SELECT COMMITTEE
OF THE
LEGISLATIVE COUNCIL
ON
GAMING LICENSING

FIRST INTERIM REPORT
UPON
GAMING LICENSING

JULY 2007

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SELECT COMMITTEE ON GAMING LICENSING

Committee Members

Mr Gordon Rich-Phillips – Chairman
Member for South Eastern Metropolitan Region

Mr Matthew Viney – Deputy Chairman
Member for Eastern Victoria Region

Mr Greg Barber
Member for Northern Metropolitan Region

Mr Damian Drum
Member for Northern Victoria Region

Mr Matthew Guy
Member for Northern Metropolitan Region

Mr Peter Kavanagh
Member for Western Victoria Region

Mr Martin Pakula
Member for Western Metropolitan Region

Committee Staff

Mr Richard Willis – Secretary to the Committee

Mr Anthony Walsh – Research Assistant

Address all correspondence to –

Select Committee on Gaming Licensing
Department of the Legislative Council
Parliament of Victoria
Spring Street
MELBOURNE VIC 3002

Telephone:  (03) 9651 8696
Facsimile:  (03) 9651 6799
Email:  richard.willis@parliament.vic.gov.au
CHAIRMAN’S FOREWORD

I am pleased to present the first Interim Report of the Legislative Council Select Committee on Gaming Licensing.

This report outlines the responses received to summonses issued by the Committee, and in particular the obstructions placed in the Committee’s path by the Government.

Contrary to its ongoing rhetoric of being open and accountable, the Government has sought to obstruct the production of relevant documents to the Committee at every opportunity.

Following the issuing of summonses to Departments by the Committee, the Attorney-General unilaterally intervened to discourage the production of key documents sought by the Committee.

The Department of Premier and Cabinet and the Department of Treasury and Finance have been particularly uncooperative by failing to respond to their respective summonses for over 14 weeks. When responses were eventually received, key documents were withheld, consistent with the Attorney-General’s intervention.

Despite the Attorney-General’s public statement that the Department of Justice had delivered 7000 pages of documents to the Committee, again key documents were withheld, consistent with the Attorney-General’s intervention.

I would like to thank those witnesses outside Government who responded promptly and fulsomely to summonses.

This is the first Select Committee established since the Government lost its majority in the Legislative Council. It is disappointing that the Government has actively sought to obstruct the Committee in the discharge of its duties.

The establishment of the Committee was an expression of the independence of the Legislative Council from the Government. In frustrating the work of the Committee the Government is refusing to acknowledge the legitimate accountability and scrutiny functions of the Legislative Council.

The Committee now looks to the Legislative Council for direction in addressing the obstructions placed in the Committee’s path by the Government and certain external parties. The issues outlined in this report must be addressed for the will of the Legislative Council to be upheld.

Finally, on behalf of the Committee I would like to thank the Committee Secretary Mr Richard Willis, and the Research Officer Mr Anthony Walsh, for their diligent work on this inquiry over the last four months.

Gordon Rich-Phillips MLC
Chairman
REPORT

The Select Committee on Gaming Licensing has the honour to report as follows:

Background
1. On 14 February 2007 the Legislative Council adopted the following Resolution:

1.1 A select committee of seven members be appointed to inquire into and report on —

   a) the conduct, processes and circumstances (including but not limited to the probity thereof) pertaining to post-2008 public lotteries licensing in Victoria pursuant to the Gambling Regulation Act 2003 (the Act) and any related matter;
   b) the conduct, processes and circumstances (including but not limited to the probity thereof) pertaining to the extension of Tattersall’s public lotteries licence until 30 June 2008;
   c) the conduct, processes and circumstances (including but not limited to the probity thereof) pertaining to post-2012 Electronic Gaming Machine (EGM) operator licensing in Victoria pursuant to the Act, and any related matter;
   d) the adequacy or otherwise of the legislative and regulatory framework pertaining to the number, location, distribution and specification of EGMs in Victoria and any related matter;
   e) the effectiveness or otherwise of current measures to minimise and address the incidence of problem gambling in Victoria, the merits of alternative measures and any related matter;
   f) the financial position of the Community Support Fund (the Fund) described in the Act, including, but not limited to:
      i. payments into the Fund under section 10.3.2 of the Act (and its predecessors);
      ii. payments from the Fund under section 10.3.3 of the Act (and its predecessors); and
      iii. the criteria, processes and methodology for the selection of projects funded by payments referred to in sub-paragraph (ii) above; and
      iv. the community benefit statements prepared by those venues not required to contribute to the Fund;
   g) any other associated matters dealing with gaming licensing issues.

1.2 The Committee will consist of two members from the government party nominated by the Leader of the Government, two members from the opposition nominated by the Leader of the Opposition, one member from The Nationals nominated by the Leader of The Nationals, one member from the Australian Greens nominated by the Australian Greens Whip and Mr. Peter Kavanagh, MLC from the Democratic Labor Party.
1.3 The members will be appointed by lodgement of the names with the President by the persons referred to in paragraph 1.2 no later than 4.00 p.m. on Friday, 16 February 2007.

1.4 The first meeting of the Committee must be held no later than 4.00 p.m. on Monday, 26 February 2007.

1.5 The Committee may proceed to the despatch of business notwithstanding that all members have not been appointed and notwithstanding any vacancy.

1.6 Four members of the Committee will constitute a quorum of the Committee.

1.7 The Chair of the Committee will be a non-government member and the Deputy Chair will be a government member.

1.8 The Committee will advertise its terms of reference and call for submissions and all such submissions received by the Committee will be treated as public documents unless the Committee otherwise orders.

1.9 The Committee may commission persons to investigate and report to the Committee on any aspects of its inquiry.

1.10 The Committee will present its final report to the Council no later than 28 February 2008.

1.11 The presentation of a report or interim report of the Committee will not be deemed to terminate the Committee’s appointment, powers or functions.

1.12 The foregoing provisions of this resolution, so far as they are inconsistent with the Standing Orders and Sessional Orders or practices of the Council will have effect notwithstanding anything contained in the Standing or Sessional Orders or practices of the Council.

2. Pursuant to paragraph 1.2 of the Resolution, the Leader of the Government lodged with the President the names of Mr M S Viney and Mr M P Pakula; the Leader of the Opposition lodged the names of Mr G K Rich-Phillips and Mr M Guy; the Leader of the Nationals lodged the name of Mr D K Drum; and the Australian Greens Whip lodged the name of Mr G J Barber for appointment to the Committee.

3. Pursuant to paragraph 1.4 of the Resolution, the Committee held its first meeting on Monday, 26 February 2007. At that meeting Mr G K Rich-Phillips was elected Chairman and Mr M S Viney elected Deputy Chairman.

4. On 1 March 2007, the Committee resolved to give priority to clauses 1 (a) and (b) of its Terms of Reference (1.1 a & b above) to thereby enable the delivery of an interim report regarding those matters at which time the Committee shall determine the process for the consideration of the remainder of the subject Terms.

5. Between Monday, 26 February 2007 and Monday, 16 July 2007 the Committee has held 10 meetings.
6. On 26 February 2007, the Committee agreed to advertise its full terms of reference and call for public submissions. Accordingly, advertisements were placed in the Age and the Herald-Sun on 3 March 2007 and in the Financial Review on 5 March 2007. Invitations to make a submission were also sent to a wide range of government agencies, private organisations and individuals. The Committee has received a total of 52 written submissions (see Appendix A).

**Summons for Papers and Documents**

7. On 13 March 2007, the Committee obtained advice from the Clerk of the Legislative Council pertaining to the Council’s and the Committee’s power to summons documents, papers and witnesses.

8. On 13 March 2007, the Committee resolved to summons documents from a number of individuals, government agencies and private organisations seeking documents that relate to the public lotteries licence process and gaming licence process.

9. Between 23 March and 30 March 2007, 39 separate summonses were issued by registered post to recipients listed in Appendix B. Recipients of summonses can be grouped under the following categories:

- Relevant Members of the Legislative Assembly
- Relevant Government Departments
- Victorian Commission for Gambling Regulation
- Lotteries Licence Review Steering Committee
- Chief Commissioner of Victoria Police
- Solicitor-General for Victoria
- Tattersall’s Limited (including current and former executives and trustees)
- Intralot & Euro Pacific Strategies
- Tabcorp Holdings Limited
- Pitcher Partners Consulting Pty Ltd
- Hawker Britton
- Australian Securities Investment Commission (ASIC)

Recipients of summonses were given 21 days in which to respond.

**Compliance with Summonses**

10. The organisations and individuals listed below have either complied with their respective summonses to date, or have advised the Committee that they are not currently in possession or control of any of the documents or papers sought by the Committee. Therefore no further action is required with respect to their summonses.

- Australian Securities and Investments Commission (ASIC)
- The Honourable John Pandazopoulos MP, former Minister for Gaming
- Pitcher Partners Consulting Pty Ltd
- Mr Garth Lampe, former Project Director, Lotteries Licences Review Steering Committee
Non-compliance – Refusal to Produce Documents

Intervention by Attorney-General

11. The Attorney-General wrote to the Committee on 11 April 2007 advising that Members of the Legislative Assembly will not be complying with the summonses on the grounds that the Legislative Council has no power to compel such Members and documents in their possession. Further, the Attorney-General contests that the issuing of summonses to Members of the Legislative Assembly is a breach of the privileges of the Legislative Assembly and a breach of Legislative Council Standing Order 18.03. (see Appendix C)

12. The Attorney-General also wrote to the Committee on 11 April 2007 advising he had informed Departmental Secretaries in receipt of summonses that the Government will claim Executive privilege in relation to the following classes of documents:

- documents the disclosure of which would undermine the confidentiality of Cabinet deliberations; and/or
- communications between Ministers and public servants relating to the formation of Government policy; and/or
- record of opinions of Ministers or public servants on issues that are still under consideration by the Government; and/or
- information provided to the Government in confidence, including legal advice; and/or
- documents that are the subject of a statutory confidentiality requirement, in particular, secrecy provisions in the Gambling Regulation Act 2003. (see Appendix D)

13. The Attorney-General wrote to the Committee on 11 April 2007 advising he had informed the Solicitor-General for Victoria that the Government claimed Executive privilege with respect to all documents sought under summonses by the Committee from the Solicitor-General for Victoria. (see Appendix E)

14. The advice obtained by the Committee from the Clerk of the Legislative Council as to the Council’s power to call for documents and papers does not support the limitations on those powers as claimed by the Attorney-General.

Specific non-compliance

15. The Department of Justice, Department of Premier and Cabinet, Department of Treasury and Finance, Victorian Commission for Gambling Regulation, and Chief Commissioner of Victoria Police, have all replied to their respective summonses refusing to provide certain documents on the grounds referred to in paragraph 12 above.
16. In responding to the summons for documents issued by the Committee on 20 March 2007, the Department of Justice provided a number of public documents on 11 April 2007, and further public documents on 29 June 2007. The Department of Premier and Cabinet (DPC) and Department of Treasury and Finance (DTF) both delayed in providing documents until 28 June 2007. The extent of documents provided by DPC and DTF was limited. All three Departments continue to withhold documents referred to in paragraph 12 above.

17. Consistent with paragraph 13 above, the Solicitor-General for Victoria, Ms Pamela Tate SC, wrote to the Committee on 11 April 2007 seeking to be excused from compliance with the summons from the Committee (see Appendix F). In her response, Ms Tate SC states in part:

‘To my knowledge no Victorian Solicitor-General or any Solicitor-General in any other Australian jurisdiction has ever received a summons from a Parliamentary Select Committee. Indeed, to my knowledge, no Solicitor-General in the jurisdictions of England & Wales, Ireland, Canada or New Zealand has ever received a summons from a Parliamentary Select Committee.’

18. Ms Tate goes on to note the single instance where a Solicitor-General received a summons was that of Mr Byers (Commonwealth Solicitor-General) in 1975 who received a summons from the Senate. In the first instance, Mr Byers wrote to the President of the Senate stating that he would object to answering any questions. When he appeared before the Senate Committee he continued to refuse to answer questions and was excused (i.e. the Senate did not wish to pursue its powers).

19. On 30 April 2007, Williams Winter Solicitors, acting on behalf of Mr David White, Mr Danny Pearson and Mr Bruce Hawker from Hawker Britton, wrote to the Committee refusing to produce documents, objecting to the summons and questioning the powers of the Committee on a number of grounds. (see Appendix G)

20. Tattersall’s Limited and Intralot have produced a number of documents but are refusing to provide certain documents relating to their respective participation in the lotteries licence process on the grounds of commercial-in-confidence and lottery licence confidentiality. (see Appendix H and Appendix I)

21. Both Tattersall’s and Intralot were served subsequent summonses seeking documents relating to their respective participation in the public lotteries licensing process including their Registrations of Interest and Applications. Tattersall’s and Intralot have declined to produce documents pursuant to the second summonses.

22. The Committee reports to the Legislative Council that while a number of documents have been produced by Government departments, Tattersall’s Limited and Intralot, key documents relevant to the lotteries licence process have been withheld. The extent of refusal to produce documents is greatly inhibiting the Committee from fulfilling its requirement to report on parts 1 (a) & (b) of its Terms of Reference.
Legal Advice – Production of Documents

23. On 14 March 2007, the Legislative Council agreed to a Sessional Order outlining the process by which the Council may call for documents from Government departments. A copy of the Sessional Order is provided in Appendix J.

24. On 14 March 2007, the Leader of the Government, Mr John Lenders MLC, requested that the President obtain legal advice to confirm the Council’s ability to call for documents as outlined in the Sessional Order.

25. On 16 April 2007, the Committee resolved to write to the President in order that various claims of non-compliance highlighted in the above paragraphs may be considered in obtaining legal advice. To this end, copies of letters from the Attorney-General, the Solicitor-General for Victoria, Victoria Police, and the Victorian Commission for Gambling Regulation were also provided to the President.

26. On 17 April 2007, the President announced to the Legislative Council that he had organised for the Clerk to obtain legal advice in relation to the powers of the Council.

27. On 6 June 2007, the Deputy President (for the President) tabled legal advice received from Mr Bret Walker SC concerning the powers of the Legislative Council and its Select Committees to order the production of documents. A copy of the legal advice is provided in Appendix K.

