

**REPORT
OF A
SELECT COMMITTEE
OF PRIVILEGE
ON A
FAILURE TO PRODUCE
DOCUMENTS UNDER SUMMONS**

SELECT COMMITTEE OF PRIVILEGE

Date appointed

October 21 1998

Members of the Committee

Hon Bruce Donaldson MLC (Chairman)
Hon Kim Chance MLC
Hon Thomas Helm MLC
Hon Norman Kelly MLC
Hon Derrick Tomlinson MLC

Officers

Laurence Marquet, Clerk of the Legislative Council
Ian Allnutt, Deputy Clerk
Stuart Kay, Deputy Clerk (Committees)
Jan Paniperis, Clerk of the Committee

Terms of Reference

Minutes of Proceedings [LC 1998] #17 p 186.

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ISBN 0 7309 8920 8

**REPORT
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1 order of reference

By order made on Wednesday October 21 1998¹ the House appointed this Committee to consider whether the failure by Dr Peter Murphy of the Department of Resources Development to produce documents under summons of the *Estimates and Financial Operations Committee* (the "**Estimates Committee**") was a breach of privilege or a contempt of the House. If this Committee found a breach or a contempt to have been committed, it was also required to recommend a suitable penalty.

2 the facts

The Committee accepts as accurate the sequence of events and the statement of facts contained in report 24 of the Estimates Committee². The salient facts for this inquiry are that the Estimates Committee, having failed to obtain 2 documents from Dr Murphy by request, issued a summons ordering Dr Murphy to produce them on Tuesday September 29 1998. Under initially oral and later written direction from the Minister for Resources Development, Hon Colin Barnett MLA, Dr Murphy refused to produce the 2 documents sought.

Although the Committee received evidence from Dr Murphy and Hon Mark Nevill MLC, Chairman of the Estimates Committee, about that Committee's requests for the provision of the documents before the summons was issued, this Committee emphasizes that its findings and recommendations relate solely to the failure to produce those documents under summons.

3 the law

The Committee has concluded that the validity of the summons cannot be attacked for want of form or on the ground that it relates to an inquiry beyond the legislative competence of the Council.

Normally, witnesses attend committees to give evidence or provide documents voluntarily. Occasionally, a committee, whose request for evidence or production is declined, will use compulsion to obtain the information required. This is such a case.

By operation of SO 310, the Estimates Committee has the power conferred by SO 329 "to send for persons, papers, and records". The power delegated by SO 329 is derived, not from the law and custom of Parliament, but from s 4 of the *Parliamentary Privileges Act 1891* (the "**PPA**"). A committee with that power may order a person to produce to it any document "in the possession or power of such person". Section 5 of the PPA requires the order to produce to be served by summons and lays down the requirements to be observed in issuing and serving a summons³.

¹ *Minutes of Proceedings* [LC 1998] #17 p 186.

² Tabled Oct 14 1998.

³ See Annexure A for a discussion of the relevant provisions of the PPA.

The capacity of the Council under s 4 of the PPA to order production of documents was affirmed by the WA Full Court in *Aboriginal Legal Service v State of Western Australia*⁴. As well, and of relevance to this case, the Court was not prepared to tie the valid exercise of the power merely in aid of the Council's legislative function⁵. There is nothing in the judgments of the High Court in the recently-decided case of *Egan v Willis & anor*⁶ that overrules the *ALS* case on these points.

The Committee considered the application of s 7 of the PPA to this case. Section 7 enables a person ordered to produce a document to object on the ground that the document ". . . is of a private nature and does not affect the subject of inquiry, . . .". The objection is reported to the House which must then decide whether to excuse production or not.

Section 7 was not invoked after the summons was served and Dr Murphy stated to the Committee that he was unaware of its existence. Accordingly, the Committee could not pursue s 7 issues and expresses no opinion on the success or otherwise of an objection under s 7 to the production of the documents had it been made⁷.

The failure to produce the documents resulted from the Minister's direction issued on September 29 1998, and not on any of the grounds that were raised in the September 25 1998 fax answering the Estimates Committee's previous requests for production. The Committee accepts Dr Murphy's evidence that the direction was given before the time expired within which to produce the documents.

The Estimates Committee under s 4 of the PPA has power to compel the production of documents. Failure to comply with its order is a contempt punishable by the House under s 8 of the PPA. However, it is one thing to possess a power of coercion; other questions arise when, as in this case, it is exercised against the backdrop of the relationship between a House of Parliament and the Executive.

4 the documents

To be effective, an order for the production of documents must be served on the person having possession OR control of the documents. The test of who has possession or control is to be decided at, or before, the time the summons is issued.

The Committee is satisfied that the Estimates Committee proceeded on the basis that, having notified the Minister in December 1997 of the inquiry, Dr Murphy participated on behalf of the Minister and the Department.

⁴ (1993) 9 WAR 297.

⁵ *ibid*, 316, 317 per Nicholson J.

⁶ [1998] HCA 71. Judgment delivered Nov 19 1998.

