



Parliament House,  
Hobart

23 August 2017

CONFIDENTIAL

Hon Ivan Dean MLC  
Chair  
Parliamentary Standing Committee of Public Accounts  
Parliament House  
**HOBART TAS 7000**

Dear Chair,

Thank you for the opportunity to make a further submission to the inquiry of the Committee into the *Public Accounts Committee Act 1970* (PAC Act). The suspension of your inquiry necessitated by the Committee's "Inquiry into the financial position and performance of Government owned energy entities" first, has allowed me to give a little more consideration to my brief submission of 4 May 2016 and second, to highlight some of the matters the Committee has had to address during the abovementioned latter inquiry, which usefully for this purpose, directly relate to the concerns I advanced in support of an argument to repeal of the PAC Act.

My principle concerns remain:-

- that statutory prescriptions necessitate legal interpretation and are justiciable; and
- the application of section 7(2) of the Act and the implications for the Committee.

I reiterate my concern that, as with any other Act, the 'door is open' to the initiation of legal proceedings in respect to interpretation and application of the provisions of the PAC Act. The Committee will be aware that the *Judicial Review Act 2000* applies to the PAC Act and accordingly, any decision; or conduct (including conduct engaged in for the purpose of making a decision); or a failure to make a decision or to perform a duty properly according to the Act may be subject, upon application, to judicial review<sup>1</sup>. There is a Tasmanian precedent for such an application, made in respect of the *Public Works Committee Act*, where, amongst other things, the report of the Committee and the provisions of the *PWC Act* were considered by the Court.<sup>2</sup>

Resort to legal processes is available and any decision is entirely removed from the Parliament and placed into the jurisdiction of the Courts. For example, it would be open for a party to seek a Declaratory Order from the Supreme Court pursuant to the *Judicial Review Act*, that

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<sup>1</sup> *Judicial Review Act* (No. 54 of 2000), sections 3 & 10.  
<sup>2</sup> *G M Bates v The Attorney-General for the State of Tasmania*, Supreme Court of Tasmania, No. 235 of 1995, Judgement No. A12/1995.

an inquiry initiated by the Committee is *ultra vires* the PAC Act, or that a witness was not properly advised by the Committee of their privileges under the Evidence Act. In any such event, despite the probable failure of any such applications, were legal action to be initiated, it would be necessary for the Parliament to engage counsel to assert its privileges in those proceedings.

Of a lower order of concern, following the most recent inquiry, the Committee is now very well aware that because of its statutory identity, in order to provide some comfort to it in the conduct of its proceedings, the Committee is essentially compelled to resort to seeking expensive legal opinions on matters pertaining to its powers and functions which delay the inquiry process and bind the Committee to what is, after all, one opinion. Were the Committee established by resolution or pursuant to Standing Orders, advice would be readily available from experienced Parliamentary officials and the Committee, having received such advice, able to deliberate upon and determine for itself, the course of action it resolves to take.

Of most concern to me is section 7(2) of the Act. The Committee will be aware of a legal opinion that a witness appearing before the Committee is not materially different from that of any other witness appearing before any other Parliamentary committee and that given this prescription it is a matter for the Committee "to do its best" to decide the veracity of a claim of privilege made by a witness.

Notwithstanding that opinion, I reiterate my concern that this provision prescribes the expectation that the Committee is both aware of, and is able, properly to apply the rules of evidence prescribed in the Evidence Act and consequently would not seek to adduce testimony contrary to such rules. Moreover, the committee is expected to be proactive in advising witnesses of their rights, protections and immunities afforded to them under the Evidence Act. This 'black letter' interpretation is supported by legal advice provided to the Committee a number of years ago<sup>3</sup>.

At the risk of stating the obvious, the proceedings of Parliamentary committees are not and in my view, should not, be conducted in the same manner as legal proceedings are conducted. The body of practice which attends the proceedings of committees together with the advice that is provided to them from Parliamentary officials, is informed by many years' experience of Parliamentary processes and proceedings, but not usually, legal expertise. Given a want of technical legal experience of members of the Committee or its Secretariat, I remain very concerned that the provision in respect to the privileges afforded to witnesses by section 7(2) in my view at least, places an unrealistic expectation of compliance by the Committee, necessitating the procurement of legal advice and more to the point, potential exposure to legal challenge.

Second, this provision provides, in certain circumstances, a witness with the capacity to refuse to answer a question, a privilege not afforded to witnesses to other Parliamentary Committees, except the Joint Standing Committee on Integrity. Putting to one side the argument that this Committee should have an ability to compel an answer from a witness, I would submit to you that equity of treatment of witnesses and uniformity of practice across all Parliamentary Committees should be a fundamental expectation of the committee process.

You may recall that I advised you at our meeting, that I had advanced the same concern to the Independent Review of the Integrity Commission Act 2009 in respect of the identical

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<sup>3</sup> I am unable to cite details as I am unaware of the status of this opinion. This opinion supports my proposition that the Committee is obligated to be aware of and to pro-actively apply the relevant provisions of the *Evidence Act 2001*.

provision in that Act<sup>4</sup>. The Independent Reviewer and former Chief Justice, the Hon. William Cox, in his report<sup>5</sup>, responded to my submission as follows:-

*I agree that there is no occasion to make special rules in respect of witnesses, many of whom, because of the complex nature of evidentiary law, may be difficult for the Chair of the Committee and his or her Parliamentary advisers to interpret and apply. The JSC should be permitted to operate as other committees of Parliament operate, and witnesses before it accorded the same rights and privileges as are witnesses before those other committees.*

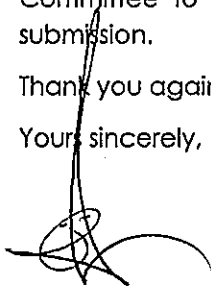
*... I recommend that clause 3(2) of Schedule 5 to the Act be repealed.<sup>6</sup>*

At the very least, these matters generally highlight that the operations and proceedings of Committees established by statute are: exposed to differing legal interpretation and opinion; open to legal challenge (albeit unlikely to be successful); and constrained by statutory provisions which are not easily changed, at least not in as timely a manner that political circumstances often necessitate.

The *Bill of Rights* and the doctrine of the separation of powers prescribe the expectation that proceedings of Parliament are unimpeachable in any Court. This fundamental tenet would be reinforced by the repeal of the PAC Act and for the authority for the establishment of the Committee to appropriately reside with both Houses in the terms I proposed in my first submission.

Thank you again for the opportunity to contribute to your inquiry.

Yours sincerely,



**Shane Donnelly**  
**CLERK OF THE HOUSE**

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<sup>4</sup> *Integrity Commission Act 2009*, Schedule 5, part 3, paragraph (2) provides that, "A witness who is summoned to appear, or who appears, before the Joint Committee has the same protection and privileges as a witness in an action tried in the Supreme Court."

<sup>5</sup> Independent Review of the Integrity Commission Act 2009, Report of the Independent Reviewer, The Hon. William Cox AC, RFD, ED, QC, May 2016.

<sup>6</sup> *Ibid*, p. 78.