28. The legal advice can be summarised as follows:

a. The capacity of the Legislative Council (and its Committees) to scrutinise the workings of government, and particularly those of the Executive, are beyond serious question.

b. The Council has a general power to order papers. There is no precedent for a successful claim on behalf of the Executive to resist all and any orders for papers.

c. Executive privilege and public interest immunity (as distinct from Cabinet documents) are not sufficient claims for non-production of documents. Where a document is not to be regarded as a Cabinet document, there should be no public interest reason to keep it from the people’s representatives, the legislators, in the Council.

d. Commercial-in-confidence is also not a valid reason for non-production of documents. It is for the Council to determine, in its assessment of the public interest, how secrecy of this kind should be observed.

e. Broadly, legal professional privilege is not a sufficient claim for non-production of documents. It is for the Council to determine what of any delicacy should apply when accessing legal advice.

f. Other than Members and Officers of the Assembly, Select Committees of the Legislative Council possess an unfettered right to compel the attendance of all other persons, including Ministerial advisers to give evidence.
g. There is no convention, practice or Standing Order which enables the Council or a Select Committee to compel the production of documents by a Member of the Legislative Assembly.

h. The claim put forward by the Solicitor-General for Victoria that particular professional legal privilege prevents her from producing documents sought by summons, is supported in Mr Walker’s opinion.

i. Mr Walker reserved, until asked specifically, the question of the validity of non-production of papers on the grounds of statutory secrecy provisions of the Gambling Regulation Act 2003.

Select Committee Response to Legal Advice

29. On 7 June 2007, the Select Committee on Gaming Licensing deliberated on the legal advice and non-compliance with summonses issued. The Committee subsequently resolved to forward a copy of the legal advice to the Attorney-General requesting that the Government reconsider its position with respect to production of documents. The Committee similarly resolved to write to Hawker Britton, Intralot and Tattersall’s requesting that they reconsider their respective responses to summonses.

30. The Committee further resolved to write to the President requesting further legal advice with regard to the Committee’s powers to call for documents covered by statutory secrecy provisions, in particular, relevant provisions within the Gambling Regulation Act 2003.

31. At the time of adopting this interim report, further legal advice from Mr Bret Walker SC had not been received.

Attorney-General Response to Legal Advice

32. On 21 June 2007, the Attorney-General responded to the Committee’s request that the Government reconsider its position with respect to the production of documents in light of the Walker opinion. The Attorney-General advised that the Government had obtained further legal advice from Mr Peter Hanks QC and Mr Graeme Hill, and maintained its position as set out in the correspondence of 11 April 2007. This advice has led the Attorney-General to submit:

- New South Wales is of only limited relevance to Victoria which has a different constitutional basis including ‘historical transfer of the privileges of the House of Commons in 1855’;
- established historical precedent of Executive Privilege;
- restrictions on the ability of the Legislative Council to seek documents relating to the affairs of private individuals (including commercial in confidence) except where they are in receipt of public funds or special privileges in performing public functions;
- legal professional privilege; and
- the requirements of individuals under the Gambling Regulation Act 2003 not to disclose protected information.

A copy of the Attorney-General’s letter is attached in Appendix L.
Other Responses to Legal Advice

33. On 26 June 2007, Williams Winter Solicitors, acting for Hawker Britton, responded to the Committee’s letter enclosing the Walker opinion, advising that they did not regard it as relevant to their client. In their correspondence they also argue that Mr Walker’s advice referred principally to the relationship between the Legislative Council and the Executive [Egan v Willis and Egan v Chadwick] and as such is not relevant to ‘strangers to the parliament’. Further, they argued that the Victorian situation is different from that in NSW given the constitutional restrictions in Victoria. A copy of their correspondence is attached as Appendix M.

34. On 2 July 2007, Tattersall’s responded to the Committee advising that its decision not to provide certain documents on the basis of ‘Lottery Licence Confidentiality’ had not changed. In their response Tattersall’s assert that they have complied with the summons to the full extent of their obligations. Further they express resentment at the Select Committee’s implied suggestion that they have not done so by issuing a subsequent summons. A copy of their correspondence is attached as Appendix N.

35. At the time of adopting this report, the Committee has not received a response from Intralot to the legal advice obtained from Brett Walker.

Public Hearings

36. On 18 June 2007, the Committee resolved to commence public hearings and take evidence from a number of witnesses in relation to parts 1 (a) and (b) of its Terms of Reference, namely matters relating to:

a. post-2008 public lotteries licensing in Victoria pursuant to the Gambling Regulation Act 2003; and

b. the extension of Tattersall’s public lotteries licence until 30 June 2008.

Invitations have been sent to relevant witnesses with the first round of hearings scheduled for 30 July and 3 August 2007.

37. The Committee further resolved, pursuant to Standing Order 18.03, that a message be sent to the Legislative Assembly requesting that leave be granted to the Hon. Steve Bracks, Premier; the Hon. John Brumby, Treasurer; the Hon. Daniel Andrews, Minister for Gaming; Mr Tim Pallas, Minister for Roads and Ports; and the Hon. John Pandazopoulos, to appear before the Select Committee to answer questions in relation to parts 1 (a) and (b) of the Committee’s Terms of Reference.

38. The resolution referred to in paragraph 37 was made in light of the central role the nominated Members of the Legislative Assembly either have or had in the lotteries licensing process.
Conclusion

39. The Committee is concerned at the unilateral intervention of the Attorney-General in applying a wide ranging claim of Executive privilege with respect to documents the Committee is seeking from government agencies.

40. The advice received by the Committee from the Clerk of the Legislative Council, and legal opinion received by the Council from Mr Bret Walker SC, does not endorse the Government’s wide ranging claim of Executive privilege.

41. The Committee believes that the Government’s obstruction of the Committee’s Inquiry by withholding key documents, and by failing to produce even uncontested documents in a timely manner represents direct government interference in the affairs of the Legislative Council.

42. The Committee is also concerned at the refusal of Tattersall’s Limited, Intralot and Hawker Britton to fully comply with their respective summonses. These three parties are central to the Committee’s Inquiry and their refusal to comply undermines the Committee’s ability to discharge its brief.

43. Certain individuals have either disputed the Committee’s power to call for documents and papers, or claimed it is a narrowly defined power. The lack of an established judicial determination of this question in the State of Victoria has limited the capacity of the Committee to seek compliance with its summonses.

44. The Committee therefore formally reports to the Legislative Council its dissatisfaction at these matters and seeks direction from the House on how the Committee might now fully discharge the responsibilities conferred on it under the Terms of Reference.

Committee Room
16 July 2007
APPENDIX A

List of Written Submissions Received

1. Mr Tom Wilson, individual
2. Tattersall’s Limited
3. City of Kingston
4. Lotteries Agents’ Association of Victoria
5. Mildura Rural City Council
6. Maroondah City Council
7. National Trust
8. Hobsons Bay City Council
9. Indigo Shire Council
10. Dr Charles Livingstone, Department of Health Sciences, Monash University
11. Geelong Catholic Social Justice Committee
12. The Australian Family Association
13. City of Melbourne
14. City of Yarra
15. AMC Convergent IT
16. Grandparents Victoria
17. Ms Jennifer Borrell, Social Consultant
18. Moonee Valley City Council
19. Dr James Doughney, Victoria University
20. The Council of Gambler’s Help Services
21. Mr Chris Cullinan, individual
22. City of Whitehorse
23. City of Greater Dandenong
24. Chrysalis Insight Inc
25. Financial and Consumer Rights Council Inc.
26. InterChurch Gambling Taskforce
27. The Salvation Army Australia Southern Territory
28. Responsible Gaming Networks
29. Moreland City Council
30. Australian Hotels & Hospitality Association Inc.
31. Victorian Council of Social Services
32. Department of Justice
33. Tabcorp Holdings Limited
34. Wyndham City Council
35. Regis Controls Pty Ltd
36. Duty of Care
37. City of Boroondara
38. Brimbank City Council
39. Mitchell Shire Council
40. City of Darebin
41. Local Governance Association of Victoria
42. Macedon Ranges Shire Council
43. Municipal Association of Victoria
44. Good Shepherd Youth and Family Services
45. City of Casey
46. Cardinia Shire Council
47. City of Greater Geelong
48. Australian Newsagents’ Federation
49. City of Whittlesea
50. City of Hume
51. Local Government Working Group on Gambling
52. Swan Hill Rural City Council
APPENDIX B

Individuals / Organisations Summoned to Produce Documents

- **Australian Securities and Investments Commission (ASIC)**
  - Mr Jeffrey Lucy, Chairman

- **Hawker Britton**
  - Mr Bruce Hawker, Managing Director
  - Mr Danny Person
  - The Honourable David White

- **Intralot**
  - The Secretary
  - The Honourable Tony Sheehan
  - Mr Alan Egan, Chief of Staff, Euro-Pacific Strategies Pty Ltd

- **Ministers**
  - The Honourable Stephen Bracks, Premier
  - The Honourable John Brumby, Treasurer
  - The Honourable Daniel Andrews, Minister for Gaming

- **Members of the Legislative Assembly**
  - The Honourable John Pandazopoulos, former Minister for Gaming

- **Pitcher Partners Consulting Pty Ltd**
  - Mr Don Rankin, Managing Partner

- **Police**
  - Ms Christine Nixon, Chief Commissioner

- **Relevant Departments**
  - Ms Penny Armatage, Secretary, Department of Justice
  - Mr Grant Heir, Secretary, Department of Treasury and Finance
  - Mr Terry Moran, Department of Premier and Cabinet
  - Lotteries Licences Review Steering Committee (former staff)
    - Mr Garth Lampe, former Project Director
  - Gambling Licences Review (current staff)
    - Mr Alan Clayton, Project Director

- **Solicitor-General for Victoria**
  - Ms Pamela Tate

- **Tabcorp Holdings Limited**
  - current Employees
    - Mr Elmer Funke Kupper, Acting Managing Director
    - Mr Kerry Willcock, Secretary
  - former Employees
    - Mr Matthew Slatter, former Chief Executive Officer

- **Tattersall’s Limited**
  - current Employees
    - Mr Harry Boon, Chairman
    - Mr Ray Gunston, Investor Relations, Chief Financial Officer
    - Mr Michael Mangos, Media Liason
    - Mr Dick Mcllwain, Managing Director, Chief Executive Officer
    - Ms Marion Rodwell, Secretary
• former Employees
  i. Mr David Carlson
  ii. Mr Simon Doyle
  iii. Mr Duncan Fisher
  iv. Mr John Harris
  v. Ms Pamela Makings
  vi. Mr Adrian Nelson

• former Trustees
  i. Mr Raymond Hornsby
  ii. Mr David Jones
  iii. Mr William Adams
  iv. Mr Peter Kerr

• **Victorian Commission for Gambling Regulation**
  • Mr Peter Cohen, Chief Executive Officer
  • Professor Ian Dunn, Chair
APPENDIX C
Attorney-General’s Letter Regarding Summons to Ministers

Richard Willis
Secretary, Legislation & Select Committees
Department of the Legislative Council
Parliament House
EAST MELBOURNE VIC 3002

Dear Mr Willis

SUMMONSES TO MINISTERS

I refer to the summonses that have been served by the Select Committee on Gaming Licensing on the Premier, the Treasurer and the Minister for Gaming to produce papers and documents.

The Legislative Council has no right to summon, much less to compel, the attendance of members of the Legislative Assembly, nor to require them to produce documents, as Members of the Legislative Assembly are immune from the processes of the Legislative Council.

Further, the issuing of summonses to Members of the Legislative Assembly is both a breach of the privileges of the Legislative Assembly and a breach of the Standing Orders of the Legislative Council. Standing Order 18.03 is clear and continues to apply. That Standing Order reflects the powers of the Council, namely that it may send a message to the Legislative Assembly requesting that leave be given to a member or officer to attend or give evidence in relation to the matters stated in that message.

The well known immunity of a member of the Legislative Assembly to the processes of the Legislative Council is confirmed by section 19(1) of the Constitution Act 1975 and is based on long-established, constitutional principles. These include that:

1. The Houses of Parliament are independent of each other. Because of this, neither House can claim, much less exercise, any authority over a member of the other House.
2. A member of the Legislative Assembly is accountable to, and a Minister in the Assembly is responsible to, that House alone.
3. The Legislative Assembly claims the power and the privilege of being the sole arbiter of claims against its Members. Further, the Legislative Assembly claims priority to the attendance of its members to its business.
4. It is on this basis that a request for leave to be given for a member of the Assembly must state reasons and must seek leave and the Assembly must determine for itself whether the request of the Council would interfere with either its privileges or its claim to the attendance of its own members.

The immunity of Members of the Legislative Assembly includes an immunity from summonses seeking documents in their possession. The Legislative Council has no authority over Members of the Legislative Assembly and thus no power to compel them to produce documents.

Standing Order 24.10 of the Legislative Council does not alter this position. The immunities of a member can only, under section 19(1) of the Constitution Act 1972, be altered by an Act of the Parliament and neither a Standing Order nor a Sessional Order of the Council is an Act of the Parliament.

The actions of the Committee, no doubt in the full knowledge of all of the matters referred to above, have the potential to undermine the committee process in this State. Further, they add more weight to the assertion that this current inquiry is nothing more than a political exercise.

Yours sincerely

[Signature]

ROB HILLS MP
Attorney-General
APPENDIX D
Attorney-General’s Letter Regarding Departmental Response

Dear Mr Willis

SUMMONS FOR PAPERS AND DOCUMENTS TO PUBLIC SERVANTS

I write to you concerning the summonses which have been served on certain public officials to produce documents (within the meaning of s 38 of the Interpretation of Legislation Act 1984 and including electronic mail) within their possession, custody or power which relate to matters contained in a Resolution of the Legislative Council of 14 February 2007.

Pursuant to section 19(1) of the Constitution Act 1975, the powers of the Legislative Council and of its Committees are those of the House of Commons on 21 July 1855 (unless those powers are inconsistent with any Act of the Parliament). In 1855, the House of Commons had no power to compel the production of documents from the Executive Government which the Executive Government asserted were the subject of Executive privilege because they were confidential or because their disclosure would not be in the public interest. On that basis, the Select Committee lacks the power to compel the production to the Committee of documents that are subject to a claim of Executive privilege.

I write to inform you that the Executive Government, on behalf of the Crown, will claim Executive privilege in relation to the following classes of documents:

1. documents the disclosure of which would undermine the confidentiality of Cabinet deliberations; and/or

2. documents which:

   (a) record communications between Ministers and public servants relating to the formation of Government policy; and/or

   (b) record the opinions of Ministers or public servants on issues that are still under consideration by the Government; and/or
(c) contain information provided to the Government in confidence, including but not limited to legal advice; and/or

(d) are the subject of a statutory confidentiality requirement.

I have informed the Secretary of the Department of Justice that the Executive Government will claim privilege in respect of the production of all documents which fall within those classes and which are within her possession, custody or power.

The disclosure of documents falling within those classes would be both prejudicial to the public interest and detrimental to the proper functioning of the Public Service.

A copy of this letter has been sent to the relevant departmental Secretaries.

