

# Orders for Papers in the Legislative Council of New South Wales: Developments and challenges

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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’.<sup>1</sup>

The Legislative Council of New South Wales, as a House of review, has the role of scrutinising the actions of the executive government and by doing so, holding it to account. Orders for the production of executive documents have become a well established mechanism for gaining information necessary to fulfil this role. However, this does not indicate an end to the debate regarding the extent of the Council’s power to order the production of state papers. The paper outlines the 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.

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<sup>1</sup> *Egan v Willis* [1998] 195 CLR 424 at para 42. quoting Queensland, Electoral and Administrative Review Commission, *Report on Review of Parliamentary Committees* (October 1992), vol 1, para 2.23

This paper commences with a brief summary of the Egan cases<sup>2</sup> of the mid to late 1990s which confirmed the power of the Legislative Council to order the production of state papers and provides various statistics regarding orders made by the House since 1999.

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 and to challenge any Executive resistance to orders made by the House. This paper suggests three ways in which members could better use the procedures available.

The paper also comments on some of the administrative challenges in managing the order for papers 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. There were no orders made between 1933 and 1990, however the reason for this is unclear. 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 mid to late 1990s, the Labor Government in New South Wales sought to resist a number of orders for papers on the grounds 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 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, having continued to decline to provide papers ordered by the House, the Treasurer and Leader of the House, the Hon. Michael Egan, was adjudged guilty of contempt and suspended from the sitting. Mr Egan refused to leave and the Usher of 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.<sup>3</sup> Mr Egan appealed to the High Court which dismissed the appeal<sup>4</sup>, and upheld the validity of

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<sup>2</sup> *Egan v Willis* (1996) 40 NSWLR 650; *Egan v Willis* [1998] 195 CLR 424; *Egan v Chadwick & Ors* [1999] 46 NSWLR 563

<sup>3</sup> *Egan v Willis* (1996) 40 NSWLR 650

<sup>4</sup> *Egan v Willis* (1998) 195 CLR 424

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 for neglecting to table the documents and suspended from the House. Mr Egan again challenged the power of the House to suspend him.

In *Egan v Chadwick*,<sup>5</sup> the Court of Appeal held that the Council's power to require the 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 (Priestley JA dissenting) the Court held that the Council could not compel the production of Cabinet documents.

### ***Arbitration of Disputes***

Since 1998, 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 arbiter's 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.

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<sup>5</sup> *Egan v Chadwick & Ors* [1999] 46 NSWLR 563; the Hon. Virginia Chadwick was elected President in June 1998

### ***Increase in Orders for the Production of State Papers Since 1999***

Since the Egan litigation the Legislative Council has agreed to an increasing number of orders for papers each year. Between 1999 and 2002 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.

Orders for papers have varied in scope, ranging from orders for all documents held by the government on a particular matter and resulting in the return of large numbers of boxes of documents, to an order for a single document. Since 1999, the most common subject matter for which papers have been ordered has been major public works projects. Of the 60 orders concerning public works, 28 related to motorways and 14 to smaller land and property developments. Environment and conservation has been the subject of 13 orders, utilities 12, and hospitals and health services 7. Nine orders related to justice and corrective services, one being an address to the Governor requesting documents regarding the administration of justice.<sup>6</sup>

In 2002 an independent member initiated 47% of the orders and in 2003 34% of orders. While members of the Liberal/Nationals 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 orders made in 2005 and 50% of the orders 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 it no longer asserts the absence of such a power, on occasion the Government has resisted orders through various other means.

### ***Opposing Motions for Orders in the House***

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

In 2005, during debate on a call for papers on the proposal to construct a desalination plant at Kurnell in Sydney's south, the Government argued that, as the tender process was underway, the production of some of the papers being requested might prejudice that process.<sup>7</sup> The Government was unsuccessful in amending the motion, but in the subsequent return claimed privilege over a sizeable portion of documents. In the ensuing dispute over the claim of privilege, the arbiter upheld the claim of privilege on the names, addresses and email addresses of persons who had

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<sup>6</sup> Made under Standing Order 53

<sup>7</sup> Legislative Council of New South Wales, *Minutes of Proceedings*, No. 126, 9 November 2005, item 10; *NSW Legislative Council Parliamentary Debates* 9 November 2005 pp 19235/6

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.

