HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MICHAEL EGAN — APPELLANT

AND

MAX WILLIS — FIRST RESPONDENT

WARREN CAMERON CAHILL — SECOND RESPONDENT

Egan v Willis [1998] HCA 71
19 November 1998
S75/1997

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

L S Katz SC, Solicitor-General for the State of New South Wales with M J Leeming for the appellant (instructed by Crown Solicitor for the State of New South Wales)

B W Walker SC with P T Taylor for the respondents (instructed by Mallesons Stephen Jaques)

Interveners:

D M J Bennett QC, Solicitor-General for the Commonwealth with H C Burmester QC and G M Aitken (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with P M Tate (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard (instructed by Crown Solicitor for the State of Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with G J Parker (instructed by Crown Solicitor for the State of South Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Egan v Willis & Anor

Parliament (NSW) – Legislative Council – Powers – Non-compliance by member of Legislative Council with order for production – Suspension of member for remainder of sitting day – Whether such suspension within power.

Parliament (NSW) – Legislative Council – Functions – Superintendence of executive government.

Parliament (NSW) – Responsible government – Source – Nature.

Justiciability – Powers of Legislative Council – Existence – Occasion for exercise – Manner of exercise.

Relief – Declaration – No other remedy sought – Availability – Discretionary considerations.

Constitution Act 1902 (NSW), s 5.
Standing Rules and Orders of the Legislative Council (NSW), Standing Orders 18, 29.

1 GAUDRON, GUMMOW AND HAYNE JJ. On 1 May 1996, the Legislative Council of New South Wales passed a resolution calling on the appellant, the Leader of the Government in that House and Treasurer, Minister for Energy, Minister for State Development and Minister Assisting the Premier, to table certain papers in the House or deliver them to the Clerk. The appellant did not do so, the Cabinet having earlier agreed that Ministers should decline to comply with any orders from either House of Parliament to table documents.

2 On 2 May 1996, the Legislative Council passed a resolution adjudging the appellant guilty of a contempt of the House (par 2), suspending him from the service of the House for the remainder of the day's sitting (par 3(a)), and ordering him to attend in his place at the Table of the House on the next sitting day to explain his reasons for not complying with a number of orders of the House to table documents, including the papers mentioned in the resolution of 1 May 1996 (par 3(b)). The appellant did not leave the House. The Usher of the Black Rod (the second respondent) was directed by the then President of the Legislative Council (the first respondent) to escort the appellant from the chamber and the parliamentary precincts. Black Rod did this, taking the appellant from the chamber and the parliament building out on to the footpath of Macquarie Street.

3 The appellant brought an action in the Supreme Court of New South Wales seeking declarations that (i) pars 2 and 3 of the resolution of 2 May 1996 were invalid and (ii) his removal into the street constituted a trespass. Those proceedings were removed into the Court of Appeal of New South Wales. That Court (Gleeson CJ, Mahoney P, Priestley JA)[1] dismissed the claim for the first declaration and, in respect of the other claim, declared that the respondents "committed an actionable trespass to the person of the [appellant] by reason of the extent of his removal on 2 May 1996".

4 The Court of Appeal, in dismissing the claim for a declaration of the invalidity of pars 2 and 3 of the resolution, dealt with the merits of the matter rather than on the footing that a bare declaration with respect to the validity of proceedings in the Legislative Council should not be made. The Court of Appeal appears to have dealt with the merits on the footing that the questions respecting the privileges of the Council required an answer as a necessary step to a determination of the private rights of the appellant for which he sought vindication through the tort of trespass to the person.

5 We emphasise that, even if an application for a bare declaration of the nature we have described would have been justiciable (as to which we express no

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1 (1996) 40 NSWLR 650.

concluded opinion), at least as a matter of discretion, a suit constituted solely to obtain such relief ordinarily ought not be entertained. Questions respecting the existence of the powers and privileges of a legislative chamber may present justiciable issues when they are elements in a controversy arising in the courts under the general law[2] but they should not be entertained in the abstract and apart from a justiciable controversy. Declaratory relief should be directed to the determination of legal controversies concerning rights, liabilities and interests of a kind which are protected or enforced in the courts[3]. This is so even though in the area of public law the ground of equitable intervention has not been limited to the protection of any particular proprietary or legal entitlement of the plaintiff[4].

6 There is a further point with respect to the relief granted by the Court of Appeal. Paragraph 3(b) of the resolution ordered the appellant to attend in his place on the next sitting day to explain his reasons for non-compliance with various orders. However, the Court of Appeal, responding to the course of argument, treated par 3(a), which dealt with suspension, as the matter essentially in question[5]. There was, as Gleeson CJ observed, no argument with respect to par 3(b)[6]. Nothing said in the reasons that follow should be read as expressing any view upon the validity of par 3(b) of the resolution.

7 The appellant appeals to this Court by special leave. No cross-appeal has been brought against the limited declaration made below and therefore what became known in the argument and judgments in the Court of Appeal as the "footpath point" does not arise in this Court. The central question in this appeal is whether there was any justification for the trespass constituted by his removal from the chamber (and other rooms for the use of members) to the limit of the parliamentary precinct. That question, in turn, presents an issue as to the powers of the Legislative Council with respect to pars 2 and 3(a) of the resolution of 2 May 1996.

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2 For example, on an application for *habeas corpus* as in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157; 92 CLR 171 (PC).

3 *Croome v Tasmania* (1997) 191 CLR 119 at 132-133; *Mutasa v Attorney-General* [1980] QB 114 at 123.

4 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 72 ALJR 1270 at 1275-1276, 1289-1291, 1291; 155 ALR 684 at 690-691, 708-712, 712.

5 (1996) 40 NSWLR 650 at 681, 693.

6 (1996) 40 NSWLR 650 at 671.

The Constitution Act and the Legislative Council

8 In addition to his ministerial portfolios, the appellant is Vice-President of the Executive Council. Section 35C(3) of the *Constitution Act* 1902 (NSW) ("the Constitution Act") allows for the appointment by the Governor of one of the members of the Executive Council as Vice-President of that body. The Executive Council advises the Governor in the government of the State (s 35B). The Premier and other Ministers of the Crown for the State are appointed by the Governor from among the members of the Executive Council and hold office "during the Governor's pleasure" (s 35E).

9 The Legislative Council was "reconstituted" on the commencement of the *Constitution (Legislative Council) Amendment Act* 1991 (NSW). This is the term used in s 17(1) of the Constitution Act, which itself was inserted in 1991. The effect of s 22B of the Constitution Act (as amended by the 1991 statute) is that a member of the Legislative Council holds office for a term longer than that of a member of the Legislative Assembly. Moreover, the system for the election of members of the Legislative Council, provided by s 22A and the Sixth Schedule to the Constitution Act, differs from that provided by Div 3 of Pt 3 of the Constitution Act (ss 23-33) with respect to the Legislative Assembly.

10 One consequence of these structural differences is that the government of the day may not command the sure support of a majority in the Legislative Council[7]. The "balance of power" may rest with members who are independent of any of the major political parties. The administration of which the appellant is a member did not, at the material time, enjoy the support of a majority in the Legislative Council. The submissions for the appellant suggested that this circumstance strengthened his position in the case. However, as will appear, that is not necessarily so. Rather, it may have provided the occasion for the exercise by the Legislative Council of its function with respect to the superintendence of the conduct of the executive branch of government, at least in its association with the legislative function of that House.

11 In s 3 of the Constitution Act, the expression "The Legislature" is so defined as to mean the Sovereign with the advice and consent of the Legislative Council and the Legislative Assembly. Section 5 makes provision for its general legislative powers. It states:

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7 Section 22I of the Constitution Act provides that all questions arising in the Legislative Council shall be decided by a majority of the votes of the members present other than the presiding member and that, when the votes are equal, the presiding member shall have a casting vote.

"The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever:

Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly."

Section 5A establishes a procedure whereby money Bills may be presented for the Royal Assent, notwithstanding that the Legislative Council has not assented thereto. Section 5B makes a special provision dealing with disagreements between the two Houses with respect to Bills other than those to which s 5A applies; these provisions include a joint sitting of members of both chambers and may lead to the submission of the Bill in contention by way of referendum to the electors. Section 7A entrenches the position and powers of the Legislative Council.

12 In general[8], the two Houses enjoy the same right of disallowance of statutory rules[9]. Section 40 of the Interpretation Act requires the tabling before each chamber of written notice of the making of a statutory rule. Section 41 empowers either chamber to pass a resolution disallowing a statutory rule, a step which has the same effect as the repeal of the rule (s 41(3)).

13 The acts that are said by the appellant to be a trespass are acts that were done following the resolution for suspension of the appellant from the service of the House. That a House of the Parliament of New South Wales has power to suspend one of its members in some circumstances cannot be doubted and no party or intervener sought to argue to the contrary. Rather, the argument focused upon the occasion for suspension and upon the question of principle of whether the Legislative Council has power to require one of its members, who is a Minister, to

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8 Some legislation, for example s 14A(6) of the Constitution Act, provides that a statutory rule does not cease to have effect upon its disallowance by one House of the Parliament unless it previously has been disallowed by the other House.

9 Section 21(1) of the *Interpretation Act* 1987 (NSW) ("the Interpretation Act") defines "statutory rule" as meaning:

"(a) a regulation, by-law, rule or ordinance:

(i) that is made by the Governor, or

(ii) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor, or

(b) a rule of court."

produce State papers to the House. Some reference to the Standing Orders of the Legislative Council should be made.

Standing Orders

14 Part V of the Standing Rules and Orders of the Legislative Council ("the Standing Orders") is headed "PAPERS". It comprises Standing Orders 18-22. Standing Order 18 states:

> "Any Papers may be ordered to be laid before the House and the Clerk shall communicate to the Premier's Department any such order."

Standing Order 20 provides:

> "All Papers and Documents laid upon the Table of the House by a Minister shall be considered public, and may be ordered to be printed on motion without notice, and it shall always be in order on the presentation of any document, except a Petition, Return to Address, or Order, for the Member presenting it to move, without previous notice, that it be printed, and, if desired, that a day be appointed for its consideration."

The Clerk "shall distribute to each Member of the Council a copy of each Paper printed by Order of the Council, and shall transmit to the Clerk of the Assembly a sufficient number of copies of all such Papers for distribution to the Members thereof" (Standing Order 22).

15 In the Court of Appeal, Gleeson CJ said that the context shows that Standing Order 18 "refers to what are sometimes called State papers, that is to say, papers which are created or acquired by ministers, office-holders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of the State of New South Wales"[10].

16 Part VIII of the Standing Orders is headed "QUESTIONS SEEKING INFORMATION FROM THE GOVERNMENT OR PRIVATE MEMBERS" and comprises Standing Orders 29-32A. Standing Order 29 deals with Question Time. It states:

> "Questions may be put to Ministers of the Crown relating to public affairs; and to other Members, relating to any Bill, Motion, or other public matter connected with the business of the House, in which such Members may be concerned, and the Clerk shall enter upon the Minutes of Proceedings the

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10 (1996) 40 NSWLR 650 at 654.

Questions of which formal notice shall have been given, with the answers returned to the same."

The facts

17 In the Court of Appeal, the Chief Justice described the circumstances of the dispute giving rise to the present litigation. His Honour said[11]:

"During 1995, in respect of a number of politically controversial government proposals, the Legislative Council, under Standing Order 18, resolved that there be tabled, in [that] House, documents relating to various activities of 'the Government'.

There was nothing novel about such resolutions. The Court has been given details of many occasions, going back to 1856, when the Legislative Council has passed resolutions requiring the production to the Council of State papers. It appears that, in the great majority of such instances, the requirement has been obeyed without demur. However, on several of the occasions in 1995 mentioned above, the power of the Legislative Council to require the tabling of State papers was disputed.

The issue came to a head with respect to a matter concerning a proposal by a mining company in relation to a gold mine at Lake Cowal near West Wyalong. The nature of the political controversy in relation to the proposal is irrelevant. It suffices to say that the Opposition in the Legislative Council moved for the appointment of a Select Committee to inquire into and report upon certain decisions that had been made by a Commission of Inquiry, and advice or information that had been received by the Government about the matter."

18 On 23 April 1996, the Legislative Council resolved that there be tabled "all papers" relating to the consideration by the Government of the report of the Commission of Inquiry and the determination of the consent to the project. The resolution stated that it would be a sufficient compliance "for the Minister to table the documents required by delivering them to the Clerk of the House". It is common ground that the "Minister" referred to was the appellant.

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11 (1996) 40 NSWLR 650 at 654-655.

19 On 29 April 1996, Cabinet considered the resolution and made the following decision[12]:

> "The Cabinet agreed that Ministers should act on advice previously obtained from Crown Law officers and, accordingly, decline to comply with any orders from either House of Parliament to table documents on the grounds that such orders are invalid and beyond power."

20 On 2 May 1995, the appellant had informed the Legislative Council that, in addition to acting in respect to his own portfolios, he would, in the matter of the representation of government responsibilities in the Council, represent the Premier and a number of other named Ministers, including the Minister for Urban Affairs and Planning. Section 38A of the Constitution Act provides for, at any one time, one Minister of the Crown who is a member of the Legislative Assembly to sit in the Legislative Council, with the consent of that body, and for the purpose only of explaining the provisions of any Bill relating to or connected with any Department administered by him; this Minister may take part in any debate or discussion in the Legislative Council on that Bill but shall not vote in the Legislative Council. The provision for "representation" by the appellant, including of the Minister for Urban Affairs and Planning, had no foundation in s 38A. In the Court of Appeal, the Chief Justice observed[13]:

> "In this context, the concept of representation has a significance based upon convention and parliamentary practice. It has no defined legal or constitutional status. A minister who is a member of one of the two Houses will be represented in the other House; the representative, the Court was informed, undertakes 'the accountability obligations' of the minister being represented 'to the extent permitted by the co-operation' of the latter."

The Chief Justice also noted[14]:

> "It has been agreed between the parties that the [appellant] had in his custody and control at least four documents which were capable of being regarded as falling within the resolution of 23 April 1996. One of those documents was a report, or a copy of a report, from the Director-General of Urban Affairs and Planning to the Minister for Urban Affairs and Planning, dated 2 April 1996. The other three documents were described as ministerial

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12 (1996) 40 NSWLR 650 at 655.

13 (1996) 40 NSWLR 650 at 654.

14 (1996) 40 NSWLR 650 at 655.

> briefing notes which had been prepared for the purpose of enabling the [appellant] to answer questions in the Upper House on the subject of the Lake Cowal project. There is no agreement, or evidence, as to whether the [appellant] had, or could obtain, any other documents, or copies of documents, falling within the resolution. The [appellant] has taken his stand, not upon any suggested compliance with the orders of the Council, but upon what he contends is the Council's inability to compel compliance."

The role of the courts

21 What we have observed when outlining the course of the proceedings in the Court of Appeal indicates a necessity to say something of the role of the courts in a dispute like this. In order to understand that role, it is necessary to refer to some matters of history.

22 The history of the relationship between the courts and Parliament at Westminster is long and, at times, has been marked by conflict and controversy. That history underlies and underpins much of the law that has developed in this country. Central to the understanding of much of the history of the relationship between the courts and the Westminster Parliament is Art 9 of the *Bill of Rights* ("the Bill of Rights")[15]:

> "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."

And Art 9 is relevant to the issues that fall for decision in this case because the Bill of Rights is one of the Imperial Acts dealt with in the *Imperial Acts Application Act* 1969 (NSW) ("the Imperial Acts Application Act"). Section 6 of that Act declares the Bill of Rights and various other statutes (including Magna Carta and the *Habeas Corpus Acts* of 1640[16], 1679[17] and 1816[18]) so far as those Acts were in force in England on 25 July 1828 to have been in force in New South Wales on that day. This restates the effect of the Imperial Act known as the *Australian Courts Act* ("the Australian Courts Act")[19]. The Imperial Acts Application Act

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15 1 Wm & Mary Sess 2 c 2.

16 16 Cha I c 10, s 6.

17 31 Cha II c 2, ss 1-8, part of s 11 and ss 15-19.

18 56 Geo III c 100.

19 9 Geo IV c 83.

further declares that, except so far as affected by any Imperial enactments or State Acts from time to time in force in New South Wales, these Acts have remained in force and shall be in force in the State. It was not suggested that Art 9 of the Bill of Rights had been affected by any Imperial or State Act.

23 Applying the Bill of Rights in New South Wales presents some textual problems, if only because it is a statute that, when enacted, was directed to the English courts and Parliament. Yet the evident intention behind the provisions of the Imperial Acts Application Act that have been mentioned is that the constitutional norms prescribed by the Bill of Rights should apply in New South Wales. In particular, so far as presently relevant, the evident intention was that there should be some limits upon the extent to which events happening in the New South Wales legislature may be considered in the courts. It may very well be that effect is to be given to that intention simply by reading the references in Art 9 to "court" and "parliament" as references to the courts and Parliament of the State. But not all other provisions of the Bill of Rights or other preserved Imperial Acts may admit of so ready a solution to the problems of how they are to be applied and it may be that more radical solutions may be required in such cases[20]. These are questions that need not be addressed in this case.

24 However, it may be observed that in South Australia and Western Australia, where the Australian Courts Act never applied, "it appears simply to have been regarded as axiomatic from the beginnings of European occupation that a statute such as the Bill of Rights would apply under the common law principles on the reception of law in settled colonies"[21]. Further, in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*[22], Isaacs J referred to discussion of the Bill of Rights as being but declaratory of "the ancient law of England" and, in an appeal from New South Wales heard before the enactment of the Imperial Acts Application Act, Dixon CJ treated the Bill of Rights as embodying "general constitutional principle[s]"[23].

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20 See, for example, Landis, "Statutes and the Sources of Law", *Harvard Legal Essays*, (1934) at 213.

21 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 467.

22 (1922) 31 CLR 421 at 463, citing May, *Parliamentary Practice*, 10th ed at 4.

23 *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 258. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566; Dixon, "The Common Law as an Ultimate Constitutional Foundation", (1957) 31 *Australian Law Journal* 240 at 242-243.

25 What, then, is the role of the courts in a dispute like this? The appellant's action is for trespass to the person. The respondents plead justification of their admitted acts: that justification being the suspension of the appellant from the service of the House. The "question at the root of the case"[24] is whether the House has the power to do so for non-compliance with resolutions that the appellant table certain State papers. There are numerous examples of similar disputes to be found in decided cases. For example, in *Willis and Christie v Perry*[25], the respondent, a member of the New South Wales Legislative Assembly, brought an action against the Speaker and the Serjeant-at-Arms for assault and false imprisonment. There was judgment for the respondent on his demurrer to a plea by the defendants. The unsuccessful plea had been to the effect that the Speaker had authority to cause a member, who had been disorderly in the chamber and who had left it in a disorderly manner, to be arrested outside the chamber and brought back into it.

26 Two propositions are clear. First, the present action having been brought, it must be decided[26]. And secondly, the plea of justification is not conclusive, notwithstanding that it is an alleged justification founded in what was resolved by the Legislative Council[27].

27 There are, nevertheless, some limits to the extent to which the courts will examine what occurred in the House. For present purposes the relevant limit is that identified in *R v Richards; Ex parte Fitzpatrick and Browne* where Dixon CJ, speaking for the whole Court, said that[28]:

> "it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise".

Although this was said in a case arising from action taken by one of the Houses of the Commonwealth Parliament, it has equal application to the present case. The corollary is, to adopt what McLachlin J said with respect to the privileges of the

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24 The phrase used by Griffith CJ in *Willis and Christie v Perry* (1912) 13 CLR 592 at 597.

25 (1912) 13 CLR 592.

26 *Stockdale v Hansard* (1839) 9 Ad & E 1 [112 ER 1112].

27 *Stockdale v Hansard* (1839) 9 Ad & E 1 [112 ER 1112]; *Kielley v Carson* (1842) 4 Moo PC 63 [13 ER 225]; *Barton v Taylor* (1886) 11 App Cas 197; *Toohey v Melville* (1892) 13 LR (NSW) 132; *Willis and Christie v Perry* (1912) 13 CLR 592.

28 (1955) 92 CLR 157 at 162.

Nova Scotia House of Assembly, that for the courts to examine the content of particular exercises of valid privilege "would trump the exclusive jurisdiction of the legislative body" and that intervention by the courts is only "at the initial jurisdictional level"[29].

28 Section 49 of the Commonwealth Constitution provides that, until declared by the Parliament, "[t]he powers, privileges, and immunities of the Senate and of the House of Representatives … shall be those of the Commons House of Parliament of the United Kingdom … at the establishment of the Commonwealth". At the time of *Fitzpatrick and Browne* those powers, privileges and immunities included the principles declared by Art 9 of the Bill of Rights[30].

29 The Constitution Act contains no equivalent of s 49 of the Commonwealth Constitution. The New South Wales Parliament, unlike some other colonial or State legislatures[31], has never enacted general legislation seeking to identify its powers, privileges and immunities with those of the House of Commons in the United Kingdom. Its powers and privileges, so far as presently relevant, are therefore to be found otherwise than by reference to statute[32].

The powers and privileges of the Legislative Council

30 What are the powers and privileges of the Legislative Council of New South Wales? In particular, may the Legislative Council suspend one of its members (for a limited time) for failing to produce State papers that the House has sought?

31 Since *Kielley v Carson*[33] (which concerned the powers of the House of Assembly of Newfoundland) discussion of the powers and privileges of what were

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29 *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319 at 384.

30 The *Parliamentary Privileges Act* 1989 (Cth) enacted after *R v Richards; Ex parte Fitzpatrick and Browne* may be put to one side for present purposes.

