The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the *Egan* Decisions Ten Years On[*]

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June 10 2009 marked the tenth anniversary of the handing down by the New South Wales Court of Appeal of its decision in *Egan v Chadwick*.[1] This was the last of a series of three landmark decisions, the *Egan* decisions,[2] generated by the refusal of the former Treasurer and Leader of the Government in the New South Wales Legislative Council, the Hon Michael Egan, to produce certain state papers ordered by the Council. The cases judicially confirmed the fundamental role of the Council in scrutinising the activities of the Executive Government and holding it to account, including by ordering the production of state papers.

This paper revisits the *Egan* decisions and the exercise by the New South Wales Legislative Council of its power to order the production of state papers.

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[*] This article has been edited to conform more closely with the journal's word requirements. Some sections on the history of responsible government and on the powers of committees to order papers have been omitted. Readers who are interested in these materials should contact the authors directly.

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1 (1999) 46 NSWLR 563.

2 See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the High Court decision in *Egan v Willis* (1998) 195 CLR 424 and the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

Since the *Egan* decisions the power of the Council to order the production of papers has become a key mechanism by which the Council exercises its constitutional role of holding the Executive Government to account. The process for ordering the production of state papers is now set out in standing order 52 of the Council. Other than documents that reveal 'the actual deliberations of Cabinet', the Government is required to table in the Council all documents captured by an order for papers, although it may make a claim of privilege over any documents it believes should not be made public. These documents are then only made available to members of the Council. In the event of a member disputing an executive claim of privilege an independent arbiter is appointed to consider and report to the Council as to whether any 'privileged' documents should be made public.

While the order for papers process is well established, areas of controversy remain. This paper takes the opportunity to respond to criticisms of the order for papers process in an article published recently by Associate Professor Anne Twomey.[3] It also considers unresolved issues in relation to the orders for papers process such as the status of papers not in the custody or control of minister.

The Egan cases and the power to order the production of state papers

The New South Wales Parliament is unique among Australian Parliaments in that it has not legislated to declare its powers and immunities. While certain powers and immunities have been conferred by statute, no comprehensive legislation has been enacted on this subject.

The majority of the powers of the New South Wales Parliament is derived from the common law principle of reasonable necessity. In 1815 British law officers expressed the opinion that the grant of legislative power to colonial legislatures conferred only 'such privileges as are incidental to, and necessary to enable them to perform their functions in deliberating and advising upon, and consenting to laws for the peace, welfare and good government of the Province'.[4] This principle of reasonable necessity was confirmed by the Judicial Committee of the Privy Council in a series of 19th century cases dealing with the powers of colonial legislatures.[5]

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[3] Twomey, A. 2007, 'Executive Accountability to the Australian Senate and the New South Wales Legislative Council', Legal Studies Research Paper No 07/70, University of Sydney Law School. A shorter edited version of this paper was published in *Australasian Parliamentary Review*, 23, 1, Autumn 2008, 257-273.

[4] Letter by Garrow, W. and Shepherd, S. to Lord Bathurst, 30 December 1815, reprinted in Kennedy, W.P.M., *Documents on the Canadian Constitution, 1759-1915*, Toronto 1908, pp 297-9, as quoted Campbell, E., *Parliamentary Privilege in Australia*, Melbourne University Press, Melbourne, 1966, 17.

[5] *Kielley v Carson* (1842) 12 ER 225, *Fenton v Hampton* (1858) 14 ER 727, *Barton v Taylor* (1839) 112 ER 1112

According to these cases, the privileges of the British House of Commons were not inherited by colonial legislatures when the common law of England was 'received' at colonial settlement. Any wider powers must be conferred by express statutory grant.

Between 1856 and the early 1900s the practice of ordering the production of state papers, based on the common law principle of reasonable necessity, was well established in the Legislative Council. However, orders for state papers ceased to be a common feature of the operation of the Council during the second decade of the 20th century,[6] with the occasional exception up until as late as 1948.[7]

It was not until October 1990 that an order for the production of a list of unproclaimed legislation was again carried by the Council, although no return to the order was received.[8] The revival of the practice reflected the changing party numbers in the House, following electoral reform of the Council in 1978. As a result of those reforms the Government lost its majority in the House at the March 1988 election. No Government has held a majority in the House since.

The next order to produce state papers was made in 1995 although on this occasion the power of the House to enforce the order was challenged by the Government in the *Egan* cases, as outlined below.

In October and November 1995, and again in April 1996, the Council passed a series of resolutions requiring the Leader of the Government in the Council, the Hon Michael Egan, to produce certain state papers held by the Government in relation to four separate matters.[9] With the exception of some documents in one case, the papers specified in the resolutions were not tabled as required.

Mr Egan argued that the House had no authority to compel the production of state papers, a position that led to his suspension from the chamber. He challenged his suspension both in the New South Wales Supreme Court, from where the matter was removed to the Court of Appeal, and subsequently the High Court. These proceedings are well documented.[10]

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6 Clune, D. and Griffith, G., 2006, *Decision and Deliberation: The Parliament of New South Wales 1856* – 2003, Sydney, The Federation Press, 276-277.

7 *LC Minutes* (18/8/1948) 210

8 *LC Minutes* (11/10/1990) 461

9 The matters related to the closure of certain veterinary laboratories and the Biological and Chemical Research Institute at Rydalmere, the Government's negotiations with 20th Century Fox concerning the conversion of the Sydney Showground into a film complex, the Government's decision to recentralise the Department of Education resulting in the closure of regional offices, and the Government's consideration of the Report of the Commission of Inquiry into the Lake Cowal gold mine.

10 See Lovelock, L. and Evans, J., 2008, *New South Wales Legislative Council Practice*, Sydney, The Federation Press, 474-480.

On 29 November 1996, in *Egan v Willis and Cahill*, the Court of Appeal unanimously held that 'a power to order the production of state papers … is reasonably necessary for the proper exercise by the Legislative Council of its functions'.[11] The Court also held that the resolution of the Council suspending Mr Egan was within the Council's power as a measure of self-protection and coercion, although Mr Egan's removal beyond the chamber to the footpath of Macquarie Street was beyond its power.

