Orders for Documents: An Examination of the Powers of the Legislative Council of Victoria[#]

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The Legislative Council of Victoria does not have a strong tradition of establishing select committees or ordering the production of documents as means of scrutinising the Executive. However, following constitutional changes, which took full effect from the 2006 State election, the reconstituted Legislative Council established two select committees and a standing committee to inquire into different aspects of the Government's administration.[1] It also agreed to a Sessional Order to regulate its power to order the production of documents.[2] During the debate on this Sessional Order, the power of the Legislative Council to adopt this Sessional Order and to order the production of documents, was questioned and challenged by Members of the Executive. The Leader of the Government requested the President obtain legal advice as to whether the Council had the power to adopt, implement and enforce this Sessional Order. Subsequently two legal advices were obtained from Mr Bret Walker SC suggesting that the Council did possess this power.[3] The Executive Government however maintained that there were limitations on the Council's ability to order documents which meant that the power was far less than had been suggested by some commentators. [4]

This paper explores the issue of whether the reconstituted Legislative Council possesses the power to order the production of documents. It will not examine

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[1] The Select Committee on Gaming Licensing was established on 14 February 2007. The Select Committee on Public Land Development was established on 2 May 2007, and the Standing Committee on Finance and Public Administration was established on 21 November 2007.

[2] Sessional Order 21; Victoria, *Minutes of the Proceedings*, Legislative Council, 14 March 2007, 51; Victoria, *Parliamentary Debates*, Legislative Council, 14 March 2007, 556.

[3] Legislative Council Select Committee on Gaming Licensing, 2007: 43; Legislative Council Select Committee on Gaming Licensing, 2007: 5.

[4] Select Committee of the Legislative Council on Gaming Licensing, Parliament of Victoria, *First Interim Report* (2007) 49.

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specific orders for documents, nor will it determine whether these documents should be produced. Rather it will identify the basis of the Legislative Council's power to order the production of documents, outline how this power has operated historically, and determine whether there are any limitations on the exercise of this power. The principal focus will be on the Legislative Council's first attempt to order the production of documents in 2007, and the grounds raised by the Executive Government for failing to comply with this order.

The Basis of the Victorian Parliament's Powers

The powers, privileges and immunities of the Victorian Parliament are outlined in s 19 of the *Constitution Act 1975* (Vic):

> The Council and the Assembly respectively and the committees and members thereof respectively shall hold enjoy and exercise such and the like privileges immunities and powers as at the 21st day of July, 1855 were held enjoyed and exercised by the House of Commons of Great Britain and Ireland and by the committees and members thereof, so far as the same are not inconsistent with any Act of the Parliament of Victoria, whether such privileges or powers were so held possessed or enjoyed by custom statute or otherwise.

The wording of this section has largely remained unchanged since the Victorian Parliament first introduced legislation in 1857, pegging its powers, privileges and immunities to those of the House of Commons. The powers and privileges of the Victorian Parliament were pegged against the House of Commons as at 21 July 1855, because this was the date when Victoria was granted 'responsible government'. Given there is no reference to specific powers in this Act, this means the Victorian Parliament possesses a relatively wide grant of powers. Questions relating to the powers, privileges and immunities of the Victorian Parliament therefore are resolved by reference to those possessed by the House of Commons as at 21 July 1855. The Victorian Parliament could expand its powers beyond this date, but would need to do so by statute, as occurred previously to give the Victorian Parliament the power to administer oaths to witnesses,[5] as prior to 1855 the House of Commons did not possess this power. (The House of Commons only obtained this power following the passing of the *Parliamentary Witnesses Oaths Act 1871* (UK)[6] In contrast, it will be demonstrated below, an Act of Parliament is not required in relation to the Legislative Council's power to order the production of documents as the House of Commons possessed and exercised this power prior to 1855.

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[5] *Parliamentary Witness Act 1923* (Vic)

[6] TE May, *A Practical Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, (3rd ed, 1855) 329; W McKay (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, (23rd ed, 2004) 763..

Did the House of Commons Possess the Power to Order the Production of Documents in 1855?

As Victoria's Legislative Council does not have a detailed history of ordering the production of documents, it lacks a specific or direct Standing Order in relation to this power. It has been suggested that the practice of the House is that any Member could move a substantive motion during general business, calling for the tabling of certain documents.[7] It should be noted however that Standing Order 24.10 grants Select Committees of the Legislative Council the power to send for persons, documents and other things. Numerous Legislative Council Select Committees have sought to exercise the power, ordering the production of documents with varying levels of success.[8] During debate on the adoption of Sessional Order 21, the Leader of the Opposition, Mr Philip Davis, argued that the Legislative Council could not delegate the power to summon documents to one of its committees unless it held this power itself.[9]

Questions relating to the existence of the power to order the production of documents can be confirmed by an examination of the powers of the House of Commons in 1855. The powers, privileges, immunities and practices of the House of Commons can be traced through a number of sources, the most widely accepted is *Erskine May's Treatise on The Law, Privileges, Proceedings and usage of Parliament* ('May'). This book, currently in its twenty- third edition, is edited by the Clerk of the House of Commons and documents the powers and practices of the House of Commons at the time of publication. Therefore a comparison between earlier and later editions of this text, demonstrates how the practices and procedures in the House of Commons have evolved over time. Earlier editions can also be used to confirm the existence of a certain power at a point in time. Coincidentally the third edition of this guide was published in 1855, which coincides with the pegging of the privileges of the Victorian Parliament. The third edition of May therefore will be instrumental in identifying whether the Legislative Council possesses the power to order the production of documents.