⁷ Both committees have treated the documents as state papers for which a claim of public interest immunity might be made were their production sought in the course of legal proceedings. For a full discussion of public interest immunity and how a court will deal with claims see *Sankey v Whitlam* (1978) 142 CLR 1, 38 et seq per Gibbs ACJ.

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Dr Murphy was questioned extensively on this matter, particularly when, how and to whom he reported as the inquiry progressed, and how he intended the Estimates Committee to understand his role.

The Committee accepts Dr Murphy's evidence that —

- the Department's CEO assigned him to act for the Department and presumably the Minister during the inquiry
- Dr Murphy, consistent with departmental procedure, reported periodically and informally to his CEO about the inquiry's progress
- Dr Murphy believed that the CEO, in turn, would report to the Minister
- Dr Murphy relied on legal and other advice when it came to deciding how he should answer the summons
- the Estimates Committee was justified in acting in the belief that decisions on matters involving the Minister or the Department could be made by Dr Murphy.

Importantly, given the tenor of the correspondence between it and Dr Murphy about the 2 reports before the issue of the summons, the Estimates Committee believed when issuing the summons that Dr Murphy had possession of, and power over, those documents.

However, the Estimates Committee's belief is not decisive and does not determine what meaning should be given to "possession or power" in s 4 of the PPA.

Dr Murphy had possession of the documents and was in a position to provide them within the prescribed time. Before the time to produce expired, the Minister issued his direction not to produce the documents with the result that Dr Murphy, although having possession, lost any power that he might otherwise have had to deliver them. Unfortunately, it was not until after the time for production had expired that the Committee was made aware of the direction.

The Committee need not make a finding as to Dr Murphy's power - control - in relation to the documents for the reason that the Minister's intervention deprived him of any ability that he might otherwise have had to obtain and produce the documents had they not been in his physical possession. The Committee has no quarrel with the right of a minister to control the actions of a departmental officer, including the Minister's direction to Dr Murphy.

If a decision not to produce documents in answer to a summons is to be taken by the responsible minister, that decision must surely be communicated to the House or a committee before the time for production expires. The Committee notes that the *Guidelines re Evidence to Parliamentary Committees*⁸ supports this view. Dr Murphy, by his own admission, did not know that this document exists. Neither was its content nor existence drawn to his attention. Had he known of and observed its requirements, including the continuing obligation on him to say to the Clerk how he intended to respond to the summons in light of the Minister's direction, the *impasse* might well have been avoided.

⁸ Circular to Ministers 7/87 (Feb 10 1987) Premier Burke. The guidelines are still in operation but under review. Appended as Annexure B.

Under the circumstances, it seems to the Committee that there was an obligation cast on Dr Murphy to inform the Clerk, as the officer with whom the documents were to be deposited, that he could not, or would not, comply with the summons by reason of the Minister's direction. That obligation should have been discharged before 4.30 pm on September 29.

Had that veto been communicated at the appropriate time, the subsequent train of events would have been very different, and revolve around the conventions governing the provision of information to the House, in this case, by a minister representing a minister in the Legislative Assembly.

The Committee has resisted the temptation to discuss issues relating to the provision of documents that are peripheral to the order of reference, eg, refusal to produce on grounds of public interest immunity or "commercial-in-confidence". Those issues are raised, at least inferentially, in the September 25 fax but are not the grounds of refusal to comply with the summons.

5 findings

The Committee finds that —

- (a) the summons was properly served on Dr Murphy at his usual place of business at or about 11.30 am on Tuesday September 29 1998;
- (b) Dr Murphy, acting on the direction of the Minister for Resources Development, failed to produce the documents subject to the summons within the time prescribed (4.30 pm that day);
- (c) the documents subject to the summons were in the possession or power of Dr Murphy at the time of service;
- (d) The ministerial direction, although depriving Dr Murphy *vis-a-vis* the Minister of the power he otherwise had to produce the documents, did not affect the operation of the summons; because he failed to make known to the Clerk before 4.30 pm that he was unable to comply with its terms
- (e) Dr Murphy's failure to comply with the terms of the summons was a contempt of the Legislative Council, as so defined under s 8 of the PPA,.

6 penalty

Having found that a contempt has been committed, the Committee has considered, under the second order of reference, what penalty (if any) the House might impose. In so doing, the Committee has had regard for the provisions of s 59 (1) of the *Criminal Code* which creates a similar, but not identical, offence for failing to produce documents under summons to the House or a committee⁹.

⁹ The potential for conflicting views because of this "concurrent" jurisdiction was discussed by the Parliamentary Standards Committee (Report of the *Parliamentary Standards Committee* 1989 §§ 3.5, 3.6). This Committee notes that its recommendations have not been taken up but acknowledges that the possibility of a person being found in contempt by the House and convicted of an offence under s 59 (1) on the same facts is extremely remote.

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No offence is committed under s 59 (1) if the failure to produce is excused by law. The Committee will not speculate about what a court would accept as a "lawful excuse"; what can be said is that judicial interpretation is apt to be more extensive than the parliamentary¹⁰.