In the subsequent decision of the High Court in *Egan v Willis* on 19 November 1998, the majority (Gaudron, Gummow and Hayne JJ) confirmed that it is reasonably necessary for the Council to have the power to order one of its members to produce certain papers. As the majority judgment noted:

> It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament 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'.[12]

However, while the High Court in *Egan v Willis* clearly established the power of the Council to order the production of state papers, it did not consider the issues of the production of papers subject to a claim of privilege by the Executive Government, such as public interest immunity or legal professional privilege. This was not resolved until the decision in *Egan v Chadwick* in 1999, where the Court of Appeal held that the Council's power to require production of documents, upheld in *Egan v Willis*, extended to documents in respect of which a claim of legal professional privilege or public interest immunity could be made. However, the majority (Spigelman CJ and Meagher JA) did hold that public interest may be harmed if access were given to documents which would conflict with individual or collective ministerial responsibility, such as records of Cabinet deliberations.

The system of responsible government and the 'House of Review'

The *Egan* cases were significant not only for their confirmation that the Houses of the New South Wales Parliament have the power to order the production of state papers, but for their detailed examination of the system of responsible government found in New South Wales, which defines the relationship between the Legislature[13] and the executive.[14]

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[11] *Egan v Willis and Cahill* (1996) 40 NSWLR 650, per Gleeson CJ at 667.

[12] *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at 451.

[13] Meaning Her Majesty the Queen with the advice and consent of the Legislative Council and the Legislative Assembly, the two Houses of the New South Wales Parliament.

[14] Meaning the Premier and other ministers of the Crown appointed form amongst the members of the Executive Council.

Responsible government was established in New South Wales by the *Constitution Act 1855(NSW)*, and subsequently extended in the *Constitution Act 1902 (NSW)*, although its expression in the Constitution is somewhat muted and oblique, a feature in keeping with many former colonial legislatures. In particular, the Constitution does not define the relationship between the Executive Government and the upper House of Parliament.

In *Egan v Willis*, Mr Egan submitted that, in the context of the New South Wales system of government, responsible government meant no more than that the Crown's representative acts on the advice of the Ministers and that the Ministers enjoyed the confidence of the lower House of Parliament. However, this suggestion was pointedly and emphatically rejected by the High Court in *Egan v Willis*. In his judgement, Kirby J observed:

> The fact that the Executive Government is made or unmade in the Legislative Assembly, that appropriation bills must originate there and may sometimes be presented for the royal assent without the concurrence of the Council does not reduce the latter to a mere cipher or legislative charade. The Council is an elected chamber of a Parliament of a State of Australia. Its power to render the Executive Government in that State accountable, and to sanction obstruction where it occurs, is not only lawful. It is the very reason for constituting the Council as a House of Parliament.[15]

In turn, McHugh J observed:

> It is true, of course, that governments are made and broken in the Lower House of Parliament – in New South Wales, the Legislative Assembly. But that does not mean that the Legislative Council has no power to seek information from the government or the Minister who represents the government in the Legislative Council. It is part of the Legislature of New South Wales. If it is to carry out one of the primary functions of a legislative chamber under the Westminster system, it must be entitled to seek information concerning the administration of public affairs and finances. The Legislative Council is not, as Queen Elizabeth the First thought the House of Commons was, a chamber that merely says 'Aye or No' to bills presented to it. It is an essential part of a legislature which operates under a system of responsible government.[16]

It is fundamental to the system of responsible government in New South Wales that the executive, through its ministers, is accountable and answerable to both Houses of the New South Wales Parliament, and not simply to that House which determines the government.

Of course, the reality of responsible government is that the Executive Government, determined by its majority in the lower House, usually maintains complete dominance of that House through the mechanism of strict party control.

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[15] *Egan v Willis* (1998) 195 CLR 424, per Kirby J at 503.
[16] *Egan v Willis* (1998) 195 CLR 424, per McHugh J at 476.

As a check on that dominance, in New South Wales, the Legislative Council is now based on a different electoral system to the lower House and possesses relatively strong legislative powers, equal to those of the Legislative Assembly except in respect of certain money bills. Under this particular model, the Legislative Council has a crucial role as a 'House of Review' in superintending the actions of the government and holding it to account.

Procedures for the production of documents under standing order 52

The procedures of the House for ordering the production of state papers are now set out in standing order 52 (formerly standing order 18).[17]

When a claim of privilege is made by the Government[18] the document or documents can only be viewed by members of the Legislative Council, and may not be published or copied without an order of the House. A claim of privilege may be disputed by any member of the Council by communication in writing to the Clerk. The Clerk is authorised to release the disputed document or documents to an independent legal arbiter for evaluation and report as to the validity of the claim of privilege. The independent legal arbiter is appointed by the President and must be either a retired Supreme Court judge, Queen's Counsel or Senior Counsel.

Once completed, the arbiter lodges his or her report with the Clerk, who makes it available to members. As is the case with privileged documents, the report cannot be published or copied without an order of the House. The arbiter simply provides a report; it is still the decision of the House whether to uphold a claim of privilege or make a document public notwithstanding the claim.

The efficacy of calls for papers process in holding the executive to account

Since the decision of the NSW Court of Appeal in *Egan v Chadwick* in 1999, the New South Wales Legislative Council has agreed to a total of 220 orders for state papers (at the time of this research). 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,

[17] Under standing order 52, any member of the House may give notice of a motion for an order for papers. If the House agrees to the motion, the Clerk communicates the terms of the order to the Director General of the Department of Premier and Cabinet to coordinate a return. The return to order is required to be laid on the table by the Clerk, or to be lodged with the Clerk if the House is not sitting, and must be accompanied by an indexed list of the documents, showing the date of creation and author of each document, together with a description of the document.

