



Parliament of Tasmania

LEGISLATIVE COUNCIL SELECT COMMITTEE

SPECIAL REPORT

ON

POLICE VESSEL FORTESCUE

Members of the Committee

Mr Ivan Dean MLC (Chair)
Mr Paul Harriss MLC
Mrs Adriana Taylor MLC
Mr Jim Wilkinson MLC

Committee Secretary: Mr Tom Wise

Introduction

On Tuesday, 16 November 2010 the Legislative Council resolved that a Select Committee be appointed with power to send for persons and papers, with leave to sit during any adjournment of the Council, and with leave to adjourn from place to place, to inquire into and report upon, the replacement of the P.V. Freycinet by the P.V. Fortescue and all issues relevant to this matter, with particular reference to —

- (1) Whether there was any operational urgency relative to the replacement of the P.V. Freycinet.
- (2) The design and construction of the P.V. Fortescue.
- (3) The terms of the contract and any variation thereto.
- (4) Any changes to the design of the vessel.
- (5) The suitability of the vessel to meet the operational requirements of the Department of Police and Emergency Management (DPEM) to undertake the operational duties as required.
- (6) The supervision and control of the construction phase of the vessel; and
- (7) The engagement by DPEM of a naval architect to design the vessel; and
- (8) Other matters incidental thereto.

And that Mr *Dean*, Mr *Harriss*, Mrs *Taylor* and Mr *Wilkinson* be appointed as Members of the Committee.

The Committee met for the first time on Wednesday, 24 November 2010 and Mr *Dean* was elected as Chair.

The Committee called for evidence in advertisements seeking written submissions or requests to give evidence in the three daily Tasmanian newspapers on Saturday, 29 January 2011. The closing date for receipt of submissions was Friday, 4 March 2011.

Three written submissions were received into evidence.

The Committee has met on seven occasions and held public hearings on two occasions, taking evidence from five witnesses.

Subjudice Matter

Background

While arranging for further public hearings in August 2011 the Committee received correspondence on 21 June 2011 from Page Seager Lawyers on behalf of their client, Mr Graeme Phillips, Managing Director of Sabre Marine and General Engineers Pty Ltd.

The correspondence alerted the Committee to proceedings on foot in the Supreme Court of Tasmania, namely Sabre Marine and General Engineers Pty Ltd v State of Tasmania, action number 411 of 2011.

The correspondence indicated that Mr Phillips was willing to give evidence to the Committee, but requested that such evidence be heard *in-camera* so as not to prejudice the proceedings referred to above.

On 23 June 2011, the Committee replied to Page Seager Lawyers seeking further advice as to how evidence given by their client to the Committee during a public hearing may prejudice the Supreme Court proceedings.

A response was received from Page Seager Lawyers on 30 June 2011 in which it was argued that evidence given by Mr Phillips to the Committee at a public hearing would put him at a substantial forensic disadvantage in respect of the Supreme Court proceedings.

At its meeting on Thursday, 7 July 2011 the Committee considered the correspondence from Page Seager Lawyers and advice from the Committee Secretary.

Discussion

A public hearing before a Parliamentary Committee, such as the Legislative Council Select Committee on the P.V. Fortescue, is a proceeding in Parliament and is protected by Parliamentary Privilege whether or not the hearing takes place in public or in private.

Protection is afforded to witnesses by reason of the *Bill of Rights 1688* (Imp) and the *Defamation Act 2005* (Tas). The *Bill of Rights 1688* applies to Tasmanian local law by reason of the *Australian Courts Act 9 Geo IV, c 83* (1828) (Imp.). Article 9 of the *Bill of Rights 1688* provides; “*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.*”

The effect is that evidence given before the Select Committee cannot be used in a court contrary to the above prohibition.

