senator Bullock's resignation and the intended date of the Federal election was that the Senate would be dissolved on or prior to the date when a joint sitting of the WA House would usually occur - Wednesday, 11 May 2016. Even if chosen by a joint sitting on that day, Mr Dodson would not have an opportunity to be sworn in and take his seat in the Senate. If the vacancy was to be filled, a joint sitting would therefore need to take place in April 2016 and the adjournments of the two Houses altered so as to bring each back to conduct this business. To comply with the standing joint rules for the filling of a Senate

[8] SD, 01/03/2016, pp. 1521-1526.

[9] *Commonwealth of Australia Constitution Act 1900*, s.57. There was some debate as to whether this date was in fact Tuesday, 10 May 2016.

vacancy[10] the Houses would first need to meet separately to pass the necessary resolutions to convene a joint sitting and then conduct that joint sitting.

This all appeared to be academic given that any person chosen to fill the vacancy would sit in the Senate for only a matter of days before the Senate was dissolved by the constitutional deadline of 11 May 2016.[11] The usual process by the party whips in the Senate for the granting of pairs would mean that the failure to fill the vacancy would have no influence on the voting for the Bills that were the triggers for a double dissolution Federal election.[12] The Senate rejected these Bills before the Houses of the Western Australian Parliament convened for a joint sitting to select Mr Dodson.[13] It was with some surprise, not only to the Clerks but also to the Presiding Officers, that moves were afoot on 12 April for a joint sitting to occur. The Premier of Western Australian, Hon Colin Barnett MLA, subsequently announced in the media on 21 April 2016 that the two Houses would conduct a special joint sitting to select the ALP nominee, Pat Dodson, to fill the Senate vacancy.[14] This surprise announcement, in the middle of a four week break and when the President of the Legislative Council was overseas, was not warmly greeted by all MPs.[15]

The *Commonwealth of Australia Constitution Act 1900*

Section 15 of the Commonwealth *Constitution* provides the mechanisms by which vacancies in the Senate are filled. There are two mechanisms. Firstly, and the most common is the relevant State Parliament convenes to choose a person to fill the vacancy. In the case of a bicameral parliament this is by a joint sitting of the Houses. Secondly, in the event that the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, on the advice and with the consent of the Executive Council may appoint a person to hold the place for the period of the Senator's remaining term until the expiration of 14 days from the beginning of the next session of the State Parliament. The appointment is later ratified at a joint sitting prior to the expiry of that 14 day period. In the past the Senate has

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[10] Agreed to by both Houses of the Parliament of Western Australia in 1903.

[11] On 21 March 2016 the Prime Minister wrote to the Governor-General requesting that he prorogue the Senate and House of Representatives on Friday, 15 April and summons Parliament to sit on Monday, 18 April 2016. The Senate subsequently resolved to sit on 18, 19 April and 2-4 May 2016.

[12] Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]; and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2] (the ABCC Bills). The Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2] had been rejected twice by the Senate and satisfied the constitutional requirement to trigger a double dissolution election on 17/08/2015. See 17/08/2015, J.2963.

[13] 18/04/2016, J.4117-8.

[14] *WA Parliament to be recalled to endorse Pat Dodson as Bullock replacement*, ABC Online, 21 April 2016, p1 (http://www.abc.net.au, accessed 2 July 2016). Premier's Press Release, 21 April 2016. It should be noted that on 18 April, the day on which the Governor General had recalled the Federal Parliament for its second session, the Senate rejected the ABCC Bills by defeating the question on the second reading thereby providing the primary constitutional trigger for invoking the deadlock provisions of the Commonwealth *Constitution* and allowing for the simultaneous dissolution of the two Houses of Federal Parliament.

[15] *WA Parliament recall to ratify Pat Dodson Senate spot condemned by angry country MPs*, by Jacob Kagi, ABC Online, 22 April 2016 (http://www.abc.net.au, accessed 2 July 2016).

been critical of the time taken by the WA Parliament to fill a Senate vacancy and has passed a resolution to this affect.[16] These occasions demonstrate that the 1977 amendments to the Commonwealth *Constitution* following the manipulation of the then convention for filling Senate vacancies by the Premier of Queensland, Joh Bejelke-Peterson, may not have entirely eliminated the capacity of the States or Territories to affect voting in the Senate by delaying the process for filling vacancies. The alternative view for those of us less prone to conspiracy theories is that, if in place, the pairing arrangements in the Senate make a delay more frustrating to the prospective appointee than to voting outcomes in the Federal Parliament.

The *Constitution Act 1889* (WA)

In the case of filling the vacancy created by the resignation of Senator Bullock, there appeared to be no capacity for the Governor in Executive Council to appoint Mr Dodson unless the Houses of Parliament were first prorogued.

Under the *Constitution Act 1889*, s.3, the Governor has the power to fix a place and time of sessions of Parliament, to prorogue the Houses and to dissolve the Assembly. Other than for any reserve powers the Governor acts on the advice and with the consent of the Executive Council, so in effect the Executive controls when the Houses are prorogued. There is no power in the *Constitution Act 1889* or indeed in the Letters Patent issued under the Royal Sign Manual that provides the Governor of Western Australia with a power to alter the adjournments of the Houses of Parliament other than by prorogation and/or dissolution and setting a date for a new session/Parliament.

The alternative mechanism for the filling of a vacancy via appointment by the Governor in Executive Council is dependent upon the parliament of the State being "*not in session when the vacancy is notified,…*". The words "*session*" and "*in session*" as used in section 15 of the Commonwealth *Constitution* are to be accorded their ordinary parliamentary and legal meaning.[17] This alternative appointment mechanism is therefore only available in circumstances where the Houses have been prorogued so as to bring to an end a session of Parliament.

Prorogation was a very unpalatable option to the Executive given that it would clear the notice paper of all business and require an opening of Parliament for a new session. When the notification of the vacancy was received by the Governor on 13 April 2016[18] the Parliament was in session and only adjourned. So would an appointment by the Governor in

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[16] 3/06/1992, J.2401, on the motion of Senator Chamarette. Ms Chamarette was chosen by joint sitting after 41 days to fill the vacancy arising from the resignation of Senator Jo Valentine. The WA record stands at 108 days when in 1997 Hon Ross Lightfoot MLC was chosen at a joint sitting to fill a Senate vacancy caused by the death of Senator J.H. Panizza on 31/01/1997.

[17] A session is the period of time between the meeting of a Parliament, whether after prorogation or dissolution, and its prorogation. *Erskine May*, 21st edition, 1989, p.220.

[18] Letter from the President of the Senate, Hon Stephen Parry to Her Excellency the Governor of Western Australia, Hon Kerry Sanderson AO dated 13 April 2016.

Executive Council following a prorogation *after* the date of notification satisfy the requirements of section 15? This question was academic as the only politically acceptable option for filling the vacancy was by joint sitting of the Houses. The question therefore arose as to how the Houses of the Western Australian Parliament could be recalled to achieve the Premier's objective.[19]

The Standing Orders

This problem was not one that concerned the Western Australian Legislative Assembly. Under its Standing Orders there is a capacity for the Speaker to vary a date of an adjournment on request from the Leader of the Government.[20] This Standing Order had recently been used to bring the Assembly back on the same day it had been unexpectedly adjourned.[21] The Legislative Council Standing Orders does not contain an equivalent provision.

Certainty for the sittings and adjournments of the House is a matter of some importance to members of Parliament. Having a known annual sitting schedule makes it easier to schedule a Member's limited time between the parliamentary sittings, committee work and electorate and party responsibilities. A review of the Standing Orders of the Legislative Council of Western Australia in 2011 sought to achieve this certainty by requiring that the Leader of the Government table a sitting schedule for the next year's sittings prior to the House adjourning for the summer recess.[22] The House adopts the sitting schedule by resolution and it can only be varied by a subsequent motion supported by an absolute majority.

Altering adjournments have occurred so as to add or vacate sitting days. However, this can only occur via proposing and voting on a motion to do so. There is no standing order as there exists in other Houses permitting the Presiding Officer to unilaterally alter adjournments by recalling the House to a date and time not previously determined. The only power of the President to set a date for a sitting is following a State general election given that on these occasions the House adjourns *sine die*.

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[19] The question of whether in the circumstances the Houses *should* be recalled was of equal relevance given the impending Federal election date.

[20] SO 25, *Standing Orders of the Legislative Assembly of the Parliament of Western Australia*.

