NSW GOVERNMENT Premier & Cabinet

Reference: 2014- 202343

Senator Stephen Parry
Chair
Senate Procedure Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Parry

I refer to your letter to the Premier of 23 June 2014 inviting a submission to the Procedure Committee's inquiry into a process for independent arbitration of claims of public interest immunity, such as operates in the NSW Legislative Council under Standing Order 52.

The Premier has asked me to reply on his behalf.

The Department of Premier and Cabinet (DPC) has recently made the following submissions in relation to this issue:

- submission to the inquiry of the NSW Legislative Council Privileges Committee into the 2009 Mt Penny Return to Order in July 2013, suggesting improvements to our Standing Order 52 procedure, including in relation to the use of an independent arbiter;
- submission on the role of the independent legal arbiter under Standing Order 52 to the Hon Keith Mason AC QC, dated 21 July 2014 (in relation to a disputed claim of privilege concerning documents returned pursuant to the Westconnex Business Case order for papers dated 4 March 2014)
- submission in reply on the role of the independent legal arbiter under Standing Order 52 to the Hon Keith Mason AC QC, dated 1 August 2014 (in relation to the disputed claim of privilege concerning the Westconnex Business Case)

I enclose a copy of these submissions. I also refer the Senate Procedure Committee to the Hon Keith Mason AC QC's report on the disputed claim for privilege in relation to the Westconnex Business Case return to order, dated 8 August 2014 and tabled on 13 August 2014. This report is available from the Legislative Council's Tabled Papers page of the NSW Parliament's website at www.parliament.nsw.gov.au.

I hope you find this of assistance to your inquiry.

Yours sincerely

Simon A Y Smith
Acting Secretary

. 1 SEP 2014

Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000 ■ GPO Box 5341 Sydney NSW 2001
Tel: (02) 9228 5555 ■ www.dpc.nsw.gov.au

ANNEXURE B

PRIVILEGES COMMITTEE
INQUIRY INTO THE 2009 MOUNT PENNY RETURN TO ORDER

Suggested Improvements to the Standing Order 52 process

Department of Premier and Cabinet Submission

The purpose and uses of Standing Order 52

The NSW Court of Appeal in *Egan v Willis & Cahill*[1] recognised that the Legislative Council has power to order the production of State Papers because, it found, such power is "reasonably necessary" for the proper exercise of its functions, namely "to scrutinise the workings of the executive government".[2] The High Court confirmed this in *Egan v Willis,*[3] holding that the power to order the production of State Papers is reasonably necessary in support of the system of responsible government under which the Council has a role to "question and criticise"[4] the actions of the executive.

The power to order the production of State Papers is, therefore, not a power that exists for its own sake. It exists to facilitate the proper inquiry and scrutiny of executive activities by the Legislative Council.

Since the Court of Appeal's decision, there have been hundreds of orders made under Standing Order 52 in New South Wales. The power is used more often in the Legislative Council than in the upper house of any other Australian jurisdiction. In 2009, there were at least thirty such orders, including the Mt Penny order, equating to around two every sitting week.

Currently there is no requirement that a motion for an order under Standing Order 52 should reference any current inquiry by the Council or one of its Committees. Nor is there any requirement that, once such an order has been made and complied with, any such inquiry should be held. It is not always apparent that documents returned under Standing Order 52 are subject to serious scrutiny by the Council.[5]

The requirement to show a legitimate public interest in an order being made

We consider the power of the Legislative Council to require the production of State Papers to be an essential element of our parliamentary democracy and accordingly support the exercise of that power in the public interest.

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[1] (1996) 40 NSWLR 650.
[2] (1996) 40 NSWLR 650, at 665 (Gleeson CJ).
[3] (1999) 46 NSWLR 563.
[4] (1999) 46 NSWLR 563, at 451 (Gaudron, Gummow and Hayne JJ).
[5] See A Twomey, "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, November 2007, available at <http://ssrn.com/abstract=1031602>, at 15-1.

However, where the Standing Order 52 process is used merely as a 'fishing expedition' or for partisan political reasons, there is a risk that agencies will come to view it more as a cost and a burden with no clear connection to their own public interest objectives.

The following suggestions are offered:

1. In moving a motion for an order under Standing Order 52, consideration could be given to requiring the Member to satisfy the Council that the order is genuinely necessary for the scrutiny function of the Legislative Council. Without limiting the ways in which the Member might do this, examples might include showing that the State Papers are needed for a Committee to complete a current inquiry or for the Council to debate in a fully-informed manner some matter (such as a Bill) currently before the House.

2. Where State Papers are ordered for a particular purpose, such as a Committee inquiry, then they should be made available exclusively for that purpose, similar to the undertaking that applies in respect of documents that are produced to a Court for the purpose of Court proceedings. (This would not prevent a Committee deciding that any of the State Papers should be published in its report of its inquiry in due course.)

The balancing of other public interest considerations - privilege claims

The importance of the Council only exercising its power where it is shown to be legitimately warranted is particularly important having regard to the potential for that power to override other important public interests. There is, of course, a public interest in not imposing unnecessary costs on the executive and therefore on the public purse. Whether that cost is warranted depends on whether the power is being used appropriately.

The second public interest concern arises where documents are sought for which there is a genuine countervailing public interest in maintaining confidentiality.

The power of the Council under Standing Order 52 to override public interest privileges is extraordinary. The process lacks many of the safeguards, consultation processes, and independent oversight mechanisms of other compulsory production processes, such as subpoenas or GIPA applications.[6]

Under the current process, agencies claiming that a document is subject to public interest privilege must make a submission as to the basis for that claim when they return the document. If the privilege claim is challenged, it is reviewed by an 'independent legal arbiter'. No opportunity is given for the agency to make further submissions or to respond to any contrary arguments.

The effect of this process is that agencies are put to the work of preparing comprehensive submissions in support of privilege claims that might never be challenged. Given agencies only have this 'one-shot' to explain the claim, they must proceed on the assumption that the claim will be challenged, or else they risk a decision being made against the claim not because it is deficient but rather because they have not explained with sufficient detail or clarity the basis for it in their original return.

[6] *Government Information (Public Access) Act 2009* (GIPA).

Further, and unlike other processes such as GIPA and court-ordered production, where the privilege exists because of the interests of third parties (such as claims grounded in privacy or commercial confidentiality), no provision exists for those third parties to be given notice of the claim and to be given an opportunity to make submissions as to whether they object to the documents being released.

3. In respect of State Papers that are subject to privilege, consideration could be given to allowing the executive to return initially an index of those State Papers, rather than the documents themselves. The index would identify in general terms the grounds upon which privilege is claimed. If the Council, having regard to that index, wishes to press a request for any of the particular documents, a further resolution could be passed identifying from that index the State Papers that are sought. The executive would then be required to produce those State Papers, which would proceed to be considered in accordance with the procedure under Standing Order 52 for dealing with contested claims of privilege.

