LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

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Secretary
Standing Committee on Finance and Public Administration
Senate
Parliament House
PO Box 6100
CANBERRA ACT 2600

30 November 2009

Dear Mr Palethorpe

**Inquiry into Independent Arbitration of Public Interest Immunity Claims**

Thank you for your letter dated 18 November 2009 inviting a submission to your committee's inquiry.

Please find attached a submission on behalf of the New South Wales Legislative Council.

Yours sincerely

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# SENATE FINANCE AND PUBLIC ADMINISTRATION COMMITTEE

## *INQUIRY INTO INDEPENDENT ARBITRATION OF PUBLIC INTEREST IMMUNITY CLAIMS*

**Submission by the New South Wales Legislative Council**

## INTRODUCTION

This submission outlines:

- the power of the New South Wales Legislative Council to order the production of government documents
- the procedures followed in the House for the production of documents and the arbitration of privilege claims
- the approach which has been taken to the assessment of such claims in New South Wales and
- certain differences between the Legislative Council's procedures and the proposed Senate resolution for the independent arbitration of public interest immunity claims.

## THE POWER OF THE LEGISLATIVE COUNCIL TO ORDER THE PRODUCTION OF DOCUMENTS

The New South Wales Parliament is unique among Australian Parliaments in that it has not legislated to declare its powers and immunities. While certain powers and immunities have been conferred by statute, no comprehensive legislation has been enacted on this subject. In New South Wales, the majority of the powers of Parliament are derived from the common law principle of reasonable necessity.

In *Egan v Willis* (1998) 195 CLR 424, the High Court of Australia confirmed that a power to order the production of state papers is reasonably necessary for the proper exercise by the Legislative Council of its functions. The power was seen as critical to the Council's role in holding the Executive to account, within a system of responsible government. In *Egan v Chadwick* (1999) 46 NSWLR 563, the New South Wales Court of Appeal held that the Council's power to require the production of documents, confirmed in *Egan v Willis*, extends to documents in respect of which a claim of legal professional privilege or public interest immunity is made. The majority (Spigelman CJ and Meagher JA), however, held that the power does not extend to the production of Cabinet documents.

Since the decision in *Egan v Chadwick* in 1999, orders for the production of documents have become common in the Legislative Council.[1] The Government routinely complies with such orders including by the production of documents subject to legal professional privilege and public interest immunity. Recently an area of contention has emerged concerning the extent of

1 The Council has agreed to 250 orders for state papers since 1999.

the immunity attaching to Cabinet documents, but this has affected a relatively small number of documents to date.[2]

## PROCEDURES FOR THE PRODUCTION OF DOCUMENTS AND THE ARBITRATION OF PRIVILEGE CLAIMS IN THE LEGISLATIVE COUNCIL

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.

The procedures of the House for the production of documents and the arbitration of privilege claims are contained in standing order 52 (copy at Attachment 1).

### Summary of procedures under standing order 52

Under standing order 52, documents provided in response to an order of the House are tabled in the House by the Clerk. The documents must be accompanied by an indexed list showing the date of creation, author, and description of each document. Once tabled, the documents and the indexed list are deemed to be public unless a claim of privilege is made.

If a claim of privilege is made in relation to a document, the document is made available only to members of the House and may not be published or copied without an order of the House. Claims of privilege are formulated in terms of either legal professional privilege or public interest immunity (which may include commercial confidentiality). The reasons for the claim of privilege or immunity must be stated in the return to the order of the House.

Any member of the House may dispute the validity of a claim of privilege or immunity, in writing to the Clerk. On receipt of such a dispute, the Clerk is authorised to release the disputed documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim. The arbiter is appointed by the President, and must be a Queen's Counsel, Senior Counsel, or retired Supreme Court judge.

The arbiter lodges a report with the Clerk setting out his or her assessment of the privilege claim. The report is made available only to members of the House and may not be published or copied without an order of the House.

The arbiter's report does not trigger any further action or bind the House to act in any particular way; it remains a matter for the House whether to make the documents public or not. If no further action is taken by the House the documents remain accessible only to members subject to any further order of the House.

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2 For further details see Lovelock, L. and Evans, J., 2008, *New South Wales Legislative Council Practice*, Sydney, The Federation Press, pp 482-485.

## THE ASSESSMENT OF PRIVILEGE CLAIMS

There have been 44 occasions on which privilege claims have been disputed and referred to the independent arbiter since 1999. When assessing such claims, the arbiter has drawn on the principles developed by the courts in relation to legal professional privilege, public interest immunity, or commercial-in-confidence, as applicable. However, the arbiter is not bound by the tests applied in the courts given the different role of privilege claims in Parliament, and in some cases has given priority to an assessment of whether the balance of the public interest lies in favour of or against the publication of particular documents.