[18] Where documents are considered by the Government to be privileged, a separate return is to be prepared showing the date of creation of the document, a description of the document, the author and the reason for the claim of privilege.

41 in 2005, and 56 in 2006, before declining to 10 in 2007, 17 in 2008 and 14 so far in 2009. This recent decline in orders for state papers reflects in part the changing party numbers in the House.[19]

Documents provided by the Government in response to such orders have ranged from a single report to more than 100 boxes of privileged documents on the millennium trains.

From time to time, the efficacy of the order for papers process as a mechanism for holding the Government to account has been questioned.[20]

It is the nature of politics that some issues will generate greater interest than others. Some orders for papers initiated by a member may be in relation to a particular topic or issue with which only the member is intimately concerned. Other orders, however, are made in response to issues of current public concern and receive significant interest.

For example in October 2005 the House received a return to order concerning the Cross City Tunnel. The return to order was viewed by more than 150 visitors to the Clerk's Office, including members of both the Council and the Legislative Assembly, members' staffers, and representatives of the media.

Furthermore, in its report on issues surrounding the construction of the Cross City Tunnel, the Joint Select Committee on the Cross City Tunnel made frequent reference to documents provided in the return to order, and concluded that:

> The Legislative Council order for papers relating to the CCT project in 2003 and 2005 uncovered a number of issues of concern to the community, including aspects of the negotiations between the RTA and Cross City Motorway. Information that should have been made publicly available, for example, the toll increase following negotiation of the First Amendment Deed, was revealed in a manner that has unfortunately increased negative reaction to the tunnel and associated road changes …
>
> The Committee considers that the tabling in Parliament of papers has enabled closer scrutiny of the Cross City Tunnel project by members of Parliament, the public and media. It enabled public access to a range of documents that provide an insight into the technical and practical aspects of development and implementation of a specific privately financed project.[21]

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[19] As indicated previously, since 1988, the Government has lacked a majority in the House. However, in the current 54th Parliament (2007 onwards), the Government only requires three of the eight cross-bench members to vote with it to win a division, compared to four of 11 in the 53rd Parliament, and 6 of 13 in the 52nd Parliament.

[20] See for example Twomey, *op cit*, 15. See also *LC Hansard* (6/4/2000) 4285 per the Hon Michael Egan

[21] Joint Select Committee on the Cross City Tunnel, February 2006, *Cross City Tunnel – First Report*, xvi and 138.

The report of the Committee was tabled in the House on 28 February 2006, and was the focus of much debate and questions without notice in the House concerning issues such as changes to local streets in the Sydney CBD, the cost of the toll for motorists using the tunnel, and the appropriate use of public private partnerships for the construction of major infrastructure.[22]

The media interest arising from the release of the documents not only focussed on the controversial financial and planning aspects of the tunnel's construction, but also led to serious allegations regarding ministerial misconduct. Newspapers reported that staff of the Shadow Minister for Roads and Leader of the Nationals had come across correspondence amongst the tabled documents from the Minister for Roads to the Minister for Planning, alleging that Cabinet minutes setting out the cost of relocating the tunnel's ventilation stacks in Darling Harbour had been leaked to the Cross City Motorway Consortium, potentially impacting on the Government's negotiating position.[23] The matter led to wide-ranging accusations and was ultimately referred to the Independent Commission Against Corruption by the Leader of the Nationals.[24]

Documents ordered for production concerning the proposed sale of Snowy Hydro Limited in 2006 were also used extensively to inform debate in the Council and its committees. On 7 June 2006, the Council established a select committee to inquire into and report on the ongoing public ownership of Snowy Hydro Limited, after a previous inquiry into the sale of Snowy Hydro Limited was concluded when the sale was abandoned. The return to order in relation to the proposed sale of Snowy Hydro Limited tabled in the House on 30 May 2006 significantly assisted the inquiry and was used during the hearings of the committee in questioning public officials concerning the sale.[25] In the House, the public concern surrounding the sale of Snowy Hydro Limited led to the passage of the Snowy Hydro Corporatisation Amendment (Parliamentary Scrutiny of Sale) Bill 2006, a bill to require the approval of both Houses of Parliament before shares in the Snowy Hydro Company held by the State of New South Wales could be sold or otherwise disposed of. The passage of this bill was directly informed by information revealed in the return to order.[26]

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[22] See for example *LC Hansard* (28/2/2006) 20640-20641, 20653-20654 and 20659.

[23] Patty, A. 4 November 2005, 'Tunnel corruption bombshell', *Daily Telegraph*; 1,4; Davies, A. 4 November 2005, 'Tunnel builders saw leaked papers, Opposition says', *Sydney Morning Herald*, 3.

[24] In its report on the matter, the ICAC found weaknesses in the system of handling draft material to be submitted to Cabinet, but did not make a finding of corrupt conduct. See The ICAC, April 2006, *Report on investigation into the alleged leaking of a draft Cabinet minute*.

[25] See for example Select Committee on the Continued Public Ownership of Snowy Hydro Limited Transcript (7/7/2006) 30, 35 and 64

[26] *LC Hansard* (7/6/2006) 723-724

Information derived from returns to orders in the Council has also been widely cited in parliamentary and public debate surrounding other issues that have been of particular state importance, such as dioxin levels in Sydney Harbour,[27] the Iron Cove Bridge in Drummoyne,[28] the appointment of Dr Graeme Reeves,[29] and the proposed North West metro-link.[30]

On occasion, poor targeting of orders for papers has led to the suggestion that they were simply 'fishing expeditions'.[31] Two returns to order in 2003 and 2004, concerning the Millennium Trains and AusSteel, were not well targeted, resulting in an unnecessarily large volume of papers being provided. However, the House has increasingly attempted to target orders for papers in order to limit the burden that the process places on government agencies. Consequently, orders are drafted to directly target only relevant departments, to exclude any documents not specifically required, and to limit the time periods for which documents are sought.

