

It's the Constitution, stupid! Why the Victorian Government believes it has the right to control Parliament's access to information – and why it is wrong

Introduction

This paper examines the ongoing refusal of the Victorian Government to adhere to the Legislative Council's Standing Order that requires documents attracting disputed claims of Executive Privilege to be provided to an Independent Arbiter. It draws on academic writings, Hansard records, and interviews with Parliamentary professionals and legal experts.

The paper begins by outlining Australia's system of government, including the three most relevant components addressed in this paper: responsible government; the separation of powers; and powers of the Houses. It then explains using 'real life' examples why this issue is vital in ensuring our democracy functions in way that means our governments meet the needs of all citizens.

The paper proceeds to outline the history of the Standing Order since 2007 before unwrapping the arguments used by the Victorian Government – in particular, the nexus between Victoria's Constitution and the powers of the House of Commons in 1855. It then examines other relevant issues, such as the Egan cases in New South Wales, problems with classifying documents as Cabinet-in-Confidence, before highlighting weaknesses in other attempts by the Victorian Government to justify its position.

The paper concludes with two suggestions on what may be needed to persuade the Victorian Government to reconsider its position, from a sustained court action to the (perhaps whimsical) suggestion of incarcerating recalcitrant Ministers.

About our system

The Commonwealth of Australia is a federation of six states and two self-governing territories. The federation is considered one integrated system that also nurtures 'the diversity which is a necessary and indeed desirable feature of federalism'.¹

The system is described as both parliamentary government and responsible government (i.e. a version of the Westminster system). 'Parliamentary government' means that the Executive comes from within the Parliament. 'Responsible government' means that the Executive is responsible to the Parliament.²

Greg Taylor, an expert on Victoria's Constitution, points out that the responsibility of Ministers 'is both collective and individual, and owed to the whole Parliament (and not just one House of it) as representatives of the people'.³

¹ Greg Taylor, *The Constitution of Victoria*, Melbourne: The Federation Press, 2006, p. 2.

² Infosheet 20 – The Australian System of Government, https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government

³ Greg Taylor, *The Constitution of Victoria*, Melbourne: The Federation Press, 2006, p. 162.

A fundamental principle of democracy in Australia is the separation of powers between the legislative (parliaments), executive (ministers) and judicial (courts) branches of government. Harry Evans writes: ‘Governments are supposed to be accountable to Parliament, and through Parliament to the electorate.’⁴

Federally, Section 49 of the Constitution empowers each House to call witnesses and order the production of documents (also found in Standing Orders, for example SO164 in the Senate). This power, which is frequently delegated to Committees,⁵ also exists in every other jurisdiction. In Victoria, responsible government dates from the opening of the first Parliament, in November 1856.⁶

In Victoria, Parliament’s powers are defined in Section 19 of the Constitution:

(1) 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, 1855⁷ 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 immunities or powers were so held possessed or enjoyed by custom, statute or otherwise.

*(2) The Parliament may by Act legislate for or with respect to the privileges immunities and powers to be held enjoyed and exercised by the Council and the Assembly and by the committees and the members thereof respectively.*⁸

These powers include the power to order the production of documents. This is also seen in the *Parliamentary Committee Act 2003* 28(1), which states: ‘A Joint Investigatory Committee has power to send for persons, documents and other things’.⁹ While the Legislative Council’s Standing Order 10.01 states: ‘The Council may order documents to be tabled in the Council’.¹⁰

Access to government information is crucial to democratic practice, identified as underpinning ‘the core Australian constitutional tenets of representative and responsible government’.¹¹

⁴ Harry Evans, ‘The Role of the Senate’. Department of the Senate, Papers on Parliament no. 25, December 2009, p. 97.

⁵ Harry Evans, Odgers’ Australian Senate Practice, 14th edition, Chapter 2, ‘Parliamentary privilege: immunities and powers of the Senate’.

⁶ Greg Taylor, *The Constitution of Victoria*, Melbourne: The Federation Press, 2006, p. 38.

⁷ 21 July 1855 was the day that Queen Victoria gave Royal Assent to the Victorian Constitution Statute – although the Act was not proclaimed by the Governor until 23 November of that year.

⁸ *Constitution Act 1975* (Vic) s. 19.

⁹ *Parliamentary Committees Act 2003* (Vic) s. 28(1).

¹⁰ Legislative Council of Victoria, Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria, Parliament of Victoria, 2022.

¹¹ Centre for Public Integrity, Still Shrouded in Secrecy, p. 3. <https://publicintegrity.org.au/wp-content/uploads/2025/07/Still-Shrouded-in-Secrecy-2.pdf>

Former Clerk of the Legislative Council Wayne Tunnecliffe (1999–2015) described this power as part of the House’s ‘armoury’ in holding the Executive to account.¹²

Why this matters to all of us

Parliamentary oversight of the Executive is of course the main component of responsible government. In Victoria, two recent issues highlight why this is not just a matter of interest to parliamentary boffins but is important to how the Government functions, as well as to individual members of the community.

On 2 August 2023, the Legislative Council formed a Select Committee to inquire into the 2026 Commonwealth Games bid, following the Labor Government cancelling the Games in July 2023 at a cost of \$589 million to the Victorian taxpayer.¹³ However, the Committee’s work was impeded by the Government refusing to provide documents requested by the Committee¹⁴ by claiming Executive Privilege.