The third edition of May confirms that the House of Commons had the power to order the production of documents, stating:

> Parliament, in the exercise of its various functions, is invested with the power of ordering all documents to be laid before it which are necessary for its information. Each house enjoys this power separately, but not in all cases independently of the Crown.[10]

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7 Victoria, *Parliamentary Debates*, Legislative Council, 14 March 2007, 563.

8 For examples see: Select Committee of the Legislative Council on the Urban and Regional Land Corporation Managing Director, Parliament of Victoria, *Report*, Victoria (2002); Select Committee of the Legislative Council on Gaming Licensing, Parliament of Victoria, *First Interim Report*, (2007); Select Committee of the Legislative Council on Gaming Licensing, Parliament of Victoria, *Second Interim Report*, (2007).

9 Victoria, *Parliamentary Debates*, Legislative Council, 14 March 2007, 557.

10 May, fn 6: 411

While the existence of this power in 1855 can be confirmed there does not appear to be agreement over the exercise of this power. Some commentators suggested that the ability of the House of Commons to demand the production of documents could be enforced without restriction,[11] others suggested that information could be withheld from the Parliament at the discretion of the relevant Minister.[12] The third edition of May states that while each House could employ this power separately this power was subject to the following limitation:

> … as a general rule, it may be stated that all public departments connected with the collection or management of the revenue or which are under the control of the Treasury, may be reached by direct order from either house of Parliament, but that public officers and departments, subject to her Majesty's secretaries of state, are to receive their orders from the Crown.[13]

Further, if an order for documents was not returned in a reasonable time, May notes that the House had the power to order the person to appear before the bar and censure or punish them if they could not satisfactorily explain the reason for refusing to comply with the order.[14]

While there were limitations on the ability of the House of Commons to order the production of documents, from a reading of May, it appears that in 1855 refusal to provide documents needed to have a satisfactory basis and was not merely subject to the discretion of the relevant Minister as some commentators have suggested. While there is no longer a dispute that Victoria's Legislative Council possesses the power to order the production of documents, there are disputes concerning the application and extent of this power.

Are the Council's Powers Static?

The powers, privileges and immunities of the Victorian Parliament remain constant unless changed by an Act of Parliament. The general wording used in s 19 of the *Constitution Act 1975 (Vic)* however, means that these powers and privileges are not clearly defined. As such, these powers, privileges and immunities may be reinterpreted over time, placing different emphasis and understanding on them, ensuring they remain relevant. This reinterpretation does not mean the Parliament's powers can either be expanded or diminished, rather is another means by which practice may evolve. The ability to modify the practice for the use of a power is similar to introducing a practice when the House possesses a specific power but not an established practice, such as ordering the production of documents. Legislative Council Standing Order 25.01 also empowers the President to refer to the practices, rules and forms employed by other Parliaments operating under the Westminster system, to deal with situations not covered by existing Standing or Sessional Orders

[11] J Redlich, *The Procedure of the House of Commons*, (AE Steinthal, trans) Vol 2, (1908) 39..
[12] A Todd, *On Parliamentary Government in England*, Vol 1, (2nd ed, 1887) 440.
[13] May, fn 6: 412.
[14] Ibid.: 413.

or practices of the Legislative Council.[15] The Parliament's powers and the relevant practice, are regularly exposed to challenge and reinterpretation. This process of reinterpretation may be attributed to changes in society's values expectations, which also influences change to both statute and the common law. Such changes can occur gradually and be almost imperceptible or occur quite visibly and rapidly. For example, statute law was progressively changed throughout Australia in the 1900s to give women the right to vote,[16] while changes to the common law have been recognised by cases such as *Queen v L* (1991) 174 CLR 379. (This case found the concept of irrevocable consent to sexual intercourse following marriage out of date with society's view of marriage and suggested that if this concept was ever part of the common law it was no longer the case.[17]) While it is unusual for Parliament to 'lose' powers in the absence of an Act of Parliament, this has occurred to the United Kingdom House of Commons. It is generally accepted the House of Commons no longer possesses the power to issue fines, although has never abolished this power.[18] This power, which was last exercised/used in 1666,[19] was questioned by the Courts in the eighteenth century.[20] While in the current era Houses appear reluctant to exercise their privilege power, in relation to 'low grade' abuse,[21] this does not mean that this power has been 'lost'.