Nonetheless, specific targeting can be problematic where the Executive Government takes a restrictive approach in interpreting the already narrowly drafted order and in deciding which documents to supply. In such cases, the House has found it necessary to make a further order for the relevant documents before they have been supplied.

The immunity of documents which record the 'actual deliberations of Cabinet'

As indicated earlier, in *Egan v Chadwick*, the NSW Court of Appeal held that the Council does not have the power to order the production of documents which record the 'actual deliberations of Cabinet'. This is a matter of ongoing controversy.

In his judgement, Spigelman CJ held that it is not reasonably necessary for the proper exercise of the functions of the Council to call for documents the production of which would conflict with a key element in our system of responsible government: the doctrine of collective ministerial responsibility. However, while he concluded that the production of documents which recorded the 'actual deliberations of Cabinet' was inconsistent with collective ministerial responsibility,[32] he specified that the production of documents 'prepared outside Cabinet

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[27] Fisher, D., 19 May 2006, 'Fish poison lies that risked lives', *Daily Telegraph*, 9.
[28] Besser, L., 25-27 April 2008, 'RTA fears collision risk from extra lanes', *Sydney Morning Herald*, 8.
[29] Tadros, E., 16 May 2008, 'Meagher error on Bega doctor check', *Sydney Morning Herald*, 7.
[30] Robins, B. and Besser, L., 23 May 2008, 'Queries raised over deadlines for metro', *Sydney Morning Herald*, 7.
[31] Twomey, *op cit*, 16.
[32] *Egan v Chadwick* (1999) 46 NSWLR 568, per Spigelman CJ at 574-575.

for submission to Cabinet may, or may not, depending on their content, manifest a similar inconsistency'.[33]

However, the defined scope of Cabinet documents was not settled in *Egan v Chadwick*. Meagher JA took a broader view that the immunity of Cabinet documents was 'complete',[34] whereas Priestly JA, in dissent, found that the Council does have the power to order the production of Cabinet documents.[35]

The distinction drawn by Spigelman CJ between different types of Cabinet documents has subsequently been noted in reports of the independent legal arbiter. For example, in a report tabled with the Clerk on 22 December 2005 concerning documents relating to a proposed desalination plant,[36] the Hon Terrence Cole QC observed:

> In assessing a claim for public interest immunity in relation to 'Cabinet documents', a distinction is to be drawn between (a) true Cabinet documents, that is, those documents which disclose the actual deliberations of Cabinet; and (b) Cabinet documents, that is, reports or submission prepared for the assistance of Cabinet.
>
> A claim of privilege for true Cabinet documents will always be upheld. That is because the public interest in maintaining the principle of or doctrine of collective responsibility of Cabinet for its decisions outweighs any other public interest …
>
> When privilege is claimed for other Cabinet documents, a judgment process is required to weigh the competing public interests.[37]

However, defining true Cabinet documents is not easy. In general terms documents which disclose the actual deliberations include Cabinet minutes, which are the formal signed submissions and recommendations made to Cabinet by individual ministers, as submitted to the Cabinet Secretariat in advance of a Cabinet meeting. They also include the responses of other government departments and agencies to Cabinet minutes, setting out support or criticism of the minute. In addition, they include the formal records of decisions at Cabinet as made by the Director-General of the Cabinet Office. All these documents reveal either directly or indirectly the deliberations of Cabinet, and as such, according to the majority judgement in *Egan v Chadwick*, the Council does not have the power to order the production of such documents.

This distinction becomes difficult where Cabinet minutes may have attached to them reports or other appendices which the minister may seek to use as evidence to support his or her position in Cabinet.

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[33] *Ibid*, at 575.
[34] *Ibid*, per Meagher JA at 597.
[35] *Ibid*, per Priestley JA at 594.
[36] *LC Minutes* (28/2/2006) 1840.
[37] The Hon Terence Cole QC, 'Disputed claim for privilege: Desalination plant', Report of the Independent Legal Arbiter, pp 3-4.

In her 2007 paper Twomey was critical of the Council where it has raised concerns at the Government's failure to provide it with reports that form part of a Cabinet minute.[38] However, in response to Twomey, it should also be placed on the record that there have been many instances in the past five years where the Executive Government has been less than helpful in justifying its claim of privilege over Cabinet documents, with reference to the test developed by Spigelman CJ.

For example, in response to an order of the House on 8 December 2004 for the production of papers prepared by a consulting firm in relation to Redfern-Waterloo, and a subsequent request for an explanation for the Government's failure to produce the papers, the Government stated rather unhelpfully that the documents had not been produced as they had been 'classified as Cabinet documents'.[39] Similar refusals to provide certain documents on the grounds that they fell within the definition of Cabinet documents, without explanation or reference to the test developed in *Egan v Chadwick*, occurred in February 2005 and again in May 2006.[40]

There are also occasionally signs that appear to validate suspicions that the Executive Government may have used Cabinet confidentiality as a cloak against the production of documents to the Council. In September 2005, the Director General of the Premier's Department issued a memorandum to all departmental chief executive officers advising that all documents prepared for the 2005-2006 Budget Estimates hearings should be prepared for submission to and consideration by the Cabinet Standing Committee on Public Administration.[41]

As it currently stands, the House has no way of knowing if the Government's claims of privilege relate to 'true' Cabinet documents or a wider class of documents that do not necessarily attract this immunity.

Claims of privilege in returns to orders

As indicated earlier, in *Egan v Chadwick*, the Court of Appeal held that the Council has the power to require the production of state papers that are subject to a claim of privilege: specifically legal professional privilege or public interest immunity.[42]

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[38] Twomey, *op cit*, 13.

[39] Correspondence from the Director General, Premier's Department, Mr C Gellatly, to the Clerk of the Parliaments dated 22 December 2004, *LC Minutes* (22/2/2005) 1229.

[40] Correspondence from the Director General, Premier's Department, Mr C Gellatly, to the Clerk of the Parliaments dated 10 March 2005, *LC Minutes* (22/3/2005) 1283; *LC Minutes* (23/5/2006) 19.

