

Legislative Council of Victoria

Response to invitation to provide a written submission to Inquiry into Independent Arbitration of Public Interest Immunity Claims

The Legislative Council's Sessional Order relating to orders for the production of documents

The Legislative Council of Victoria adopted Sessional Order 21 on 14 March 2007, setting out a process for the Council to order the production of government documents and for disputes about claims of Executive privilege to be determined by an independent legal arbiter. Sessional Order 21, Production of Documents, is attached as Attachment 1.

The order is based on Standing Order 52 of the New South Wales Legislative Council. In summary, the order provides for:

- the Council to order that documents be produced to the Clerk by a specified date and then laid upon the Table;
- that any claim of Executive privilege over a document include the reasons for such claim;
- that in the event of any claim of Executive privilege the document(s) subject to the claim be produced to the Clerk, who instead of tabling the document(s) will forward the document(s) and claim to the mover of the motion for the order;
- the mover may dispute the claim of executive privilege, whereupon the claim is evaluated by an independent legal arbiter and reported back to the Clerk, distributed to Members of the Council, but not published.

The Sessional Order does not prescribe any actions that follow the distribution of the arbiter's report, but any further action is logically a matter for the House to determine.

Background

In moving for the adoption of the Sessional Order in March 2007, the Leader of the Opposition Mr. Philip Davis told the Council that the motion "clearly asserted the right of the Council to require that the Executive produce documents that are relevant to the business of the Government". He cited section 19 of the *Constitution Act 1975*, which confers the powers, privileges and immunities of the House of Commons of Great Britain as at 21 July 1855 upon both Houses of the Victorian Parliament, as the authority for the motion.

In support of his motion Mr. Davis also referred to the recently well documented cases of *Egan v Willis* and *Egan v Chadwick* which he said "clearly upheld the capacity of the New South Wales Legislative Council to undertake the proper functions of its obligations to hold the Government to account".

On the other hand, Government Members vigorously opposed the motion on four main grounds. Firstly, because it breached the principle of Cabinet confidentiality which was fundamental to the accountability of the Executive and the capacity of the public service to frankly advise the Executive. It was claimed that the principle of Cabinet confidentiality ensured that no-one other than the Ministers in Cabinet and the public servant who provided advice to the particular Minister could have access to Cabinet documents. However, under the motion, the mover of a motion to produce documents could view the documents which would enhance the possibility of the documents being leaked. Secondly, because the House would delegate its capacity to resolve a dispute regarding a document to a third person – namely the independent arbiter who would determine whether any claims to privilege would be accepted. Thirdly, because the provisions in section 19 of the *Constitution Act 1975* applying the powers of the House of Commons in 1855 actually restricted the Council's capacity to call for a document because at that time the convention was that if a Minister claimed privilege the document was excluded. Fourthly, the motion should be defeated because the decisions in *Egan v Willis* and *Egan v Chadwick* were irrelevant as the New South Wales Constitution does not have the same limitations by reference to the House of Commons in 1855 as does the Victorian Constitution.

The motion was agreed to by 21 votes to 19 with all non-Government Members in support.

Legal advice as to the power of the Council to order the production of documents

Prior to the commencement of the debate on the proposed Sessional Order the Leader of the Government, Mr. John Lenders, raised a point of order and asserted the Government's claim that the powers afforded to the House under the *Constitution Act 1975* were far less than that purported to it by the motion. He therefore asked the President to seek legal advice so that assuming the motion was carried, the House was fully informed as to whether it was acting *ultra vires*. The President, whilst saying he did not want to be used by either side of the House as a legal sounding board, said that he would take the Minister's request under serious consideration.

An opinion from Mr Bret Walker, SC, confirming the Council's power to order the production of documents and to sanction Council Members for failing to comply with such an order was tabled on 6 June 2007.

The principal conclusions in Mr Walker's advice, in relation to the production of documents were:

- The Council does have a general power to order papers in accordance with the Sessional Order. There has been no precedent for a successful claim on behalf of the Executive to resist all and any orders for papers.
- The Council had the power to compel Council Members to produce the documents sought and to deal with such Members for contempt for

failure to comply with the Council's Order. Ultimately, in appropriate cases the Council could suspend such Members in an attempt to prevent their continued obstruction of the Council's business.

- Any sanctions would not include the expulsion of a Member because to do so would represent an abrogation of the voters' choice.
- Executive privilege or public interest immunity (as distinct from Cabinet documents), commercial-in-confidence and the sub-judice convention were not valid reasons which might be advanced in support of the non-production of documents, although it would be a matter for the Council to determine, in its assessment of the public interest, how secrecy relating to commercial-in-confidence might be observed.
- In most cases, legal professional privilege was also not a valid ground and that as access to legal advice was reasonably necessary for the exercise by the Council of its functions, it is for the Council to determine what if any delicacy it should apply in a particular case.
- On balance, the privilege against self-incrimination was a valid ground for refusing to provide documents.
- It was not precisely possible to define a Cabinet document, but there was useful guidance in the judgement in *Egan v Chadwick* where Spigelman CJ, together with Meagher JA, noted a possible distinction between documents which disclosed the actual deliberations within Cabinet and those which are in the nature of reports or submissions prepared for the assistance of Cabinet although the latter category may produce problematical questions as to their importance for the doctrine of collective responsibility, which is likely to be the touchstone for justified refusal to produce them to the Council.
- The validity of the grounds which might be advanced in relation to the non-production of documents to the Council also applies to Select Committees.