The Victorian Attorney-General suggested that the legal opinion from Bret Walker SC, regarding the powers of the Council, was incorrect. The Attorney-General suggested that s 19 of the *Constitution Act 1975 (Vic)* pegged, and therefore limited, powers of Victoria's Legislative Council to those possessed by the House of Commons in 1855, unless modified by the Victorian Parliament.[22] This argument however was not considered following the introduction of another procedure to scrutinise the Executive — questions without notice or 'question time'. Parallels can be drawn between question time and orders for documents, such as, both are processes to seek information from and scrutinise the Executive. Some commentators may classify question time as a practice of the House, given it is a procedure exercised by individual Members and the House cannot enforce compliance if questions are not answered. Orders for documents may be classified as deriving from parliamentary privilege, given it is a power exercised by the entire

[15] Legislative Council of Victoria, Parliament of Victoria, *Standing Orders*, (2006).
[16] Audrey Oldfield, *Australian Women and the Vote* (1994) 1, 60; Marian Sawyer, 'Perspectives on Women's Suffrage' (2002) *Dissent* 40.
[17] *The Queen v L* (1991) 174 CLR 379
[18] Joint Committee on Parliamentary Privilege, United Kingdom Parliament, *Report* (1999) 73; Enid Campbell, 'Adjudication of Parliamentary Offences' (2003) 22(2) *University of Queensland Law Journal*, 184.
[19] House of Commons Select Committee on Parliamentary Privilege, United Kingdom Parliament, *Third Report* (1977) xix; John Waugh, 'Contempt of Parliament in Victoria' (2005) 26 *Adelaide Law Review* 47.
[20] House of Commons, above n 19, xix; *R v Pitt* (1762) 97 ER 861
[21] Evidence to House of Commons Select Committee on Procedure: Conduct of Members in the Chamber and the Alleged Abuse of Parliamentary Privilege, Parliament of the United Kingdom, 23 March 1989 (Mr CJ Boulton, Clerk of the House of Commons) 4.
[22] Select Committee of the Legislative Council on Gaming Licensing (2007: 49).

House and the House possesses the ability to punish where its orders are not complied with. The way in which a House of Parliament exercises the power to order the production of documents is therefore a matter of practice; the above classifications are consequently irrelevant for a comparison of the House of Commons' practice for both questions and orders for documents in 1855, and their adoption and practice of the Victorian Parliament.

When question time was introduced into the Council in 1976[23] there was no discussion in relation to the powers or practices of the House of Commons in 1855. It should be noted that in the House of Commons initially questions were regarded as an irregular form of debate. At this time the ability of Members to ask questions was granted through the indulgence of the House.[24] The third edition of May, while acknowledging the existence of this practice at this time, is silent with respect to the procedure relating to the operation of questions.[25] It is generally agreed that a fixed time for questions was only set aside by the Commons in the mid-nineteenth century.[26] It was, and continues to be, the practice of the House of Commons for notice to be given of the question to ensure that the Minister had time to secure the necessary information.[27] While possible to ask questions without giving notice, this practice was discouraged by the House.[28] Thus in 1855, there was no formal time set aside for questions in the House of Commons, and when questions were asked notice was given beforehand.

Prior to 1976 the Council's Standing Orders permitted questions without notice only by leave of the Council; however this procedure was rarely used.[29] The practice of the Legislative Council at this time was for Members to give notice of questions, which would then be printed in the *Notice Paper*, and responses would be received from the Minister and printed in *Parliamentary Debates* (Hansard).[30] In 1976 the Council amended this practice by agreement, with a period of 10 minutes being set aside for questions without notice.[31] These changes reflected those implemented by the Legislative Assembly in 1969. The practices of other Parliaments in Australia were considered by the Assembly's Standing Order's Committee, before it recommended adopting question time based on the practice of the Commonwealth Parliament.[32] The practices of other Parliaments therefore

[23] Two years before the Council became popularly elected.
[24] J Uhr, *Questions Without Answers: An Analysis of Question Time in the Australian House of Representatives* (1980) 19.
[25] May, fn 6: 256.
[26] Uhr, fn 24: 20.
[27] DN Chester & N Bowring, *Questions in Parliament* (1962) 17.
[28] R Borthwick, 'Questions and Debates' in SA Walkland (ed), *The House of Commons in the Twentieth Century* (1979) 477.
[29] Standing Orders Committee of the Legislative Council (1980).
[30] The Council still has this practice, which is governed by Chapter 8 of the Council's Standing Orders.
[31] Standing Orders Committee of the Legislative Council.
[32] Standing Orders Committee of the Legislative Assembly (1968).

appear to have been more influential when developing this procedure rather than reference to the powers of the House of Commons in 1855.