[41] Correspondence from the Director General, Premier's Department, Mr C Gellatly, to the Clerk of the Parliaments, regarding forthcoming Budget Estimates process, 7 September 2005.

[42] Other claims of privilege may also be made, notably that documents are commercially confidential or are covered by statutory secrecy provisions, however these claims of

Documents subject to such claims must be produced to the Council in response to an order for their production, and members are entitled to inspect them. Once tabled, the documents remained privileged and not publicly accessible unless the House decides otherwise.

In determining whether a document, which is the subject of a claim of privilege, should be kept confidential or made public, the test applied by the Parliament is that of the public interest.[43] Put simply: is it in the public interest for the document in question to be made public? This inevitably involves a balancing act between the disclosure of potentially sensitive government information on the one hand, and the public's right to know and the need for transparency and accountability on the part of the Executive Government on the other.

Legal professional privilege

The principle of legal professional privilege is that confidential communications between a person or corporation and their legal representatives, or documents brought into existence for the sole purpose of obtaining or receiving legal advice are immune from reproduction in the courts.

However, the application of the principle of legal professional privilege to the courts should be distinguished from its application to the special relationship between the Executive Government and Parliament.

The courts, when dealing with a claim of legal professional privilege, are only required to determine whether the document falls within the category of legal professional privilege. If it does, then it is protected and does not have to be produced to the court.

By contrast, in *Egan v Chadwick*, it was found that the Houses of the NSW Parliament, unlike the courts, do have the power to order the production of state papers subject to a valid claim of legal professional privilege. Spigelman CJ drew a distinction between the strict application of legal professional privilege to individuals in an adversarial situation in a court of law, and the public policy application of legal professional privilege in the context of the relationship between the Executive Government and the Parliament. He found that in the context of the relationship between the Executive Government and the Parliament, the

privilege were not discussed in *Egan v Chadwick*, and are therefore not discussed in this paper.

[43] This matter is somewhat confused by the fact that the test of the public interest – whether it is in the public interest for a document to be made public – is also the name applied to one of the claims of privilege: public interest immunity. The earlier expression 'Crown privilege' is sometimes still used, and is perhaps a less confusing term.

accountability function of the Council as one of the Houses of the Parliament should prevail over the principles of legal professional privilege:

> In performing its accountability function, the Legislative Council may require access to legal advice on the basis of which the Executive acted, or purported to act. In many situations, access to such advice will be relevant in order to make an informed assessment of the justification for the Executive decision. In my opinion, access to legal advice is reasonably necessary for the exercise by the Legislative Council of its functions.[44]

Priestley and Meagher JA also agreed that the Council's power to call for documents extended to documents subject to a claim of legal professional privilege along similar lines.[45]

While the Legislative Council has the power to require the production of state papers subject to a claim of legal professional privilege, a subsequent decision to make such documents public is based on the public interest test. The relevant test is that the documents must have been prepared for the purpose of seeking legal advice or constitute advice furnished by legal advisers to the Department or Minister. If documents meet those criteria, the independent legal arbiter has generally held that it is not in the public interest for them to be made public.[46]

In 2006, in an interesting case, it was held by the Independent Legal Arbiter in relation to the *Lane Cove Tunnel Further Order* that documents that fell within the normal category of legal professional privilege, being documents brought into being for the purpose of seeking and giving legal advice, should nevertheless be made public in the public interest.[47] In its submission accompanying documents concerning the *Lane Cove Tunnel Further Order*, the Cabinet Office asserted that:

> At law, legal professional privilege is absolute and is not subject to any public interest override. Although standing order 52 provides that any member may dispute the validity of a claim for privilege, in which case the matter may be referred to an independent legal arbiter, it is not open for the arbiter to disregard any claim of privilege which has been validly made.[48]

This position is misconceived. It is correct that at law, legal professional privilege is absolute and is not subject to any public interest override. However, as Spigelman CJ observed, that is not the test applied to the relationship between the Parliament

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[44] *Egan v Chadwick* (1999) 46 NSWLR 568, per Spigelman CJ at 578.

[45] *Egan v Chadwick* (1999) 46 NSWLR 568, per Priestley JA at 593-594, per Meagher JA at 596.

[46] Report of the Independent Arbiter, 17 October 2001, *Appointment of Mr Peter Scolari as Administrator of the Wellington Local Aboriginal Land Council* , 3-4.

[47] Report of the Independent Arbiter, 22 May 2006, *Lane Cove Tunnel – Further Order*, 1-2.

[48] The Cabinet Office, *Lane Cove Tunnel – Further Order* (8 March 2006), 'Submission in support of claims for privilege by the Cabinet Office'.

and the executive. The arbiter is not bound, as for example is a court, to uphold a claim of legal professional privilege that is legally valid, but rather to evaluate whether it is in the public interest for the Parliament to exercise its authority to make public a document subject to a claim of legal professional privilege. As stated by the independent legal arbiter, Sir Laurence Street, in his report on the Lane Cove Tunnel – Further Order:

> The arbiter's duty, as the delegate of the Parliament, is to evaluate the competing public interests in, on the one hand, recognizing and enforcing the principles upon which legal professional privilege is recognised and upheld in the Courts, and, on the other hand, recognising and upholding an over-riding public interest in disclosure of the otherwise privileged documents.[49]

Public interest immunity

Perhaps the most contentious, and most likely, claim of privilege raised by the Executive Government over documents supplied to the Council in a return to order is that of public interest immunity, although the earlier expression 'Crown privilege' is sometimes still used.

Public interest immunity in the parliamentary context refers to a claim by the executive that it is not in the public interest for certain information to be made public.

In *Egan v Chadwick*, all three members of the Court of Appeal agreed that the Council has the power to order the production of documents subject to a claim of public interest immunity.[50]

However, the issue of whether documents subject to a claim of public interest immunity should be made public by the Parliament according to the public interest test is more complex.