The applicable approach to the assessment of privilege claims in the Council has been summarised by the arbiter as follows:

> [T]here 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.[3]

Similarly, the arbiter has stated that:

> 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.[4]

The arbiter's role in evaluating the public interest has been the subject of academic criticism. Professor Anne Twomey has argued that the arbiter should be restricted to determining whether a document falls within a strict legal definition of privilege, and should not make recommendations on whether documents should be made public by attempting to gauge the public interest, as this is Parliament's role.[5] She has also argued that the arbiter 'should not undertake the balancing task' as the arbiter 'does not have the relevant experience to make such an assessment.'[6] However, as was emphasised by the Court of Appeal in *Egan v Chadwick*, there are clear differences between the role of privilege claims in the courts and their role in

3 Report of the Independent Arbiter, 20 October 2005, *Cross City Tunnel—Further Order*, 2-3.
4 Report of the Independent Arbiter, 22 August 2003, *Millennium Trains Papers*, 6-7.
5 Twomey, A. 2007, 'Executive Accountability to the Australian Senate and the New South Wales Legislative Council', Legal Studies Research Paper No 07/70, University of Sydney Law School, pp 4, 6, 8, 14.
6 Twomey, *op cit*, p 8.

Parliament.[7] Further, the qualifications required for appointment of the arbiter under standing order 52 have in practice ensured that the persons appointed have possessed the necessary objectivity and experience to make them eminently suited to the role of assessing such claims.[8]

Professor Twomey has also argued that the Council may not delegate its powers to assess privilege claims to an arbiter.[9] In reality, the Legislative Council does not purport to 'delegate' its powers in the sense of replacing the arbiter's decision for its own. Although it usually acts in accordance with the arbiter's determinations, given the recognised independence of the arbiter's views, there is no procedural or legal requirement for it to do so.

## DIFFERENCES BETWEEN THE LEGISLATIVE COUNCIL PROCEDURES AND THE PROPOSED SENATE PROCEDURES

### Impact of Executive claims on the production of documents

Under the proposed Senate procedure (paragraph 4(6)), documents are to be produced to the Senate if the arbitrator reports that the Government's reasons for non-disclosure are not justified; this seems to imply that documents will *not* be produced if the arbitrator upholds the Government's reasons. In the Legislative Council, by contrast, documents required by the House must be produced irrespective of any Government views (as only Cabinet documents are immune from production). While claims of privilege or immunity may be made, and if disputed are assessed, such claims are relevant to the question of whether documents should be made public once produced, not whether they should be produced at all.

Although it is accepted under standing order 52 that members thus have access to privileged material, there is also a requirement for members to maintain the confidentiality of such material (standing order 52(5)(b)). There has never been a breach of this confidentiality requirement, despite the considerable number of privilege claims which have been made in response to orders of the Council since 1999. If such a breach were to occur, it would be investigated and dealt with by the House as a contempt.

### Relationship between the arbiter and the House

Under paragraph 4(6) of the proposed Senate resolution, it appears that the determination of the arbitrator effectively determines the fate of the documents ordered by the Senate, in that a negative report by the arbitrator results in the documents being produced, without any further consideration by the Senate.

The Council's relationship with its arbiter is somewhat different, in that the arbiter's determination is merely a recommendation as previously discussed. Any further action depends on a motion on notice being moved in the House and passed by the House. While to date the House has generally accepted the recommendations of the arbiter, in a small number of instances

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7 Lovelock, L, 'The power of the Legislative Council to order the production of State papers: revisiting the *Egan* decisions ten years on', *Australasian Parliamentary Review*, Journal of the Australasian Study of Parliament Group, Spring 2009, Vol 24, No 2, p. 214.

8 Lovelock, *op cit*, pp 214-5. The person most commonly appointed as arbiter has been Sir Laurence Street, a former Chief Justice of New South Wales. Other appointees have been the Hon Terrence Cole and the Hon MJ Clarke, both former Supreme Court judges.

9 Twomey, *op cit*, pp 4-5.

the House has not made documents public despite the arbiter's finding that the privilege claim should not be upheld.

### Arbiter's access to documents

The proposed Senate resolution is silent on the question of whether the arbitrator will have access to the documents referred to in the Senate's order, as well as to the Government's reasons for non-disclosure. In the Council, the arbiter has access not only to the reasons for the claim of privilege but also to the documents themselves. This is similar to the position in the courts where, when assessing one party's claim that documents should be immune or privileged from production, the judge may consider both the reasons for the claim and the documents to which the claim relates.