Yours faithfully

ROB HILLS MP
Attorney-General
APPENDIX E
Attorney-General’s Letter Regarding Solicitor-General for Victoria’s Response

Dear Mr Willis

SUMMONS TO THE SOLICITOR-GENERAL

I understand that your Committee has issued a summons to the Solicitor-General for Victoria to produce all documents (within the meaning of s 38 of the Interpretation of Legislation Act 1984 and including electronic mail) within her possession custody or power that relate to:

- “Legal advice, reports, assessments or recommendations sought or provided with respect to the probity investigations conducted by the Victorian Commission for Gambling Regulation (VCGR) of Tattersall’s and Intralot”; and
- “Any communication between the Solicitor-General or her office and the relevant Ministers, the relevant Departments, the VCGR, the Lotteries Licensing Review Steering Committee, Tattersall’s or Intralot or other legal practitioners with respect to the probity investigations conducted by the VCGR of Tattersall’s and Intralot.”

As Attorney-General for the State of Victoria and a Minister of the Crown in the right of the State of Victoria, I write to advise you that the Executive Government, on behalf of the Crown, claims Executive privilege in relation to each document that falls within the terms of the summons served on the Solicitor-General.

The Executive Government claims Executive privilege over the documents on three bases:

- First, because the documents fall within the class of documents containing (or relating to the provision of) confidential legal advices from the Solicitor-General to the Executive Government;
- Second, because the disclosure of the documents would undermine the confidentiality of Cabinet deliberations; and
• Third, because the disclosure of the documents would contradict the confidentiality prescribed by the Gambling Regulation Act 2003 and undermine the confidentiality under which the information the subject of the advice was obtained. The operation of the VCGR would be materially affected if it could not ensure the confidentiality of its sources of information.

As a preliminary matter, I note that the powers of the Legislative Council and its Committees, are, by section 19(1) of the Constitution Act 1975, those of the House of Commons on 21 July 1855 unless those powers are inconsistent with any Act of the Parliament.

Legal advice

The Executive Government asserts that the documents come within a class of documents the subject of Executive privilege because of their status as documents containing or relating to the provision of advice by the Solicitor-General to the Executive Government.

• Law officers’ opinions were recognised in 1855, and have been recognised ever since, as falling within a class of documents which, by their very nature, should be privileged from production whatever their contents.

• It is in the public interest that those in government who bear the responsibility of making decisions should have free and ready confidential access to their legal advisers. This confidentiality encourages resort to legal advice to assist in ensuring that public power is properly exercised.

• The role and function of the Solicitor-General includes the provision of advice at the highest level of government, and it is therefore critical to the functioning of government that there be no diminution of the confidentiality that is integral to the relationship between the Solicitor-General and the Executive Government, and that there be no consequential disincentive to the Executive Government seeking the Solicitor-General’s advice.

Cabinet confidentiality

Certain of the Solicitor-General’s opinions were before the Gaming Subcommittee of Cabinet and were the subject of deliberations by the Subcommittee. Those opinions, in turn, are cumulative on and refer to her previous opinions.

• In these circumstances, the disclosure of the documents would permit an inquiry into matters that were the subject of the deliberations of Cabinet.

• The proceedings and deliberations of Cabinet, are required – as a result of the principle of collective responsibility and because they form part of the counsels of the Crown – to be kept confidential.

• The exposure of those deliberations, including through the exposure of the reasons for Cabinet’s decisions and the process by which those decisions have been reached, particularly in relation to a matter which is current and would be contrary to the public interest.

The Gambling Regulation Act 2003

Some of the information referred to in the opinions of the Solicitor-General is the subject of the confidentiality provisions in sections 10.1.30, 10.1.31 and 10.1.34 of the Gambling Regulation Act 2003.
Those provisions reflect the critical importance for the proper regulation of the gaming industry of the VCGR having access to confidential information, whether from applicants, confidential sources or law enforcement agencies.

It is in the public interest that the VCGR have the fullest information possible in relation to the reputation, character and financial standing of applicants for, and holders of, licences under the Gambling Regulation Act 2003; if such information were not kept confidential, the quantity and quality of the information available to the VCGR would be materially affected. It is therefore not in the public interest for such information to be provided to the Select Committee.

Further, although the starting-point for the powers and privileges of the Legislative Council and its Committees is (under section 19(1) of the Constitution Act 1975) the powers and privileges of the House of Commons on 21 July 1855, that section provides that those powers and privileges are subject to any inconsistent Act of the Parliament.

Section 10.1.31(1)(a) of the Gambling Regulation Act 2003 provides, in short, that a regulated person can not be required to produce specified documents to a tribunal, authority or person (including a body politic) having power to require the production of documents or the answering of questions. That provision is inconsistent with, and abrogates, the powers of the Council and its Select Committee to obtain, from any person who is a regulated person, documents which fall within its terms.

Section 10.1.34(1) of the Gambling Regulation Act 2003 prohibits a person (other than a regulated person) to whom protected information is disclosed by a regulated person from disclosing to someone else any of that information. That provision is inconsistent with, and abrogates, the powers of the Council and its Select Committee to obtain, from any person who is not a regulated person, documents which contain protected information.

Those provisions clearly indicate that it would be contrary to the public interest for documents containing protected information to be disclosed to the Council and its Select Committee.

I have informed the Solicitor-General of the Crown’s assertion of privilege as set out above and I attach, for your information, my letter to the Solicitor-General.

Yours sincerely,

ROB HULLS MP
Attorney-General
Dear Solicitor-General

SUMMONS FOR PAPERS AND DOCUMENTS FROM THE SELECT COMMITTEE ON GAMING LICENSING

I understand that you have received a summons from the Legislative Council Select Committee on Gaming Licensing to produce all documents within your possession, custody or power that relate to:

- Legal advice, reports, assessments or recommendations sought or provided with respect to the probity investigations conducted by the Victorian Commission for Gambling Regulation (VCGR) of Tattersall’s and Intragot; and

- Any communication between the Solicitor-General or her office and the relevant Ministers, the relevant Departments, the VCGR, the Lotteries Licensing Review Steering Committee, Tattersall’s or Intragot or other legal practitioners with respect to the probity investigations conducted by the VCGR of Tattersall’s and Intragot.

I write to inform you that I have written to the Select Committee today to advise it that the Executive Government, on behalf of the Crown, claims Executive privilege in relation to each document that falls within the terms of the summons. That privilege is claimed on three bases:

1. First, because the documents fall within the class of documents containing (or relating to the provision of) confidential legal advice from you as the Solicitor-General to the Executive Government;

2. Second, because the disclosure of the documents would undermine the confidentiality of Cabinet deliberations; and
3. Third, because the disclosure of the documents would contradict the confidentiality prescribed by the Gambling Regulation Act 2003 and undermine the confidentiality under which the information the subject of the advice was obtained. The operation of the VGR would be materially affected if it could not ensure the confidentiality of its sources of information.

I attach a copy of my letter to the Select Committee which contains further detail of the claim of privilege.

Yours sincerely

[Signature]

ROB HULLS MP
Attorney-General
APPENDIX F
Solicitor-General for Victoria’s Response

11 April 2007

Mr Richard Willis
Secretary
Select Committee on Gaming Licensing
Legislative Council
Parliament House
East Melbourne Vic 3002

Dear Mr Willis

1. Summons dated 20 March 2007

1.1. I refer to the summons dated 20 March 2007 that has been served upon me. The summons requires the production to the Legislative Council Select Committee on Gaming Licensing of all documents within my possession, custody or power that relate to:

   (1) Legal advice, reports, assessments or recommendations sought or provided with respect to the probity investigations conducted by the VCGR [the Victorian Commission for Gambling Regulation] of Tattersall’s and IntraLot; and

   (2) Any communication between the Solicitor-General or her office and the relevant Ministers, the relevant Departments, the VCGR, the LLRSC [the Lotteries Licensing Review Steering Committee], Tattersall’s or IntraLot or other legal practitioners with respect to the probity investigations conducted by the VCGR of Tattersall’s and IntraLot.

1.2. In the State of Victoria, I am the second Law Officer of the Crown (subject only to the precedence of the Attorney-General). I am not a member of either House of Parliament. I am a barrister who as a Senior Counsel of the Victorian Bar has been appointed under statute to act as independent counsel to Her Majesty. I was appointed in 2003 for a period of ten years to appear for the Government of the day in Constitutional matters before the High Court of Australia and other superior courts, and to provide legal advice on matters involving Constitutional law, Administrative law, or matters of public interest to the State. Under statute, during my period of tenure, I am retained exclusively by the State and am prohibited from engaging in legal practice except in the exercise of functions under my office.
1.3. The independence of my office is in substance the same as that of the Auditor-General, the Valuer-General, the Director of Public Prosecutions or the Ombudsman.

1.4. As the principal professional legal advisor to the Crown, I have no interest in the documents described in the summons. My sole objective, in responding to the summons, is to discharge the duties of my office according to law.

1.5. I have given careful consideration to the summons in accordance with my respect for both Houses of Parliament and their committees, including the Legislative Council Select Committee on Gaming Licensing.

1.6. I have also given consideration to a letter dated 11 April 2007 from the Attorney-General to me informing me that he has written a letter dated 11 April 2007 (a copy of which was attached to the letter to me) to the Legislative Council Select Committee on Gaming Licensing by which the Executive Government, on behalf of the Crown, claims Executive privilege in relation to each document that falls within the terms of the summons and that the privilege is claimed on three bases:

1.6.1. first, because the documents fall within the class of documents containing (or relating to the provision of) confidential legal advice to me as Solicitor-General to the Executive Government;

1.6.2. second, because the disclosure of the documents would undermine the confidentiality of Cabinet deliberations; and

1.6.3. third, because the disclosure of the documents would contravene the confidentiality prescribed by the Gambling Regulation Act 2003 (Vic) and undermine the confidentiality under which the information the subject of the advice was obtained. The operation of the Victorian Commission for Gambling Regulation would be materially affected if it could not ensure the confidentiality of its sources of information.

1.7. I have examined all the documents in my possession, custody or power that are relevant to the terms of the summons and I have concluded that I am duty bound to decline to produce the documents sought in the summons because I cannot act incompatibly with a privilege asserted by the Crown by reason of the confidential advisory relationship of the Solicitor-General to the Crown. In particular, I have concluded that disclosure of the documents sought by the summons would be in contravention of the duties of my office because the documents are subject to the convention that the opinions of "Law Officers of the Crown" (by tradition, the Attorney-General and the Solicitor-General) are confidential and are not laid before Parliament. In short, the privilege asserted is the privilege of the Crown and it is my obligation not to act inconsistently with that assertion of privilege. It is my duty to the Crown not to act in a manner which would defeat the privilege it asserts.

1.8. Furthermore, I am prohibited under law from disclosure as some of the documents are subject to the confidentiality provisions of the Gambling Regulation Act 2003, which prohibit disclosure.

1.9. In those circumstances, I am bound not to disclose the documents as any disclosure would place me in contravention of the duties of my office. I must seek to be excused from compliance with the summons. My reasons are explained in more detail below.
2. Role of the Solicitor-General for Victoria

2.1. The Solicitor-General is an independent statutory officeholder, appointed by the Governor in Council under section 4(1) of the Attorney-General and Solicitor-General Act 1972 (Vic). Pursuant to section 5(a), the Solicitor-General acts as counsel for Her Majesty. Section 5(c) provides that the Solicitor-General has precedence after the Attorney-General in all cases whatsoever. The Solicitor-General, therefore, is the second Law Officer of the Crown.

2.2. In contemporary terms, the Solicitor-General is a barrister, either Queen’s Counsel or Senior Counsel, who is appointed by the Governor in Council to appear in court exclusively for the Crown on matters of Constitutional Law, Administrative law or matters of significant interest to the State. The role also encompasses giving legal advice on such matters exclusively to the State.

2.3. The office of Solicitor-General originated in England in the 15th century as a professional attorney retained by the King for a fee to sue on the King’s behalf to avoid the King appearing in person in any suit (in the absence of the Attorney-General, also then a professional attorney). The first Solicitor-General in Australia was appointed in 1834 in the colony of New South Wales. The first Solicitor-General for the State of Victoria was Sir Redmond Barry. In 1951 the Parliament of Victoria passed the Solicitor-General Act and the office became, and has continued to be, a non-ministerial appointment made by the Governor in Council. The occupants of the office in Victoria from that time have been Sir Henry Wimshurst Q.C., Tony Murray Q.C., Daryl Dawson Q.C., Hartog Berkeley Q.C., Ray Pinkelstein Q.C. (acting for 12 months) and Douglas Graham Q.C.

2.4. As the second Law Officer of the Crown, the Solicitor-General occupies a special position as counsel for the Crown. In the performance of the Solicitor-General’s functions, the Solicitor-General is given highly confidential information by the Executive Government and is required to advise on matters of the utmost importance and sensitivity to the State.

2.5. The Solicitor-General is not subject to the Public Administration Act 2004 (Vic) (see section 106(1)(g) of that Act) and is not subject to Ministerial direction in the way that public servants are subject to Ministerial direction. The Attorney-General may direct the Solicitor-General on what duties of counsel the Solicitor-General must perform (see section 5(a) of the Attorney-General and Solicitor-General Act 1972) but cannot give directions on how those duties are to be performed, or otherwise.

3. Confidentiality of Law Officers’ opinions and documents relating to the provision of Law Officers’ opinions

3.1. It is of the essence of the relationship between the Solicitor-General and the Crown that the Solicitor-General must respect the confidences of the Crown. The Solicitor-General must keep the counsels of the Crown confidential and cannot act inconsistently with any privileges asserted by the Executive Government on behalf of the Crown.

3.2. In J. L. J. Edwards, The Law Officers of the Crown (1964, Sweet & Maxwell, London) at pages 256-261, there is a detailed discussion of the long-standing British constitutional convention that Law Officers’ opinions are kept confidential and are
not laid before Parliament. The reference to Law Officers is to the Attorney-General and the Solicitor-General.

3.3. At page 258, the learned author quotes from a statement of Prime Minister Balfour in Parliamentary Debates (House of Commons) 4s volume 92, 26 April 1901, columns 1479-1480, that “the opinions of the Law Officers of the Crown have invariably been regarded as confidential documents, and are never laid under any circumstances before the House”.

3.4. On the same page, the learned author quotes a statement from Sir Douglas Hogg in Parliamentary Debates (House of Commons) volume 164, 17 May 1923, column 656, that it is his understanding that it is “a long-established rule of this House that the opinions of the Law Officers are absolutely confidential and that neither Minister nor Law Officers may be interrogated about them”.