In his judgement in *Egan v Chadwick*, Spigelman CJ noted that where public interest immunity arises in court proceedings, the trial judge is required to balance conflicting public interests – the significance of the information to the issues in the trial, against the public harm from disclosure.[51] Similarly, Spigelman CJ indicated where public interest immunity arises in parliamentary proceedings, a balance must be struck between the significance of the information to Parliament against the public harm from disclosure.[52]

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[49] Report of the Independent Arbiter, *Lane Cove Tunnel – Further Order*, 22 May 2006, pp 3-4.

[50] *Egan v Willis and Cahill* (1996) 40 NSWLR 650, per Spigelman CJ at 574, per Priestley at 595, per Meagher at 597.

[51] *Egan v Chadwick* (1999) 46 NSWLR 568, per Spigelman CJ at 573.

[52] *Egan v Chadwick* (1999) 46 NSWLR 568, per Spigelman CJ at 574.

Priestley JA, in his judgement, noted that where claims of public interest immunity arise in judicial proceedings, the courts have the power to compel the production of documents by the Executive Government in respect of which immunity is claimed, for the purpose of balancing the public interests for and against disclosure. He continued that the function and status of the Council in the system of government in New South Wales requires and justifies the same high degree of trust being reposed in the Council when dealing with documents in respect of which the executive claims public interest immunity. Accordingly, in exercising its powers in respect of such documents, the 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 inimical to the public interest.[53]

Accordingly, the Court of Appeal in *Egan v Chadwick* left the decision whether to publish a document subject to a claim of public interest immunity to the Council.

In October 2005, in the report entitled *Cross City Tunnel—Second Report*, the independent arbiter, Sir Laurence Street, made the following observations on Parliament's role in evaluating the public interest:

> Courts have developed a principled approach in deciding … claims of privilege. Parliament has as a matter of convention adopted a somewhat similar approach, particularly in relation to [legal professional privilege]. But there is an important difference between the responsibility of a court ruling on such claims and the function of Parliament. The Court's function is to administer justice and expound the law. Parliament is the guardian of the public interest with age old constitutional authority to call upon the Executive to give an account of its activities.
>
> While Courts apply developed principles in ruling on claims for privilege, Parliament will evaluate the claim (usually by its Arbiter) to consider whether it is in the public interest to uphold it. This process involves balancing against each other two heads of public interest that are in tension. On the one hand, there is a public interest in not invading lawyer client relationships and a public interest in protecting what might be called commercially sensitive material. And, on the other hand, there is a contrary public interest in recognizing the public's right to know and the need for transparency and accountability on the part of the Executive.[54]

Claims of public interest immunity have been validly made in the past in relation to such issues as protecting the identity of an informant where it concerned the enforcement or administration of the law[55] and the application of the Government policy of attracting investment to the State.[56]

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[53] *Egan v Chadwick* (1999) 46 NSWLR 568, per Priestley at 594.

[54] Report of the Independent Arbiter, 20 October 2005, *Cross City Tunnel – Further Order*, 2-3.

[55] Report of the Independent Arbiter, 25 October 2002, *M5 East Motorway*, 5-6.

[56] Report of the Independent Arbiter, 28 May 2002, *Mogo Charcoal Plant*, 3.

Claims of public interest immunity have not been upheld in relation to the conditional lease of a former quarantine station on the foreshores of Sydney Harbour, when it was held that the public interest in the foreshores of the harbour and the stewardship of the site outweighed the confidentiality of Government policy in relation to the site,[57] and in relation to the appointment of Mr Peter Scolari as the Administrator of the Wellington Local Aboriginal Land Council, where it was held that the public interest in the appointment of Mr Scolari outweighed any matters of Government policy.[58]

In addition, as noted previously, in 2006, in relation to the Cross City Tunnel, the Independent Legal Arbiter held rather unusually that the public interest in the construction and commissioning of the tunnel was of such a level as to outweigh legal arguments that would ordinarily have been recognised as clear candidates for legal professional or public interest immunity privilege.[59]

The decision to publicly release state papers

The decision to publicly release documents over which the Government has made a claim of privilege is not made lightly, and there are many examples where the independent legal arbiter has recommended that claims of privilege be upheld. Sir Laurence Street has stated:

> Ordinarily the House gives great weight to validly based claims of Legal Professional Privilege, Public Interest Immunity and Commercial in Confidence Privilege and such claims, where validly based, will frequently be allowed by the House although none is legally binding on the House in absolute terms. …
>
> As a generality it can be accepted that there is a clear public interest in respecting validly based claims for Legal Professional Privilege, Public Interest Immunity and Commercial in Confidence Privilege. The ordinary functions of government and the legitimate interests of third parties could be encumbered and harmed if such claims are disregarded or over-ruled. As against this, there can be matters in respect of which the public interest in open government, in transparency and accountability will call for disclosure of every document that cannot be positively and validly identified as one for which the public interest in disclosure is outweighed by the public interest in immunity. It lies with the party claiming privilege to establish it.[60]

Twomey has suggested that because documents subject to a claim of privilege are available to members privately, and therefore may already privately inform members when fulfilling functions in the House such as voting, introducing bills or

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[57] Report of the Independent Arbiter, 31 July 2001, *Conditional Agreement to Lease the Quarantine Station*, 2-3.

[58] Report of the Independent Arbiter, 17 October 2001, *Appointment of Mr Peter Scolari as Administrator of the Wellington Local Aboriginal Land Council*, 2-3.

[59] Report of the Independent Arbiter, 15 November 2005, *Cross City Tunnel – Further Order*, 4.