[21] Unlike in other jurisdictions where the adjournment motion may only be moved by a Minister, a motion for adjournment in the WA Legislative Assembly may be moved by any Member. The opposition took advantage of the absence from the Chamber of all Ministers and the Government whip to move the adjournment. Under SO 24 this motion is required to "be put immediately by the Chair."

[22] In cases where the following year is an election year the Standing Orders provide that the House is to adjourn to a date and time fixed by the President. This is the only express power providing the President with a power to determine a day and time for sitting. However, the usual position is that in the new year the Governor by proclamation prorogues the Houses and dissolves the Legislative Assembly in preparation for a March State election. The Houses then return on a date and time determined by the Governor via a proclamation made under s.3 of the *Constitution Act 1889*.

Standing Orders are of course intended to be facilitative. This is reflected in SO 1 of the Legislative Council which provides that:

> *These Standing Orders shall in no way restrict or prejudice the method in which the Council may exercise and uphold its powers, privileges and immunities.*

So the question arose as to whether there was a power, privilege or immunity that permitted the House to return to a date and time earlier to the previously agreed adjournment set out in the adopted sitting schedule.

The New Zealand Position and the First Gulf War

New Zealand faced a similar problem on the outbreak of the first Gulf War in January 1991. At that time the New Zealand Parliament was in the middle of a lengthy adjournment until 19 February of that year. There was no statutory basis or provision in the Standing Orders of the New Zealand House of Representatives for the House to abridge its adjournment. The mechanism used to alter the adjournment and recall the House was for the Governor General of New Zealand to prorogue the House of Representative and convene a new session of parliament.[23] This resulted in a new SO 55 following a recommendation of the Standing Orders Committee. This standing order enables both abridged adjournments and adjournments postponed to later times. In the period before SO 55, in order to guard against the contingency of it being necessary for the House to reassemble during an adjournment, it was the practice in New Zealand to include provision in the adjournment motion for this to be permitted at the instigation of the Government.

The House of Commons

Erskine May refers to a power conferred by the Houses of Parliament on the Speaker and Lord Chancellor to alter adjournments. In the House of Commons this is provided for in SO 13. This permits the Speaker on the representation of the Government and being satisfied that it is in the public interest to do so, to alter the adjournment and recall the House to an earlier date by the publication of a notice specifying the date and time of sitting. The history of these arrangements is relatively recent.[24] In both the Lords and the Commons the capacity of the presiding officers to alter adjournments was first formalised by sessional resolutions. These resolutions arose from the frequent need for recalls experienced during WWII. House of Commons Standing Order 13 which currently regulates these arrangements was first made in 1947.[25]

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[23] *Parliamentary Practice in New Zealand*, David McGee, Third Edition, p.153.

[24] *Erskine May*, 21st Edition, p.224.

[25] Advice from House of Commons Clerk of the Journals dated 22 April 2016.

There are also UK statutes which empower the Crown to recall Parliament during an adjournment in the event of war or national emergency or the demise of the Crown.[26] There is no statutory equivalent in Western Australia. Even if there were, the appointment of a Senator for Western Australia in April 2016 to be sworn in on 2 May when there would be a prorogation of the Senate on or before 11 May could hardly be considered an 'emergency'.

The Solicitor General's Advice

The Western Australian Executive sought to assist the President of the Legislative Council and its Chief Clerk by providing a copy of an advice by the Solicitor General, Grant Donaldson SC, to the Premier and the Attorney General. In his advice the Solicitor General contended that there were several bases upon which the Legislative Council could sit prior to 10 May 2016 to facilitate a joint sitting. All of these required the adjournment of the Legislative Council to be abridged to an earlier date.

Parliamentary Privileges Act 1891

The Solicitor General contended that the Presiding Officers of the Western Australian Parliament have a power to alter adjournments and to recall the Houses by reason of section 1 of the *Parliamentary Privileges Act 1891*. This Act grants each House to the extent that they are not inconsistent with the Act, "*the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989*."[27]

The 21st Edition of *Erskine May* provides commentary to the effect that both Houses have a capacity to alter their adjournments under powers conferred by each House on their presiding officers. In his advice, the Solicitor General conceded that although *Erskine May* recites a custom of the House of Lords and Commons by which they could be recalled, later incorporated into specific standing orders, there was nothing in the relevant passage in *Erskine May* to suggest that, in respect of the House of Commons, the practice or power of recalling emanates other than from a standing order.

Although not referred to by the Solicitor General in his advice, the case of *Stockdale v Hansard* (1839) 9 ad. & E. 1. is relevant. This case established the well-known principle of parliamentary law that a resolution of a single house could not create a new privilege or alter

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[26] *Emergency Powers Act 1920* (UK). Under this now repealed Act, the Crown could recall parliament in cases where a state of emergency was declared. The *Civil Contingencies Act 2004* (UK) largely replicates the repealed provisions. See s.28.

[27] This date was chosen and the Act amended in 2004 to avoid what was seen as undesirable consequences flowing from the amendment to the then *Defamation Act 1996* (UK) prompted by the 1995 stay of defamation proceedings issued by Neil Hamilton MP against *The Guardian* newspaper for its 'cash for comment' story. The amendment (s. 13) permitted individual members of parliament to waive privilege. In addition the *Human Rights Act 1998* (UK) brought the Westminster Parliament under the jurisdiction of the European Court of Human Rights in certain matters including aspects of parliamentary privilege. See Legislative Assembly Procedure and Privileges Committee Report No. 5, 2004, *Parliamentary Privilege and its Linage to the UK House of Commons*.

the law of the land. Applying this principle to the current situation would mean that merely because the House of Commons had a standing order that permitted its Speaker to abridge adjournments, this did not of itself mean that the President of the Legislative Council possessed this power. So the Solicitor General concluded that the power of recall granted to the Speaker in the Commons standing order was not a privilege or power of the House of Commons and therefore could not be imported to Western Australia by operation of section 1 of the *Parliamentary Privileges Act 1891*. In that respect the Solicitor General and I were in agreement.

***Meeting of Parliament Act 1799* (UK) and *Meeting of Parliament Act 1870* (UK)**

The first means by which the Solicitor General argued that the Legislative Council could abridge its adjournment also related to the *Parliamentary Privileges Act 1891* and derived from the same reference in *Erskine May*. This argument centred on two rather old British statutes, the *Meeting of Parliament Act 1799* (UK) and the *Meeting of Parliament Act 1870* (UK). The 1799 Act which remains in force in the UK enables the Crown to issue a proclamation for the Houses of Parliament to meet in circumstances where they have adjourned for not less than fourteen days. The 1870 Act amends the 14 day adjournment period to 6 days. A minimum of 6 days' notice is required in respect of any proclamation of the Crown to recall the Houses to an earlier date.

The Solicitor General contended that these UK Acts could be understood to be in respect of "*the privileges, immunities and powers*" of the House of Commons within the meaning of section 1(b) of the *Parliamentary Privileges Act 1891*. Because these privileges, immunities and powers were not inconsistent with the 1891 Act he reasoned that they were also powers of the two Houses of the Western Australian Parliament. In this argument the Solicitor General fundamentally misconceived the purpose of the UK Acts and the tripartite nature of the UK Parliament as distinct from two of its constituent parts; the House of Lords and the House of Commons. The grant of power in the two UK Acts is to the Crown. Its purpose is to modify the privilege of exclusive cognisance of two of Parliament's three constituent parts so far as this relates to the power of the two Houses to determine their own adjournments. The UK Acts do this by granting one of the constituent parts of the Parliament, the Crown, a power to modify adjournments in certain circumstances. The nature of these UK Acts are the very opposite of a privilege, immunity or power of a House of Parliament. As such the statutory power to alter adjournments granted to the Crown is not capable of being imported to the two Houses of the Western Australian Parliament by operation of section 1 of the *Parliamentary Privileges Act 1891*. Indeed, taken to its logical conclusion the Solicitor General's reasoning could mean that all manner of UK statutes that touched on the operation of the UK Parliament could affect the two Houses of the Western Australian Parliament.