31 See, for example, "An Act for defining the Privileges Immunities and Powers of the Legislative Council and Legislative Assembly of Victoria respectively" (20 Vict No 1) passed by the Parliament of Victoria in 1857. See, now, as to the privileges of State legislatures other than New South Wales, *Constitution Act* 1975 (Vic), s 19; *Constitution Act* 1934 (SA), s 38; *Constitution Act* 1867 (Q), s 40A; *Parliamentary Privileges Act* 1891 (WA); *Parliamentary Privilege Act* 1858 (Tas).

32 The *Parliamentary Evidence Act* 1881 (NSW) and the *Parliamentary Evidence Act* 1901 (NSW) are not relevant to this matter and may be put aside.

33 (1842) 4 Moo PC 63 [13 ER 225].

then colonial legislatures has been cast in terms of whether the power in question is "necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute"[34]. (The test is sometimes described as a test of "reasonable necessity"[35] but nothing turns in this case on which is the better description.)

32 The approach described above has been applied in cases concerning the New South Wales legislature. In *Barton v Taylor*[36] the Privy Council considered an appeal from a demurrer in an action for trespass arising from the forcible removal of a member from the Legislative Assembly of New South Wales. The Judicial Committee applied the principles described in *Kielley v Carson* and *Doyle v Falconer*, namely, that no powers to protect itself against obstruction, interruption or disturbance of its proceedings by the misconduct of any of its members in the course of those proceedings "are incident to or inherent in a Colonial Legislative Assembly (without express grant), except 'such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute'"[37]. The Privy Council held in *Barton v Taylor* that the power of suspending a member guilty of obstruction or disorderly conduct during the continuance of a current sitting was reasonably necessary for the proper exercise of the functions of the Legislative Assembly. Like principles were then applied by this Court in *Willis and Christie v Perry*[38], a case which also concerned the Legislative Assembly of New South Wales.

33 It was submitted that other considerations should be taken into account since federation and since the passing of the *Australia Act* 1986 (Cth) ("the Australia Act"). In particular, it was contended that the Commonwealth Constitution's reference to and conferral of functions upon the Parliaments of a State or its

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34 *Kielley v Carson* (1842) 4 Moo PC 63 at 88 per Parke B [13 ER 225 at 234]; *Fenton v Hampton* (1858) 11 Moo PC 347 [14 ER 727] (concerning the Legislative Council of Van Diemen's Land); *Doyle v Falconer* (1866) LR 1 PC 328 (concerning the House of Assembly of Dominica).

35 *Barton v Taylor* (1886) 11 App Cas 197 at 203; *Willis and Christie v Perry* (1912) 13 CLR 592 at 597 per Griffith CJ.

36 (1886) 11 App Cas 197.

37 (1886) 11 App Cas 197 at 203; citing *Kielley v Carson* (1842) 4 Moo PC 63 at 88 [13 ER 225 at 234].

38 (1912) 13 CLR 592.

Houses[39] and its continuation of the Constitution of each State of the Commonwealth[40] may affect the powers or privileges of the Houses of the State Parliaments. And it was further contended that account may have to be taken of the Australia Act, including its references to the legislative and other powers of the State Parliaments[41] and its termination of responsibility of the United Kingdom government in relation to State matters[42].

34 It is not necessary to consider in this case whether these submissions are right. It was not suggested that to take account of the Commonwealth Constitution or the Australia Act would lead to any diminution in the powers and privileges of the State Parliaments when those powers and privileges are identified according to what hitherto have been accepted principles. It is sufficient, therefore, for the purposes of this case, to apply the tests that have been applied in earlier authority.

The functions of the Legislative Council

35 In identifying the functions of the Legislative Council of New South Wales and what is "necessary" to the "proper exercise" of those functions, it is, again, desirable to make some reference to history.

36 As Gleeson CJ said in his reasons for judgment in the Court of Appeal[43]:

> "At the present time New South Wales has a responsible and representative system of government, with a legislature comprising the Queen, the Legislative Council, and the Legislative Assembly. The members of both Houses are popularly elected, although the methods of election, and terms of office of the members, are different."

However, his Honour went on to point out that many aspects of responsible government, as it presently exists in the State, are not identified in the Constitution

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39 See, for example, ss 9, 15.

40 s 106.

41 See, for example, ss 2, 3, 4.

42 s 10.

43 (1996) 40 NSWLR 650 at 659.

Act and depend upon what has come to be fixed by convention. The Chief Justice said[44]:

> "The *Constitution Act* makes no reference to Cabinet. It does not refer to the conventional requirement that ministers be chosen from amongst the members of one or other of the Houses of Parliament. It does not reflect the conventional requirement that the Governor may only appoint as Premier a person who commands the confidence of the Legislative Assembly, or that the ministry must have the confidence of that House. No reference of any kind is made to the party system, which is of such importance at the level of political practice."

37 It was the *Constitution Act* 1855 (Imp)[45] ("the 1855 Imperial Act") that first provided for a bicameral legislature for New South Wales. Under that Act, the members of the Legislative Council were nominated, for life, by the Governor. (Members of the Legislative Council have been elected in New South Wales only since 1933, first by the two chambers of the legislature and later by popular election[46].) Opinions differ about whether the changes made by the 1855 Imperial Act to the institutions of government in New South Wales were designed to bring any particular form of responsible (as well as representative) government to what was then the Colony of New South Wales[47].

38 The contemporary operation of a system of responsible government reflects the significant role of modern political parties, one of which, or a coalition of which, in the ordinary course "controls" the legislative chamber or, in a bicameral system, at least the lower House[48]. Modern political parties did not exist in New

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44 (1996) 40 NSWLR 650 at 660.

45 Being Sched 1 to the Imperial Act, 18 & 19 Vict c 54.

46 See *Constitution Amendment (Legislative Council) Act* 1933 (NSW); *Constitution and Parliamentary Electorates and Elections (Amendment) Act* 1978 (NSW).

47 cf Jenks, *A History of the Australasian Colonies*, (1896), Ch XI; Jenks, *The Government of Victoria*, (1891), Ch XXII; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901), Historical Introduction, Pt III; Ward, *Colonial Self-Government*, (1976), Ch 9; Ward, "The Responsible Government Question in Victoria, South Australia and Tasmania, 1851-1856", (1978) 63 *Journal of the Royal Australian Historical Society* 221.

48 Australia, *Final Report of the Constitutional Commission*, (1988), vol 1 at 97, pars 2.233-2.234; Kinley, "The Duty to Govern and the Pursuit of Accountable Government in Australia and the United Kingdom", (1995) 21 *Monash University*

(Footnote continues on next page)

South Wales when the bicameral legislature was first established under the 1855 Imperial Act. Indeed, until the end of the last century, no Australian colony had a developed system of political parties[49].

39 The Imperial legislation of the mid-nineteenth century by which bicameral legislatures were established in New South Wales and Victoria contained no express declaration of the establishment of the system of responsible government[50]. Despite the use of the short title "Constitution Act", there was no single instrument in which there was to be found what might be called the constitution of the colony or later of the State[51]. Further, in some colonies, for example Victoria, provisions required that only a certain number of the officers of the government need be members of the legislature[52].

40 In New South Wales, provisions were made in the 1855 Imperial Act with respect to money Bills and the parliamentary appropriation of the Consolidated Fund[53]. Further, s 37[54] of the 1855 Imperial Act included a provision to replace

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Law Review 116 at 124-126; Lipton, "Responsible Government, Representative Democracy and the Senate: Options for Reform", (1997) 19 *University of Queensland Law Journal* 194 at 195-196.

49 Finn, "Myths of Australian Public Administration" in Power (ed), *Public Administration in Australia: A Watershed*, (1990), 41 at 43.

50 *Toy v Musgrove* (1888) 14 VLR 349 at 392, 428; rev on other grounds [1891] AC 272.

51 See *The Commonwealth v Limerick Steamship Co Ltd and Kidman* (1924) 35 CLR 69 at 101-102. See also *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319 at 375-377.

52 Section 18 of the *Act to establish a Constitution in and for the Colony of Victoria*, being Sched 1 to the Imperial Act, 18 & 19 Vict c 55.

53 ss 47, 53-55. Section 45 of the Constitution Act now provides:

> "The Consolidated Fund shall be subject to be appropriated to such specific purposes as may be prescribed by any Act in that behalf",

and s 46 requires money Bills to be recommended by a message from the Governor to the Legislative Assembly save in respect of Bills introduced by, or a vote or resolution proposed by, a Minister of the Crown.

54 Section 37 stated:

(Footnote continues on next page)

the system whereby the appointment of officers in the public service of the colony had been made in England with a system conferring on the new colonial government power to make such appointments[55]. Provision to corresponding effect is presently made by s 47 of the Constitution Act. Both sections excepted from their scope the appointments of officers "liable to retire from office on political grounds". The officers mentioned in such an exception were said by Higinbotham CJ to be "clearly responsible officers or Ministers"; and the upshot was to give, "though indirectly", what was an "adequate expression" to an intention that "the principle of responsible government should be established by law"[56].

41 It should not be assumed that the characteristics of a system of responsible government are fixed or that the principles of ministerial responsibility which developed in New South Wales after 1855 necessarily reflected closely those from time to time accepted at Westminster[57]. Moreover, what are now federal and State co-operative legislative schemes involve the enactment of legislation by one Parliament which is administered and enforced by Ministers and officials at another level of government, not responsible to the enacting legislature[58].

> "The Appointment to all Public Offices under the Government of the Colony hereafter to become vacant or to be created, whether such Offices be salaried or not, shall be vested in the Governor, with the Advice of the Executive Council, with the Exception of the Appointments of the Officers liable to retire from Office on political Grounds as herein-after mentioned, which Appointments shall be vested in the Governor alone: Provided always, that this Enactment shall not extend to minor Appointments, which by Act of the Legislature, or by Order of the Governor and Executive Council, may be vested in Heads of Departments, or other Officers or Persons within the Colony."

55 *Ex parte Duggan* (1883) 4 NSWR(L) 332 at 334. See also *Evans v Donaldson* (1909) 9 CLR 140 at 148, 157-158.

56 *Toy v Musgrove* (1888) 14 VLR 349 at 392-393. Quick and Garran agreed with the position taken by Higinbotham CJ in this case: *The Annotated Constitution of the Australian Commonwealth*, (1901) at 44-47.

57 Finn, "Myths of Australian Public Administration" in Power (ed), *Public Administration in Australia: A Watershed*, (1990), 41; Finn, *Law and Government in Colonial Australia*, (1987) at 11-13, 86-91, 160-165; Uhr, *Deliberative Democracy in Australia*, (1998) at 194-196.

58 See *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 126-131; Lindell, "Responsible Government" in Finn (ed), *Essays on Law and Government*, (1995), vol 1, 75 at 112-113.

42 A system of responsible government traditionally has been considered to encompass "the means by which Parliament brings the Executive to account" so that "the Executive's primary responsibility in its prosecution of government is owed to Parliament"[59]. The point was made by Mill, writing in 1861, who spoke of the task of the legislature "to watch and control the government: to throw the light of publicity on its acts"[60]. It has been said of the contemporary position in Australia that, whilst "the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people" and that "to secure accountability of government activity is the very essence of

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59 Kinley, "Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices", (1995) 18 *University of New South Wales Law Journal* 409 at 411.

60 Mill, *Considerations on Representative Government*, (1861) at 104.

responsible government"[61]. In *Lange v Australian Broadcasting Corporation*[62], reference was made to those provisions of the Commonwealth Constitution which prescribe the system of responsible government as necessarily implying "a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament". The Court added[63]:

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

In Australia, s 75(v) of the Constitution and judicial review of administrative action under federal and State law, together with freedom of information legislation, supplement the operation of responsible government in this respect.

43 In the United Kingdom, the responsibility or accountability of individual Ministers recently was identified in a publication by the Cabinet Office as a guide to Ministers as including[64]:

> "Each Minister is responsible to Parliament for the conduct of his or her Department, and for the actions carried out by the Department in pursuit of Government policies or in the discharge of responsibilities laid upon him or her as a Minister. Ministers are accountable to Parliament, in the sense that they have a duty to explain in Parliament the exercise of their powers and duties and to give an account to Parliament of what is done by them in their capacity as Ministers or by their Departments."

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61 Queensland, Electoral and Administrative Review Commission, *Report on Review of Parliamentary Committees*, (October 1992), vol 1, par 2.23.

62 (1997) 189 CLR 520 at 561.

63 (1997) 189 CLR 520 at 561.

64 *Questions of Procedure for Ministers*, first published by the Cabinet Office in 1992, par 27. The text appears in Brazier, *Ministers of the Crown*, (1997) at 262-263 and in par D4.57 of the *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* ("The Scott Report"), HC 115, vol 4, ordered by the House of Commons to be printed, 15 February 1996. See also Tomkins, "Government Information and Parliament: Misleading by Design or by Default?", [1996] *Public Law* 472 at 478-481.

On the other hand, the Court recently affirmed that the confidentiality of Cabinet deliberations reflects the principle of collective responsibility which "remains an important element in our system of government"[65].

44 The litigation in *Fenton v Hampton*[66], which concerned the powers of the Legislative Council of Van Diemen's Land before the establishment of a bicameral legislature for Tasmania[67], had a significance beyond the immediate decision that such colonial legislatures had no inherent power to punish for contempt. The respondent had been Comptroller-General of Convicts and had been summoned to appear as a witness before a Select Committee of the Legislative Council which was inquiring into certain aspects of the convict system. The decision of the Privy Council proceeded on the undisputed footing that the Legislative Council had had the power to make the inquiry out of which the proceedings arose[68]. It may be taken that the New South Wales Legislative Council, as established under the 1855 Imperial Act, was in no lesser position. Moreover, the position of the Legislative Council has been enhanced since that time by its change to an elective body and by the arrival of the universal franchise.

45 One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the ministry must command the support of the lower House of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of a chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them. Nor is it a determinative consideration that the political party or parties, from members of which the administration has been formed, "controls" the lower but not the upper chamber. Rather, there may be much to be said for the view that it is such a state of affairs which assists the attainment of the object of responsible government of which Mill spoke in 1861.

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65 *The Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 615.

66 (1858) 11 Moo PC 347 [14 ER 727].

67 The constitutional development of Tasmania is traced by Quick and Garran: *The Annotated Constitution of the Australian Commonwealth*, (1901) at 60-61.

68 (1858) 11 Moo PC 347 at 397 [14 ER 727 at 745].

Conclusions

46 The arrangements made for New South Wales for the period following 1855 provided the elements of what now should be identified as a system of responsible government. There was an assumption of a measure of examination of the executive by the legislature as well as legislative control over taxation and appropriation of money. The consideration that the government of the day must retain the confidence of the lower House and that it is there that governments are made and unmade does not deny what follows from the assumption in 1856 by the Legislative Council of a measure of superintendence of the conduct of the executive government by the production to it of State papers.

47 It is not necessary to consider for the purposes of this appeal the limits involved in that superintendence. What is presently significant is the immediate interrelation between that superintendence and the law-making function in which the Legislative Council participates, together with the Legislative Assembly and the Crown.

48 The principle derived from the authorities and not challenged on this appeal is that the Legislative Council has such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions. As Priestley JA emphasised in the Court of Appeal[69], to decide whether a particular power, here the power of suspension of a member for a limited time from the service of the House, is reasonably necessary for the Legislative Council to perform any constitutional function, it is necessary first to identify that function.

49 The primary function of the Legislative Council is indicated by s 5 of the Constitution Act. This is the exercise by the Legislative Council, as an element of the legislature, of its power, subject to the provisions of the Commonwealth Constitution, to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever. As has been pointed out, subject to restrictions with respect to money Bills, a Bill may originate in the Legislative Council. Further, the Legislative Council has, in general, equal power of disallowance of delegated legislation[70].

50 In addition, the long practice since 1856 with respect to the production to the Council of State papers, together with the provision in Standing Order 29 for the putting to Ministers of questions relating to public affairs and the convention and parliamentary practice with respect to the representation in the Legislative Council

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69 (1996) 40 NSWLR 650 at 692.

70 Interpretation Act, ss 40, 41.

by a Minister in respect of portfolios held by members in the Legislative Assembly, are significant. What is "reasonably necessary" at any time for the "proper exercise" of the "functions" of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.

51 Such a position might be varied or abrogated by legislation. There has been no such legislation which is relevant to the present issue. In that regard, it will be noted that in respect of disagreements between the two chambers, s 5B of the Constitution Act provides a special mechanism which may lead to the submission of the measure to the electors.

52 In the Court of Appeal, Priestley JA pointed to the broad reach of the legislative power conferred by s 5 as indicating an imperative need for each chamber to have access to material which may be of help to it in considering not only the making of changes to existing laws or the enactment of new laws but, as an anterior matter, to the manner of operation of existing laws[71]. That anterior matter, as his Honour said, "clearly embraces the way in which the Executive Government is executing the laws"[72].

53 Questions of privilege may arise in relation to the production of documents. No such question arises here. Reduced to its essentials, what happened in the present case involved the determination by the Legislative Council to seek the provision to it by a member, who is a Minister and who "represented" another Minister in the Legislative Assembly, of State papers which, as Gleeson CJ described them, related "to matters of government business which the Council wished to debate"[73]. The appellant had in his custody and control certain documents which fell within the description of those sought in the relevant resolution. The Minister chose not to produce the papers, claiming, consistently with the position taken by the Cabinet, that the Legislative Council had no power to call for them. He was then suspended for the balance of the day's sitting.

54 If a member will not produce documents sought by the House there may be some limits to the steps it may take in response. In *Barton v Taylor* the Privy Council said[74]:

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71 (1996) 40 NSWLR 650 at 692-693.

72 (1996) 40 NSWLR 650 at 693.

73 (1996) 40 NSWLR 650 at 653.

74 (1886) 11 App Cas 197 at 204-205.

> "it may very well be, that the same doctrine of reasonable necessity would authorize a suspension until submission or apology by the offending member; which, if he were refractory, might cause it to be prolonged (not by the arbitrary discretion of the Assembly, but by his own wilful default) for some further time. The facts pleaded in this case do not raise the question whether that would be ultra vires or not. If these are the limits of the inherent or implied power, reasonably deducible from the principle of general necessity, they have the advantage of drawing a simple practical line between defensive and punitive action on the part of the Assembly. A power of unconditional suspension, for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse."

It is not necessary to say whether this is an accurate or exhaustive statement of the limits of the powers of the House. But one of the steps that the House may undoubtedly take is to resolve that the member be suspended for a limited time from the service of the House, and that is what happened here.

55 It was submitted that the House may not punish the member concerned but may coerce or induce compliance with its wish. To distinguish between punishing and merely inducing compliance may very well be difficult. Further, to state the distinction in these terms may distract attention from more important considerations of identifying what is the power that has been exercised and whether, or to what extent, the courts may review what has been done in Parliament. But on no view of the authorities did the action taken in passing and implementing pars 2 and 3(a) of the resolution go beyond the boundary of what is permissible. That being so, the appeal should be dismissed. We observed earlier in these reasons that we do not enter upon any question respecting par 3(b).

56 It is important to emphasise that no question arises in this case about what powers a House of the New South Wales Parliament may have to deal with persons who are not members of the House concerned. Altogether different considerations might arise in such a case. Nor does any question arise about what, if any, consequences might follow from the fact that some claim to privilege from production is made but rejected. Although these matters were canvassed in argument, it is not necessary to decide them.

57 McHUGH J. This important appeal concerns the powers of the Legislative Council of New South Wales, one of the two Houses of the Parliament of that State, and the extent to which, if at all, the courts in that State can make orders or declarations in respect of events occurring within the walls of the Council.

58 The appeal is brought by the Honourable Michael Egan, a member of the Legislative Council. The appeal arises out of proceedings which he commenced in the Supreme Court of New South Wales as the result of a resolution of the Council, made on 2 May 1996, suspending him "from the service of the House for the remainder of today's sitting"[75]. In the Supreme Court, the appellant sought a declaration that the respondents, the President and the Usher of the Black Rod of the Council respectively, had committed an unlawful trespass to his person by forcibly removing him from the "Chamber to the public footpath on Macquarie Street". He also sought a declaration that two paragraphs of a resolution, passed on 2 May 1996, were invalid. Those paragraphs contained resolutions of the Council which inter alia adjudged the appellant guilty of contempt of the House and suspended him from its service. On 2 July 1996, Dunford J ordered that the proceedings should be removed to the Court of Appeal. His Honour stated certain questions "to be decided" upon the removal. However, the Court of Appeal did not decide or answer the questions. At all events, it did not decide them formally. Instead, it ordered that the "[appellant's] claim for a declaration that the resolutions of the Legislative Council of 2 May 1996 were invalid [be] dismissed". It also declared that the respondents "committed an actionable trespass to the person of the [appellant] by reason of the extent of his removal on 2 May 1996." Pursuant to the grant of special leave, the appellant now appeals against the Order of the Court of Appeal dismissing his claim for a declaration that the resolutions were invalid.

59 I agree with other members of this Court that the substance of the appellant's claim must fail. But my reasons for doing so are different from theirs. My reasons are also different from those of the judges of the Court of Appeal of New South Wales against whose Order the appeal to this Court is brought. As a result, I think that, for what some may regard as technical reasons, the appeal should be allowed so that the Order and declaration made by the Court of Appeal can be set aside and a different order substituted.

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75 New South Wales, Legislative Council, *Minutes of the Proceedings of the Legislative Council*, 2 May 1996 at 117. Set out in the reasons of Gleeson CJ in the Court of Appeal: (1996) 40 NSWLR 650 at 657.