[60] Report of the Independent Arbiter, 22 August 2003, *Millennium Trains Papers*, 6-7.

asking questions of ministers, the further public release of documents over which privilege is claimed is unnecessary.[61]

Arguably, however, the people have a right to know the information that underlies public debate and informs Government decision-making. This right to know derives from the responsibility of the Government to govern in the public interest. As stated by Priestley JA in *Egan v Chadwick*:

> Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.[62]

While the role of the Government is to govern in the public interest, the role of the Parliament, in the words of John Stuart Mill,[63] is 'to throw the light of publicity' on the actions of the Government as the representative of the people and on behalf of the people. In doing so, the Parliament should secure full exposition and justification of all government actions by questioning and if necessary criticising government on behalf of the people. As stated by Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth*:

> .. the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercising of those powers the representatives of necessity are accountable to the people for what they do … [64]

It should be the exception, rather than the rule, that the public is denied access to the information upon which the Government bases its decision-making on the public's behalf.

The role of the independent legal arbiter in evaluating the public interest

In her 2007 paper Twomey was highly critical of the interpretation that one independent legal arbiter, Sir Laurence Street QC, has brought to the role, claiming that he has overstepped his position in asserting that he is a 'delegate of the Parliament' who makes 'determinations in the exercise of the plenary parliamentary authority that has been delegated to [him]'.[65]

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[61] Twomey, *op cit*, 8, 18.

[62] *Egan v Willis and Cahill* (1996) 40 NSWLR 650, per Priestley at 592.

[63] Mill J S, *Considerations on Representative Government*, London, Parker, 1861, p 104

[64] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, per Mason CJ at 138.

[65] Report of the Independent Arbiter, 22 May 2006, *Lane Cove Tunnel*, 4, cited in Twomey, *op cit*, 4.

In response, it is observed that in making recommendations to the Council in relation to claims of privilege, the independent legal arbiter fulfils a function conferred upon him by the President of the Legislative Council under standing order 52 – namely to evaluate and report to the Parliament on a claim of privilege made by the executive over documents supplied in a return to order. The Council does not delegate in any way its power to make a document public. Upon receipt of a report from the independent legal arbiter, it is the decision of the House whether or not to accept the arbiter's advice in relation to the privilege to be afforded to state papers.

Twomey has also suggested that the role of the independent arbiter in the call for papers process should be restricted to determining whether a document falls within a strict legal definition of privilege, not making recommendations on whether a document should be made public through attempting to gauge the public interest. This should be the role of parliament.[66]

There are problems however with Twomey's suggestion.

Firstly, as noted above, in relation to claims of legal professional privilege, the Court of Appeal recognised in *Egan v Chadwick* that the strict application of the principle of legal professional privilege in a court of law is not analogous to the public policy application of legal professional privilege in the parliamentary context. Documents subject to claims of legal professional privilege must be produced to Parliament, while they do not have to be produced to a court.

Secondly, in relation to claims of public interest immunity, as Twomey herself acknowledges,[67] there is no strict legal definition of public interest immunity that might be applied by the independent legal arbiter. As the Court of Appeal recognised in *Egan v Chadwick*, where claims of public interest immunity arise in court proceedings, the trial judge is in fact required to engage in a balancing act to determine where the public interest best lies. Similarly, where public interest immunity arises in parliamentary proceedings, the independent legal arbiter is equally obliged to engage in a balancing act between weighing the significance of the information to the proceedings in Parliament against the public harm from disclosure. The essential question is whether a claim of privilege is validly made, and if so, whether the public interest in disclosure justifies over-riding that claim.[68]

Twomey suggests that there are 'good grounds for arguing that the independent arbiter should not undertake the balancing task' on the basis that 'the arbiter does not have the relevant experience to make such an assessment'.[69]

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66 Twomey, *op cit*, 4, 6, 8, 14.
67 Twomey, *op cit*, 8.
68 Report of the Independent Arbiter, 17 September 2003, *Papers on Cross City Tunnel Motorway Consortium*, 2.
69 Twomey, *op cit*, 8.

This suggestion is surprising. In recognition of the complexity of the issues involved and the need for an arbiter to be highly experienced in determining issues of public interest, the House requires that the independent legal arbiter be a Queen's Counsel, Senior Counsel or a retired Supreme Court Judge. Sir Laurence Street is a former Chief Justice of the New South Wales Supreme Court. The Hon Terrence Cole is a former member of the Supreme Court of New South Wales. They are both objective and highly experienced in the task of evaluating public interest issues before the courts, and are eminently qualified for the task.

The provision of an index to a return

Twomey also raised concerns in relation to the requirement of standing order 52(3) for a return to order to include an indexed list of documents. She asserts that there is no legal basis for requiring the Government to put resources into the production of a new document – an indexed list – and that it cannot be compelled to do so. The 'risk', according to Twomey, is that in time, the fact that the Government has 'voluntarily provided indexes in most cases', even though it is doubtful that there is any compulsion on the Government to do so, will come to be seen as 'reasonably necessary'.[70]

The Council arguably has the power to order the preparation of a list as a matter of inherent need under the common law, on the simple basis that the power to order the production of a list is reasonably necessary for the House to be able to effectively examine the documents. The biggest return to order ever received – Hunter Rail Cars in 2006 – constituted 142 boxes of papers. Without the production of a list, it would have been almost impossible for members of the Council to have made an intelligent assessment of the documents provided and the material they contained. The government agencies that collated the documents are in the best position to make such a list.

Moreover, as Twomey acknowledges, there are numerous precedents between 1856 and the early 1900s of orders for papers which required the Government to physically produce new papers to be tabled in the House, analogous to the production of an index to a return. Prior to the practice of ordering papers falling into disuse, the most recent example appears to have been in 1932, when the House ordered a statement showing the details of amounts of money derived from the State Lottery and paid to each hospital.[71] The document was duly produced and tabled.[72]

There are also precedents where papers have been produced by the Government in response to other orders of the House. For instance, in 1857 the Government complied with an order of the House that a list of members' absences for more than

[70] *Ibid*, 3
[71] *LC Minutes* (8/12/1932) 165.
[72] *LC Minutes* (13/12/1932) 174.

21 days without leave be tabled.[73] 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.[74]

Furthermore, the Government routinely complies with standing order 106(2) which requires a minister to table a list of all legislation that has not been proclaimed ninety days after assent, and with standing order 233 requiring a Government response to be prepared to committee reports.