4. Where an independent legal arbiter is appointed to provide advice to the Council in respect of contested privilege claims, the executive agency that claims the privilege could be given an opportunity to make submissions directly to the arbiter in relation to the contested claim.

5. Any third party whose personal or business affairs are affected by a contested privilege claim could also be given an opportunity to be make their views known to the legal arbiter.

The use of Standing Order 52 to support public release of Government information

A practice has developed by which the Department of the Legislative Council immediately makes publicly available, and in particular to the media, all documents that have been produced by the executive in response to an order under Standing Order 52 where they have not been the subject of a claim of privilege. Privileged documents may also be released if an independent person appointed by the Council determines, in his or her view, it would be in the public interest that they should be; that decision is not subject to review or appeal by the executive.

As noted above, the purpose of the power referred to in Standing Order 52 is to facilitate the exercise of the functions of the Legislative Council itself. The publication of material in the course of the exercise of that function will in many cases be appropriate and desirable.[7]

It would, however, not appear to be consistent with the special power that is vested uniquely in the Council that it be used simply for the purpose of passing on documents to the media and other third parties. Instead, legislation has been approved by *both* Houses of Parliament (the GIPA Act) that sets out a comprehensive regime by which the media and other third parties are given a legally enforceable right to access Government held information, subject to public interest safeguards and review rights.

[7] See L Lovelock, "The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the *Egan* Decisions Ten Years on" (2009) 24 *Australian Parliamentary Review* 119, at 214-*215.*

Standing Order 52

Standing Order 52 is not the source of the Legislative Council's power to order the production of State Papers; it merely regulates the procedures of the Council in respect of the exercise of that power.

DPC recommends that Standing Order 52 be amended to reflect the suggestions made above. Further amendments to the Standing Order which the Committee may wish to consider include the following.

Date at which an order speaks

There appears currently to be some confusion as to the date at which an order made under Standing Order 52 'speaks'. An order will be made on a certain date and require the production of documents within a certain period, usually 14 days later.

Technically, it would appear that an order can and should only require the production of State Papers in existence as at the date the order was made. There seems to be no basis for suggesting that the Council has power to impose a continuous obligation on the executive to produce documents as and when they are created into the future.

It has, however, become standard practice for the last paragraph of an order to stipulate that documents produced in responding to the order should also be produced; clearly such documents can only have been created after the date of the order. The executive has chosen to comply with the request made in that paragraph, but we do not accept that the Council has the power to make an order in those terms.

6. Consideration could be given to amending Standing Order 52 to make clear that an order 'speaks' as at the date the order was passed, and accordingly only documents that were in existence as at the date of the order can be required to be produced. The Council can continue to request, but not require, the production of the documents referred to in the last paragraph of its orders.[8] (However, as explained further below, we recommend the consideration be given to discontinuing this practice – see (19) below.)

Provision for the making of supplementary returns

During the course of the hearings we noted that, although the executive strives always to comply with an order under Standing Order 52 within the time specified for compliance (typically 14 days), on occasion additional documents have been identified shortly after a return has been produced and those documents have been produced to the Council by way of a supplementary return.

It may be useful to amend Standing Order 52 to clarify the power of the executive to make such supplementary returns. This may be particularly important in cases where the additional documents may be subject to some confidentiality restriction, and the agency needs to be sure that it is producing the document under a compulsory process to avoid being in breach of some confidentiality obligation or other statutory duty.

[8] It could, of course, *require* the production of these documents by way of a further order made after the return of the main order.

7. Consideration could be given to amending Standing Order 52 to provide that, if additional documents that were subject to an order but not produced are subsequently identified, these may be returned to the House by way of a supplementary return, and the usual procedures (eg with respect to privilege claims) apply.

The exclusion of Cabinet documents

A majority of the Court of Appeal in *Egan v Chadwick*[9] held that the Legislative Council has no power to require the production of Cabinet documents. The confidentiality of Cabinet information is a necessary component of Responsible Government and, in particular, the convention of collective Ministerial responsibility.

The precise scope of the protection for Cabinet documents is, however, not entirely clear.

The Parliament has determined a definition of Cabinet Information for the purposes of the GIPA Act. It may be that this definition is in some respects more strict (that is, narrower) and in some respects less strict (broader) than what the majority of the Court of Appeal would have considered to be a Cabinet document for the purposes of Standing Order 52, noting that the judgments comprising the majority were not themselves consistent in this regard.

It seems reasonable that the Legislative Council should not be precluded from obtaining documents that might be available to any member of the public under the GIPA Act. Accordingly, to provide both clarity and consistency, consideration could be given to amending the Standing Order to expressly note that Cabinet documents are not required to be produced and that, for this purpose, this can be taken to include any document that contains "Cabinet Information" as defined in the GIPA Act.

8. Consideration could be given to amending Standing Order 52 to note expressly that Cabinet documents do not need to be produced in response to an order. It would state that a Cabinet document includes one containing "Cabinet Information" as defined in clause 2 of Schedule 1 of the GIPA Act.

The drafting of orders

The scope of orders

Orders should be targeted to the State Papers that the Council actually needs to perform its functions in the particular case. Although there may be an understandable tendency on the part of members of the Council to cast the net broadly, it is important that orders not be unnecessarily burdensome and they should not seek documents that are not required.

Nor should, as happens from time to time, the executive be subject to any criticism for producing reams of documents that are of no real interest to the Council or its members – agencies have no choice but to produce everything that has been asked for and cannot

[9] (1999) 46 NSWLR 563 (Spigelman CJ and Meagher JA; Priestley JA disagreeing on this point).

substitute the terms of the order for a narrower category of documents which they think the Council might actually find interesting or useful.

In drafting an order, the Council could also specifically consider what documents it does *not* need. For example, many experienced users of the GIPA Act will expressly state in their application that they do not require the production of certain categories of documents, such as drafts of documents before the more recent draft, intra-departmental emails and communications, general correspondence from the public, and so on. Excluding these documents in the terms of an order may help to reduce processing time and cost, and avoid the Council receiving documents that it does not need or want.

9. The scope of orders should be drafted carefully to identify the documents that are actually needed for the Legislative Council's functions, exclude more clearly any documents that are not required, and avoid broad fishing expeditions.

The clarity of orders

Orders passed by the Council under Standing Order 52 can lack the precision of other legal instruments, such as subpoenas and orders for discovery. They can be ambiguous and internally inconsistent. They can be oppressively broad in scope.