Reception of Laws

The second means by which the Solicitor General contended that the Legislative Council could be recalled was because the *Meeting of Parliament Act 1799* (UK) was received law in Western Australia. As a result the Solicitor General argued that the Crown could exercise the powers under the 1799 UK Act. This could be affected by a proclamation recalling the Houses. The Solicitor General conceded that the *Meeting of Parliament Act 1870* (UK) could not be received law given it was enacted after the colony was founded on 1 June 1829 and no Act had been passed applying that Imperial Act to the colony or adopting or re-enacting it. Only the 1799 UK Act could be received law. The fact that the 1870 UK Act could not be received law made no material difference as the Western Australian Parliament at the material time was adjourned for longer than 14 days, the period specified in the 1799 UK Act which enabled the Crown to recall the UK Houses of Parliament. If the 1799 UK Act was received law then the Western Australian Governor on the advice of her Executive Council could recall the WA Houses of Parliament using the power contained in that UK Act. The Solicitor General cited the position in Victoria to support his argument. However, the constitutional arrangements in that State are very different to Western Australia and unlike Victoria the 1799 UK Act (and its 1797 predecessor) was not included in an Imperial Acts Application Act and the State's Constitution Act.[28]

The test for the reception of laws doctrine is well known, though its application in particular cases is more problematic. The rule is referred to by Blackstone[29] and the case of *Cooper v Stuart* (1889) 14 App. Cas. 286 is one of the better illustrations of the long established rule of English law that when Englishmen settled on land which,

> *…consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British Dominions…the law of England must (subject to well established exceptions) become from the outset the law of the Colony and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute.*[30]

Captain James Stirling, the founder of the Swan River Colony and later its Lieutenant Governor, issued a proclamation on 18 June 1829 which reflected this position as follows:

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[28] *Imperial Acts Application Act 1922* (Vic), s.66. See also *Constitution Act 1975* (Vic), ss.20-22.

[29] W. Blackstone, *Commentaries on the Laws of England* (London, 1876) Vol.1, p.107.

[30] *Cooper v Stuart* (1889) 14 App. Cas. 286 at p.291.

> *The Laws of the United Kingdom so far as they are applicable to the circumstances of the case…do immediately prevail and become security for the Rights, Privileges and Immunities of all His Majesty's Subjects found or residing in such Territory.*[31]

The argument contending that the *Meeting of Parliament Act 1799* (UK) could be reasonably applied to the circumstances of the Colony at settlement is difficult to accept. The 1799 UK Act was enacted for the purpose of providing the Crown with a capacity to shorten adjournments of the two Houses of the British Parliament. For a law of the United Kingdom to be received in Western Australia it must be reasonably applicable to the circumstances of the colony.[32] The Colony of Western Australia did not have an elected legislature until 1870 when the Legislative Council consisted of 18 members, 12 of whom were elected. Bicameral responsible government did not arrive until 1890.[33] Prior to 1870 the legislature consisted of appointed members from 1832. There was no parliament in Western Australia when the colony was founded. I do not understand how a rule of UK statute law applicable to the Houses of the UK Parliament could become part of our law in 1829 but somehow lie dormant for more than 60 years until the State had a Parliament that it could supposedly apply to.

Similarly, like many colonial outposts of Great Britain, the colony of Western Australia did not automatically receive via the reception of laws doctrine the equivalent powers, privileges and immunities possessed by the Houses of the British Parliament upon establishment of the colony in 1829.[34] Western Australia had to pass a privilege statute in 1891 for this to occur.[35] Unlike in Victoria, there was never an adoption statute or a statutory equivalent of the 1799 UK Act passed in this State.

The doubt surrounding the reception of some UK laws arising from the reasonable application test was expressed by the Law Reform Commission of Western Australia in 1994.[36] The Commission referred to the *Meeting of Parliament Act 1797*[37] and included it in a list of received UK statutes. Its report also referred to various United Kingdom statutes that related to parliamentary privilege. The Commission recommended that the UK statutes relating to parliamentary privilege be repealed as, whether or not they were part of the

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[31] See *A History of Law in Western Australia and its Development From 1829 to 1979*, by Enid Russell, UWA Press, 1980, Chapter 6.

[32] Others include that Private Acts and laws of specific rather than general application were not received.

[33] One argument not considered at the time was that the *Constitution Act 1889* (WA), s.3 impliedly repealed the 1799 UK Act, if indeed it was ever received law in WA.

[34] The *Interpretation Act 1984* (WA), s.73 provides certainty by specifying that 1 June 1829 is the date of establishment of the State of Western Australia. *Kielly v Carson* (1842) 4 Moo PC 63 and *Fenton v Hampton* (1858) 11 Moo PC 347 established that colonial legislatures did not have the punitive powers possessed by the British Parliament.

[35] The *Parliamentary Papers Act 1891* was also enacted, a statute the direct consequence of the judicial decision in *Stockdale v Hansard* (1839) 9 ad. & E. 1.

[36] Law Reform Commission of Western Australia, Project 75 – *United Kingdom statutes in force in Western Australia*.

[37] 37 George III chapter 127.

received law, they were effectively incorporated into Western Australian law by section 1 of the *Parliamentary Privileges Act 1891*. A point made by the Law Reform Commission about the Imperial parliamentary privilege statutes that applied equally to the *Meeting of Parliament Act 1797* (and the 1799 UK Act) was as follows:

> *"In any case, the statutes might not have been inherited when the colony of Western Australia was founded because they were not reasonably capable of being applied under local conditions, there being no local legislature."*[38]

It is also of some significance that the *Meeting of Parliament Act 1797* (UK) was not listed in the Commission's report as one of the statutes relating to Parliamentary Privilege. In this regard it would seem that the Commission, unlike the Solicitor General, took the view that the *Meeting of Parliament Act 1797* (UK) was not one relating to the powers, privileges or immunities of the House of Commons.

Contrary to the Solicitor General's view, I considered that it was extremely doubtful that the *Meeting of Parliament Act 1799* or its 1797 predecessor referred to in the Law Reform Commission report was received law in Western Australia. The 1799 UK Act was simply not reasonably capable of being applied under local conditions in the Colony of Western Australia.

Retrospective validation of sitting

The third and final argument by the Solicitor General was that the Legislative Council could be recalled by the President unilaterally convening a sitting at the request of the leaders of government and opposition and informing all Members of the new sitting date and ordering Members to convene on this date. At that sitting the House would retrospectively validate the abridged adjournment. In an additional note of advice to the Attorney General, the Solicitor General stated that this was the State Governor's preferred way to proceed following his verbal briefing to Her Excellency on the advices he had previously provided to the Executive.[39] Western Australian parliamentary committees have made similar arrangements in the past in circumstances where all of their membership agrees by way of a unanimous circular resolution later ratified at a meeting. There was no precedent in Western Australia for such action relating to a sitting of a House in plenary session and no power in its standing orders for this to occur. The New Zealand Parliament did not proceed in this way in 1991 and the Executive advised the Crown to prorogue the Houses to commence a new session to affect a recall. Given the absence of any express power in the Standing Orders or statute the President of the WA Legislative Council certainly did not want to unilaterally recall the House without clear and independent advice that he had such a power. Short of

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[38] Law Reform Commission of Western Australia, Project 75 – *United Kingdom statutes in force in Western Australia*, p.92 / Appendix I.

[39] Note from Solicitor General, Grant Donaldson SC to the Attorney General, Hon Michael Mischin MLA, *The Process for Filling of a Casual Senate Vacancy*, dated 19 April 2016.

prorogation the Executive and the President of the Legislative Council faced the constitutional equivalent of a 'Mexican standoff'.

An Invalid Proclamation

By the time the Solicitor General's opinion was received it was obvious that if the President of the Legislative Council did not act to recall the House then the Executive would act to have the Governor issue a proclamation. This proclamation would need to be issued under the *Meeting of Parliament Act 1799* (UK) on the grounds that this was part of the received law of Western Australia. At that time the President of the Legislative Council warned the Premier that the 1799 UK Act was not a power privilege or immunity of the Houses of the WA Parliament and of the legal doubt surrounding the 1799 UK Act being received law in Western Australia.[40]

It was with some surprise that the Secretary to the Executive Council provided me with a copy of the proposed proclamation for my comment prior to it being presented to Her Excellency in Executive Council. Most concerning to me was its omission of any statutory basis for its issue. Perhaps the reference to an ancient UK statute may have raised eyebrows when the proclamation was read by the two Clerks in their respective chambers. Perhaps it was thought that the omission of the statutory basis of the proclamation would assist in deflecting a possible legal challenge to its validity.[41] Whatever the reason the omission of an express legal power was a matter for Her Excellency and her advisors but is makes a stark contrast to past proclamations calling a meeting of the Houses. The proclamation to recall the Houses was issued on 21 April 2016 and published in the *Gazette*. Notwithstanding the omission in the proclamation of a statutory power it complied with the requirement under the *Meeting of Parliament Act 1799* that 6 days' notice be given to Members for the specified date of meeting, Thursday, 28 April 2016. Although not stated, it was obvious that this was the statutory power relied upon by the Executive consistent with the Solicitor General's advice.