In 2006 the Government made similar claims of public interest in nondisclosure 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 Government being compromised in its obligations under the Corporations Act and the rules of the Australian Stock Exchange.<sup>8</sup>

### *Claims of Privilege*

*Egan v Chadwick* 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 would be contrary to the public interest.<sup>9</sup>

Consistent with *Egan v Chadwick*, the Council has taken a cautious approach to the publication of privileged documents. This is significant considering that members are severely restricted in the use of information contained in privileged documents, and may not have the legal or financial skills necessary to interpret the information.<sup>10</sup>

It is therefore significant that on only one occasion has the House taken further action where an arbiter has upheld a claim of privilege. This exception relates to an order for papers made in 2003 concerning the Cross City Tunnel. 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 continuing public concern regarding the Cross City Tunnel, all the documents be re-assessed by an independent arbiter. 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

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<sup>8</sup> *NSW Legislative Council Parliamentary Debates*, 11 May 2006, pp 23073/4

<sup>9</sup> *Egan v Chadwick & Ors* [1999] NSWCA 176, para 142

<sup>10</sup> Clune D & Griffith G, *Decision & Deliberation: The Parliament of New South Wales 1856–2003* The Federation Press, 2006, p 655

non-disclosure had the potential to diminish public confidence in the Roads and Traffic Authority's handling of the project, and in the RTA itself.<sup>11</sup> The arbiter denied privilege on all the documents, which were subsequently tabled and made public.<sup>12</sup>

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*

*Egan v Chadwick* held that public interest immunity and legal professional privilege do not apply in New South Wales when a House of Parliament seeks the production of Executive documents. However the Court of Appeal held (Priestley JA dissenting)<sup>13</sup> that the Legislative Council could not compel the production of Cabinet documents without subverting the doctrine of responsible government, a doctrine on which the Legislative Council relies to justify its rights to call for documents.<sup>14</sup> In discussing the Cabinet documents exemption, the Court of Appeal made a distinction between those documents which disclose the deliberations of Cabinet, the revelation of which is inconsistent with the doctrine of collective responsibility, and those documents prepared outside Cabinet for submission to Cabinet.<sup>15</sup>

In claiming the Cabinet document exemption, the Government has taken a broad definition of Cabinet documents. For instance, in October 2004 an order for the production of papers relating to a Government commissioned report into juvenile justice was initiated in 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 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.<sup>16</sup>

The House has attempted to arrest the Government's broad claims of Cabinet confidentiality. In February 2005, the House ordered the return of certain specified studies relating to the Grey Nurse shark population. In response, the Government

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<sup>11</sup> Report of Independent Legal Arbiter, Sir Laurence Street, tabled 20 October 2005, Legislative Council of New South Wales, *Minutes of Proceedings*, No. 124, 20 October 2005, item 15

<sup>12</sup> Legislative Council of New South Wales, *Minutes of Proceedings*, No. 124, 20 October 2005, item 15

<sup>13</sup> *Egan v Chadwick & Ors* [1999] NSWCA 176, para 140

<sup>14</sup> *Egan v Chadwick & Ors* [1999] NSWCA 176, para 154

<sup>15</sup> *Egan v Chadwick & Ors* [1999] NSWCA 176, para 57; Legislative Council of New South Wales, *Minutes of Proceedings*, 1 December 2005, item 22.

<sup>16</sup> Legislative Council of New South Wales, *Minutes of Proceedings*, No. 80, 9 November 2004, item 11

asserted that two of the documents ordered had not been provided because they 'formed part of a Cabinet Minute' and were therefore exempt from orders for the production of documents.<sup>17</sup> On 1 December 2005, the House agreed to a second order for papers relating to the Grey Nurse shark 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'. 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.<sup>18</sup>

This broad approach to the definition of Cabinet documents was addressed in the 2004–2005 Annual Report of the NSW Ombudsman which noted a marked increase in agencies claiming 'cabinet confidentiality' as a reason for refusing access to documents under the provisions of the Freedom of Information Act 1989 and that some agencies may be 'inappropriately' classifying documents in this way in order to avoid releasing them to the public.<sup>19</sup>

### ***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 production of a return showing required information. Interestingly, there are numerous examples since 1856 where such orders have been complied with.<sup>20</sup> 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.<sup>21</sup> The Government also complies with the standing order regulating the power to order papers, which requires that an indexed 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.<sup>22</sup> The Government also complies with the standing order requiring it to regularly table a list of unproclaimed legislation. The

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<sup>17</sup> Legislative Council of New South Wales, *Minutes of Proceedings*, No. 95, 22 March 2005, item 11