Unlike court processes, however, the executive is simply required to comply with an order that has been passed, irrespective of how poorly it has been drafted or how oppressive it might be. There is no opportunity to challenge or clarify the terms of an order once it has been made, despite the fact that the agencies to whom it is directed will typically have had no involvement in its debate and passage.

We have considered whether some process might be adopted by which an agency required to produce documents could seek to challenge or clarify an order on a similar basis to which a subpoena may be challenged, or at least to negotiate or seek clarification as to the proper interpretation of an order which is ambiguous. On reflection, however, we do not consider that this is appropriate given that an order, like a Bill, is a statement of the House as a whole and not merely the voice of a single member (not even the member who moved the Order or the Presiding Officer). The fact that an order under Standing Order 52 is not amenable to challenge or negotiation makes it even more important that it be drafted as carefully and narrowly as possible.

There is nothing to prevent either a member, before drafting or moving a motion for an order, or the Council, before debating that motion, consulting with the agencies which will actually have to comply with it. Advance consultation may also give the mover and the Council an opportunity to consider more directly the likely impact of the order in terms of the extent of documents that it is likely to receive, what confidentiality or other public interest concerns might be raised, and how an order in those terms is likely to be interpreted and applied by the executive.

10. Greater care could be given in the drafting of orders to clarify the particular documents that are sought.

11. Consideration could be given to consulting with the executive agencies named in an order (either separately or, perhaps more practically, through DPC) on the drafting of the order

before it is moved and debated. (The need for such consultation would be less important if our suggestions (9) and (10) above are adopted.)

The adoption of language consistent with GIPA

In most agencies, responsibility for collating returns to orders under Standing Order 52 belongs with those branches that are also responsible for handling the agency's GIPA applications. Agencies have a good understanding of the GIPA Act.

The GIPA Act sets out a prescriptive regime that has been approved by Parliament for accessing government-held information, with appropriate safeguards for third parties and a comprehensive public interest balancing test. There is a good argument that orders under Standing Order 52 should only be considered if for some reason an application under the GIPA Act would not be appropriate or if one has been made but has not yielded a result that is satisfactory to the Council.

Putting that aside, Standing Order 52 practice might be improved more generally if it, and the orders made under it, were to adopt directly some of the concepts and terminology used in the GIPA Act. For example:

(a) under the GIPA Act it is clear that a Minister (taken to include his or her staff) constitutes an "agency"[10] and therefore that requests for documents from that Minister mean documents held by that Minister and his or her office and not, for example, documents held by that Minister's department, to which a separate request would need to be made;

(b) the GIPA Act refers to documents that are "held" by the agency, and makes clear that this includes information that is held by the State Records Authority on behalf of the agency,[11] but does not include information that is already generally available to the public;[12]

(c) the GIPA Act contains provisions regarding defunct agencies, for example providing that if an access application is made to an agency which becomes defunct, it is taken to have been made to the successor agency;[13]

(d) the GIPA Act clarifies that agencies are not required to search electronic back-up records unless they have reason to believe that a relevant record has been lost as a result of a contravention of the *State Records Act 1998;*[14] and

(e) the GIPA Act sets out a clear public interest balancing test for determining when information can be withheld from public release in the public interest, including by providing an exhaustive list of the public interest considerations that might weigh against disclosure.[15]

[10] Section 4(1) GIPA Act (definition of "agency").
[11] Clause 12(1)(c) of Schedule 4, GIPA Act.
[12] Clause 12(2) of Schedule 4, GIPA Act.
[13] Clause 14 of Schedule 4, GIPA Act.
[14] Section 53, GIPA Act.
[15] Section 14, GIPA Act.

12. Consideration could be given to whether greater clarity would be provided by adopting concepts used in the GIPA Act, such as: What is an "agency"? When are documents considered to be "held" by an agency?

13. Consideration could be given to providing in Standing Order 52 that privilege claims may be made on the basis of any ground that would constitute an "overriding public interest against disclosure" (OPIAD) under the GIPA Act.

The timeframe for compliance

It has become usual practice for the Council to impose a 14 day timeframe for compliance with an order under Standing Order 52. This appears to done without reference either to the urgency of the matter or to the size and scope of the order. Where an order merely seeks a particular document from a particular agency, a 14 day turnaround period is feasible. Where, however, an order is expressed in broad terms by reference to general subject matters and requires searching throughout numerous agencies and parts of agencies, 14 days is unreasonable.

14. Consideration could be given to prescribing 28 days as the default period within which documents must be returned. Where an order seeks to impose a shorter timeframe this would be justified when the order is moved and debated.

The Executive's response to orders under Standing Order 52

As mentioned above, the power of the Legislative Council to order the production of documents derives from the common law having regard to what is *reasonably necessary* for the Council to perform its 'scrutiny of executive activities' function.

As such, DPC does not accept that the Council has any power to direct the executive as to the particular manner in which it complies with such an order. For example, and notwithstanding the current text of Standing Order 52, it appears that the Legislative Council has no power to require the executive to produce an index of the documents produced.[16]

A whole-of-government policy

While there is currently no single whole-of-government 'policy' dealing with the manner in which agencies are to respond to orders under Standing Order 52, the detailed memorandum that is provided by DPC to agencies named in an order effectively performs

[16] The executive has voluntarily complied with requests to provide an index and will continue to do so: see A Twomey, "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, November 2007, available at <http://ssrn.com/abstract=1031602>, at 2-3. In this regard we respectfully disagree with the view of the former Clerk of the Parliaments: see L Lovelock, "The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the *Egan* Decisions Ten Years on" (2009) 24 *Australian Parliamentary Review* 119, at 217-218.

that function. An example of that memorandum is set out on pages 63 to 66 of the Committee's Report No.68.

In our view, that memorandum has performed the function of a whole-of-government policy at least as effectively – and perhaps better, given that it is physically provided to each agency on each occasion – than would a 'policy' document sitting on a government website. That said, and subject to the outcomes of this Committee's inquiries, consideration will be given to adopting a whole of government policy that deals with the fundamental obligations and procedures for responding to an order under Standing Order 52.

15. Following consideration of the findings and any recommendations of this Committee, DPC will revise the current memoranda and create a whole-of-government policy explaining the obligations and procedures to be followed by agencies in responding to orders under Standing Order 52. Agencies will be directed to this policy whenever they are named in an order.

Internal agency procedures

Having conferred with the other Directors General on the Senior Management Council, it is clear that all Departments adopt a similar internal process for conducting searches and responding to orders. The procedures adopted by DPC were explained by us in the public hearing.

Although the current memoranda and the proposed new whole-of-government policy will apply to all agencies, this will not avoid the need for each agency to determine particular internal processes for dealing with an order having regard to its own particular structures and governance arrangements.