3.5. However, the Executive Government, or a responsible Minister on its behalf, may permit disclosure. On page 260, the learned author approves the rule as expressed in Erskine May’s Treatise on the Law: Privileges, Proceedings and Usages of Parliament (16th ed, 1957, Butterworths, London, page 461):

The opinions of the law officers of the Crown, being confidential, are not usually laid before Parliament or cited in debate; and their production has frequently been refused: but if a Minister deems it expedient that such opinions should be made known for the information of the House, he is entitled to cite them in debate.

3.6. In the most recent edition of Erskine May’s Treatise (23rd ed, 2004, LexisNexis, UK, page 443), the British constitutional convention is described as follows:

By long-standing convention, observed by successive governments, the fact of, and substance of advice from, the law officers of the Crown is not disclosed outside government. This convention is referred to in paragraph 24 of the Ministerial Code. The purpose of this convention is to enable the government to obtain frank and full legal advice in confidence. Therefore, the opinions of the law officers of the Crown, being confidential, are not usually laid before Parliament, cited in debate or provided in evidence before a select committee, and their production has frequently been refused; but if a Minister deems it expedient that such opinions should be made known for the information of the House, the Speaker has ruled that the orders of the House are in no way involved in the proceeding.

3.7. To my knowledge no Victorian Solicitor-General nor any Solicitor-General in any other Australian jurisdiction has ever received a summons from a Parliamentary Select Committee. Indeed, to my knowledge, no Solicitor-General in the jurisdictions of England & Wales, Ireland, Canada or New Zealand has ever received a summons from a Parliamentary Select Committee. This is consistent with the convention described above. There is a single instance of which I am aware where a Solicitor-General received a summons from a House of Parliament. This was a summons issued by the Senate to the then Commonwealth Solicitor-General, Mr Maurice Byers Q.C., to appear before the Senate on 15 July 1975 to answer questions in relation to activities and matters before and after a meeting of the Executive Council. Mr Byers wrote to the President of the Senate to inform him that he would object to answering any question. He appeared before the Senate and maintained that position when
questioned by Senators. He was excused. See Commonwealth Parliament Debates (Senate) 15 July 1975 pages 2730-2731; 16 July 1975 pages 2781-2790.

3.8. The documents sought in the summons that I have received constitute or relate to the provision of my legal advices to the Crown, as the second Law Officer of the Crown. The legal advices are subject to the convention referred to above, namely, that they are not produced to any House of Parliament. On this occasion, the Crown has asserted Executive privilege in relation to the advices. I cannot act inconsistently with the Crown’s assertion of privilege for to do so would, to that extent, defeat that privilege. In accordance with my obligations, I must decline to produce the advices.

3.9. The Executive Government, on behalf of the Crown, claims Executive privilege over the documents which relate to the provision of the confidential legal advices I provided to the Crown. The integrity of my role as the second Law Officer of the Crown is dependent upon my capacity to maintain the confidentiality of the instructions and information given to me for the purpose of securing my advice. Unless the Crown is able to confide in me in a full and free manner, and, in turn, I am able to advise the Crown fully and freely on its legal rights and obligations, the performance of my functions as Solicitor-General would be compromised. I could not provide proper or adequate advice to the highest levels of government on matters of State if I could not discharge my obligation to maintain the confidentiality of all the instructions and information provided to me for the purpose of obtaining my advice. The documents in my possession, custody or power that fall within the terms of the summons and relate to the provision of my legal advices to the Crown were communicated to me confidentially only for the purpose of obtaining my legal advices. Executive privilege has been asserted by the Crown over those documents. It is my obligation not to act inconsistently with the Crown’s assertion of privilege. In accordance with my obligations, I must decline to produce the documents which relate to the provision of my confidential legal advices to the Crown.

4. Confidentiality of Cabinet deliberations

4.1. The Executive Government, on behalf of the Crown, claims Executive privilege over my legal advices to the Crown, and documents relating to the provision of my legal advices to the Crown, on the ground that disclosure of the documents would expose the subject-matter of deliberations of Cabinet. Neither a House of Parliament, nor a Committee of Parliament, has the power to require the production of documents which directly or indirectly reveal the deliberations of Cabinet. The existence of such a power would undermine the collective responsibility of Ministers, contrary to the principle of responsible government. Neither a House of Parliament, nor a Committee of Parliament, has the power to require the production of legal advice, or documents relating to the provision of legal advice, if that production would conflict with the principle of responsible government or the collective responsibility of members of Cabinet.

4.2. My legal advices to the Crown, and the documents relating to the provision of those advices, relate to an important deliberative process by the Crown. That process has not yet been completed. There is a public interest in preserving the confidentiality of the legal advices and the sensitive deliberative process to which my advices, and the documents relating to the provision of those advices, relate. The Executive Government has asserted Executive privilege on the ground of the maintenance of Cabinet confidentiality. I am obliged not to act inconsistently with that assertion of
privilege for to do so would defeat the privilege, to that extent. In accordance with my obligations, I must decline to produce the documents.

5. Gambling Regulation Act 2003

5.1. Section 10.1.34(1) of the Gambling Regulation Act 2003 provides:

A person (other than a regulated person) to whom protected information is disclosed by a regulated person must not make a record of, or disclose to someone else, any of the information.

Penalty: 60 penalty units.

5.2. Section 10.1.29(1)(a) defines “protected information” as “information with respect to the affairs of any person”. Section 1.3(1) defines “person” as including “a body (whether or not incorporated), a partnership and the Trustees”. Section 1.3(1) defines “Trustees” as “the trustees of the will and estate of the late George Adams”. Section 10.1.29(1) defines “regulated person” as the Commission, a commissioner, an employee or member of staff referred to in section 10.1.25; the Minister; an employee in the department administered by the Minister; or a person acting on behalf of the Commission or the Minister.

5.3. For the purposes of preparing my advices to the Crown, I was given information falling within the definition of “protected information” by persons falling within the definition of “regulated person”. That information is contained in documents that fall within the terms of the summons. By virtue of section 10.1.34(1), I am prohibited from disclosing that information to the Legislative Council Select Committee on Gaming Licensing. It would place me in breach of a statutory prohibition to comply with the summons by disclosing the “protected information” given to me by “regulated persons”. In accordance with my obligation under statute, I must decline to produce any document that contains protected information.

In all the circumstances, I must respectfully request that I be excused from compliance with the summons.

Yours sincerely

Pamela Tate S.C.
Solicitor-General for Victoria
30 April 2007

Richard Willis
Secretary to the Committee
Select Committee on Gaming Licensing
Legislative Council
Parliament House
EAST MELBOURNE VIC 3002

Via Courier

Dear Sir,

RE: HAWKER BRITTON
SELECT COMMITTEE ON GAMING LICENSING

I act for Mr David White, Mr Danny Pearson and Mr Bruce Hawker.

I refer to the three “Summons for papers and documents” dated 20 March 2007 which you issued, at the direction of the Legislative Council Select Committee on Gaming Licensing (“the Committee”), directed to each of my clients (collectively, “the Summonses”).

My clients consider there are serious questions regarding the validity of the Summonses, including the following.

(1) The power of the Committee to issue a summons directed to a stranger to the Legislative Council, compelling the production of documents.

(2) The power of the Committee and/or of the Legislative Council to issue a summons directed to a stranger to the Parliament when that summons is intended to coerce production from that person of a document:

   a. likely to also be in the custody, possession or control of a Member of the Legislative Assembly; and

   b. the production of which could be resisted by that Member of the Legislative Assembly.
(3) If, for its power to issue the summons directed to my clients, the Committee is relying on s 19(1) of the Constitution Act 1975 (Vic), that power is inconsistent with:
   c. The Gambling Regulation Act 2003 (Vic) and the establishment under that Act of the Victorian Commission for Gambling Regulation with certain powers and duties.

(4) Further any coercive powers of the Committee are subject to the implied freedom of political communication.

(5) The relevance and proportionality of the Summonses given the Terms of Reference dated 14 February 2007 establishing the Committee (“the Terms of Reference”), both generally and in respect of each of the paragraphs of the Summons.

(6) The oppressive nature of the Summonses, both generally and with specific reference to paragraphs (3) and (6).

(7) The validity of service of the Summonses.

My clients reserve their rights to challenge by legal proceedings each of the Summonses, and any actions taken by the Committee or the Legislative Council against my clients in connection with the Summonses. The production of the documents which accompany this letter is not and should not be taken as any waiver of their right to institute and prosecute such proceedings, nor be taken as any concession as to the lawfulness of the Summonses and any consequent conduct by the Committee or the Legislative Assembly against my clients.

The documents produced are listed in the Schedule at the front of the folder which accompanies this letter. They have been identified on the basis of searches conducted by my clients, bearing in mind their retainer with Tattersalls ceased on 31 October 2006.

Insofar as it is a proper function of the Parliament, or its Committees, to oversee the functioning of the Executive, then where coercive powers are thought necessary, the appropriate mechanisms to employ are inquiries established under statutory authority. Otherwise, the function of overseeing the Executive is properly discharged by orders directed at members of the Executive, not private citizens. Wholesale reliance on an historical position which may or may not have appertained in a country other than Australia some 150 years ago is misplaced in the 21st century in the State of Victoria, especially after the passage of the Charter of Human Rights and Responsibilities Act 2006 (Vic).

If the Committee proposes to insist that any or all of my clients produce to it documents which by this letter they have indicated they will not produce, then we request that the Committee communicate its intention to us in writing, advising us of the steps it proposes to take and giving my clients a reasonable opportunity to respond to the Committee’s position. In particular, we request that the Committee provide us with a written explanation of the legal basis on which it asserts authority to coerce production of such documents.
Yours faithfully,
WILLIAMS WINTER

John A. Howie
Special Counsel
jhowie@williamswinter.com
27 April 2007

Mr Richard Willis
Secretary to the Select Committee on Gaming Licensing
Legislative Council
Parliament House
Spring Street
MELBOURNE VIC 3002

Dear Mr Willis,

SELECT COMMITTEE ON GAMING LICENSING
SUMMONS FOR PAPERS AND DOCUMENTS

I refer to the Summons for Papers and Documents ("Summons") addressed to me and dated 20 March 2007 in which I am required to produce all documents within my possession, custody or power relating to the various matters set out in the Summons.

In seeking to ensure the production of all relevant documents, I have carefully read the Committee’s Terms of Reference ("Terms") and sought to respond according to those Terms and the Summons.

In this response, I have sought to explain the methodology I have adopted by setting out:

(a) my **Interpretation** of the requirements, then

(b) the **Approach** I have taken.

**Interpretation**

I am conscious of my duty to the Parliament and wish to cooperate as best as is practicable in the circumstances.

Certain categories of documents referred to in the Summons are vague and are so widely defined as to arguably be oppressive and unduly onerous. As a consequence, interpreting them at their broadest would result in an inordinate amount of time and cost being incurred which could not have been what the Select Committee intended.

Taking into account the Terms, I have adopted interpretations of the categories as detailed below which removes the vague and potentially oppressive and unduly onerous element but which I consider are consistent with the Terms. These are as follows:

**TATTERSALL’S LIMITED**

A.C.N. 108 626 610

Tattersall’s House, 615 St. Kilda Road, Melbourne, Victoria, 3004, Australia

Locked Bag 888, St. Kilda Road Central, Melbourne, Victoria, 3000, Australia

Telephone 61.3.8547 7777, Fax 61.3.8547 7752

www.tattersall.com.au
(a) Categories 1 and 2 (Lotteries and Gambling licence processes)

Many of the documents in my possession, custody or power do not relate to the Government process itself but rather the approach Tattersall’s has taken in both a strategic and policy manner and have been written for internal purposes only by Tattersall’s employees or third parties to assist Tattersall’s in preparing its lottery application and gaming submission. As a result, I have not provided such documents as, in my opinion, they do not form part of the respective Government licensing processes.

Further, many of these documents are treated by Tattersall’s as “commercial in confidence” and/or are not relevant to the Terms.

(b) Category 8 (Tattersall’s Corporate Diaries)

I have interpreted this to only refer to any corporate diary which is in my custody and contained within Microsoft Outlook. In my case no such diary existed before January 2007.

(c) Category 9 (Diaries or similar records)

I consider or interpret this to refer to personal diaries as opposed to corporate diaries. Again, I have applied the same interpretation as in (b) above.

(d) Categories 11, 12 and 13

I have interpreted these categories to require the production of the same documents as that contained in category 3.

APPROACH

The approach I have taken in relation to documents in my possession, custody or power is to include in this letter under the heading “Response”, a list of the documents I have in my custody and in respect of the documents over which I may have possession or power, I have undertaken the following steps:

- I have spoken with the other Tattersall’s employees who have received a Summons from the Select Committee and have an understanding of the breadth of what each such person has done to comply with the Summons. In this regard, I ask that the Committee be mindful of the fact that with the public listing of Tattersall’s in July 2005 and the merger of Tattersall’s and UNITAB in October of 2006, there have been a vast number of changes to personnel at Tattersall’s and many who may have knowledge of documents and meetings which may be relevant to the Terms and Summons are no longer employed by Tattersall’s.

- I am aware that Marion Rodwell and Ray Gunston have contacted the key people who remain employees of Tattersall’s involved in the lottery and gaming licence processes to ensure that any records they have, or which have been left to them by
relevant persons who have since left the employ of Tattersall’s, have been searched to ensure compliance with the Summons.

- In order to minimise duplication of the sources and the production of numerous copies of the same documents and with a view to preventing the incurring of further unnecessary costs, I consider the steps that I have taken to be reasonable to ensure that the documents relevant to this Summons, in light of my interpretation as outlined above, that otherwise would have been in my possession and power have been provided either by myself or another Tattersall’s employee who has received a Summons.

- Attached to this letter as Attachment B is a list of the documents which will be or have been provided by Marlon Rodwell, Ray Gunston and Michael Mangos and therefore have not been duplicated by me but are in fact incorporated by reference in this response.

- A number of documents that are listed in Attachment B have not been provided on the basis of being commercial in confidence and if this is the case, it is stated in the Attachments where relevant.

In particular, the documents requested in category 1 which relate to Tattersall’s application for a public lottery licence that came into existence after the issuing of the Invitation to Apply (20 November 2005) including correspondence passing both ways between Tattersall’s and Gambling Licences Review have been listed but not produced as a consequence of:

(i) my interpretation of the confidentiality obligations that each applicant for a public lottery licence agrees to when submitting its application for a public lottery licence, and/or

(ii) my interpretation of the requirements expressed in the Invitation to Apply prohibiting communication between an applicant for a public lottery licence and officers, employees, agents or advisors of the Minister, the State, Members of Parliament or their staff and advisors in connection with the Invitation to Apply or the licensing process, and/or

(iii) the information is “protected information” under Chapter 10 of the Gambling Regulation Act 2003 prohibiting its disclosure by a person, (i) to (iii) together referred to as “Lottery Licence Confidentiality” in Attachments A and B to this letter), and/or

(iv) the commercial in confidence nature of the information contained within the relevant listed documents.