The second reason for considering s 59 (1) is the penalty provided for the offence - a fine of \$7 500 or 2 years' jail. Dr Murphy's contempt is one for which a fine can be imposed under s 8 of the PPA¹¹. No maximum is prescribed, leaving the House to impose an appropriate monetary penalty.

Because a contempt can be committed regardless of a person's intent (or lack of it), the penalty imposed is the appropriate means for the House to indicate how serious it takes it to be. Customarily, an unintended or technical contempt¹² is excused without penalty.

The Committee sees this contempt as being more than unintended or technical primarily because of Dr Murphy's failure to inform the Clerk before the time of expiry that he was unable to comply with the summons.

After hearing Dr Murphy, the Committee was left with the impression that he was prepared to cooperate with the Estimates Committee by providing information but at times of his choosing and that there were limits to that cooperation. Dr Murphy agreed with the Committee's suggestion that he anticipated that at some stage the Estimates Committee would order him to produce the 2 documents. However, he had not anticipated that the summons would issue in response to his September 25 fax; in his view there was still room for discussion and the summons was a surprise.

The Committee is not suggesting that Dr Murphy deliberately set out to thwart the Estimates Committee's requests for information and documents. Rather, it seems to be the case that Dr Murphy expected the Estimates Committee to accept his limits on cooperation as to time and information. Dr Murphy took no steps to inform himself of what his obligations to a parliamentary committee might be, and under what circumstances it was appropriate to involve the Minister. While not expressing a view on the adequacy of the Department's internal procedures, or the advice that Dr Murphy was given, the Committee was surprised to find that a very senior officer such as Dr Murphy was totally unaware of existing guidelines for public servants dealing with parliamentary committees and did nothing to inform himself. To that extent, Dr Murphy was negligent.

Dr Murphy sought directions from the Minister and CEO as to how he should deal with the production of the documents after the summons was served. On Dr Murphy's evidence, the Minister's oral direction was given about 2.00 pm on September 29. At that stage, Dr Murphy had been advised on the effects of the summons. Nevertheless, it took at least 3 hours to communicate the Minister's direction to the Clerk. By that time, the contempt had been committed. The Committee cannot excuse the delay.

¹⁰ The NSW Court of Appeal in *Egan v Willis* CA 4037/96 certainly saw as "major unresolved questions" what grounds might exist for lawful excuse even in those Houses whose powers derive from statute and are assimilated to those of the Commons. See judgment of Gleeson CJ p 22 et seq.

¹¹ Absent s 8, the penalties that may be imposed by the House for a breach or contempt are reprimand, censure, or imprisonment.

¹² Eg, the documents sought have been destroyed or lost. It would be different if the person had a part in the documents' destruction or failed to prevent it.

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Under the circumstances, and having regard to the systemic failures that contributed to Dr Murphy's acts, the Committee recommends that Dr Murphy be ordered to pay a fine of \$1 500.00.

Chairman

ANNEXURE A



PARLIAMENTARY PRIVILEGE — FAILURE TO PRODUCE
DOCUMENTS UNDER SUMMONS

Mr Chairman

5

Your committee is required by its Order of Reference to advise the House whether the failure of Dr Peter Murphy to produce documents to the *Estimates and Financial Operations Committee* (the "Committee") under summons constitutes a contempt of the House. If your committee so finds, it is further directed to recommend what penalty, if any, the House might impose for the contempt. I do not deal with the second matter in this memorandum.

10

The circumstances leading to the issue of the summons on September 29 1998, and evidence of Dr Murphy's failure to comply with its terms, are described in the Committee's 24th report although further evidence will be required, particularly so far as Dr Murphy's understanding of what was being required of him is concerned.

15

The powers, privileges, rights and immunities of each House of the Western Australian Parliament are derived from the *Parliamentary Privileges Act 1891* ("PPA") enacted in reliance on s 36 of the *Constitution Act 1889*¹. The Committee's resolution of September 9 empowered the Chairman to authorize the issue of a summons to produce the documents sought by the Committee².

20

Issuing of an order, whether to attend as a witness or to produce documents, is dealt with expressly in s 4 of PPA³, and s 5 prescribes the formal requirements governing the issuing of a summons transmitting the order to the person subject to the order.

25

A preliminary question is whether the order to produce the documents to the Clerk rather than to the Committee at a properly constituted meeting is sufficient compliance with s 4 of PPA. The question arises by reason of the proviso to s 1 of PPA:

¹ Although s 36 limits any enactment of privileges to those "held, enjoyed and exercised" by the House of Commons, s 8 of PPA (enabling the imposition of fines) arguably breaches that limitation. That does not make s 8 invalid - s 36, to the extent of any inconsistency with s 8, gives way under the normal rules of statutory construction. See also *ALS v WA* (1993) 9 WAR 297, 312 per Nicholson J comparing s 36 with s 1 PPA on the question of *vires* and s 1 operating as a valid constitutional amendment of s 36.

² The Committee, for s 4 purposes, is "duly authorized" by SO 329 (a).