Training of staff

For most agency staff, complying with an order under Standing Order 52 is a straight-forward exercise for which no special training should be required. Further, in most agencies the unit responsible for collating the returns is also responsible for the agency's compliance with the GIPA Act and other compulsory document production processes, and so can be expected to appreciate both the importance of compliance and the appropriate procedures to be followed.

Agencies have, however, from time to time sought assistance and guidance from DPC particularly as to the types of privilege claims that can be made, and the appropriate way of documenting these in the return to the Council. It is noted that, at present, privilege claims are considered solely in accordance with the common law relating to legal professional privilege and public interest immunity. If our suggestion at (13) above is adopted, it will be much easier for agencies to identify and articulate privilege claims, utilising their existing understanding and the much clearer statutory guidance under the GIPA Act.

The Crown Solicitor regularly conducts training for agency officials on the GIPA Act. Through the Government's Legal Managers Forum, DPC will approach the Crown Solicitor with a view to developing and offering training to agency officials who are involved in

responding to orders under Standing Order 52 particularly in relation to the making of privilege claims.

DPC already conducts information seminars for Ministerial officers in relation to a range of matters, including their responsibilities as "agencies" under the GIPA Act and Standing Order 52. In respect of the current Government, these seminars were included as part of an induction available to all Ministerial staff immediately after the 2011 election. Refresher training, and training for new staff, was held at the end of 2011 and 2012, and is expected to be held again at the end of 2013, and annually thereafter.

16. DPC will approach the Crown Solicitor with a view to the provision of training seminars for agency officials with particular responsibility for responding to orders under Standing Order 52, particularly in relating to the making of privilege claims.

17. DPC will continue to provide training seminars to Ministerial staff annually, which includes information about their obligations in respect of Standing Order 52.

Certification processes

DPC requires agencies named in an order to provide a certification from the head of the agency that, to the best of their knowledge, all documents held by the agency and covered by the terms of the order have been produced.

Obviously, it is not practicable or appropriate for the head of the agency to undertake personally all of the searches that will be necessary to be conducted. In providing the certification, the head of the agency will reasonably need to rely on the diligence and advice of other executive officers throughout the agency. As happens in DPC, an agency head may require those sub-ordinate officers also to provide him or her with a certification in respect of the particular branch of the agency for which they have responsibility. This pyramid-style 'certification' process within an agency appears to be best-practice, and will be recommended in the proposed new whole-of-government policy.

18. The proposed whole-of-government policy will direct agencies responding to an order to require certifications from relevant officers at appropriate levels in the agency to certify that all relevant State Papers have been produced. This certification will be amended to be expressed as being "to the best of the officer's knowledge after having undertaken or directed the undertaking of reasonable searches".

Identification of search parameters

At present, DPC does not require agencies to document the particular methodology, the search parameters or criteria, or the particular search terms involved in electronic searches. Agencies can, of course, create this information if they wish.

One possible impediment to agencies doing this at present is the practice of the Council of asking agencies to produce all documents created in responding to the order.

Say, for example, an order asks for all briefs from DPC to the Premier relating specifically to X in a certain time period. DPC could create a document listing all briefs to the Premier

in that period by subject matter, and identify from that list those that relate to X. Most of the briefs on the list will have nothing to do with X, but the list could if necessary be used in the future to demonstrate the search that was conducted to identify those that did. However, under the terms of the order, DPC would apparently have to produce this document in response to the order. That is, a document would be produced to the Council showing all briefs to the Premier over a certain time period, even though the Council itself only requested those that relate to X.

This is clearly undesirable from the perspective of the Government. Apart from the release of information that has not actually been requested, it also creates an ongoing administrative burden as any new documents created during the searching process have to themselves be copied and added to the index, which becomes a continually moving document.

It is also undesirable from the Council's perspective: presumably the members involved in the debate on the order, and who may have supported its passage, did so on the understanding that they were only requiring the details of briefs relating to X, not details of all briefs relating to every conceivable subject matter.

As noted above, DPC disputes that the Council even has the power to order the production of documents created after the date on which the order was made (except by way of a separate and subsequent order). The point we are making here is that the continued practice of doing so acts as a disincentive to the creation of records which might otherwise be useful if it becomes necessary in the future to understand and reconstruct search processes and methodologies.

DPC would support the adoption, in the proposed whole-of-government policy, of a requirement that agencies create documents identifying who was involved in searches, the search parameters and criteria for electronic documents, and what files were searched. However, we would only do so if the Council ceases its practice of requesting these documents to be produced as a matter of course.

19. Consideration could be given to discontinuing the practice of always requesting the executive to produce "any document which records or refers to the production of documents as a result of this order of the House". Instead, records of the searches conducted could be sought by way of a separate subsequent order only if some legitimate concern arose about possible incomplete compliance with the original order.

20. DPC will consider including in the whole-of-government policy a direction to agencies to create and keep full records of their searches (which could include who was involved in searches, the search parameters and criteria, and what files were searched). However, consideration will need to be given to the additional administrative burden such a requirement will place on agencies, particularly if the Council does not accept recommendation (19) above.

Electronic records of Ministerial officers

DPC's Ministerial and Parliamentary Services IT branch, MAPS IT, provides specialist technology support to Ministers and Ministerial staff, including the provision of email

accounts and network drives.[17] The staff of MAPS IT has the ability to access those accounts and drives only for the purpose of providing that IT support.

DPC does not consider that an order under Standing Order 52 would, in so far as it is directed to DPC, ordinarily be interpreted as covering any 'documents' on this Ministerial office network that are only accessible by DPC (MAPS IT) in this way.[18] It would evidently be undesirable if DPC were routinely required to search such records for these purposes.

Under the recently-enacted *Members of Parliament Staff Act 2013*, clause 7 of Schedule 2 provides as follows:

> **"7 Records of political office holders**
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> (1) Any record of information created or received by a political office holder or the staff of a political office holder that is stored by a person employed in the Department of Premier and Cabinet in connection with the provision of information technology services for the office holder or his or her staff is, for all purposes while the political office holder is holding that office, taken to be in the possession or under the control of the political office holder and not in the possession or under the control of the Department of Premier and Cabinet.
>
> (2) Accordingly, any request or requirement to produce any such record of information is to be made or directed to the political office holder concerned or his or her staff.
>
> (3) This clause extends to records of information in existence before the commencement of this clause."

The *Members of Parliament Staff Act 2013* is expected to be proclaimed to commence in early 2014. In respect of Standing Order 52, DPC considers that the provision reflects the existing practice.