If it is envisaged that the arbitrator report to the Senate on the basis of the Government's assertions alone, in the Council's experience, it may be difficult for the arbitrator to reach any meaningful conclusions. In the Council, the reasons provided in support of privilege claims are often scant. Further, the arbiter has identified cases in which the Executive has attempted to 'spread' a valid claim of privilege covering a small selection of documents to an umbrella claim over a wider selection of documents.[10] Such analysis and scrutiny of Executive claims is only possible if the arbiter has access to the documents as well as the reasons for the claim.

Not only does the Council's arbiter rely upon the documents as well as the claim, the arbiter also has access to an index to the documents. The arbiter has reported that it is impossible to properly assess privilege claims without an adequate index.[11] The provision of an index is particularly important where the documents covered by a privilege claim are voluminous or the claim is complex. The arbiter has commended agencies which have taken care in sorting and segregating large numbers of documents making it easier to identify documents within different categories of privilege.[12]

### Selection of the arbiter

The proposed Senate resolution provides for the arbitrator to be appointed by resolution of the Senate, except where commercial confidentiality is claimed, in which case the Auditor-General is to arbitrate. In the Council, the arbiter is appointed by the President but must be a Queen's Counsel, Senior Counsel or retired Supreme Court judge.

The selection mechanism adopted by the Council is intended to ensure that the person appointed has the necessary objectivity and experience while also allowing for flexibility in individual appointments (for example, if a particular arbiter is unavailable). The same arbiter is appointed irrespective of whether the Government's claim includes commercial confidentiality. If it were to be proposed that the Auditor-General arbitrate on claims in New South Wales, the Council would be concerned about the arbiter's ability to provide timely reports, given the heavy workload of the Auditor-General, and the deadline of seven days for the provision of reports imposed by standing order 52. The success or otherwise of the Council's approach to the assessment of commercial confidentiality might be able to be gauged by reference to arbiters'

10 Report of the Independent Arbiter, 16 January 2007, State Finances, 3.

11 Eg Report of the Independent Arbiter, 26 August 2004, *Documents on Ventilation in the M5 East*, Proposed Cross City and Lane Cove Tunnels, 2-3.

12 Report of the Independent Arbiter, 16 August 2008, *Snowy Hydro Limited*, p. 6.

reports which have included consideration of such claims; copies of relevant reports can be provided to the Committee if desired.

### Referral to the arbiter

Paragraph (2) of the proposed Senate resolution provides for matters to be referred to the arbitrator automatically if the Senate has not by resolution accepted the Government's reasons within two sitting days. The Council procedure is different in three respects: privilege claims are referred to the arbiter if disputed by an individual member; there is no time limit on referral; and there is no provision for the House to 'accept' Government claims.

Although the Council's procedure effectively leaves the process of referral in the hands of individual members, and thus is arguably subject to less control, relatively few privilege claims have in practice been disputed. Of the 135 returns to orders in which privilege has been claimed since 1999, only 44 disputes have been lodged.[13]

It is common in the Council for more than two sitting days to elapse before a claim of privilege is disputed. This could be because it takes members time to go through the documents provided in the Government's return, which may include both public documents and documents claimed to be privileged, and to consider the reasons provided for the claim.

A requirement for the House to 'accept' government reasons for the non-disclosure of documents could prove problematic as the House's view may change over time. In a case in the Council, for example, in 2003, the arbiter upheld claims of legal professional privilege and public interest immunity relating to certain documents concerning the Cross City Tunnel. Subsequently, however, in 2005, following the re-referral of the documents to the arbiter, the arbiter concluded that the claims of privilege and immunity formerly upheld could no longer be sustained in view of changed circumstances. This subsequently led to the House resolving to make the documents public even though it had previously maintained their confidentiality.

## CONCLUSION

Both the Council's procedures and the proposed Senate resolution include a mechanism for the independent arbitration of executive claims in response to orders of the House. The Council's procedures, however, reflect the contest between the Council and the Executive in the *Egan* cases, which was ultimately resolved by the courts. As a result of those cases, it is now established practice that documents claimed to be privileged are produced to the House. The question of whether the documents are then published is determined by the House, with advice from an arbiter in cases of dispute.

The Council's approach has resource implications for the Parliament, in terms of arbiters' costs, and the storage of documents provided in returns. There are also costs to government in terms of compliance. Further, it has been claimed that in some cases there has been limited evidence of interest in returns to orders.[14] However, there have been many instances in which the production of papers to the Council has informed parliamentary and public debate on matters of public

13 The number of disputes in individual years has fluctuated: in 2006, for example, disputes were lodged in relation to 14 out of 32 returns containing privilege claims, while in 2009, the proportion was 2 out of 18.

14 Twomey, *op cit*, 15.

importance or significantly assisted in the conduct of parliamentary committee inquiries.[15] Further information concerning any of these issues can be provided if the Committee desires.

15 See Lovelock , *op cit*, pp. 203-205.

**APPENDIX 1**

## STANDING ORDER 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.