The history of the proceedings

60 The appellant is the Leader of the Government in the Legislative Council. At times material to this case, he was a Minister of the Crown, holding the offices of Treasurer, Minister for Energy, Minister of State Development and Minister Assisting the Premier. On 1 May 1996, the Council censured the appellant "as the representative of the Government in this House for the Government's failure to comply" with an earlier resolution requiring the tabling in the House of "papers relating to the Government's consideration of the report of the commission of Inquiry into the Lake Cowal goldmine and associated facilities ... and the determination of the consent to the project."[76] The resolution of 1 May also called upon the appellant to table the papers by the following day. He failed to do so. As a result, on 2 May 1996 the Council, after debate, adjudged the appellant "guilty of a contempt of this House"[77]. It also resolved[78]:

> "That this House, regarding it as necessary to obtain information on any matter affecting the public interest and in order to protect the rightful powers and privileges of the House, and to remove any obstruction to the proper performance of the important functions it is intended to execute:
>
> (a) hereby suspends the [appellant] from the service of the House for the remainder of today's sitting;
>
> (b) orders the [appellant] to attend in his place at the Table of this House on the next sitting day to explain:
>
> (i) his reasons for continued non-compliance with:
>
> [certain Orders of the House]
>
> (ii) the Government's failure to comply with the Order of the House dated 26 October 1995 to table certain documents concerning the recentralisation of the Department of Education."

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76 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 1 May 1996 at 577.

77 New South Wales, Legislative Council, *Minutes of the Proceedings of the Legislative Council*, 2 May 1996 at 117. Set out in the reasons of Gleeson CJ in the Court of Appeal: (1996) 40 NSWLR 650 at 656.

78 New South Wales, Legislative Council, *Minutes of the Proceedings of the Legislative Council*, 2 May 1996 at 117. Set out in the reasons of Gleeson CJ in the Court of Appeal: (1996) 40 NSWLR 650 at 657.

61 The sole ground of the Notice of Appeal filed in this Court states that the Court of Appeal:

> "erred in holding that the Legislative Council had an implied power to order the laying of documents on the table by the appellant, which order was enforceable by the imposition of the sanction of suspension on the appellant."

The ground of appeal, as so framed, suggests that there is only one question in the appeal. But in fact there are three. The first is whether the Council has the power to demand that a Minister of the Crown who is the Leader of the Government in the Council should table papers relating to matters that have been dealt with by the Government. The second question, which arises only if the first is answered in the affirmative, is whether the Council has power to suspend the Minister for failing to table papers in the possession of the Government when the Council has directed that those papers be tabled in the Council. Superimposed on these two questions is the third question. It is whether and, if so, to what extent the Supreme Court of New South Wales can make declarations or investigate matters concerning the business of the Council which takes place within the walls of the Council.

The question for decision

62 The appellant and the respondents were content to have the appeal in this Court determined, as it had been determined in the Court of Appeal, by answering the question whether the powers purportedly exercised by or on behalf of the Council were reasonably necessary for the proper exercise of the functions which the Council intended to execute. In the Court of Appeal, Priestley JA said that both sides accepted that the application of this test was "the only possible basis for the power which the Legislative Council was and is [asserting]"[79]. In my view, however, that test, although appropriate in other contexts as the determinant of the extent of the powers of the Council, is not appropriate when, as here, the issue concerns the right of the Council to obtain information from a Minister of the Crown concerning the business of government and the Minister is a member of the Council. It is not appropriate because, if answered in the affirmative, it must logically lead to the conclusion that the Council, by its resolution, could also adjudge an ordinary citizen guilty of contempt for failing to produce papers falling within the class in issue here, notwithstanding that no statute or common law rule in New South Wales requires a citizen to produce such papers to the Council. If answered in the negative, it must deprive the Council of a power to obtain documents whose production may be of great importance to the proper exercise of responsible government in New South Wales.

63 In my opinion, the power to adjudge the appellant guilty of contempt of the Council and to suspend him for failing to produce the papers inheres in the Council

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79 (1996) 40 NSWLR 650 at 687.

by reason of its being part of the Parliament of New South Wales. As an institution, that Parliament may not have all the attributes and powers of the Parliament of the United Kingdom whose enactment brought the Parliament of New South Wales into existence. Nevertheless, the powers and privileges of each of the Houses of the Parliament of New South Wales can only be understood by reference to the powers and privileges of the House of Commons and the great constitutional conflicts between the House of Commons on the one hand and the Crown, the House of Lords and the courts of law on the other which remained unsettled until the nineteenth century. As a result, the privileges and powers of each of the Houses of the New South Wales legislature include the power to obtain information from a Minister who is a member of that House and to suspend that Minister when the House concludes that his or her refusal to produce information is obstructing the business of the House.

64 Because one of the orders that the appellant sought in his Statement of Claim was a declaration that a resolution of the Council was invalid, it is necessary to begin by examining the relationship between the common law courts and Parliament when those courts are called upon to determine whether acts done in pursuance of a parliamentary resolution are unlawful. That examination must begin with the relationship of the courts and Parliament at Westminster, particularly the relationship of those courts with the House of Commons.

The law of Parliament as customary law

65 The principal disputes between the courts and the Houses of Parliament at Westminster arose from the claims of the House of Commons "that no Court has jurisdiction to discuss the legality of anything which its vote has ordered."[80] The common law courts have rejected that claim[81], and, as Sir William Anson pointed out in 1909[82], "[i]t is safe to say that the Courts have won the day." By 1840, the law was finally settled that, in the absence of a statutory direction, it was a matter for judicial decision as to what were the powers, privileges and immunities of the

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80 Anson, *Law and Custom of the Constitution*, 4th ed (1909), vol 1 at 146.

81 *Stockdale v Hansard* (1839) 9 Ad & E 1 [112 ER 1112].

82 *Law and Custom of the Constitution*, 4th ed (1909), vol 1 at 147.

House of Commons[83]. Whenever a claim of privilege arose in determining the rights and liabilities of subjects, the courts took the view that they had no option but to determine the correctness of the claim of privilege in so far as it was claimed to affect those rights or liabilities[84]. In *Stockdale v Hansard*[85], Patteson J said:

> "[E]very Court in which an action is brought upon a subject-matter generally and prima facie within its jurisdiction, and in which, by the course of the proceedings in that action, the powers and privileges and jurisdiction of another Court come into question, must of necessity determine as to the extent of those powers, privileges and jurisdiction: that the decisions of that Court, whose powers, privileges, and jurisdiction are so brought into question, as to their extent, are authorities, and, if I may say so, evidences in law upon the subject, but not conclusive. In the present case, therefore, both upon principle and authority, I conceive that this Court is not precluded by the resolution of the House of Commons of May 1837 from inquiring into the legality of the act complained of, although we are bound to treat that resolution with all possible respect".

66 Although the common law courts triumphed in their claim that they had jurisdiction to declare what were the powers, privileges and immunities of the Commons, they nevertheless conceded[86]:

> "that the members of each House of Parliament are the sole judges whether their privileges have been violated, and whether thereby any person has been guilty of a contempt of their authority; and so they must necessarily adjudicate on the extent of their privileges."

Moreover, *Burdett v Abbot*[87] and the *Case of the Sheriff of Middlesex*[88] established that the courts would not go behind a warrant of commitment for contempt of the Commons. The principle established by those cases was applied to commitments for contempt by the colonial legislature of Victoria in *Dill v Murphy*[89] and *The*

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83 Discussed in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162.

84 *Stockdale* (1839) 9 Ad & E 1 at 227-228 [112 ER 1112 at 1197].

85 (1839) 9 Ad & E 1 at 203 [112 ER 1112 at 1188].

86 *Stockdale* (1839) 9 Ad & E 1 at 195 [112 ER 1112 at 1186].

87 (1811) 14 East 1 [104 ER 501].

88 (1840) 11 Ad & E 273 [113 ER 419].

89 (1864) 1 Moore (NS) 487 [15 ER 784].

Speaker of the Legislative Assembly of Victoria v Glass[90], the legislature of Victoria having been given a statutory power to punish for contempt. The circumstances in which the courts will examine a claim of privilege, the breach of which has resulted in a commitment for contempt, were summarised by this Court in *R v Richards; Ex parte Fitzpatrick and Browne*[91]:

> "[I]t is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms."

67 Furthermore, the common law courts will not examine the administration of the law - including statute law - within the walls of Parliament when the matters involved relate only to the internal procedure of a House of Parliament. What is said or done within the walls of a parliamentary chamber cannot be examined in a court of law[92]. That was accepted by all the judges in *Stockdale*[93]. Mr Justice Coleridge said[94] "that the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules, or derogation from its dignity, stands upon the clearest grounds of necessity."

68 In *Bradlaugh v Gossett*[95], the Queen's Bench Division refused to examine the propriety of a resolution that restrained a member of the House of Commons from doing within the walls of the Commons what a statute entitled him to do, namely

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90 (1871) LR 3 PC 560.

91 (1955) 92 CLR 157 at 162.

92 Anson, *Law and Custom of the Constitution*, 4th ed (1909), vol 1 at 174-175, 176.

93 See (1839) 9 Ad & E 1 at 114, 162, 209, 233 [112 ER 1112 at 1156, 1173-1174, 1191, 1199].

94 (1839) 9 Ad & E 1 at 233 [112 ER 1112 at 1199].

95 (1884) 12 QBD 271.

take the oath prescribed by the *Parliamentary Oaths Act* 1866 (UK). Lord Coleridge CJ said[96]:

> "What is said or done within the walls of Parliament cannot be inquired into in a court of law. ... The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive."

Stephen J said[97]:

> "Some of these rights are to be exercised out of parliament, others within the walls of the House of Commons. Those which are to be exercised out of Parliament are under the protection of this Court, which, as has been shewn in many cases, will apply proper remedies if they are in any way invaded, and will in so doing be bound, not by resolutions of either House of Parliament, but by its own judgment as to the law of the land, of which the privileges of Parliament form a part. Others must be exercised, if at all, within the walls of the House of Commons; and it seems to me that, from the nature of the case, such rights must be dependent upon the resolutions of the House. In my opinion the House stands with relation to such rights and to the resolutions which affect their exercise, in precisely the same relation as we the judges of this Court stand in to the laws which regulate the rights of which we are the guardians, and to the judgments which apply them to particular cases; that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever, to guide their conduct by the law as they understand it."

Stephen J went on to say[98]:

> "We ought not to try to make new laws, under the pretence of declaring the existing law. But I must add that this is not a case in which I at least feel tempted to do so. It seems to me that, if we were to attempt to erect ourselves into a Court of Appeal from the House of Commons, we should consult neither the public interest, nor the interests of parliament and the constitution, nor our own dignity. We should provoke a conflict between the House of Commons and this Court, which in itself would be a great evil; and, even upon the most improbable supposition of their acquiescence in our adverse decision, an appeal would lie from that decision to the Court of Appeal, and

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96 (1884) 12 QBD 271 at 275.

97 (1884) 12 QBD 271 at 286.

98 (1884) 12 QBD 271 at 286-287.

thence to the House of Lords, which would thus become the judge in the last resort of the powers and privileges of the House of Commons."

69 In neither *Stockdale* nor *Bradlaugh* did the judges suggest that it was Art 9 of the Bill of Rights that precluded them from exercising jurisdiction. Rather, their reasoning indicates that by parliamentary law - which as customary law is part of the common law - matters affecting the internal administration of the House of Commons are outside the jurisdiction of the common law courts. The Bill of Rights which is in force in New South Wales[99] merely confirms the common law[100].

70 If the law laid down in *Bradlaugh*[101] correctly states the relationship between the Supreme Court of New South Wales and the Houses of the Parliament of that State, as I think it does, it would seem to follow that the claim of the appellant for a declaration concerning the invalidity of the resolution of 2 May was misconceived. It is one thing for that Court, as an incident in determining whether the respondents have committed a trespass against the appellant, to determine whether the resolution was valid. It is another matter altogether to make a formal declaration which is binding on the parties for all purposes including their conduct in the House divorced from the exercise of any rights cognisable in a court of law. However, a series of decisions in the Privy Council, which have been followed in this Court, have held that in the absence of a statutory authority the privileges, powers and immunities of colonial legislatures are less than those possessed by the House of Commons. Relying on those decisions, the appellant argues that the Court of Appeal erred in dismissing his claim that the resolution of 2 May was beyond the power of the Council. The effect of those decisions is therefore central to the outcome of this appeal.

The implied powers of the Council

71 In his great work on *Responsible Government In The Dominions*[102], Professor Berriedale Keith contended:

"The legal position of Colonial Legislatures as regards privilege has long been made clear by judgements of the Privy Council. These assert in effect

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99 *Imperial Acts Application Act* 1969 (NSW), s 6.

100 *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 463; *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 258; *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 467.

101 (1884) 12 QBD 271.

102 2nd ed (1928), vol 1 at 366.

that the privileges of Parliament[103] are essentially peculiar to itself, being the product of long usage, that they are not carried over to any Legislature by its mere performance of similar functions in legislative matters - the Parliament having had more complex origin than mere legislation - and that a Legislature has merely, perhaps in a marked form, the right of any Assembly to secure order in its own proceedings."

72 One of the judgments to which Professor Keith referred was *Kielley v Carson*[104] where the Privy Council held that the Legislative Assembly of Newfoundland did not have the power to arrest with a view to adjudicating on a contempt committed out of the House. In *Kielley*[105], Mr Baron Parke delivering the Advice of the Privy Council said:

"The whole question then is reduced to this, - whether by law, the power of committing for a contempt, not in the presence of the Assembly, is incident to every local Legislature.

The Statute Law on this subject being silent, the Common Law is to govern it; and what is the Common Law, depends upon principle and precedent.

Their Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment ... This is the principle which governs all legal incidents. '*Quando Lex aliquid concedit, concedere viditur et illud, sine quo res ipsa esse non potest.*'[106] In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the Common Law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature,

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103 That is, the Parliament of the United Kingdom.

104 (1842) 4 Moore 63 [13 ER 225].

105 (1842) 4 Moore 63 at 88-89 [13 ER 225 at 234-235].

106 [Whenever the law gives something to someone, it is seen to give also that without which the thing could not exist.]

> whether representative or not. All these functions may be well performed without this extraordinary power".

73 The Privy Council applied these principles in *Barton v Taylor*[107] where the respondent, a member of the Legislative Assembly of New South Wales, brought an action in trespass against the Speaker of the Assembly for directing that the respondent be removed from the Chamber. The Speaker pleaded that, within a week of the Assembly having passed a resolution that the respondent "be suspended from the service of the House", the respondent had entered the Chamber and claimed the right to sit and serve as a member "whereupon the appellant, as Speaker, requested him to withdraw, and upon his refusal directed the Serjeant-at-Arms to remove him from the chamber"[108]. The Judicial Committee held that the plea was bad. The Earl of Selborne said[109]:

> "[The] intention of [the] plea seems to have been to justify the trespass on the ground of an inherent power in every Colonial Legislative Assembly to protect itself against obstruction, interruption, or disturbance of it proceedings by the misconduct of any of its members in the course of those proceedings."

After referring to two earlier decisions of the Privy Council[110], his Lordship said[111]:

> "It results from those authorities that no powers of that kind are incident to or inherent in a Colonial Legislative Assembly (without express grant), except 'such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute'[112]. Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes, protective and self-defensive powers only, *and not punitive*, are necessary." (emphasis added)

74 The Earl of Selborne went on to say that the "principle on which the implied power is given confines it within the limits of what is required by the assumed

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107 (1886) 11 App Cas 197.

108 (1886) 11 App Cas 197 at 198.

109 (1886) 11 App Cas 197 at 203.

110 *Kielley* (1842) 4 Moore 63 [13 ER 225]; *Doyle v Falconer* (1866) LR 1 PC 328.

111 (1886) 11 App Cas 197 at 203.

112 (1842) 4 Moore 63 at 88 [13 ER 225 at 234].

necessity."[113] Although the Assembly had no power to punish, his Lordship said that the Privy Council was of the view that the principle of reasonable necessity gave the Assembly a power of suspension. He said[114]:

> "The power, therefore, of suspending a member guilty of obstruction or disorderly conduct during the continuance of any current sitting, is, in their Lordships' judgment, reasonably necessary for the proper exercise of the functions of any Legislative Assembly of this kind; and it may very well be, that the same doctrine of reasonable necessity would authorize a suspension until submission or apology by the offending member; which, if he were refractory, might cause it to be prolonged (not by the arbitrary discretion of the Assembly, but by his own wilful default) for some further time."

75 In an earlier case - *Fenton v Hampton*[115] - the Privy Council had also applied the principles laid down in *Kielley*[116]. It upheld the judgment of the Supreme Court of Van Diemen's Land that the Legislative Council of that Colony did not have the power to arrest a government servant for a contempt in circumstances where the servant had refused to obey a summons to attend and give evidence before a Select Committee of the Council.

76 The principles laid down in *Barton* and in *Kielley* were applied in *Willis and Christie v Perry*[117] where this Court held that the Speaker of the Legislative Assembly of New South Wales had no authority to direct that a member, who had been guilty of disorder but had left the Chamber, should be arrested and brought back into the Chamber. Griffith CJ said[118]:

> "In my opinion the Speaker had no more authority over the plaintiff when he was outside the chamber than he had over a person who was not a member. The Speaker undoubtedly has power when any person who is outside the chamber is conducting himself in such a manner as to interfere with the orderly conduct of proceedings in the chamber to have that person removed, and for that purpose to obtain the aid of the police. But that is quite a different thing from arresting a person and bringing him into the chamber. The only

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113 (1886) 11 App Cas 197 at 204.

114 (1886) 11 App Cas 197 at 204-205.

115 (1858) 11 Moore 347 at 360 [14 ER 727 at 732].

116 (1842) 4 Moore 63 [13 ER 225].

117 (1912) 13 CLR 592.

118 (1912) 13 CLR 592 at 598.

object of such action is to punish him, or, as *Ferguson* J said, 'that the example made might be effective as a deterrent'."

77 However, all these cases are far removed from the issue whether the Council has power to suspend a Minister of the Crown who has refused to provide information concerning the business of government. *Kielley*[119] and the cases which follow it deal with the power of a colonial legislature to *punish* for contempt or to require non-members to attend before it. They have nothing authoritative to say on whether, for the purpose of its business, a House in a State or colonial legislature may require a Minister who is a member of that House to provide information, whether orally or in writing. Nor have they anything authoritative to say on whether the Council may lawfully take the view that the failure to produce the information obstructs the business of the House and requires the suspension of the Minister. In one respect, they support the respondents' case: *Barton*[120] and *Willis and Christie*[121] accept that the Council has a power of suspension which may be exercised, inter alia, for the purpose of removing any obstruction to the conduct of the business of the House.

78 If the present case had taken the course that I think that it should have taken, the issue raised by the notice of appeal[122] could have been disposed of on narrow grounds. Those grounds are that the Council has power to suspend a member who is obstructing the business of the Council and that it is for the Council to judge whether its business is obstructed. *Barton* establishes that the Council has power to suspend a member who obstructs the business of the

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119 (1842) 4 Moore 63 [13 ER 225].

120 (1886) 11 App Cas 197.

121 (1912) 13 CLR 592.

122 Whether the Court of Appeal "erred in holding that the Legislative Council had an implied power to order the laying of documents on the table by the appellant, which order was enforceable by the imposition of the sanction of suspension on the appellant"?

Council. *Dill*[123], *Glass*[124] and *Richards*[125] establish that, if a privilege exists, the resolution of the House is conclusive as to whether it has been breached.

79 It was for the Council, and the Council alone, to determine the facts of the case and whether they fell within the privilege or power to suspend for obstruction. Upon those questions, the resolution of the House was conclusive[126]. There was no need, therefore, for the Court of Appeal to determine whether the functions of the Council were such that reasonable necessity entitled it to demand the production of the papers. Indeed, I have real difficulty in seeing how the Court of Appeal had jurisdiction to determine the issue, an issue which after all concerns only the relationship between the House and one of its members and the internal administration of the business of the House.

80 However, the judges of the Court of Appeal and the other members of this Court have taken the view that the exercise of the power of suspension is dependent upon the existence of the right to demand the papers. Moreover, the submissions of the respondents as well as those of the appellant accepted that that issue was open for determination by the Court of Appeal. Because the parties have put the issue before the Court for decision, it seems appropriate to express my view on the subject.

The power of the Council to demand that a Minister table papers

81 If the correct test for determining whether the Council had power to demand the tabling of the papers was whether their tabling was reasonably "necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute"[127], I think that the state of authority would compel the answer that it does not have the power which it sought to exercise. The requirement of reasonable necessity in this context is not satisfied by showing that the suggested power is conducive to the proper exercise of the functions of the Council, notwithstanding that the argument for the appellant almost conceded that this would suffice. A legislative chamber relying on "reasonable necessity" must show that it would be impossible, in the absence of the power asserted, to carry out the relevant function and that therefore that power is impliedly "supplied by necessary

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123 (1864) 1 Moore (NS) 487 [15 ER 784].

124 (1871) LR 3 PC 560.

125 (1955) 92 CLR 157 at 162.

126 *Richards* (1955) 92 CLR 157 at 166.

127 (1842) 4 Moore 63 at 88 [13 ER 225 at 234].

intendment"[128]. In this case, as will later appear, the relevant function is that of examining the conduct of the executive government to determine whether that conduct should be the subject of criticism, control or both. Plainly, access to the papers of the executive government concerning the Lake Cowal gold mine would assist an examination of the executive's activities. However, it is impossible to conclude that, without the papers, that conduct cannot be the subject of effective examination by the House. A Select Committee exercising its powers under the *Parliamentary Evidence Act* 1901 (NSW), for example, could no doubt obtain a great deal of information concerning the matter.

