

**Orders for papers in the Legislative Council of New South Wales:
Developments and Challenges**

Paper by

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Introduction

It has been said of the contemporary position in Australia that, while the “primary role of Parliaments is to pass laws, it also has important functions to question and criticise government on behalf of the people” and that “to secure accountability of government activity is the very essence of responsible government”.¹

This paper commences with a brief summary of the Egan cases² and provides various statistics on the number of orders for the production of documents made by the Legislative Council of New South Wales since 1999.

While orders for papers have since become a well-established mechanism for the House’s superintendence of the Executive government this does not mean that the debate regarding the extent of the Council’s power to order the production of state papers has ended. The paper outlines means by which the Government continues to seek to resist the power of the House by:

- opposing motions in relation to orders in the House,
- making extensive use of claims of privilege,
- taking a broad approach to the definition of Cabinet documents,
- denying the power of the Council to order the compilation of a return, and
- asserting that parliamentary committees do not have the power to order the production of papers.

If the value of the Council’s power to order papers is to be fully realised, the non-government members of the House will need to use the procedures available to them more strategically to challenge the Executive and hold them publicly accountable for the decisions they make. Three ways in which members could better use the procedures available are suggested.

The paper also comments on some of the administrative challenges in managing the process.

Background – the Egan cases

Between 1856 and 1933 the practice of ordering the production of state papers was well established in the Legislative Council. During that time the Council passed 217 orders for papers. Of these, 171 were complied with, 45 were not, and one order was rescinded. For reasons unknown, no orders for papers were made between 1933 and 1990. In October 1990, an order for the production of a list of unproclaimed legislation was carried on division, however no return was received.

In the late 1990s, the Government sought to resist a number of orders for papers on the ground of an asserted lack of power on the part of the Council. In response, the Council asserted that in the absence of legislated powers, privileges and immunities of the Parliament, it possessed an

¹ *Egan v Willis* [1998] 148 ALR 527, per Gaudron, Gummow, Hayne JJ, para 42 quoting Queensland, Electoral and Administrative Review Commission, *Report on Review of Parliamentary Committees* (October 1992), vol 1, para 2.23

² *Egan v Willis* (1996) 40 NSWLR 650; *Egan v Willis* [1998] HCA 71; *Egan v Chadwick & Ors* [1999] NSWCA 176;

inherent, common law power to make the orders for the production of state papers, and to take action to enforce them.

On 2 May 1996 the House adjudged the Treasurer, Michael Egan, guilty of contempt and suspended him from the sitting. Mr Egan refused to leave and the Black Rod was directed to remove him from the Chamber. Mr Egan commenced legal proceedings in the Supreme Court against the President (Willis) and the Usher of the Black Rod (Cahill) challenging the validity of the suspension and his removal from the precincts of the Parliament.

In November 1996 the NSW Court of Appeal dismissed the case.³ Mr Egan appealed to the High Court which dismissed the appeal⁴, and upheld the validity of the Legislative Council's power to order the production of state papers and the suspension of the Minister for non-compliance with the order.

The consequence of these cases was confirmation that the Legislative Council possesses such implied powers as are reasonably necessary for the existence of the House and the proper exercise of its functions; that the functions of the Legislative Council are the making of laws and the review of Executive action; and that the power to call for state papers is reasonably necessary for the performance of these functions. The High Court expressly left open the question of whether the power extended to documents for which claims of privilege or immunity could be made at common law.

In 1998, before the High Court had handed down its decision, the House called for further papers and included in its resolution that documents which were subject to a claim of privilege, except Cabinet documents, would be made available only to members of the Council and in the event of a dispute, an arbitration process would commence. The Government again refused to table documents required by the House, claiming they were subject to legal professional privilege and public interest immunity. The Treasurer was again adjudged guilty of contempt and suspended from the House for neglecting to table the documents. Mr Egan again challenged the power of the House to suspend him.

In *Egan v Chadwick*⁵, the Court of Appeal held that the Council's power to require production of documents, upheld in *Egan v Willis*, extended to documents for which claims of legal professional privilege and public interest immunity could be made at common law. However, by 2-1 (Priestly dissented) the Court held the Council could not compel the production of Cabinet documents.

Since that time, provision has been made for the arbitration of disputes as to the validity of claims of privilege, initially in resolutions of the House and subsequently in a standing order adopted in May 2004. Under standing order 52, a member may, by communication in writing to the Clerk, dispute the validity of a claim of privilege. The President appoints an independent legal arbiter, who must be a retired Supreme Court judge, a Senior Counsel or a Queen's Counsel. The Clerk is authorised to release the documents to the arbiter for evaluation and report. The arbiters report is lodged with the Clerk, tabled and made available to members.

Where a claim of privilege is undisputed, or upheld by an independent legal arbiter, the documents remain available to members of the Legislative Council only.