Prior to the adoption of Sessional Order 21, the last instance where the Legislative Council sought to order the production of documents was on 16 October 2002.[33] Mr Bill Forwood, the Leader of the Opposition in the Council at the time, moved a motion calling for the production of documents, correspondence, file notes, emails and records relating to a specific priority housing application.[34] While debate on the motion was never concluded as the Parliament was dissolved and an election held, throughout the debate the President made several rulings which reaffirmed the power of the Legislative Council to order the production of documents was unfettered.[35] The President also referred to the practice in other Parliaments when making his rulings, referring specifically to the case of *Egan v Willis and Another* (1998) 158 ALR 527 ('*Egan v Willis*') stating:

> I mentioned Egan's case in New South Wales. That is relevant because … The court came to the conclusion that the house was quite entitled to call for the production of those documents and that it used the power given to it by what is called the Bill of Rights of 1689 … you do not provide a power like this through standing orders. They exist to regulate your proceedings once you use your particular power.[36]

While these rulings are not binding, they are influential on future decisions, rulings and practices of the Council.

It should be acknowledged that the Victorian Legislative Council's Sessional Order relating to the production of documents draws upon New South Wales Legislative Council Standing Order 52.[37] Although the basis of the powers, privileges and immunities between the Victorian and New South Wales Parliaments differs both have the power to order the production of documents albeit derived from different bases. Given the Victorian Legislative Council's Sessional Order which defines the power to order the production of documents draws upon that of the New South Wales Legislative Council, it follows that until the Victorian Legislative Council's own practice has evolved that it will draw on developments in New South Wales including cases such as *Egan v Willis,*[38] and *Egan v Chadwick* [1999] 46 NSWLR 563.

It has been demonstrated that although the Council's powers are pegged against the powers of the House of Commons as at 1855, once the existence of a power has been confirmed, reference can and has been made to other Westminster Parliaments when the Council does not have an established practice. Given reference was made

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[33] Victoria, *Parliamentary Debates*, Legislative Council, 16 October 2002, 345.
[34] In order to protect the privacy of the applicant, the motion called for the documents to be lodged with the President and restricted access to the party leaders or their nominee.
[35] Victoria, *Parliamentary Debates*, Legislative Council, 16 October 2002, 357.
[36] *ibid*.
[37] Legislative Council, *Standing Rules and* Orders, Parliament of New South Wales (2004).
[38] (1998) 158 ALR 527.

to the procedure employed by other Parliaments when introducing question time, it is logical that the application of the Council's power to order the production of documents would follow a similar process and not be determined in isolation from relevant developments in other jurisdictions.

Are There Limitations on the Council's Powers?

As discussed previously there is no consensus from contemporary authors as to whether in 1855 there were grounds for refusing to comply with an order of the House of Commons for the production of documents. May states that in 1855, unless there was a satisfactory basis for withholding information from the House, it had the power to censure or punish.[39] In 2007 both the Legislative Council and one of its Select Committees ordered and summoned documents respectively, but were both met by non-compliance by the Government. There have been a variety of reasons:

Executive Privilege[40]

Following the Legislative Council's resolution on 19 September 2007, ordering the production of certain documents in relation to the granting of the Public Lotteries Licence,[41] the Attorney-General advised that the documents would not be provided as they were subject to both Executive privilege and statutory secrecy.[42]

The Attorney-General suggested that the Government could withhold documents from the Council on the basis of a claim of Executive privilege, claiming that in 1855 a Minister's claim of privilege over documents was sufficient grounds for refusing to provide the document to the House or its committees.[43] Although Redlich suggested that the House of Commons possessed an unlimited power to demand the production of documents,[44] he also indicated that Ministers possessed a limited prerogative to withhold information from the Parliament, stating:

> It is only in exceptional cases, as always when there is any question of prerogative, that such a refusal can be given. In any case this use of an obsolete prerogative is in the legal foundation upon which a Ministry may base a refusal of information to the House, and thereby to the public, when it is thought necessary to keep something an official secret. This, of course, only affects a small segment of the whole wide circle of administration and government; in the ordinary course of things the distinction is only really important in one department, namely that of foreign affairs, and to a certain extent also in naval and military policy. [45]

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[39] May, fn 6: 413.
[40] This is also referred to as public interest immunity, and crown privilege.
[41] Victoria, *Parliamentary Debates*, Legislative Council, 14 March 2007, 556.
[42] Letter from Hon Rob Hulls MP (Attorney-General), to Mr Wayne Tunnecliffe (Clerk of the Legislative Council), 27 September 2007 (tabled in the Council on 9 October 2007).
[43] Select Committee of the Legislative Council (2007: 50).
[44] Redlich fn 11: 39.
[45] *ibid*, p 41-2.