82 The most that can be said for implying a necessary power from the functions of the Council is that it would be convenient and perhaps very helpful if the Council had access to the papers. However, inconvenience in achieving a goal - even one authorised by statute - does not justify implying a power that would interfere with or erode fundamental rights[129]. The power that the Council now claims arises by implication from the need to exercise the Council's functions is a far reaching one which seriously interferes with the freedom of Ministers. If it exists as an essential incident of the exercise of the Council's functions, it must logically extend as far as authorising searches and seizures of Ministers and also of private citizens who have relevant information. If it is the functions of the Council that furnish the power, the identity of the person who has the relevant information is surely irrelevant. A court should be slow to conclude that the functions of any institution necessarily imply the existence of such an invasive power.

83 As the seminal case of *Kielley*[130] makes clear, the source of the implication upon which the respondents rely is the maxim: *Quando lex aliquid alicui concedit, concedere videtur id, sine quo res ipsa esse non potest*[131]. The meaning of this maxim was explained by Fleming CJ in *Fenton*[132] in a passage which O'Connor J

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128 *Fenton v Hampton* (1858) 11 Moore 347 at 360 [14 ER 727 at 732].

129 *Plenty v Dillon* (1991) 171 CLR 635 at 653-654; *Coco v The Queen* (1994) 179 CLR 427 at 436.

130 (1842) 4 Moore 63 [13 ER 225].

131 *Osborn's Concise Law Dictionary*, 8th ed (1993) at 272; Nygh and Butt, *Butterworths Australian Legal Dictionary*, (1997) at 967.

132 (1858) 11 Moore 347 at 360 [14 ER 727 at 732].

has said in this Court sets out its "full and true import"[133]. In the Supreme Court, Fleming CJ said that the true import of the maxim was[134]:

> "Whenever anything is authorized, and especially if, as a matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something else will be supplied by necessary intendment."

84 In *Fenton*, the Select Committee was appointed in accordance with the Standing Rules and Orders of the Legislative Council of Van Diemen's Land to inquire into abuses in the Convict Department which were matters within the province of the Council to examine. The respondent, Hampton, was a "material and necessary witness" in the inquiry who refused to obey a summons requiring him to give evidence before the Committee[135]. Yet the Privy Council held that it was not necessary in the relevant sense to imply a power in the Council that would enable it to arrest the respondent and charge him with contempt, notwithstanding that his evidence would probably have been of the greatest assistance to the Committee. That being so, it is plain that, in the absence of the statutory power contained in the *Parliamentary Evidence Act*, the Legislative Council of New South Wales could not compel the persons associated with the Lake Cowal gold mine to attend before them. Nor could it require them to produce documents to the Council.

85 Having regard to the decisions of the Privy Council no such power existed before federation, and I cannot see any ground for thinking that federation or the passing of the *Australia Acts*[136] has given the Council a power which it did not have before 1900. Neither event gives any support to the idea that, unsupported by a statutory power, a resolution of the Council can alter the legal rights of citizens and give the Council the lawful power to compel them to attend before the Council or to make documents available to the Council.

86 *Willis and Christie*[137] was decided by this Court after federation. Yet the Court applied the law as laid down in *Barton*[138] and held that the Legislative

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133 *The Trolly, Draymen and Carters Union of Sydney and Suburbs v The Master Carriers Association of NSW* (1905) 2 CLR 509 at 523.

134 (1858) 11 Moore 347 at 360 [14 ER 727 at 732].

135 (1858) 11 Moore 347 at 348 [14 ER 727 at 727-728].

136 *Australia Act* 1986 (Cth); *Australia Act* 1986 (UK).

137 (1912) 13 CLR 592.

138 (1886) 11 App Cas 197.

Assembly had no power to arrest the respondent after he had left the House, notwithstanding that shortly before he had been guilty of disorderly conduct in the House. It occurred to none of the judges that federation had enlarged the implied powers of the Assembly. Of course, the provisions of the *Commonwealth of Australia Constitution Act* 1900 (Imp) affect the Constitutions of the States. The provisions of the federal Constitution make many references to the States and their Parliaments. That Constitution also refers to the Ministers and the Executive Council and Executive Government of a State. But, for present purposes, nothing in the federal Constitution increases the implied powers of a House of a State legislature to obtain documents or information or to suspend a member for contempt. Even s 15 of the federal Constitution, which requires the Houses of Parliament of a State to choose a Senator for that State where a Senate vacancy occurs, does not enlarge the implied powers of an individual House - although that section probably confers such implied powers as are necessary to enable the Houses "sitting and voting together" to choose a person to fill the vacancy.

87 In the Court of Appeal, all the judges[139] relied on the enactment of the *Australia Acts* as supporting the conclusion that the functions of the Council and reasonable necessity implied a power to compel the production of the documents. Those Acts may have had some impact on the legislative powers of the Parliament of New South Wales, but it is not easy to see how they altered the *functions* of either House of the New South Wales Parliament. Significantly, the learned judges of that Court did not identify any specific change in the functions of either House. The Solicitor-General for New South Wales pointed out that, in *Powell v Apollo Candle Company*[140] which had been decided the year before *Barton*[141], the Privy Council, applying its decisions in *R v Burah*[142] and *Hodge v The Queen*[143], had declared that the legislative powers of the Parliament of New South Wales within their territorial limits were "plenary powers of legislation as large, and of the same nature, as those of [the Imperial] Parliament itself"[144]. They also declared in that case that the New South Wales Legislature was "supreme, and has the same authority as the Imperial Parliament."[145] The Solicitor-General pointed out that for many years prior to the passing of s 2 of the *Australia Act* 1986 (UK) it had

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139 (1996) 40 NSWLR 650 at 659, 664, 685, 691-692.

140 (1885) 10 App Cas 282.

141 (1886) 11 App Cas 197.

142 (1878) 3 App Cas 889.

143 (1883) 9 App Cas 117.

144 (1885) 10 App Cas 282 at 289.

145 (1885) 10 App Cas 282 at 290.

been accepted that, notwithstanding what had been said in *Powell* concerning the territorial limitations of colonial legislatures, those legislatures also had power to make laws which operated extra-territorially[146].

88 In the Court of Appeal, Mahoney P made the radical suggestion[147] that the effect of the *Australia Acts* might in a future case warrant reconsideration of the principles upon which the implied powers of the individual Houses of Parliament are determined. Presumably, his Honour thought that the Houses may now have the power to punish for contempts committed outside the Parliament or its precincts. Mahoney P said[148]:

> "The powers of the State legislatures, and accordingly, of the Houses composing them cannot now be determined upon the basis that their legislative powers are limited to the powers appropriate only to a colonial legislative body, that the functions which they are to perform are limited accordingly, and that the powers which they are to have because of what they are and what they may do are to be measured by legal maxims appropriate to powers which are derived from grant."

His Honour said that the Parliaments of the States are legislatures with plenary powers "which derive not from grant but from their characters as organs representative of the democratic societies which they represent"[149]. Mahoney P went on to say that, so far as inherent powers were concerned, State Parliaments "have the powers appropriate to a body of that character"[150].

89 I have already pointed out that, well before the passing of the *Australia Acts*, the legislatures of the States had plenary powers and could legislate extra-territorially. I have great difficulty in seeing how the passing of the *Australia Acts*, in some unidentified way, affected the principles by which the implied powers of the individual Houses of the State Parliaments authorise resolutions which legally bind others. It may be that in some situations - which I do not presently see - a House now has *functions* that it did not have before the enactment of that legislation in 1986. If so, the principle of reasonable necessity may

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146 *Bonser v La Macchia* (1969) 122 CLR 177 at 189, 224-225; *R v Bull* (1974) 131 CLR 203 at 263, 270-271, 280-282; *New South Wales v The Commonwealth* ("the *Offshore Sovereignty Case*") (1975) 135 CLR 337 at 468-469, 494-495; and see *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 12.

147 (1996) 40 NSWLR 650 at 685-686.

148 (1996) 40 NSWLR 650 at 685-686.

149 (1996) 40 NSWLR 650 at 686.

150 (1996) 40 NSWLR 650 at 686.

authorise resolutions that a legislative chamber could not have passed before the *Australia Acts*. But the judgment of Mahoney P appears to suggest that those Acts have changed the whole basis for determining the implied powers of the individual Chambers. His Honour said that they now have the powers "appropriate" to organs representative of a democratic society.

90 If the learned President means that each of the Houses of a State Parliament has implied power to do all that is appropriate to perform its functions as a democratically elected body, provided it does not affect the rights of outside parties, I would hesitate to disagree with what his Honour says. Arguably, the individual Houses of the legislatures of the Australian colonies and States have always had this power. If he means, however, that individual Houses now have power to coerce and punish individuals so long as what they do is "appropriate" for a democratically elected body, I would unhesitatingly reject the suggestion. It would confuse what is administratively reasonable or appropriate for the individual Houses to do with what it is necessary to do in order to protect the institution and its functions. Indeed, this radical view of the power of the individual Houses would be tantamount to giving each of them an implied legislative power of its own.

91 Nor has the evolution of the institution of responsible government in this century altered the situation that existed when New South Wales was given self-government. It will later be necessary to examine the functions of the Council. But nothing concerning those functions has been so changed or added to that they are now different in kind from those exercised by the Council at earlier stages of its history. It is true that members of the Legislative Council are now elected while until 1933 they were appointed. But the Legislative Assembly has long been elected directly by the people, and yet the Privy Council and this Court have held that the existence of its implied powers is to be determined in accordance with the principles applicable to other colonial legislatures, whether the particular legislature be elected or appointed[151].

92 It is hardly surprising that the Council has no implied power to pass resolutions compelling witnesses to appear before it or to order them to produce documents. Resolutions of a parliamentary chamber cannot alter the law. It has long been accepted that even a resolution of the House of Commons cannot change the law of the land[152]. It is true that the House of Commons has power to compel the production of documents. That power probably arises from the fact that it is also a court of record. That cannot be said of the Houses of the Parliament of New South Wales. Furthermore, although the Crown, in its capacity as one of the three constituent elements of the legislature, may set up a Royal Commission without

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151 *Barton v Taylor* (1886) 11 App Cas 197 at 205.

152 *Bradlaugh* (1884) 12 QBD 271 at 273-274, 284.

statutory authority, a Royal Commissioner has no authority to compel a person to attend and give evidence or to produce documents to the Commission in the absence of statutory authority[153]. It would be surprising that an individual House should have the power of compulsion when the Crown which is also an essential part of the law-making body, does not have that power when it seeks information. A House is not a legislature. Its resolutions do not make law. If it claims a power not conferred by positive law, its claim must be rejected unless it can point to a power that inheres in its very existence as a legislative chamber or which is essential in the true sense to the carrying out of its functions.

93 I cannot accept that the functions of the Council confer an implied power to compel ordinary citizens to produce documents to it. If that is so, how can those functions compel a member of the House to produce such documents to it? The answer made by counsel for the respondents is that the appellant stands in a different position to ordinary members of the public because he is not only a member of the Council but a Minister of the Crown and Leader of the Government in the House. I think that counsel for the respondents is correct in claiming that this relationship makes all the difference and that it provides a secure basis for the power which he claims. But his answer demonstrates that the power is not implied because of the functions of the Council. It demonstrates that the power exists not because the functions of the Council make it necessary in the relevant sense to imply it, but because the appellant, by reason of his membership of the Council and his position as a Minister of the Crown, has a special relationship with the House which entitles it to obtain the information. When the nature of parliamentary government under the Westminster system of responsible government is properly understood, it is apparent that the power which the respondents claim is one that inheres in the very notion of a parliamentary chamber which is a co-ordinate part of a legislature in such a system.

The introduction of responsible government

94 To a person familiar with the history of British parliamentary institutions and the constitutional history of New South Wales, it seems plain enough that the Constitution of 1855 gave the people of New South Wales self-government by means of a system of responsible government. It may be, as Professor John Ward has insisted[154]:

> "that the Australian colonies did not demand responsible government in the 1850s. It was imposed upon them before they had sought it. They received

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153 *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73 at 98-99.

154 "The Responsible Government Question in Victoria, South Australia and Tasmania, 1851-1856", (1978) 63 *Journal of the Royal Australian Historical Society* 221 at 222.

> it willingly because they believed that it was their destiny, when they saw it established in British North America and New Zealand."

But whether or not the colonies demanded that they be given responsible government, no one now denies that New South Wales received responsible government in 1855.

95 No doubt the conclusion that New South Wales received responsible government as the result of the 1855 Constitution would not readily occur to someone unfamiliar with the system of responsible government and the history of New South Wales government or from a mere examination of the Constitution of 1855. The provisions of the Constitution which were contained in a Schedule to an Imperial Act[155] were brief. They provided for a bicameral legislature[156] for the taxes and revenues of the Colony to form a Consolidated Revenue Fund[157] and for that Fund to "be subject to be appropriated to such specific Purposes as by any Act of the Legislature of the Colony shall be prescribed in that Behalf"[158]. But the provisions of the Constitution reveal very little about how the Legislature of the Colony was to be administered, how laws were to be made or how governments were to be formed. They make no mention of a Premier or Ministers, although mention is made of a Speaker, "Official Members of the Government" and a President of the Legislative Council. Nothing in the Act required any Minister to be a member of either House of the Legislature. The provisions of the Act made no mention of a Cabinet or the Cabinet system of government although they refer to a Governor and an Executive Council.

96 The Constitution Act plainly assumed a body of constitutional and political practice which would give meaning to its very sparse provisions. And the contemporary materials make it clear that the Imperial authorities intended that the new Constitution would be administered in accordance with the principles of responsible government[159]. This was so notwithstanding that powerful and conservative interests in the Colony may have taken the view that it was contrary to their interests to have responsible government with Ministers answerable to a Parliament which in turn was answerable to the people. The opposition of these parties - some of whom were responsible for the draft Constitution - may explain

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155 18 & 19 Vict, c 54.

156 18 & 19 Vict, c 54, Sched 1, s I.

157 s XLVII.

158 s LIII.

159 Ward, "The Responsible Government Question in Victoria, South Australia and Tasmania, 1851-1856", (1978) 63 *Journal of the Royal Australian Historical Society* 221 at 223-224.

the lack of any clear indication in the text of the Constitution that the Colony was to have responsible government. Professor Ward has written[160]:

> "The leading pastoralists and officials ... and their allies ... needed the [Colonial Secretary's] help to have their constitution enacted by the [I]mperial Parliament; therefore, they had to do his bidding by providing for responsible government in the constitution as he wished. They were careful merely to make responsible government possible; they did not make it mandatory and most of them did not believe that it would actually begin for many years. For their purposes responsible government was unnecessary and possibly dangerous, and they did not seek it."

97 However, the Imperial authorities had no doubt that the Constitution was intended to and did in fact introduce responsible government into the Colony. In the Despatch to Governor Denison which transmitted the Imperial *Constitution Act*, Lord John Russell, who introduced the Imperial Bill into the Parliament on 17 May 1855, wrote[161]:

> "21. The only remaining instructions, which I have to convey, relate to the introduction of Responsible Government; but it is so evident, from the provisions of the Colonial Bill before me, that your Advisers and the Legislature, have had fully in view the exigencies of that system, that I am not aware that any special directions are required from myself. You will shortly receive a fresh Commission and Instructions, amended in those particulars which the introduction of that system renders it necessary to change. There need be no delay in your bringing the Act into operation, as these documents will arrive in time for the assembling of the new Legislature."

98 Paragraph 23 of the Despatch contained the following statement[162]:

> "And, at the same time, the Colonists of New South Wales, by their avowed desire to assimilate their Institutions, as far as possible, to those of the Parent Country, have proved that this sympathy was not merely the expression of a common sentiment arising from a common origin, but connected with a

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160 Ward, "The Responsible Government Question in Victoria, South Australia and Tasmania, 1851-1856", (1978) 63 *Journal of the Royal Australian Historical Society* 221 at 224.

161 20 July 1855, CO 202/66 cited in Melbourne, *Early Constitutional Development in Australia* (1963) at 423-424 and set out in *The New South Wales Parliamentary Handbook*, 7th ed (1903) at 200.

162 *The New South Wales Parliamentary Handbook*, 7th ed (1903) at 201.

> deliberate attachment to the ancient laws of the community from which their own has sprung."

99 In my opinion, there can be no doubt that from 1855 the system of responsible government existed in New South Wales, as it existed in the United Kingdom, in so far as that system could be adapted to the circumstances of the Colony[163]. The *Constitution Act* 1902 (NSW), the current successor of the Constitution of 1855, makes that even plainer.

The functions of the Council

100 In his Preface to the first volume of Professor Redlich's *The Procedure of the House of Commons*[164], Sir Courtenay Ilbert, then Clerk to the House of Commons, stated that the business of the House of Commons was "threefold - legislative, financial, critical." He pointed out that Parliament, and the House of Commons in particular[165]:

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

101 Sir Courtenay Ilbert went on to say that "[u]nless these vital and fundamental principles of the British constitution are understood and appreciated, British parliamentary procedure is unintelligible."[166]

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163 cf *Toy v Musgrove* (1888) 14 VLR 349 at 392-393.

164 (1908), vol 1 at vi.

165 Redlich, *The Procedure of the House of Commons*, (1908), vol 1 at vii. This statement accords with that of John Stuart Mill that the role of the legislature in a system of representative government is "to watch and control the government" (*Considerations on Representative Government*, (1861) at 104).

166 Redlich, *The Procedure of the House of Commons*, (1908), vol 1 at viii.

The power of the Council to demand the tabling of documents by a Minister

102 In *Stockdale*, Lord Denman CJ described the House of Commons as "the grand inquest of the nation"[167]. In *Howard v Gosset*[168], Coleridge J said that "the Commons are, in the words of Lord Coke, the general inquisitors of the realm". These statements summarise one of the most important functions of a House in a legislature under the Westminster system, namely, that it is the function of the Houses of Parliament to obtain information as to the state of affairs in their jurisdiction so that they can, where necessary, criticise the ways in which public affairs are being administered and public money is being spent. The Crown through its Ministers governs. Under the system of responsible government, those Ministers are responsible to the Parliament. For that system to work effectively, for the Administration to retain the confidence of the Parliament, the Houses of Parliament must have access to information relating to public affairs and public finance which is in the possession of the government of the day.

103 It is true, of course, that governments are made and broken in the lower House of Parliament - in New South Wales, the Legislative Assembly. But that does not mean that the Legislative Council has no power to seek information from the government or the Minister who represents the government in the Legislative Council. It is part of the legislature of New South Wales. If it is to carry out one of the primary functions of a legislative chamber under the Westminster system, it must be entitled to seek information concerning the administration of public affairs and finances. The Legislative Council is not, as Queen Elizabeth the First thought the House of Commons was, a chamber that merely says "Aye or No" to bills presented to it[169]. It is an essential part of a legislature which operates under a system of responsible government. Whether the Council can enforce a demand for the information which it seeks is another matter.

104 There was a long period in English parliamentary history when membership of the Privy Council, rather than membership of the Commons, was the source of advice to the Crown. Yet even in those days, "the right of the Commons to information on money matters was never disputed"[170] and "[a]ccording to time-honoured practice the House of Commons is entitled to demand at any time

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167 (1839) 9 Ad & E 1 at 115 [112 ER 1112 at 1156].

168 (1845) 10 QB 359 at 379 [116 ER 139 at 147].

169 Redlich, *The Procedure of the House of Commons*, (1908), vol 1 at 37-38. Elizabeth's "Chancellor answered the Speaker, Sir Edward Coke, when he made the customary request for the privileges of the House by saying, 'Privilege of speech is granted, but you must know what privilege you have; not to speak every one what he listeth or what cometh in his brain, but your privilege is Aye or No'."

170 Redlich, *The Procedure of the House of Commons*, (1908), vol 2 at 41.

such particulars as it may want as to trade or finance or as to national or local administration, by means of a direct order."[171] This is part of the customary law of the House of Commons and therefore part of the common law. It is the source of the Commons' right "to summon any subject of the state as a witness, to put questions to him and to examine any memoranda in his possession."[172] A person who disobeys such an order of the House of Commons is guilty of contempt of the House. According to current doctrine, the Houses of the New South Wales legislature lack the power to punish for contempt. Absent statutory backing, they have no power to compel a witness to attend Parliament or to produce documents and no power to punish a person who refuses to produce those documents. But that is quite different from saying that they have no power to obtain information relevant to the business of the House. The power and its enforcement are distinct matters, as Dr Hearn recognised when writing of the power of the House of Commons to compel the attendance of witnesses and the production of documents[173]. The Legislative Council does not, in my view, exceed its powers when it seeks information from a Minister concerning the administration by the government of State affairs.

105 The seeking of information by questions directed to Ministers is of comparatively recent origin. No doubt its development was brought about by the introduction of the system of responsible government, a system that was not properly established until the passing of the *Reform Act* 1832 (UK). But it is an essential part of that system and was so recognised at the time of the grant of self-government in New South Wales[174]. Writing in 1908, Professor Redlich said of the practice in the House of Commons[175]:

> "[T]he ordinary questions put to the members of Government play a very important part in the proceedings of the House of Commons, and give the whole institution the great significance which it possesses.

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171 Redlich, *The Procedure of the House of Commons*, (1908), vol 2 at 40.

172 Redlich, *The Procedure of the House of Commons*, (1908), vol 2 at 39.

173 *The Government of England*, 2nd ed (1886) at 145.

174 In 1847, only 129 questions were asked in the Commons. This had risen to 212 by 1850 and to 699 by 1860. By 1885, the number of questions asked had risen to 3,354 and by 1901 to 6,448; (Redlich, *The Procedure of the House of Commons*, (1908), vol 2 at 244).

175 Redlich, *The Procedure of the House of Commons*, (1908), vol 2 at 241.

> 'Asking questions' is a modern method, developed by recent parliamentary practice, of supervising the general policy and the administrative acts of the Ministry."