Increase in orders since 1999

³ *Egan v Willis* (1996) 40 NSWLR 650

⁴ *Egan v Willis* (1998) 158 ALR 527; (1998) 73 ALRJ 75; [1998] HCA 71

⁵ *Egan v Chadwick & Ors* [1999] NSWCA 176

Since the Egan litigation in 1999⁶ the non-government majority in the New South Wales Legislative Council has agreed to an increasing number of orders for papers each year. In the three years following 1999 there were 30 orders for papers made. Fifteen orders were agreed to in 2003, rising to 25 in 2004, 41 in 2005 and, to date in 2006 there have been 24. Overall 146 orders have been agreed to since 1999.

Documents sought by orders of the House have ranged from topics such as major infrastructure projects, such as motorways, bridges and a desalination plant to an order for a single document. Since 1999, the most common orders relate to major infrastructure projects (27), particularly motorways (18); smaller land and property developments have constituted 14 of the orders. Environment and conservation have been the subject of 13 orders, utilities 12, and hospitals and health services, seven. Nine resolutions passed by the House have related to justice and corrective services, one being an address to the Governor requesting documents regarding the administration of justice⁷.

In 2002 an independent member initiated 47% of the orders and in 2003 34% of orders. Members of the Liberal/Nationals coalition opposition have been responsible for the majority of orders over time. In recent years the Greens have become increasingly active in the process, accounting for 37% of all orders made in 2005 and 50% of the orders so far in 2006, a significant proportion given there are only three Greens members in the non-government majority of 24.

Although the House has agreed to an increasing number of orders, the extent of the Council's power to order the production of state papers is still a matter of debate. While no longer arguing that the Council does not possess the power to order documents, on occasion the Government has resisted orders through various other means.

Opposing motions for orders in the House

In some cases the Government has sought to resist orders of the House by arguing that the orders should not be made in the public interest.

During debate on a call for papers on the proposal to construct a desalination plant at Kurnell, the Government argued that, as the tender process was underway, the production of some of the papers being requested might prejudice that process. The Government was unsuccessful in amending the motion, but in the subsequent return claimed privilege over a sizeable number of documents. In the ensuing dispute over the claim of privilege on many of the documents, the arbiter upheld the claim of privilege on the names, addresses and email addresses of persons who had written to Ministers concerning environmental aspects of the proposed desalination plant, as well as the claim of legal professional privilege on documents between Sydney Water and its lawyers relating to certain proposed drafts of agreements and advices regarding how agreements might be structured. However, the claim of public interest immunity and legal professional privilege on all other documents was denied by the arbiter. Sometime later the Premier announced that the Government did not intend to proceed with the desalination plant.

The Government made similar claims with regard to an order for papers relating to the proposed sale of Snowy Hydro Limited. The Government argued that there was the potential risk to the float of Snowy Hydro Limited should certain information be made public prior to the prospectus being released. The Government further argued that it was not intending to deny access to documents that would be captured by the order for papers, but wished to prevent the

⁶ *Egan v Chadwick & Ors* [1999] NSWCA 176

⁷ Made under Standing Order 53

Government being compromised in its obligations under the Corporations Act and the rules of the Australian Stock Exchange.

Claims of privilege

In complying with orders for the production of documents, the Government has made extensive use of claiming of legal professional privilege and public interest immunity over documents.

The Legislative Council has, however, taken a cautious approach to the publication of privileged documents.⁸ In all cases where an arbiter has upheld the claim of privilege, the House has accepted the recommendation of the arbiter and no further action has been taken. This is significant considering that members are severely restricted in the use of information contained in privileged documents, and in some cases members may not have the legal or financial skills to interpret the information.⁹

The only occasion upon which the House has challenged an arbiter's evaluation, was to order that documents upon which a claim of privilege was upheld in 2003, be reassessed. The validity of the claim of privilege on documents returned to order in 2003 was disputed and subsequently upheld by the independent legal arbiter, except in relation to a small number of documents. In 2005, the House resolved that, in light of the public concern, all the documents be re-assessed. Due to their sizeable number and complexity, the documents were referred to the arbiter who had assessed the documents in 2003. In his report on the reassessment of the documents the arbiter stated that a major consideration in favour of the public interest in disclosure of the documents was that the continued non-disclosure had the potential to diminish public confidence in the Road and Traffic Authority's handling of the project, and in the RTA itself. The arbiter denied privilege on all the documents.

The public interest in confidentiality may well change over time and subsequently be outweighed by the public interest in disclosure. It will be up to the House to determine whether there are other privileged documents which ultimately should be reassessed by an independent legal arbiter.

Cabinet documents

There have also been instances where the Government has declined to provide documents to the House claiming that they are Cabinet documents, and therefore exempt from the power of the House to order papers.