In their Minority Report, the Labor Party Members of the Committee wrote:

Executive privilege is the right of governments not to disclose certain information or documents from public release where the government deems there are reasonable grounds for such information to be kept confidential ...

*The application of privilege in the Victorian Constitution relies on the practices observed in the British House of Commons in 1855 ... Claims in the majority report surrounding Executive Privilege ignore this foundational principle as set out in the Constitution.*¹⁵

The Labor Party Members had also unsuccessfully voted to include the following finding in the Report: ‘Executive Privilege is a matter to be determined by the executive, as per the Constitution.’¹⁶

The Chair of the Select Committee, David Limbrick, considered the Government’s actions ‘an avoidance of parliamentary scrutiny and public accountability’.¹⁷

A more recent example is found in the Legislative Council’s Legal and Social Issues Committee’s *Inquiry into the redevelopment of Melbourne’s public housing towers*, tabled in December 2025. Again, the Committee was impeded in its work by the

¹² Parliament of Tasmania, Legislative Council Select Committee Report on Production of Documents, 2021, p. 26.

¹³ Select Committee on the 2026 Commonwealth Games Bid, The 2026 Commonwealth Games Bid Final Report, Melbourne: Parliament of Victoria, 2025, p. 3.

¹⁴ The Council itself had also requested documents.

¹⁵ Select Committee on the 2026 Commonwealth Games Bid, The 2026 Commonwealth Games Bid Final Report, Melbourne: Parliament of Victoria, 2025, p. 275.

¹⁶ Select Committee on the 2026 Commonwealth Games Bid, The 2026 Commonwealth Games Bid Final Report, Melbourne: Parliament of Victoria, 2025, p. 275.

¹⁷ Select Committee on the 2026 Commonwealth Games Bid, The 2026 Commonwealth Games Bid Final Report, Melbourne: Parliament of Victoria, 2025, p. x.

Government claiming Executive Privilege over documents. These included technical documents, such as building condition reports, prepared by consultants.¹⁸

Similar to the Commonwealth Games Inquiry, the Minority Report from Labor Party Members repeated the view that in 1855, claims of Executive Privilege ‘were in the domain of the Executive itself’.¹⁹ They added that to think otherwise ‘fundamentally misunderstands the Constitutional basis of Executive Privilege’.²⁰

Joe McCracken, the Committee Chair, highlighted in his foreword that the residents of the towers have a right to see the reports the Government relied on in deciding to demolish the towers. In denying the residents this evidence, the Victorian Government contributed to the anxiety many residents are already experiencing because of the redevelopment program. He explained:

... this issue extends beyond parliamentary procedure. Residents repeatedly told the Committee that they simply want to see the evidence about the buildings they live in. These technical assessments should not be secret. The Government has no legitimate basis for withholding them, and stakeholders rightly expect the Legislative Council to insist on transparency.’²¹

A further problem can be seen in the Victorian Government’s *Guidelines for appearing before and producing documents to Parliamentary Inquiries*, which apply to all Government bodies.

The Guidelines state:

Executive Privilege is a privilege held by the Executive Government ... The Government may claim Executive Privilege in response to a Parliamentary Committee request for information if it considers the public interest in withholding the information outweighs the public interest in providing it to the Parliamentary Committee.’²²

The Guidelines also state that ‘various Victorian Governments have informed Parliaments’ about the factors they consider when determining whether to abide by orders to produce documents or not.²³

¹⁸ Legislative Council Legal and Social Issues Committee, *Inquiry into the Redevelopment of Melbourne’s Public Housing Towers*, Melbourne: Parliament of Victoria, 2025, pp. 30-33. The Council itself had also requested documents.

¹⁹ Legislative Council Legal and Social Issues Committee, *Inquiry into the Redevelopment of Melbourne’s Public Housing Towers*, Melbourne: Parliament of Victoria, 2025, p. 210.

²⁰ Legislative Council Legal and Social Issues Committee, *Inquiry into the Redevelopment of Melbourne’s Public Housing Towers*, Melbourne: Parliament of Victoria, 2025, p. 210.

²¹ Legislative Council Legal and Social Issues Committee, *Inquiry into the Redevelopment of Melbourne’s Public Housing Towers*, Melbourne: Parliament of Victoria, 2025, p. 12.

²² Department of Premier and Cabinet, *Guidelines for appearing before and producing documents to Victorian Inquiries*, Melbourne: Victorian Government, 2025, p. 12.

²³ Department of Premier and Cabinet, *Guidelines for appearing before and producing documents to Victorian Inquiries*, Melbourne: Victorian Government, 2025, p. 26.

This statement is highly problematic because, as current Clerk Robert McDonald advised Commonwealth Games Select Committee Chair David Limbrick: ‘The Legislative Council has not conceded the existence of any conclusive Executive Privilege in relation to its proceedings.’²⁴

However, Departments and Government agencies typically refer to these Guidelines when claiming Executive Privilege over documents they refuse to provide to Committees. It is undeniable that these regulations need to be rewritten as a matter of great urgency.

Timeline of the Standing Order

The arguments advanced by the Victorian Government are addressed shortly in this paper. First, though, the next section of this paper provides a timeline of the Legislative Council’s Standing Order regarding its power to order the production of documents. It discusses the actions of a Select Committee and, crucially, the debate in the House when the Sessional Order was agreed to, seven years before becoming a Standing Order.