Bret Walker QC - London Calling

When the Solicitor General's advice was received and it became obvious that the Executive would proceed to force the Legislative Council to sit earlier I sought some independent legal advice. Naturally and like many other Australian Clerks I turned to Australia's pre-eminent constitutional lawyer, Mr Bret Walker SC. His always helpful Executive Assistant who answered the phone said that he was in London. Nevertheless materials, including a copy of

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[40] Letter from the President of the Legislative Council, Hon Barry House MLC to the Premier, Hon Colin Barnett MLA, dated 20 April 2016.

[41] A previous Clerk of the Legislative Council had sought a declaration from the Supreme Court of Western Australia regarding the lawfulness of presenting to the Governor for the Royal Assent two Bills that had not passed both Houses with an absolute majority in accordance with manner and form provisions contained in the *Electoral Distribution Act 1947* (WA), s 13. The matter was appealed to the High Court of Australia where the court found in favour of the Clerk. See *Attorney General (WA) v Marquet* (2003) 217 CLR 545.

the Solicitor General's advice managed to find their way to Mr Walker in his London hotel room. The materials provided included information that I had received from the Clerk of the Journals in the House of Commons regarding the history of the development of SO 13 of the Commons pertaining to the Speaker exercising a power to recall the House.

Given the urgency of the matter, Bret Walker's location and the seven hour time difference he was not able to provide at that time a written opinion. However, we had a lengthy telephone conversation on the late evening of 20 April 2016 in which he went through each of the Solicitor General's arguments dismissing them. However, one argument that had been considered and dismissed by both me and the Solicitor General concerned whether the House of Commons possessed a power, exercisable by the Speaker and reflected in Commons SO 13 found favour with Bret Walker SC. In his view this was an existing power *regulated* by the relevant Commons standing order rather than created by it. As such it was a power of the House of Commons that could be included by reference as one possessed by each House of the Western Australian Parliament under s.1 of the *Parliamentary Privileges Act 1891*.

Bret Walker SC was particularly concerned that should the Legislative Council concede to the Crown's proclamation exercising a purported power to shorten its adjournment, this concession would provide legitimacy to a Crown power that did not exist in Western Australia. He urged the Council to take an alternative approach consistent with his advice. This was for the President to recall the Legislative Council based on the power of recall arising from the power of the House of Commons, vested in its Speaker and incorporated in Western Australia by reference under the *Parliamentary Privileges Act 1891*.

Recall of the Legislative Council under House of Commons Practice

So as to avoid giving legitimacy to the proclamation and the Executive's contention that the Crown had a power to recall the Houses in these circumstances, the President decided to proceed with a recall of the House based on Bret Walker's advice. Commons practice was followed to the extent possible. Legislative Council Members were advised in writing by the President of the basis for this action after the proclamation was gazetted.[42] A notice was placed in the public notices section of *The West Australian* newspaper on Tuesday, 26 April which mirrored the wording of the Commons' Speaker's Notice that appears in the *London Gazette*.

When the Legislative Council convened its sitting at 10.00am on Thursday, 28 April 2016 for the purpose of passing the necessary resolutions for a joint sitting to occur later that morning it was not the proclamation of Her Excellency that was read by me but the notice issued by the President.[43] This procedure was followed to ensure that no legitimacy was given to a

[42] Memorandum sent to all Members of the Legislative Council by email on Sunday, 24 April 2016.

[43] By contrast the proclamation was read in the Legislative Assembly.

proclamation of dubious validity and so that a precedent would not be set, at least in respect of the Legislative Council of Western Australia.

At the joint sitting held later that morning Mr Dodson, being the only nominee, was chosen to fill the vacancy. Another record was broken in this process. His selection now holds the record in the Western Australian Parliament as the shortest time between a vacancy being created and the joint sitting to select the replacement - 15 days.

Conclusion: Why all the fuss?

In the absence of the co-operation of a Presiding Officer the Executive has no power to alter the adjournments of a House of Parliament other than in accordance with the law. In this particular case the *Constitution Act 1889* (WA), s.3 provides a means to alter an adjournment via prorogation.

The advice of Bret Walker SC is that the Presiding Officers of the Western Australian Parliament each have a power to abridge adjournments of the House imported from the House of Commons by reference under s. 1 of the *Parliamentary Privilege Act 1891*. This power is independent of any standing order that expressly provides such a power, or indeed that may be inconsistent with this power. The Legislative Council was recalled on this basis for the purpose of sitting on the one day to pass the necessary resolutions so that a joint sitting could proceed on the same day to choose Mr Dodson to fill the Senate vacancy. The proclamation by the Governor to recall the House was ignored by the Legislative Council given its dubious legality.

I remain uncomfortable with the view that a Standing Order of the House of Commons, first introduced as a sessional order in the 20th century, can be elevated to the status of a power or privilege and as a result of the *Parliamentary Privileges Act 1891* imported by reference as a power of the Houses of the WA Parliament. Those Australian jurisdictions that 'peg' their privileges and powers to those of the House of Commons as at 1901 when the Commonwealth and Federation of States was created would certainly not have this 20th century 'power' available. These jurisdictions would need to rely upon an express power in their Standing Orders, a local statute or the application of ancient UK laws such as the *Meeting of Parliament Act 1799* (UK) and the *Meeting of Parliament Act 1870* (UK) via an Imperial Act application Act. As has been shown, an argument applying the 1799 UK Act based on the doctrine of reception of laws cannot be sustained in Western Australia and a similar conclusion could be reached in other Australian jurisdictions.

Standing Orders are merely resolutions of a House and cannot create a privilege or alter the law. This was put beyond doubt in the famous case of *Stockdale v Hansard*. However, Standing Orders can be made to regulate the proceedings of a House of Parliament and this includes the times that it meets and the manner in which adjournments are determined. This is one of a House of Parliament's undoubted powers as part of the privilege of exclusive cognisance. The power to make standing orders for the regulation and orderly conduct of business is expressly provided for in the *Constitution Act 1889* (WA), s. 34 as follows:

34. Standing Rules and Orders

The Legislative Council and Legislative Assembly, in their first session, and from time to time afterwards as there shall be occasion, shall each adopt Standing Rules and Orders, joint as well as otherwise, for the regulation and orderly conduct of their proceedings and the despatch of business, and for the manner in which the said Council and Assembly shall be presided over in the absence of the President or the Speaker, and for the mode in which the said Council and Assembly shall confer, correspond, and communicate with each other, and for the passing, intituling, and numbering of Bills, and for the presentation of the same to the Governor for Her Majesty's assent.

As a consequence moves are afoot to amend the Legislative Council Standing Orders so as to provide a discretion to the President similar to that provided to the Speaker of the Commons and the Speaker of the WA Legislative Assembly to exercise a power to alter the adjournments of the House where certain criteria are met. It should be remembered that this inherited power will remain a discretion of the presiding officer who may not necessarily do the bidding of the Government of the day. Such a power helps to maintain the independence of a House of Parliament from the Executive and is preferable to giving credibility to a purported power of the Crown to erode this independence by enlarging its capacity to direct when a House of Parliament is to convene.

The remarkable outcome in this case demonstrates the length to which an Executive will go when there is resistance to a proposed course of action supported by valid considerations, some of which may not be founded in legal argument. I congratulate Mr Dodson on his appointment and I am confident that he will bring his undoubted wisdom and political strengths to the Senate. However, his appointment by the hurriedly convened joint sitting of the WA Parliament made no difference to the Senate's consideration of the Bills that were double dissolution triggers. That matter had been resolved 10 days earlier. At that time Mr Dodson's election as a Senator for Western Australia from 2 July 2016 was assured by his place on the ALP Senate ticket.

Regarding the different approaches taken by the President of the Legislative Council and the Crown/Executive and their respective advisors perhaps the last word should go to Mr Bret Walker SC whose opinion I have attached together with the opinion of the Solicitor General and other relevant appendices:

> *This Opinion does not purport to be a detailed response to or critique of the reasoning set out by the Solicitor General in his Opinion to the Premier and Attorney General dated 19th April 2016. Nor does it spell out and address in detail the implications of the possible approach or approaches thought by the Executive to justify the proclamation by the Governor made on 21st April 2016. Rather, the explanation below sets out what I regard as the only lawful means by which the recall of the Legislative Council could have been accomplished. It follows in my respectful opinion, that everything inconsistent with this approach, that can be seen explicitly in the*

> *reasoning of the Solicitor General and might be inferred in the bald proclamation of the Governor, is wrong.*[44]

Although I could never express myself to the eloquent and erudite standard of Mr Bret Walker SC, I trust that this paper has provided the necessary detailed response to and critique of this reasoning.