<sup>18</sup> Correspondence from Mr Col Gellatly, director General, Premier's Department to Mr John Evans, Clerk of the Parliaments, dated 15 December 2005

<sup>19</sup> NSW Ombudsman, *Annual Report*, 2004–05, pp129

<sup>20</sup> See for instance in 1857 the House ordered that a list of members' absences for more than 21 days without leave be tabled. Legislative Council of New South Wales, *Minutes of Proceedings*, Wednesday 8 November 1857 and Thursday 9 November 1857, vol 2, p 24

<sup>21</sup> Legislative Council of New South Wales, *Minutes of Proceedings*, No. 131, 14 November 2001, item 5

<sup>22</sup> Legislative Council of New South Wales, *Minutes of Proceedings* No. 65, 31 August 2004, items 13 and 14.

Government's position in relation to the power of the House to order the creation of a document appears to be 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 continues to argue that the power is not delegable to parliamentary committees, and in the absence of legislation conferring such a power, does not concede the existence of the power, notwithstanding instances when the Government has provided documents to committees.<sup>23</sup>

During the 2004 inquiry into a 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).<sup>24</sup> 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 Committee repeated its request for DIPNR to provide the documents. DIPNR subsequently provided the documents 'voluntarily' while maintaining that the Committee did not have the power to call for papers. A claim of legal professional privilege was made over several of the documents.

On the second occasion, the Committee ordered the production of certain documents held by the Premier's Office or the Premier's Department.<sup>25</sup> The Premier's Department declined to provide the documents, based on the same legal advice from the Crown Solicitor as that previously relied upon by DIPNR.<sup>26</sup>

### ***Challenging Government Resistance to Orders of the House***

Given the apparent reluctance of the Executive to provide documents in relation to its administration, and the downward trend in compliance with FOI applications,<sup>27</sup> it is becoming increasingly important for members of the non-government controlled

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<sup>23</sup> General Purpose Standing Committee No. 3, Minutes No. 40 Friday, 15 June 2001

<sup>24</sup> Minutes No. 34, 28 July 2004, and correspondence from Director to Ms Jennifer Westacott, Director General, DIPNR, 28 July 2004

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

<sup>26</sup> 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

<sup>27</sup> NSW Ombudsman, *Annual Report, 2004–05*, pp 126



Upper House to effectively and strategically use the procedures available to them to challenge the Executive and hold them accountable for decisions made.

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 assertion by Government that it lacks such a power. 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 specific action in response to assertions made by the Government in relation to an order for papers regarding the Grey Nurse shark population or the assertion 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 members could better target orders for papers. Rather than seeking specific documents, proposals for orders for papers are often expansive and could be seen as trawling exercises and just one step in a process of information gathering. Targeted orders will ensure the House has access to information necessary for the scrutiny of government action.

In addition, 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, specifically exclude documents not required and, where appropriate, be limited to specified periods of time.

### *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 meticulously scrutinised by members and their staff, community groups, lobby groups, and the media, resulting in, or at least coinciding with, a change in government policy of action,<sup>28</sup> anecdotal evidence suggests that some returns receive only a cursory inspection.

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<sup>28</sup> 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.

As stated by the Court of Appeal, the Legislative Council has such powers, privileges and immunities as are reasonably necessary for the existence of such a body and for the proper exercise of its functions. The exercise of the power to call for papers must be seen to be reasonably necessary if it is not to be seen as vexatious.

### ***Challenges in the Administration of the Practice***

The administration of documents received in response to orders for papers is a major challenge facing the Department of the Legislative Council.

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. The management of the documents has also required considerable staff resources. On one occasion, documents relating to the Cross City Tunnel viewed by a number of people were left out of numerical order and Council staff were required to re-sort over 10,000 documents.

The Department of the Legislative Council has begun to explore ways to improve the storage and access of documents. For example, 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 need to find storage of the documents on their arrival, and in the long term, has also 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 power of the House to order the production of papers is currently central to its ability to function effectively as a House of review.

However, the value of the Council's power to order papers relies on the diligence of members in using procedures available to them effectively, strategically ordering necessary documents and challenging any Government resistance to orders made by the House. Moreover, the integrity of the orders for papers process relies on this challenge. Only by doing so will the power to order executive documents remain a valuable tool in scrutinising government action and holding the executive to account.

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.<sup>29</sup>



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<sup>29</sup> *Egan v Chadwick & Ors* [1999] NSWCA 176, para 139