On 14 February 2007, the Legislative Council established a Select Committee on Gaming Licencing. One month later, the Committee resolved to summons documents from individuals, government agencies and private organisations. (This paper focuses only on government documents.) The Government at the time was a Labor Government under Premier Steve Bracks.

The Attorney-General, Rob Hulls, wrote to the Committee on 11 April 2007 advising that he had informed Departmental Secretaries that the Government was claiming Executive privilege in relation to documents he claimed would, among others:

- undermine the confidentiality of Cabinet deliberations; and/or
- reveal communications between Ministers and public servants relating to the formation of Government policy; and/or
- be a record of opinions of Ministers or public servants on issues under consideration by the Government.²⁵

Prior to this, on 14 March 2007, the Legislative Council agreed to a Sessional Order outlining how the Council should call for documents from the Government. The Order’s subsections most relevant to this paper include:

- The Council may order documents to be tabled in the Council.
- Where a document is claimed to be covered by Executive Privilege —

²⁴ Correspondence from Robert McDonald, Clerk of the Legislative Council, to David Limbrick MLC, Chair of the Select Committee on the 2026 Commonwealth Games Bid 10 November 2023, p. 1.

²⁵ Select Committee of the Legislative Council on Gaming Licensing, First Interim Report Upon Gaming Licencing, Melbourne: Parliament of Victoria, 2007, p. 8.

- 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
- the documents are to be delivered to the Clerk by the date and time required in the resolution of the Council and —
 - made available only to the mover of the motion for the order; and
 - not published or copied without an order of the Council.
- 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 seven calendar days as to the validity of the claim.²⁶
- 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.
- A report from the independent legal arbiter is to be lodged with the Clerk and —
 - made available only to members of the Council; and
 - not published or copied without an order of the Council.

The Sessional Order was moved by the Leader of the Opposition in the Council, Philip Davis, with the ayes having it by 21-19. The Coalition and the Greens voted yes and Labor voted no.

On the same day, the Leader of the Government in the Council, John Lenders, requested that the President obtain legal advice regarding the Council's power. On 6 June 2007, that legal advice was received from Mr Bret Walker SC and tabled. Chief among Walker's advice was that:

- The Council's capacity for oversight of government, and particularly the Executive, was 'beyond serious question'.
- This power is not stated in the Constitution as it is an 'implied power'.
- There was no precedent for a successful claim by the Executive to simply resist an order for papers.²⁷

Importantly, this third point highlights that merely claiming Executive Privilege is not a sufficient reason to withhold documents. Further: 'Where a document is not to be regarded as a Cabinet document, there should be no public interest reason to keep it from the people's representatives, the legislators, in the Council.'²⁸ (The problem with Cabinet documents is discussed later in this paper.)

²⁶ As is the practice in New South Wales and the ACT.

²⁷ Select Committee of the Legislative Council on Gaming Licensing, First Interim Report Upon Gaming Licencing, Melbourne: Parliament of Victoria, 2007, p. 10.

²⁸ Select Committee of the Legislative Council on Gaming Licensing, First Interim Report Upon Gaming Licencing, Melbourne: Parliament of Victoria, 2007, pp. 43-48.

The Committee forwarded this advice to the Attorney-General and received a response on 21 June 2007. Hulls advised that the Government had obtained different legal advice from Peter Hanks QC and repeated the argument contained in the letter of 11 April.

The Sessional Order stayed in place for another seven years before the Council voted for it to become a Standing Order on 16 October 2014.

A state of denial

This section focuses on the Victorian Government's main reasoning for ignoring the Council's production of documents motions: the belief that the nexus between the Constitution and the powers of the House of Commons in 1855 means the Government is the sole arbiter in deciding whether Executive Privilege applies or not.

In Hulls' first letter to the Council's Gaming Inquiry, he argued that the Committee could not demand the documents because in 1855, 'the House of Commons had no power to compel the production of documents from the Executive Government which the Executive Government asserted were the subject of Executive Privilege'.²⁹

In his second letter, Hulls argued:

- The Council has some power to call for documents, but this power is limited by 'clearly established exceptions'.
- Crown or Executive Privilege meant that the House of Commons could request documents from the Crown through an 'address' but could not compel the production of documents over which the Crown claimed privilege.
- A Minister needed only to claim Executive Privilege and the House and its Committees 'were required to respect that claim'.
- Section 19(1) of the *Constitution Act 1975* means that those limitations apply in Victoria.³⁰

The legal advice that Hulls relied on has never been made public, a fact is shown to be particularly relevant later in this paper.

By contrast, the core of Phillip Davis's argument was that the Council's power to order documents exists both under the Constitution – i.e. Sections 19(1) and (2) – and in legislation relating to Committees – i.e. they may send for persons, documents and other things. Wayne Tunnecliffe, who was Clerk at the time, later confirmed that he shared Davis's view that the power already existed in the Constitution.³¹

When moving the motion, Davis referred to a Ruling from the Chair confirming the Council's 'unfettered power to require the production of documents, a power provided

²⁹ Select Committee of the Legislative Council on Gaming Licensing, First Interim Report Upon Gaming Licencing, Melbourne: Parliament of Victoria, 2007, p. 19.

³⁰ Select Committee of the Legislative Council on Gaming Licensing, First Interim Report Upon Gaming Licencing, Melbourne: Parliament of Victoria, 2007, pp. 49-51.