Records of former Ministers

When a Minister ceases to hold office, any records still held by the office are dealt with in accordance the *State Records Act* and, in particular, with the *General Retention and Disposal Authority – Records of a Minister's Office* (GDA 13). Generally that requires:

(a) Cabinet documents to be returned to The Cabinet Office (now DPC);

(b) Departmental or agency-related documents to be returned to the appropriate agency (for example, the relevant portfolio department); and

(c) Other records of portfolio responsibilities that the authority requires to be kept as State archives, to be transferred to the custody of the State Records Authority.

GDA 13 applies to electronic records as much as it does to other records.

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[17] The email accounts and network drives provided to Ministers and their staff by MAPS IT may not be the only place where electronic communications and records of Ministerial offices are kept. For example, Ministers, like other MPs, may be provided with Parliamentary IT services and email accounts (including for the purposes of their electorate offices). Further, DPC would not necessarily know about or have any access to material that might be held on other removable electronic document storage devices or internet-based email and other services.

[18] Particularly where there might from time to time exist any 'back-ups' of such networks, we query whether these would in this form even be considered to constitute "State Papers" in the sense referred to in the *Egan* series of cases.

It allows the destruction of other paper and electronic records that are not required to be kept in accordance with one of the three paragraphs above, and that are no longer required for administrative purposes. GDA 13 provides that the following documents can be deleted/destroyed when no longer required: routine correspondence, general briefing notes, routine enquiries and information requests, and reference material.

GDA 13 also states that:

> "A lot of recorded information flows between an agency and the Minister's office. Much of it represents a work flow as information, briefing documents, letter approvals and so on move between the two, but little of this will need to be retained by the Minister **when** the agency is capturing the whole process on to its files and into its recordkeeping systems. The portfolio agency **should** retain any documents or records that it refers up to the Minister and subsequent approvals, emails, letters and documentation that are referred back to it (for action and/or filing)."

We are aware of the suggestion that has been made to the Committee that Ministers should be required, upon ceasing to hold office, to conduct a 'hand over' with any incoming Minister. DPC does not support this as a workable proposal and considers the current practice, whereby responsibility for briefing the incoming Minister is the responsibility of the relevant portfolio department(s), should remain. This does not, of course, mean that an outgoing Minister cannot, as a matter of collegiality, talk through with the new Minister the issues with which they might have dealt while in office.

Compliance with the *State Records Act* and GDA 13 means that State Records of a former Minister's office continue to be available if required by the Legislative Council under Standing Order 52.

In particular, those records will in most cases be available going forward as records of the relevant portfolio department to whom they were returned upon the Minister ceasing to hold office.

If the former Minister also deposited additional documents with the State Records Authority then those records can be obtained there. If in the future the Legislative Council does propose to make an order seeking State archives deposited by a former Minister, the Council may wish to consider directing the order to "the State Records Authority (in so far is it holds any State archives deposited by the Hon, [*Insert Name*])".

CROWN SOLICITOR
NEW SOUTH WALES

Submission in reply to the Honourable Keith Mason AC QC prepared on behalf of the Department of Premier and Cabinet

1. Introduction

1.1 This submission in reply addresses key points in the submissions to the independent legal arbiter, the Hon Keith Mason AC QC, in relation to the role of the independent legal arbiter. It endeavours not to repeat the substance of my primary submission, but to respond to issues arising from the other submissions, and to highlight for the assistance of the arbiter particular differences between my approach to the construction of "privilege" in Standing Order 52 and the application of public interest considerations, and that of others.

Submissions by the Hon A Searle MLC and the Hon D Shoebridge MLC that "privilege" in Standing Order 52 pertains to a privilege between the Executive and Legislative Council

1.2 The Hon A Searle MLC and the Hon D Shoebridge MLC prefer the view that "privilege" in Standing Order 52 pertains to privilege as between the Executive and Legislative Council[1].

1.3 It is submitted in reply that there is, strictly speaking, no "privilege" as such in law as between the Executive and the Legislative Council. Rather, the implied power of the House to call for documents has been held not to extend to the production of documents which reveal the deliberations of Cabinet: *Egan v Chadwick* [1999] NSWCA 176; (1999) 46 NSWLR 563.

1.4 If the submission is that "privileged" should be taken to refer to "a document which the Executive cannot be compelled to produce to the House", it is not clear why that test would be intended to be applied in respect of documents which have been produced. That test would have no work to do as documents "privileged" in that sense are not produced and are, therefore, not subject to claims of "privilege" under the procedure outlined in Standing Order 52(5).

1.5 The preferable view is that the procedures provided for in Standing Order 52 point to "privileged" documents being documents which it is claimed by the Executive should not be published. Those procedures it is submitted should be understood as the Legislative Council's means of taking the steps, and addressing the duty regarding non-publication, referred to by Priestley JA in *Egan v Chadwick* at [139], cited in my primary submission at [4.7].

[1] See submission of the Hon D Shoebridge MLC, 21 July 2014, at pp. 5-6 and submission of the Hon A Searle MLC, 21 July 2014, at pp. 5-6.

1.6 As noted in my primary submission at [4.8], both Spigelman CJ and Priestley JA made clear the importance of distinguishing a lack of power to compel *production* and the issue of subsequent publication of those documents which are produced.

Submission that "privilege" in Standing Order 52 refers to technical legal privilege – apparently supported by the Hon A Searle MLC and Mr D Blunt, Clerk

1.7 Another view of "privilege" in Standing Order 52, apparently supported by the Hon. A Searle MLC and the Clerk Mr D Blunt, is that "privilege" means privileges "known to law" which are, at least, equivalent to those which would be recognised by a court in a claim of privilege against production or admission into evidence. (I will refer to this as "technical legal privilege")[2]. This view is also referred to by the Hon D Shoebridge MLC (apparently without endorsement) at pg. 5:

> "...previous arbiters... undertook a two-step approach regarding the validity of claims for privilege under SO52(6). Essentially that two-step approach was to consider established classes of privilege or immunity and then weigh up the public interest in disclosure as against the public interest in retaining the privilege or immunity claimed".

There are several reasons why a construction of "privilege" as technical legal privilege should not be favoured.

1.8 Firstly, as outlined in my primary submission at [4.9]-[4.10], unlike in judicial proceedings, it is clear that "privilege" under Standing Order 52 is not directed to production. There are significant difficulties in transposing categories of technical legal privilege, which are applied by a court in determining whether documents should be produced to it (including by admission into evidence), in the context of documents already produced to the Legislative Council. Any legal principles are not, in terms, directly applicable.