³ 4. *Each House of Parliament of the said Colony, and any Committee of either House, duly authorized by the House to send for persons and papers, may order any person to attend before the House or such Committee, as the case may be, and also to produce to such House or Committee any paper, book, record, or other document in the possession or power of such person.*

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Provided always, that with respect to the powers hereinafter more particularly defined by this Act, the provisions of this Act shall prevail.

5 On its face, s 4 requires the person to appear physically "before" the Committee whether to produce the documents or to decline production under s 7 of PPA. The proviso appears to prevent recourse to other, less formal, procedures used by the House of Commons to obtain production eg, deposit with the Bills Office.

10 This issue was dealt with by the Full Court in *ALS v WA*⁴ where it was argued that an order of the Legislative Council directed to the Aboriginal Legal Service and its officers was invalid to the extent, *inter alia*, that it required production of documents to the Clerk rather than by way of personal appearance "before" the House. That argument, in essence that s 4 requirements are mandatory rather than merely directory, was dismissed by the Court:

15 *Reading s 4 with the other sections [ss 5, 7 PPA] referred to, it is apparent that the power to summons persons and documents is being addressed disjunctively in s 4. Furthermore, I am unable to see how production of documents to the duly appointed Clerk of the Legislative Council would not be an attendance "before" the House for that purpose or production to that House.⁵*

20 Although the Court was dealing with an order of the House, the same argument can be made in relation to an order of a committee. Accordingly, it would appear that no objection can be made to the validity of the summons on the ground that it required Dr Murphy to produce the documents to the Clerk, rather than the Committee.

25 A related question is whether there was any defect in the form of the summons. Section 5 of PPA requires that an order of a committee—

- be communicated to the person required to produce documents by summons
- the summons is to be signed by the Clerk under the chairman's authorization
- 30 • the summons must state a time and place when and where the person is to appear and produce the documents
- the summons must describe the documents to be produced
- the summons must be served on the person or left with an adult at the person's address.

35 A copy of the summons to Dr Murphy is "Annexure F" to the Committee's report. It complies with statutory requirements.

To summarize:

- 40 • the Committee had power to order the production of documents
- the order to produce documents to the Clerk, rather than to the Committee, is valid
- the summons complies with the manner and form requirements of PPA.

45 The Committee ordered a public servant to produce documents. Before considering the implications arising from that fact, some discussion of s 7 of PPA is required in that it provides a ground, the sole, statutorily-recognized ground, that may excuse compliance with such an order. Under s 7, a person may object to the production of a document if it is ". . . of a private nature and does not affect the subject of the inquiry". That objection is reported to the House which then decides whether to excuse or insist on production. No finding of contempt can be made for a failure to produce a document on s 7 grounds until the validity of the objection raised under s 7 is determined by the House.

50 Because no objection was raised to production based on s 7, it is not necessary to discuss its application or

⁴ (1993) 9 WAR 297

⁵ *ibid* at 314 per Nicholson J.

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12

5 otherwise to the present case. It should be noted that in the *ALS* case, the Court saw no conflict between s 4 and s 7 of PPA - any objection was to be, and undoubtedly would be, communicated to the House by the President or chairman of a committee. The Court took the view that the objection need not be made in the presence of the House or a committee.

10 From another perspective, s 7 does no more than reinforce the rules of relevancy applied to all parliamentary proceedings by self-imposed rules - it does not excuse production of documents. Rather, it requires the House to determine a question of relevancy, viz, are the documents sought, private and irrelevant to the subject of inquiry? If the answer is negative, the documents must be produced unless the House does not insist

15 The Committee's report discloses a failure to produce documents under summons, a failure which is punishable as a contempt under s 8 of PPA⁶. That does not mean that the House is bound to treat that failure as a contempt.

The pivotal issue in this case is to determine if Dr Murphy was justified in his refusal to comply with an order to produce documents to the Committee —

- 20 (a) for lawful excuse;
(b) by operation of parliamentary custom and usage.

25 "Lawful excuse" provides a defense to a charge under s 59 (1) of the *Criminal Code* of failing to produce documents to the House or a committee. As noted earlier, PPA does not provide defenses. Were the House to direct the Attorney General under s 15 of PPA to prosecute Dr Murphy under s 59, rather than deal with him under PPA, the result may be that a court may allow as a lawful excuse that which the House rejects or does not recognize.

30 Both the House and a court may accept a factual impossibility as a lawful excuse, eg, the documents are not in the possession or under the control of the person ordered to produce them, or they no longer exist. It is where a person claims legal impossibility that House and court might diverge.

In "Annexure E" of the report, 2 aspects of legal impossibility are raised by Dr Murphy. In relation to the *Bird Cameron* report he says:

35 " . . . as Clause 23 (4) constitutes a statutory requirement not to use the information other than for those specified purposes, I am unable to release the *Bird Cameron Report* to the Committee."

40 Regarding the *McLennan Magazanik* report, Dr Murphy indicates that it contains commercially sensitive material the disclosure of which by the Minister may give rise to an action for breach of contract.

