LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

26 July 2019

Ms Julie Thompson
Committee Secretary
Legislative Council Select Committee on the Production of Documents

Dear Ms Thompson

I refer to your invitation for me to make a submission on behalf of the New South Wales Legislative Council to the inquiry being conducted into the production of documents.

The New South Wales Legislative Council has considerable experience of the matters raised by the committee. Accordingly, I hope that the attached submission is of assistance.

Please contact me should you need any further information in relation to any of the issues referred to in this submission.

Yours sincerely

David Blunt
Clerk of the Parliaments

Parliament House
Macquarie Street Sydney
NSW 2000 Australia

Telephone (02) 9230 2773
council@parliament.nsw.gov.au

LEGISLATIVE COUNCIL OF TASMANIA SELECT COMMITTEE INQUIRY INTO THE PRODUCTION OF DOCUMENTS

Submission by the Clerk of the New South Wales Legislative Council

INTRODUCTION

This submission is in response to the Legislative Council of Tasmania Select Committee's request for a submission in relation to its inquiry into options for an agreed process to resolve disputes regarding orders for the production of papers by the Legislative Council and its committees.

During the debate to establish the Select Committee's inquiry on 21 May 2019, reference was made to an earlier submission by the NSW Legislative Council to a 2014 inquiry by the Senate Legal and Constitutional Affairs References Committee into public immunity claims and orders for papers.

That submission included a considerable amount of background information about orders for the production of papers in New South Wales, including the role of the independent legal arbiter in resolving disputes over claims of privilege, and is attached at Appendix 1. This information remains substantially unchanged.[1]

The main focus of this submission is on recent significant developments in relation to orders for papers in New South Wales. Specifically, the power of the Legislative Council to order the production of cabinet information to the House, and the power of Legislative Council committees to order documents.

The submission draws extensively on several previously published articles, noted in the footnotes, which provide further details regarding these developments, should this be required.[2]

ORDERS FOR PAPERS AND "CABINET INFORMATION"

In 1998 the High Court of Australia confirmed the power of the NSW Legislative Council to order the production of state papers, because such a power was reasonably necessary for the House to fulfil its functions of making laws and holding the executive government to account. In 1999 the NSW Court of Appeal confirmed that this power extends to requiring the production of state papers notwithstanding the making by the executive government of claims of public interest immunity or legal professional privilege. What the 1998 decision in *Egan v Chadwick* left in the view of some observers unsettled, however, was the situation with regards to "cabinet documents," with the three judges making different statements on this point.

Over the 20 years since the Egan cases, from time to time members have suspected that certain important documents otherwise captured by the terms of an order have not been produced, on the grounds they are deemed by the executive government to be "cabinet documents" or "cabinet information." In a very small number of cases this has been made explicit, mostly it has been supposition. On a couple of occasions in that time, while some members expressed interest in testing the issue, they never pursued the matter. In other instances, whilst disappointed for

[1] Jenelle Moore, 'The challenge of change: A possible new approach for the independent legal arbiter in assessing orders for papers?' (Paper presented at the ANZACATT conference, Sydney, January 2015).
[2] D Blunt, *Parliamentary Privilege in Practice*, paper delivered at a Legalwise Seminar on Practice, Procedure and the Law of Parliament, Sydney, 27 March 2019.

example that "business cases" or other consultant reports known to exist have not been produced, members have found enough information of interest in the other documents produced.[3] However, all that changed in early 2018.

Key developments in 2018[4]

In 2018 the House agreed to a series of orders for papers regarding two controversial capital projects (relating to Sydney Stadiums and the relocation of the Powerhouse museum) and a report of a consultant on a policy matter (the Tune report on out of home care)[5]. Although some documents were produced in response to the Sydney Stadiums order, the return included no business cases. The orders concerning the Powerhouse museum and the Tune report were precise in scope, and in response to those orders neither of the required documents were produced, with the Leader of the Government insisting the powers of the Legislative Council did not extend to "cabinet information."[6]

The Leader of the Government was censured for his non-compliance with the orders of the House and further ordered to produce the documents by the next day or attend in his place to explain the reasons for his continued non-compliance. On the next sitting day, the President tabled correspondence from the Department of Premier and Cabinet advising that there were no further documents for tabling and attaching advice from the Crown Solicitor. It was anticipated that a motion would be moved to suspend standing orders to enable a further motion to be moved holding the Leader of the Government in contempt and suspending him from the service of the House in order to compel compliance. However, when the Leader of the Government was called upon to address the House as to his reasons for continued non-compliance he advised that the documents would now be produced voluntarily.[7]

The business cases and the Tune report were produced: the Tune report was immediately provided in full and made public; the business cases were provided in full subject to claims of privilege, with redacted versions made public. Given the continued assertion by the Leader of the Government and the Department of Premier and Cabinet that the powers of the House did not extend to requiring the production of "cabinet information", the Leader of the Opposition moved a motion which sought to crystallize the position of the House. The motion, agreed to by the House on 21 June 2018, rejected the Government's use of the definition of "cabinet information" in the *Government Information (Public Access) Act 2009* in these matters as the Government's reliance on that definition "is likely to have led to a much broader class of documents being withheld from production to this House." The motion asserted the power of the House to require the production of Cabinet documents such as those produced on this occasion, and that the test to be applied in determining whether a document falls within this category is, at a minimum, that articulated by Spigelman CJ in *Egan v Chadwick*. The terms of the resolution of 21 June are attached as Appendix 2, and includes a summary of the positions of the three judges, including Spigelman CJ, in relation to cabinet information, at paragraphs 8(a) to (c).

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[3] For a detailed discussion of the question "Are only *true* cabinet documents being withheld from the Legislative Council?" see Sharon Ohnesorge & Beverly Duffy, "Evading Scrutiny: Orders for papers and Access to Cabinet Information by the New South Wales Legislative Council, (2018) 29 PLR 118.

[4] David Blunt, *Orders for papers and parliamentary committees: An update from the New South Wales Legislative Council*, paper delivered at the 49th Presiding Officers and Clerks Conference, Wellington, New Zealand, 10 July 2018.

[5] See *Hansard*, NSW Legislative Council, 15 March 2018, 12 April 2018 and 17 May 2018.

[6] *Hansard*, NSW Legislative Council, 1 May 2018, p 14.

[7] *Hansard*, NSW Legislative Council, 6 June 2018, p 1.

ORDERS FOR PAPERS AND COMMITTEES

Whilst the first half of 2018 saw significant developments take place in relation to the powers of the Legislative Council in respect of cabinet documents, the second half of 2018 saw equally important developments in relation to the powers of parliamentary committees to order the production of documents.

In the years immediately following the Egan cases a number of committee orders for the production of documents were complied with by government agencies. In these instances the committees cited Standing Order 208(c), which affords committees the power to order the production of documents. However, in 2001 the Crown Solicitor advised that government agencies should resist such orders and recommend that the committee pursue the matters through the House under Standing Order 52. This advice was reflected in the guidelines for public servants appearing before parliamentary committees and remained the position of the executive government in NSW up until 2018. Over the years Legislative Council committees and members have found creative ways to obtain information, usually through the Committee Chair moving a motion in the House on behalf of the committee, after the committee has already agreed to such a course of action "notwithstanding the power of the committee to order the production of documents."

This position changed during the course of 2018. In part, the change was precipitated by an observation by Bret Walker SC in an earlier advice regarding the power of the Council to order documents from statutory agencies. Mr Walker suggested that the reference in section 4 of the *Parliamentary Evidence Act* (the power to summons a person to attend and) to "give evidence" was likely to include not only oral evidence but also the production of documents during their attendance.[8] A carefully worded summons could therefore potentially be used by a committee to require the production of a document.

The Legislative Council's Portfolio Committee No. 5 was conducting an inquiry into the proposed replacement of Windsor Bridge. Faced with repeated refusal by Transport for NSW to produce a business case for the replacement, in May 2018 the committee issued a summons for the Secretary to attend and produce the document. In due course the Secretary attended and indicated that he was producing the document voluntarily "without any concession to the Committee's power."

Although the result was somewhat ambiguous (the committee asserting that it had compelled the production of the document, the witness asserting it had been produced voluntarily), unbeknown to the committee, the actions of the committee in this matter apparently prompted the provision of significant legal advice, which was revealed indirectly.

Amongst those apparently concerned about the assertion of committee powers was the Auditor-General, who faced with likely requests to assist two other Legislative Council Committees inquiring into particularly controversial government projects (Sydney Stadiums and the CBD and South East Light Rail) sought the advice of the Crown Solicitor. The Auditor-General is required to include as an appendix to the annual financial audit report on the total state sector accounts, any legal advices received during the preceding 12 months from the Crown Solicitor. Consequently, two very enlightening advices were made public.[9]

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[8] Advice from Mr Bret Walker SC, *Parliament of New South Wales Legislative Council - Orders for Papers from bodies not subject to direction or control by the Government*, opinion, 18 November 2015.
[9] NSW Auditor-General, *Report on State Finances* – 19 October 2018 (2018).

In those advices the Crown Solicitor deferred to the apparently recent opinion of the Solicitor-General to the effect that "it is more likely than not that if the question were to be the subject of a decision of a court, a finding would be made that a committee of the New South Wales Parliament has the power to call for a witness to attend and give evidence, including by production of a document." Furthermore, the Solicitor-General had advised that he preferred the view that the power would be found to reside in Standing Order 208 (c) and reasonable necessity rather than the *Parliamentary Evidence Act*, but that the true source of the power would likely emerge in any court proceedings regardless of the power actually relied upon by a committee which precipitated the proceedings. The position asserted by Legislative Council committees (but resisted by the executive government) for 17 years had been vindicated.

During the remaining months of 2018 two Legislative Council committees confidently asserted their powers to order the production of documents. In one case successfully, obtaining a Gateway Review document in relation to the CBD and South East Light Rail project.[10] The other case, involving a request and then a summons under Section 4 of the *Parliamentary Evidence Act* for a draft report of the Inspector of Custodial Services proved to be more complex. The refusal of the Inspector to produce the draft report led to the committee obtaining, through the Clerk, verbal advice from Bret Walker SC and the Inspector obtaining (and providing to the committee) advice from the Acting Crown Solicitor and Ms Anna Mitchelmore SC. A redacted version of an opinion from the Solicitor-General was also provided. Each of these advices have subsequently been published by the committee in its report.[11] Ultimately, the committee decided in all of the circumstances not to seek to enforce the provisions of the summons or the *Parliamentary Evidence Act* in respect of the Inspector. However, as the committee made plain in its report, the firm but judicious assertion by Legislative Council committees of their powers over recent months has led to legal advice being provided, which now binds public servants into the future, apparently accepting the long held position of the Legislative Council and its committees.[12]

Sessional order to regulate committees' orders for papers

While there is a longstanding agreed process for managing orders for papers by the House, this is not the case in relation to committees. The House sought to progress this matter immediately following the establishment of the 57th Parliament in May 2019, when it agreed to a sessional order affirming the power outlined in standing order 208(c) and establishing the process by which a committee can order the production of documents. The motion and the debate on the sessional order noted and endorsed the advice provided by the Solicitor-General in 2018.[13]

Sessional Order 40[14] (attached as Appendix 3) outlines the process by which documents can be ordered and received and privilege claims made, and also includes the process by which members may dispute claims of privilege made over documents returned. The provisions are based on those of standing order 52.