[44] Opinion of Bret Walker SC – *Legislative Council of Western Australia, Power of President to Recall for Joint Sitting to Elect a Senator*, dated 30 June 2016.

APPENDICES

A	19/04/2016	Advice by Solicitor General of Western Australia, Grant Donaldson SC to the Premier and Attorney General – *The Process for Filling of a Casual Senate Vacancy*.
B	19/04/2016	Note by Solicitor General of Western Australia, Grant Donaldson SC to the Attorney General - *The Process for Filling of a Casual Senate Vacancy*, Re discussions with Governor.
C	21/04/2016	Proclamation published in the Government *Gazette* recalling the Legislative Council and Legislative Assembly, together with a proclamation calling the Houses to meet following a general election (for purposes of comparison).
D	24/04/2016	Memorandum from the President of the Legislative Council to all Members advising of recall of the Legislative Council under the *Parliamentary Privileges Act 1891*.
E	30/06/2016	Opinion of Bret Walker SC, *Legislative Council of Western Australia, Power of President to Recall for Joint Sitting to Elect a Senator*, dated 30 June 2016.

Appendix A

SOLICITOR GENERAL
WESTERN AUSTRALIA

19 April 2016

HON PREMIER
HON ATTORNEY GENERAL

THE PROCESS FOR FILLING OF A CASUAL SENATE VACANCY

1. You have my opinion of 8 April 2016 relating to the above.

2. I need not repeat it. Since that date, and as expected, Senator Bullock, a Senator from Western Australia, resigned from the Senate as from 13 April 2016. Upon resignation, his position became vacant. This is all prior to the expiration of his term.

3. Section 15 of the *Commonwealth Constitution* provides that:

> If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together ...shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.

4. Notification for the purpose of s.15 is provided for in s.21 of the *Commonwealth Constitution*:

> Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

5. I have seen a letter of the President of the Senate dated 13 April 2016 notifying the Governor of Senator Bullock's resignation and the consequent vacancy.

6. In my note of 8 April 2016 I stated my opinion (*inter alia*) that the word "session" in s.15 of the *Commonwealth Constitution* has the same meaning as that term in s.3 of the *Constitution Act 1889* (WA) (which coincides with the meaning of that term in ss.5 and 6 of the *Commonwealth Constitution*). It followed from this that the Western Australian Parliament is currently in session, though sittings are not scheduled until 10 May 2016. So, as at 13 April 2016, the Western Australian Parliament is in session but not sitting.

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7. I also expressed the opinion that, in terms of s.15 of the *Commonwealth Constitution*, because the Parliament is in session, the Governor has no power to appoint a person to fill the Senate vacancy, and the Executive Council has no basis to advise an appointment.

8. I also advised that there is no statutory requirement for the Parliament to be recalled in order to hold a joint sitting for the purposes of filling the vacancy.

9. I am instructed that the executive government wishes for Parliament to sit for the purpose of s.15 of the *Commonwealth Constitution* – that is, to choose a person to hold the place in the Senate – on 3 May 2016.

10. I have seen a note of the Clerk of Legislative Council dated 13 April 2016. In it the Clerk has advised the President of the Legislative Council that there is no power to recall the Council prior to its next scheduled sitting commencing on 10 May 2016.

11. In his note, the Clerk refers to the Standing Orders and practice in the Legislative Assembly that empowers the Speaker to vary the time at which the Assembly will next meet, even if the Assembly had been adjourned to a specific time. In effect, the Speaker can reduce or extend an adjournment. The Clerk of the Legislative Council contrasts this with the position in the Legislative Council. I note in passing that this note misrepresents advice that I had earlier given.

12. I have also seen a later note from the Clerk of Legislative Council to the President, dated 14 April 2016. It misrepresents a conversation that I had with the Clerk. I deal with the substance of this note below.

13. I have been asked to comment on the view expressed by the Clerk that there is no power to recall the Council prior to its next scheduled sitting commencing on 10 May 2016.

14. The view of the Clerk is plainly wrong. There are several bases upon which the Legislative Council can sit prior to 10 May 2016.

A reason that does not exist

15. I have seen commentary from officers of the Department of Premier and Cabinet to the effect that s.3 of the *Constitution Act 1889* (WA) empowers the Governor, on the advice of the Executive Council, to fix sitting times of the Legislative Council, different to those scheduled by the President. Section 3 of the *Constitution Act 1889* (WA) is in the following terms:

> **Governor may fix place and time of sessions, prorogue Houses and dissolve Assembly**
>
> It shall be lawful for the Governor to fix the place and time for holding the first and every other session of the Legislative Council and Legislative Assembly, and from time to time to vary the same as he may judge advisable, giving sufficient notice thereof: and also to prorogue the Legislative Council and Legislative Assembly from time to time, and to dissolve the Legislative Assembly by Proclamation or otherwise whenever he shall think fit.

16. In my opinion, s.3 only empowers the Governor to fix the time for holding "sessions" of the Legislative Council and Legislative Assembly, and to vary sessions. I hold this

view because this is literally what the words of the section provide, and there is no basis to construe it other than literally. I also note that Professor Twomey in her seminal work, *The Constitution of New South Wales* (2004), discusses the equivalent s.10 of the *Constitution Act 1902* (NSW) and makes no reference to it empowering the Governor to alter sitting times, as opposed to sessions. Professor Taylor in his work, *The Constitution of Victoria* (2006) refers to the specific and clear powers of the Governor in Victoria, pursuant to s.20 of the *Constitution Act 1975* (Vic) to, "... summon the Council and the Assembly to meet for the despatch of the business of the Parliament on any day not less than six days from the date of such proclamation or in a case of emergency upon such shorter notice as he may think fit".

An undesirable means

17. As I have previously advised, and as the Clerk points out in his note, it is open to the Governor to prorogue the Legislative Council and Legislative Assembly, which would end the current session. Such a power is exercisable under s.3 of *Constitution Act 1889* (WA). Were this to occur, and a new session not commence; the Governor could exercise the alternate power under s.15 of the *Commonwealth Constitution*.

18. I have given advice as to the effects and consequences of prorogation.

The first way that the Legislative Council can sit prior to 10 May 2016

19. It occurs to me that there is at least one other means by which the Governor might alter the sitting times of the Legislative Assembly and the Legislative Council. I raised this with the Clerk in a conversation and this prompted his second note. It is the Clerk's second note that is plainly wrong.

20. Section 1 of the *Parliamentary Privileges Act 1891* (WA) provides that:

> The Legislative Council and Legislative Assembly of Western Australia, and their members and committees, have and may exercise —
>
> (a) the privileges, immunities and powers set out in this Act; and
>
> (b) to the extent that they are not inconsistent with this Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989.

21. Happily, the 21st edition of *Erskine May, Parliamentary Practice*, dealing with the privileges, immunities and powers of the House of Commons, is as at 1 January 1989.

22. *Erskine May* at p.224 states as follows:

> When Parliament is dispersed through the adjournment of both Houses its reassembly can be effected either by proclamation or under powers specifically conferred by each House on its Speaker.
>
> A power of interfering with adjournments in certain cases has been conceded to the Crown by statute. The *Meeting of Parliament Act 1799*, amended by the *Meeting of Parliament Act 1870*, enacts that when both Houses of Parliament stand adjourned for more than fourteen days, the Queen may issue a proclamation, with the advice of her Privy Council, declaring that the Parliament shall meet on a day not less than six days from the proclamation; and the Houses of Parliament then stand adjourned to the day and place declared in the proclamation; and all the orders which may have been made by either

> House, and appointed for the original day of meeting, or any subsequent day, stand appointed for the day named in the proclamation. ...
>
> In the Commons, under Standing Order No 12 the Speaker, having received representations from the Government that the House should meet at any earlier time during an adjournment, if he is satisfied that the public interest does so require, may give notice that he is so satisfied, whereupon the House meets at the time stated in the notice. ...

