

Background

At its meeting on 9 March 2017, General Purpose Standing Committee No. 4 (now known as Portfolio Committee No. 4) resolved that the committee:

- authorise the Chair, on behalf of the committee, to give notice in the next sitting period, for an order for papers under SO 52 for all documents related to the preliminary business case for the relocation of the Powerhouse Museum
- seek advice from the Clerk as to whether the committee should pursue these documents via standing order 208 (c) *parallel* to seeking them under SO 52, and furthermore, what mechanisms are available to the committee or the House to seek to enforce these orders, in the event the executive refuses to provide the documents.

This request followed an earlier advice from me dated 27 February 2017 regarding the steps the committee could take to press witnesses who declined to answer questions on the grounds of cabinet confidentiality, and how the committee could access the preliminary business case for the relocation of the Powerhouse Museum.¹

As noted in my earlier advice, while the ability of the House to order State papers, including those subject to claims of public interest and legal professional privilege, was confirmed by the *Egan* cases, these cases did not settle whether this power extended to cabinet documents. Given past precedents, it is likely the Executive will not provide the documents sought by the committee, either under SO 52 or 208. The committee has therefore sought my advice as to what mechanisms are available to enforce these orders.

The issues raised by the committee are complex and so I would be pleased to meet with members to expand upon the suggestions contained in my written advice or to answer any further questions.

Advice

Pursuing the documents under SO52

I note that the Chair, on behalf of the committee, is due to give notice of a motion to order the relevant documents under SO 52. Presuming the House agrees to the order but that the Government refuses to comply, members may wish to pursue the following options. These options draw on the steps taken by members and the House in the lead up to the first *Egan* case in the late 1990s.

The Chair, or another committee member, could:

- move a motion in the House that the Leader of the Government has not complied with the order, with the motion including a provision for the Leader of the Government to be given a set timeframe to present the papers to the Clerk. Presuming the order is not complied with, the member could then:
- move a motion that the Leader of the Government be found in contempt and be required to attend in his place in the House to answer the question as to why he would not produce the papers, or
- move a motion that the Leader of the Government is guilty of contempt and that the member be suspended from the service of the House for a certain period of time (for example, for the remainder of the day's sitting, five sitting days or until the documents are

¹ Advice, Clerk of the Parliaments to General Purpose Standing Committee No. 4, 27 February 2017 (attached)

lodged with the Clerk of the Parliaments, whichever occurs first). This was the trigger for the commencement of legal proceedings in the *Egan* cases.

In pursuing any of the above options, the committee should be cognisant of the following factors:

First, the pursuit of the documents will require the support of the House in both the short and long term. This support may not be forthcoming if other members do not feel the documents are necessary for the committee's inquiry, especially in light of media speculation that the Government may reverse or alter its decision to relocate the Powerhouse Museum from Ultimo to Parramatta.

Attempts to secure the documents may take some time. The first *Egan* case took approximately three years to unfold. While the pursuit of the documents in the present case may not take this long, members need to be aware that it may take at least several months.

A second, important consideration is the role of the courts in resolving the matter. In the first *Egan* case, the Leader of the Government challenged his suspension and alleged assault in the Supreme Court. There is no guarantee that this would necessarily occur in the current situation. Recent events in the Victorian Legislative Council are instructive in this regard. On the 25 May 2016, the Leader of the Government, Gavin Jennings, was suspended from the chamber for six months for failing to produce documents ordered by the Council.² However, Mr Jennings did not challenge his suspension which he completed by December of that year. Therefore, there is no guarantee the government will trigger court proceedings, thus leaving the issue unresolved or requiring multiple, extended suspensions from the House.

Even if the matter were to be litigated, there is a possibility that the court may decline to adjudicate the matter, or if the case did proceed, that the court may read down the powers of the Legislative Council. High level legal advice would be required at a number of stages along the way.

Concurrent pursuit of the documents via SO 208

The Committee has also asked me to comment on whether it should pursue these documents via SO 208 (c) *parallel* to seeking them under SO 52.

Under SO 208(c) committees are authorised 'to send for and examine persons, papers, records and things'. The key difference between the power of the House to order documents and the power of a committee to do so is that, if an order by a committee is resisted, the committee itself does not have the power to deal with the consequences of that failure, the normal course of action being for the committee to make a special report to the House. It is then up to the House to determine whether action should be taken for contempt against the person who has failed to comply with the Committee's order.³

Between 1999 and 2001, following the decision in *Egan v Willis*, there were a number of precedents of documents being provided to a committee following a formal order by the committee.⁴ However, since 2004, several attempts by committees to order the production of documents have been resisted. For example, during the 2004 'Orange Grove inquiry', the committee resolved twice to order the production of documents SO 208(c) from relevant government departments but the Government asserted that:

² Benjamin Preiss, 'Senior minister Gavin Jennings booted from Victorian parliament for six months', *The Age*, 25 May 2016, <http://www.theage.com.au/victoria/senior-minister-gavin-jennings-booted-from-victorian-parliament-for-six-months-20160525-gp3cjl.html>; *Hansard*, Victoria Legislative Council, 25 May 2016, pp 2380-2395.

³ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), pp 541-542.

⁴ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 538.

...committees do not have the power to require documents to be produced; that there is no statute that confers powers on committees to require the production of documents; and that, while the House does have power to call for documents, there is no clear evidence to suggest that the House can delegate that power to its committees.⁵

In such cases, committees have generally resorted to seeking the documents via the House, ensuring that the relevant notices include a preliminary paragraph reasserting the committee's powers in this respect.⁶

Thus, if the committee wanted to pursue the documents via SO 208, but was rebuffed, its only recourse would be to ask the House to deal with that rejection, via a special report.

While there is no barrier to the committee pursuing its powers under SO 208(c) *parallel* to the Chair seeking an order for papers under SO 52, I would suggest that the committee focus on pursuing its order for papers via the House. Enforcement of either of these powers is a complex matter, and given any non-compliance with a committee order under SO 208(c) may need to be referred to the House anyway, it would be more efficient for the committee to focus its attention on attempting to access the documents solely via SO 52.

An alternative approach, as touched on in my earlier advice, would be for the committee to use its powers under the *Parliamentary Evidence Act* to secure these documents. However, this would likely entail the committee invoking the punitive powers under the Act which have never been invoked, generating legal and reputational risks for the committee.

David Blunt
Clerk of the Parliaments
28 March 2017

⁵ Correspondence from Dr Col Gellatly, Director General, Premier's Department, to Director of GPSC 4, 7 September 2004, cited in Lovelock and Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), p 540.

⁶ Beverly Duffy and David Blunt, *Information is power, recent challenges for committees in the NSW Legislative Council*, Paper presented at the 45th Presiding Officers' and Clerks' Conference, 30 June - 4 July 2014, p 4.