45 Both "excuses" are aspects of claims to immunity⁷ from disclosure, claimed by the Crown from time to time in parliamentary, and legal, proceedings. The Crown's immunity in legal proceedings has been known as "Crown privilege", "Executive immunity" and, latterly, as "public interest immunity"⁸. As previously noted, the High Court in *Sankey* has settled how a court will deal with public interest immunity claims whereas, parliamentary attitudes vary both between, and within, jurisdictions. An outline of the form and content of public interest immunity is, perhaps, desirable at this point.

⁶ It is also a criminal offense under s 59 (1) of the *Criminal Code*. It is a defense to the charge to show that the refusal to produce was for "lawful excuse". PPA does not provide a statutory defense.

⁷ Both claims may also be viewed as based on statutory immunity, an issue discussed later in this memorandum.

⁸ The law in Australia relating to a claim of public interest immunity in legal proceedings is set out in *Sankey v Whitlam* (1978) 142 CLR 1.

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5 The Crown has always enjoyed personal powers, privileges, and immunities - prerogatives" - that flow from, and are inherent in, the concept of monarchy, particularly the belief that the state and the monarch are indistinguishable. The king could do no wrong and, as a consequence, was immune from being sued in his own courts. The genius of English constitutional law lies in the translation of those prerogatives from the Crown to its subjects through the medium of representative and responsible government. Consequently, what is done by the Crown's ministers is done by the Crown, and its prerogatives, to that extent, attach to them.

10 Relevantly, Crown prerogative was, and is, part of the general law cognizable, and administered, by the courts in the course of cases before them. The way in which they have come to apply it where the production of state papers is sought has altered⁹, leaving the decision whether or not to produce in the hands of the court, not the government.

15 There is no corresponding rule of law in the parliamentary sphere. The *Egan* case decides no more than that which s 4 of PPA declares, viz, the House (or a duly authorized committee) may order the production of relevant documents including state papers. *Egan* turns on the existence of the power to order production rather than the circumstances under which an order for production may be a nullity. The same issues arose in the *ALS* case but again, the Full Court was not concerned with defenses to production based on other than the constitutional relationship between the Commonwealth and the State in relation to a body incorporated under State law but funded by the Commonwealth.¹⁰

20 It is left to the House and the Government to determine how, and to what extent, those documents will be produced. Caution should be exercised in attempting to translate what occurs in the course of litigation, where production (if required) is limited to the extent necessary to do justice between the parties, to the parliamentary environment where "public interest" may equate with the political objectives of the majority rather than any considered weighing of private right and public interest. As the NSW Court of Appeal observed in *Egan*:

30 *Powers of the kind here in question are exercised in a context in which conventions and political practices are as important as rules of law*¹¹,

The issues before your committee are —

- 35
1. Was the order properly directed to Dr Murphy as a public servant?
 2. If not, to whom should it have been directed?
 3. Was Dr Murphy justified in not producing the documents if the order was improperly directed to him?

40 These questions require consideration of the relationship that exists between a minister and a public servant and, as between the House and the Government, which of them has the possession or control of the documents. Consideration will also need to be given to the actual status of the documents, ie, were they commissioned, controlled or possessed by the Crown?

- 45
4. Was the failure to produce justified by reference to the obligations imposed on the Minister by the *Goldfields Gas Pipeline Agreement Act 1994*? Additionally, is non-production justified on the ground that the documents contain commercially-sensitive material?

These questions involve discussion of the rule of construction that express words are required in a statute if parliamentary privilege is to be ousted or its application modified. It also requires consideration of s 58C

⁹ *Sankey* supra pp 13-17 per Gibbs ACJ.

¹⁰ see the discussion in *ALS* p 318 et seq per Nicholson J.

¹¹ *Egan v Willis & Cahill* (1996) NSW Court of Appeal CA 40374/96 p 23 per Gleeson CJ. Currently on appeal to High Court.

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of the *Financial Administration and Audit Act 1985*¹² and its effect (if any) on the construction of the *Agreement Act*.

5 For the sake of completeness, there is a further question on which your committee may wish to express a view:

May the Committee order the documents' authors to produce them on refusal of the Minister?

10 Before advising your committee on these issues, it is suggested that evidence be taken from Dr Murphy, the Chairman and/or other members of the Committee (by invitation), and the Attorney General. It would be useful if the Attorney General could be asked to provide the State's written submission to the High Court on *Egan*¹³ and the Director-General of the Department of Premier and Cabinet be requested to provide a copy of guidelines for public servants appearing before parliamentary committees.

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L.B. Marduet
Clerk of the Legislative Council

25

November 3 1998

Chairman and Members
Select Committee of Privilege *re* Failure to Produce Documents

¹² " 58C. The Minister and the accountable officer of every department . . . shall ensure that —

- (a) no action is taken or omitted to be taken; and
- (b) no contractual or other obligation is entered into,

by or on behalf of the Minister, department or statutory authority that would prevent or inhibit the provision by the Minister to the Parliament of information concerning any conduct or operation of the department or statutory authority in such a manner and to such an extent as the Minister thinks reasonable and appropriate. "

¹³ see Transcript of proceedings, Sep 1 1998, *Egan v Willis & anor S75/1997*, p 14, Meadows SG.