[10] Public Accountability Committee, NSW Legislative Council, *Impact of the CBD and South East Light Rail Project* (2018).
[11] Portfolio Committee No. 4 – Legal Affairs, NSW Legislative Council, *Budget Estimates 2018-2019* (2018).
[12] More detail regarding orders for papers by committees is provided in S Reynolds, *Two steps forward one step back: Committees power to order papers and the Crown Solicitor*, presentation to Biennial Clerks' meeting, Hobart, 25 January 2019.
[13] Solicitor General, *Question of powers of Legislative Council Committees to call for the production of documents from witnesses* (2018) (Redacted).
[14] Sessional Orders, Resolutions of Continuing Effect and Office Holders, as at 19 June 2019, pp 28-30.

At the time this submission was prepared, no committee has yet utilised sessional order 40. It is intended only as a last resort, when the usual processes of inviting or requesting witnesses to appear and provide documents have failed.

THE ROLE OF THE INDEPENDENT LEGAL ARBITER

The system in New South Wales to resolve disputes regarding claims of privilege over documents returned to the House is well established. In a nutshell: a member may dispute a claim of privilege by writing to the Clerk, who advises the President that a dispute has been lodged. The President appoints an independent legal arbiter, who must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge. The Clerk releases the documents subject to the dispute to the arbiter, who assesses the claim of privilege made by the executive. The arbiter prepares a report that the Clerk makes available to members. While the arbiter makes recommendations as to the validity of the claim of privilege, the House is the ultimate authority, and can resolve that previously privileged documents be tabled and made public.

Page four of the 2014 submission to the Senate inquiry goes into further detail on the arbitration process. Further information about the system for resolving disputes can also be found in an excerpt from the Annotated Standing Orders of the New South Wales Legislative Council[15], attached at Appendix 4. An analysis of the approach taken by arbiters to adjudicating disputes can be found in a paper by Jenelle Moore titled 'The challenge of change: A possible new approach for the independent legal arbiter in assessing orders for papers?'.[16]

CONCLUSION

The NSW Legislative Council has considerable experience in ordering the production of documents and managing disputes over privilege claims made by the executive. The process is well established and there are a number of precedents of the arbitration process resulting in the House agreeing to recommendations made by arbiters and making previously privileged documents public.

The Council is less experienced in resolving disputes over orders for the production of documents claimed to include cabinet information, and orders for papers by committees. The resolution of 21 June 2018 relating to cabinet papers expresses the view of the House regarding the test to be applied in determining where documents classified as cabinet information should be provided in a return to an order. In adopting Sessional Order 40 the Council has established a process for committees to pursue papers when requests are unsuccessful. These recent developments suggest that the House and committees may test their powers further in the 57th Parliament.

APPENDICES

Appendix 1 – Submission to Senate inquiry into a claim of public interest immunity raised over documents
Appendix 2 – Resolution of 21 June 2018
Appendix 3 – Sessional order 40
Appendix 4 – Excerpt from chapter 9 of 'Annotated Standing Orders of the Legislative Council'
Appendix 5 – Standing Order 52

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[15] Susan Want and Jenelle Moore, *Annotated Standing Orders of the New South Wales Legislative Council* (Federation Press, 2018), pp 160-176.
[16] Jenelle Moore, 'The challenge of change: A possible new approach for the independent legal arbiter in assessing orders for papers?' (Paper presented at the ANZACATT conference, Sydney, January 2015).

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE INQUIRY INTO A CLAIM OF PUBLIC INTEREST IMMUNITY RAISED OVER DOCUMENTS

Submission by the Clerk of the New South Wales Legislative Council

INTRODUCTION

This submission is in response to the Senate Legal and Constitutional Affairs References Committee's request for a submission in relation to its inquiry into claims of public interest immunity raised over documents tabled by the Assistant Minister for Immigration and Border Protection in the Senate.

The submission focuses on that part of the terms of reference concerning 'the authority of the Senate to determine the application of claims of public interest immunity'.

As indicated in the covering letter, the New South Wales Legislative Council has considerable experience of the matters raised in the terms of reference. In the late 1990s, the power of the Council to order the production of state papers, including papers subject to a claim of public interest immunity, was upheld by the courts in the *Egan* decisions.[1] Since that time, the procedures of the Council for ordering the production of state papers, and dealing with claims of privilege such as public interest immunity, have become well established.

THE POWER OF THE NEW SOUTH WALES LEGISLATIVE COUNCIL TO ORDER THE PRODUCTION OF STATE PAPERS

The New South Wales Legislative Council may order the production of state papers held by the executive. These orders are commonly referred to as 'orders for papers' or 'orders for returns'.

The power of the Legislative Council to order the production of state papers is derived from the common law principle of reasonable necessity. This principle finds expression in a series of 19th century cases decided by the Judicial Committee of the Privy Council between 1842 and 1886 in which it was held that while colonial legislature did not possess all the privileges of the Houses of the British Parliament, they were entitled by law to such privileges as were 'reasonably necessary' for the proper exercise of their functions.[2] More extensive privileges could be acquired by legislation.

With self-government in 1855, the New South Wales *Constitution Act 1855* granted the new New South Wales legislature the power to make laws for the peace, welfare and good government of the State. Significantly, however, the *Constitution Act 1855* did not include an express grant of powers and immunities to the Houses of the New South Wales Parliament, for example based

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

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

on the powers and immunities of the House of Commons as at a particular date. There has been no comprehensive grant of powers and immunities to the Houses of the New South Wales Parliament since.

Accordingly, today, the common law principle of reasonable necessity remains the source of the majority of the powers enjoyed by the Houses of the New South Wales Parliament, with the exception of certain few powers conferred by statute. As Lord Denman CJ said in *Stockdale and Hansard*:

> If the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament, and justifies all that it requires.[3]

The power of the Senate to order the production of papers is expressed in *Odgers' Australian Senate Practice* as conferred by section 49 of the Australian Constitution. However, reference is also made in *Odgers* to the powers inherent in a legislature, with specific reference to the circumstances of the New South Wales Legislative Council.[4]

THE *EGAN* DECISIONS

The power of the New South Wales Legislative Council to order the production of state papers was routinely exercised between 1856 and the early 1900s. However, orders for state papers ceased to be a common feature of the operation of the Council during the second decade of the 20th century, with the occasional exception up until as late as 1948. It was during the 1990s that the power of the Legislative Council to order papers was revived, precipitating the *Egan* cases.

The *Egan* cases were generated by the refusal of the former Treasurer and Leader of the Government in the New South Wales Legislative Council, the Hon Michael Egan, to produce certain state papers ordered by the Council. This occurred on a number of occasions, precipitating legal proceedings in the courts.

In November 1996, in *Egan v Willis and Cahill*, the New South Wales Court of Appeal unanimously held that 'a power to order the production of state papers ... is reasonably necessary for the proper exercise by the Legislative Council of its functions'.[5]

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

> It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that 'to secure accountability of government activity is the very essence of responsible government'.[6]

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3 (1839) 112 ER 1112 at 1169. Privilege could, he said, be grounded on 'three principles - necessity, - practice, - universal acquiescence'.

4 *Odgers' Australian Senate Practice*, 13th edn, pp 75 – 76.

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

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

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

Accordingly, the executive in New South Wales is required to produce to the Legislative Council documents subject to an order for papers notwithstanding any claim of public interest immunity. Since the *Egan* decisions, orders for the production of documents have become common in the Legislative Council, with over 300 orders made since 1999. The executive in New South Wales routinely complies with such orders including by the production of documents subject to a claim of public interest immunity.

PROCEDURE IN THE LEGISLATIVE COUNCIL FOR THE PRODUCTION OF STATE PAPERS AND THE CLAIMING OF PRIVILEGE OVER CERTAIN DOCUMENTS BY THE EXECUTIVE

Although documents claimed to be privileged are produced to the Legislative Council in response to its orders, the House has recognised that in some cases the documents so produced should not receive wider publication. This is the case where the wider disclosure of documents would be contrary to the public interest. The House has therefore developed procedures which allow for claims of privilege to be made by the executive over documents provided in returns to orders. The procedures also allow for disputed claims to be referred to an independent arbiter for assessment, but for the House to make the final judgement on the claim of privilege.

The procedure of the House for the production of papers and the arbitration of privilege claims is contained in standing order 52. A copy of standing order 52 is at Attachment 1. The standing order 52 process is now well established over many years as the mechanism for regulating the Council's common law power to order the production of State papers.[7]

It is notable, however, that the process evolved over time. Initial orders for papers at the time the House again started to use the power to order the production of state papers did not include an arbiter process for resolving deadlocks between the executive and the parliament. The process was later included in each order for papers of the House passed, before finally being adopted in the standing orders of the Council in 2004.

Summary of the order for papers procedure under standing order 52

Under standing order 52, orders for papers are initiated by resolution of the House. On an order for papers being agreed to, the terms are communicated by the Clerk to the Director General of the Department of Premier and Cabinet, who liaises with the departments or ministerial offices named in the resolution to coordinate the retrieval of the documents requested. On or before the

7 In *Egan v Willis & Cahill*, Gleeson CJ observed that the standing orders do not operate as a source of power, but rather regulate the exercise of powers that exist independently by some other means. *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 664 per Gleeson CJ.

due date imposed by the resolution, the Director General lodges the return comprising the documents with the Clerk of the Parliaments. If the House is not sitting the Clerk receives the documents out of session and announces receipt of the return on the next sitting day.

In returning documents to the House, the executive may make a claim of privilege over some or all of the documents provided. Where a claim of privilege is made over documents, the return must also include reasons for the claim of privilege. Documents returned to the House must be accompanied by an indexed list of all documents tabled, showing the date of creation of each document, a description of the document and the author of the document. Where documents are subject to a claim of privilege, a separate index of those documents is required to be provided.

Once the documents have been tabled in the House or received out of session by the Clerk, they are deemed to have been published by authority of the House, unless a claim of privilege has been made. The documents are made publicly available in the same way as any other tabled paper. Documents over which a claim of privilege has been made are kept confidential to members of the Legislative Council only in the Office of the Clerk and may not be copied or published without an order of the House.

A claim of privilege by the Government over a document or documents supplied in a return to order (thereby necessitating that it be kept confidential) may be disputed by any member of the Council by communication in writing to the Clerk. On receipt of such a communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter for evaluation and report as to the validity of the claim of privilege. The independent legal arbiter is appointed by the President and must be either a retired Supreme Court judge, Queen's Counsel or Senior Counsel. The report of the arbiter is required within seven days. However, on several occasions arbiters have sought an extension of time where privilege has been claimed over a large volume of documents.

Once completed, the arbiter lodges his or her report with the Clerk, who makes it available to members. The Clerk also informs the House of receipt of the report at the next sitting. As is the case with privileged documents, the report is confidential to members, and cannot be published or copied without an order of the House.