23. Although *Erskine May* recites a custom of the House of Lords by which it could be recalled, which was later incorporated into a specific Standing Order, there is nothing in the passage extracted above to suggest that, in respect of the House of Commons, the practice or power of recalling emanates other than from the Standing Order.

24. As the Clerk of the Legislative Council points out in his first note, Standing Order 25 of the Legislative Assembly provides a power to the Speaker to vary the time at which the Assembly will next meet. There is no equivalent power in the Council Standing Orders. The Council's Standing Order 6 provides:

> **6. Annual Sitting Schedule**
>
> (1) Prior to the conclusion of sittings each calendar year (except for the year prior to a scheduled general election), the Leader of the House shall table a schedule of dates for sittings of the Council for the forthcoming calendar year.
>
> (2) The schedule of sittings tabled under (1) shall only be varied by motion supported by an absolute majority of the Council, unless the Council adjourns until a date and time to be fixed by the President.

25. I understand that when the Council last sat it was not adjourned to a date and time to be fixed by the President.

26. In the passage from *Erskine May* extracted above, reference is made to the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870*.

27. Section 1 of the former provides that:

> In all cases where both Houses of Parliament shall stand adjourned for more than fourteen days from the day of the date of the proclamation herein-after mentioned, it shall and may be lawful for his Majesty, his heirs and successors, to issue his and their royal proclamation, by and with the advice of his and their privy council, thereby declaring that the said Parliament shall meet on a day, being not less than six days from the day of the date of such proclamation, and the Houses of Parliament shall thereupon stand adjourned to the day and place declared in such proclamation, notwithstanding any previous adjournment of the Houses of Parliament to any longer day, and notwithstanding any former law, usage or custom to the contrary.

28. Section 1 of the *Meeting of Parliament Act 1870* simply amended fourteen days to six days.

29. If the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870* can be understood to be in respect of "the privileges, immunities and powers" of the House of Commons, within the meaning of s.1(b) of the *Parliamentary Privileges Act 1891* (WA), then the Legislative Council has and may exercise such privilege or power.

30. There is nothing in the *Parliamentary Privileges Act 1891* (WA) that is inconsistent with the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870*.

31. The reference in the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870* to her Majesty and the Privy Council is readily referable to the Governor and the Executive Council.

32. The principal issue of construction that arises with s.1 of the *Parliamentary Privileges Act 1891* (WA) is whether the "power" exercisable under the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870* is a power 'of' the House of Commons, and therefore exercisable by the Legislative Council.

33. On one view or characterisation, the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870* confer a power on the Sovereign to do something 'to' the House of Commons, rather than provide a power "of" the Commons. If this were so then the power exercisable under the Acts is not a power able to be exercised 'by' the Legislative Assembly and the Legislative Council. Rather, it might be supposed, it is a power exercised 'upon' the Assembly and the Council.

34. In my opinion, such an interpretation of s.1 of the *Parliamentary Privileges Act 1891* (WA) and such a characterisation of the power exercisable under the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870*, is too narrow or refined and is contrary to the plain purpose of s.1 of the *Parliamentary Privileges Act 1891* (WA).

35. In respect of the characterisation of the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870*, in my opinion it is erroneous to view them as not being in respect of a power (conferred by statute) "of" (*inter alia*) the House of Commons.

36. As can be seen from s.1 of the *Meeting of Parliament Act 1799* (which is extracted above), the power of the Sovereign to declare that the Houses of Parliament shall meet on a specified day is expressed to be "notwithstanding any previous adjournment of the Houses of Parliament to any longer day, and notwithstanding any former law, usage or custom to the contrary". The statute varies previous usage or custom. Moreover, being a statute, the change that it made came into effect as a result of it being passed by the Houses of Parliament.

37. In meaning and effect, the statute changes a power of the Houses of Parliament, and the changed power becomes, it seems to me, the relevant power of the Parliament. The subject matter of the relevant 'power' might best be described as a power to determine sitting times. This is a power of the Houses of Parliament that is affected by the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870*, such that the amended, or statutorily affected, power becomes a "power by custom, statute or otherwise of the Commons" (in terms of s.1 of the *Parliamentary Privileges Act 1891* (WA)).

38. This characterisation of the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870* gives a meaning to s.1 of the *Parliamentary Privileges Act 1891* (WA) which is consistent with its obvious purpose.

39. The evident and obvious purpose of s.1 of the *Parliamentary Privileges Act 1891* (WA) is to equate the privileges, immunities and powers of the Legislative Council and Legislative Assembly to those of the House of Commons as at 1 January 1989. Such a purpose is frustrated rather than enhanced if the section requires, in considering every such privilege, immunity and power, determination of whether it is one 'of' the House of Commons or of some other body 'in respect of' the Commons.

40. In short, if a statute affects the privileges, immunities and powers of the House of Commons as at 1 January 1989, it has the equivalent effect on such privileges, immunities and powers of the Legislative Council and Legislative Assembly.

41. Put in another way, if the House of Commons had (as at 1 January 1989) a power, subject to or affected by a statute, the Legislative Council and the Legislative Assembly have and may exercise the same power, so affected.

42. It occurs to me that this is similar to the manner in which the freedom of speech provision of the *Bill of Rights 1688* (UK) operates in respect of the proceedings of the Legislative Assembly and Legislative Council. That provision is:

> That the Freedome of Speech and Debates or Proceedings in Parlyment ought not to be impeached or questioned in any Court or Place out of Parlyment.

43. It makes no sense to consider whether this statute, which plainly relates to a privilege of the House of Commons, is a privilege 'of' the House of Commons or accorded to the House of Commons by Courts and thereby not 'of' the House of Commons but 'in respect of' it.

44. There is a further explanation for this conclusion. Section 1 of the *Parliamentary Privileges Act 1891* (WA) empowers the Legislative Council and Legislative Assembly to have and exercise the privileges, immunities and powers by custom, statute or otherwise of the [House of] Commons as at 1 January 1989. The custom of the House of Commons at that date, in respect of its power to determine its sitting times, had been affected by the *Meeting of Parliament Act 1799* (as amended by the *Meeting of Parliament Act 1870*). So, even if the power to recall an adjourned sitting was not a "power by statute of the [House of] Commons as at 1 January 1989", it was a power "by custom or otherwise" (even if inchoate) affected by statute of the [House of] Commons as at 1 January 1989. This is so even though (as noted above) *Erskine May* does not recite a customary power of the House of Commons to recall itself during adjournment. If the House of Commons did not otherwise exercise such a customary power, it was created by the statute.

45. There is one further question of construction. As noted, s.1 of the *Meeting of Parliament Act 1799* (as amended by the *Meeting of Parliament Act 1870*) operates in the circumstance of both Houses of Parliament being adjourned, and the declaration is that the "Houses of Parliament" shall sit on the declared day.

46. It occurs to me that, although being in respect of a power of the House of Commons and the House of Lords, in terms of s.1 of the *Parliamentary Privileges Act 1891* (WA), it is, none-the-less, a power "of the [House of] Commons". It is just that it is an identical power of the House of Lords also.

47. It follows, in my opinion, that (subject to the point made last in this note) the power of the Legislative Council to adjourn its sitting dates to a set date in the future (greater than 6 days thereafter) is subject to a power of the Governor, on the advice of the Executive Council, by proclamation to declare that the Council shall meet on a day, not less than six days from the date of such proclamation. If such a declaration is made, the Legislative Council shall stand adjourned to the day and place declared in such proclamation, notwithstanding any previous adjournment of the Legislative Council to any longer day.

48. To the extent that it might be thought that this conclusion is inconsistent with provisions of the Standing Orders of the Legislative Council (say Standing Order 6), regard should, with respect, be had to Standing Order 1(3), which provides that:

> These Standing Orders shall in no way restrict or prejudice the method in which the Council may exercise and uphold its powers, privileges and immunities.

49. The final matter to note is that the operative provision of the *Meeting of Parliament Act 1799* and the *Meeting of Parliament Act 1870* relates to a circumstance where "both Houses of Parliament ... stand adjourned" and the power is to "[declare] that the said Parliament shall meet on a day ... and the Houses of Parliament shall thereupon stand adjourned to the day and place declared".

50. To avoid argument, it might be thought prudent, if advice is to be given to the Governor, to provide advice in respect of the Legislative Assembly and the Legislative Council. So; the power of the Legislative Assembly and Legislative Council to adjourn its sitting dates to a set date in the future (greater than six days thereafter) is subject to a power of the Governor, on the advice of the Executive Council, by proclamation to declare that both Houses shall meet on a day, not less than six days from the date of such proclamation. If such a declaration is made, the Legislative Assembly and Legislative Council shall stand adjourned to the day and place declared in such proclamation, notwithstanding any previous adjournment of the Legislative Assembly and Legislative Council to any longer day.