ANNEXURE B



OFFICE OF THE PREMIER

DEPARTMENT OF THE PREMIER AND CABINET
187 ST. GEORGE'S TERRACE, PERTH, WESTERN AUSTRALIA 6000.
TELEPHONE: 09 222 9444. TELEX: AA 80078.

Our Ref: P.518/86

10th February, 1987

CIRCULAR TO MINISTERS 7/87

GUIDELINES RE EVIDENCE TO PARLIAMENTARY COMMITTEES

Attached are introductory guidelines for the provision of information and evidence by Western Australian Government officers and employees to Western Australian, Commonwealth and other parliamentary committees and other official inquiries.

The document is an introductory guide and, in some situations, skilled legal advice will be needed.

Ministers are alerted particularly to paragraph 4 of the guidelines concerning the need for the Attorney General or his officers to be consulted.

The guidelines specifically underline to officers the need to distinguish between expressing personal views and the views they may properly express in an official capacity. The document also offers useful advice on how to deal with improper questions.

Ministers' attention is also drawn to paragraph 34 concerning the need for submissions to Commonwealth inquiries to be co-ordinated by the Policy Division of the Department of the Premier and Cabinet.

The guidelines have been prepared because officers who have given evidence to committees in the past have indicated that they were uncertain as to their rights and responsibilities. Accordingly, the document should be made readily available to any of your officers who may face the prospect of being asked to give evidence verbally or in writing to a parliamentary committee.

Rowan Burke

PREMIER

GUIDELINES FOR THE PROVISION OF INFORMATION AND EVIDENCE BY WESTERN AUSTRALIAN GOVERNMENT OFFICERS AND EMPLOYEES TO WESTERN AUSTRALIAN, COMMONWEALTH AND OTHER PARLIAMENTARY COMMITTEES AND OTHER OFFICIAL INQUIRIES

1. Western Australian Government officers and employees may be called upon to provide information or give evidence in a variety of contexts outside the course of their day to day duties.
2. This may involve appearances before or provision of information or evidence to:
 - (1) Western Australian parliamentary or other Committees of Inquiry; or
 - (2) Parliamentary or other Committees of Inquiry of the Commonwealth or another State or Territory.
3. These guidelines are to assist officers and employees to understand their responsibilities and the procedures applying in each of the above cases.
4. They are necessarily introductory in nature and in a particular case specific legal advice may well be necessary. In such cases the Attorney General or his officers should be consulted.
5. Royal Commissions and other Boards of Inquiry may be appointed with statutory powers to request or summon the production of documents or appearances by individuals. Such requests or summonses are beyond the scope of these guidelines. Such requests or summonses should be reported immediately to the Head of Department or Agency and the Minister informed.

PROVISION OF INFORMATION AND EVIDENCE TO COMMITTEES OR A HOUSE OF THE WESTERN AUSTRALIAN PARLIAMENT

General

6. The Committee system can, in general terms, be seen as an extension of the parliament as regards powers and privileges. It is one of the major means by which the parliament carries out its examination of Government activity.

- 2 -

Committees have the power to send for persons, papers and records. In scrutinising the affairs of Government, this is done in the knowledge that Government officers and employees are called to give evidence of activities carried out under the direction and responsibility of the Minister. This accords with the basic Westminster principle that for activities of Government, the Minister answers to the Parliament; officers and employees through the Head of their Department or Agency, are responsible to the Minister. The exceptions to this principle are of course those bodies which have a statutory responsibility, deliberately given on account of their unique responsibilities, to report direct to the parliament. These bodies include the Auditor-General and the Ombudsman.

8. The role of official witnesses is to speak to any official statement provided to the Committee to provide factual and background material pertinent to its inquiries, to give factual explanation of Government policy if required, and to assist the Committee's understanding of any issues involved.

Officers and Employees Appearing in Private Capacity

9. Officers may not, except with the consent of their Minister or Permanent Head as appropriate, utilise or refer in their submissions to information gained in the course of official duties. Neither should they seek to attribute status to their submissions by virtue of their official position.
10. Senior officers, and Permanent Heads in particular, are expected to consult with their Minister in respect of any submissions they may wish to make as private individuals. Any opinions offered by officials should be expressly identified as their own.

Arrangements to Provide Evidence or to Appear Before a Committee or a House of the Western Australian Parliament

11. As a matter of practice, arrangements for an official to attend a Committee inquiry in an official capacity, or to provide material to it, should be made through the relevant Minister.

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- 3 -

12. The Permanent Head will advise the Minister on the official(s) most appropriate to provide the evidence sought by the committee from the Department or Authority.
13. Any original official statement, and the provision or production of other documentary evidence, will be cleared with the Minister before it is submitted.
14. A request for more time to prepare evidence may be made to the Committee by the Minister (or the department acting on his or her behalf) if the notice is considered insufficient.