Following receipt of the arbiter's report, in most cases, the member responsible for lodging the dispute on the claim of privilege will then give notice of a motion for the arbiter's report to be tabled and made public. While it is usual for this motion to be agreed to, and the report tabled at a later hour of that day, this is not always the case.

In cases where the arbiter's report is tabled and the arbiter has recommended that the claim of privilege on certain documents be denied, a member will then usually give notice of a motion requiring the Clerk to lay the documents considered not to be privileged on the table of the House and to authorise them to be published. The motion is moved on a subsequent day and, if agreed to, the documents are tabled by the Clerk later that same day.

If the arbiter's report upholds the claim of privilege, the papers remain restricted to members only. While the House, as the final arbiter on any claim of privilege, may vote to make the documents public at any time, notwithstanding the recommendation of the arbiter, this has not happened to date.

CLAIMS OF PUBLIC INTEREST IMMUNITY AND THE DECISION IN *EGAN V CHADWICK*

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

The claim of public interest immunity refers to a claim by the executive that it is not in the public interest for certain information to be made public. The common law formulation of public interest immunity stated in *Sankey v Whitlam*[8] is as follows:

> [T]he court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to do so.[9]

In *Egan v Chadwick*, all three members of the Court of Appeal agreed that the Council's power to order the production of documents included the power to compel the production of state papers subject to a claim of public interest immunity, on the basis that such a power may be reasonably necessary for the exercise of the Council's legislative function and its role in scrutinising the executive.[10]

However, this raises the further questions of how the House is to determine whether or not to uphold a claim of public interest immunity by the executive, should a claim be contested by a member.

In his judgement, Spigelman CJ noted that where public interest immunity arises in court proceedings, the trial judge is required to balance conflicting public interests - the significance of the information to the issues in the trial, against the public harm from disclosure.[11] Similarly, where public interest immunity arises in parliamentary proceedings, a balance must be struck between the significance of the information to the proceedings in Parliament, against the public harm from disclosure. Spigelman CJ continued in his judgement:

> Where the public interest to be balanced involves the legislative or accountability functions of a House of Parliament, the courts should be very reluctant to undertake any such balancing. This does not involve a constitutional function appropriate to be undertaken by judicial officers. This is not only because judges do not have relevant experience, a proposition which may be equally true of other public interests which they are called upon to weigh. It is because the court should respect the role of a House of Parliament in determining for itself what it requires and the significance or weight to be given to particular information.[12]

In his judgement, Priestley JA noted that where claims of public interest immunity arise in judicial proceedings, the courts have the power to compel the production of documents by the executive government in respect of which immunity is claimed, for the purpose of balancing the public interests for and against disclosure. He continued that the function and status of the Council in the system of government in New South Wales 'require and justifies the same degree of trust being reposed in the Council when dealing with documents in respect of which the

8 (1978) 142 CLR 35.
9 *Sankey v Whitlam* (1978) 142 CLR 35 at 38.
10 *Egan v Chadwick* (1996) 46 NSWLR 568, per Spigelman CJ at 574, per Priestley at 595, per Meagher at 597.
11 *Egan v Chadwick* (1999) 46 NSWLR 568, per Spigelman CJ at 573.
12 *Egan v Chadwick* (1999) 46 NSWLR 568, per Spigelman CJ at 574.

executive claims public interest immunity'. Accordingly, in exercising its powers in respect of such documents, the Council has a duty analogous to that of a court of balancing the public interest considerations, and a duty to prevent publication beyond itself of documents the disclosure of which will be inimical to the public interest.[13]

Accordingly, the Court of Appeal in *Egan v Chadwick* left the decision whether to publish a document subject to a claim of public interest immunity to the Legislative Council. The Council performs this role with the advice of the independent legal arbiter.

FURTHER COMMENTS ON CLAIMS OF PUBLIC INTEREST IMMUNITY FROM THE INDEPENDENT ARBITER

As noted, since the *Egan* decisions, orders for the production of papers have become common in the Legislative Council, with over 300 orders made since 1999. In over 180 of those returns to order, the executive has made a claim of privilege. The validity of the claim has been disputed by a member of the House on 38 occasions.

When assessing whether claims of privilege are valid, the test that is applied by the arbiter and ultimately the House itself is that of the public interest. Put simply: is it in the public interest for the document in question to be made public? This inevitably involves a balancing act between the disclosure of potentially sensitive information in the Government's possession on the one hand, and the public's right to know and the need for transparency and accountability on the part of the executive on the other. As articulated in *Egan v Chadwick*, the test applied by the Legislative Council is not the same as the test applied in the courts.

Over the years, the various arbiters, but particularly Sir Laurence Street, have articulated in their arbiter reports further guidance as to their approach in assessing claims of privilege.

In 2003, in his report on the Millennium Train Papers, Sir Laurence made the following observation on claims of privilege:

> As a generality it can be accepted that there is a clear public interest in respecting validly based claims for Legal Professional Privilege, Public Interest Immunity and Commercial in Confidence Privilege. The ordinary functions of government and the legitimate interests of third parties could be encumbered and harmed if such claims are disregarded or over-ruled. As against this, there can be matters in respect of which the public interest in open government, in transparency and accountability will call for disclosure of every document that cannot be positively and validly identified as one for which the public interest in disclosure is outweighed by the public interest in immunity. It lies with the party claiming privilege to establish it.[14]

Subsequently, in 2005, in his report on the report on the Cross City Tunnel—Second Report, Sir Laurence made the following observation on evaluating the public interest generally:

> When the Legislative Council exercised its authority in 2003 to call upon the Executive Branch of Government to produce the Cross City Motorway documents, the Executive (in this instance principally the RTA) was legally bound to comply totally. But while no such documents could be withheld by the RTA, it was conventionally open to it to claim for any

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

14 Report of the Independent Arbiter, *Millennium Trains Papers*, 22 August 2003, pp 6-7.

> of the documents privilege from their being disclosed to the public. In terms of its absolute authority, Parliament is not bound by such claims, but conventionally it (or its appointed Arbiter) examines the documents and the claims to determine whether or not to grant the claimed immunity from disclosure.
>
> Claims for privilege commonly fall into two categories – Legal Professional Privilege (LPP) and Public Interest Privilege (PIP). These claims are not uncommon in judicial proceedings. LPP is recognized and enforced by Courts in protecting the confidentiality of the lawyer client relationship. PIP is a more wide-ranging and less readily defined privilege based, broadly speaking, on the justification for protecting the confidentiality of documents containing sensitive or confidential information which it would be unreasonably prejudicial to disclose to the public.
>
> Courts have developed a principled approach in deciding such claims of privilege. Parliament has as a matter of convention adopted a somewhat similar approach, particularly in relation to LPP. But there is an important difference between the responsibility of a court ruling on such claims and the function of Parliament. The Court's function is to administer justice and expound the law. Parliament is the guardian of the public interest with age old constitutional authority to call upon the Executive to give an account of its activities.
>
> While Courts apply developed principles in ruling on claims for privilege, Parliament will evaluate the claim (usually by its Arbiter) to consider whether it is in the public interest to uphold it. This process involves balancing against each other two heads of public interest that are in tension. On the one hand, there is a public interest in not invading lawyer client relationships and a public interest in protecting what might be called commercially sensitive material. And, on the other hand, there is a contrary public interest in recognizing the public's right to know and the need for transparency and accountability on the part of the Executive.[15]

It is notable that in the above matter, Sir Laurence ultimately concluded that, in light of the controversy generated by the Cross City Tunnel, '[m]y determination … is that the privilege granted in September 2003 to some of the documents produced by the RTA is no longer justified in the public interest and should now be denied'.[16]

Subsequently, in relation to the above Cross City Tunnel – Further order, Sir Laurence held that the public interest in the construction and commissioning of the tunnel was of such a level as to outweigh legal arguments that would ordinarily have been recognised as clear candidates for legal professional or public interest immunity privilege. As Sir Laurence Street stated, 'the demands of open government, transparency and accountability are almost irresistible.'[17] He further stated:

> … regardless of varying degrees of sensitivity, I am of the view that there is a legitimate public interest in all of the RTA's actions being laid bare. Indeed, although it may find this unwelcome and irksome, I am of the view that it is in the RTA's own interests as one of the State's great institutions of Government, to table all of its material and to 'stand up and be counted'… The public has an over-riding right in the present climate of concern over the tunnel project – financial, environmental and even safety – to have ordinary barriers of confidentiality or privilege placed aside.[18]

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15 Report of the Independent Arbiter, *Cross City Tunnel—Further* Order, 20 October 2005, pp 1-2.
16 Report of the Independent Arbiter, *Cross City Tunnel—Further* Order, 20 October 2005, p 3.
17 Report of the Independent Arbiter, *Cross City Tunnel—Further Order*, 15 November 2005, p 3.
18 Report of the Independent Arbiter, *Cross City Tunnel—Further Order*, 15 November 2005, p 4.

The balancing of the public interest was further elucidated by Sir Laurence in June 2006 in a report on the sale of PowerCoal Assets:

> ... it must be accepted that the making and testing of such claims are part of the democratic process. In the constitutional fabric of the state of New South Wales there is no absolute doctrine of separation of powers as there is for example in the Commonwealth and the United States. The NSW Parliament is supreme in its authority over the Executive but, in deference to the public expectation that the three branches of Government will co-exist in a conventionally ordered relationship, the underlying philosophy of the separation of powers doctrine is a relevant consideration, albeit that it is not constitutionally mandated or enforceable. Hence the existence of Parliament's authority to over-ride the Executive in the matter of the production of documents. It is a power that exists but is exercised only where it is, in the judgement of Parliament, in the public interest to do so.[19]

Arbiters have also commented on the role of departments and agencies in determining whether privilege is claimed over documents during the initial stages of compiling the return. In assessing a return in 2005, Mr MJ Clarke QC found that a claim of privilege could be validly made in relation to only a portion of the volume of documents over which an umbrella claim had been made.[20] In effect, the extension of the claim to the accompanying documents appeared to have the effect of weakening the claim of privilege in the arbiter's eyes as, taken in the context of the whole, the arbiter determined that the claim of privilege could not be sustained and was outweighed by the high public interest in their disclosure. A similar problem was encountered by Sir Laurence Street during an evaluation in 2003, to which he responded by seeking the permission of the Clerk of the Parliaments to invite representatives of the agencies concerned to assist in identifying and making good the claims for privilege made on individual documents.[21]

Claims of public interest immunity have been validly made in the past in relation to such issues as protecting the identity of an informant[22] and the application of the Government policy of attracting investment to the State.[23]

However, examples where claims of public interest immunity have not been upheld include in relation to the conditional lease of a former quarantine station on the foreshores of Sydney Harbour, when it was held that the public interest in the foreshores of the harbour and the stewardship of the site outweighed the confidentiality of government policy in relation to the site,[24] and in relation to leases and agreements pertaining to Luna Park, where the arbiter held that the documents primarily comprised concluded commitments entered into by a public authority relating to a Sydney icon which contained nothing of such sensitivity as to counterbalance the public interest in the exposure of their contents.[25]

CONCLUSION

The power of the New South Wales Legislative Council to order the production of state papers, including papers over which a claim of public interest immunity may be made, is well established. The power is founded on the common law principle of reasonable necessity and was confirmed

19 Report of the Independent Arbiter, *Sale of PowerCoal Assets*, 27 June 2006, p 6.
20 Report of the Independent Arbiter, *State Finances*, 16 January 2007, p 3.
21 Report of the Independent Arbiter, *Millennium Trains Papers*,22 August 2003, p 7.
22 Report of the Independent Arbiter, *M5 East Motorway*, 25 October 2002, pp 5-6.
23 Report of the Independent Arbiter, *Mogo Charcoal Plant*, 28 May 2002, p 3.
24 Report of the Independent Arbiter, *Conditional Agreement to Lease the Quarantine Station*, 31 July 2001, pp 2-3.
25 Report of the Independent Arbiter, *Luna Park Leases and Agreements*, 19 June 2006, pp 2-4.

by the *Egan* decisions of the late 1990s. Accordingly, the executive in New South Wales is required to produce to the Legislative Council documents subject to an order for papers notwithstanding any claim or public interest immunity. Where a claim of privilege is made, the documents subject to the claim are confidential to members. However, under standing order 52, the House has established a process whereby any member of the House may contest a claim of privilege, precipitating the contested documents being released to an independent legal arbiter for report as to the validity of the claim of privilege. On receipt of the arbiter's report, the decision whether to make public the documents over which privilege is claimed rests with the House, based upon an evaluation of whether it is in the public interest for the documents to be made public.