An application of this prerogative to Victoria would mean that there would be no limitations on the exercise of this power by Victoria's Legislative Council, given foreign affairs and defence policy fall under Commonwealth control. Further, although there are cases where the House of Commons did not press for the production of documents following a claim of privilege from the Minister, these documents were withheld on the basis they were cabinet minutes and/or documents which related to defence, foreign affairs and security.[46] Other classes of documents were also exempted, such as advices to Ministers by heads of Departments, law officers' opinions and where the Minister took the view that production of the document would prevent the Public Service providing frank opinions.[47] Further, the ability of Ministers to issue conclusive certificates in all cases was challenged following the House of Lords decision in *Conway v Rimmer* [1968] UKHL 2 AC 910.[48]

The common law view with respect to claims of Executive privilege in court proceedings has been influenced and shaped by cases such as *Sankey v Whitlam and Others* (1978) 21 ALR 505 ('*Sankey v Whitlam*'). For example Gibbs ACJ Stephen and Mason JJ in *Sankey v Whitlam,*[49] suggested that in all cases it was a duty of the court, and not the Executive Government, to decide whether a document would be produced or withheld. Stephen J in *Sankey v Whitlam,*[50] suggested that a claim to Executive privilege had no automatic operation, and that public interest was not confined to strict and static classes. Each claim of Executive privilege needed to be evaluated against the public interest at that time. It is for the court to inspect the allegedly privileged documents because it was not possible to determine whether the production should be ordered without an inspection.[51]

A parallel can be drawn between a court and the Parliament. While the Executive could claim a document was subject to privilege, one would expect the document would still be produced and the House concerned to determine whether to make the document public or not. In his evidence to the Senate Standing Committee on Privileges in 1994, Senator Gareth Evans, who at the time was Leader of the Government in the Senate and Minister for Foreign Affairs, reflected this view, stating:

> … a tussle about whether or not some document or some information should be revealed — the claim that an Executive Government may make of public interest immunity, which is the currently preferred expression, is, I acknowledge, ultimately one for the house of parliament to decide.[52]

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[46] Parliament of Australia, *Parliamentary Committees: Powers Over and Protection Afforded to Witnesses*, (1973), 34.
[47] *ibid*.
[48] *ibid*, p 35.
[49] 21 ALR 505, 507.
[50] 21 ALR 505, 542, 543.
[51] 'Crown Privilege — Objection to produce upon grounds of Public Interest' (1983) 57 *Australian Law Journal*, 709.
[52] Evidence to Senate Standing Committee on Privileges, Parliament of Australia, Canberra, 18 August 1994, p. 19 (Senator Gareth Evans).

More recently, in relation to resolving the competing claims between a House of Parliament and the Executive, Spigelman CJ (NSW) in paragraph 71 of *Egan v Chadwick,*[53] stated:

> The test [for executive privilege] is whether the disclosure is inconsistent with the principles of responsible government — not a balancing exercise between conflicting public interests.

The Legislative Council's Sessional Order 21 has a provision to deal with situations where privilege is claimed over documents. If Executive privilege is claimed, the document is still required to be lodged with the Clerk and only made available to the Member who moved the motion calling for the documents. If this Member disputes the claim of Executive privilege, the President will appoint an independent arbiter to determine the claim of privilege. (To date this provision has not been used as the documents have not been produced when a claim of Executive privilege is made.)

Drawing on the common law suggested the House has the power to deal with claims of privilege over documents; however the Legislative Council has delegated this power as part of Sessional Order 21 to an independent arbiter. While Executive privilege can be flagged in relation to specific documents, this claim does not appear to be an acceptable basis for refusing to provide documents to Victoria's Legislative Council.

Statutory Secrecy

In response to the Council's resolution on 19 September 2007 ordering the production of documents in relation to the grant of the public lotteries licence, the Leader of the Government, Mr John Lenders, suggested that a Sessional Order cannot expand the power of the Council because the order is not an Act of Parliament.[54] In this context he argued that s 19(1) of the *Constitution Act 1975 (Vic)* was therefore limited by s 10.1.29 to s 10.1.34 of the *Gambling Regulation Act 2003 (Vic)*.

Section 19(1) of the *Constitution Act 1975 (Vic)*, grants the Victorian Parliament's powers '… so far as the same are not inconsistent with any Act of the Parliament of Victoria …' It should be noted that when the Victorian Parliament first defined its privileges, it did so via reference to the Imperial Act establishing responsible government in Victoria, stating: '… so far as the same are not inconsistent with the said recited Act …'[55]. The 'recited Act' was the Imperial Act, *An Act to enable Her Majesty to assent to a Bill, as amended, of the Legislature of Victoria, to establish a*

[53] [1999] 46 NSWLR 563.
[54] Letter from Mr John Lenders MP (Treasurer) to Mr Wayne Tunnecliffe (Clerk of the Legislative Council), 5 November 2007 (tabled in the Council on 20 November 2007).
[55] *An Act for defining the Privileges Immunities and Powers of the Legislative Council and Legislative Assembly of Victoria Respectively 1857 (Vic).*

Constitution in and for the Colony of Victoria 1855, which stated: '… no such Privileges Immunities or Powers shall exceed those now held enjoyed and exercised by the Commons House of Parliament or the Members thereof …' The reference to this Act was altered in 1928, when the words 'or with any act of the Victorian Parliament' were incorporated in *The Constitution Act Amendment Act 1928 (Vic)*. While originally the only limitation on the powers of the Victorian Parliament were that it could not claim powers greater than those enjoyed by the House of Commons in 1855, over time this has changed to be that its powers are limited if they are inconsistent with any act of the Victorian Parliament. Accordingly, based on this wording, it has been suggested that the confidentiality provisions contained in s 10.1.29 to 10.1.34 of the *Gambling Regulation Act 2004 (Vic)* limit the powers of the Victorian Parliament.