106 In my opinion, as the result of the establishment of self-government in New South Wales, the Legislative Council and the Legislative Assembly acquired the power to seek information concerning matters of government policy and administration from Ministers. As Mahoney P pointed out in the Court of Appeal[176], "it would be extraordinary if, having a matter before it for consideration, it could not do what was necessary to inform itself about it." As his Honour pointed out, it can obtain information in various ways - "by Committees, by consultants and by the provision of information by members and others."[177] That the power exists has been recognised by Ministers over a long period. They have recognised it by answering questions and producing documents. The Journals of the Council and Hansard, for example, show that between 1856-1857 and 1932-1933, many documents were produced in Returns to Orders for Production. Only in comparatively recent times does the existence of the power seem to have been denied.

107 Moreover, the obtaining of information concerning the administration of government is part of the business of the Council. The history of the procedures of the House of Commons and its effect upon our understanding of parliamentary procedure under the Westminster system makes it clear that it is a matter for the Council as to the way in which it conducts business and the order of its business. Sir William Holdsworth has pointed out that the right of the Commons to control its business was essential to the success of the Commons' opposition to the Crown[178]:

> "The privilege of deciding the order of business enabled the House to obstruct. It could decline to do anything till its grievances were redressed."

Of all the great privileges of the House of Commons, none played a greater role in the Commons achieving influence than its capacity to control its own business and to set its own agenda. The view of the Tudor and Stuart monarchs was that the House of Commons was summoned only to vote on the appropriations asked of them, to approve legislation submitted to them and to express opinions on matters of policy only when asked[179]. The House of Commons would not have become the powerful institution that it is if the views of those monarchs had prevailed. The

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176 (1996) 40 NSWLR 650 at 677.

177 (1996) 40 NSWLR 650 at 677.

178 *A History of English Law*, 2nd ed (1937), vol 6 at 100.

179 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 6 at 99.

importance of Parliament under the Westminster system is in no small part due to the seemingly inconsequential right of the House of Commons to control its business. The right of any legislative chamber under the Westminster system to control its business has existed for so long that it must be regarded as an essential part of its procedure which inheres in the very notion of a legislative chamber under that system. If the Legislative Council wishes to conduct its business by asking questions of Ministers of the Crown present in that Chamber, I can see nothing in parliamentary history that would deny it that right. Indeed, the whole history of parliamentary procedure supports it.

The sanctions for refusing to produce documents

108 What steps, then, can the Council take when a Minister who is a member of the House refuses to produce documents or to provide information? Notwithstanding the decision in *Armstrong v Budd*[180], it may be doubted whether the House has a power of expulsion in such a case. As decisions of the Privy Council show, however, the Council has the power to suspend a member who obstructs the business of the House. Whether a member is or is not obstructing the business of the House is a matter for the Council. Ordinarily it would be reasonably open to the Council to conclude that the failure of the Minister to provide the information requested was an obstruction of its business.

109 In the present case, the procedure for suspension set out in Standing Orders 258 to 263 was not followed. But that is not decisive. Those Orders do not exclusively define the circumstances in which the Council may protect itself from an obstruction of its proceedings[181]. It follows, therefore, that because the Council has the power to suspend a member for obstruction of its business the validity of its resolution cannot be impeached in the Supreme Court or elsewhere.

110 In my opinion, the substance of Mr Egan's appeal fails. However, I think that the Order and Declaration made by the Court of Appeal should be set aside. The Court did not answer any of the eight questions referred to it. Nor do I suggest that it should have. Instead, the Court entered upon the determination of whether the appellant had made out his claim "that paragraphs 2 and 3 of the resolution of the Legislative Council dated 2 May 1996 concerning the plaintiff were invalid." By its Order, it has dismissed the whole of that claim although none of the judgments in the Court of Appeal deal with the important questions raised by

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180 (1969) 71 SR (NSW) 386.

181 *Toohey v Melville* (1892) 13 LR (NSW) 132.

par 3(b) of the resolution[182], the parties apparently ignoring its content. The substance of that sub-paragraph is to require the appellant "to attend in his place at the Table of this House on the next sitting day to explain" his reasons for non-compliance with two Orders of the House and "the Government's failure to comply with the Order of the House dated 26 October 1995 to table certain documents concerning the recentralisation of the Department of Education." If this aspect of the case is governed by the principles laid down in *Barton*[183], as the members of the Court of Appeal held was the case in relation to the production of documents, it would seem difficult to support these parts of the resolution, particularly having regard to this Court's decision in *Willis and Christie*[184].

111 In this Court, the appellant seeks a declaration that pars 2 and 3 of the resolution of the Council are invalid. Although he made no complaint that the Court of Appeal had not dealt with par 3(b), I think that the proper course is to allow his appeal so that the Order of the Court of Appeal can be set aside. In the absence of a statutory requirement, a court should not entertain a claim for a declaration that a resolution of a House of Parliament is invalid. In the course of determining the legal rights of parties, it may be necessary for a court, as an incident of that determination, to hold that a resolution of a legislative chamber cannot affect a person's legal rights. But that is a different matter from directly entertaining a claim that a resolution of the chamber is invalid. No doubt there are cases – those arising under the federal Constitution for example – where a court is compelled to make a formal declaration concerning the internal affairs of a legislative chamber. But, as a general rule, courts should eschew making such declarations even when the validity of the resolution is incidental to the determination of a plaintiff's legal rights. I would allow the appeal so that the Order of the Court of Appeal can be set aside. In lieu thereof, I would declare that the Supreme Court has no jurisdiction to make the declaration sought.

112 I would also allow the appeal so that the declaration of trespass which the Court made can be set aside. That part of its Order declares that "[t]he defendants committed an actionable trespass to the person of the [appellant] by reason of the extent of his removal on 2 May 1996." With great respect to the learned judges of the Court of Appeal, that declaration is too imprecise. No doubt its intended meaning can be ascertained by reference to the reasons for judgment of the Court. But the meaning of orders which declare legal rights and duties and which can found an action for contempt should be clear on their face without the need to

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182 New South Wales, Legislative Council, *Minutes of the Proceedings of the Legislative Council*, 2 May 1996 at 117. Set out in the reasons of Gleeson CJ in the Court of Appeal: (1996) 40 NSWLR 650 at 657.

183 (1886) 11 App Cas 197.

184 (1912) 13 CLR 592.

resort to other materials to understand their true effect. In any event, it is difficult to see what purpose this declaration serves. The appellant did not claim damages. Moreover, while the conduct which is relied on relates to events that are alleged to have occurred in Macquarie Street, it arises out of events which occurred in the Legislative Council. Respect for the procedures of the Council requires that a court should make declarations or entertain claims arising out of the business of the Council only when it is essential to declaring the existing rights of parties. If the appellant had claimed damages, the appropriate order would be reflected in a monetary sum, not a declaration. But he makes no such claim. In those circumstances, the declaration does nothing more than make a statement about a past event without it having any effect on the parties' legal rights. Since this Court must make the order which the Supreme Court should have made, in the exercise of our discretion, the claim for a declaration should be dismissed.

113 The appeal should be allowed in order to give effect to the orders that I think are appropriate. But since the appellant has failed on the substantial issue which he propounded, he should pay the costs of and incidental to the appeal. Furthermore, the costs orders made in the Court of Appeal should stand.

114 KIRBY J. This appeal from the New South Wales Court of Appeal[185] concerns the powers, privileges and immunities (the "privileges") of the Legislative Council ("the Council") of the Parliament of the State of New South Wales. The questions presented for decision involve issues of high constitutional importance. It could scarcely be otherwise where the Court is asked to define the extent to which the Executive Government of a State is accountable to a democratically elected chamber of a Parliament and to the rule of law itself.

A Minister is suspended and removed from Parliament

115 The issues were tendered for decision as a consequence of the filing of a statement of claim in the Administrative Law Division of the Supreme Court of New South Wales. By this, the Hon Michael Egan ("the appellant") sought a declaration that the Hon Max Willis ("the first respondent") and Mr Warren Cahill ("the second respondent") had committed an unlawful trespass upon his person[186]. The appellant was, and is, a Minister in the Executive Government of the State and Leader of the Government in the Council. At the relevant times, the Hon Max Willis was the President of the Council. Mr Cahill was the Usher of the Black Rod, an officer of the Council.

116 In consequence of various political controversies in 1995 and 1996, the Council resolved that identified "government" documents should be laid before the House. Such resolutions are not unusual. Extracts from the parliamentary record demonstrate that similar demands have been made over virtually the entire history of the Council, at least since the middle of the last century[187]. Most such demands have been met; although sometimes (apparently to protect confidentiality or other interests) papers have been provided for private and conditional perusal by the member demanding them[188]. Not until this case has the right, in law, of the Council to require production of State papers in the possession or under the control of a member arisen for judicial decision. To understand the problem, it is useful to sketch the context.

117 On 23 April 1996 the Council resolved that papers relating to consideration of a report of a commission of inquiry into a goldmine be tabled and that the Minister (meaning the appellant) provide those papers to the Clerk of the House.

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

186 Subsequently the statement of claim was amended to seek an additional declaration that pars 2 and 3 of the resolution of the Legislative Council of 2 May 1996 concerning the appellant were invalid.

187 See eg *New South Wales Parliamentary Debates (Council)* Vol 1 (1856) at 17; (1858) at 60, 71, 72, 74; (1898) at 457-459; (1913) at 1837-1838.

188 cf *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 654 per Gleeson CJ.

This was done in accordance with Standing Order 18[189]. Pursuant to a resolution by Cabinet that Ministers should "decline to comply with any orders from either House of Parliament to table documents on the grounds that such orders are invalid and beyond power"[190], the appellant did not comply with the resolution of the Council. That fact was drawn to notice of the Council on 1 May 1996. An Opposition member moved that the Council censure the appellant. During the ensuing debate, it emerged that the appellant had, in his possession or under his control, documents falling within the terms of the resolution. Asked to justify his refusal to table them, the appellant contested the right of the House to make its demand. He stated: "The constitutional principle ... is that the government of the day is responsible to the Legislative Assembly"[191]. Although this was a principle narrower than that expressed in the Cabinet's decision (which authorised Ministers to decline to comply with orders of either House of Parliament) it signalled the battle lines drawn between the Government and the Council.

118 By majority, the Council resolved to censure the appellant. It called on him by the next morning to deliver to the Clerk the documents referred to. No such documents were delivered or tabled. In the result, on 2 May 1996, again by majority, the Council resolved that the failure of the Government and of the appellant to comply with its orders was "an affront to the full and effectual exercise of its important functions". The Council adjudged the appellant to be guilty of contempt of the House.

119 Asserting that it was "necessary to obtain information on any matter affecting the public interest and in order to protect the rightful powers and privileges of the House and to remove any obstruction to the proper performance of the important functions it is intended to execute", the Council suspended the appellant from the service of the House for the remainder of the day's sitting. It ordered him to appear on the next sitting day to explain his, and the Government's, failure to comply with the Council's orders[192]. According to the record of proceedings, the first

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189 Standing Order 18, of the Standing Orders of the Council, states that "Any Papers may be ordered to be laid before the House and the Clerk shall communicate to the Premier's Department any such order". In accordance with this Standing Order, the resolution of the Council was communicated to the Premier's Department on the following day. Amongst his ministerial appointments, the appellant is the Minister assisting the Premier, and representing the Premier in the Council.

190 Cabinet Minute No 382 (29 April 1996) "Tabling of Papers - Lake Cowal Goldmine".

191 *New South Wales Parliamentary Debates (Council)* 1 May 1996, quoted by Gleeson CJ in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 656.

192 *New South Wales Parliamentary Debates* (*Council*), 2 May 1996, quoted by Gleeson CJ in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 657.

respondent then directed the second respondent to escort the appellant from the precincts of Parliament. When the appellant declined to leave voluntarily, the chair was vacated because of disorder. The Usher removed the appellant to the public street beyond the perimeter of Parliament. The drama then moved to the courts.

120 The pleadings in the Supreme Court included an assertion by the appellant of trespass and a defence by the respondents which justified as lawful the action they had taken. The appellant's reply contested the lawfulness of that action. Issues of law were referred to the Court of Appeal. That Court found the so-called "footpath point" in favour of the appellant, holding that there was no justification, in law, for the direction that the appellant be escorted beyond the perimeter of Parliament[193]. All that could be justified was his exclusion "from the House and from all the rooms set apart for the use of the Members"[194]. However, the Court otherwise upheld, as valid, the Council's resolution of 2 May 1996. It declined the declaration sought by the appellant. By special leave, the appellant now contests the latter conclusion. In this Court, the respondents did not seek to re-agitate the "footpath point".

Common ground

121 In addition to the common ground about the facts leading to their dispute, there was much agreement between the parties about a number of essential questions.

1. *Interpretation of the facts:* The respondents did not dispute that the removal from the chamber to the public footpath was against the appellant's will. It was assumed from this fact, and from the manner in which the removal was effected, that unless justified in law the removal amounted to a trespass to the appellant's person. It was not in dispute that the sole purpose of the order of the Council was to coerce the appellant, a member of the House and a Minister, to produce the disputed documents. No suggestion was raised that the appellant did not have in his possession or under his control documents of the kind referred to in the successive resolutions[195], nor that he was incapable of complying with the Council's demands, save for the suggested lack of power of the Council to make them[196]. It was accepted by those members of the Council who supported its resolution that the Council had no

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193 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 672 per Gleeson CJ, 684-686 per Mahoney P, 693 per Priestley JA.

194 Standing Order 262.

195 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 655, 671 per Gleeson CJ.

196 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 670-671 per Gleeson CJ.

power to punish the appellant, eg by way of fine or imprisonment[197]. While what they did might, in law, be held to constitute punishment, it was not their objective. It was accepted for the appellant that the powers purportedly exerted against him rested on the fact that he was a member of the Council, present in the chamber. Different considerations might arise in respect of an absentee member and would arise in respect of a member of the other House of Parliament or a stranger. It was also accepted that there was no precedent for such a suspension of a member, Minister or otherwise, to coerce the tabling of documents. The appellant argued that this was significant given the 140 year history of the Council. For the respondents it was argued that this was so only because no other Minister had claimed, and insisted upon, such an absolute immunity from accountability to the Council.

2. *Legal foundations:* It was common ground that the Parliament of New South Wales, including the Council, was originally established by the *Constitution Act* 1855 (Imp)[198] by which New South Wales achieved responsible government. By that Act, the new legislature was given[199] "full Power and Authority ... to alter the Provisions or Laws for the Time being in force" under it. It was accepted that, from its statutory provenance and its constitutional history and functions, the Council did not, in law, inherit all of the privileges enjoyed by the House of Commons of the British Parliament. Nor were its privileges defined by statute, as they have been in the case of other Australian Parliaments[200]. For the Federal

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197 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 671 per Gleeson CJ.

198 18 and 19 Vict, c 54. The curious history of the adoption of the Constitution is told by Priestley JA in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 690-691. See now also *Constitution Act* 1902 (NSW).

199 *Constitution Act* 1855 (Imp), s 36.

200 Except to a lesser extent in Tasmania. The position of the Legislative Assemblies of the Northern Territory, the Australian Capital Territory and the other Territories of the Commonwealth was not examined.

Parliament[201] and other State Parliaments[202], express provision has been made in various ways to assimilate the privileges of the Commons House of Parliament of the United Kingdom. Such a formula could have been adopted by the Parliament of New South Wales, there being no legal impediment[203]. Despite various attempts, no such legislation has been enacted. The only Act of specific relevance in New South Wales was the *Parliamentary Evidence Act* 1901 (NSW)[204]. Its procedures, even if applicable to the appellant in the present controversy, were not invoked. In this way, it became common ground that there was no express power in the *Constitution Act,* or any statute enacted by the New South Wales Parliament or the Standing Orders, authorising the assertion by the Council of its right to demand the tabling by the appellant of the specified documents. Nor was there an express foundation for the resolution adjudging the appellant guilty of contempt and authorising the respondents to effect his removal from the precincts of the Council which followed. If a legal foundation for such conduct existed, it had to be found in the inherent or implied privileges belonging to the Council as a constituent part of the Parliament of New South Wales.

3. *Functions of the Council:* To ascertain whether the Council enjoyed the privileges which it had asserted and exercised against the appellant, both sides agreed that it was essential to define what the functions of the Council were. For the respondents, it was accepted that it was not sufficient, in order to establish an inherent power or to derive an implied one, that its existence would merely be conducive to the Council's functions, in the sense of convenient or advantageous. Relying on a line of authority in the Privy Council[205], in this Court[206] and in the Full Court of the Supreme Court of New South Wales[207], the Court of Appeal adopted as its criterion whether the

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201 Australian Constitution, s 49.

202 *Constitution Act* 1975 (Vic), s 19; *Constitution Act* 1934 (SA), s 38; *Parliamentary Privileges Act* 1891 (WA), s 12. See also *Constitution Act* 1867 (Q), s 40A (inserted 1978) and *Parliamentary Privileges Act* 1858 (Tas), s 17.

203 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 660 per Gleeson CJ.

204 The Act was originally enacted in 1881.

205 *Kielley v Carson* (1842) 4 Moo PC 63 at 92 [13 ER 225 at 236]; *Fenton v Hampton* (1858) 11 Moo PC 347 [14 ER 727]; *Doyle v Falconer* (1866) LR 1 PC 328; *Barton v Taylor* (1886) 11 App Cas 197.

206 *Willis and Christie v Perry* (1912) 13 CLR 592 at 597; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162, 166.

207 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 391-394, 395, 403, 406.

privilege asserted was reasonably necessary for the existence of the body and the proper exercise of its functions[208]. In this Court, both sides accepted that criterion. However, each derived different conclusions from its application. Although the appellant accepted that the role of the Council included "participation in legislation"[209], the potential ambit of that phrase was contested. It was not accepted, for example, that it extended to coercing a Minister or any other member, to table documents in his or her possession or control without express authority of law to make such demand[210]. To ascribe it to an "inherent" power or privilege of a chamber of a Parliament which had begun its days as a subordinate colonial legislature, was a distortion of the history of that Parliament. Thus, whilst the applicable principles were agreed, their application was hotly disputed.

4. *Justiciability:* No objection was taken by the principal parties on the ground that the dispute was not justiciable. On the contrary, the appellant initiated the proceedings, alleging trespass and seeking a declaration to that effect. The respondent joined issue, supplied additional material and invited the determination of the dispute by the Supreme Court. This was, indeed, the course suggested during the Parliamentary debates which led to the appellant's removal from the Council[211]. The Supreme Court thus had before it a claim which demanded a legal ruling as to the existence of the privilege upon which the Council relied to justify an otherwise unlawful invasion of the appellant's legal rights. In the absence of clear authority,

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208 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 664-665 per Gleeson CJ, 676-677 per Mahoney P, 687-692 per Priestley JA.

209 *Constitution Act* 1902 (NSW), ss 5A, 5B.

210 Although it was accepted that the Council had functions in filling casual vacancies both of the New South Wales Parliament (*Constitution Act* 1902 (NSW), s 22D) and of the Federal Parliament (*Constitution Act* 1902 (NSW), s 15), any implied right to secure documentary information about such candidates would be strictly limited to that issue. According to the appellant, to infer a more general implied right to obtain documents was not reasonably necessary.

211 *New South Wales Parliamentary Debates (Council)* 13 November 1995 at 2996; *ibid* 1 May 1996 at 585.

that Court was obliged to adjudicate the issues thus tendered[212]. As no party suggested that the issues were not justiciable, and as, in a sense, the competing parties represented the Executive Government of the State and the Council requesting adjudication, no criticism can be addressed to the Court of Appeal for proceeding, as it did, to resolve, as justiciable, the dispute which was submitted to it.

5. *Footpath and precinct point:* As I have said, the respondents did not, in this Court, seek to challenge the ruling of the Court of Appeal that expulsion of the appellant to the public footpath exceeded the implied powers necessary for the protection of the functions of the Council and its performance as such. A point concerning the limits of the expulsion had been taken during the debate in the Council[213]. It was overruled by the first respondent. Questions were raised during argument as to whether "reasonable necessity" would extend, for the purpose of coercion, beyond the chamber of the Council into the "precinct" of the Parliamentary building, including ministerial officer and members' rooms. But as neither party sought to re-agitate this point, decided by the unanimous opinion of the Court of Appeal, I am content to leave it there.

122 A common thread running through judicial consideration of challenges as to the existence or absence of asserted parliamentary privileges has been the disinclination of the courts to be drawn into factual contests and questions of degree and proportionality. In part, this disinclination arises from the deference historically paid by English courts to the entitlement of Parliament to declare its own privileges[214]. In part, it represents a wise disinclination of judges to be dragged into the political controversies which commonly attend the conduct of business within the Houses of Parliament.

The issues

123 When the issues before the Court are refined by the excision of matters upon which the parties agreed, or chose not to contest, the questions for decision (adding those posed by an intervener and by the Court itself) were:

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212 *Stockdale v Hansard* (1839) 9 Ad & E 1 [112 ER 1112].

213 *New South Wales Parliamentary Debates (Council)* 2 May 1996 at 713.

214 *Stockdale v Hansard* (1839) 9 Ad & E 1 at 115 [112 ER 1112 at 1156] where Lord Denman CJ said: "All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt".

1. Is the parties' dispute justiciable or, having regard to the Bill of Rights 1688[215] as applied in New South Wales[216], or otherwise, was the Court of Appeal in error, and did it act beyond its jurisdiction, in inquiring into and deciding the privileges of the Council? (The justiciability point)[217].

2. Is the answer to the justiciability point and the resolution of the privileges of the Council as a constituent part of the Parliament of a State of the Commonwealth, affected in any material way by the provisions of the Australian Constitution? Or by the provision of the *Australia Acts* 1986 as they affect the status and powers of the Parliaments of the Australian States, including that of New South Wales? (The constitutional point).