Conduct During Hearings

15. Officials should adopt a co-operative and frank approach and should submit pertinent and precise evidence. This should however be of a factual kind. On matters of government business, officials appear before Parliamentary Committees as representatives of Ministers. They should not be expected therefore to answer questions:
 - (a) seeking their personal views on government policy;
 - (b) which would require the witnesses to offer judgments on the policies or policy options of the Western Australian or other governments;
 - (c) on matters which could give rise to a claim of privilege (see detailed comments later) including questions seeking evidence or identification of consideration leading to a Ministerial or Government decision or possible decision, unless the Minister has already decided that a claim of privilege is not proper or will not be made.
16. The Chairman may rule out of order questions falling within paragraph 15. If an official witness is directed to answer such a question, permission should be sought to defer an answer until the matter can be discussed with the Minister or Permanent Head. The witness should alternatively request that the answer to the particular question be reserved for submission in writing.

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17. Official witnesses, when preparing for questioning, should be careful to consider the wider ramifications of any response or submission which might bring it within an area of public controversy. This includes background material or information.
18. It is important that as questions are answered during hearings, witnesses should take care not to intrude into responsibilities of other departments and agencies. Where a question falls within the administration of another department or agency an official witness may request that it be directed to that department or agency or be deferred until that department or agency is consulted.

PARLIAMENTARY AND CROWN PRIVILEGE

Claims of Privilege by Ministers (or on their behalf)

19. Claims of privilege are a significant step and normally should only be made by a Minister (normally the responsible Minister) in consultation with the Premier. As far as practicable, the question whether a claim of privilege should be made should be decided before a hearing.
20. If an official witness, when giving evidence to a Committee, believes that circumstances have arisen which may justify a claim of privilege he or she should request a postponement of evidence, or of the relevant part of that evidence, until the Minister can be consulted.
21. The Minister should be consulted in all cases in relation to requests for information or documents relating to the following matters. (N.B. These categories are not exhaustive. They are intended to alert officers to the type of information or document which may be the subject of a claim of privilege):
 - (a) Ministerial or departmental advice to or communications with Her Majesty or the Governor.
 - (b) Cabinet documents and proceedings.
 - (c) Executive Council documents and proceedings.

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- (d) Internal workings of the Government, such as discussions between Heads of Departments, papers brought into existence for the purpose of preparing Cabinet submissions, recommendations to and discussion papers for Ministers and Cabinet, documents and information which is part of the higher level of the policy formation processes of Government.
 - (e) Matters communicated by another Government or dealing with relations with other Governments.
 - (f) The national security.
 - (g) Law enforcement - including the identity of informants, information which would jeopardise an enquiry if revealed, information known to the Police which could place individuals in personal jeopardy or otherwise seriously harm them, information obtained by the Police in confidence.
 - (h) Public health and safety such as some information gathered by inspectors with a view to the setting and maintenance of proper safety standards and information obtained in confidence.
 - (i) Documents the subject of legal professional privilege or affecting legal proceedings.
 - (j) Opinions or advice of law officers.
 - (k) Information obtained under statutory compulsion or subject to a statutory confidentiality obligation.
 - (l) Information obtained in confidence.
 - (m) Personal or commercial information of a confidential nature.
22. It will often be appropriate for the official witness or the Minister to consult with the originator of a document before a decision is made by the Minister.

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Evidence in Camera

23. There may be occasions when a Minister would wish, on a balancing of the public interests involved, to raise with the Chairman the possibility of an official producing documents or giving oral evidence in camera and on the basis that information be not disclosed or published except with the Minister's consent.
24. There will be circumstances where official witnesses may have to request that their evidence, or part of that evidence, be heard in camera. These circumstances might include:
 - (a) Cases where, although a claim of privilege may be justified, the Minister considers that the balance of public interest lies in making information available to the Committee on the basis that it be heard in camera and not disclosed or published except with his consent.
 - (b) Cases where, while a claim of privilege may not be justified, there are other special considerations justifying the Committee being asked to take the evidence privately, e.g. where a private individual might unfairly be harmed or prejudiced by public disclosure, or be placed at physical or commercial risk.
 - (c) Cases where similar or identical evidence has been previously given in camera to other hearings of the Committee or other Committees of the Parliament and has not been made public.
25. If official witnesses, when giving evidence to a Committee, believe that circumstances have arisen to justify a request that evidence be heard in camera, they should request the postponement of their evidence, or of the relevant part of that evidence, until their Minister can be consulted.
26. In the event of witnesses being asked by a Committee to give evidence "off the record", they should request a postponement until their Minister can be consulted.

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Publication of Evidence

27. After perusing the record of their evidence, official witnesses should suggest any necessary corrections for incorporation or noting in the published record. Where these affect the substance of the evidence previously given, it may be necessary to seek the agreement of the Committee on the way in which the correction should be made, e.g. by tendering a subsequent statement.
28. If an official witness believes, after perusing the record, that some relevant evidence has been omitted, the leave of the Committee should be sought, after consultation with the Minister (or Permanent Head), to lodge a further statement supplementing the earlier evidence or to give further oral evidence.
29. An official witness has no authority to consent to the disclosure or publication of evidence given in camera. This is a matter for the Minister.