The second way that the Legislative Council can sit prior to 10 May 2016

51. As can be seen from the above reasoning, the operative provision of the *Meeting of Parliament Act 1799* (as amended by the *Meeting of Parliament Act 1870*) 'applies' by reason of s.1 of the *Parliamentary Privileges Act 1891* (WA).

52. There is no reason to doubt that the *Meeting of Parliament Act 1799* is directly in force in Western Australia as a result of being a United Kingdom law 'inherited' on 1 June 1829 (as to this date, see s.4 of the *Supreme Court Ordinance 1961* (WA)).

53. That this is so is confirmed by the circumstance of the Victorian constitution. Section 66 of the *Imperial Acts Application Act 1922* (Vic) consolidated the *Meeting of Parliament Acts* of 1797 and 1799. The effective consolidation is now reflected in ss.20–22 of the *Constitution Act 1975* (Vic). Sir Leo Cussen drafted the *Imperial Acts Application Act 1922* (Vic) and obviously took the view that both of the *Meeting of Parliament Acts* of 1797 and 1799 were in force in Victoria in 1922.

54. As the *Meeting of Parliament Act 1799* has not been repealed it continues to directly apply in Western Australia. It applies directly, however, in a form unamended by the

Meeting of Parliament Act 1870. This has no effect in this matter because both the Legislative Assembly and the Legislative Council will have been adjourned for more than fourteen days from the proposed date of the foreshadowed sitting on 3 May 2016. Both last sat on 7 April 2016. As noted above, the effect of the *Meeting of Parliament Act 1870* was to amend this time of fourteen days to seven days.

The third and most obvious way that the Legislative Council can sit prior to 10 May 2016

55. I noted above that I could conceive of at least one means by which the Governor might alter the sitting times of the Legislative Assembly and Legislative Council. I have addressed two such means, and noted prorogation.

56. It occurs to me that there is a more obvious and sensible way of achieving the same result. Unfortunately it is one that the Clerk of the Legislative Council appears to consider unavailable.

57. Having regard to Standing Order 1(3) of the Legislative Council, which is set out above, it occurs to me that were the leaders of the government and the opposition in the Council to request that the President convene a sitting on 3 May 2016, the President might request that members attend on that date. At such sitting, and on the basis that the President's request to members of the Council was at the request of leaders of the government and the opposition in the Council, the attenuation of the adjournment would (I assume) be readily ratified by the Council.

58. Why the Clerk of the Council holds the view that this course cannot be followed is beyond my (generally limitless) comprehension.

GRANT DONALDSON SC
SOLICITOR GENERAL

Appendix B

19 April 2016

HON ATTORNEY GENERAL

THE PROCESS FOR FILLING OF A CASUAL SENATE VACANCY

1. As directed, I spoke earlier today with Her Excellency the Governor concerning the above.

2. As directed, I provided to Her Excellency the two advices that I have provided to you and the Premier concerning this matter. Her Excellency also had a copy of the first note of advice of the Clerk of the Legislative Council that had been provided to the President. Her Excellency did not have the Clerk's second note.

3. I spoke to my advices.

4. Two matters, in addition to orally dealing with the subject matter of those advices arose.

5. *First*, Her Excellency queried why the government considered it desirable to appoint the replacement for Senator Bullock prior to the next scheduled sitting of the Legislative Assembly and Council on 10 May 2016. I advised Her Excellency that I was unaware of the precise reason or reasons for this. I stated to Her Excellency that I was aware that the federal Opposition was wishing Senator Bullock's replacement to be appointed on 3 May 2016, and that, to my understanding, the Western Australian government was simply wishing to accommodate this desire.

6. *Second*, Her Excellency made plain her view that, what I described in my advice of 19 April 2016 as "The third and most obvious way that the Legislative Council can sit prior to 10 May 2016" was, in Her Excellency's view, the most desirable way to resolve the issue. You will recall that "The third and most obvious way that the Legislative Council can sit prior to 10 May 2016" was (having regard to Standing Order 1(3) of the Legislative Council) that, in the event that the leaders of the government and the opposition in the Council were to request that the President convene a sitting on 3 May 2016, the President might request that members attend on that date. At such sitting, and on the basis that the President's request to members of the Council was at the request of leaders of the government and the opposition in the Council, the attenuation of the adjournment would (I assume) be readily ratified by the Council.

7. Her Excellency kindly agreed to permit me to pass Her Excellency's view as to the desirability of this course on to you, on the understanding that you might convey this to others.

GRANT DONALDSON SC
SOLICITOR GENERAL

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Appendix C

1239

PERTH, THURSDAY, 21 APRIL 2016 No. 65 SPECIAL

PUBLISHED BY AUTHORITY JOHN A. STRIJK, GOVERNMENT PRINTER AT 4.30 PM

Proclamation declaring that the Legislative Council and the Legislative Assembly are to meet

Made by the Governor in Executive Council.

1. Citation

This proclamation is the *Proclamation declaring that the Legislative Council and the Legislative Assembly are to meet*.

2. Legislative Council and Legislative Assembly to meet on 28 April 2016

(1) The Legislative Council and the Legislative Assembly are to meet at Parliament House in the City of Perth on Thursday, 28 April 2016 at 10 am.

(2) The Legislative Council and the Legislative Assembly stand adjourned to that day and place, regardless of any previous adjournment to any later day.

K. SANDERSON, Governor. L.S.

C. J. BARNETT, Premier.

WESTERN AUSTRALIAN GOVERNMENT Gazette

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PERTH, TUESDAY, 26 MARCH 2013 No. 50 SPECIAL

PUBLISHED BY AUTHORITY JOHN A. STRIJK, GOVERNMENT PRINTER AT 12.15 PM

CONSTITUTION ACT 1889

PROCLAMATION

summoning the Legislative Council and Legislative Assembly

Western Australia

By His Excellency
Malcolm James McCusker
Companion of the Order of Australia,
Commander of the Royal Victorian Order,
Queen's Counsel,
Governor of the State of Western Australia

M. J. McCUSKER
Governor

[L.S.]

By this proclamation I, the Governor, acting under the *Constitution Act 1889* section 3—

(a) fix Parliament House in the City of Perth as the place for holding the first session of the Legislative Assembly and the Legislative Council in the 39th Parliament; and

(b) fix Thursday 11 April 2013 at 11.00 a.m. as the time for holding the first sitting of the first session of the Legislative Assembly in the 39th Parliament; and

(c) fix Thursday 11 April 2013 at 2.45 p.m. as the time for holding the first sitting of the first session of the Legislative Council in the 39th Parliament.

Given under my hand and the Public Seal of the State on 26 March 2013.

By Command of the Governor,

COLIN BARNETT, Premier.

Appendix D

MEMORANDUM TO MEMBERS OF THE LEGISLATIVE COUNCIL

PRESIDENT RECALLING THE LEGISLATIVE COUNCIL TO MEET ON

THURSDAY, 28 APRIL 2016 AT 10.00 AM

Please find attached the text of a notice that will appear in the notices section of *The West Australian* newspaper on Tuesday, 26 April 2016.

One of the most important privileges of this House is its capacity to determine the days and times when it adjourns and convenes to undertake its business. This is one aspect of the privilege of exclusive cognisance, a privilege that arose from the centuries-long conflict in England between the Monarch and Parliament. The Parliament was ultimately triumphant. The *Bill of Rights 1688* (UK), which is part of Western Australian law, is a significant statutory recognition of this privilege.

The proclamation issued by Her Excellency the Governor on the advice and with the consent of her Executive Council on Thursday, 21 April 2016 is silent as to the legal authority under which it is issued. This is a significant departure from the usual practice. The powers of the Crown to determine the sittings and adjournment of the Houses of Parliament are confined to s.3 of the *Constitution Act 1889*.

Having received legal advice from Australia's pre-eminent constitutional lawyer, Mr Bret Walker SC, I have treated the proclamation as a request from the Government to recall the Legislative Council earlier than the date to which it last adjourned, 10 May 2016. I have done this notwithstanding the mechanisms contained in the Standing Orders of the Legislative Council relating to how sittings and adjournments are determined and its apparent conflict with a power of a presiding officer to recall the House.