30 COMPLIANCE WITH ORDERS FOR PAPERS

Mr Searle moved, according to notice:

1. That this House notes that, on 5 June 2018, this House:

   (a) censured the Leader of the Government as the representative of the Government in the Legislative Council for the Government's failure to comply with orders for the production of documents under standing order 52 dated 15 March 2018, 12 April 2018 and 17 May 2018,

   (b) ordered that, under standing order 52, there be laid upon the table of the House by 9.30 am on 6 June 2018 certain of those documents not previously provided to the resolutions dated 15 March 2018, 12 April 2018 and 17 May 2018, and

   (c) ordered that, should the Leader of the Government fail to table the documents by 9.30 am on 6 June 2018, the Leader of the Government was to attend in his place at the Table at the conclusion of prayers to explain his reasons for continued non-compliance.

2. That this House notes that on 6 June 2018:

   (a) the Leader of the Government failed to table documents in compliance with the resolution of 5 June 2018,

   (b) the Clerk tabled correspondence from the Deputy Secretary, Cabinet and Legal, Department of Premier and Cabinet in relation to the order of 5 June 2018, which stated that "after considering advice from the Crown Solicitor, a copy of which is enclosed, I advise that there are no further documents for production", and

   (c) on the President calling on the Leader of the Government to explain his reasons for continued non-compliance, in accordance with the resolution of 5 June 2018, the Leader of the Government stated that "further to the earlier advice of Ms Karen Smith, the Department of Premier and Cabinet will provide the documents sought to the Clerk of the Legislative Council by 5.00 pm on Friday".

3. That this House notes that, on 8 June 2018, the Clerk received:

   (a) correspondence from the Secretary, Department of Premier and Cabinet, noting that:
      (i) "all of the documents referred to in the resolution are Cabinet documents",
      (ii) "the Legislative Council has no power to require such documents to be produced",
      (iii) "on this occasion, however, the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production",

   (b) redacted documents relating to Sydney Stadiums and unredacted documents relating to the Tune Report on the out-of-home-care system, and

   (c) a submission identifying documents relating to Sydney Stadiums and the Powerhouse Museum relocation business case which have been "provided on a confidential basis for inspection by members of the Legislative Council only".

4. That this House notes that on 12 June 2018, the Clerk published redacted documents relating to the Powerhouse Museum relocation business case, received on 8 June 2018, which had been treated as confidential until separated by representatives of the Department of Planning and Environment.

5. That this House notes that:

   (a) the only established mechanism by which the Department of Premier and Cabinet may lodge documents with the Clerk directly, or by which ministers and government agencies may make a claim of privilege, is under standing order 52, in response to an order for the production of documents,

   (b) in response to the House ordering the Leader of the Government to stand in his place at the Table to explain his reasons for non-compliance with the order of 5 June 2018, the Leader of the Government advised the House that "the Department of Premier and Cabinet will provide the documents sought to the Clerk of the Legislative Council by 5.00 pm on Friday", and

   (c) the correspondence and documents provided by the Department of Premier and Cabinet and received by the Clerk on 8 June 2018 and 12 June 2018 were administered by the Clerk in accordance with, and under the authority of, the provisions of standing order 52, including by treating the documents "provided on a confidential basis" in the same manner as documents subject to a claim of privilege.

6. That this House rejects the statement made by the Secretary of the Department of Premier and Cabinet on behalf of the Government that the documents provided on 8 June 2018 and 12 June 2018 were provided voluntarily.

7. That this House notes with concern the following statements made by the Government regarding the power of the Legislative Council to order the production of documents:

   (a) on 1 May 2018, in response to a question without notice regarding the non-production to the House of the full business case in relation to the Powerhouse Museum, the Leader of the Government informed the House of the Government's position that "no Cabinet information will be produced or referred to in responding to a resolution made under standing order 52",

   (b) on 5 June 2018 during debate on the motion to censure the Leader of the Government, the Leader of the Government stated:
      (i) "I represent the Government's view as it relates to the order for production of Cabinet documents",
      (ii) "The majority judgement in Egan v Chadwick did decide the matter: the law is settled and it is well established",
      (iii) that the Government's view is based on "the very clear position at law that the Legislative Council cannot compel the [Government] to hand over Cabinet documents", and

   (c) in correspondence received by the Clerk on 8 June 2018, the Secretary of the Department of Premier and Cabinet stated that "the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production".

8. That this House notes that in the judgements of Chief Justice Spigelman and Justices Meagher and Priestley in the Court of Appeal in Egan v Chadwick (1999), in relation to Cabinet documents:

(a) Spigelman CJ held that:

(i) a distinction has been made between documents which disclose the actual deliberations within cabinet and documents in the nature of reports or submissions prepared for the assistance of Cabinet,
(ii) it is not reasonably necessary for the proper exercise of the functions of the Council to call for documents the production of which would conflict with the doctrine of collective ministerial responsibility by revealing the "actual deliberations of Cabinet",
(iii) however, the production of documents prepared outside Cabinet for submission to Cabinet may, or may not, depending on their content, be inconsistent with the doctrine of collective ministerial responsibility to Cabinet,

(b) Meagher JA took the view that the immunity of cabinet documents from production was "complete", arguing that the Legislative Council could not compel their production without subverting the doctrine of responsible government, but without exploring the distinction between different types of Cabinet documents drawn by Spigelman CJ, and

(c) Priestley JA noted that:
(i) a court has "the power to compel production to itself even of Cabinet documents",
(ii) the "function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity", and
(iii) " … notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no legal right to absolute secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy".

9. That this House notes that:

(a) the Government apparently relies on the broad definition of "Cabinet information" adopted in the Government Information (Public Access) Act 2009,

(b) the Legislative Council rejects the proposition that the test in the Government Information (Public Access) Act 2009 of what constitutes Cabinet information is applicable to Parliament,

(c) the Government's apparent reliance on the definition in the Government Information (Public Access) Act 2009 is likely to have led to a much broader class of documents being withheld from production to this House than that articulated by the majority of the NSW Court of Appeal in the judgments of Spigelman CJ and Priestly JA in Egan v Chadwick, the provision of which is necessary for the Legislative Council to fulfil its constitutional role, and

(d) the true principle from Egan v Chadwick concerning the power of the House to order the production of Cabinet documents is, at a minimum, that articulated by Spigelman CJ, and that the Government has failed to undertake the discrimination between classes of documents required by the reasoning of Spigelman CJ.

10. That this House asserts that it has the power to require the production of Cabinet documents such as those produced on 8 June 2018 and 12 June 2018 and that the test to be applied in determining whether a document is a Cabinet document captured by an order of the House is, at a minimum, that articulated by Spigelman CJ in Egan v Chadwick.

Debate ensued.

Question put.

The House divided.

Ayes 21

Mr Borsak	Mrs Houssos	Mr Secord
Mr Brown	Mr Mason-Cox	Ms Sharpe
Mr Buckingham	Mr Mookhey	Mr Shoebridge
Mr Donnelly *	Mr Moselmane *	Mr Veitch
Dr Faruqi	Mr Pearson	Ms Voltz
Mr Field	Mr Primrose	Ms Walker
Mr Graham	Mr Searle	Mr Wong

* Tellers

Noes 20

Mr Amato	Mr Franklin	Mr Martin
Mr Blair	Mr Green	Mrs Mitchell
Mr Clarke	Mr Harwin	Revd Mr Nile
Mr Colless	Mr Khan	Dr Phelps
Ms Cusack	Mr MacDonald	Mrs Taylor
Mr Fang *	Mrs Maclaren-Jones *	Ms Ward
Mr Farlow	Mr Mallard	

* Tellers

Question resolved in the affirmative.

40. Orders for the production of documents by committees

1. That this House notes that in 2018, the unredacted copy of the Government's Final Business Case for the Windsor Bridge replacement project was produced to Portfolio Committee No. 5 – Industry and Transport as part of its inquiry into the Windsor Bridge replacement project following assertion by the committee of the power of Legislative Council committees to order the production of State papers.

2. That this House notes that Portfolio Committee No. 4 – Legal Affairs in its report on the Budget Estimates 2018-2019, published the following legal advices in relation to the power of Legislative Council committees to order the production of State papers:

    (a) Crown Solicitor, "Section 38 Public Finance and Audit Act and powers of parliamentary committees", 10 August 2018,

    (b) Crown Solicitor, "Section 38 Public Finance and Audit Act and powers of parliamentary committees – Advice 2", 12 September 2018,

    (c) Acting Crown Solicitor, "Draft report of Inspector of Custodial Services", 24 October 2018,

    (d) Mr Bret Walker SC, "Initial advice documented in email from Clerk of the Parliaments to Clerk Assistant – Committees and Director – Committees", 25 October 2018,

    (e) Acting Crown Solicitor, "Request by Committee for draft report of Inspector of Custodial Services", 29 October 2018,

    (f) Solicitor General, "Question of powers of Legislative Council Committees to call for production of documents from witnesses", Advice SG 2018/23 (redacted), and

(g) Ms Anna Mitchelmore SC, "Powers of Legislative Council Portfolio Committee No 4 in the context of its Inquiry into Budget Estimates 2018-2019", 19 November 2018.

3. That this House notes that the Solicitor-General in her advice SG 2018/23 stated:

I should add, however, that it is more likely than not, in my view, that, if this question of the powers of a parliamentary Committee were to be the subject of a decision of a court, a finding would be made that a Committee of the NSW parliament has the power to call for a witness to attend and give evidence, including by the production of a document, subject to claims of privilege, such as public interest immunity and legal professional privilege, that might be made by the witness. There may be some argument as to whether such a power resides in the Parliamentary Evidence Act, Standing Order 208(c) of the Legislative Council or a power based on reasonable necessity but, if the power does exist, it would be likely to emerge in any court proceedings on the basis that such proceedings would be difficult to confine to the limited question of the construction of the Parliamentary Evidence Act.