In his most recent Annual Report, the NSW Ombudsman noted that there had been a marked increase during 2004-05 in agencies claiming 'cabinet confidentiality' as a reason for refusing access to documents and that some agencies may be 'inappropriately' classifying documents in this way in order to avoid releasing them to the public.¹⁰

The Government has taken a broad definition of Cabinet documents in relation to orders of the House. In October 2004 an order was passed in relation to a Government commissioned report into juvenile justice. The member initiated the order to assist General Purpose Standing Committee No. 3 in its inquiry into the Kariong Juvenile Justice Centre. On 9 November 2004 the Clerk tabled documents together with a letter from the Director General of the Premier's

⁸ *Egan v Chadwick & Ors* [1999] NSWCA 176, para 140 held that, in exercising its power in respect of documents, the Legislative Council has a duty analogous to that of a court of balancing the public interest considerations, and a duty to prevent publication beyond itself of documents the disclosure of which will be contrary to the public interest

⁹ Clune D & Griffith G, *Decision & Deliberation: The Parliament of New South Wales 1856-2003* The Federation Press, 2006, p 655

¹⁰ NSW Ombudsman, *Annual Report, 2004-05*, pp129

Department indicating that, although the report required by the order had now been publicly released, it did not alter the fact that it formed part of the Cabinet process and was, therefore, exempt from the order.

In an attempt to arrest the Government's broad claims of Cabinet confidentiality, on 1 December 2005, the House agreed to a second order for papers relating to the Grey Nurse shark population with the proviso that if any document falling within the scope of the order was not produced on the grounds that it formed part of a Cabinet minute, or was held for consideration as part of Cabinet deliberations, a detailed index be prepared stating the reasons why the production of each document would "disclose the deliberations of Cabinet" as discussed by the Court of Appeal in *Egan v Chadwick*.¹¹ However, in a letter accompanying the return of documents, the Director General of the Premier's Department stated an index would not be provided as, based on Crown Solicitor's advice, the Government did not concede that the Council had the power to impose such a requirement.¹²

Power to order the compilation of a return

The order for papers regarding the Grey Nurse shark raised another matter of conflict between the Council and the Executive, that is, the Government's view that the House does not have the power to make orders for the producing of a return showing required information. Interestingly, there are numerous examples since 1856 where such orders have been made and complied with.¹³ More recently the Government complied with an order of the House that a return be provided showing various statistics regarding the New South Wales Companion Animals Register.¹⁴ The Government also complies with the standing orders regulating the power to order papers, which requires that an index list of the documents be prepared, although on one occasion the poor quality of an index was considered by the House to constitute non-compliance with the standing order,¹⁵ as well as the standing order requiring the Government to table a list of unproclaimed legislation. Obviously the Government's position in relation to the power of the House to order the creation of a document is somewhat inconsistent, at least in practice.

Powers of parliamentary committees to order the production of documents

While acknowledging the power of the House to call for documents, the Government also continues to argue that the power is not delegable to parliamentary committees, and in the absence of legislation conferring the powers on committees to require the production of documents, does not concede the power, notwithstanding instances when the Government has provided documents to committees.¹⁶

During the 2004 inquiry into the Designer Outlet Centre, in Sydney's Western suburbs, the Committee resolved to order the production of documents from relevant government agencies on two occasions. On the first occasion, the Committee ordered the production of certain documents from the Department of Infrastructure, Planning and Natural Resources (DIPNR).¹⁷ DIPNR initially declined to provide the documents, based in part, on legal advice from the Crown Solicitor casting doubt on the Committee's powers to call for documents. The

¹¹ at [1999] NSWCA 176; Legislative Council of New South Wales, *Minutes of Proceedings*, 1 December 2005, item 22.

¹² Correspondence from Mr Col Gellatly, director General, Premier's Department to Mr John Evans, Clerk of the Parliaments, dated 15 December 2005

¹³ see for instance in 1857 the House ordered that a list of members' absences for more than 21 days without leave be tabled.

¹⁴ Legislative Council of New South Wales, *Minutes of Proceedings*, No. 131, 14 November 2001, item 5

¹⁵ Legislative Council of New South Wales, *Minutes of Proceedings* No. 65, 31 August 2004, items 13 and 14.