³¹ Parliament of Tasmania, Legislative Council Select Committee Report on Production of Documents, 2021, p. 107.

under the *Constitution Act 1975*.³² He then referenced an earlier debate in 2002 on the powers of the Council to order documents. In his contributions to the debate, the then President, Bruce Chamberlain, stated that Standing Orders are only needed to guide how existing powers are used:

*... the House clearly has this power. You do not provide a power like this through the Standing Orders. They exist to regulate your proceedings once you use your particular power ... The power comes, if you like, from higher up – in this case the Constitution Act of the State of Victoria.*³³

Therefore, the Sessional Order was formalising or codifying a way to regulate the House's power. As Gordon Rich-Phillips, the Member for South-Eastern Metropolitan said: 'Mr Davis's motion is merely a codification of existing powers.'³⁴

Ed O'Donohue, the Member for Eastern Victoria, referencing Section 19(1) added: 'Custom, statute or otherwise of course includes the common law doctrine [of reasonable necessity]. This Council derives its power via the Constitution, via the Bill of Rights of 1689 and via common law interpretation.'³⁵

The Government opposed the motion vigorously, albeit somewhat confusingly. For example, Martin Pakula, who was later to become Labor's Attorney-General, told the chamber: 'In short, it is a bad look for the Council to be making a mockery of its own processes by passing Sessional Orders that breach the Constitution and other Acts of this Parliament.'³⁶

During the same debate and by way of contrast, Matt Viney, the Labor Member for Eastern Victoria said: 'No-one is denying that the Standing Orders entitle the House to call for documents.'³⁷

As noted above, the Council, under a Coalition Government, voted for the Sessional Order to become a Standing Order on 16 October 2014. The Labor Opposition voted in favour of the Standing Order, with Lenders saying:

*The Labor Party does not oppose the part of [the] amendment on the production of documents chapter ... The principles of the Labor Party are that we follow the procedures of the Senate as a starting point and we deal with the iterations of what is happening under our current Standing Orders, Sessional Orders and practice.*³⁸

(The Senate's powers are discussed later in this paper.)

³² Parliamentary Debates (Hansard), Legislative Council of Victoria, 14 March 2007, p. 557.

³³ Parliamentary Debates (Hansard), Legislative Council of Victoria, 16 October 2002, p. 358.

³⁴ Parliamentary Debates (Hansard), Legislative Council of Victoria, 14 March 2007, p. 570.

³⁵ Parliamentary Debates (Hansard), Legislative Council of Victoria, 14 March 2007, p. 566. Taylor argues that Parliament's powers at times go beyond reasonable necessity.

³⁶ Parliamentary Debates (Hansard), Legislative Council of Victoria, 14 March 2007, p. 567.

³⁷ Parliamentary Debates (Hansard), Legislative Council of Victoria, 14 March 2007, p. 561.

³⁸ Parliamentary Debates (Hansard), Legislative Council of Victoria, 16 October 2014, p. 3402.

The Standing Order came into operation at the beginning of the 58th Parliament in 2015. A later review of the Standing Order stated that it ‘reflects the House’s authority to order the production of documents as an inherent power that, in Victoria, is based on the inherited powers under s 19 of the *Constitution Act 1975*.’³⁹

The Labor Party returned to power in November 2014. To date, neither party when in government has complied with the rule requiring documents related to disputed claims of Executive Privilege to be provided to an Independent Arbiter.

When questioned about this for this paper, former Council Clerk Andrew Young (2015-2022) described various Victorian Governments’ behaviour as ‘inconsistent with the whole concept of what our parliamentary system is. We have a system of parliamentary government, not a system of presidential government ... this is not just an idea, it's the law.’⁴⁰

And what of Erskine May?

This next section discusses the link between the 1855 edition of Erskine May and Parliament’s powers as defined in the Victorian Constitution. It refers in particular to references to addresses, or requests, for documents and the relevance of Secretaries of State. As the Victorian Government has never cited any evidence supporting its claims, it would appear to be a relatively safe guess that the Government has misinterpreted the 1855 edition of Erskine May.

A correct reading of Erskine May is that Parliament’s powers should *not exceed* those of the House of Commons. Hulls was arguing that the Council was trying to do just that, however, Taylor rejects this argument outright. In reference to the Standing Order, he said: ‘If Hulls were correct, which he’s not, but if he were correct, the House would be attempting to confer upon itself a privilege which it doesn’t have.’⁴¹

Taylor also suspects that s. 19(2) of the Constitution exists to give Parliament the power to legislate an increase in its powers, saying: ‘Somebody might say subsection 1 limits the power of Parliament and so the drafter back in 1975 presumably said, “We’ll put that in to make sure that we hit that argument on the head”.’⁴²

Similarly, in an interview for this paper Hanks said that Parliament is not limited by s. 19. This being the case, Parliament could write legislation ‘re-defining those privileges in a manner very different from s. 19’.⁴³

What is contested is Government Members – reflecting Hulls’s argument in his second letter listed above – arguing that in 1855 ‘all it took was for a Minister to rise in his place

³⁹ Legislative Council of Victoria, Standing Orders Review, March 2019 [Internal document].

⁴⁰ Interview with Andrew Young, 8 April 2026.

⁴¹ Interview with Greg Taylor, 13 March 2026.