4. That this House welcomes and endorses the opinion of the Solicitor-General as an acknowledgement of the power of Legislative Council committees to order the production of documents.

5. That this House further affirms that whilst in the first instance Legislative Council committees will seek to obtain access to necessary documents by request, they do possess the power to order the production of documents which may be exercised in the event a request is declined.

6. That this House calls upon the Premier to reissue Premiers memorandum C2011-27 "Guidelines for Appearing before Parliamentary Committees" and M2017-02 "Guidelines for Government Sector Employees dealing with the Legislative Council's Portfolio Committees" in accordance with the Solicitor-General's opinion, and the procedures set out in this resolution.

7. That, notwithstanding anything to the contrary in the standing orders, for the duration of the current session:

(1) Whenever a committee resolves to order the production of documents under standing order 208(c):

(a) a copy of the order is to be communicated to the Department of Premier and Cabinet by the Clerk, and

(b) a summary of the terms of the order are to be reported to the House by the President on the next sitting day.

(2) The terms of the order agreed to by a committee must specify the inquiry to which the order relates, and the date by which the documents are to be returned.

(3) When returned, the documents will be lodged with the Clerk of the Parliaments and made available to members of the House.

(4) The committee may authorise the publication of documents received, subject to paragraphs (6) – (8).

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

(6) Where a document is considered to be privileged:

(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 privilege, and

(b) the documents are to be delivered to the Clerk of the Parliaments by the date and time required in the resolution of the committee and not published or copied without an order of the committee.

(7) A member of the committee may, by communication in writing to the Clerk of the Parliaments, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk of the Parliaments is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report as to the validity of the claim.

(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 of the Parliaments and:

(a) made available only to members of the committee, and

(b) not published or copied without an order of the committee.

(10) Documents returned to an order of a committee under standing order 208(c), which are in the custody of the Clerk of the Parliaments, are documents presented to the committee and form part of the evidence of the inquiry to which they relate.

[adopted 8 May 2019]

Chapter 9

Tabling of Documents

52. Order for the production of documents

(1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.

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

(3) 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.

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

(5) Where a document is considered to be privileged:

(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 privilege,

(b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:

(i) made available only to members of the Legislative Council,

(ii) not published or copied without an order of the House.

(6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, 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.

(7) 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.

(8) A report from the independent legal arbiter is to be lodged with the Clerk and:

(a) made available only to members of the House,

(b) not published or copied without an order of the House.

(9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

Development summary		
1856	Standing order 23	Orders for papers
1870	Standing order 26	Orders for papers
1895	Standing order 18	Orders for papers
1922	Standing order 18	Orders for papers
1927	Standing order 18	Orders for papers
1998	Sessional order	Appointment of Independent Legal Arbiter
2003	Sessional order 52	Order for the production of documents
2004	Sessional order 52	Order for the production of documents

Standing order 52 regulates the House's power to order the production of documents concerning the administration of the state, including from ministers, departments and other entities. While SO 52 is not the source of the power, which is conferred on the House as a reasonably necessary power at common law,[1] the standing order outlines the administrative process by which orders will be made, communicated and returned, and provides for an arbitration mechanism in the event that a member disputes a claim of privilege made over a document.

Operation

Orders made under SO 52

Orders for the production of documents are initiated by resolution of the House, agreed to on motion in the usual manner. The resolution states the offices, agencies and other bodies that are the subject of the order and the documents sought. The definition of

1 The power of the Legislative Council to order the production of state papers is derived from the common law principle of reasonable necessity. This principle finds expression in a series of 19th-century cases decided by the Judicial Committee of the Privy Council between 1842 and 1886, in which it was held that while colonial legislatures did not possess all the privileges of the Houses of the British Parliament, they were entitled by law to such privileges as were 'reasonably necessary' for the proper exercise of their functions. (See *Kielly v Carson* (1842) 12 ER 225, *Fenton v Hampton* (1858) 14 ER 727, *Barton v Taylor* (1839) 112 ER 1112). This is discussed further in Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008) and David Blunt, 'Parliamentary sovereignty and parliamentary privilege', 2015, Paper presented to a Legalwise Seminar, www.parliament.nsw.gov.au/lc/articles, retrieved 1 June 2016.

a document extends to a number of materials and formats under the provisions of section 21 of the *Interpretation Act 1987*,[2] and returns have included maps, books, other publications and data in electronic format on CD and USB.[3]

The resolution must also nominate the date by which the return is required (SO 52(4)). Returns to orders have been required between 1 day[4] and 28 days[5] from the date of the resolution. Between the late 1990s and 2013, orders routinely nominated a deadline of 14 days, with occasional variation to 7 days or 28 days. However, following a 2013 Privileges Committee inquiry into the orders for papers process and feedback provided by the Department of Premier and Cabinet,[6] the House has moved to a default deadline of 21 days, although this is still subject to the discretion of the member proposing the motion and the House in considering the merits of an order on a case by case basis.

On several occasions, following a request from a department or a minister, the House has passed a resolution to extend the due date for an order previously agreed to[7] or to alter the terms of a resolution previously agreed to.[8] On other occasions, departments have advised that they would not be able to produce the documents within the time specified. A supplementary return containing additional documents was then made some time after the original due date.[9]

2 Under section 21 of the Interpretation Act 1987, a document means any record of information, and includes: (a) anything on which there is writing, or (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or (d) a map, plan, drawing or photograph.

3 For example, returns regarding unflued gas heaters and the 'Going Home, Staying Home' reforms included data provided on a USB (*Minutes*, NSW Legislative Council, 19 May 2010, p 1831; 6 May 2015, p 51); a return regarding the Lower Hunter Regional Strategy included a roll of maps (*Minutes*, NSW Legislative Council, 9 May 2007, p 26); returns regarding Cessnock Council (*Minutes*, NSW Legislative Council, 2 June 2010, p 1873), the Building Australia Fund (*Minutes*, NSW Legislative Council, 31 August 2010, p 1994) and Barangaroo (*Minutes*, NSW Legislative Council, 21 September 2010, p 2060) contained information on CD.

4 For example, *Minutes*, NSW Legislative Council, 13 October 1998, pp 749-752; 26 November 1998, pp 953-961. These orders were consequential upon earlier orders on the same subject, with longer deadlines, not having been complied with.

5 For example, *Minutes*, NSW Legislative Council, 14 May 2009, p 1166; 11 March 2010, pp 1696-1697; 1 December 2010, pp 2313-2314.

6 Privileges Committee, NSW Legislative Council, *The 2009 Mt Penny return to order*, Report No. 69 (October 2013).

7 For example, *Minutes*, NSW Legislative Council, 26 October 2006, p 316; 13 November 2013, p 2191.

8 *Minutes*, NSW Legislative Council, 8 May 2014, pp 2486-2488; 15 May 2014, pp 2520-2521; 19 November 2014, pp 323-324.

9 *Minutes*, NSW Legislative Council, 19 May 2010, p 1831 (see *Minutes* entry relating to unflued gas heaters) and subsequent return on 8 June 2010, p 1894; 22 June 2010, p 1936 (see index tabled relating to a return to order regarding NSW Lotteries) and subsequent return on 7 September 2010, p 2025; 26 November 2013, p 2260 (see index tabled relating to a return to order regarding Mr Matthew Daniel) and subsequent return on 30 January 2014, p 2310; 4 November 2014, p 219 (see index tabled relating to a return to order regarding Martins Creek and Wollombi Public Schools) and

When a resolution is agreed to, the Clerk writes to the Secretary of the Department of Premier and Cabinet[10] to communicate the terms of the order (SO 52(1)). The department then carries out the administrative function of coordinating the return by the due date from the offices and agencies named in the order.

While an order is directed to the ministers or agencies named in the resolution, there is an expectation that if the resolution coincides with a change in the allocation of portfolios or the restructure of an agency, the order will nevertheless be complied with. The ramifications of such arrangements came to the attention of the Council in 2013, when it became apparent that a change in the allocation of portfolios in the Executive may have contributed to certain documents not being returned in response to an order for papers.[11]

The return to order

Documents returned to an order of the House are tabled immediately by the Clerk, or received out of session if the House is not sitting (SO 52(2) and (4)). Returns must be accompanied by an indexed list of all documents returned, showing the date of creation, a description of the document and the author of the document (SO 52(3)).

Documents returned over which no claim of privilege is made are immediately made public. However, in one case in 2009, the House resolved to delay the publication of documents in a return to order not covered by a claim of privilege, in response to concerns that the publication of information concerning the future configuration of the Hurlstone Agricultural High School would coincide with a period during which students would be sitting their HSC exams.[12]

Claims of privilege

If privileged documents are contained within the return the Clerk announces the receipt of the privileged documents, but tables only the index provided under paragraph (3), as all documents tabled by the Clerk are otherwise immediately made public (SO 54). Privileged documents cannot be 'tabled' as they may only be made available to members of the Legislative Council (SO 52(5)). Privileged documents are stored in the Office of the Clerk for security. Under SO 52(5)(b)(ii) privileged documents must not be published

subsequent returns on 11 November 2014, p 253 and 13 November 2014, p 300; 6 May 2015, p 52 (see index tabled relating to a return to order regarding Parramatta Road Urban Renewal Project) and subsequent return also reported that day.

10 SO 52(1) refers to 'Premier's Department', as it was constituted in 2004.

11 The circumstances that led to this series of events, and the manner in which this bore upon the return process, are discussed in chapter 3 of the Privileges Committee, *The 2009 Mt Penny return to order*, Report No. 69.

12 Publication delayed (*Minutes*, NSW Legislative Council, 29 October 2009, p 1473); publication further delayed (*Minutes*, NSW Legislative Council, 11 November 2009, p 1498); documents published (*Minutes*, NSW Legislative Council, 12 November 2009, p 1516).

or copied without an order of the House, and while members may view the documents they cannot make public the information contained therein. Privileged documents are nevertheless effective in informing members of the particulars of matters the subject of the documents, which in turn may be instructive in influencing further actions taken by members on the matter, or in determining their vote on the matter.

The House may decide to authorise the publication of privileged documents by way of a subsequent resolution to that effect. This ordinarily occurs following an assessment by an independent legal arbiter (see below), however the House is at liberty to pass such a resolution at any time. For example, in 2003 the House resolved to publish documents received in a return to order concerning the removal of Dr Shailendra Sinha from the Register of Medical Practitioners, which had previously only been authorised to be viewed by members of the Parliamentary Joint Committee on the Health Care Complaints Commission.[13]

On five occasions, claims of privilege have been subsequently withdrawn by the department from which the documents originated. On three occasions, the claim was withdrawn following the publication of an independent legal arbiter's report that recommended that the House publish those documents;[14] on two occasions the claim was withdrawn following receipt of a dispute and referral to an arbiter, but prior to the arbiter reporting on the dispute.[15]

On several occasions, a claim of privilege or confidentiality has been made over documents already provided as public documents. In one case, the Department of Premier and Cabinet lodged a claim for privilege on documents provided as public documents the previous month.[16] In another, the Secretary of Family and Community Services advised that due to the large number of documents provided in response to a return, there was a risk that certain sensitive information may have been included in the public documents. The Secretary recommended that the Clerk require any person accessing the public documents to certify that they would not disclose certain information, should it be contained in the documents.[17] The Clerk agreed to the request.