This has been confirmed in a variety of cases and specifically in the Tasmanian jurisdiction in *R v Turnbull* [1958] TAS S.R.80.¹

Further, *Odgers' Australian Senate Practice* notes that:

*'The question of whether a legislative committee may inquire into matters at issue in legal proceedings was the subject of leading cases on legislative powers in the United States, and the courts have consistently held that the legislature and its committees are not inhibited in inquiring into such matters ...'*²

However, Legislative Council Standing Order 98 states that:

*"Subject always to the discretion of the President and to the right of the Council to legislate on any matter, matters awaiting or under adjudication in any court of record (a) in criminal matters from the time a person is charged, until sentence; and (b) in civil matters from the time that the case has been set down for trial or otherwise brought before the court, may not be referred to in any motion, debate or question if it appears to the President that there is a real and substantial danger of prejudice to the trial of the case."*³

This Standing Order reflects a long-held practice in the House of Commons that matters before civil courts should not be referred to *'if it appears that there is a real and substantial danger of prejudice to the proceedings ... [and] the principle that such matters should not be prejudiced by public comment holds good in select committees.'*⁴

Erskine May goes on to note that *'the bar does not, however, operate when evidence is being taken in private ...'*⁵

With this in mind, two questions arise. First, it is open to the Committee to hear *in-camera* evidence from Mr Phillips as suggested in the Page Seager correspondence of 21 June 2011. Second, it is also open to the Committee to defer taking evidence from Mr Phillips, but to continue hearing evidence from other witnesses.

In respect of taking *in-camera* evidence from Mr Phillips, the Committee is of the view that this would create serious difficulties when examining other witnesses and also when preparing its final Report.

¹ See also *Prebble v NZTV* [1995] 1 AC 321; *NSW AMA v Minister for Health and Community Services* (1992) 26 NSWLR 114; *R v Jackson* (1987) 8 NSWLR 116; *R v Waincott* (1899) 1 WAR 77.

² *Odgers' Australian Senate Practice* (12th ed.), Evans, H. (ed.), Dept of the Senate, Canberra 2008, p. 405.

³ Standing Order 98 – Subjudice Convention, *Legislative Council Standing Orders*, November 2010.

⁴ *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (22nd ed.), Limon, D. & McKay, W. R. (eds), Butterworths, London 1997, pp. 383-384 & p. 640.

⁵ *Ibid.*, p. 641.

It has been common practice by select committees, although not without some rare exceptions, that *in-camera* evidence, both verbal and written, remains confidential and is not referred to in any subsequent public proceedings of the Committee, nor in the preparation and publication of a Report.

The second question of deferring Mr Phillips' evidence and continuing to hear from other witnesses at public hearings also presents problems. The most serious of these is that evidence given to the Committee by another witness may touch directly on the previously-mentioned proceedings in the Supreme Court. This may result in some prejudice to the civil proceedings if the witness was also involved in giving evidence to the court.

Whether or not a case of '*real and substantial danger of prejudice*' exists in relation to the Committee's inquiry and the matter of Sabre Marine and General Engineers Pty Ltd v State of Tasmania, the Committee is of the view that this is not the only test that should apply in considering whether it should continue with its inquiry and hear from Mr Phillips or other witnesses.

As *Odger's Australian Senate Practice* points out:

*'Committees may, however, indirectly cause difficulties in legal proceedings by generating evidence which, because of parliamentary privilege, cannot be used in any substantive way in the legal proceedings ... For example, if a party to legal proceedings makes statements before a committee relevant to those proceedings, the other party may claim that the inability to examine those statements leads to unfairness in the proceedings, perhaps even justifying their termination Committees should therefore be wary of taking evidence relevant to legal proceedings. On this basis, committees on several occasions have refrained from taking particular evidence. The potential difficulty clearly arises where parties to legal proceedings give evidence, but may also exist in relation to other persons involved in proceedings.'*⁶

It seems clear then that, at the very least, the Committee should exercise caution in considering whether to take further public evidence on the matters set out in its Terms of Reference. Taking evidence *in-camera* may not be a practical option because publication of such evidence in a Report or otherwise would have to be deferred until after the civil action and any appeal to ensure there is no prejudice to the parties or other difficulties.

It is also worth noting that the outcome of the legal proceedings may usefully inform the Committee's inquiry and to pre-empt that outcome may deny it access to important and relevant information.

⁶ *Odgers' Australian Senate Practice*, op. cit., p. 405.

Conclusion

In light of the above and in keeping with the principle of comity between the Courts and the Parliament, as well as the principle of fairness to all parties involved in the Supreme Court proceedings in question, the Committee has resolved to suspend further examination of witnesses and the gathering of evidence. The period of the suspension is uncertain, but the Committee will follow the progress of the Supreme Court proceedings and keep the matters of its inquiry under regular review.

Ivan Dean MLC Paul Harriss MLC Adriana Taylor MLC Jim Wilkinson MLC
(Chair)

14 July 2011