⁴² Interview with Greg Taylor, 13 March 2026.

⁴³ Interview with Peter Hanks KC, 17 July 2026.

and say a document was privileged and the House accepted it. That was the basis of the law and of privilege at that time.’⁴⁴

And it is interesting to note that Hulls’s first rejection of the Gaming Inquiry order for documents was to claim Executive Privilege ‘on behalf of the Crown’.⁴⁵

Yet, Erskine May’s 1855 edition can be read to reject the Victorian Government’s views. Foremost, it states that Parliament ‘is invested with the power of ordering all documents to be laid before it which are necessary for its information’.⁴⁶ Regarding Committees, it states that witnesses must provide all documents requested and ‘any neglect or disobedience of a summons will be reported to the House, and the offender will be treated in the same manner as if he had been guilty of a *similar contempt* [my emphasis] to the House itself’.⁴⁷

Erskine May then turns its attention to the question of which documents are to be ordered and which are to be provided via an ‘address’ or request. It states:

*... 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 a 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.*⁴⁸

Hulls argued that in 1855 the House of Commons only passed addresses asking the Crown to provide documents, as opposed to orders, presenting this as a matter of law, not simply Parliamentary practice. However, using addresses does not acknowledge any legal restrictions on the House’s powers. It is simply a practice that the House can choose to use when it sees fit.⁴⁹

As such, the Legislative Council’s Standing Orders make no reference to addresses, while the Legislative Assembly’s Standing Orders only refer to addresses when the Assembly requires documents from the Governor and ‘the royal prerogative is concerned’.⁵⁰ Further, when Premiers ‘advise’ a Governor this is in reality an order couched in polite language – more a matter of maintaining tradition than subservience.

⁴⁴ Matt Viney, In: Parliamentary Debates (Hansard), Legislative Council of Victoria, Wednesday 14 March 2007, p. 561.

⁴⁵ Letter from Rob Hulls Attorney General to Richard Willis, Secretary, Legislation and Select Committees, in Select Committee of the Legislative Council on Gaming Licensing, First Interim Report Upon Gaming Licencing, Melbourne: Parliament of Victoria, 2007, p. 19.

⁴⁶ Thomas Erskine May, A practical treatise on the law, privileges, proceedings and usage of Parliament, Butterworths: London, 1855, p. 411.

⁴⁷ Thomas Erskine May, A practical treatise on the law, privileges, proceedings and usage of Parliament, Butterworths: London, 1855, p. 314.

⁴⁸ Thomas Erskine May, A practical treatise on the law, privileges, proceedings and usage of Parliament, Butterworths: London, 1855, p. 412.

⁴⁹ Greg Taylor, Parliament’s power to require the production of documents – a recent Victorian case, in Deakin Law Review, Volume 13, No 2, 2014, pp. 22-23.

⁵⁰ Legislative Assembly of Victoria, Standing Orders and Joint Standing Orders and Joint Rules of Practice of the Parliament of Victoria, Parliament of Victoria, 2026.

Again, the practice of using addresses does not restrict the Parliament's legal powers. Taylor adds that if Hulls were correct 'clearly a lot of other legislative chambers with legally identical powers to those of the Victorian Legislative Council (or even, in the case of New South Wales, with lesser powers) would now be mistaken about the extent of their powers'.⁵¹

Indeed, no other government in Australia has tried to use the same argument as Hulls and the Victorian Government.

The second relevant discussion point is Erskine May's reference to Secretaries of State. There are two problems with relying on this reference to support limiting the powers of the Victorian Parliament to order papers:

- In 1855, a Secretary of State was literally a personal secretary to the Queen – that is no longer the case.
- Australia does not have the position of Secretary of State – what Taylor refers to as the monarch's 'alter egos'.

In the United Kingdom, it was important to only request state documents, as opposed to private documents such as personal diaries, from the monarch or their 'alter egos'. This continues only as convention in Australia.

However, because in Victoria the only 'alter ego' of the monarch is the Governor, that convention does not apply to anyone else, including Ministers. Otherwise, Parliament could only ever request information from public servants, which, as Taylor states:

*... would be a ridiculous state of affairs. So, there must be something wrong with that argument. It's a prime illustration of that maxim that they're arguing for themselves to be exempted from all scrutiny except their own scrutiny, which of course is no scrutiny at all. Clearly, power has blinded them to that insight.*⁵²

It is very easy to find others who think along the same lines as Taylor. For example, regarding Hulls, Andrew Young has written:

*I do not agree with the Attorney-General's assertion ... that the Council's powers are trumped by a Government's claim of Executive Privilege ... the powers and privileges of the Council mean that it is for the House to decide this on a case-by-case basis.*⁵³

Our old friend Egan – is it relevant to Victoria?

Any discussion on Parliament's powers in Australia – in a kind of parliamentary improvement on Godwin's Law – invariably turns to the Egan cases in New South Wales: *Egan v Willis* (1998); and *Egan v Chadwick* (1999). That is equally true for this paper, as

⁵¹ Greg Taylor, Parliament's power to require the production of documents – a recent Victorian case, in *Deakin Law Review*, Volume 13, No 2, 2014, p. 33.

⁵² Interview with Greg Taylor, 13 March 2026.

⁵³ Andrew Young, Submission to Parliament of Tasmania, Legislative Council Select Committee Report on Production of Documents, 2021, p. 2.

the cases have been used both in support of and in opposition to the Victorian Government's position.