The arbitration mechanism

Under paragraph (6), any member may dispute the validity of a claim of privilege in relation to a particular document or documents by written communication to the Clerk. In doing so, members are encouraged to be as detailed as possible in their correspondence, identifying the particular documents disputed (based on the

13 *Minutes*, NSW Legislative Council, 30 October 2003, p 372.
14 *Minutes*, NSW Legislative Council, 23 November 2006, p 436; 1 September 2009, p 1293; 3 June 2010, p 1884.
15 *Minutes*, NSW Legislative Council, 6 May 2014, pp 2458-2459; 12 August 2014, p 2646.
16 *Minutes*, NSW Legislative Council, 12 August 2014, p 2645.
17 Correspondence from the General Counsel, Department of Premier and Cabinet, *Request for papers – 'Going Home, Staying Home'*, dated 20 November 2014, tabled *Minutes*, NSW Legislative Council, 6 May 2015, p 51.

information contained in the index) and the reasons they believe the documents do not warrant a claim of privilege. On receipt of a dispute, the Clerk is authorised to release those specific documents to an independent legal arbiter for evaluation and report (SO 52(6)). The arbitration mechanism was first incorporated into the standing orders in 2004, having been introduced by way of resolutions of the House during the *Egan* disputes (discussed under Background).

The arbiter is appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge (SO 52(7)), in recognition of the complexity of the issues under consideration and the need for an arbiter to be highly experienced in determining issues of public interest. On one occasion, a second arbiter was appointed to evaluate a claim of privilege after the first arbiter appointed advised that he would be unable to complete the evaluation due to personal circumstances.[18]

SO 52(6) requires that a report by an arbiter be provided within seven days. In practice, the House has not sought to enforce this deadline as the volume and complexity of the documents the subject of most disputes do not lend themselves to such a tight deadline. Most assessments are made within a matter of weeks, however, in one case a report was provided almost a year after the documents were released, and was never made public.[19]

In some cases, the arbiter has sought additional information or assistance, either from the Clerk or from the departments that have claimed privilege.[20] More recently, a newly appointed arbiter sought submissions from members and stakeholders on both the merits of a disputed claim of privilege and the role he was expected to perform as arbiter.[21] The arbiter took this approach in response to statements made in the House which questioned the first assessment made by that arbiter.[22] As a result of the submission process, the arbiter took the opportunity to set out his understanding of the broad principles by which an assessment should be determined. The arbiter also foreshadowed that he would likely elect to adopt the same process of seeking submissions from members to assist him in determining the merits of any future disputes referred to him for assessment.[23]

18 *Minutes*, NSW Legislative Council, 13 November 2012, p 1351.
19 *Minutes*, NSW Legislative Council, 9 May 2007, p 44 (Clerk announced that dispute had been referred to arbiter on 20 December 2006); 27 November 2007, p 367 (Clerk announced receipt of report).
20 Report of Independent Legal Arbiter, *Documents on ventilation in the M5 East, Proposed Cross City and Lane Cove Road Tunnels*, 26 August 2004, pp 2-4, tabled *Minutes*, NSW Legislative Council, 14 September 2004, p 977; Report of Independent Legal Arbiter, *Papers on M5 East Motorway*, 25 October 2002, pp 2-4, tabled *Minutes*, NSW Legislative Council, 30 October 2002, p 445; Report of Independent Legal Arbiter, *Millennium Trains Papers*, 22 August 2003, tabled *Minutes*, NSW Legislative Council, 3 September 2003, p 265; Report of Independent Legal Arbiter, *Unflued gas heaters*, 4 June 2010, pp 4-5, tabled *Minutes*, NSW Legislative Council, 10 June 2010, p 1928.
21 *Minutes*, NSW Legislative Council, 13 August 2014, p 2658.
22 *Hansard*, NSW Legislative Council, 6 March 2014, pp 27157-27158.
23 Report of Independent Legal Arbiter, the Hon Keith Mason, *Report under standing order 52 on disputed claim of privilege: Westconnex Business case*, 8 August 2014, tabled *Minutes*, 13 August 2014, p 2658.

The arbiter's report is lodged with the Clerk. The report is only made available to members, unless the House otherwise orders (SO 52(8)). The House is informed, but not bound, by the arbiter's determination, and the decision as to whether documents should be published remains the final prerogative of the House. On a small number of occasions, the House has not acted on the arbiter's recommendation that certain documents be published[24] or has gone beyond the recommendation of the arbiter by resolving that information be redacted from a greater volume of documents than that originally recommended by the arbiter.[25] In some cases, the House has not published a report provided by the arbiter.[26] As the recommendations remain confidential and available only to members, it cannot be determined whether the House acted on the arbiter's recommendations in those cases.

In the majority of cases, if the arbiter has recommended that documents the subject of the dispute be made public, the member who lodged the dispute will seek to have the report tabled and published, by motion on notice in the usual way, so that the report and its recommendations can be discussed more openly and a determination made as to whether the documents in question warrant the claim of privilege. These procedures usually occur over successive days, however, there has been some variation in procedure over the years. On one occasion, a member gave a contingent notice that, on the report of the arbiter being published, he would move a motion for the publication of the documents, thereby accelerating the process of publication.[27]

Unusual proceedings in relation to claims of privilege

House resolves to publish documents prior to receipt of arbiter's report

On one occasion, prior to the adjournment of the House for the summer recess, the House agreed to a series of resolutions concerning several disputed returns that, if the arbiter's reports on the disputes found that the documents did not warrant the claims of privilege made, both the reports and documents in question were authorised to be published by the Clerk out of session.[28] This practice has been the subject of varied comment.[29]

24 *Minutes*, NSW Legislative Council, 8 May 2003, p 72 (report tabled; report recommended that documents be published but no subsequent motion to that effect was moved); 10 March 2010 p 1688 (House resolved that some, but not all, of the documents determined by the arbiter not to warrant a claim of privilege be published).

25 *Minutes*, NSW Legislative Council, 23 June 2010, p 1952.

26 For example, reports regarding the Dalton reports into juvenile justice (2005); grey nurse sharks (2006); Boral Timber (2007); Hunter Rail Cars (2007); the 2007-08 Budget (2007); and the Lower Hunter Regional Strategy (2007) have been received and reported to the House, but the House has not resolved to publish the reports.

27 *Minutes*, NSW Legislative Council, 26 November 2009, p 1574.

28 *Minutes*, NSW Legislative Council, 18 October 2005, p 1644; 30 November 2005, pp 1785-1786; 1 December 2005, p 1815.

29 Anne Twomey, *Executive Accountability to the Australian Senate and the New South Wales Legislative Council*, Legal Studies Research Paper No. 07/70, The University of Sydney Law School, November 2007; Lynn Lovelock, 'The power of the New South Wales Legislative Council to order the production of State papers: Revisiting the *Egan* decisions 10 years on' (Spring 2009), vol 24 (2), *Australasian Parliamentary Review*, pp 199-220.

Referral of privileged documents and arbiter's report to Privileges Committee

As an alternative to this practice, in the lead-up to the final sittings of the 55th Parliament and the summer recess prior to a periodic election, the House resolved that, in view of the fact that the House was currently awaiting receipt of a number of returns to orders, and a number of disputed claims of privileges had been referred to the independent legal arbiter for evaluation and report, the Privileges Committee be authorised to undertake the role usually performed by the House in dealing with disputed claims of privilege over returns to order while the House was not sitting. The motion specified that this would extend to the committee being authorised to make public any documents over which privilege had been claimed but not upheld by the arbiter. Any member of the Council who had disputed a claim of privilege would be entitled to participate in the deliberations of the committee, but could not vote, move any motion or be counted for the purposes or any quorum or division unless they were a member of the committee.[30]

There have been occasions on which further alternative procedures have been followed in relation to the determination of claims of privilege. In October 2014, the House resolved that the Privileges Committee inquire into and report on the implementation of a report by an independent legal arbiter on papers relating to the VIP Gaming Management Agreement, entered into between the Independent Liquor and Gaming Authority (ILGA) and Crown Casino. The arbiter's report had recommended that information claimed by the Executive to be commercially sensitive and confidential be published, as the claim was not valid.[31] The committee invited submissions from the member who had lodged the dispute and, through the Department of Premier and Cabinet, from Crown Resorts Limited and the ILGA. The committee reported that, having reviewed the matter in reference to the submissions received, it supported the recommendation made by the arbiter in his report, and the House in turn resolved to publish the arbiter's report and the information the subject of the dispute.[32]

The House authorises a committee to determine whether papers not subject to a claim of privilege should be published

On 12 November 2014, the House established a select committee to inquire into and report on the conduct and progress of the Ombudsman's inquiry 'Operation Prospect'. Later that month, under SO 52, the House ordered the production of a report prepared by Police Strike Force Emblems and other related documents. The resolution provided

30 *Minutes*, NSW Legislative Council, 20 November 2014, pp 365-367.

31 *Minutes*, NSW Legislative Council, 23 October 2014, pp 201-202.

32 Privileges Committee, NSW Legislative Council, *The Crown Casino VIP Gaming Management Agreement*, Report No. 72 (November 2014).

that, notwithstanding anything to the contrary in SO 52, any documents returned over which a claim of privilege was *not* made would:

a) subject to (b) below, remain confidential and available for inspection by members of the House only, and

b) stand referred to the Select Committee on the conduct and progress of the Ombudsman's inquiry 'Operation Prospect', which was authorised to determine whether the documents should subsequently be made public.[33]

Ultimately, the arrangement did not proceed as General Counsel for the Department of Premier and Cabinet lodged legal advice from the Crown Solicitor which stated that information concerning the administration of justice must be ordered from the Governor under SO 53 rather than from the Executive under SO 52.[34] As the House had adjourned for the summer recess, a subsequent order under SO 53 was not pursued.

The House authorises a committee to publish documents the subject of a disputed claim of privilege

In 2013, the House resolved to order the production of certain documents required by General Purpose Standing Committee No. 1 for the purposes of an inquiry into allegations of bullying at WorkCover NSW.[35] The committee had previously sought to order the documents directly from the Public Service Commissioner but had been refused.

The key report received in the return and required by the committee was subject to a claim of privilege. The Chair disputed the claim, and the independent legal arbiter determined that the claim should not be upheld because the 'privacy concerns that have been advanced [did] not establish a relevant privilege known to law'.[36] The House then resolved that, notwithstanding the provisions of SO 52, the documents considered by the arbiter not to warrant privilege from publication be referred to the committee for the purposes of its inquiry, and that the committee have the power to authorise the publication of the documents in whole or in part, taking into consideration the recommendations made by the arbiter.[37] The committee later reported that the House's actions had empowered members to more freely question witnesses in relation to the matters revealed in the return to order.[38]

33 *Minutes*, NSW Legislative Council, 20 November 2014, pp 363-364.
34 *Minutes*, NSW Legislative Council, 6 May 2015, p 52.
35 *Minutes*, NSW Legislative Council, 13 November 2013, p 2171.
36 Report of Independent Legal Arbiter, the Hon Keith Mason, *Disputed claim of privilege on the report regarding a former WorkCover NSW employee*, 5 March 2014, p 2; *Minutes*, NSW Legislative Council, 5 March 2014, p 2333.
37 *Minutes*, NSW Legislative Council, 6 March 2014, p 2347.
38 General Purpose Standing Committee No. 1, NSW Legislative Council, *Allegations of bullying in WorkCover NSW* (2014), p 9.