3. Depending on the answer to the first two points, did the Council have the implied or inherent power to act as it did in relation to the appellant within the chamber and in the precincts of the Council in (a) ordering him to table documents in his possession or control and (b) suspending him from the service of the House and removing him from its precincts so as to coerce him into tabling such documents? It is obvious that the answer to (b) depends upon the answer to (a). (The scope of the privilege point).

The justiciability point

124 In the Court of Appeal, the question of the justiciability of the dispute was not overlooked. However, because of the common understanding of the parties, the Court considered that it was unnecessary to debate the point[218]. In this Court, the Attorney-General for South Australia intervened on behalf of that State[219]. He submitted that the Court of Appeal had erred in proceeding to inquire whether the suspension and removal of the appellant was lawful. He based this submission, in part, on the prohibitions contained in Art 9 of the Bill of Rights 1688 and, in part, upon the common law governing the inherent or implied privileges of a House of Parliament such as the Council. In essence, South Australia contended that inquiries addressed to the "reasonableness" of the necessity to have the powers asserted or as to whether particular conduct amounted to a permissible coercion, as distinct from impermissible punishment, were exclusively matters for the

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215 1 Wm & Mary Sess 2 cap 2 Art 9.

216 *Imperial Acts Application Act* 1969 (NSW), s 6. See *R v Jackson* (1987) 8 NSWLR 116 at 118.

217 Raised by the Attorney-General for South Australia (intervening).

218 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 663 per Gleeson CJ. See also at 675, 686 per Mahoney P.

219 Pursuant to the *Judiciary Act* 1903 (Cth), s 78A.

relevant House of Parliament to decide. They were political. They were not matters into which a court would, or should, intrude. The only exception allowed related to the "footpath point" which, by definition, fell outside the suggested prohibition on curial intervention into the internal business of a House of Parliament.

125 Although it would be congenial to ignore a point raised only by an intervener, I do not think that the Court should. The intervener is a State of the Commonwealth. By federal law, it is taken to be a party to the appeal[220]. It contends that the Court of Appeal did not have jurisdiction to deal with questions referred to it, save for the "footpath point". As the issue of justiciability lies at the threshold of this Court's response to the appeal, it is necessary to resolve it.

126 A preliminary issue may be disposed of quite readily. South Australia submitted that the Court of Appeal had no jurisdiction to answer specified questions. These were the questions formulated in the order removing the proceedings from the Administrative Division of the Supreme Court into the Court of Appeal. But when the matter came before the Court of Appeal, it elected to deal with it by way of disposing of the proceedings in their entirety. It did not provide answers to the specified questions, as such. In adopting this course, the Court followed its usual practice[221]. It was not suggested that a separate issue of justiciability arose because the issues posed were theoretical. On the contrary, they were entirely practical. They addressed the legal rights of the principal parties. Where a party has regularly invoked the jurisdiction of a competent court, that party has "a prima facie right to insist upon its exercise and to have [the] claim heard and determined"[222].

127 This said, the question remains whether the Court of Appeal otherwise lacked jurisdiction to decide whether the respondents had acted unlawfully. Will a court, even to resolve the legal rights of parties to proceedings before it, intrude itself within the walls of a Parliamentary chamber? Or will it refuse to do so out of deference to the requirements of the Bill of Rights 1688 as applied in New South Wales or out of a conception of the exclusive rights of the Houses of Parliament in the performance of their legislative functions and the protection of their own privileges[223]?

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220 Pursuant to the *Judiciary Act* 1903 (Cth), s 78A(3).

221 *Sivakumar v Pattison* [1984] 2 NSWLR 78 at 80.

222 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 241.

223 *Prebble v Television New Zealand Limited* [1995] 1 AC 321 at 332 citing *Burdett v Abbot* (1811) 14 East 1 [104 ER 501]; *Stockdale v Hansard* (1839) 9 Ad & E 1 [112

(Footnote continues on next page)

128 A further preliminary issue can be dismissed. Certain textual difficulties arise in applying the Bill of Rights provision to the Parliament of New South Wales. Thus Article 9 reads:

> "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any Court or place out of Parlyament".

129 This statute of the English Parliament is one of those specially mentioned and preserved by the *Imperial Acts Application Act* 1969 (NSW)[224]. When the Bill of Rights was enacted by the Parliament at Westminster, the only "Parlyment" referred to was the enacting one. However, the Bill of Rights is part of the constitutional heritage of Australia. It came with those who established the colonies. It applied in the colonies by the medium of imperial law[225], except so far as later altered or repealed by valid local statute[226]. Against the background of its constitutional importance, and the trouble taken by the New South Wales Parliament as recently as 1969 to preserve its operation in that State, it is plain that the language of Art 9 must be taken to refer, with such modifications as are necessary, to the Parliament of the State and hence to each of the chambers which constitute it in which "speech and debates or proceedings" take place, including the Council. Similar conclusions have been reached in respect of the application of the Bill of Rights to the Parliaments of other former colonies[227]. Any suggestion that Art 9 is inapplicable to the Council of the Parliament of New South Wales must therefore be rejected.

130 But does that article forbid the scrutiny of proceedings which the Court of Appeal undertook at the request of both parties in order to be able to determine the controversy which they tendered?

ER 1112]; *Bradlaugh v Gossett* (1884) 12 QBD 271; *Pickin v British Railways Board* [1974] AC 765 and *Pepper v Hart* [1993] AC 593.

224 See *Arena v Nader* (1997) 71 ALJR 1604 at 1065; *R v Jackson* (1987) 8 NSWLR 116 at 118; *Smith v The Queen* (1991) 25 NSWLR 1 at 13-16.

225 9 Geo IV c 83, s 24; cf *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 466-467.

226 cf *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 433-434, 463.

227 The position in New Zealand is described in *Prebble v Television New Zealand Limited* [1995] 1 AC 321 at 332 referring to the *Imperial Laws Application Act* 1988 (NZ).

131 South Australia pointed to the broad view taken of the application of Art 9 of the Bill of Rights in *Prebble v Television New Zealand Limited*[228], a New Zealand appeal to the Privy Council. It submitted that this view had its ultimate foundation in respect for the "absolute and exclusive" right of every Parliament, as such, to impose discipline "within their walls"[229]. In that sense, Art 9 was to be seen as "merely one manifestation" of a "wider principle" of deference by the courts to the exercise by Parliamentary chambers of their privileges in relation to members. That deference was reinforced by a determination on the part of courts not to become embroiled in the political controversies which such questions typically involve[230]. Whereas other jurisdictions of Australia have generally defined their privileges by statute[231], in New South Wales no relevant statute, justiciable in a court, has been enacted. The only applicable statutory provision was therefore Art 9. It imports, so South Australia submitted, basic English constitutional notions so that acts which constitute "proceedings in Parliament" are not justiciable in the courts. The acts preceding and immediately following the suspension of the appellant were said to fall within that prohibited class.

132 In resisting the point, the appellant trod a fine line. On the one hand, he contested the applicability of the approach adopted by this Court in relation to a chamber of the Federal Parliament expressed in *R v Richards; Ex parte Fitzpatrick and Browne*[232] which he ascribed to the assimilation of English practices by force of the language of s 49 of the Australian Constitution. This had not happened in the case of the New South Wales Parliament. Unlike the Parliament at Westminster, he argued, the New South Wales Parliament had no functions as a court. It had no inherent powers. It enjoyed no more privileges than those expressly conferred or necessarily implied. The appellant also disputed the correctness of the decision of the New South Wales Supreme Court in *Armstrong v Budd*[233]. He pointed to suggested inconsistencies in the reasoning of the judges in that case about justiciability. Yet, in this case, it was the appellant who invoked the jurisdiction of the Supreme Court. In order to demonstrate the unlawfulness

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228 [1995] 1 AC 321.

229 *Bradlaugh v Gossett* (1884) 12 QBD 271 at 275.

230 *Prebble v Television New Zealand Limited* [1995] 1 AC 321; cf *Eastgate v Rozzoli* (1990) 20 NSWLR 188; *Bignold v Dickson* (1991) 23 NSWLR 683.

231 In the case of the Federal Parliament, Australian Constitution, s 49; cf *Sankey v Whitlam* (1978) 142 CLR 1 at 35, 97-99; *R v Murphy* (1986) 5 NSWLR 18 disapproved in *Prebble v Television New Zealand Limited* [1995] 1 AC 321 at 333. See now *Parliamentary Privileges Act* 1987 (Cth), s 16.

232 (1955) 92 CLR 157.

233 (1969) 71 SR (NSW) 386.

of the Council's resolutions, orders and actions, it was essential for him, in the light of the pleading of the respondents, to invite the Court to enter beyond the walls of Parliament so that it could determine the legal admissibility of his claim.

133 In my view the objection by South Australia to the justiciability of the matter before the Court must be dismissed. My reasons are as follows:

1. As the Privy Council pointed out in *Prebble v Television New Zealand Limited*[234], it is important to avoid confusion between the right to prove the occurrence of parliamentary events and the prohibition on questioning their propriety, as for example, suggesting that a member had misled the House or acted wrongly or from improper motives[235]. Like every statutory provision, Art 9 of the Bill of Rights, in its application to New South Wales, has a purpose. It is to defend, relevantly against legal inquiry or sanction in a court, the freedoms belonging to a House of Parliament. Those freedoms include its right to conduct its affairs, answerable, on matters of truth, motive, intention or good faith, only to the House concerned and through it to the electors. These considerations are not raised in any way by the competing submissions of the parties to these proceedings. Whilst each doubtless has political criticisms to make of the other (as illustrated by the Hansard Debates) such were not in any way the questions for the courts. Their only concern has been with the legality of what had occurred. Upon that question each side in the contest sought the Supreme Court's ruling. That ruling could be given by the use of legal techniques without entering upon the political arguments or debates. Naturally, the resolution of the legal controversy might have political implications. But that is so in most, if not all, constitutional matters[236]. To designate all matters having political or partisan implications as non-justiciable would be to withdraw judicial supervision (and the rule of law) from an intolerably broad class of conduct. It would lead to a conclusion that a mere claim of privilege by a House of Parliament expelled the courts from holding whether the privilege, in law, exists. And that is not the law.

2. Even if it be the case that individual members of a Parliamentary chamber may not waive a privilege belonging collectively to a House of Parliament[237], the present case is virtually unique in the stance adopted by the antagonists. On the one side of the record is the Executive Government, inferentially

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234 [1995] 1 AC 321 at 337.

235 *Prebble v Television New Zealand Limited* [1995] 1 AC 321 at 335.

236 cf *Melbourne Corporation v The Commonwealth (*"the *State Banking Case*"*)* (1947) 74 CLR 31 at 82.

237 cf *Prebble v Television New Zealand Limited* [1995] 1 AC 321 at 335.

supported by those members of the Council of its political persuasion who contest the right of the Council to act as it did in relation to the appellant. On the other side are parties who were officers of the Council directed by it to act as they did. Each side has come to the Court arguing its view of the law of parliamentary privilege. Far from impeaching or questioning the freedom of speech and debates or proceedings in Parliament, this is a case where the record shows that the members of the Council, although of different views, desired the ruling of the Supreme Court to define the limits of the Council's powers (as distinct from adjudging the propriety of the exercise of those powers in the present matter)[238]. Whilst consent or acquiescence cannot overcome the absence of a justiciable question apt for judicial determination, where the source of the suggested problem is said to lie principally in the requirements of Art 9 of the Bill of Rights, as applied, it is surely relevant that no member of the Council raised objection to the jurisdiction of the Supreme Court but all, apparently, sought that Court's ruling.

3. In a string of cases concerning colonial or post-colonial legislatures, courts which must have been aware of Art 9 of the Bill of Rights proceeded to judge claims of trespass and, for that purpose, to consider the lawfulness of the resolutions of the legislative chamber in question directing the plaintiff's arrest[239]. In none of these cases was Art 9 perceived as an obstacle to the examination by the court of the relevant parliamentary proceedings. Even if in some cases[240] it might be doubted that Art 9 applied locally, that was certainly not the position in most of the cases[241]. I would not accept that so many decisions in this area of discourse were reached *per incuriam*, as must have been the case if the submission for South Australia were correct. It should be accepted that the courts proceeded on the assumption that Art 9 did not apply by its terms or had to be adapted to the context of a Parliament other than that at Westminster and in a way consistent with the discharge by the courts of their function to specify the limits of the privileges in question. Where no express statement of those privileges exists, apt for the case in hand, it is for the courts to define the outer boundary of any implied privilege

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238 cf *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 166. In refusing a grant of special leave, the Privy Council observed that the judgment of this Court was "unimpeachable". See *ibid* at 171-172.

239 *Kielley v Carson* (1842) 4 Moo PC 63 [13 ER 225]; *Fenton v Hampton* (1858) 11 Moo PC 347 [14 ER 727]; *Doyle v Falconer* (1866) LR 1 PC 328; *Barton v Taylor* (1886) 11 App Cas 197; *Willis and Christie v Perry* (1912) 13 CLR 592.

240 *Kielley* (Newfoundland) and *Doyle* (Dominica).

241 *Fenton* (Van Diemen's Land); *Barton* and *Willis* (New South Wales).

claimed. This they do by reference to concepts such as "essentiality"[242] or "reasonable necessity"[243]. In fixing the boundaries, courts naturally extend a large measure of deference to the assertion by a House of Parliament itself of the existence and limits of the House's privileges. Privilege being established, courts would not become involved in decisions about the exercise of the privilege in a particular case.

4. There is a further reason, in Australia, for dismissing the argument of non-justiciability. Courts in this country, at least in the scrutiny of the requirements of the Australian Constitution, have generally rejected the notion that they are forbidden by considerations of parliamentary privilege, or of the ancient common law of Parliament, from adjudging the validity of parliamentary conduct where this must be measured against the requirements of the Constitution[244]. Whilst it is true that Australian courts will ordinarily permit parliamentary procedures to be completed[245] before they intervene, the power of intervention by the courts cannot be seriously doubted. It is the nature of a federal polity that it constantly renders the organs of government, federal and State, accountable to a constitutional standard. State Parliaments in Australia, whatever their historical provenance, are not colonial legislatures. They are provided for in the Australian Constitution[246]. To this extent, at least, they are rendered accountable to the constitutional text. Notions of unreviewable parliamentary privilege and unaccountable determination of the boundaries of that privilege which may have been apt for the sovereign British Parliament must, in the Australian context, be adapted to the entitlement to constitutional review. Federation cultivates the

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242 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167 ["... there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something *essential* or, at any rate, *proper* for its protection" (emphasis added)].

243 *Kielley v Carson* (1842) 4 Moo PC 63 [13 ER 225]; *Fenton v Hampton* (1858) 11 Moo PC 347 [14 ER 727]; *Doyle v Falconer* (1866) LR 1 PC 328; *Barton v Taylor* (1886) 11 App Cas 197; *Willis and Christie v Perry* (1912) 13 CLR 592.

244 *Osborne v The Commonwealth* (1911) 12 CLR 321 at 336; *The State of South Australia v The State of Victoria* (1911) 12 CLR 667 at 674-675; *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203 at 204-205; *Clayton v Heffron* (1960) 105 CLR 214 at 234-235; *Cormack v Cope* (1974) 131 CLR 432 at 451-454, 464-466, 467, 472; *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 193-198.

245 *Cormack v Cope* (1974) 131 CLR 432; cf *Trethowan v Peden* (1930) 31 SR (NSW) 183; (1931) 44 CLR 394; *Attorney-General (NSW) v Trethowan* (1932) 47 CLR 97 (PC); [1932] AC 526.

246 Australian Constitution, ss 9, 15, 107, 108, 123, 124.

habit of mind which accompanies constitutional superintendence by the courts. Courts recognise a large measure of power in, say, the chamber of a State Parliament, to define and enforce its notions of its own privileges. But the Australian constitutional context does not accord to such a body a completely unreviewable entitlement, in law, to define and enforce its own powers. Any such powers can only be exercised in conformity with the political and judicial system which the Constitution creates. Decisions of other countries and from other times therefore need to be adapted in the modern Australian context when it is suggested that they apply to the privileges of a House of Parliament of an Australian State[247]. I would acknowledge no lesser scrutiny by the Court of the lawfulness of a claim of privilege by a chamber of the New South Wales Parliament than that accepted in *R v Richards: Ex parte Fitzpatrick and Browne*[248] in relation to the Federal Parliament which arguably enjoys larger powers and broader immunities by virtue of the text of the Constitution[249].

134 It is therefore lawful to proceed to consider the ambit of the privilege relied upon in this case whilst avoiding the evaluative judgments inherent in deciding whether the appellant's conduct merited the action which occurred. This is the approach which has been taken in New South Wales in the past to the delineation of the respective functions of the Houses of Parliament and the courts[250]. Nothing in Art 9 of the Bill of Rights or the common law of Parliament as applied in this country forbids that approach. Although the line drawn may not always be bright, it will be found by courts limiting their functions in this area to the elucidation of legal questions and the avoidance of purely political ones. The controversy tendered here as to the existence and scope of the privilege relied upon is susceptible of judicial resolution. It is justiciable. The submission to the contrary is rejected.

The constitutional point

135 In the course of argument, questions were raised by the Court concerning the broader implications for the issues for decision of the language and structure of the

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247 Despite the equivalent to Art 9 of the Bill of Rights in the United States Constitution, it was not suggested that the Supreme Court not determine where the limit of privilege lay. See *Quinn v United States* 349 US 155 (1955). As to the position in India see *The President's Reference No 1 of 1964* (1965) 1 SCR 413 (SC India); and criticism in Seervai, *Constitutional Law of India*, 4th ed (1993), vol 2 at 2169-2196.

248 (1955) 92 CLR 157.

249 Australian Constitution, s 49. See also now *Parliamentary Privileges Act* 1987 (Cth), s 16.

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

Australian Constitution. Two aspects of potential importance were mentioned. The first is the reference in the Constitution to State Parliaments[251], to the Executive Government of the States[252] and to the State Governors who are advised by such governments[253]. Clearly, the Constitution envisages that State Parliaments will exist, comprised of a single House or Houses which can be properly described as such, be capable, as such, of exercising the functions envisaged for them in the Constitution and having a character which is not inconsistent with the basic norms of government which the Constitution establishes.

136 The second feature of the Australian Constitution referred to is the creation of a judicature in which is vested the judicial power of the Commonwealth including when exercised by State courts[254]. In *Ex parte Fitzpatrick and Browne*[255] this Court held that neither the structure of the Constitution providing separately for the judicature, nor its provisions, required a reading down of s 49 of the Constitution defining the privileges of the two Houses of the Federal Parliament in terms of those of the House of Commons of the Parliament of the United Kingdom. That aspect of the decision in *Ex Parte Fitzpatrick and Browne* may one day require reconsideration. But it is not required in this case[256].

137 The Australian Constitution makes no express reference to the privileges of the Houses of the State Parliaments. In this regard they are treated differently from the Federal Parliament in respect of which specific provision is made. It was suggested that the framers were content, for most purposes at least, to leave the definition of the privileges of the Houses of the State Parliaments to them and to the courts. Drawing implications from the general character of constitutional institutions (including the State Parliaments) requires care when it comes to

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251 Australian Constitution, ss 9, 15, 107, 108, 123, 124.

252 Australian Constitution, s 119.

253 Australian Constitution, ss 15, 21, 110.

254 Australian Constitution, s 71.

255 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 166-168; cf *The President's Reference No 1 of 1964* (1965) 1 SCR 413 (SC India).

256 The want of power on the part of a chamber to punish those in contempt of its orders has sometimes been explained by reference to the fact that punishment is, of its nature, judicial in character and therefore not apt to be implied as amongst the privileges of a legislature. See *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 393. The opposite conclusion was reached in the United States of America in an early case where the power of the Congress to punish for contempt so as to uphold its privileges was considered essential to their effectiveness. See *Kilbourn v Thompson* 103 US 168 (1880); *Jurney v MacCracken* 294 US 125 at 152 (1935).

matters of detail[257]. There are limits on the extent to which legal requirements can, or should, be derived from general notions appearing in the Constitution[258]. Rigidity of interpretation should be avoided[259], given the variations which already exist in the composition and election of the Upper Houses of State Parliaments in Australia and the undesirability of importing unexpressed restrictions which would needlessly inhibit legitimate experimentation in the government of the States.

138 Having regard to these considerations, and to the way in which the appeal was argued, it is appropriate to confine the significance of the Australian Constitution for the present problem to this. Where the asserted privilege of one House of a State Parliament is not expressly provided for by law, but must be implied as essential to the existence of the body as a Parliamentary chamber or as reasonably necessary to the performance of its functions as such, the starting point for determining the validity of this assertion is not the series of cases of the 19th century in which the Privy Council and colonial courts defined the implied privileges of colonial legislatures. It is the ascertainment of the privileges that must be inferred from the recognised functions and status of the body as a House of Parliament of an Australian State and thus of part of the legislature of a constituent of the Australian Commonwealth.

139 This is not to say that the learning of the old cases should be discarded as irrelevant. But their value is now primarily historical rather than juridical[260]. Where, as in the case of the Houses of the New South Wales Parliament, no external reference point has been provided to identify and define the limits of the applicable privileges, the inquiry is even more at large than otherwise it would be. It involves identifying the functions of the House in question and then specifying, by reference to the Constitution, statute law and the common law of Parliaments, those powers essential to the existence of the House as a chamber of Parliament, or at least reasonably necessary to the performance by that House of its functions as such. The powers which fit those criteria are not frozen in terms of the exposition of the powers of colonial legislatures, whether in Australia or

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257 *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169, 184-185, 231.