These cases focused on the refusal of the former Treasurer and Leader of the Government in the House, Michael Egan, to produce documents ordered by the Legislative Council. The decisions reaffirmed all Australian Parliament's power to order documents with the majority judgement in *Egan v Willis* noting the importance of oversight and accountability in all systems of responsible government.⁵⁴

Unlike other Parliaments in Australia, though, New South Wales has never tied its powers to the House of Commons. This has led to differences of opinion regarding whether the Egan decisions are applicable in Victoria.

In 2007, the Victorian Government thought not. For example, the Sessional Orders debate contained several references to Egan and New South Wales. John Lenders interjected on more than one occasion with the view that 'there is no link to the House of Commons in their constitution [and] That is the wrong constitution. We are south of the Murray, not north'.⁵⁵

Others take the view that the decisions apply to all Parliaments in Australia. In the 2002 debate referred to above, Council President Bruce Chamberlain referred to Egan:

*... because it examined in great detail – and it went up to the High Court, where there was a four-to-one decision in favour of the Legislative Council in New South Wales – the powers of upper houses in Australia [my emphasis] to require the production of documents.*⁵⁶

In the 2007 Sessional Order debate, Ed O'Donohue argued:

*The government may try to artificially delineate the decisions made in New South Wales [but] the first place a Victorian court would refer for precedent is to the highest court in Australia – that is, the High Court of Australia [which is] a binding court on the Victorian jurisdiction.*⁵⁷

In his advice to the Gaming Inquiry, Bret Walker similarly stated that the High Court's decisions apply to all upper houses in Australia, adding that a similar case in Victoria would see the court regard *Egan v Willis* as a '... binding and applicable judicial authority against the Executive'.⁵⁸

⁵⁴ Quoted in: The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the Egan Decisions Ten Years On, Lynn Lovelock, Australasian Parliamentary Review, Spring 2009, Vol. 24(2), 202

⁵⁵ Parliamentary Debates (Hansard), Legislative Council of Victoria, 14 March 2007, p. 566.

⁵⁶ Parliamentary Debates (Hansard), Legislative Council of Victoria, 16 October 2002, p. 357.

⁵⁷ Parliamentary Debates (Hansard), Legislative Council of Victoria, 14 March 2007, p. 566-567.

⁵⁸ Legal opinion obtained from Mr Bret Walker SC, in Select Committee of the Legislative Council on Gaming Licensing, First Interim Report Upon Gaming Licencing, Melbourne: Parliament of Victoria, 2007, p. 44.

When asked for his thoughts for this paper, Hanks said that the Council's Standing Order's 'cannot be definitive of the solution to any dispute between the Council and the Assembly or between the Council and the Executive ... The only definitive decision on Executive Privilege would be given by the Supreme Court.'⁵⁹

Crucially, he added: '[i]n any event, the Executive is not the sole arbiter of when Executive Privilege applies'.⁶⁰

Considering Hanks' statement back in 2007 referred to above – that the Government had received advice from Hanks but was still claiming itself as the sole arbiter of when Executive Privilege applies – it perhaps becomes clearer why the Victorian Government chose not to make that advice public.

Problem with cabinet documents

The third approach taken by the Victorian Government to support its position is to claim that ordered documents are Cabinet-in-Confidence. It is always useful to remind ourselves of the problems around how governments, be they Labor or Conservative, define Cabinet papers.

In a 2006 paper, the Hon. Dr Ken Coghill *et al*, a former Speaker of the Victorian Parliament, states that not every document seen by Cabinet deserves protection. He states: '[a]n attachment to a Cabinet document providing factual or statistical information to assist in Cabinet decision making should not be exempt. This is because such raw material cannot, by definition, disclose Cabinet's deliberations.'⁶¹

Notably, a 2005 Senate paper listed unacceptable grounds for claims of public interest immunity as including: legal professional privilege; advice to government; and working documents.⁶²

This is particularly telling in the context of the technical documents relevant to the public housing towers Inquiry that the Victorian Government refused to provide.

Odgers' similarly states: 'A claim that a document is a Cabinet document should not be accepted ... it has to be established that disclosure of the document would reveal Cabinet deliberations. The claim cannot be made simply because a document has the word "Cabinet" in or on it.'⁶³

In confirming these views, Gordon Rich-Phillips, who held several Ministries in the Coalition Government from 2010–2014 said: 'The reality is, most Cabinet documents –

⁵⁹ Interview with Peter Hanks KC, 17 July 2026.

⁶⁰ Interview with Peter Hanks KC, 17 July 2026.

⁶¹ Ken Cogill *et al*, 'Discussion Paper on Reform of Government Accountability in Australia', *Australasian Parliamentary Review*, Spring 2006, Vol. 21(2), 10–48; p 14.

⁶² Harry Evans, *The Senate: Grounds for public interest immunity claims*, May 2005

⁶³ Harry Evans, *Odgers' Australian Senate Practice*, 14th edition, 2016, p. 665.

certainly ones I saw as a Minister – do not reveal the deliberations of Cabinet. They reveal the decisions of Cabinet.’⁶⁴

In other words, documents that inform Cabinet should not be withheld from the public.