1.9 Secondly, if a technical legal construction of privilege is adopted, this has the consequence of significantly restricting the documents which will be subject to consideration prior to publication, and results under Standing Order 52 in the automatic publication of many documents in respect of which legitimate interests against disclosure may exist. (As noted in my primary submission at [3.3], where a privilege claim is not made by the Executive, Standing Order 52 purports to order that

[2] See submission of the Hon. A Searle MLC, 21 July 2014, at p 4 "this two-step process... while imperfect, has worked well" and p 7, wherein the submission appears to endorse, albeit in the alternative to Searle's preferred view (Executive-Legislative Council privilege),the technical legal privilege approach characterised as being that of former arbiters, and pp. 7-8 generally see references to privileges "known to law". See also the submission of the Clerk, Mr D Blunt, 21 July 2014, at pp. 1, 11-12, for example, "the House thus endorsed the approach taken by the authors of those reports... not only evaluating the technical validity of claims of privilege but also evaluating whether technically valid claims are accompanied by sufficient justification to outweigh the competing (and perhaps overriding) public interest in disclosure".

documents returned are automatically published.) Such consequences suggest that the intention underlying Standing Order 52 is that "privilege" does not refer to technical legal privilege.

1.10 That construction would mean, for example, that the WorkCover claim, cited with approval by the Hon. Members Shoebridge and Searle, could never take place. In that matter, the Executive's privilege claim based on privacy was not upheld by the arbiter, as it did not give rise to a "relevant privilege known to law". However, the House ultimately determined that publication was not in the public interest. The Hon D Shoebridge cites this as an example of "comity, common sense and a general commitment amongst members of the Legislative Council to protecting the public interest" (at p. 5). So too, the Hon A Searle cites this example as "the answer" to the difficulties in construing Standing Order 52 (at p. 5). However, if the technical legal construction of privilege is correct, the Executive should not have made the privilege claim which it did and the documents would have been produced and automatically published pursuant to Standing Order 52. This consequence, apparently not thought desirable by any of the submissions, points strongly against the construction of "privilege" claims under Standing Order 52 as pertaining only to technical legal privileges.

1.11 Indeed, the classes of documents which will be considered prior to publication would generally be much more limited than those which have been considered to date. In relation to public interest immunity claims, the common law principles (also reflected in s.130 *Evidence Act 1995*) require that the information or document relates *to a matter of state*, as a preliminary requirement *before* the weighing exercise of public interests occurs (see generally *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60). This means that some of the documents considered by previous arbiters including Sir Laurence Street and M J Clarke QC, may not properly have been the subject of claims for privilege under a technical legal definition. For example, I refer to arbiter decisions recognising the legitimate interests in protecting commercially sensitive information and speaking of "commercial confidentiality privilege" (see Sir Laurence Street, Papers on MS Motorway, 7 December 1999), "commercial in confidence immunity" (Sir Laurence Street, Papers on Leave of Quarantine Station, 31 July 2001), "commercial in confidence privilege" and the "legitimate private interest in confidentiality" (Sir Laurence Street, Development on Crown Land (Woodward Park Oasis Development), 8 May 2003), "commercial in confidence privilege" (Sir Laurence Street, Papers on Millennium Trains, 22 August 2003), the "contractual duty of the Department" as an apparently legitimate basis of a claim for privilege (Sir Laurence Street, Documents on Axiom Education Consortium, 1 September 2004), "confidentiality agreements" as the basis of a claim "not to be lightly disregarded" (Sir Laurence Street, Audit of Restricted Rail Lines, 16 June 2005), "the public interest in maintaining the privacy of the report" (M J Clarke QC, Audit of Expenditure and Assets, 26 June 2006) and "commercial in confidence privilege and so

on" (Sir Laurence Street, 2009-2010 Budget, 11 December 2009)[3]. Whilst these matters involved different outcomes as to the arbiter's recommendations to the House, none suggest that the Executive's privilege claim was without proper basis and should fail for that reason.

1.12 Similarly, documents falling into the categories cited in the Clerk's submission as grounds of public interest immunity claims with a measure of acceptance in the Commonwealth Senate (at page 10), including unreasonable invasion of privacy and damage to commercial interests, may not properly be regarded as privilege categories known to law if a technical legal construction of privilege is favoured.

1.13 For the same reason, it may be that highly sensitive personal information captured by an order under Standing Order 52 (often with no apparent relevance to any scrutiny or law making function being exercised by the Executive) is subject to automatic publication. As noted in my primary submission at [4.17], even carefully crafted orders will often capture unintended documents and information. Such documents may not clearly fit within a category of technical legal privilege, yet there may be significant privacy and even personal security issues arising. In judicial proceedings where such information is relevant and admitted into evidence, courts will generally exercise discretion as to what information is revealed in judgments or may make non-publication orders, or orders restricting access beyond the parties. It would seem surprising if it were the House's intention that such information would become publicly available without restriction upon a return of documents, and yet that would be the consequence of adopting a technical legal definition of privilege under Standing Order 52.

1.14 Thirdly, a construction of "privilege" as technical legal privilege cannot be supported together with a view that the arbiter should then continue to make an additional evaluation or observations to the House about whether to publish a document.

1.15 The role of the arbiter is clearly set out in Standing Order 52 (6) to "evaluate and report" on the "validity of the claim" for privilege. If "privilege" refers to technical legal privilege, the arbiter on the plain language of Standing Order 52(6) should determine only whether the document in question comes within a technical legal privilege, and not engage in further consideration as to weighing the public interest for and against publication of the document. (See further Twomey[4].) This would mean, for example, that the approach adopted in the Report of the Independent Legal Arbiter on Papers on the Lane Cove Tunnel, dated 24 January 2006, in which claims for legal professional privilege were recognised as technically valid, could not be supported. The arbiter noted:

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[3] I note with gratitude the assistance provided by the Clerk in preparing the appendix of extracts from tabled independent arbiter reports to his primary submission.

[4] Anne Twomey, Executive Accountability to the Senate and the NSW Legislative Council, (2008) 23(1) *Australasian Parliamentary Review* 257 at 265.

> "in addressing the essential question of whether they [the documents] should nevertheless be opened up for public scrutiny, I am of the view that they are not of such sensitivity as to be withheld. The public interest in transparency and accountability in all aspects of the Lane Cove Tunnel, as part of the transport infrastructure, outweighs the justification for protecting solicitor-client communication in relation to all of these documents. My conclusion is that LPP is denied".

With respect, this is not an approach open to the arbiter if it is suggested that "privilege" in Standing Order 52 be construed to mean technical legal privilege. That "essential question" regarding public interests in publication discussed above forms no part of legal professional privilege as understood at law.

1.16 If the arbiter and the House are to apply a balancing test in considering publication of documents, a position which appears to be favoured in all submissions (setting aside at present the nature of that test), any such consideration is premised on the fact that the Executive has made a claim for privilege in that document. Without such a claim, automatic publication results under Standing Order 52.