258 cf *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319.

259 A measure of flexibility appears in the decision of the Court in *Taylor v Attorney-General of Queensland* (1917) 23 CLR 457 which held that, despite references in the Australian Constitution to "Houses" of State Parliaments the Upper House of the Queensland Parliament might be abolished. See also *Western Australia v The Commonwealth (Territory Senator's Case (No 1))* (1975) 134 CLR 201.

260 *R v Tilley* (1991) 56 SASR 140 at 143 per King CJ; cf *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 686 per Mahoney P.

elsewhere. Thirty years ago Wallace P in *Armstrong v Budd*[261] pointed out how anachronistic that approach would be for the laws of contemporary Australia. It is even more so today.

140 The status of the New South Wales Parliament, and its constituent chambers, was immeasurably enhanced by the coming of the Commonwealth and the provision for the States in the Australian Constitution. This may not have been fully understood at the time. However, we have now had almost a century to adjust our thinking to the new constitutional realities. In ascertaining an implied privilege of a House of the New South Wales Parliament, it may sometimes still be useful to use the old language of colonial days. But in giving content to the criteria of essentiality and reasonable necessity it is important to keep in mind that the legislative body whose status and functions are the touchstone for the determination is one significantly different from the chamber of a colonial legislature. It is a component of a system of representative and responsible government established by the Australian Constitution for a free, independent, democratic and federal nation. It must therefore be apt to an independent legislative body which enjoys, under that Constitution, plenary legislative powers - now released from earlier historical limitations[262].

141 With these changes has come an alteration in the character of the New South Wales Parliament and hence of its constituent Houses. That change of character inevitably affects the determination of the privileges which will be imputed by the law to a House of such a Parliament. There are doubtless further consequences for the State Parliaments and their respective Houses, which flow from the references to them in the Australian Constitution. The elucidation of these implications must await future cases. For the present, it is enough to insist that the Council should be seen as a constituent House of a Parliament of a State of Australia which bears a significantly different relationship to the people governed by it than that which existed in colonial times[263].

The scope of the privilege point

142 *Grounds of objection:* Reduced to their essentials, the appellant's arguments suggested five reasons why the Council lacked the power to order him to table the specified papers, to suspend him for default and consequently to authorise the

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261 (1969) 71 SR (NSW) 386 at 401-402.

262 *Australia Act* 1986 (Cth), ss 1, 2 and 3. Note however that even in colonial times a wide measure of legislative power was accorded to a Parliament such as that of New South Wales. See *Barton v Taylor* (1886) 11 App Cas 197; *Powell v Apollo Candle Co Ltd* (1885) 10 App Cas 282 at 289-290.

263 *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319.

respondents to do what they did in removing him forcibly from the chamber and precincts of the Council. These were (1) that no such powers were expressly afforded to the Council by law, that they were not inherent in the Council as a House of Parliament and could not be implied as being essential to the existence of the Council or reasonably necessary to the performance of its functions as such[264]; (2) that the action taken was not authorised by the accepted legislative functions of the Council; (3) that it was not authorised by the function (if any) of the Council to scrutinise the conduct of the Executive Government; (4) that it involved a serious intrusion into the basic rights of the appellant which, to be sustained as lawful, would require express legal authority; and (5) that it amounted to an impermissible imposition of punishment by the Council which was beyond its implied privileges. None of these complaints is sustained.

143 *Test for inherent or implied powers:* It is unnecessary to explore at length the question of whether the Council, as a House of the New South Wales Parliament, enjoys, by virtue of the Australian Constitution, the statutes constituting it or the common law of Parliaments, *inherent* powers as distinct from those *inferred* from, or *implied* in, the legislative grant of power establishing it. In the context of courts, this question has been controversial[265]. Certainly, the United Kingdom Parliament, as the successor to the English Parliament, has inherent powers by reason of its origins as an emanation of the royal prerogative. It has been argued that the position of the Houses of the New South Wales Parliament is different because that Parliament is purely a creature of statute or (possibly) because it has not adopted a legislative formula assimilating its privileges to those of the British House of Commons[266]. There are dicta of other courts which run in the opposite direction[267]. It is unnecessary to resolve this question because the implied powers which the respondents asserted would be no different from any inherent powers applicable.

144 Drawing upon the line of cases from colonial times, the appellant argued that a strict test would be applied to discern those powers which were essential to the existence of the Council or reasonably necessary to the performance of its functions. To reinforce the legal authority, the appellant pointed out that the New South Wales Parliament could, at any time during virtually its entire existence, have propounded a law affording itself expressly the powers which were now

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264 *Kielley v Carson* (1842) 4 Moo PC 63 at 88 [13 ER 225 at 234].

265 *Taylor v Taylor* (1979) 143 CLR 1 at 5-6; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623; *Grassby v The Queen* (1989) 168 CLR 1 at 16-17; *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 at 147.

266 cf *Crick v Harnett* (1907) 7 SR (NSW) 126 at 132.

267 See eg *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319. See also *Watkins v United States* 354 US 178 at 187 (1957).

asserted as implied. It could have adopted, as other colonies and States have done, a general rule assimilating its privileges to those of the British House of Commons. In default of such legislative initiatives, courts (so it was argued) would not fill the gap. This was particularly so in the case of New South Wales because of the adoption of the express, but limited, provisions of the *Parliamentary Evidence Act*[268]. For powers, potentially oppressive to the citizen to be imported by implication, the appellant argued that clear and unmistakable necessity would have to be demonstrated[269].

145 It may be accepted that strict criteria will be adopted to imply to a House of Parliament a privilege with the potential to involve significant obligations and the risk of abuse. But no one doubts that implied powers exist. The problem is one of defining their content. In respect of the assertion by a chamber of Parliament of implied powers over a member present in that chamber, it is much more likely that a court will accept the implication than it would were the power to be asserted over a member outside the chamber, over a member of the other House (if there be one) or over a stranger[270]. It is also probably true to say, as Mahoney P did in the Court of Appeal, that judicial perceptions of the needs and functions of legislative institutions, and thus of the powers that will be implied to them where an express grant is missing, will vary over time. They will change according to constitutional perspectives and social viewpoints.[271] To identify the reasons for the failure of the New South Wales Parliament to adopt a comprehensive statute or the general principle of assimilation to the privileges of the British House of Commons, or to explain the failure of the Legislative Council itself to adopt Standing Orders of greater particularity[272], is to engage in speculation. The uncontested result is that there is a gap. It can be filled, if at all, only in accordance with legal principle. But in a proper case it will be filled.

146 *Council's legislative function:* The appellant argued that the Court of Appeal had misunderstood the legislative functions of the Council. Of necessity, he had to concede that it had a legislative function. Its name and history require that concession. However, the appellant suggested that such function was limited to "participating in legislation". As presented, this conception of the Council's legislative function appeared highly circumscribed. It was the appellant's case that

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268 First enacted in 1881. There were attempts to enact legislation but none succeeded. See Campbell, *Parliamentary Privilege in Australia* (1966).

269 Relying on *McGinty v Western Australia* (1996) 186 CLR 140 esp 214.

270 cf *Willis and Christie v Perry* (1912) 13 CLR 592.

271 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 676 per Mahoney P.

272 A power to adopt standing orders exists. See *Constitution Act* 1902 (NSW), s 15(1)(a).

the mistake which had arisen in relation to the power of the Council, in support of its legislative function, to require a member to table official documents derived from an erroneous assimilation of the Council's powers to those of the British House of Commons. This, it was submitted, was inappropriate by reason of the lack of an assimilative statute. It was also inappropriate given the history of the Council and the legal limitations on its powers. Those limitations could be seen most clearly in s 5A of the *Constitution Act* 1902 (NSW). That section permits any Bill appropriating revenue for the annual services of government which has been rejected or amended by the Council to be presented to the Governor, although the Council has not approved it. The provision and the requirement that appropriation bills should originate in the Legislative Assembly[273] were said to demonstrate the constitutional limits placed on the Council so as to make the importation of implied powers from British Parliamentary practice quite unsafe. It was conceded that the prevention of disorderly conduct by the suspension of a member of the Council would be within the implied powers of a body such as the Council. But, it was submitted that the failure of a Minister to comply with a demand that official documents be tabled, was of a different character. If such an obligation were to be imposed, it would need statutory authority. In any case it was pointed out that there was no suggestion that the demand for the papers in the present matter was incidental to any legislative measure before the Council or pending when the demand was made.

147 The last-mentioned argument is inadmissible. To explore it would involve the Court in evaluation of the occasion for the asserted privilege rather than whether the privilege existed in law or not. Only the latter consideration is proper to a court confining itself to legal questions[274].

148 It is certainly true that each House of the United Kingdom Parliament has, for a long time, enjoyed the power to call for the production of papers by means of "a motion for a return"[275]. There are exceptions acknowledged by the conventions of Parliament. Most documents requested would be voluntarily produced upon request of a member or demand by resolution of a House. Many documents must be tabled in conformity with statute. The position in the United States is similar. In *Quinn v United States*[276], Warren CJ, delivering the opinion of the Supreme Court said:

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273 *Constitution Act* 1902 (NSW) s 5 (proviso).

274 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 166.

275 Erskine May, *Parliamentary Practice*, 21st ed (1989) at 213-214; cf *Odgers' Australian Senate Practice*, 7th ed (1995) at 51.

276 349 US 155 at 160-161 (1955).

> "There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigate ... Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively."

149 Despite the submissions of the appellant, I see no reason of principle why the same is not true of the Council in the Parliament of New South Wales. The limitations on its legislative functions and powers to initiate legislation are strictly confined and highly specific. In all other respects the Council is an essential chamber with large legislative powers. The notion that it "participates in legislation" in some subordinate way or that it must simply respond to legislation presented by the Executive Government is completely inconsistent with the constitutional functions which it enjoys. It would be competent to any member of the Council, upon the tabling of official documents such as those demanded here, to introduce legislation to cure a perceived defect of administration, to refer the papers for inquiry by a committee or to take other legislative action as the Council thought fit. In *McGrain v Daugherty*[277] it was said in the Supreme Court of the United States, in words which apply with no less force to the New South Wales Parliament:

> "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information - which not infrequently is true - recourse must be had to others who do possess it."

150 In the United States, where the Executive Government is not present in the legislature, procuring relevant information may sometimes be more difficult than it is in an Australian Parliament. At a federal level the position in the United States is now largely regulated by statute[278]. But in Australia, where the Ministers by law or by convention[279] must be members of the legislature, their availability to assist the legislature in the performance of its lawmaking functions is more immediate.

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277 273 US 135 at 175 (1927).

278 See *Senate Select Committee v Nixon* 498 F 2d 725 (1974).

279 See eg Australian Constitution, s 64; *Constitution Act* 1902 (NSW), ss 35E and 38A; cf Uhr, *Deliberative Democracy in Australia* (1998) at 161-163; Shane, "Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress" 71 *Minnesota Law Review* 461 (1987).

Indeed, this is one of the advantages of the system of responsible government which is practised in Australia.

151 In *Clayton v Heffron*[280] this Court remarked that, with the establishment of the Parliament of New South Wales, with its two Houses, "the principles of responsible government were introduced and with that came the principles and conventions and general tradition of British parliamentary procedure". Amongst those principles are those which state that, whilst in the chamber, a member is a person under the lawful authority of the chamber. He or she is bound to conform to its lawful demands. A demand incidental to the performance by the chamber of its legislative functions is such a demand[281]. A demand for documents containing information relevant to the discharge of those functions, either now or in the future, cannot of itself be unlawful[282]. All just exceptions provided by law aside, such a demand is prima facie essential to the existence of that body as a legislative chamber. It is reasonably necessary to the discharge of its functions as such. The appellant's objection on this ground has no legal merit[283].

152 *Scrutinising the Executive*: The appellant next objected to so much of the reasoning of the Court of Appeal as proffered a second ground for upholding the legality of the Council's resolution. This was that, by demanding the tabling of the documents as it did, the Council was performing its lawful function of rendering the Executive Government accountable to it as an incident of the system of responsible government[284]. Care must be observed in the use of the notion of

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280 (1960) 105 CLR 214 at 251.

281 *Willis and Christie v Perry* (1912) 13 CLR 592 at 598.

282 In 1975 the Prime Minister objected to demands made by the Senate on public servants for the production of documents, but only on the basis that such "documents ... should be sought from Ministers by the normal and proper procedures of the Parliament". See letter to the President of the Senate quoted in Campbell, "Appearance of Officials as Witnesses Before Parliamentary Committees" in Nethercote (ed), *Parliament and Bureaucracy* (1982) at 179, 211-213.

283 Compare the consideration of analogous issues in the context of "deliberative" or "discursive" democracy and of so-called "civic-republicanism". See generally Sunstein, *The Partial Constitution* (1993) at 1-12, 134-135, 241-247; Sunstein, "Beyond the Republican Revival", (1988) 97 *Yale Law Journal* 1539 at 1541, 1544-1551; Rawls, *A Theory of Justice* (1971) at 416-424; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996). In the Australian context, see Uhr, *Deliberative Democracy in Australia* (1998), Ch 1 and Ch 3.

284 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 665 per Gleeson CJ, 677 per Mahoney P.

"responsible government" in legal reasoning. It is a political epithet rather than a definition which specifies the precise content of constitutional requirements. As with the notion of "representative government", it is possible to accept the words as a general description of a feature of constitutional arrangements in Australia without necessarily being able to derive from that feature precise implications which are binding in law[285].

153 The appellant submitted that, in the context of New South Wales, "responsible government" meant no more than that the Crown's representative acted on the advice of the Ministers and that the Ministers enjoyed the confidence of the Lower House of Parliament[286]. From these premises, the Court was urged to accept the notion that the Executive Government was not accountable to the Council and that a member of that Government sitting in the Council could not be obliged to hand over official documents on the basis that this was necessary to make the scrutiny of Government effective. I cannot agree with these submissions.

154 It reads too much into the statutory limits on the powers of the Council[287] to suggest that it has no function in rendering the Executive Government accountable, through it, to the Parliament and thus to the electors of the State. This argument appears to be an attempt to put the Executive Government above Parliament, comprising as it does, two Houses. That attempt cannot succeed[288]. The practice and Standing Orders of the Council allow for oral questioning of Ministers present in the chamber. They do so precisely to make the Council's scrutiny of the Executive Government effective. There seems no reason in logic to limit such scrutiny to oral answers given by a Minister or to exclude the provision of written documents which are in the Minister's possession or under his or her control and not otherwise legally exempt from production. It is by such scrutiny that the system of government established by the *Constitution Act* and envisaged by the Australian Constitution permits effective public debate, facilitates the democratic choice of the members of the chambers and allows periodic judgment of the government by the electors. The suggestion that only the Lower House has the power to extract documentary information from the Executive Government is not only inconsistent with the Cabinet resolution to which the appellant originally adhered. It involves a view of the accountability of the Executive Government to Parliament, including the Council, which is alien to the system of government

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285 *McGinty v Western Australia* (1996) 186 CLR 140.

286 The latter principle was said to derive principally from s 5A of the *Constitution Act* 1902 (NSW).

287 *Constitution Act* 1902 (NSW), ss 5, 5A, 38A.

288 *Stockdale v Hansard* (1839) 9 Ad & E 1 [112 ER 1112].

which the *Constitution Act* establishes and the Australian Constitution envisages[289].

155 The reason why the accountability of Ministers in the Council is not spelt out in terms in the *Constitution Act* itself, or in the Standing Orders, may be that it is so fundamental to the existence of a legislative chamber in our system of government, and necessary to the performance of that Chamber's functions as such, that it was accepted as axiomatic that, if a House of the Parliament insists and there is no lawful reason for resistance, a member, including a Minister, must obey the House's demand[290]. Whether that is the explanation or not, the legal power of the Council to make such a demand upon the Executive Government cannot be doubted. Where the representative of the Executive Government is a member of the Council, the power of the latter to suspend that member in order to coerce him or her to comply with its demand can likewise not be doubted. To deny the Council such powers would be to destroy its effectiveness as a House of Parliament. The fact that the Executive Government is made or unmade in the Legislative Assembly, that appropriation bills must originate there and may sometimes be presented for the royal assent without the concurrence of the Council does not reduce the latter to a mere cipher or legislative charade. The Council is an elected chamber of a Parliament of a State of Australia. Its power to render the Executive Government in that State accountable, and to sanction obstruction where it occurs, is not only lawful. It is the very reason for constituting the Council as a House of Parliament[291]. This ground of objection also fails.

156 *Intrusion into civil rights:* The appellant then argued that the resolution of the Council and the steps taken to give effect to it were unlawful because they coerced him and impinged on his basic civil rights without clear authority of law. The Court was reminded of the authorities in which it has said, many times, that

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289 See for example Lumb, *The Constitutions of the Australian States*, 5th ed (1991) at 65-70; Parker, "Responsible Government in Australia" in Weller and Jaensch (eds) *Responsible Government in Australia* (1980), Ch 2; Uhr, *Deliberative Democracy in Australia* (1998), Ch 7.

290 cf Finn, *Law and Government in Colonial Australia* (1987), Ch 3; Ward, *Colonial Self-Government* (1976), Ch 9; Ward, "The Responsible Government Question in Victoria, South Australia and Tasmania 1851-1856", (1978) 63 *Journal of the Royal Australian Historical Society* 221.

291 cf Finn, "Public Trust and Political Accountability" (1993) *Australian Quarterly* 65; Finn, "A Sovereign People, A Public Trust" in Finn (ed) *Essays on Law and Government* (1995), vol 1, Ch 1; Uhr, *Deliberative Democracy in Australia*, (1998) Ch 7.

inconvenience is not a ground for eroding fundamental civil rights[292]. The appellant submitted that, even if the Council had a right to demand the official documents, if it wished to enforce that right in a way which infringed his liberties, it could only do so with the authority of express legislation[293]. Analogies were drawn to the requirements imposed by the Court upon the Executive Government where it had sought, arguably for valid reasons, to impose burdens upon citizens without express authority of law. In essence, the appellant contended that his failure to comply with a demand, such as was made by the resolution of the Council, should be left to carry only the political consequences which flowed. Doing so would reflect the distinction between the recognition, as lawful, of powers implied in a legislative body that were protective of its status and functions and those which constituted an aggressive assertion of its will more appropriate to legislation[294].

157 There is no merit in this argument in the circumstances of this case. Although it is true that upholding the lawfulness of the Council's resolution and of the actions performed by the respondents in pursuit of it, deprives the appellant to that extent, of an entitlement which he would otherwise have to recover redress for the trespass to his person, the coercion of the appellant was not directed to him as an individual citizen. It was addressed to him as a member of the Council, also a Minister, sitting in the chamber. That is how it must be characterised. Quite different considerations would arise were a resolution to be directed to a non-member or a Minister sitting in the other chamber or to a stranger. Temporary suspension of members is a sanction frequently used by a House of Parliament in order to coerce that member to conform to the will of the House[295]. The will of the House might relate to the prevention of rowdy or disruptive conduct, but it is not confined to such behaviour. The relevant limits are those which arise from the nature of the chamber as a House of Parliament and the lawful performance of its functions, including its legislative functions and its functions of rendering the Executive Government accountable, through it, to the Parliament and the electors of the State.

158 *Impermissibility of punishment:* The English Parliament claimed for centuries a power to punish members and strangers for contempt of Parliament. In colonial times it was held that, without valid legislation, the power of punishment

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292 See eg *Coco v The Queen* (1994) 179 CLR 427 at 436; cf *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 736; 152 ALR 540 at 558.

293 cf *Plenty v Dillon* (1991) 171 CLR 635 at 653-654.

294 *Willis and Christie v Perry* (1912) 13 CLR 592 at 597-598; cf *Fenton v Hampton* (1858) 11 Moo PC 347 [14 ER 727].

295 See eg *Harnett v Crick* [1908] AC 470.

did not accrue to a colonial legislature[296]. It would not be implied[297]. In the United States there is no equivalent disinclination to impute to the Congress a power to punish those found guilty of contempt of Congress[298]. But in Australia, it has been held, for a long time, that a parliamentary chamber has no implied power of punishment[299]. This rule has existed too long to be changed by the Court even if it were so inclined. But the difficulty of drawing a line between legitimate coercion and punishment has often been acknowledged[300].

159 The appellant laid emphasis upon this difficulty. He sought to resist the acceptance of the implied powers urged on behalf of the Council by pointing to the punitive effect which depriving him of his seat in the chamber had not only upon him as a citizen but upon those who had elected him. Difficult questions might arise where a longer or indefinite suspension or expulsion was attempted. In this appeal this Court is not required to consider the admissibility of expulsion either generally or for the purpose of coercing a member to conform to the will of the Council expressed in a resolution[301]. It is enough to say that suspension of a member for the remainder of a single day's sitting and the application of minimal force to effect that member's removal where he would not leave the chamber and precincts voluntarily, could not on any view be characterised as punishment. It was, as it purported to be, an attempt to uphold the will of the Council against the resistance of the appellant. The distinction between punishment and coercion was acknowledged during the debates in the Council. It was observed in what the Council resolved and what the respondents proceeded to do[302].

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296 *Fenton v Hampton* (1858) 11 Moo PC 347 [14 ER 727].

297 See *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 667 per Gleeson CJ citing *Barton v Taylor* (1886) 11 App Cas 197 at 205; *Willis and Christie v Perry* (1912) 13 CLR 592 at 599-600.

298 *Anderson v Dunn* 19 US 204 (1821). The contrary proposition was said to be "a supposition too wild to be suggested".

299 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157; cf *Willis and Christie v Perry* (1912) 13 CLR 592; *Armstrong v Budd* (1969) 71 SR (NSW) 386.