While asserting the power of the Council to order the Government to provide an index to a return to order, and noting precedents to support this, it is also self-evidently in the interests of the Government to provide an index where the Government wishes to claim that a document is privileged. Without the provision of such a list, the Government cannot identify the document and provide a reason for the claim of privilege (SO 52(5)(a)).

This issue arose in 2004 in response to a return to order relating to Tunnel Ventilation Systems. Following his appointment as independent legal arbiter, Sir Laurence Street QC wrote to the Clerk to advise that 'he had experienced difficulty in being able to responsibly determine whether or not privilege should be allowed because of the manner in which the Roads and Traffic Authority had provided their documents.' As Sir Laurence Street subsequently indicated in his report:

> Someone must be prepared to stand up and be counted in support of the claim for privilege for each of these sheets of paper. … Failure to prepare [a] return required by [standing] order 52 (5) (a) could lead to the House denying [a] claim for privilege… I could not possibly determine the matter without the assistance of details required by [standing] order 52 (5) (a).[75]

In the event, the documents provided by the RTA under the resolution of the House were re-examined by officers of the RTA in the Clerk's office. A revised index of documents was subsequently tabled with the Clerk, and the matter was reported to the House at the next sitting.[76]

It has also been found by the independent legal arbiter that where the Executive Government attempts to 'spread' a valid claim of privilege covering a small selection of documents to an umbrella claim over a wider selection of documents, it weakens the strength of the claim of privilege covering even those documents for which privilege could validly be claimed and likely upheld.[77]

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[73] *LC Minutes* (19/11/1857) 24
[74] *LC Minutes* (29/11/2001) 1312
[75] Report of the Independent Arbiter, 26 August 2004, *Documents on Ventilation in the M5 East, Proposed Cross City and Lane Cove Tunnels*, 2-3.
[76] *LC Minutes* (31/8/2004) 948-949.
[77] Report of the Independent Arbiter, 16 January 2007, *State Finances*, 3.

Documents not in the custody or control of a minister

While the House has the power to order the production of state papers in the custody and control of ministers of the Government, the power of the House to order the production of documents not in the custody or control of a minister is less clear cut. Such documents include state papers held by agencies such as the Audit Office of New South Wales, which is not directly responsible to a minister, or papers held by private individuals.

In relation to papers held by government agencies not directly responsible to a minister, Priestley JA gave the following guidance in the Court of Appeal in 1996 in *Egan v Willis and Cahill* on what documents might be 'reasonably necessary' for the operation of the House:

> In my opinion it is well within the boundaries of reasonable necessity that the Legislative Council have power to inform itself of any matter relevant to a subject on which the legislature has power to make laws. The common law as it operates in New South Wales today necessarily implies such a power, in my opinion, in the two parts ordinarily called parliament of the three part legislature. This seems to me to be a necessary implication in light of the very broad reach of the legislative power of the legislature and what seems to me to be the imperative need for both the Legislative Assembly and Legislative Council to have access (and ready access) to all facts and information which may be of help to them in considering three subjects: the way in which existing laws are operating; possible changes to existing laws; and the possible making of new laws. [78]

There is no guidance as to whether or not the power to order documents extends to private citizens. As stated by Gleeson CJ in *Egan v Willis and Cahill*:

> The extent of the power to compel the production of documents is governed by the source of the power; necessity. The present case does not require a consideration of the extent to which there may be power to compel the production of private documents.[79]

The High Court also left the issues unresolved in *Egan v Willis* in 1998. For his part, Kirby J commented that 'Quite different considerations would arise were a resolution to be directed to a non-member or a Minister sitting in the other chamber or a stranger'.[80] Likewise, the joint judgement of Gaudron, Gummow and Hayne JJ spoke of 'Altogether different considerations' arising in relation to individuals who are not members of the House concerned.[81]

On the face of it, however, the power of the Parliament to order the production of papers from private citizens would appear to be no different from other powers

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[78] *Egan v Willis and Cahill* (1996) 40 NSWLR 650, per Priestley JA at 692.
[79] *Egan v Willis and Cahill* (1996) 40 NSWLR 650, per Gleeson CJ at 665.
[80] *Egan v Willis* (1998) 195 CLR 424, per Kirby J at 504.
[81] *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at 456.

based upon the common law principle of necessity: if the necessity can be made out, then the power exists.

Conclusion

The handing down of the *Egan* decisions ten years ago was a defining period in the history of the New South Wales Parliament, and especially the Legislative Council.

The *Egan* decisions confirmed the power of the Houses of the New South Wales Parliament to order the production of state papers. Today, this power remains one of the key powers available to the legislature in performing its function of scrutinising the actions of the executive and holding the Government of the day to account. There are many good examples where the production of state papers to the Council has informed parliamentary and public debate on matters of public importance, or has assisted significantly in the conduct of committee inquiries.

Moreover, the *Egan* decisions provide a detailed confirmation by the courts, including the High Court of Australia, that under the system of responsible government found in New South Wales, a Government that has a majority in the lower House and effectively controls that House is nevertheless required to be accountable to the upper House of Parliament as well. To that extent, an upper House that is not controlled by the Government can provide a constitutional check on the operations of the Government, thereby strengthening the institution of Parliament itself and, with it, the system of responsible government.

The processes for the production of state papers to the Council are now governed by standing order 52. A particular feature of this standing order is the role performed by the independent legal arbiter in evaluating claims of privilege made by the Executive Government over documents provided in a return to order. This process has proved to be highly effective and has operated well in balancing the public interest in the disclosure of government information against the recognised need for some government papers to remain confidential where there is a justifiable claim that their disclosure is not in the public interest.

However, areas of uncertainty remain in relation to the power to order the production of papers. These include most notably the definition of documents that record the 'actual deliberations of Cabinet', together with the power of the Houses to order the production of papers not in the custody or control of ministers. ▲