¹⁶ General Purpose Standing Committee No. 3, Minutes No. 40 Friday, 15 June 2001 Room 1153, Level 11, Parliament House, Macquarie Street, Sydney at 1.00pm

¹⁷ Minutes No. 34, 28 July 2004, and correspondence from Director to Ms Jennifer Westacott, Director General, DIPNR, 28 July 2004

Committee repeated its request for DIPNR to provide the documents.¹⁸ Although DIPNR maintained that the Committee did not have the power to call for documents, the Department voluntarily provided the documents requested. A claim of legal professional privilege was made over several of these documents. On the second occasion, the Committee also resolved to order the production of certain documents held by the Premier's Office or the Premier's Department.¹⁹ The Premier's Department declined to provide the documents, based on the same legal advice from the Crown Solicitor as that provided previously by DIPNR.²⁰

Challenging Government resistance to orders of the House

Given the reluctance of the Executive to provide a growing number of documents in relation to its administration, and the downward trend in compliance with FOI applications,²¹ it is becoming increasingly important for members of the non-government controlled Upper House to effectively and strategically use the procedures available to them to challenge the Executive and hold them publicly accountable for the decisions they make.

Three ways in which members could better use the procedures available are suggested.

Pursuing government resistance

The value of the power of the House to order the production of papers relies on its members challenging any asserted lack of power made by the Government. By declining to pursue such matters, the House puts at risk the integrity of the practice. For example, to date, the House has declined to take any action in response to assertions made by the Government in relation to an order for papers regarding Grey Nurse shark population and that the House lacks the power to order the production of a return showing required information.

Targeting orders

An examination of recent orders for papers would suggest that non-government members could better target orders for papers. Rather than seeking specific documents, proposals for orders for papers could be seen as trawling exercises, just one step in a process of information gathering. Targeted orders will ensure the House has access to information necessary to perform its function of scrutinising Government action.

However, the power of the House to order documents should be exercised with caution. Members should ensure that orders are not unnecessarily burdensome on the Government nor capture documents not required. For instance, orders should be directed to relevant departments only, exclude any documents not required, and be limited to specific periods of time. The Clerks regularly assist members in drafting notices of motions for orders for papers and, in some cases, provide advice as to more appropriate courses of action.

Scrutinising documents received

The value of orders for papers is also dependent, in part, on the diligence of members, the media and others in the scrutiny of documents received. While many returns are scrutinised by members and their staff, community groups, lobby groups, and the media, anecdotal evidence suggests that some returns receive a cursory inspection.

¹⁸ Correspondence from Director to Ms Jennifer Westacott, Director General, DIPNR, 12 August 2004

¹⁹ Minutes No. 40, 25 August 2004, and correspondence from Director to Dr Col Gellatly, Director General, Premier's Department, 26 August 2004

²⁰ Correspondence from Dr Col Gellatly, Director General, Premier's Department, to Director, dated 7 September 2004, and correspondence from Marcus Ray, A/Director Legal Services, DIPNR, to Deputy Clerk, Legislative Council, 11 August 2004

²¹ NSW Ombudsman, *Annual Report, 2004-05*, pp126

Access to documents previously unavailable does provide members with a valuable tool with which to influence government policy,²² and scrutinise government actions.²³ However, the procedure must be seen to be a necessary tool if it is not to be seen as vexatious.

Challenges in the administration of the practice

One of the challenges of the exercise of the power of the House to order papers is administration of the practice. There have been difficulties in offering space for members, their staff and interest groups to view the public documents, particularly when several returns have been received simultaneously. On one occasion, a number of people viewed documents regarding the Cross City Tunnel, which were left out of numerical order and Council staff were required to re-sort over 10,000 documents. The Council has also sought to provide better access to documents. In anticipation of high levels of media and public interest in documents on the Cross City Tunnel, over 3000 documents were scanned by the Council and made available on searchable CDROM.

The management of the documents also requires considerable staff resources, and the need to find storage of the documents on their arrival, and in the long term, has been a challenge. As a result of the relatively sudden increase in orders in recent years, the available storage in Parliament House has been exhausted and alternative arrangements are now being considered.

Conclusion

The value of the Council's power to order papers relies on the diligence of non-government members to use procedures available to them to effectively and strategically challenge Government resistance to orders made by the House. Moreover, the integrity of the orders for papers process relies on this challenge. In this way, the power will remain a valuable tool in scrutinising government action and holding it accountable for decisions made.

As the Court of Appeal said in *Egan v Chadwick*, having regard to the common law rule of "reasonable necessity":

the Legislative Council must have the power to call for any information relevant to the performance of its task of reviewing, changing and adding to the statute law of the State. This includes information in Executive documents either necessary or useful for carrying out those tasks.²⁴

²² For example, the proposed desalination plant

²³ For example the return of Cross City Tunnel documents coincided with the Chief Executive of the Roads and Traffic Authority being removed from his position and placed on the unattached employees list; the discovery of correspondence between the former Ministers for Roads and for Planning alleging that Cabinet minutes had been leaked to the Cross City Motorway Consortium, potentially impacting on the Government's negotiating position, and ultimately being referred to the Independent Commission Against Corruption.

²⁴ *Egan v Chadwick & Ors* [1999] NSWCA 176, para 139