After the grant of a public lottery licence by the Minister for Gaming and subject to the Minister’s consent being given as required by the Gambling Regulation Act 2003, documents or extracts of those documents listed in category 1 which are not
commercial in confidence can be provided.

RESPONSE

Following the numbering sequence used in the Summons, I respond to each category of documents requested as follows

(1) I was not involved in the public lotteries licensing process until after joining Tattersall’s on October 12, 2006, being well after the date of submission of the Lottery Licence application by Tattersall’s, and as such I do not have any such documents in my custody.

(2) There are no documents in my custody relating to Tattersall’s involvement in the gaming/wagering/ Keno and sports betting licences processes.

(3) Copies of the following documents are enclosed:
   - Letter from Department of Justice dated 23/10/06 advising of possibility for Tattersall’s to apply for a lottery licence extension;
   - Letter from Tattersall’s dated 2 November 2006 seeking an extension to the lottery licence;
   - Letter from Department of Justice dated 6/11/06 inviting Tattersall’s to attend a meeting to discuss a potential licence renewal;
   - Letter from Department of Justice dated 05/03/07 inviting written submissions to aspects of the reference detailed;
   - Letter from Tattersall’s dated 14/03/07 to Select Committee on Gaming Licensing in response to their invitation for written submissions to aspects of the reference detailed.

(4) The arrangements between Hawker Britton and anyone from Hawker Britton were before my time at Tattersall’s. I have never met, spoken with, or read anything provided by Mr White, or anyone from Hawker Britton. Mr. White terminated the arrangements between Hawker Britton and Tattersall’s without any reference to me. The only correspondence relating to the termination of these arrangements is attached in the form of an:
   - Email from me to Herald-Sun Editor
   - Responses from the Herald-Sun Editor
   - A brief email exchange between me and the Chairman of Tattersall’s.

(5) No accounts submitted by Hawker Britton were approved or seen by me. I do not have any such documents in my custody.
(8) I was not involved in the preparation by or for Tattersall's of any material which related to any of the matters raised in points (1), (2), (3) or (4) above for any Government Ministers, Ministerial staff or any Government bodies. Nor do I have in my custody any records of any material prepared by Tattersall's on these matters.

(7) I have no documents in my custody prepared by or for Tattersall's relating to a meeting with the Premier on 19/2/03 or any records prepared for it, or derived from it.

(8) I had no involvement with Tattersall's prior to 12/10/06, I do not keep a diary. Since mid January 2007 I have kept a record of appointments in Windows Outlook. This list is not provided as it is outside the timeframe specified and I have not attended any meetings with any Government officials or politicians since 1/1/07, except as noted below and in my response to category (9).

I can recollect attending two meetings to introduce myself to Minister Pandazopoulos and Treasurer Brumby in November/December 2006. There was no discussion on the lottery licensing process, or the review of the other gambling licences, at either meeting. Probity auditors attended both of these meetings and took notes. I didn't!

(9) As stated in (8) above, I do not keep a diary. I have had no meetings with any Government official so far in 2007, except for a recorded interview with VCGR as part of the probity review required for me to become an associate of Tattersall's.

(10) I do not have in my custody any communication between me and the listed authorities except for the communications relating to the routine probity review described in (9) above.

(11) See the correspondence mentioned in (3) above.

(12) See the correspondence mentioned in (3) above.

(13) See the correspondence mentioned in (3) above.

In relation to each of categories (1) to (13) above, Attachment B contains the documents within my possession or power but which I do not have custody of and are those attached to the responses provided by Ray Gunston, Marion Rodwell and Michael Mangos.

Yours faithfully,

Dick McIlwain
Chief Executive
APPENDIX I

Intralot Letter

11 April 2007

BY HAND
The Secretary
Select Committee on Gaming Licensing
Legislative Council
Parliament House
Spring Street
MELBOURNE VIC 3002

Dear Sir

We refer to the Summons* which were served upon Anthony Sheehan, Alan Egan and the Secretary of Intralot Australia Pty Ltd (the Summons). Enclosed is our response to the Summons.

Five categories of documents are listed in the Summons. We have not provided copies of the following documents as we are of the view that they don’t fall within any of the categories:

1. The Registration of Interest;
2. The Application; and
3. The additional material which was lodged with the Office of Gaming and Racing on 28 March 2007 (Updated Application).

In our view these documents are unrelated to the ‘process’. In any event, these documents are commercial and in confidence, and should not be in the public domain as they would damage Intralot’s commercial interests.

The first category of documents listed in the Summons is documents that relate to ‘the public lotteries licensing process (including any probity investigations relating thereto)’. A number of probity forms were lodged as part of the Application and Updated Application. We have not provided copies of these forms as they do not relate to any ‘probity investigations’.

The third category of documents listed in the Summons is ‘Intralot’s corporate diaries for the period 1 January 2003 to 31 December 2006’. We have provided a copy of Euro-Pacific Strategies Pty Ltd’s corporate diary for 2006. Intralot S.A., the parent of Intralot Australia Pty Ltd, does not maintain a corporate diary of appointments and other activities.

* cf: Euro Pacific Strategies Pty Ltd
Level 13, 30 Collins Street, Melbourne 3000 Australia
Email: chiefstaff@europacificstrategies.com.au
Telephone: + 61 3 9650 0200 Facsimile: + 61 3 9650 5521
Please note that the tab numbers in the folders correspond with the numbers in the Summons. You will notice that no documents have been provided for (4), (5)(c) and (5)(f).

Please note that IntraLot have engaged Maddocks Lawyers to assist them with this process and any enquiries you have with respect to the provision of additional documents should be made of Mark Henry of that firm. Mark's contact number is 9288 0506.

Yours faithfully

Anthony Sheehan
Director
APPENDIX J
Legislative Council Sessional Order 21 – Production of Documents

(Adopted 14 March 2007)

The following arrangements will apply in relation to the production of documents:

(1) The Council may order documents to be tabled in the Council. The Clerk is to communicate to the Secretary, Department of Premier and Cabinet, all orders for documents made by the Council.

(2) An order for the production of documents must specify the date for the documents to be provided.

(3) When returned, the documents will be laid on the table by the Clerk.

(4) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.

(5) If at the time the documents are required to be tabled the Council is not sitting, the documents may be lodged with the Clerk, and unless Executive privilege is claimed, are deemed to have been presented to the Council and published by authority of the Council.

(6) Where a document is claimed to be covered by Executive privilege –
   (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of Executive privilege; and
   (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the Council and-
      i. made available only to the mover of the motion for the order; and
      ii. not published or copied without an order of the Council.

(7) The mover may notify the Clerk in writing, disputing the validity of the claim of Executive privilege in relation to a particular document or documents. On receipt of such notification, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within 7 calendar days as to the validity of the claim.

(8) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

(9) A report from the independent legal arbiter is to be lodged with the Clerk and-
   (a) made available only to members of the Council; and
   (b) not published or copied without an order of the Council.

(10) The Clerk will maintain a register showing the name of any person examining documents tabled under this order.
APPENDIX K
Legal Opinion Obtained from Mr Bret Walker S.C.

PARLIAMENT OF VICTORIA
LEGISLATIVE COUNCIL
ORDERS FOR PAPERS

OPINION

I am asked to advise the Clerk of the Legislative Council of Victoria on a number of questions arising in relation to the power of the Council to order documents to be produced to it. I will call such a procedure “an order for papers”.

2 These questions have arisen in circumstances which included the adoption on 14th March 2007 of a Sessional Order for the arrangements to apply in the production of documents. That Sessional Order is derived from the terms of Standing Order 52 of the Legislative Council of New South Wales, which was devised in light of the experience in New South Wales recorded in Egan v Chadwick (1999) 46 NSWLR 564.

3 Subsequently, the present circumstances in Victoria include the claim on 11th April 2007 from the Attorney-General and the Solicitor-General for Victoria to the Select Committee on Gaming Licensing, essentially refusing to disclose certain documents which were the subject of orders for papers.

4 The relevant powers of the Council, subject to statutory modification or regulation, are founded in subsec 19(1) of the Constitution Act 1975 (Vic). Its provisions provide for House-of-Commons equivalency as at 21st July 1855 (ie responsible self-government).

5 Subsection 19(2) of the Constitution Act expressly provides for legislation with respect to the privileges, immunities and powers of the Council, its committees and members, but no relevant legislation affects the general subject-matter. Some questions arise, however, in relation to specific legislation with respect to certain secrecy provisions appertaining to particular regulatory schemes.

6 Under para 43(1)(f) of the Constitution Act, the Council may make standing rules and orders for the conduct of all business and proceedings in it. The Sessional Order noted above was adopted as contemplated by Standing Order 25.02.

7 Further, Standing Order 24.10 simply authorizes a select committee to “send for persons, documents and other things” (cf sec 28 of the Parliamentary Committees Act 2003 (Vic)).

8 The general importance of the rôle of the Legislative Council, like that of any House in any Parliament in Australia, in responsible government lies in its capacity to
scrutinize the workings of government, and particularly those of the Executive, whose members (ie the Ministers) sit in one or other of the Houses (in a bicameral system). This need not be elaborated. I regard it as beyond serious question. The principles can be seen in the background and outcome of Egan v Willis (1996) 40 NSWLR 650, (1998) 195 CLR 424 and Egan v Chadwick. (New South Wales does not have a House-of-Commons equivalency provision, but the explanations of principle in the High Court do not leave any scope for distinguishing its Houses of Parliament from other Australian Houses in this regard.)

9 It is tolerably clear from the precedents discussed in Ch XXI of Erskine May’s Parliamentary Practice 10th Ed (1893) that orders for papers were well established as within the power of the House of Commons before 1855. That chapter starts with the words – “Parliament is invested with the power of ordering all documents to be laid before it, which are necessary for its information. Each House enjoys this authority separately, but not in all cases independently of the Crown”.

10 Against this background, I answer the specific questions I have been asked as follows.

11 (1) Does the Legislative Council possess an inherent power under the Constitution Act 1975 to call for the production of documents in accordance with the Sessional Order adopted on 14th March 2007?

The Council does have such a power, in general terms.

12 As noted above, the Council does have a general power to order papers. There is no precedent for a successful claim on behalf of the Executive to resist all and any orders for papers. If the Executive were to take such a position (which I do not understand to be the case), and the conflict were to take shape so as to be litigated, I confidently predict that a court would regard Egan v Willis as binding and applicable judicial authority against the Executive.

13 The power in question is not, in my opinion, properly called “inherent”, at least in Victoria. The point probably does not matter. Upon the historical showing that the House of Commons had such a power in 1855, there is express statutory provision in the Constitution Act for the same power in the Legislative Council of the Parliament of Victoria. On the other hand, for reasons to do with the fundamental character of a House as the grand inquest of the nation, if it had not been a power expressly granted in Victoria, then in my opinion it probably would have been an implied power, inherent in the nature of a parliamentary chamber (as was held for the New South Wales Legislative Council in Egan v Willis).

14 The Sessional Order does not purport to do more than regulate the Council’s own procedures. It is no objection to it that Cabinet secrecy is not specifically referred to, nor the position where other legislation entrenches on the Council’s power to order papers. (I note that so-called “Executive privilege” is catered for by the Sessional Order.) Cabinet secrecy and statutory prohibition on disclosure are dealt with by substantive law, as to the former in accordance with the principles noted in Egan v Chadwick, and as to the latter as a matter of statutory interpretation.
15 (2) If the answer to question (1) is yes, what are the powers of the Legislative Council to compel a Member to produce the documents sought and to deal with the Member for contempt for failure to comply with an Order of the House requiring the Member to produce the documents?

Ultimately, in appropriate cases the Council could suspend such a Member in an attempt to prevent his or her continued obstruction of the Council’s business.

16 All Members are elected to serve in the Council according to their oaths, and according to law. Their duties include compliance with resolutions and Standing Orders so as to permit the orderly discharge of business. In accordance with the non-punitive principle vindicated in Egan v Willis, a Member who obstructs the business of the Council by refusing – without cause – to answer an order for papers could be suspended from the service of the Council.

17 (3) Would any sanctions available to the Council against the Member failing to produce documents include the power of suspension and ultimate declaration of the Member’s seat as vacant?

No as to expulsion.

18 There is a tension between suspension of an obstructive Member, as discussed in 16 above, and abrogation of the electors’ choice which would follow from declaring a Member’s seat vacant, ie expelling him or her. In my opinion, that tension will be resolved in favour of the reasonable necessity (as explained in Egan v Willis) of a self-protective step such as suspension being adequate as the sanction against non-production upon an order for papers. Suspension being adequate, expulsion would be excessive. Further, the basic democratic provisions providing for the seating of elected representatives as Members are in my opinion highly likely to be regarded as paramount.

19 I would reserve, as presently hypothetical and as depending wholly upon extreme circumstances, the question whether a Member might, by conduct including defiance of an order for papers, so act as to justify expulsion. I merely note that I cannot see that any such case would be properly described as expulsion (merely) for non-production of papers ordered to be produced.

20 (4) Other than Cabinet documents, are any of the following reasons which might be claimed in support of the non-production of documents valid:
   (a) Executive privilege or public interest immunity (as distinct from Cabinet documents)
   (b) Commercial-in-confidence
   (c) Legal professional privilege
   (d) Sub-judice convention
   (e) Privilege against self-incrimination?

(a) no, (b) no, (c) mostly not, (d) no, (e) yes.

21 As to (a), as my answer to question 5 below indicates, the category of Cabinet documents is not clear beyond dispute. Partly, this is because the practices of responsible and parliamentary government evolve. In my opinion, the reasoning of Spigelman CJ, with whom Meagher JA agreed, in Egan v Chadwick at 46 NSWLR 573-574 [48]-[54] is compelling. Where a document is not to be regarded as a Cabinet
document, there should be no public interest reason to keep it from the people’s representatives, the legislators, in the Council.

22 As to (b), at best in favour of non-production, this category would be a subset of public interest immunity. As such, it has no better claim for immunity against an order for papers. It is for the Council to determine, in its assessment of the public interest, how secrecy of this kind should be observed. In my experience, there is no difficulty in restricted access and redacted publication, where public disclosure would hurt the public interest.

23 As to (c), subject to what I note below in relation to the Solicitor-General for Victoria, the matter should be approached on the basis of the argument I successfully presented for the New South Wales Legislative Council in Egan v Chadwick, per Spigelman CJ at 46 NSWLR 576-579 [72]-[88], also agreed in by Meagher JA. It follows that access to legal advice being reasonably necessary for the exercise by the Council of its functions, it is for the Council to determine what if any delicacy it should apply in a particular case.