Interestingly, Taylor believes that, although it definitely should not, Parliament has the legal power to demand the production of Cabinet documents. This is relevant to the Council’s Standing Order because it means Parliament ‘can be the arbiter or itself appoint an arbiter’ to decide which documents can be demanded by the House.⁶⁵

Clutching at flaws

Government members in the Council have also presented a range of other arguments meant to aid their approach. This next section discusses two of those arguments: the powers of the Senate; and the relevance of decisions in court cases.

In defending the Victorian Government’s refusal to provide documents ordered by the Council, Martin Pakula told the House: ‘The Australian Senate, despite claims to the contrary, does not apportion to itself these powers.’⁶⁶

This statement does not deserve too much scrutiny, aside from pointing out how it jars with John Lenders’s statement in 2014, noted above, that the Labor Party follows the procedures of the Senate. Nonetheless, refuting this statement is important – and simple to do.

In 1975, for example, the Senate reasserted its inquiry powers in a resolution, including the power to summons witnesses and documents. Further, when a claim of privilege is made ‘the Senate shall consider and determine each such claim’.⁶⁷

Odgers, as well, is clear that it is up to the Senate to judge claims of Executive Privilege: ‘The Senate has not conceded the existence of any conclusive executive privilege in relation to its proceedings.’⁶⁸

The Victorian Government has also argued that decisions by a court regarding the non-disclosure of documents override Parliament’s powers. This clear rejection of the separation of powers followed a 2024 class action brought about by residents of the North Melbourne public housing towers seeking a judicial review of the Victorian Government’s decision to demolish the towers.

⁶⁴ Parliament of Tasmania, Legislative Council Select Committee Report on Production of Documents, 2021, p. 47.

⁶⁵ Interview with Greg Taylor, 13 March 2026.

⁶⁶ Parliamentary Debates (Hansard), Legislative Council of Victoria, Wednesday 14 March 2007, p. 569.

⁶⁷ Harry Evans, Odgers’ Australian Senate Practice, 14th edition, 2016, p. 644.

⁶⁸ Harry Evans, Odgers’ Australian Senate Practice, 14th edition, 2016, p. 45. Evans goes further in arguing that executive privilege has not been conceded by the Senate, the US Houses of Congress or ‘...other legislatures worthy of the name’. Evans H, ‘Legislative Power and Executive Privilege in the Courts’, Papers on Parliament No. 49, August 2008.

The Government claimed public interest immunity over documents requested by the residents and the Court agreed with the Government that the documents were immune from disclosure in this case.

During public hearings for the Inquiry into the towers' redevelopment, the Hon. Harriet Shing, the Minister for Housing, several times used the Court's decision to justify ignoring the Council's and the Committee's orders for documents. Minister Shing said:

- '... no matter how many times you ask, I am not going to stray from the fact that privilege has been exercised and that the exercise of that privilege has been upheld by the Courts'.⁶⁹
- 'I will say it again: the Court has been clear that the exercise of Executive Privilege is legitimate and is reasonable.'⁷⁰
- 'I also just want to be really clear: the claim of privilege in relation to matters [which are] the subject of cabinet confidence, cabinet discussions and cabinet deliberations has been upheld by the court.'⁷¹

The Labor Members further upheld Minister Shing's position in their Minority Report for the Inquiry, stating: 'In a class action brought by residents against Homes Victoria, the Supreme Court of Victoria upheld the confidentiality of these Cabinet documents.'⁷²

However, in Australia, a decision by a court regarding its proceedings has no influence whatsoever on Parliament's powers to order documents. Parliaments are not bound by what judges say about a case in their court. Legally, the Victorian Parliament's powers include the power to demand documents that in a court would be subject to Executive Privilege.⁷³

This is not just true in Victoria, as can be seen in a 2024 case in Tasmania that also ended up in the High Court. The final decision pointed out that it would not just be wrong but 'corrosive' for the Court to 'assum[e] authority over core institutional aspects of another branch of government'.⁷⁴

What is needed: courting jail time?

In the absence of the Victorian Government having a 'come to Odgers' moment', what, if anything, can be done?

⁶⁹ Hon Harriet Shing, Minister for Housing and Building, Minister for the Suburban Rail Loop, Minister for Development Victoria and Precincts, Transcript, Legislative Council Legal and Social Issues Committee, Inquiry into the Redevelopment of Melbourne's Public Housing Towers, 6 August 2025, p. 91.

⁷⁰ Hon Harriet Shing, Minister for Housing and Building, Minister for the Suburban Rail Loop, Minister for Development Victoria and Precincts, Transcript, Legislative Council Legal and Social Issues Committee, Inquiry into the Redevelopment of Melbourne's Public Housing Towers, 6 August 2025, p. 93.

⁷¹ Hon Harriet Shing, Minister for Housing and Building, Minister for the Suburban Rail Loop, Minister for Development Victoria and Precincts, Transcript, Legislative Council Legal and Social Issues Committee, Inquiry into the Redevelopment of Melbourne's Public Housing Towers, 6 August 2025, p. 99.

⁷² Legislative Council Legal and Social Issues Committee, Inquiry into the Redevelopment of Melbourne's Public Housing Towers, Melbourne: Parliament of Victoria, 2025, p. 210.