1.17 It cannot be that the correct approach is one which depends upon the Executive making (what would be) spurious claims for privilege in order to prevent immediate publication of documents and to provide an opportunity for documents which may have a public interest element supporting non-disclosure to be considered by the arbiter and the House.

1.18 As noted in my primary submission at [2.1] and [4.2], I prefer the view that a claim of privilege under Standing Order 52 is a claim by the Executive that the documents not, on balance, be made public, and that the arbiter's role in determining the validity of a claim of privilege is to answer the question whether the public interest in the House making the document publicly available **in the exercise of its functions** outweighs the public interest in the documents not being published. I do not think, for the reasons outlined above, that Standing Order 52 can properly be construed as requiring a two-stage test where the first stage requires the Executive to demonstrate that the document falls within a category of technical legal privilege.

Submissions as to the public interests to be considered

1.19 Each submission appears to suggest that the public interests for and against disclosure of documents should be considered as part of the evaluation of Executive claims of "privilege" – even if in some submissions it is said that this is the sole function of the House, and not the arbiter. As outlined in my primary submission at [4.16], [4.20], [4.21] and [5.4] particularly, the question for the arbiter is whether the public interest in the House publishing the documents **in the exercise of a function** outweighs the public interest in the documents not being published. Other submissions do not appear, with respect, to recognise or emphasise the necessity to link the issue of publication of

documents with the *function* being exercised by the House which supported the making of the order under Standing Order 52.

1.20 There is not and was not recognised in *Egan v Willis* [1998] HCA 71; (1998) 195 CLR 424 a power or function for the House to require production of documents from the Executive merely in order to make them public. Rather, the power to require production of documents pursuant to Standing Order 52 is an incidental power to the functions recognised in *Egan v Willis* and summarised by Spigelman CJ in *Egan v Chadwick* [1999] NSWCA 176; (1999) 46 NSWLR 563 at [2] (cited in my primary submission at [4.14]).

1.21 The identification of the function being exercised by the House is a necessary component of the context in which the balancing of public interest considerations must take place. That balancing process of public interests cannot take place in the abstract.

1.22 For example, a public interest immunity assessment by a court involves consideration of the public interest in the harm disclosure of the matters of state may cause against the public interest in the administration of justice if the Court is denied access to that information. This necessitates understanding both the public interest for and against production. There is a public interest in disclosure because enabling the Court to have access to the documents or information will assist the Court to exercise its function of administering justice by deciding the case in accordance with law[5].

1.23 So too, the assessment under Standing Order 52 must be made in the context of the constitutional functions said to be exercised by the House in each instance where it calls for production of documents from the Executive and the publication of such documents to the public at large. As noted in my primary submission at [2.1] and [5.4], to determine the public interest in publication of documents it is necessary for the arbiter to understand:

i) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of that function;

ii) how publication of the documents is reasonably necessary for the House to fulfil that function; and

iii) the reasons why the Executive submits that, on balance, documents claimed to be privileged should not be published.

1.24 There can be found in the reports of previous arbiters examples where the arbiters have turned their mind to the relevant function being exercised by the House in relation to

[5] See for example *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39 (Gibbs ACJ), cited with approval in *Alister v The Queen* (1984) 154 CLR 404 at 434 (Wilson and Dawson JJ).

the particular order. The Hon Terrence Cole, in his report on Papers on the Nimmie-Caira System Enhanced Environmental Water Delivery Project (20 November 2012), considered that the Legislative Council was, in relation to the particular order for documents, exercising a function on a subject matter "in which the Legislative Council and its members have a constitutional right...of reviewing the actions or proposed actions of the Executive government". The report continued "competing with this interest is the private interest [of private individuals and the government in conducting confidential and sensitive commercial arrangements]". Similarly in his report on Desalination Plant Papers (22 December 2005) the Hon Terrence Cole spoke of "the public interest in permitting the Legislative Council to perform that task" [of reviewing Executive conduct in respect of the particular subject matter at issue] and later of "the public interest in the Legislative Council being in a position properly to perform its constitutional duties of review of the Executive arm of government". So too Sir Laurence Street, in his report on the 2009-2010 Budget (11 December 2009), referred to the evaluation of privilege as involving "...considerations travelling beyond the mere contents of the documents; it requires evaluation of the legitimacy of Parliament having access to the documents and subjecting them to Parliamentary scrutiny and debate".

1.25 It is essential that the balancing of public interests be understood in context, as involving a consideration on the one hand of the function being exercised by the House which supported the Standing Order 52 call for documents and which is said to support the public interest in the House being able to publish those documents (in the course of exercising that function) and, on the other hand, those public interests identified by the Executive in the claim of privilege which support the documents not being published. For example, it may be that the House requires production of documents to exercise its constitutional function of scrutinising the Executive, but the public interest in the document being *published* in the exercise of that scrutiny function may not outweigh a public interest which exists against publication of the document. Publication of Executive documents is not in itself a function of the House.

Submissions which draw support from the reports of previous arbiters

1.26 The question of the proper role of the legal arbiter must be determined by construction of Standing Order 52 and is not determined by the reports of previous arbiters, although those reports may of course assist to highlight the issues regarding construction of Standing Order 52.

1.27 To the extent that the approach of former arbiters is of assistance and is relied upon in other submissions, it should be noted that it is, with respect, not easy to determine what view each arbiter held as to the proper construction of "privilege" under Standing Order 52, and whether they applied a one or two step process. For example, it is far from clear that the previous arbiters adopted a strict legal definition of privilege under Standing Order 52. Indeed, certain reports indicate strongly that they did not, as

outlined above at [1.11]. Sir Laurence Street has variously referred to "in essence" the question involving the "standard issue of balancing the public interest in disclosure against the public interest in allowing privilege from disclosure" (Papers on M5 East, Lane Cove and Cross City Tunnel Ventilation, 28 February 2006) and "the overriding public interest... preponderates over the considerations advance in support of the matters put forward as justifying the non-disclosure of the documents" (WorkCover prosecutions, 17 April 2012). These examples appear more consistent with a single stage balancing task unconfined by strict legal categories of privilege, although in my submission they do not necessarily correctly state the nature of the public interest balancing test.

Signed:

I V Knight
Crown Solicitor
1 August 2014

Submission to the Honourable Keith Mason AC QC prepared on behalf of the Department of Premier and Cabinet

1. Introduction

1.1 This submission has been prepared on behalf of the Department of Premier and Cabinet, in response to the invitation from the Honourable Keith Mason AC QC, who has been appointed as an independent legal arbiter to evaluate and report on certain disputed claims of privilege in relation to documents regarding the WestConnex Business Case that were returned to House in compliance with an order for the production of documents dated 4 March 2014.