24 As to (d), I assume that there is no suggestion of abandoning the traditional parliamentary convention respecting the current or pending judicial consideration of particular cases. However, in my opinion, properly understood, that convention has never stifled parliamentary discussion where public opinion is engaged, and it is probably best applied as a form of institutional courtesy to the judiciary.

25 In any event, there would be no sense if the Executive could be forced to produce confidential legal advice, but could not be forced to produce information about pending litigation.

26 As to (e), I regard this as the most difficult question in this bracket. Clear words or necessary implication are required, in all other contexts, to abrogate the common law privilege against self-incrimination – which is available only to individuals ie natural persons, not corporations. However, it might be that parliamentary privilege as in Article 9 of the Bill of Rights could be seen as a protection of persons forced to give evidence to the Council or one of its committees, by rendering tender of a record of it in a criminal court a breach of parliamentary privilege. On balance, I regard the privilege against self-incrimination as insufficiently substituted by such reasoning, which after all involves the possibility of the Council waiving its privilege.

27 (5) Is it possible to adequately define a Cabinet document?

Not precisely.

28 However, the discussion by Spigelman CJ in Egan v Chadwick at 46 NSWLR 574-576 [55]-[71], agreed in by Meagher JA, provides useful guidance, as well as indications of the most likely source of difficulty. In particular, his Honour notes a possible distinction between documents which disclosed the actual deliberations within Cabinet and those which are in the nature of reports or submissions prepared for the assistance of Cabinet. The latter category may produce problematical questions as to their importance for the doctrine of collective responsibility, which is likely to be the touchstone for justified refusal to produce them to the Council.
(6) Other than Members and Officers of the Assembly, do Select Committees of the Legislative Council possess an unfettered right to compel the attendance of all other persons, including Ministerial advisers to give evidence?

Yes.

A critical distinction is between compulsion to attend to give evidence, and compulsion to answer particular questions. Conventionally, and for good reason, Houses have not required public servants, or Ministerial advisers, to answer questions about policy, in such a way as to endanger the necessary confidence between Ministers and public servants. Guideline 19 reflects this conventional approach.

Assuming there is no intention on foot in the Council to alter that conventional position, there is no reason why such persons should not be required to give evidence outside that conventionally proscribed area. In particular, Ministerial advisers are not a caste which has been given the benefit of parliamentary precedent in this direction, let alone as at 1855. Of course, the usual rôle of Ministerial advisers means that in most cases their attendance would be sought to answer policy questions of a kind conventionally reserved for Ministers.

(7) Other than Cabinet documents, does a Select Committee possess the power to seek any other document, including a document held by an Assembly Minister?

Generally, yes. No, except by mere request, in the case of a document held by a Member (including a Minister) of the Assembly.

As advised above, a Select Committee is authorized to seek the production of documents, with compulsion generally, subject to exceptions of the kind noted above. I stress that, subject to limited delegation by the Council, a Select Committee acts on behalf of the Council with full capacity to use those powers of the Council delegated to it.

On the other hand, as also advised above, the key to sanctioning non-production in answer to an order for papers, in the case of the Executive, in my opinion most effectively turns on the nexus of membership of the House. (I am not addressing in this Opinion the different question of punishment for contempt committed by strangers who defy an applicable order for papers. This Opinion focusses on orders for papers in the classic responsible-government sense of the production of papers to assist a House in its task of scrutinizing Executive administration.)

Relations between the Houses do not, historically, conventionally or currently, sanction any purported compulsion by one House against a Member (Minister or not) of the other House. In my opinion, this is unaffected by the general notion of responsible government, viz that the Executive is accountable to the Houses of Parliament. In my opinion, none of the precedents in Westminster or this country supports a distinction between a Minister in the other House and a Member in the other House, whereby the former may be compelled by an order for papers but the latter not. Arrangements of a familiar kind by which Ministers, say, in the Council have allocated to them responsibility to answer questions in relation to portfolios whose Ministers sit in the Assembly, were of some importance in the background to Egan v Willis. In my opinion, they are
arrangements which recognize the significance of membership of a House in the compulsion of a Minister to produce in answer to an order for papers.

36 Standing Order 18.03, in relation to evidence from a Member or Officer of the Assembly, reflects this ancient restraint. It does not limit the breadth of the principle, which clearly comprehends purported compulsion to produce documents, as well.

37 (8) Are any of the grounds in question (4) also valid in relation to the non-production of documents sought by a Select Committee of the Council?

The position is the same as for the Council.

38 This position might be qualified, but only if and to the extent to which a resolution of the Council narrowed the powers it delegates to a Committee – as it well may, if the proposed inquiries were expected to venture into sensitive areas, and the Council wished to make ground rules.

39 Generally, I have the following short comment about the position put by the learned Solicitor-General for Victoria in her letter to the Select Committee on Gaming Licensing, dated 11th April 2007. In my opinion, Ms Tate SC’s propositions and reasoning concerning the position of the opinions of the Law Officers are correct, if I may say so with respect. They are none the less powerful for being largely based on conventions.

40 On the other hand, I would reserve, until asked specifically, the question of the correctness of Ms Tate’s assertions concerning the confidentiality or secrecy provisions of the Gambling Regulation Act 2003 (Vic), which assertions are similar to those made by the learned Attorney-General in his letter dated 11th April 2007, in the letter from the Deputy Commissioner of the Victoria Police on behalf of the Chief Commissioner apparently sent the same day, and the letter from the Executive Commissioner of the Victorian Commission for Gambling Regulation dated 11th April 2007.

41 It is a matter of statutory interpretation whether such provisions extend so far as to prevent a House of Parliament from obtaining information it considers necessary for scrutiny of administration of laws such as those regulating gambling. In my opinion, the proper commencement is to doubt the application of such general provisions to restrict the specific and paramount rôle of a House of Parliament. However, no specific question has been raised with me concerning this important topic.

FIFTH FLOOR,  
ST JAMES’ HALL.  
4th June 2007 Bret Walker
APPENDIX L

Attorney-General’s Response to the Legal Advice

21 JUN 2007

Mr Gordon Rich-Phillips MLC
Chairman
Select Committee on Gaming Licensing
Parliament House
East Melbourne VIC 3002

Dear Mr Rich-Phillips

SELECT COMMITTEE ON GAMING LICENSING – PRODUCTION OF DOCUMENTS

I refer to your letter dated 8 June 2007, in which you provided a copy of the legal opinion from Bret Walker SC and asked that the Government reconsider its position about the production of certain documents summoned by the Committee. In my letter of 13 June 2007, I said that I was seeking advice on Mr Walker’s opinion and would provide a response as soon as possible after receiving and considering that advice.

I have now received advice from Peter Hanks QC and Graeme Hill of counsel. I repeat the views that I expressed in my letter to the Committee on 11 April 2007 about the summons for papers and documents issued to public servants.

Victorian position different from NSW position

Mr Walker relies for much of his opinion on decisions about the powers of the New South Wales Parliament. However, as I noted in my letter to the Committee on 11 April 2007, those decisions have limited relevance to Victoria. The powers and privileges of the New South Wales Parliament are based on “reasonable necessity”; but the powers and privileges of the Victorian Parliament are based on historical transfer. Under s 19 of the Constitution Act 1975 (Vic), the powers and privileges of the Victorian Parliament are fixed by reference to the powers and privileges of the United Kingdom House of Commons of the United Kingdom Parliament in 1855, subject to any later modification by a Victorian Act of Parliament.

I accept that the Legislative Council has a power to call for the production of documents, because the House of Commons had such a power in 1855. However, this power is not unlimited as the House of Commons’ power was subject to clearly established exceptions, and those exceptions now limit the power of the Legislative Council.
Executive privilege

The first exception to the House of Commons’ power to call for the production of documents was Crown or Executive privilege (now called public interest immunity). In 1855, Executive privilege allowed a Minister to object to the production of documents which recorded the deliberations of Ministers and their advisers on the formulation of Government policy or on issues still under consideration by the Government. The method by which the House of Commons sought documents from the Crown – by way of “address” and not by way of return or order – establishes that the House of Commons’ power was one to request, but not compel, production of documents over which the Crown claimed privilege.

In 1855, a responsible Minister’s claim of Executive privilege over documents was a sufficient reason for refusing to produce the documents to the House of Commons or its committees. If a Minister made a claim of Executive privilege, the House and its committees were required to respect that claim.

Section 19(1) of the Constitution Act makes that limit on the House of Commons’ power a limit on the current power of the Council to require production of documents. Accordingly, when Executive privilege is claimed, Ministers and officers of their departments must refuse to provide documents that are subject to the claim, and the Council (and its committees) cannot require production of those documents.

Cabinet documents

Documents protected by Executive privilege include documents that record or reveal Cabinet deliberations and decisions, because those documents contain information which the proper functioning of government requires be kept confidential.

Cabinet documents include documents that record or disclose Cabinet deliberations and decisions, and submissions to Cabinet. Disclosure of those submissions could undermine the principle of collective ministerial responsibility, which underlies responsible government.

Private information (including commercial-in-confidence)

The second exception to the power of the House of Commons to call for the production of documents in 1855 was its inability to call for documents relating to the affairs of private individuals or bodies that were not in receipt of public funds or special privileges or performing some public function.

Because the powers of the Legislative Council are defined by the House of Commons’ powers in 1855 (subject to any later statutory modification), the Council is also unable to call for documents relating to the affairs of private individuals or bodies, except where those individuals or bodies are receiving public funds or special privileges or performing some public function.

Legal professional privilege

A claim of Executive privilege (in modern terms, public interest immunity) can be made over legal advice provided to the Executive by its professional legal advisers. A claim of Executive privilege made on that basis is a complete answer to any demand by the Council for production of a document disclosing that advice.

Powers of Select Committee

These conclusions about the powers of the Legislative Council apply equally to any Committee established by the Council. The Council cannot give a Committee any greater power than the Council itself has; and, as I have already indicated, the Council’s power is defined by the power of the House of Commons in 1855 – subject to any statutory modification.
Gambling Regulation Act - confidentiality provisions

The Gambling Regulation Act 2003 (Vic) is a clear example of statutory modification of the power of the Legislative Council to require the production of documents (and of its power to require persons to appear and give evidence). The Gambling Regulation Act greatly restricts the ability of a “regulated person” to disclose “protected information”, including to a “court”. The Council’s Select Committee is a “court” for the purposes of the Act’s provision limiting disclosure to a court, because the Committee has power to require the production of documents or the answering of questions.

Under the Gambling Regulation Act, a “regulated person” includes the Victorian Commission for Gambling Regulation and its staff, a Commissioner, the Minister and relevant public servants and a person acting on behalf of the Commission or the Minister. “Protected information” in these provisions includes information with respect to the affairs of any person (including a corporation).

These provisions override the Select Committee’s power to compel the production of a document. These provisions abrogate any power, derived from parliamentary privilege, that the Select Committee would otherwise have. Although these provisions in the Gambling Regulation Act are subject to exceptions, none of those exceptions allow disclosure to the Select Committee. Instead, disclosure will only be authorised if, for example, the Minister certifies that it is necessary in the public interest for such a disclosure to be made.

The Select Committee is seeking to develop a method of operating that challenges long held legal principles, conventions and statutory provisions outlined above. I reaffirm that the Government is cooperating with the Committee to the full extent of the law, however, I will not allow the Committee to make demands for documents or claim powers that have no legal basis.

Yours sincerely

[Signature]

ROB HULLS MP
Attorney-General
APPENDIX M
Hawker Britton’s Response to the Legal Advice

26 June 2007

Richard Willis
Secretary to the Committee
Select Committee on Gaming Licensing
Legislative Council
Parliament House
EAST MELBOURNE VIC 3002

Via Email: richard.willis@parliament.vic.gov.au

Dear Sir,

RE: HAWKER BRITTON
SELECT COMMITTEE ON GAMING LICENSING

We refer to your letter of 8 June 2007 and to our subsequent correspondence.

We have noted the advice of Brett Walker SC and have considered the Sessional Order adopted on 14 March 2007.

It is our view that Mr. Walker’s advice and the Sessional Order say nothing relevant to the position of our clients who are strangers to the Parliament.

We also note the cases of Egan v Willis (1998) 195 CLR 424 and Egan v Chadwick (1999) 46 NSWLR 563, considered by Brett Walker SC, are limited in their findings to the position of members of the Executive (for example, what was said by Gaudron, Gummow and Hayne JJ in Egan v Willis at page 456). They are also cases concerned with a different constitutional framework than that which exists in Victoria.

We note you have advised, in your e-mail of 21 June 2007, that the Committee has requested that Brett Walker SC be asked to provide further advice on the issue of the statutory secrecy provisions under the Gambling Regulations Act 2003 (Vic). We look forward to receiving a copy of that advice, in accordance with the practice that has been adopted by the Committee of providing relevant legal advice to persons to whom Summons have been issued.
Yours faithfully,
WILLIAMS WINTER

John A. Howie
Special Counsel
jhowie@williamswinter.com
APPENDIX N
Tattersall’s Response to the Legal Advice

2 July 2007

Mr Gordon Rich-Phillips MLC
Chairman
Select Committee on Gaming Licensing
Legislative Council
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Mr Rich-Phillips,

SELECT COMMITTEE ON GAMING LICENSING
SUMMONS FOR PAPERS AND DOCUMENTS

I refer to your letter mistakenly dated 8 June 2007 received by me on 22 June 2007 enclosing the legal opinion of Mr Brett Walker SC.

I note that in the fifth paragraph of your letter you state that the opinion of Mr Walker supports the position that the Council has wide ranging general powers to call for papers and documents from the Executive. Tattersall's is not a part of the Executive.

As you are aware, Tattersall's is relying on “Lottery Licence Confidentiality” (as that term has been defined in my previous correspondence) as the reason for not providing documents to the Select Committee that relate to the Public Lottery Licensing Process.

Tattersall's interpretation of the confidentiality or secrecy provisions of the Gambling Regulation Act 2003 (Vic) when coupled with the express terms of the Invitation to Apply for a Public Lottery Licence is that Tattersall's is precluded from providing the Select Committee with documents relating to the Public Lottery Licensing process.

In paragraphs 40 and 41 of Mr Walker's opinion, he clearly states that he has not been asked to provide an opinion concerning the confidentiality or secrecy provisions of the Gambling Regulation Act 2003 (Vic) and the brief opinion expressed by Mr Walker in paragraph 41 on this matter is neither concluded nor supported. As a consequence, Tattersall's has not changed its position on this issue.