There is uncertainty whether the confidentiality provisions of the *Gambling Regulation Act 2003 (Vic)* limit the powers of the Victorian Parliament. The disagreement on this issue arises from different statutory interpretations. Statutory interpretation is generally guided by two principles, which were reaffirmed in *Baker v Campbell* [1983] 153 CLR 52: the specific Act prevails over the general one, and if the two Acts are equally specific or equally general then the latter Act prevails over the earlier one.[56] Mr Bret Walker SC suggested that while it is within the legislative competence of the Victorian Parliament to enact statutory secrecy provisions. Further, any such provision which sough to diminish parliamentary privilege would need to be in plain words.[57] This latter point was reflected in the joint statement issued by the Commonwealth Attorney-General, Senator Gareth Evans, and the Commonwealth Solicitor-General, Mr M. H. Byers in 1983, that '… parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary before it may be taken away.'[58] Despite the wording in s 19 of the *Constitution Act 1975 (Vic)*, Mr Walker argued that s 10.1.29 to 10.1.34 of the *Gambling Regulation Act 2003 (Vic)*, do not limit the Parliament's powers to require the production of documents regarding the granting of Public Lottery Licences as there is no specific wording limiting Parliament.

> … in my opinion the highly specific, indeed peculiar, aspect of parliamentary privilege in question (viz the power, for the exercise of responsible government, to compel persons to attend to be questioned and the production of documents) should not be included with the completely general prohibition.

Egan v Willis,[59] and *Egan v Chadwick,*[60] are frequently cited when discussing the ability of the Legislative Council to order the production of documents. The

[56] D Gifford, *Statutory Interpretation*, (1990) 111.
[57] Select Committee of the Legislative Council on Gaming Licensing, Parliament of Victoria, *Second Interim Report*, (2007) 15.
[58] Senate Standing Committee on Constitutional and Legal Affairs, *Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments*, Commonwealth Parliament (1985) 86.
[59] (1998) 158 ALR 527.
[60] [1999] 46 NSWLR 563.

Attorney-General, the Hon. Rob Hulls, argued that these cases have limited applicability given the powers and privileges of the New South Wales Parliament are based on 'reasonable necessity' while those of Victoria are based on an historical transfer.[61] However Taylor in his *Constitution of Victoria* argued that:

> In *Egan v Chadwick* the Supreme Court of New South Wales held that public interest immunity would permit the non-production of cabinet documents, but this was under the law of privilege applicable in New South Wales, which is materially different from that application in Victoria … I suggest that no power on earth, or in Victoria at least, can resist a demand by Parliament for documents unless some valid statute provides to the contrary (and statutes will not ordinarily be read as doing so by general secrecy provisions, because Parliament is not presumed to take away its own powers except by clear words).[62]

While Parliament's powers can be limited by statutory secrecy provisions, it has been suggested that the powers of the Victorian Parliament are not limited by a reading of the phrase '… so far as the same are not inconsistent with any Act of the Parliament of Victoria …', in s 19(1) of the *Constitution Act 1975 (Vic)*, with the confidentiality provisions of the *Gambling Regulation Act 2004 (Vic)*, given express words are required. In this instance, the confidentiality provisions of the *Gambling Regulation Act 2004 (Vic)* are unlikely to prevent the Legislative Council's ability to order the production of documents.

Oaths of Secrecy

A further ground that has been advanced by the Executive Government for not providing documents to the Legislative Council is founded upon the oath of secrecy taken by Executive Councillors. The Leader of the Government, Mr John Lenders, acknowledged he had taken an oath as a Minister to uphold the law, and suggested that if he were to comply with the Legislative Council's resolution ordering documents in relation to the public lotteries licensing process, he would have to break both the law and this oath.[63] In a subsequent letter to the Clerk of the Legislative Council, Mr Lenders suggested that within the system of responsible government he was bound by competing obligations, stemming from the oaths he took in respect of being a Member of the Legislative Council, a Minister of the Crown, and an Executive Councillor.[64]

While Mr Lenders suggested that these oaths prevented him from producing the documents ordered by the Legislative Council, Gibbs ACJ in *Sankey v Whitlam,*[65] suggested that while Members of the Executive Council are required to take a

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[61] Select Committee of the Legislative Council on Gaming Licensing, Parliament of Victoria, *First Interim Report*, (2007) 49.
[62] G Taylor, *The Constitution of Victoria*, (2006) 277.
[63] Victoria, *Parliamentary Debates*, Legislative Council, 10 October 2007, 2990.
[64] Letter from Mr John Lenders MP (Treasurer) to Mr Wayne Tunnecliffe (Clerk of the Legislative Council), 5 November 2007 (tabled in the Council on 20 November 2007).
[65] 21 ALR 505, 529.

binding oath of secrecy, this cannot be used as a basis for not producing documents. He suggested that State papers are not protected from disclosure either because they are confidential or because a Minister has taken an oath not to reveal them.