Application of the Sessional Order

Since the adoption of the Sessional Order in March 2007, there has been an increasing incidence of orders for the production of documents. There have been a variety of responses from the Government, including a claim that the Council does not possess the power to order documents to be produced, the refusal to produce any documents on the grounds of Executive privilege, on other occasions the provision of most documents excepting those with a claim of Executive privilege, and on small number of occasions the production of documents in full compliance with the order.

On two occasions the Government's refusal to comply with the Council's order has ultimately led to the suspension of the Leader of the Government in the Legislative Council, a first in Victorian Parliamentary history. It is also worth noting that on every occasion the Government has made a claim of Executive privilege it has failed to comply with the Sessional Order's requirement that the documents be lodged in the first instance so that such a claim may

ultimately be determined by an independent legal arbiter. As such, the role of an independent legal arbiter has never been utilised in accordance with the Sessional Order, because the Government has not provided the documents subject to its claim of Executive privilege.

Comments on the Proposed Resolution of the Senate

Given the requirements of the Council's Sessional Order and its practical application, I have some queries with the proposed resolution of the Senate.

The proposed resolution places the onus on a minister to make a statement to the Senate stating the reasons for a claim of public interest immunity. I agree with the principle that the onus should be on the Executive to substantiate such a claim. However, the proposed resolution does not expressly require the Minister to provide the documents subject to a claim of public interest immunity so as to facilitate the arbitrator's evaluation of the claim. The Victorian Council's approach has been that without the documents the role of the arbiter is made difficult, and the House has instead dealt with the matter by passing further resolutions calling for the documents, admonishing the Executive and, on two occasions, carrying out the ultimate sanction of suspending the Leader of the Government in the House.

I also note the proposed resolution's differentiation of claims of commercial confidentiality and the role of the Auditor-General as an arbitrator of such claims. Given that I consider the prevailing Parliamentary view to be that claims of commercial confidentiality enjoy no special status, I see no benefit for the Senate in differentiating such claims. I would extend this view to questioning why the Auditor-General is better placed than an independent legal arbiter to determine such matters. The prevailing knowledge that should be held by an independent arbiter is about the powers of the House and the principle of public interest immunity, much of which is derived from an understanding of parliamentary practice and law, and the evolving standards of public interest immunity in the courts. I regard an understanding of the commercially confidential nature of a document to be relevant, but secondary. In any claim of commercial confidentiality, as a matter of public interest immunity, the Government of the day should be relied upon to provide a thorough case which is all that is required for an independent arbiter to undertake the required balancing test of what is in the public interest. It should be noted that the courts themselves do not refer such judgements to the Auditor-General when deliberating on claims of public interest immunity.

Wayne Tunnecliffe
Clerk of the Legislative Council, Victoria

Legislative Council of Victoria, Sessional Order adopted on 14 March 2007.

PRODUCTION OF DOCUMENTS

21. The following arrangements will apply in relation to the production of documents:
 - (1) The Council may order documents to be tabled in the Council. The Clerk is to communicate to the Secretary, Department of Premier and Cabinet, all orders for documents made by the Council.
 - (2) An order for the production of documents must specify the date for the documents to be provided.
 - (3) When returned, the documents will be laid on the table by the Clerk.
 - (4) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.
 - (5) If at the time the documents are required to be tabled the Council is not sitting, the documents may be lodged with the Clerk, and unless Executive privilege is claimed, are deemed to have been presented to the Council and published by authority of the Council.
 - (6) Where a document is claimed to be covered by Executive privilege —
 - (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of Executive privilege; and
 - (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the Council and —
 - (i) made available only to the mover of the motion for the order; and
 - (ii) not published or copied without an order of the Council.
 - (7) The mover may notify the Clerk in writing, disputing the validity of the claim of Executive privilege in relation to a particular document or documents. On receipt of such notification, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for

evaluation and report within 7 calendar days as to the validity of the claim.

- (8) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.
- (9) A report from the independent legal arbiter is to be lodged with the Clerk and —
 - (a) made available only to members of the Council; and
 - (b) not published or copied without an order of the Council.
- (10) The Clerk will maintain a register showing the name of any person examining documents tabled under this order.

Attachment 2

Legal opinion from Brett Walker SC to the Clerk of the Legislative Council, 4 June 2007. Tabled in the Legislative Council on 5 June 2007.

See separate PDF attachment in emailed submission.