Yours faithfully,

Dick Melliwain
Chief Executive

TATTERSALL'S LIMITED
A.C.N. 108 616 040
Tattersall's House, 415 St Kilda Road, Melbourne, Victoria, 3004, Australia
Locked Bag 888, St Kilda Road Central, Melbourne, Victoria, 8008, Australia
Telephone 61-3-9537 7777, Fax 61-3-9537 7752
www.tattersall.com.au
EXTRACTS FROM THE PROCEEDINGS

The following extracts from the Minutes of the Proceedings of the Committee show Divisions which took place during the consideration of the draft Interim Report on 16 July 2007.

The Committee divided on the respective questions –

1. That paragraphs 1, 4, 8, 11, 13, 14, 15, 17, 22, 28, 32, 33, 34, 38, 39, 40, 41, 42, 43 and 44, as amended, stand part of the Report.


The result of the division detailed below:

Paragraph 1

1. On 14 February 2007 the Legislative Council adopted the following Resolution:

1.1 A select committee of seven members be appointed to inquire into and report on —

a. the conduct, processes and circumstances (including but not limited to the probity thereof) pertaining to post-2008 public lotteries licensing in Victoria pursuant to the Gambling Regulation Act 2003 (the Act) and any related matter;

b. the conduct, processes and circumstances (including but not limited to the probity thereof) pertaining to the extension of Tattersall’s public lotteries licence until 30 June 2008;

c. the conduct, processes and circumstances (including but not limited to the probity thereof) pertaining to post-2012 Electronic Gaming Machine (EGM) operator licensing in Victoria pursuant to the Act, and any related matter;

d. the adequacy or otherwise of the legislative and regulatory framework pertaining to the number, location, distribution and specification of EGMs in Victoria and any related matter;

e. the effectiveness or otherwise of current measures to minimise and address the incidence of problem gambling in Victoria, the merits of alternative measures and any related matter;

f. the financial position of the Community Support Fund (the Fund) described in the Act, including, but not limited to:

i. payments into the Fund under section 10.3.2 of the Act (and its predecessors);

ii. payments from the Fund under section 10.3.3 of the Act (and its predecessors); and

iii. the criteria, processes and methodology for the selection of projects funded by payments referred to in sub-paragraph (ii) above; and

iv. the community benefit statements prepared by those venues not required to contribute to the Fund;

g. any other associated matters dealing with gaming licensing issues.
1.2 The Committee will consist of two members from the government party nominated by the Leader of the Government, two members from the opposition nominated by the Leader of the Opposition, one member from The Nationals nominated by the Leader of The Nationals, one member from the Australian Greens nominated by the Australian Greens Whip and Mr. Peter Kavanagh, MLC from the Democratic Labor Party.

1.3 The members will be appointed by lodgement of the names with the President by the persons referred to in paragraph 1.2 no later than 4.00 p.m. on Friday, 16 February 2007.

1.4 The first meeting of the Committee must be held no later than 4.00 p.m. on Monday, 26 February 2007.

1.5 The Committee may proceed to the despatch of business notwithstanding that all members have not been appointed and notwithstanding any vacancy.

1.6 Four members of the Committee will constitute a quorum of the Committee.

1.7 The Chair of the Committee will be a non-government member and the Deputy Chair will be a government member.

1.8 The Committee will advertise its terms of reference and call for submissions and all such submissions received by the Committee will be treated as public documents unless the Committee otherwise orders.

1.9 The Committee may commission persons to investigate and report to the Committee on any aspects of its inquiry.

1.10 The Committee will present its final report to the Council no later than 28 February 2008.

1.11 The presentation of a report or interim report of the Committee will not be deemed to terminate the Committee’s appointment, powers or functions.

1.12 The foregoing provisions of this resolution, so far as they are inconsistent with the Standing Orders and Sessional Orders or practices of the Council will have effect notwithstanding anything contained in the Standing or Sessional Orders or practices of the Council.

Amendment moved by Mr M S Viney – That after paragraph 1.12 the following sub-paragraph be inserted: “The Government Members of the Legislative Council objected to the structure of the Committee on the basis that they believed the Committee did not proportionally reflect the structure of the Council itself. The Greens voted with the Liberal and National Parties and the DLP to defeat the Government proposal that their representation be increased to three members.”

Question – that the amended be agreed to – put.

The Committee divided

**Ayes 3**
Mr P D Kavanagh
Mr M P Pakula
Mr M S Viney

**Noes 3**
Mr G J Barber
Mr D K Drum
Mr M J Guy

There being an equality of votes, the Chairman gave his casting vote for the Noes.

Amendment negatived.
Paragraph 4
On 1 March 2007, the Committee resolved to give priority to clauses 1 (a) and (b) of its Terms of Reference (1.1 a & b above) to thereby enable the delivery of an interim report regarding those matters at which time the Committee shall determine the process for the consideration of the remainder of the subject Terms.

Amendment moved by Mr M S Viney – That after paragraph 4 the following sub-paragraph be inserted: “The Government Members objected to this proposal stating that parts 1 a & b should be delayed until after the tender process, because to do so prior to the completion of the tender, could put the entire tender at risk. This concern was subsequently supported in correspondence from the Probity Auditors overseeing the Lotteries Licence tender process who expressed concern that “... if breaches of security and confidentiality were to occur then the Lotteries Licence Process may be required to be terminated on the basis of the fundamental, and irretrievable, breach of probity.”. The Government Members concerns were supported by the DLP member Mr P D Kavanagh, but were overruled by the Greens, Liberal and National parties who resolved to investigate the Lotteries Licence process before the tender was complete.”

Question – that the amended be agreed to – put.

The Committee divided

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<td>Mr P D Kavanagh</td>
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There being an equality of votes, the Chairman gave his casting vote for the Noes.

Amendment negatived.

* * * *

Paragraph 8
On 13 March 2007, the Committee resolved to summons documents from a number of individuals, Government agencies and private organisations seeking documents that relate to the public lotteries licence process and gaming licence process.

Amendment moved by Mr M S Viney – That after paragraph 8 the following sub-paragraphs be inserted: “The Government Members objected to the use of a summons in the first instance. It has been long standing practise noted in both Erskine May’s ‘Parliamentary Practice’ and Odgers’ ‘Senate Practice’, that it is usual for Parliamentary Committees to request documents or invite attendance to give evidence in the first instance, and that a summons may be issued where these are consequently declined. The Green, Liberal, and National parties voted to issue summonses immediately, despite the objection of Government Members and the DLP.

Government Members particularly objected to the issue of a summons to the Solicitor-General for Victoria as unprecedented interference in the provision of free and frank advice to the executive and on the grounds of legal professional privilege.
Government Members supported by Mr P D Kavanagh [DLP] then sought a delay of one week to enable advice to be sought from the Victorian Government Solicitor. This proposal was defeated by the Green, Liberal, and National parties.

Question – that the amended be agreed to – put.

The Committee divided

**Ayes 3**
Mr P D Kavanagh
Mr M P Pakula
Mr M S Viney

**Noes 3**
Mr G J Barber
Mr D K Drum
Mr M J Guy

There being an equality of votes, the Chairman gave his casting vote for the Noes.

Amendment negatived.

* * * * *

**Paragraph 11**
The Attorney-General wrote to the Committee on 11 April 2007 advising that Members of the Legislative Assembly will not be complying with the summonses on the grounds that the Legislative Council has no power to compel such Members and documents in their possession. Further, the Attorney-General contests that the issuing of summonses to Members of the Legislative Assembly is a breach of the privileges of the Legislative Assembly and a breach of Legislative Council Standing Order 18.03. (see Appendix C)

Amendment moved by Mr M S Viney – That after paragraph 11 the following sub-paragraphs be inserted "Government Members had already raised concerns that:
1. the issue of summonses to members of the Legislative Assembly was a potential breach of the privilege of members of the Assembly;
2. the summons requiring all documents of other individuals tendering for or assessing the Lotteries Licence will place them in either breach of the Gambling Regulation Act 2003 [or other Acts of the Victorian Parliament] or of the summons, placing these persons in intolerable positions; and
3. summonses were requesting documents that were in breach of the centuries old tradition of nondisclosure of 'cabinet in confidence' principles.

These concerns were rejected by the Green, Liberal and National parties."

Question – that the amended be agreed to – put.

The Committee divided

**Ayes 3**
Mr P D Kavanagh
Mr M P Pakula
Mr M S Viney

**Noes 3**
Mr G J Barber
Mr D K Drum
Mr M J Guy

There being an equality of votes, the Chairman gave his casting vote for the Noes.

Amendment negatived.
Paragraph 13
The Attorney-General wrote to the Committee on 11 April 2007 advising he had informed the Solicitor-General for Victoria that the Government claimed Executive privilege with respect to all documents sought under summons by the Committee from the Solicitor-General for Victoria. (see Appendix E)

Amendment moved by Mr M S Viney – That after paragraph 13 the following sub-paragraph be inserted "This correspondence from the Attorney-General is consistent with the view expressed by the Government Members on the Committee."

Question – that the amended be agreed to – put.

The Committee divided

Ayes 3
Mr P D Kavanagh
Mr M P Pakula
Mr M S Viney

Noes 3
Mr G J Barber
Mr D K Drum
Mr M J Guy

There being an equality of votes, the Chairman gave his casting vote for the Noes.

Amendment negatived.

Paragraph 14
The advice obtained by the Committee from the Clerk of the Legislative Council as to the Council’s power to call for documents and papers does not support the limitations on those powers as claimed by the Attorney-General.

Amendment moved by Mr M S Viney – That paragraph 14 be omitted with the view of inserting in its place the following: “The grounds for non-compliance are valid in that they point to the fundamental problem for those summoned that to comply with the requirements of the Select Committee would place individuals involved in the Lotteries Licence Process [tenderers, assessors and probity advisors] in breach of the confidentiality requirements of the Gambling Regulation Act 2003 and other acts of the Victorian Parliament.

The Committee notes that the advice of the clerks based on the opinion of Mr Bret Walker SC is not consistent with the position of the Attorney-General based on advice to him from Mr Peter Hanks QC and Mr Graeme Hill.

The Select Committee therefore believes no action can be taken on the decision of summoned individuals not to comply on the grounds of their obligations under the Gambling Regulation Act 2003 given that the parliament is unable to resolve on the fact that it has passed laws restricting the release of information. This position conflicts with the view of the Green, Liberal and National parties and to some extent the DLP that they have power beyond the constitutional restrictions on its privilege
Question – that the amended be agreed to – put.

The Committee divided

**Ayes 2**
- Mr M P Pakula
- Mr M S Viney

**Noes 4**
- Mr G J Barber
- Mr D K Drum
- Mr M J Guy
- Mr P D Kavanagh

Amendment negatived.

Amendment moved by Mr M S Viney – That after paragraph 14 the following sub-paragraph be inserted: “On the 30 April 2007 the Committee resolved [against the objections of the Government Members] to reissue a summons to Intralot seeking a copy of their tender for the public lotteries license. This would have required them to breach the *Gambling Regulation Act 2003* and would have the effect of potentially destroying the process itself. Government Members expressed the view that such an action would seriously damage the reputation of Victoria as a place to do business and that the earlier leaks from the Select Committee meant that business could not have confidence in the ability of a political exercise such as this Select Committee to keep such commercially sensitive material confidential.

The Committee resolved on the 21st of May to send a similar second summons to Tattersall’s which was also objected to by the Government Members but ultimately determined to be issued by the non-Government Members.”

Question – that the amended be agreed to – put.

The Committee divided

**Ayes 2**
- Mr M P Pakula
- Mr M S Viney

**Noes 4**
- Mr G J Barber
- Mr D K Drum
- Mr M J Guy
- Mr P D Kavanagh

Amendment negatived.

* * * *

**Paragraph 15**
The Department of Justice, Department of Premier and Cabinet, Department of Treasury and Finance, Victorian Commission for Gambling Regulation, and Chief Commissioner of Victoria Police, have all replied to their respective summonses refusing to provide certain documents on the grounds referred to in paragraph 12 above.
Amendment moved by Mr M S Viney – That after paragraph 15 the following sub-paragraph be inserted: “The position of the Attorney-General was consistent with the previously stated position of Government Members on breaches of the Gambling Regulation Act 2003 and other Acts, and the attempt to breach cabinet in confidence principles, a position rejected by the non-Government Members.

Question – that the amended be agreed to – put.

The Committee divided

Ayes 2  Noes 4
Mr M P Pakula  Mr G J Barber
Mr M S Viney  Mr D K Drum
            Mr M J Guy
            Mr P D Kavanagh

Amendment negatived.

*               *               *              *

Paragraph 17
Consistent with paragraph 13 above, the Solicitor-General for Victoria, Ms Pamela Tate SC, wrote to the Committee on 11 April 2007 seeking to be excused from compliance with the summons from the Committee. (see Appendix F)

Amendment moved by Mr M S Viney – That after paragraph 17 the following sub-paragraphs be inserted: “In her response Ms Tate SC states in part:

‘To my knowledge no Victorian Solicitor-General or any Solicitor-General in any other Australian jurisdiction has ever received a summons from a Parliamentary Select Committee. Indeed, to my knowledge, no Solicitor-General in the jurisdictions of England & Wales, Ireland, Canada or New Zealand has ever received a summons from a Parliamentary Select Committee.’

Ms Tate goes on to note the single instance where a Solicitor-General received a summons was that of Mr Byers (Commonwealth Solicitor-General) in 1975 who received a summons from the Senate. In the first instance Mr Byers wrote to the President of the Senate stating that he would object to answering any questions. When he appeared before the Senate Committee he continued to refuse to answer questions and was excused. [i.e. the Senate did not wish to pursue its powers].”

Question – that the amended be agreed to – put.

The Committee divided

Ayes 4  Noes 2
Mr D K Drum  Mr G J Barber
Mr P D Kavanagh  Mr M J Guy
Mr M P Pakula
Mr M S Viney
Amendment agreed to.

* * * * *

Paragraph 22
The Committee reports to the Legislative Council that while a number of documents have been produced by Government departments, Tattersall’s Limited and Intralot, key documents relevant to the lotteries licence process have been withheld. The extent of refusal to produce documents is greatly inhibiting the Committee from fulfilling its requirement to report on parts 1 (a) & (b) of its Terms of Reference.

Amendment moved by Mr M S Viney – That the final sentence in Paragraph 22 be omitted with the view of inserting in its place the following: “The grounds for withholding these documents are based on sound principles and with considerable legal authority. These include executive privilege, cabinet in confidence, private information, legal professional privilege, and restrictions on the provision of information required of designated individuals in the Gambling Regulation Act 2003.

Question – that the amended be agreed to – put.