300 As it was by Gleeson CJ. See *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 667; cf *Witham v Holloway* (1995) 183 CLR 525; *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98.

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

302 The unchallenged finding that expulsion to the footpath was excessive and unlawful is excluded from consideration.

160 *Abuse and exceptions:* In the course of his arguments, the appellant sought, finally, to dissuade this Court from confirming the decision of the Court of Appeal by reference to the problems and risks which were said to be inherent in that course. Thus, it was argued that the power to demand the tabling of documents in the possession of a member might, if upheld, be abused. Such demands could be addressed to a political opponent[303] or to a Minister in the other chamber or to a stranger. They might be used for extraneous or improper reasons. Whilst the risk of such abuses exists, the law cannot be expressed by reference to "some distorting possibility"[304]. It should not be imputed to the elected members of an Australian Parliament that they will act improperly or venally. And if they do, it should not be assumed that the law, and Parliamentary Standing Orders and procedures, would not afford relief.

161 There would, indeed, be exceptions to the obligation of a member, including a Minister, to table documents demanded by a resolution of a chamber of Parliament. Such exceptions could arise on grounds of individual privacy, confidentiality (as for example papers disclosing Cabinet discussions[305]) public interest immunity, as well as other grounds. At this stage of these proceedings it is unnecessary to say anything about such grounds of exemption. It is significant that in the long history of elected legislative chambers in Australia, an *impasse* such as the present, has usually been avoided by give and take on the part of the legislature demanding information and the Executive Government initially reluctant to give it.

162 The appellant argued that the risks of abuse and the catalogue of exceptions made it inappropriate to uphold, as an implied power, entitlements which were not spelt out in legislation where the checks and balances could be precisely drawn. Whilst that argument has some force, the necessity to uphold the legislative powers of a chamber of an Australian Parliament, and its functions to render accountable the Executive Government, present within it, is of great constitutional importance. History suggests that it might be unsafe to wait for comprehensive legislation on such matters. Meantime, the present case falls to be determined. The powers of the Council and its officers must be decided. It will primarily be for the Houses of a Parliament to avoid abuses of the principle established by this case. In extreme cases, abuse might invite judicial intervention. The principles governing claims for immunity or exemption from the obligation of a member, including a Minister, to produce documents demanded by a House of Parliament can await occasions

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303 cf *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 397.

304 *Western Australia v The Commonwealth (Territory Senator's Case (No 1))* (1975) 134 CLR 201 at 275; *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 743; 152 ALR 540 at 569.

305 *Sankey v Whitlam* (1978) 142 CLR 1 at 38-43.

when a claim to a specific exemption is made and refused. That point has not been reached in this case, given the stance adopted by the appellant.

Conclusion and orders

163 On the footing that there has been no challenge in this Court to the determination by the Court of Appeal of the "footpath point", the declaration that the respondents committed an unlawful trespass to the person of the appellant in that regard will be sustained. I see no merit in the criticism that a declaration of trespass is an inappropriate remedy or that the declaration made was too wide, too imprecise or too divorced from the parties' legal disputes. No-one submitted that this was so in the otherwise comprehensive arguments received by the Court.

164 It is sufficient for this Court to dispose of the issues before it to hold, as I would, that no error occurred in the Court of Appeal's refusal to make the declaration sought by the appellant that the resolutions of the Council of 2 May 1996 were invalid. The appeal should be dismissed. The cost order in the Court of Appeal should not be disturbed. The appellant should pay the respondents' costs in this Court.

165 CALLINAN J. This is an appeal from a judgment of the Court of Appeal of New South Wales constituted by Gleeson CJ, Mahoney P and Priestley JA concerning the powers of the Legislative Council of New South Wales.

166 Towards the end of the hearing in this Court on 16 June 1998, the parties' attention was drawn to the possibility that issues notifiable to the State and Commonwealth Attorneys-General under s 78B of the *Judiciary Act* 1903 (Cth) may have been latent in the arguments addressed to the courts. Notices were then given and the matter was listed for further hearing on those issues.

167 The issues raised by the notices are as follows:

> Whether either the text or structure of either the Commonwealth Constitution or the Australia Acts 1986, in so far as that Constitution or those Acts are relevant to the State of New South Wales:
>
> (a) renders no longer supportable the reasoning in *Barton v Taylor*[306], and *Willis and Christie v Perry*[307]; or
>
> (b) either gives rise or is relevant to:
>
> (i) a power in the New South Wales Legislative Council to require the appellant to produce to it the documents required by its resolutions dated 23 April 1996 and 1 May 1996; or
>
> (ii) the justiciability of disputed questions arising in relation to any purported exercise by the Council of such power.

168 I leave aside these questions until later.

169 For some time the Legislative Council had been seeking the production of some State documents relating to a consent to mine gold at Lake Cowal, near West Wyalong and some other matters which the Council wished to debate. The appellant, the Treasurer of the State, a member of the Executive Council and a member of the Legislative Council was directed by a resolution of the Legislative Council of 1 May 1996 to deliver the documents to the Clerk of the House on the following day.

170 The appellant refused to produce the documents. In view of the refusal, the Legislative Council adjudged the appellant guilty of contempt, resolved to suspend him and ordered that he be escorted from the precincts of the Parliament. The

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306 (1886) 11 App Cas 197 at 202-203.

307 (1912) 13 CLR 592 at 597-598, 599-600.

appellant, unavailingly, protested against the resolution of the House and was removed beyond its precincts.

The Proceedings in the Court of Appeal

171 The appellant claimed, in the Administrative Law Division of the Supreme Court, declarations that the President of the Legislative Council and the officer acting pursuant to the resolution, the Usher of the Black Rod, committed an unlawful trespass to the person of the appellant, and that the resolution to the extent that it applied to the appellant was invalid. By consent of the parties an order for the removal of the case to the Court of Appeal was made by Dunford J. In short, both parties sought the intervention of the courts for the resolution of their differences and the courts were accordingly bound to resolve the controversy between them[308].

172 The Court of Appeal held that the Legislative Council has such implied or inherent powers as are reasonably necessary for its existence and for the proper exercise of its functions: that a power to order the production of the relevant State Papers was such a power, as was the power to suspend the appellant when he declined to do so in order to attempt to coerce him into producing the papers[309]. The Court of Appeal found that the extent of the removal of the appellant, because he was removed not merely from the Legislative Council chamber, but also from the land occupied by the New South Wales Parliament, was excessive, and not warranted by the Standing Orders of the Legislative Council. There is no appeal against the finding of unlawfulness in favour of the appellant of the respondents' conduct outside the House (the Footpath Point).

173 The Standing Orders of the Legislative Council contain the following provisions:

> "18. Any papers may be ordered to be laid before the House and the Clerk shall communicate to the Premier's Department any such order.
>
> 19. The production of Papers concerning the Royal Prerogative, or of Despatches or other correspondence addressed to or emanating from His Excellency the Governor, or having reference to the Administration of Justice, shall be asked for only by Address to the Governor."

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308 Contrast *Criminal Justice Commission v Nationwide News Pty Ltd* [1996] 2 Qd R 444 in which the Speaker of the unicameral legislature of Queensland sought to intervene to argue and did argue that the Court should abstain from hearing the case.

309 *Egan v Willis & Cahill* (1996) 40 NSWLR 650.

174 With respect to these, Gleeson CJ in the Court of Appeal said, that they assume the existence of a power, but do not operate as a source of power; rather they regulate in certain respects the exercise of a power, which, if it exists, must have some other source[310]. This proposition was not challenged by the appellant in this Court, on the assumption, as I understand it, that the only possible source of power for a Standing Order of substantive operation is s 15(1)(a) of the *Constitution Act* 1902 (NSW)[311] which authorises orders for the orderly conduct of Council business, but does not authorise the making of Standing Orders to require production of documents, and measures to secure production on any failure in that regard.

The Appeal to this Court

175 There was only one ground of appeal to this Court:

1. The Court erred in holding that the Legislative Council had an implied power to order the laying of documents on the table by the appellant, which order was enforceable by the imposition of the sanction of suspension on the appellant.

176 Some preliminary observations may be made.

177 There is no express conferral of any of the asserted powers upon the Legislative Council by the *Constitution Act* 1902 (NSW).

178 It is clear however from the scheme of that Act that legislation may be initiated in the Legislative Council which is, in name and by definition, one of the constituent parts of the Legislature of the State.

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310 (1996) 40 NSWLR 650 at 664.

311 Section 15(1) provides:

> "The Legislative Council and Legislative Assembly shall, as there may be occasion, prepare and adopt respectively Standing Rules and Orders regulating:
>
> (a) the orderly conduct of such Council and Assembly respectively;
>
> …".

179 Neither in the Court of Appeal nor here were questions of justiciability debated. Accordingly Gleeson CJ in the Court of Appeal was able to define the relevant questions in this way[312]:

> "As the High Court observed in *R v Richards; Ex parte Fitzpatrick and Browne*[313], after a long period of controversy in England, it was established that disputes as to the existence of a power, privilege or immunity of a House of Parliament are justiciable in a court of law. The same principle applies in Australia. However, whilst it is for the courts to judge the existence in a House of Parliament of a privilege, if a privilege exists it is for the House to determine the occasion and the manner of its exercise. Hence the argument before us has been directed towards questions of power rather than factual issues going to the appropriateness of the exercise of such power, if it existed. On that common understanding, it was unnecessary to debate questions of justiciability which might otherwise have arisen."

180 Unlike some other Parliaments, including the Federal Parliament,[314] there is no legislation in New South Wales which expressly confers powers, privileges and immunities upon the New South Wales Parliament, although numerous futile legislative attempts have been made to do so[315]. Section 6 of the *Imperial Acts*

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312 (1996) 40 NSWLR 650 at 653.

313 (1955) 92 CLR 157 at 162.

314 See the Commonwealth Constitution ss 49 and 50:

> "49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.
>
> 50. Each House of the Parliament may make rules and orders with respect to –
>
> (i) The mode in which its powers, privileges, and immunities may be exercised and upheld:
>
> (ii) The order and conduct of its business and proceedings either separately or jointly with the other House."

315 Legislation was introduced five times between 1856 and 1912. Further consideration was given to enacting legislation as recently as 1984 and 1996. See also *Report of the Joint Select Committee of the Legislative Council and Legislative Assembly on Parliamentary Privilege in New South Wales*, 1984-5, at 17. Examples of failed legislation are the *Parliamentary Powers and Privileges Bill* 1879, the

(Footnote continues on next page)

Application Act 1969 (NSW) does however apply the Bill of Rights to the State Houses of New South Wales but that legislation has nothing to say about the powers of the Houses with respect to the production of documents and any coercive measures which might be adopted in default of their production. Nonetheless it serves (with necessary adaptations to accommodate differences between the Houses of Westminster and of a State legislature) as a clear indication that the proceedings of the Houses in New South Wales should not in general be subject to check or questioning in the Courts.

181 The two principal submissions of the appellant are that the Legislative Council does not possess any implied powers of any kind: alternatively, if the Council does have implied power, it is only to do what is reasonably necessary for the proper exercise of its powers and functions as an Upper House of Parliament (with a limited role with respect to money bills)[316] and, the conduct complained of here was not reasonably necessary for that purpose.

182 In some respects the New South Wales *Constitution Act* of 1902 is more explicit than the Constitutional legislation of other States[317]. But there are still usages, practices and conventions according to which the Houses and Ministers are accustomed to act that are not the subject of legislation in New South Wales; for example, the appointment of Ministers from the ranks of parliamentarians. However that is not to the point in determining whether an express power is necessary to compel the production of documents and to empower the Houses to adopt measures to coerce compliance in default of production.

183 The possibility that there may be no right to have reviewed by a court what is in truth a sanction or punishment rather than a merely coercive measure imposed by a House of Parliament upon one of its members, especially a Minister, is not the only matter of concern, and therefore one which might perhaps legitimately bear upon the resolution of the issues in a case such as this, where there is no express legislative foundation for the power asserted by the Legislative Council, and implications would be necessary to found the exercise of such a power. Another matter of concern is that Ministers (and officials) need to be free to express themselves with a high degree of candour in Cabinet discussions and papers, a candour which might well be inhibited and therefore compromised, if a

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Parliamentary Powers and Privileges Bill of 1901 and 1912 and the *Parliamentary Privileges Bill* of 1911.

316 Money bills cannot originate in the Council and may be presented for Royal assent notwithstanding the Council's failure to pass them, if certain conditions are satisfied: *Constitution Act* 1902 (NSW) ss 5, 5A.

317 See for example *Constitution Act* 1867 (Qld); *Constitution Act* 1934 (Tas); *Constitution Act* 1934 (SA).

Minister may be compelled to produce papers proposing measures for consideration by the Cabinet and views tentatively expressed, and perhaps altered, after the ebb and flow of Cabinet discourse. As Sir Ivor Jennings wrote in *Cabinet Government*[318] regarding the basis for the confidentiality of Cabinet materials:

> "The Cabinet deliberates in secret; its proceedings are confidential. The Privy Councillor's oath imposes an obligation not to disclose information; and the Official Secrets Acts forbid the publication of Cabinet as well as other official documents. But the effective sanction is neither of these. The rule is, primarily, one of practice. Its theoretical basis is that a Cabinet decision is advice to the Queen, whose consent is necessary to its publication. Its practical foundation is the necessity of securing free discussion by which a compromise can be reached, without the risk of publicity for every statement made and every point given away."

184 Because of the view which I have formed of this case, whether, and the extent to which claims for a form of public interest immunity or privilege might be sustained in the Houses of Parliament of New South Wales are questions which it is unnecessary to answer. Other matters which were also touched upon in argument similarly do not need resolution in this appeal: whether *Armstrong v Budd*[319] was correctly decided; whether there is a relevant distinction and what it is, between "defensive" actions by a House of Parliament and punitive ones[320]; whether, notwithstanding anything that was said in *R v Richards; Ex parte Fitzpatrick and Browne*,[321] a House should be absolutely entitled to suspend for a lengthy period, or expel a member, rather than, as here, merely suspend him for a

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318 3rd ed (1969) at 267 (footnote omitted). See also *Odgers' Australian Senate Practice*, 8th ed (1997); Commonwealth Cabinet Handbook "Access to Cabinet Documents of Previous Governments" at pars 9.32-9.35 and Professor Enid Campbell's chapter, "Appearance of Officials as Witnesses Before Parliamentary Committees" in Nethercote (ed), *Parliament and Bureaucracy* (1982) at 179-226.

319 (1969) 71 SR (NSW) 386.

320 See *Doyle v Falconer* (1866) LR 1 PC 328 at 340; *Barton v Taylor* (1886) 11 App Cas 197 at 203, 205; *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 406 per Sugerman JA.

321 (1955) 92 CLR 157 at 162 per Dixon CJ speaking for the Court, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ, " … it is for the House to judge of the occasion and of the manner of its exercise". See also the recent discussion in *Criminal Justice Commission v Nationwide News Pty Ltd* [1996] 2 Qd R 444 at 455-457 per Pincus JA and at 459-460 per Davies JA regarding the justiciability of some matters occurring in a House of Parliament.

brief period[322]; and, the extent to which a House possesses powers of compulsion with respect to private citizens, their affairs, and their documents.

185 It is obvious, I think, that the Legislative Council as a popularly elected House of Parliament and part of the legislature of the State may on occasions need to see certain documents in order to carry out its legislative and other roles effectively.

186 It might be suggested that the remedy for difficulties experienced by the Legislative Council arising from any failure or refusal to produce documents lies in the Council's own hands, the rejection of such legislation as the Legislative Council is entitled to reject until the documents are produced[323]. However, the opportunity to avail itself of that remedy will often not be practically available, and, in any event may be far too harsh, or inappropriate in the case of unrelated legislation or legislation which should for other reasons be passed. Such a remedy may therefore have to be regarded as too imperfect, or inappropriate, to resolve difficulties associated with the withholding of relevant documents.

187 Another matter to which the appellant referred was the language of the *Parliamentary Evidence Act* of 1881 (NSW) (consolidated as the *Parliamentary Evidence Act* 1901 (NSW)). With respect to it, the appellant made two points: first, that if implied powers to obtain information already existed, there was no need for its enactment; secondly, the express reference to oral materials and absence of reference to State papers and the like, indeed documentary materials

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322 The Court of Appeal of New South Wales, in *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 393, regarded *Harnett v Crick* [1908] AC 470 (a suspension case only) as supporting a right of expulsion. Legislative Councillors can hardly be regarded as holding office, like members of a club at the pleasure, or the displeasure of other members. They hold office by popular franchise governed by legislation which is the product of both Houses of Parliament.

323 See *Constitution Act* 1902 (NSW) s 5A which precludes the Legislative Council obstructing the passage of money bills.

> " (1) If the Legislative Assembly passes any Bill appropriating revenue or moneys for the ordinary annual services of the Government and the Legislative Council rejects or fails to pass it or returns the Bill to the Legislative Assembly with a message suggesting any amendment to which the Legislative Assembly does not agree, the Legislative Assembly may direct that the Bill with or without any amendment suggested by the Legislative Council, be presented to the Governor for the signification of His Majesty's pleasure thereon, and shall become an Act of the Legislature upon the Royal Assent being signified thereto, notwithstanding that the Legislative Council has not consented to the Bill."

generally, meant that it was never intended that the Council have power to compel their production.

188 The first point is answered by the terms of the *Parliamentary Evidence Act* itself which show that it was intended to provide a proper procedure for the attendance and examination of witnesses[324]. The second point cannot, in my opinion, give rise to an implication that it was deliberately intended by the legislature at the time of the enactment that Ministers and Members of a House should enjoy a particular immunity from production of documents. The *Parliamentary Evidence Act* simply does not in any relevant sense purport to deal with that topic.

189 On any view the Legislative Council must be armed with a power to do what is reasonably necessary for the proper exercise of its functions. This is the language of Lord Selborne in *Barton v Taylor*[325]:

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

190 The only question which has to be answered in this case is therefore, whether what was done by the House was reasonably necessary for its functions.

191 The amplitude of s 5 of the *Constitution Act* 1902 (NSW) and the reference in that section to the making of laws for the peace, welfare and good government of New South Wales lend support to the view that the powers and functions of the Legislative Council as a constituent part of the legislature of New South Wales should enable the Council to go as far as it did in this case. So too, s 38A expressly refers to "debate or discussion" on a bill[326]. A power (or function) to explore

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324 The Preamble to the 1881 *Parliamentary Evidence Act* (NSW) reads:

> "WHEREAS it is expedient that the power of compelling the attendance of Witnesses and of examining them on oath should be possessed by Parliament and Parliamentary Committees. Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows:-".

325 (1886) 11 App Cas 197 at 204.

326 Section 38A provides:

> "(1) Notwithstanding anything contained in this Act, any Minister of the Crown who is a member of the Legislative Assembly may at any time, with the

(Footnote continues on next page)

matters which could bear upon legislation is a power that the Legislative Council needs to possess in order to carry out its function as part of the legislature. As Mahoney P in the New South Wales Court of Appeal in this case pointed out[327]:

> " 'Necessary' has, in the law, been used frequently to denote those things which are clearly adapted to the needs or the purposes of the body or function in question[328]."

192 And, as his Honour subsequently said[329]:

> "… it would be extraordinary if, having a matter before it for consideration, it could not do what was necessary to inform itself about it. It is accordingly within its power to obtain such information in various ways. Thus, it may cause a study to be made of matters which are before it to be dealt with. It may do this by Committees, by consultants and by the provision of information by members … ."

193 In arguing that the Legislative Council's powers are confined to protective and self-defensive ones and that the power exercised here went beyond those and was punitive the appellant relied on a passage in *Barton v Taylor*[330] in the Privy Council:

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

194 The short period of suspension here and the measures taken by the respondents to remove the appellant from the House do not in my view amount to

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> consent of the Legislative Council, sit in the Legislative Council for the purpose only of explaining the provisions of any Bill relating to or connected with any department administered by him, and may take part in any debate or discussion in the Legislative Council on such Bill, but he shall not vote in the Legislative Council.
>
> (2) It shall not be lawful at any one time for more than one Minister of the Crown under the authority of this section to sit in the Legislative Council."

327 (1996) 40 NSWLR 650 at 676.

328 See generally *Water Board v Glambedakis* (1992) 28 NSWLR 694 at 707.

329 (1996) 40 NSWLR 650 at 677.

330 (1886) 11 App Cas 197 at 203.

punitive measures. To suspend for a relatively brief period a member elected by popular vote may be one matter: to suspend him for a long period or to expel him, and to declare that member's seat vacant may perhaps be different matters altogether. The measures adopted here were, in my opinion, protective in the sense that their adoption did no more than attempt to effectuate the function of the Legislative Council to inquire of a member into matters relevant to the exercise of its legislative powers and the good government of New South Wales. They were reasonably necessary for the carrying out of that function.

195 I would hold therefore, subject to what arises out of the arguments on the notice given under s 78B of the *Judiciary Act*, that what was done here (save what occurred on the footpath) was reasonably necessary for the exercise by the Legislative Council of its powers (or functions) as part of the legislature of New South Wales, and was self-defensive of the Council, or merely a not inappropriate coercive measure.

196 I turn now to the questions raised by the Notice. In my opinion neither the Commonwealth Constitution nor the Australia Acts affect the conclusion that I have reached. There was reference in argument to *Kable v Director of Public Prosecutions (NSW)*[331]. What this Court held there, that the State courts are part of a national, hierarchical scheme in which the State courts play an integral part has nothing to say about a House of a State Parliament exercising the power of suspension (relatively brief) of a member, of the kind which occurred here. Accordingly the opinion which I have formed in this case is unaffected by the matters raised by the Notices.

197 I would dismiss the appeal with costs.

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331 (1996) 189 CLR 51.