Register maintained by the Clerk

Under SO 52(9), the Clerk is to maintain a register showing the name of any person examining documents tabled under this order. The register is not made available for perusal by other members or the public and is not regarded as a public document. The requirement for a register first appeared in the 2004 standing orders, the result of deliberations of the Standing Orders Committee (see commentary below).

Refusal to provide documents

On occasion, in the years since the *Egan* decisions, the Secretary or Director-General of the Department of Premier and Cabinet has advised that returns to orders, or particular documents within those returns, would not be provided for various reasons. These have included:

- Advice that two documents identified had not been provided because they 'formed part of a Cabinet Minute dealing with Grey Nurse Sharks' and 'Cabinet Minutes and documents are exempt from standing order 52 requests'.[39]
- That it was not practicable to produce the documents sought.[40]
- That, on the advice of the Crown Solicitor, orders for papers in place at the time of prorogation had lapsed and returns would not be provided. The House subsequently agreed to four new resolutions when the new session of Parliament commenced, noting that 'there are many established conventions recorded in the Journals of the Legislative Council where the government has complied with an order of the House for state papers in the subsequent session, notwithstanding the prorogation of the House'.[41]
- The document sought by the order was tabled by a minister as general ministerial tabling.[42]

There have been cases where documents sought have not been returned, or where the Department advised that no documents were held.[43] Where this occurs, it is assumed that the documents have not been provided because they fall within the class of Cabinet documents, however the House retains the prerogative to further pursue the matter should it so choose.[44]

39 *Minutes*, NSW Legislative Council, 22 March 2005, p 1283.
40 *Minutes*, NSW Legislative Council, 6 May 2014, p 2458.
41 *Minutes*, NSW Legislative Council, 25 June 2006, pp 49-50 and 53-57; 6 June 2006, pp 70-71; 8 June 2006, p 119.
42 *Minutes*, NSW Legislative Council, 25 October 2006, p 305; 26 October 2006, p 320; 17 March 2010, p 1718.
43 *Minutes*, NSW Legislative Council, 8 June 2010, p 1894; 14 February 2012, p 669.
44 The decision in *Egan v Chadwick* (1999) 46 NSWLR 563 was not conclusive as to the powers of the House to order the production of Cabinet documents. See comments made by Mr Bret Walker SC, keynote address, *Proceedings of the C25 Seminar marking 25 years of the committee system in the Legislative Council*, 20 September 2013, pp 7-11.

In cases where documents are not provided, the onus is on the House to pursue the matter. In some cases, the House has chosen not to take any further action.[45] In others, particularly where members have identified that documents may be missing from a return, the Clerk, at the request of the member, has written to the Department of Premier and Cabinet to forward the member's concerns and invite a response. On several occasions, these inquiries have led to additional documents being tabled.[46] In one particularly significant example, a member wrote to the Clerk to advise that documents published in the course of an Independent Commission Against Corruption investigation had not been provided by a department in a return regarding the same matter. The matter ultimately led to two Privileges Committee inquiries regarding possible non-compliance with SO 52.[47]

Orders directed to statutory bodies and related entities

If the House seeks to order the production of documents from a statutory body or other similar entity not under the direct control of a minister, the resolution is communicated by the Clerk directly to the head of that body, with a courtesy letter also copied to the Secretary of the Department of Premier and Cabinet. This practice came about as the result of an attempt to order the production of documents from Greyhound Racing NSW in recent years. No return was received from GRNSW and correspondence from the Department of Premier and Cabinet advised that section 5 of the *Greyhound Racing Act 2009* provides that GRNSW does not represent the Crown and is not subject to direction or control by or on behalf of the government. With the concurrence of the President, the Clerk subsequently sought advice from Mr Bret Walker SC on some of the legal issues raised by the matter. Mr Walker advised that, in his opinion, bodies with public functions, such as GRNSW, are amenable to orders for papers addressed to them directly by the Council, and are compelled to comply with such an order. Failure to do so would result in the responsible officer being in contempt of Parliament.

The House opted to pursue the matter. However, in August the Government had passed the *Greyhound Racing Prohibition Act 2016*, which included a section 27 which stated that the minister may, at any time after the assent of the Act and until the dissolution of GRNSW, require GRNSW to produce any specified record and may make the information publicly available. The House was therefore obliged to take this new arrangement into account in its pursuit of the matter. The new resolution agreed to by the House noted the order for papers originally made, noted the advice provided by Bret Walker SC, noted the provisions of section 27 of the Act, and called on the Minister for Racing to require GRNSW to produce the documents originally ordered in September 2015, together with any related documents created until the date of the resolution. In October 2016, the

45 *Minutes*, NSW Legislative Council, 8 June 2010, p 1894; 14 February 2012, p 669.
46 For example, *Minutes*, NSW Legislative Council, 27 March 2012, p 834; 15 October 2013, p 2032; 6 May 2015, pp 52-53.
47 Privileges Committee, NSW Legislative Council, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report No. 68 (April 2013); *The 2009 Mt Penny return to order*, Report No. 69.

Clerk tabled a return received directly from the Administrator of GRNSW. The return comprised of both public documents and documents over which a claim of privilege was made and which were made available only to members.

The receipt of the return from GRNSW, and the willingness on the part of GRNSW to liaise directly with the Clerk in the provision of several additional returns to that order for papers in the subsequent months, is taken to be indicative of the acceptance by the Executive Government of the correctness of Mr Walker's advice.

Background

The standing orders have contained provisions for the House to order the production of state papers since 1856. The power of the Legislative Council to order papers was routinely exercised between 1856 and the early 1900s. However, orders for papers ceased to be a common feature of the operation of the Council during the years leading to 1920, with the occasional exception up to as late as 1948.

The 1856 and 1870 standing orders provided that all orders for papers made by the Council must be communicated to the Colonial Secretary by the Clerk (1856 SO 23; 1870 SO 26). The Colonial Secretary occupied the role of the chief government spokesperson and representative in the colonial legislature.

In 1895, the standing orders were amended to reflect a change in that officer's title, with the Clerk then required to communicate with the Chief Secretary of the colony.[48] In 1922, the requirement to communicate the order to the Chief Secretary was omitted on the recommendation of the Standing Orders Committee.[49] During consideration of the report in committee of the whole the Chair noted that the Standing Orders Committee had recommended the amendment because the Legislature had by then moved under the purview of the Premier's Department rather than the Colonial Secretary. The Committee recommended the provision be left open rather than providing that communication be forwarded to the Premier's Department because the Legislature at a future time may be placed under another department. The Clerk would simply communicate with the minister with portfolio responsibility for matters pertaining to the Legislature.[50] (The concept that the Legislature sits under the purview of an agency of the Executive Government is a repugnant concept in the modern day. It is likely that these references in debate refer to the minister or agency allocated as the principal liaison between the government and the Legislature, rather than the minister or agency having any purported oversight of the Legislature).

48 Although the title was not officially changed in statute until 1959, under the *Ministers of the Crown Act 1959*.
49 *Minutes*, NSW Legislative Council, 2 August 1922, pp 32-33; 3 August 1922, pp 36-37; 16 August 1922, p 43. The report was not made in response to a reference from the House.
50 *Hansard*, NSW Legislative Council, 3 August 1922, p 793; *Minutes*, NSW Legislative Council, 3 August 1922, pp 36-37.

In 1927, the standing order was further amended to insert a requirement that the Clerk communicate the terms of any orders made to the Premier's Department, as it was then known, also on the recommendation of the Standing Orders Committee.[51] During consideration of the report in committee of the whole a shift in views was apparent, with the Chair observing that the addition was necessary as there was nobody to whom the duty was assigned following the amendment made in 1922, and it was thought that someone should definitely be named to carry out the duty.[52]

The adoption of provisions regarding privileged documents – the Egan *cases*

During the 1990s, the Council, now a democratically elected House, revived the exercise of its power to order papers. This precipitated the *Egan* cases, which were prompted by the refusal of the Treasurer and Leader of the Government in the Legislative Council, the Hon Michael Egan, to produce certain state papers ordered by the Council. Mr Egan refused to produce papers on a number of occasions, regarding a number of subjects, ultimately leading to the matter being pursued in the courts.[53] Over the course of this period, the Council not only sought to clarify the scope of its powers to order the production of documents from the Government and related entities, but also refined the administrative arrangements for the order for papers process.

Following the initial failure of the Government to table the documents ordered,[54] the matter was referred to the Privileges Committee to report on the sanctions that should apply where a minister fails to table documents.[55] Following the referral, but prior to the committee reporting, the Leader of the Government was suspended from the House, which provided the trigger for commencement of legal proceedings.[56] The Privileges Committee provided its report several weeks later and stated that, in view of the proceedings commenced, the power to order the production of documents was (at that time) uncertain and sanctions would therefore not be appropriate. However, the committee further reported that, if the Council did possess the power to order documents, a mechanism for assessing public interest claims for each individual case

51 *Minutes*, NSW Legislative Council, 15 November 1927, p 29; 25 November 1927, p 56. The report was not made in response to a reference from the House.

52 *Hansard*, NSW Legislative Council, 22 November 1927, p 437; *Minutes*, NSW Legislative Council, 22 November 1927, p 41.

53 *Egan v Willis and Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.

54 The documents related to orders regarding the closure of veterinary laboratories (ordered *Minutes*, NSW Legislative Council, 18 October 1995, p 232); the development of the Sydney Showground site (ordered *Minutes*, NSW Legislative Council, 25 October 1995, p 264); the restructure of the Department of Education (ordered *Minutes*, NSW Legislative Council, 26 October 1995, p 279); and the proposed Lake Cowal Gold Mine (ordered *Minutes*, NSW Legislative Council, 23 April 1996, p 63).

55 *Minutes*, NSW Legislative Council, 13 November 1995, pp 292-296.

56 *Minutes*, NSW Legislative Council, 2 May 1996, pp 112-118 (suspension of Leader of the Government); 14 May 1996, pp 125-126 (President informed House of the commencement of legal proceedings in *Egan v Willis and Cahill*).

should be implemented in order to address conflicts between the Council and the Executive over claims of public interest immunity.[57] The committee observed that an equivalent arbitration model was not available in other Houses, so a mechanism was subsequently developed in consultation between the Clerks and the Leaders of the Government and the Opposition for inclusion in future resolutions of the House.

Several months after the Privileges Committee's report was tabled, the Court of Appeal handed down the first of the *Egan* decisions, ruling that the power to order the production of documents was a reasonably necessary power of the Council (*Egan v Willis & Cahill*)[58] (confirmed on appeal by the High Court in 1998 in *Egan v Willis*).[59] However, the Court did not rule on the power of the House to order documents over which a claim of privilege was made – this instead became the subject of further proceedings commenced after a series of resolutions were agreed to by the House in 1998.