Costs of Appearance Before Committees

30. Officers and employees duly authorised by the Government to attend before Committees in an official capacity and give evidence or present submissions, clearly do so as part of their duties and any costs involved will therefore be met by the Government.

PROVISION OF INFORMATION AND EVIDENCE TO COMMONWEALTH OR OTHER STATE GOVERNMENT COMMITTEES OF INQUIRY

31. In cases where a formally constituted Parliamentary or Government Committee, Inquiry, Commission or similar body of the Commonwealth or another State or a Territory is seeking the assistance or co-operation of the State Government, the approval of the Premier is required. The request should take the form of a letter to the Premier (who should also be advised of any requests received via other channels).
32. Where personal appearances before such Committees (collectively described below as Inquiries) by State officers are also sought the initial request should make this clear or a further request should be directed to the Premier.

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33. Where Ministers, Departments and Agencies are aware of Inquiries which have not been the subject of a formal request and to which the Government might wish to initiate a submission, they should bring the matter to the attention of the Premier.

Note: Should a State official be served with process purporting to compel appearance before or the production of official documents to a Committee or Inquiry etc. of the Commonwealth or of another State or Territory the matter should be reported immediately to the Head of Department or Agency, and the Minister informed immediately.

Co-ordination of Response

34. As most Inquiries may affect responsibilities of more than one Minister all submissions to Commonwealth and similar Inquiries are to be co-ordinated by the Policy Division of the Department of the Premier and Cabinet.
35. Upon receipt of a request for assistance or advice from a relevant Inquiry, the Department of the Premier and Cabinet will arrange separately for Ministers, Departments and Agencies to be advised by letter of Inquiries most likely to be of interest to them.
36. The normal procedure will be for the Department of the Premier and Cabinet then to call an initial meeting of officers from relevant Departments or Agencies to prepare recommendations on whether a submission is required, what level of submission would be appropriate, which Department or Agency should have primary carriage of preparation of the draft if a combined submission is proposed and which other agencies, if any, should be involved.
37. The Premier will then advise the Inquiry as to whether Western Australian agencies will co-operate in its activities. Thereafter, the agency with carriage should co-ordinate preparation of the draft, in conjunction with the Department of the Premier and Cabinet where it is not already the lead agency.

Form of Response

38. All submissions in response to requests from Commonwealth Inquiries require government endorsement. That endorsement may be obtained in one of two ways:

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- (a) after consideration by Cabinet;
 - (b) after consideration by the Minister or Ministers of the initiating Department(s) and clearance by the Premier. The Premier will make the final judgment in consultation with the Minister(s) concerned, whether a submission requires consideration by Cabinet.
39. Drafts for Cabinet consideration should be cleared at officer level and submitted to Cabinet by the Minister or Ministers concerned or through the relevant standing or ad hoc Cabinet Committee.
40. The Premier will sign letters of transmittal for submission to Commonwealth Inquiries after the appropriate level of consideration as discussed in paragraphs 38 and 39 above.

Appearances Before Committees

41. When appearing before Committees and Inquiries of the Commonwealth or other Parliament or Government, or providing follow-up information, officers should ensure that their remarks are consistent with and do not go beyond those they are authorised to make by their Permanent Head or Minister. In particular, remarks on policy matters should not go beyond stated Government policy, policy views expressed in the relevant submission or information provided with express permission or authority.
42. When so appearing, if answers or documents are sought by the Committee or Inquiry which could be subject of a claim of privilege (see earlier discussion paragraphs 19 and following) the witness should seek instructions from the Minister. Paragraphs 15-18 should also be observed.

Questions of Privilege

43. If questions arise as to the powers and privileges of the Commonwealth Parliament or the Parliament of another State or Territory, officers appearing should seek permission to refer to their Minister for instructions.

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Appearances in a Private Capacity

44. Officers wishing to make a submission or appear in a private capacity before an Inquiry of the Commonwealth or other Government in a private capacity should seek permission and, if necessary, leave of absence to do so.
45. Officers may not, except with the consent of their Minister or Permanent Head as appropriate, utilise or refer in their submissions to information gained in the course of official duties. Neither should they seek to attribute status to their submissions by virtue of their official position.
46. Senior officers and Permanent Heads in particular, are expected to consult with their Minister in respect of any submissions they may wish to make as private individuals. Any opinions offered by officers should be expressly identified as their own.



OFFICE OF THE PREMIER

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Our Ref: P.518/86

13 April 1987

CIRCULAR TO MINISTERS NO. 23/87

GUIDELINES RE EVIDENCE TO PARLIAMENTARY COMMITTEES

Further to my circular no. 7/87 which included guidelines for the provision of information and evidence by Western Australian government officers and employees to Western Australian, Commonwealth and other parliamentary committees, I am advised that officers have given evidence to Commonwealth enquiries without first obtaining my approval.

I would be pleased if Ministers could ensure that all departments and authorities under their control are aware that approval is required before a decision is made to appear before committees of the Commonwealth or other States.

Brian Burke

PREMIER