⁷³ Taylor interview

⁷⁴ Attorney-General (Tas) v Casimaty HCA 31: at [104]

One idea is that Victoria needs its own version of the Egan cases to confirm once and for all Parliament's powers to order documents. This was suggested as far back as 2007, with the Gaming Inquiry concluding that the disagreement between the Council and the Victorian Government would most likely only be resolved by 'judicial determination'.⁷⁵

In *Australian Constitutional Law*, Hanks notes that the Egan decisions applied the principle of a case from 1955 that 'it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and the manner of its exercise'.⁷⁶

Greg Barber, the former Leader of the Greens, did in fact take the Victorian Government to court, in a case that went up to the Supreme Court in 2012. This case followed the Council passing a motion in August 2011 for the Coalition Government to table documents related to the myki ticketing system. The Government refused, with Treasurer Kim Wells – stretching the definition of Cabinet-in-Confidence in a way that more than merely strains credulity – writing to the Clerk:

*The report sought by the Council's order was prepared for the purpose of submission for consideration by a committee of Cabinet. As such, the Council does not have the power to require the production of this document. The Government has carefully considered this matter and determined that it is not appropriate to provide the report to the Council.*⁷⁷

Barber was seeking to have the Court confirm the Council's powers. In June 2012, the Government applied to have the case dismissed or permanently stayed. In November 2012, the Court ruled that the case should be allowed to proceed. Barber did not continue with his case, however, partly because of the cost, which he was covering himself. Importantly, it was also thought that the Court would be unlikely to find for him because there had not been a clear conflict in the House i.e. the Council had not responded to the Treasurer's letter.

This again shows that courts resist getting involved in the actions of a House while the chamber still has the chance to resolve its own issues. Echoing the Tasmanian case referenced above – and what can be read as a prophetic refutation of the Victorian Governments' statements regarding the public housing towers class action – the judgement in Barber's case stated: '[t]here is a good argument that, as a matter of principle, the Court ought not to adjudicate on questions of parliamentary privilege when the Parliament could have done so itself, but has chosen not to'.⁷⁸

⁷⁵ Quoted in: Andrew Young, Submission to Parliament of Tasmania, Legislative Council Select Committee Report on Production of Documents, 2021, p. 3.

⁷⁶ Peter Hanks, Patrick Keyzer, Jennifer Clarke, 'Australian Constitutional Law, Materials and Commentary, 7th Edition,' 2004, p. 261.

⁷⁷ Quoted in: *Barber v State of Victoria*, [2012] VSC 554.

⁷⁸ *Barber v State of Victoria*, [2012] VSC 554, p. 12.

Discussing this case, Andrew Young agreed that the courts ‘determine whether a power or immunity exists, not how Parliament should then exercise it’.⁷⁹ Regarding the problems raised in this paper, Young suggested that the most likely cause for the House to take the Government to court would be a large scandal or controversy. Only then would Members stay motivated for the time needed for a case to make its way through the courts. He added:

*Really, the House should vote to empower the President to see the case through. Don't just rely on the President or the Clerk deciding it should happen. Empower the President to make sure the Council is represented at every level of court, because these things never just stop at one level of court.*⁸⁰

Another interesting – if perhaps slightly controversial – solution Taylor raised was to imprison Members who do not comply with an order from the Council. A possible outcome of this would be the Member bringing litigation to challenge their imprisonment and a decision by a court that would either support the Council’s powers or not.

Taylor explained: ‘You can't send them to prison beyond the session of Parliament. You could just send them to prison for three hours or over lunch, just to make the point and see if you could provoke a legal challenge.’⁸¹

The Victorian Government, being so beholden to 1855, may in fact agree with this option. Erskine May, in reference to the ‘strictness and severity’ with which the House of Commons protected its powers, writes:

*... the Journals abound with cases in which witnesses have been punished by commitment to the serjeant at-arms, and to Newgate, for prevaricating, or giving false testimony, or suppressing the truth; for refusing to answer questions, or to produce documents in their possession.*⁸²

However, there is less happy news for those keen to reopen the dank cells beneath Spring Street for the crime of prevarication. The Egan cases found that his removal from the chamber, even to the relative comforts of Macquarie Street, was beyond even the Council’s wide-ranging powers.

Conclusion

Parliamentary oversight of the Executive is a cornerstone of our democracy. This paper has shown the problems that occur when the Executive refuses to accept the full extent of that power. This affects not just how the State functions, but how the Government

⁷⁹ Interview with Andrew Young, 8 April 2026.

⁸⁰ Interview with Andrew Young, 8 April 2026.

⁸¹ Interview with Greg Taylor, 13 March 2026.

⁸² Thomas Erskine May, *A practical treatise on the law, privileges, proceedings and usage of Parliament*, Butterworths: London, 1855, pp. 331-332.

treats citizens, as shown in the debate over documents withheld from the residents of Melbourne's public housing towers.

The paper has laid out the arguments used by the Victorian Government to try and justify its commitment to secrecy. These include views on the powers of the House of Commons in 1855, the relationship between the courts and Parliament, and the familiar reliance on claiming documents are Cabinet-in-Confidence. The paper has also challenged each of these arguments, drawing on academic writings, Hansard records, and interviews with Parliamentary professionals and legal experts.

It is a fitting ending to remind ourselves that our democratic values, which evolved over hundreds of years of struggle, will wither and die without our protection. As Taylor writes: '[t]he future shape of the Constitution of Victoria does not depend on words on a page but on the determination of politicians and people to maintain those values'.⁸³

⁸³ Greg Taylor, *The Constitution of Victoria*, Melbourne: The Federation Press, 2006, p. 4.