I have a discretionary power to recall the House which is derived from the power of the House of Commons imported as a power of the Houses of the Western Australian Parliament by s.1 of the *Parliamentary Privileges Act 1891*. This power is independent of the Standing Orders and the proclamation. Mr Walker's advice is otherwise entirely consistent with the advice I have received from the Clerk of the House about the limitations on the power of the Crown to determine the adjournments and sittings of the Houses of Parliament. I have exercised my power under the *Parliamentary Privileges Act 1891*:

1. To assert the undoubted privilege of this House to determine its own sittings and adjournments; and
2. To ensure that the proclamation of the Crown issued on 21 April 2016 does not set a precedent whereby the Crown can in the future purport to determine the sittings and adjournments of this House other than according to law.

There is a public interest in maintaining the number of Western Australian senators in the Commonwealth Parliament. This is the case even though a nominee filling the vacancy may only be a senator for a short period prior to a Federal election.

I have therefore recalled the Legislative Council to **Thursday, 28 April 2016 at 10.00am** for the purpose of passing the necessary resolutions under the Joint Standing Orders and to then undertake a joint sitting pursuant to s.15 of the *Commonwealth Constitution* to fill the vacancy caused by the resignation on 13 April 2016 of Senator Joe Bullock.

Hon Barry House MLC

President

Notice in *The West Australian* Newspaper, Tuesday, 26 April 2016

Notice given by the President of the Legislative Council pursuant to s.1 of the *Parliamentary Privileges Act 1891* (earlier meeting of the Legislative Council).

Whereas the Government has represented to me, Hon Barry House, MLC, President of the Legislative Council, that the public interest requires the Legislative Council to meet at an earlier time than 10 May 2016 and I am satisfied that the public interest does so require:

Now therefore, I hereby give notice pursuant to the power provided in s.1 of the *Parliamentary Privileges Act 1891* (earlier meeting of the Legislative Council) that the Legislative Council shall meet on Thursday, 28 April 2016 at 10.00 am.

Given under my hand on 26 April 2016.

Hon Barry House MLC

President

Appendix E

LEGISLATIVE COUNCIL OF WESTERN AUSTRALIA
POWER OF PRESIDENT TO RECALL
FOR JOINT SITTING TO ELECT A SENATOR

OPINION

I am asked to confirm in writing the advice I gave the Clerk in April 2016 after which the Legislative Council met on 28th April 2016 to participate in the appointment of Senator Dodson in place of the resigned Senator Bullock under sec 15 of the *Constitution* (Cth).

2 As the records show, substantial differences of opinion emerged during the period before this appointment, concerning the lawful method or methods by which the Legislative Council could meet on 28th April 2016, being a date sooner than 10th May 2016 which was the date to which its sitting was last adjourned. I set out below my reasoning in support of the approach taken by the President in his Memorandum to Members of the Legislative Council dated 24th April 2016.

3 This Opinion does not purport to be a detailed response to or critique of the reasoning set out by the Solicitor General in his Opinion to the Premier and Attorney General dated 19th April 2016. Nor does it spell out and address in detail the implications of the possible approach or approaches thought by the Executive to justify the proclamation by the Governor made on 21st April 2016. Rather, the explanation below sets out what I regard as the only lawful means by which the recall of the Legislative Council could have been accomplished. It follows, in my respectful opinion, that everything inconsistent with this approach, that can be seen explicitly in

the reasoning of the Solicitor General and might be inferred in the bald proclamation of the Governor, is wrong.

4 It thus also follows, for the purposes of clarifying and maintaining the tenets of parliamentary law applicable to this issue, that the President's Memorandum is a correct statement of the law, again in my respectful opinion. It was and will likely remain important that the differences of approach be recognized and that the Legislative Council through its presiding officer record the correct position.

5 As noted in the President's Memorandum, the power of the Executive to dictate the sitting times of a House of Parliament, in systems derived from the history at Westminster, is no mere technicality. It is not simply a matter of procedural formalities. It is both a substantive and symbolic aspect of the independence of the deliberative chambers as against the monarch (or Crown or Executive).

6 In the present case, the differing approaches produce the same outcome, viz that the Legislative Council could be recalled to sit earlier than the date fixed by its last adjournment. The importance of recording the justification for that outcome lies in the radical difference they involve concerning the relation of the Executive to the House with respect to the House's power to regulate its own sitting.

7 Reflecting the historical tensions noted above, there is specific legislative enactment by sec 3 of the *Constitution Act 1889* (WA) empowering the Governor to fix sessions of the Houses, from time to time to vary them, to prorogue, and to dissolve the Assembly. The requirement for at least an annual sessions is enacted by sec 4 of the *Constitution Act*. Given the history, and this statutory text, there is much

to be said for the view that these explicit provisions leave no room for an Executive discretion to advance the sitting of the Legislative Council to a date earlier than the House itself had adjourned.

9 It should be kept in mind when contemplating that possibility that it is quite unreal to suppose the existence of a discretion to advance a sitting without also bestowing a power to postpone a sitting. The function of a House as part of the democratic "grand inquest of the nation" would be frustrated, and its essential and definitional rôle in Western Australia's system of responsible government would be contradicted, by allowing such a broad discretion to the Executive. Plain enacted words or necessary implication from enacted words are entirely lacking of a kind to produce such an unlikely constitutional state of affairs.

10 In my opinion, one then turns to sec 1 of the *Parliamentary Privileges Act 1891* (WA), which stipulates, amongst other things, that the "privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom … as at 1 January 1989" are those that the Legislative Council and its Members and Committees "have and may exercise". (There are no inconsistent provisions of the *Parliamentary Privileges Act*, in my opinion, that affect any aspect of the present question, and I have seen no suggestion to the contrary.)

11 Like the Solicitor General, I am relieved by the convenience of the self-declared currency of the 21st Edition of *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* at the beginning of 1989. Simply, the learned authors of that undoubted authority record (at p 224) that the relevant standing order in the Commons empowered the Speaker "having received

representations from the Government that the House should meet at any earlier time during an adjournment, if he is satisfied that the public interest does so require, [to] give notice that he is so satisfied, whereupon the House meets at the time stated in the notice".

12 If this provision answers the description set out in sec 1 of the *Parliamentary Privileges Act*, it completely justifies the position set out in the President's Memorandum and the course thereafter followed by the Legislative Council in this case. In particular, I note the self-evident public interest of maintaining the number of Western Australian Senators in the Commonwealth Parliament. It is also plain to demonstration that the Government, meaning the Executive, had made representations coming to the attention of the President and Members of the Legislative Council that there should be an earlier recall of the Legislative Council for this purpose.

13 In my opinion, the only serious matter to be mentioned as arguably tending against this simple solution is that the practice in the Commons described in 11 above is not within the category of "the privileges, immunities and powers ... of the Commons House of Parliament", so as not to be available by statutory extension to the Legislative Council. I suppose one might notice the idea that it is rather a power of the Speaker in the Commons than a power etc of the Commons as a House. I think that distinction is tenuous and against principle, and most unlikely to be correct as one upon which such a significant and historically charged constitutional issue could be thought to turn.

14 In my opinion, the Speaker, or President in our case, as a presiding officer is in no relevant sense an entity separate from or (with all due respect) superior to the

House. The powers or authority granted by standing orders to a presiding officer emanate from and appertain to the House that grants them. It is, by way of cognate illustration, a power of the House to regulate the conduct of orderly debate and proceedings, notwithstanding the means of exercising that power involves what may be regarded as a special kind of delegation to the presiding officer.

15 I therefore concluded, when advising the Clerk in April 2016, that the President was empowered to recall the Legislative Council for the reasons set out in the President's Memorandum. I had, and have, no doubt about the correctness of this analysis.

16 Notwithstanding what I have noted in 3 above, I add a specific note about the supposed application in Western Australia of, among other enactments, the *Meeting of Parliament Act 1799* (Imp), about which the Solicitor General has opined. I do not accept that it grants any power or privilege to either of the Houses in Westminster – to the contrary, I regard it as a statutory curtailment of their control over their own sittings. It follows that such provisions are not picked up by sec 1 of the *Parliamentary Privileges Act*. If it matters, and I think it does not, there is no scope in my opinion to treat a statute specifically governing the proceedings of the Parliament in Westminster as having any possible application to that whose Houses sit in Perth, with respect to the interesting discussion by the Solicitor General in support of a contrary view.

Fifth Floor St James' Hall

30th June 2016

Bret Walker