On 24 September 1998 (prior to the decision in the Court of Appeal being handed down), the House agreed to a new resolution ordering the production of documents concerning the contamination of Sydney's water supply.[60] On 13 October 1998, the President reported receipt of correspondence from the Director-General of the Premier's Department advising that following advice received from the Crown Solicitor, the Government would not comply with the order for papers because the documents were covered by legal professional privilege or public interest immunity privilege.[61]

Later that day, the House agreed to another resolution censuring the Leader of the Government, and calling on the Leader to table the documents the following day, subject to a number of additional criteria. These criteria reflected the first adoption of procedural provisions to address privileged documents in returns to orders:

- documents subject to claims of legal professional privilege or public interest immunity would be clearly identified and made available only to members, and would not be published or copied without an order of the House
- in the event that a member disputed the validity of a claim of privilege made over the documents in writing to the Clerk, the Clerk would be authorised to release the disputed document to an independent legal arbiter who was either a Queen's Counsel, a Senior Counsel or a retired Supreme Court judge, appointed by the President, for evaluation and report within five days as to the validity of the claim

57 Privileges Committee, NSW Legislative Council, *Inquiry into sanctions where a minister fails to table documents*, Report No. 1 (May 1996), pp 19, 23-24.

58 *Egan v Willis and Cahill* (1996) 40 NSWLR 650.

59 *Egan v Willis* (1998) 195 CLR 424.

60 *Minutes*, NSW Legislative Council, 24 September 1998, pp 730-731. The resolutions passed in 1998 did not direct the order to a department or agency, and asked for all documents relating to the subject matter.

61 *Minutes*, NSW Legislative Council, 13 October 1998, p 740.

- any document identified as a Cabinet document would not be made available to members, however the legal arbiter could be requested to evaluate any such claim
- the President would advise the House of any report from an independent arbiter, at which time a motion could be made forthwith that the disputed document be made (or not made) public without restricted access.[62]

The following day, the Government tabled the public documents regarding Sydney's water supply, but did not table the documents over which privilege was claimed. The President subsequently informed the House that further legal proceedings (*Egan v Chadwick & Ors*)[63] had been commenced by the Leader of the Government, claiming that the Council had 'no power to order the production of documents the subject of legal professional privilege or public interest immunity, or to determine itself a claim for legal professional privilege or public interest immunity', and claiming that the orders made by the Council in that regard were beyond its power.[64]

On 20 October 1998, the Clerk tabled further documents received from the Government over which no claim of privilege was made.[65] The President then tabled an opinion from Mr Philip Taylor, barrister, relating to the Leader of the Government's failure to fully comply with the resolution of the House of 13 October 1998, and the House, on motion of the Leader of the Opposition, judged the Leader of the Government in contempt and suspended him from the chamber for five sitting days or until the 13 October resolution was complied with.[66] On 22 October 1998, the President informed the House that amended summonses were issued from the Supreme Court in the matter of *Egan v Chadwick & Ors*, with the plaintiff (Mr Egan) claiming that the Council's order of 20 October was punitive and thus beyond the powers of the House. Mr Egan sought an injunction restraining the House from suspending him.[67]

In November 1998, following the ruling by the High Court in *Egan v Willis*[68] but prior to a decision being handed down in *Egan v Chadwick*, the House ordered the production of all documents previously ordered by the House since 1995 and not yet provided, including those covered by privilege. The resolution once again incorporated provision for privileged documents to be made available only to members, and for an independent legal arbiter to assess any disputed claim of privilege, including documents identified as Cabinet documents. However, the previous requirement that documents covered by privilege be 'clearly identified' was replaced with a requirement that a return be prepared showing the date of creation, description and author of any document for

62 *Minutes*, NSW Legislative Council, 13 October 1998, pp 744-747 and 749-752.
63 *Egan v Chadwick* (1999) 46 NSWLR 563.
64 *Minutes*, NSW Legislative Council, 14 October 1998, pp 759-760.
65 *Minutes*, NSW Legislative Council, 20 October 1998, p 772.
66 *Minutes*, NSW Legislative Council, 20 October 1998, pp 773-776.
67 *Minutes*, NSW Legislative Council, 22 October 1998, pp 796-797.
68 *Egan v Willis* (1998) 195 CLR 424.

which a claim of privilege was made and the reason made for the claim of privilege (which later became the index required under SO 52(5)(a)(b).[69]

On 26 November 1998, the Attorney General tabled a selection of the documents requested, but did not provide the privileged documents. The Attorney General additionally tabled a report prepared by Sir Laurence Street, whom the Government had asked to assess the validity of the claims of privilege on the documents not provided.[70] This was a notable development in the dispute between the House and the Government. Rather than provide the documents to the Council and allow the arbiter to assess the validity of the claim of privilege from publication, the Government had instead provided the documents to the arbiter and used the arbiter's assessment as authority for *non-production* of the documents, contrary to the House's resolution. The House immediately resolved that the documents be produced[71] and, when the resolution was not complied with, once again suspended the Leader of the Government.[72]

On 2 December 1998, the House adopted a sessional order to formalise the procedures for privileged documents for all orders for papers agreed to by the House, based on the terms of the 26 November 1998 resolution.[73]

In 1999, the House did not readopt the sessional order, however, soon after the commencement of the new parliamentary session the Court of Appeal handed down its judgement in *Egan v Chadwick*, which confirmed the power of the House to order the production of documents covered by legal professional or public interest immunity privilege.[74]

Further development of the rules for orders for papers following the Egan *cases*

The first order for papers agreed to by the House in 1999, which ordered the production of documents previously ordered and not yet provided, included a provision for privilege to be claimed. However, rather than require that an arbiter assess the validity of any claim the subject of a dispute, in keeping with previous resolutions and the 1998 sessional order, the order instead provided that a dispute would be resolved by a resolution of the House.[75]

Notwithstanding, after that initial resolution every subsequent order made included provision for an independent legal arbiter to make an assessment on any claims the subject of a dispute. The terms of the resolutions adopted varied slightly to those adopted previously, but generally formed the basis for those incorporated into SO 52(6) to (8) in 2004, which set out the dispute mechanism, and the terms of SO 52(4), which

69 *Minutes*, NSW Legislative Council, 24 November 1998, pp 920-927.
70 *Minutes*, NSW Legislative Council, 26 November 1998, pp 946-947.
71 *Minutes*, NSW Legislative Council, 26 November 1998, pp 947, 948-951 and 952-961.
72 *Minutes*, NSW Legislative Council, 27 November 1998, p 970.
73 *Minutes*, NSW Legislative Council, 2 December 1998, pp 998-1000.
74 *Egan v Chadwick* (1999) 46 NSWLR 563.
75 *Minutes*, NSW Legislative Council, 23 June 1999, pp 148-150.

made provision for the Clerk to receive documents out of session if the House was not then sitting.

From 2004, SO 52 formalised these arrangements, with two additions:

- the time within which the arbiter must provide a report on a dispute was extended from five calendar days to seven (SO 52(6))
- on the motion of a government member during the Standing Orders Committee's consideration of the proposed new standing orders, SO 52(9) was inserted to require that the Clerk maintain a register showing the name of any person who examines a return.[76]

53. Documents from the Governor

The production of documents concerning:

(a) the royal prerogative,

(b) dispatches or correspondence to or from the Governor, or

(c) the administration of justice,

will be in the form of an address presented to the Governor requesting that the document be laid before the House.

Development summary		
1895	Standing order 19	Addresses for papers
2003	Sessional order 53	Documents from the Governor
2004	Standing order 53	Documents from the Governor

The House has the power to order the production of papers concerning the administration of the state from the Executive. The procedures by which orders are made are set out in SO 52. SO 53 requires that orders for the production of papers concerning the royal prerogative, dispatches or correspondence to or from the Governor, or the administration of justice, must be made by way of an Address to the Governor.

The distinction between the operation of SO 52 and SO 53 is that SO 52 applies to matters that fall within the purview of the Executive Government, whereas SO 53 reflects the separation of powers and applies to matters that fall within the purview of the Crown and the Courts.

An Address is the formal mechanism by which the Council communicates with the Governor (see SO 120).

76 Standing Orders Committee, NSW Legislative Council, *Report on proposed new Standing Rules and Orders*, Report No. 1, September 2003, p 118. A similar resolution appeared in two early resolutions but referred only to members – see *Minutes*, NSW Legislative Council 26 November 1998 p 960, 2 December 1998, p 1000.

Operation

Addresses are made by motion on notice in the usual way, with the exception of an Address-in-Reply under SO 8. Once agreed to, a message is delivered to the Governor enclosing the resolution agreed to by the House

Matters under SO 53(a) and (b), being those concerning the royal prerogative or correspondence to or from the Governor, have rarely been the subject of an Address under SO 53 and are unlikely to be the subject of frequent scrutiny within modern governance arrangements, though *Odgers'* notes that correspondence from the Governor to the Premier concerning appointments made would fall within this category of documents.[77]

In contrast, matters concerning the administration of justice, particularly matters relating to criminal and legal matters, have been the subject of a number of Addresses. There has been ongoing difference of opinion as to the matters that justifiably fall within the definition of the 'administration of justice', the background to which is discussed below. The argument has not been settled, and members are encouraged to seek the advice of the Clerk before giving a notice of motion for an Address under SO 53.

The issue has previously arisen through challenges to the terms of motions for orders for papers under SO 52, on the grounds that the documents sought fall within the definition of the 'administration of justice'. In ruling on the matter, Presidents have referred to previous rulings which indicate that papers relating to the administration of justice include:

- those that make reference to actual court proceedings
- material touching on or concerning papers relating to court proceedings or the police investigation leading to such proceedings
- the administration of a sentence on conviction and the orders made
- material concerning conditions of custody where such could be seen as giving effect to or being closely connected with the sentence of the court
- documents relating to legal action.[78]

While requests to the Governor for the return of papers were frequently made and routinely complied with until the early 20th century, the practice of making requests fell away until a number of requests were made between 2005 and 2014 under SO 53.[79] On each occasion, the Governor has declined to provide the documents on the advice of the Executive Council, and on some occasions provided reasons for so doing, as follows:

77 See Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 581.

78 Presidents' rulings: President Burgmann, *Hansard*, NSW Legislative Council, 9 April 2002, pp 1194 and 1195; President Primrose, *Hansard*, NSW Legislative Council, 24 June 2009, p 16638.

79 *Minutes*, NSW Legislative Council, 15 September 2005, p 1568; 2 September 2009, p 1312; 18 March 2010, p 1724; *Hansard*, NSW Legislative Council, 20 November 2014, p 352.

CHAPTER 9 – TABLING OF DOCUMENTS

52. Order for the production of documents

(1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.

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

(3) 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.

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

(5) Where a document is considered to be privileged:

(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 privilege,

(b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:

(i) made available only to members of the Legislative Council,

(ii) not published or copied without an order of the House.

(6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, 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.

(7) 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.

(8) A report from the independent legal arbiter is to be lodged with the Clerk and:

(a) made available only to members of the House,

(b) not published or copied without an order of the House.

(9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.