Legal Professional Privilege

Following the receipt of a summons for documents from the Legislative Council Select Committee on Gaming Licensing, the Solicitor-General of Victoria, wrote to the Committee declining to produce documents on a number of grounds, including legal professional privilege. In her letter the Solicitor-General advised that it is essential that the Solicitor-General respect the confidences of the Crown.[66] While to her knowledge this was the first instance where a Solicitor-General in Victoria received a summons from either of the Houses of Parliament or its Committees, the Solicitor-General noted that there is a tradition that the opinions of the law officers of the Crown are treated as confidential documents.[67] In support of this position she quoted May:

> By long-standing convention, observed by successive governments, the fact of, and substance of advice from the law officers of the Crown is not disclosed outside government. … but if a Minister deems it expedient that such opinions should be made known for the information of the House, the Speaker has ruled that the orders of the House are in no way involved in the proceeding.[68]

While the convention referred to by the Solicitor-General is correct, the first recorded example of this issue arising in the House of Commons occurred in 1865.[69] Given the Victorian Parliament has not had this situation arise in the past, the Solicitor-General was correct in referring to the practice of other Westminster Parliaments. The applicability of the Solicitor-General's claim could be challenged, based on the argument advanced by the Executive Government, as the House of Commons did not develop a procedure in relation to providing the opinions of the law officers of the Crown until after 1855.

While acknowledging the position of the Victorian Solicitor-General with respect to the opinions of Law Officers is correct,[70] Bret Walker SC referred to the ruling by Spigelman CJ in *Egan v Chadwick*:

> 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. [71]

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[66] Select Committee of the Legislative Council on Gaming Licensing, Parliament of Victoria, *First Interim Report*, (2007) 28.
[67] *ibid*, p 29.
[68] W McKay (ed), fn 6, 443.
[69] JLJ Edwards, *The Law Officers of the Crown* (1964) 257.
[70] Select Committee of the Legislative Council on Gaming Licensing, Parliament of Victoria, *First Interim Report*, (2007) 48.
[71] [1999] 46 NSWLR 563.

Thus it would seem that a claim of legal professional privilege from the Executive is not a ground for failing to produce documents. Mr Walker suggested that it was up to the Council to determine what, if any, delicacy that should apply in particular cases.[72]

Of the grounds examined, it would appear that there is no real basis upon which the Executive can decline to produce documents, the only potential exception to this rule being Cabinet documents. Mason J in *Sank*ey v *Whitlam,*[73] suggested that Cabinet papers did not stand outside the general rule requiring a court to determine on balance whether the public interest called for the a document's production or not. Subsequent decisions and practice however have resulted in a general acceptance of the principle that documents which reveal the deliberations of Cabinet should not be produced. This view was reiterated by Spigelman CJ in *Egan v Chadwick*:

> … it is not reasonably necessary for the proper exercise of the functions of the Legislative Council to call for documents the production of which would conflict with the doctrine of ministerial responsibility, either in its individual or collective dimension.[74]

Orders for Documents and Responsible Government

The Leader of the Government in the Council, Mr John Lenders, argued that given the Executive Government is not the servant or agent of the Legislative Council, he was unable to comply with the order to present certain documents. He stated that the Executive is a separate arm of Government, given the power to govern while holding the confidence of the Lower House.[75] The fact that the Government does not have to maintain the confidence of Upper Houses does not however mean that it is not accountable to this House.[76]

In 2001, the Victorian Government established the Constitutional Commission Victoria to consider a number of matters including the structure, powers and practices of the Legislative Council. Following the report from the Commission, the Parliament agreed to changes to the *Constitution Act 1975 (Vic)* which came into effect following the election in 2006. In its report, the Commission noted that as party discipline eroded the effective responsibility of the Government to the Lower House, the enforcement of the accountability of the Government has become an important role of Upper Houses.[77] Further it suggested that the power to send for

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[72] Select Committee of the Legislative Council on Gaming Licensing, Parliament of Victoria, *First Interim Report*, (2007) 46.
[73] 21 ALR 505, 571.
[74] [1999] 46 NSWLR 563.
[75] Letter from Mr John Lenders MP (Treasurer) to Mr Wayne Tunnecliffe (Clerk of the Legislative Council), 5 November 2007 (tabled in the Council on 20 November 2007).
[76] G Carney, 'Egan v Willis and Egan v Chadwick: The Triumph of Responsible Government' in G.Winterton (ed), *State Constitutional Landmarks*, (2006) 298.
[77] Victoria, Constitution Commission, *A House for Our Future*, Victorian Government Printer, 2002, p 11.

documents and other things and to compel the attendance of witnesses was one of the chief weapons available to Upper Houses to scrutinise both legislation and the actions of the Executive Government.[78] Thus in an era of rigid party discipline, Upper Houses, not controlled by the Government, can be viewed as democratic safeguards by virtue of their ability to scrutinise the Executive and hold it to account.