The Committee divided

Ayes 2
Mr M P Pakula
Mr M S Viney

Noes 4
Mr G J Barber
Mr D K Drum
Mr M J Guy
Mr P D Kavanagh

Amendment negatived.

* * * * *

Paragraph 28
The legal advice can be summarised as follows:

a. The capacity of the Legislative Council (and its Committees) to scrutinise the workings of government, and particularly those of the Executive, are beyond serious question.

b. The Council has a general power to order papers. There is no precedent for a successful claim on behalf of the Executive to resist all and any orders for papers.

c. Executive privilege and public interest immunity (as distinct from Cabinet documents) are not sufficient claims for non-production of documents. Where a document is not to be regarded as a Cabinet document, there should be no public interest reason to keep it from the people’s representatives, the legislators, in the Council.

d. Commercial-in-confidence is also not a valid reason for non-production of documents. It is for the Council to determine, in its assessment of the public interest, how secrecy of this kind should be observed.
e. Broadly, legal professional privilege is not a sufficient claim for non-production of documents. It is for the Council to determine what of any delicacy should apply when accessing legal advice.

f. Other than Members and Officers of the Assembly, Select Committees of the Legislative Council possess an unfettered right to compel the attendance of all other persons, including Ministerial advisers to give evidence.

g. There is no convention, practice or Standing Order which enables the Council or a Select Committee to compel the production of documents by a Member of the Legislative Assembly.

h. The claim put forward by the Solicitor-General for Victoria that particular professional legal privilege prevents her from producing documents sought by summons, is supported in Mr Walker’s opinion.

i. Mr Walker reserved, until asked specifically, the question of the validity of non-production of papers on the grounds of statutory secrecy provisions of the Gambling Regulation Act 2003.

Amendment moved by Mr M S Viney – That after paragraph 28 (i) the following sub-paragraph be inserted: “Government Members raised concerns that the Clerk had sought an opinion from the barrister that presented one side of the argument in the Egan v Willis case of the NSW Supreme Court. They argued that this decision almost guaranteed the production of an opinion that would support the Legislative Council’s new sessional orders relating to the production of documents. This view was rejected by the non-Government Members who had combined to create the new sessional orders in the first place.”

Question – that the amended be agreed to – put.

The Committee divided

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Amendment negatived.

Paragraph 32
On 21 June 2007, the Attorney-General responded to the Committee’s request that the Government reconsider its position with respect to the production of documents in light of the Walker opinion. The Attorney-General advised that the Government had obtained further legal advice, and maintained its position as set out in the correspondence of 11 April 2007. A copy of the Attorney-General’s letter is attached in Appendix L.

Amendment moved by Mr M S Viney – That in paragraph 32 after the words ‘... obtained further legal advice ….’ the following be inserted: “from Mr Peter Hanks QC and Mr Graeme Hill.”
Further, in paragraph 32 after the words “...April 2007.” the following be inserted “This advice has led the Attorney-General to submit:

- New South Wales is of only limited relevance to Victoria which has a different constitutional basis including ‘historical transfer of the privileges of the House of Commons in 1855’;
- established historical precedent of Executive Privilege;
- restrictions on the ability of the Legislative Council to seek documents relating to the affairs of private individuals (including commercial in confidence) except where they are in receipt of public funds or special privileges in performing public functions;
- legal professional privilege; and
- the requirements of individuals under the Gambling Regulation Act 2003 not to disclose protected information.”

Question – that the amended be agreed to – put.

Ayes 4  Noes 2
Mr G J Barber  Mr D K Drum
Mr P D Kavanagh  Mr M J Guy
Mr M P Pakula
Mr M S Viney

Amendment agreed to.

Paragraph 33
On 26 June 2007, Williams Winter Solicitors, acting for Hawker Britton, responded to the Committee’s letter enclosing the Walker opinion, advising that they did not regard it as relevant to their client. Accordingly, their clients maintain their refusal to comply with the summons for papers and documents.

Amendment moved by Mr M S Viney – That the last sentence of paragraph 33 be omitted with the view of inserting in its place the following: “In their correspondence they also argue that Mr Walker’s advice referred principally to the relationship between the Legislative Council and the Executive [Egan v Willis and Egan v Chadwick] and as such is not relevant to ‘strangers to the parliament’. Further they argued that the Victorian situation is different from that in NSW given the constitutional restrictions in Victoria. A copy of their correspondence is attached as Appendix M.”

Question – that the amended be agreed to – put.

The Committee divided

Ayes 5  Noes 1
Mr G J Barber  Mr M J Guy
Mr D K Drum
Mr P D Kavanagh
Mr M P Pakula
Mr M S Viney

Amendment agreed to.
Paragraph 34
On 2 July 2007, Tattersall’s responded to the Committee advising that its decision not to provide certain documents on the basis of ‘ Lottery Licence Confidentiality’ had not changed.

Amendment moved by Mr M S Viney – That after paragraph 34 the following sub-paragraph be inserted: “In their response Tattersall’s assert that they have complied with the summons to the full extent of their obligations. Further they express resentment at the Select Committee’s implied suggestion that they have not done so by issuing a subsequent summons. A copy of their correspondence is attached as Appendix N.”

Question – that the amended be agreed to – put.

The Committee divided

Ayes 5
Mr G J Barber
Mr D K Drum
Mr P D Kavanagh
Mr M P Pakula
Mr M S Viney

Noes 1
Mr M J Guy

Amendment agreed to.

Paragraph 38
The resolution referred to in paragraph 37 was made in light of the central role the nominated Members of the Legislative Assembly either have or had in the lotteries licensing process.

Amendment moved by Mr M S Viney – That paragraph 38 be omitted from the report.

Question – that the amended be agreed to – put.

The Committee divided

Ayes 2
Mr M P Pakula
Mr M S Viney

Noes 4
Mr G J Barber
Mr D K Drum
Mr M J Guy
Mr P D Kavanagh

Amendment negatived.
Paragraphs 39 to 44
The Committee is concerned at the unilateral intervention of the Attorney-General in applying a wide ranging claim of Executive privilege with respect to documents the Committee is seeking from Government agencies.

The advice received by the Committee from the Clerk of the Legislative Council, and legal opinion received by the Council from Mr Bret Walker SC, does not endorse the Government's wide ranging claim of Executive privilege.

The Committee believes that the Government’s obstruction of the Committee’s Inquiry by withholding key documents, and by failing to produce even uncontested documents in a timely manner represents direct Government interference in the affairs of the Legislative Council.

The Committee is also concerned at the refusal of Tattersall’s Limited, Intralot and Hawker Britton to fully comply with their respective summonses. These three parties are central to the Committee’s Inquiry and their refusal to comply undermines the Committee's ability to discharge its brief.

Certain individuals have either disputed the Committee's power to call for documents and papers, or claimed it is a narrowly defined power. The lack of an established judicial determination of this question in the State of Victoria has limited the capacity of the Committee to seek compliance with its summonses.

The Committee therefore formally reports to the Legislative Council its dissatisfaction at these matters and seeks direction from the House on how the Committee might now fully discharge the responsibilities conferred on it under the Terms of Reference.

Amendment moved by Mr M S Viney – That paragraphs 39 to 44, inclusive, be omitted with the view of inserting in its place the following:

“Delays in the provision of information and the placement of conditions on the release of information are a reflection of the complex issues generated by the serving of summonses (and subpoenas). Organisations and individuals have been compelled to seek legal advice in some instances, and normal public service processes necessarily mean that documents could not be provided according to the Committee’s original timetable.

The failure to provide certain documents classified commercial in confidence, legal professional privilege, falls under Executive privilege and where the Gambling Regulation Act 2003 would be broken by individuals, corporations or the Executive are a reasonable response to the Committee. Until the powers of the Select Committee can be determined then the Committee has no other option than to accept these responses.

The provision of certain documents subject to summonses would, if provided, put the Lotteries Licence Process at great risk. Indeed, it appears as though the Committee is attempting to compel individuals and organisations to break the law. This would have serious consequences for the business reputation of Victoria. The Committee should be required by the Council to respect the tender process and its probity requirements at all times.
Therefore the Committee reports that it is not able to pursue parts 1 (a) & (b) of the terms of reference until the Lotteries Licence Process is complete and that whilst some documents have been withheld from the Committee, those individuals and organisations withholding them have done so on sound legal grounds, even though this may be in conflict with the advice presented to the Legislative Council.

Further the Committee believe that it would place private individuals and corporations in an extremely difficult position if the Council was to take any action designed to enforce the production of documents when the legal authority of the Council to do so is unclear.

Therefore the Select Committee advises that it will proceed with 1 (c) to (f) [inclusive] of the terms of reference relating to Electronic Gaming Machines and Problem Gambling, thereby enabling the Government to properly complete the Lotteries Licence Process before completing its investigations.

Question – that the amended be agreed to – put.

The Committee divided

Ayes 2  
Mr M P Pakula
Mr M S Viney

Noes 4  
Mr G J Barber
Mr D K Drum
Mr M J Guy
Mr P D Kavanagh

Amendment negatived.

Paragraph 44
The Committee therefore formally reports to the Legislative Council its dissatisfaction at these matters and seeks direction from the House on how the Committee might now fully discharge the responsibilities conferred on it under the Terms of Reference.

Amendment moved by Mr M S Viney – That paragraph 44 be omitted with the view of inserting in its place the following: "The Select Committee advises that it will consider proceeding with 1 (c) to (f) in lieu of 1 (a) to (b) of the terms of reference relating to Electronic Gaming Machines and Problem Gambling, thereby enabling the Government to properly complete the Lotteries Licence Process before completing the Select Committee's investigations."

Question – that the amended be agreed to – put.

The Committee divided

Ayes 3  
Mr P D Kavanagh
Mr M P Pakula
Mr M S Viney

Noes 3  
Mr G J Barber
Mr D K Drum
Mr M J Guy

There being an equality of votes, the Chairman gave his casting vote for the Noes.

Amendment negatived.
Adoption of the Report
The Chairman put the question – That the Draft First Interim Report, together with Appendices, be adopted as the First Interim Report of the Committee.

The Committee divided

Ayes 4
Mr G J Barber
Mr D K Drum
Mr M J Guy
Mr P D Kavanagh

Noes 2
Mr M P Pakula
Mr M S Viney

Question agreed to.
MINORITY REPORT

Background

Non-Government members from the Liberal, National and Green Parties said in the Legislative Council during the debate establishing the Select Committee on Gaming Licences that the inquiry was not a political witch hunt. They argued that it was about ensuring there is a high standard of probity. Yet the processes followed by the Committee so far do not reflect this position.

In our view, the standard of probity required in selecting the right corporation to run gaming and lotteries in Victoria must include respect for the process on the part of all involved; the executive arm of Government, the public service, the tenderers, those assessing their bids and anyone reviewing or overseeing the process itself. This must include Members of Parliament no matter what powers of review and investigation they think they may or may not have.

Proper Principles of Review

If we take the non-Government Members at their word and the concerns that they raised about the tender process in the parliamentary debate, then the following principles should be adhered to by the committee and the Legislative Council in any oversight of the Lotteries Licence Process:

1. Respect for the tender process and the independent probity oversight;
2. Respect for the laws and the constitution of Victoria;
3. Respect for the concerns of business in maintaining their competitive positions and for the privacy of individuals and organisations;
4. Respect for the precedents and the practices of Select Committees and the Parliament of Victoria.

In our view, when adhering to these principles, the committee and Legislative Council must acknowledge a number of points;

- that the Government has an obligation to protect the probity of the processes;
- that the Government has an obligation to protect Cabinet processes,
- that the Parliament itself should particularly respect Cabinet confidentiality conventions;
- that both business and Government can expect Parliament to protect the privacy of competitive processes, and
- That public servants and ministerial advisors can expect to give independent advice without fear or favour and the confidentiality of that advice is respected.

It follows then that the Committee should not take any action to put the Lotteries Licence Process at risk, to undermine the competitive nature of the bids or to expose the management of the probity process to risk.
Within this framework the Government Members on the Committee also expect the Government to demonstrate to the Committee that it has adhered to these standards of probity.

No evidence has been presented to the Committee so far that would indicate the Government has not adhered to these principles.

The actions of a majority of Members of the Committee to this point has led us to conclude that these principles are not in fact respected by the Committee itself.

**Confidential Tendering Principles**

Since its inception it has become increasingly clear that the Liberals, Nationals and the Greens Members are more intent on playing partisan politics than dealing with the issue of probity in the awarding of gaming licences in Victoria.

To date, after submission of thousands of pages of information to the Committee, there is no evidence of improper processes that would warrant in any way the overriding of the proper principles set out above.

It is our view that if the Committee were to receive details about the tender before its completion, this would render the tender effectively invalid as the *Gambling Regulation Act 2003*, passed by the entire Parliament, places strict confidentiality requirements on all persons with access to any part of the tenders or the process.

In his speech establishing the select committee, Mr Philip Davis said that ‘if you see a crime being committed, do you wait …… before you intervene’. With all the information having been made available in relation to a comprehensive probity oversight for the lotteries licence tender, we have seen no basis for taking the extraordinary step of intervening in this matter prior to the completion of the tender process. The checks and balances put in place put beyond any doubt that there has been no external inappropriate influences. In short, there is no crime.

Indeed whilst not in a position to publicly report on the specific evidence, there is documentation showing that no deals, favours or benefits were or have ever been offered to any bidder. In our view this gives us even more cause to be concerned that an investigation that could damage the tender process itself is unjustified. Indeed if this were to occur the potential damage to the capacity for the state of Victoria to do business is very real.

**Partisan Politics**

Rather than seek an independent review, Mr Davis and the Liberal Party have combined with the Nationals and the Greens to set up a political process of partisan politicians undertaking an investigation of their political opponents.

Government Members on the Select Committee believe that the processes of the Committee demonstrate the highly political nature of its investigations. There has been a consistent alliance of the Greens, the Liberals and the Nationals on the Committee. In 17 deliberative votes on the Select Committee, this alliance has voted as a block on almost all occasions.
Conclusion

The Government Members therefore seek the assistance of the whole Legislative Council to enforce the principles of probity on the Select Committee it has established.

We recommend that the Legislative Council instruct the Select Committee to defer all investigations into the Lotteries Licence Process [parts 1 (a) & (b) of the terms of reference] until the completion of that process. We believe the Committee has plenty of other aspects of the reference to study, in particular the issues associated with problem gaming.

We further recommend that the Legislative Council request the President to write to the Attorney General/Minister asking for his advice as to what categories of documents the Government will release to the Select Committee after the tender process has concluded and seeking his speedy co-operation with the due deliberations of the Committee.

Matt Viney MP
Deputy Chair

Martin Pakula MP