The issues of accountability were central to Egan v Willis,[79] and Egan v Chadwick.[80] In the latter case the Court was required to reconcile the two conflicting principles of responsible government – the scrutiny function against collective ministerial responsibility.[81] Although Spigelman CJ in Egan v Chadwick,[82] recognised that there was a body of opinion that the formal 'responsibility' was only to the Lower House, he referred to the judgement from Gaudron, Gummow and Hayne JJ in Egan v Willis,[83] specifically:

> One aspect of responsible government is that ministers may be members of either House in a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. … The circumstance that ministers are not members of a chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them.

Thus while not requiring the confidence of the Upper House, the Executive is still responsible to this Chamber. Consequently it has a duty to provide all documents required by this Chamber to enable it to undertake its scrutiny function.

Recent Developments

The Council's first order for documents resulted in deadlock between it and the Executive Government. The Executive refused to produce documents despite the Legislative Council ordering the documents on four separate occasions. The Legislative Council also resolved to suspend the Leader of the Government from the service of the Council for half a day, for failing to comply with its orders.[84] On the last sitting day of 2007 Mr Philip Davis, then Leader of the Opposition in the Legislative Council, gave notice of a further motion proposing the suspension of the Leader of the Government for a period of three consecutive weeks, of which one was a sitting week, if he again failed to table the documents as ordered by the Council.[85] It appeared possible that this issue would result in a determination by the courts. However in January 2008, following a leadership change in the Opposition

[78] Taylor, fn 62: 276.
[79] (1998) 158 ALR 527.
[80] [1999] 46 NSWLR 563.
[81] Carney, fn 76: 326.
[82] [1999] 46 NSWLR 563.
[83] (1998) 158 ALR 527, 541.
[84] Victoria, *Parliamentary Debates*, Legislative Council, 21 November 2007, 3535; Victoria, *Parliamentary Debates*, Legislative Council, 22 November 2007, 3630.
[85] A copy of this motion can be obtained from the Legislative Council Table Office.

in the Council this motion was withdrawn from the Notice Paper and the documents were never pursued further. While the order for documents in relation to lottery licensing documents remains outstanding, given the Select Committee has tabled its final report, it is unlikely that any further action will be taken in relation to these documents.

Despite its first attempt in 2007 being unsuccessful, the Council has not been deterred from further orders for documents. In 2008 the Legislative Council ordered the production of 76 separate documents. The position of the Government has changed over this time, with 57 documents (75 percent) produced, 16 documents (21 percent) refused following claims of executive privilege,[86] and 3 documents (4 percent) refused on the basis that they either did not exist or could not be identified.

While the motions have required the Leader of the Government in the Council to table the documents, generally a response is received from the Attorney-General, who in the 56th Parliament is a Member of the Legislative Assembly. This may make it difficult for the House to take action against the Attorney-General for failing to table documents. The documents where privilege has been claimed generally relate to either tender documents or Ministerial briefings where the Government has claimed disclosure would reveal high-level confidential deliberative processes of the Executive Government or damage the State's financial and commercial interests. The Sessional Order has a provision covering claims of privilege, requiring the disputed documents to be independently reviewed. To date the Government has failed to comply with this aspect of the Sessional Order. In his letter dated 11 June 2008, the Attorney-General suggested that the Sessional Order that directs that documents subject to a claim of Executive privilege be delivered is beyond the Council's power.

Conclusion

While the Legislative Council possesses the power to order the production of documents, there is some uncertainty from contemporary sources regarding limitations on this power. Parliament can legislate to limit its powers but such statutory secrecy provisions need to be clear and explicit. The Executive can claim certain documents are privileged; however there is no basis for the withholding of documents, and questions of privilege are for the House not the Executive to determine. The Executive then is accountable to both Houses of Parliament, albeit in different ways. ▲

[86] In relation to the documents subject to a claim of Executive privilege, some of these documents are being pursued by subsequent motions. For example. on 4 February 2009, the Council agreed to a motion censuring the Leader of the Government in the Council for failing to produce some of these documents, and again ordered their production. (Victoria, *Parliamentary Debates*, Legislative Council, 4 February 2009, 63.)

APPENDIX 1

SESSIONAL ORDER 21

PRODUCTION OF DOCUMENTS

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

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

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

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

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

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

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

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

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

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

(10) The Clerk will maintain a register showing the name of any person examining