1.2 It addresses the general question as to the proper role of, and approach to be taken by, an independent legal arbiter in respect of deciding disputed claims of privilege. The principal question addressed is what test the arbiter should apply in determining whether a document is "privileged" within the meaning of Standing Order 52. This submission does not address the particular documents or claims at issue in relation to the WestConnex Business Case papers.

1.3 The submission also briefly addresses the procedures that may be adopted by the arbiter

2. Executive summary

2.1 The Department of Premier and Cabinet submits, in short, that:

1. A claim of "privilege" under Standing Order 52 is a claim by the Executive that the documents it was legally compelled to produce to the House (there being no claim of privilege from production available) not, on balance, be made public.

2. The arbiter's role, in considering a dispute by a member of the House of the validity of a claim of "privilege" by the Executive, is to determine whether there is a valid claim that the documents should not be made public.

3. It follows that it is not the arbiter's role to determine whether it would have been open to the Executive to claim that the documents were privileged from production to the House.

4. In considering whether a document is "privileged" in the sense outlined at 1. above, the arbiter is not confined by reference to the grounds of "privilege" developed at common law to determine whether an objection to production of documents to a court should be upheld.

5. The question for the arbiter in determining whether documents are "privileged" is whether the public interest in the House making the document publicly available **in the exercise of its functions** outweighs the public interest in the documents not being published.

6. The House's power to order the production of documents from the Executive was found in *Egan v Willis* (1998) 195 CLR 424 to exist only because it was reasonably necessary to support the exercise of the House's principal functions of making laws and of scrutinising the Executive.

7. It is not, of itself, a function of the House to require production of documents from the Executive in order to publish them to the public. Publication of such documents must be for the purpose of the exercise of a function which it has.

8. In determining whether the public interest in the House publishing the documents in the exercise of a function outweighs the public interest in the documents not being published, it will be necessary for the arbiter to understand:

   i) the reasons why the Executive submits that, on balance, documents claimed to be privileged should not be published;

   ii) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of that function; and

   iii) how publication of the documents is reasonably necessary for the House to fulfil that function.

3. Standing Order 52

3.1 The independent legal arbiter is appointed by the President of the Legislative Council pursuant Standing Order 52(7).

3.2. Standing Order 52 was adopted by the Legislative Council on 5 May 2004, as part of the adoption of new standing orders to replace the standing rules and orders initially adopted on 4 July 1895 (see NSW Legislative Council 2004, *Debates*, 5 May 2004 at 8264).

3.3. The Standing Order applies in circumstances where the House has ordered documents to be tabled in the House (Standing Order 52(1)).

1. If the House is sitting the documents are to be laid on the table by the Clerk (Standing Order 52(2)). Once documents are tabled, they are authorised to be published by authority of the House pursuant to Standing Order 54(3).

2. Standing Order 52(3) provides that 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.

3. If the House is not sitting the documents may be lodged with the Clerk and are deemed to have been presented to the House and published by authority of the House (Standing Order 52(4)).

3.4. However, Standing Order 52(5) makes provision for the Executive to claim that a document is "privileged":

> "(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."

(It is understood that the only purpose for which members of the House access documents claimed to be privileged is to satisfy themselves as to whether the privilege claim should be disputed, and that members will not otherwise disclose or use the contents of the documents whilst they remain subject to a privilege claim.)

3.5. In practice an index of documents not claimed to be privileged is prepared and is made available on the Parliament's website, whilst the documents are available for inspection by any person in the offices of the Clerk. Persons inspecting the documents may make copies of the documents. The Clerk maintains a register showing the name of any person examining the documents pursuant to Standing Order 52(9).

3.6. Standing Order 52(6) provides that any member may, by communication 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".

3.7. The arbiter's report is to be lodged with the Clerk, made available only to members of the House, and not published or copied without an order of the House (52(8)).

3.8. Standing Order 52 does not expressly provide that the House take any particular steps after receiving the arbiter's report, and the House retains the right to depart from the arbiter's evaluation of the claim.

3.9. The generally established practice, however, is that where the arbiter upholds the validity of the claim for "privilege", the House does not order that those documents be tabled or published. Where the arbiter does not uphold the claim, the House generally purports to order that those documents considered not to be privileged be tabled by the Clerk.

3.10. It follows that , unless the House chooses to depart from the arbiter's report, the practical effect of the arbiter's finding that a document is "privileged" within the meaning of Standing Order 52 is that the document is not tabled. As such, only members of the House (and Parliamentary staff) are able to have access to the copy of the privileged documents produced to the House.

4. The arbiter's role in deciding whether a claim of "privilege" is validly made

4.1. The arbiter's task is to evaluate and report to the House "as to the validity" of the claim of "privilege".

4.2. The Department of Premier and Cabinet submits that the basic question for the arbiter is whether the public interest in the Legislative Council making documents claimed to be privileged publicly available **in the fulfilment of its functions** outweighs the public interest in the documents not being published.

4.3. The matters raised in this submission are in addition to those raised by the Honourable Duncan Gay before the Legislative Council on 6 March 2014. I refer particularly to the Minister's observations that the question for the arbiter is not whether the House is legally entitled to the documents, nor whether privileges (from production) exist as a matter of law as between the Executive and the Legislature.

Egan v Chadwick [1999] NSWCA 176; (1999) 46 NSWLR 563

4.4. The decision of the Court of Appeal in *Egan v Chadwick* determined that the Executive could not rely on legal professional privilege or public interest immunity to resist *production* of documents to the House.

4.5. The Court of Appeal, having determined the Executive could be compelled to produce documents the subject of these common law categories of privilege, did not have to resolve any questions about the circumstances in which Parliament may choose to publish such documents. The references to privilege by the Court of Appeal are to privilege in the ordinary sense of that term, as a privilege against production of documents.

4.6. There are, however, a few observations in the decision which are significant in the present context. Spigelman CJ (following the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424)) stated that the "high constitutional functions" of the Legislative Council encompass both legislating and the enforcement of the accountability of the Executive. The Chief Justice then stated that: (at [54] 574; emphasis added)

> "Performance of these functions may require access to information the **disclosure** of which may harm the public interest. **Access** to such information may, accordingly, be reasonably necessary for the performance of the functions of the Legislative Council."

4.7. Priestley JA, having concluded that legal professional privilege could not be relied upon by the Executive to prevent production of documents to the House, observed that: (at [139] 593-594 emphasis added)[1]

> "Possession of the power to compel production does not mean that the power will be exercised unless the House is convinced the exercise is necessary; if exercised, it does not follow that the House will do anything detrimental to the public interest; the House can take steps to prevent information becoming public **if it is thought necessary in the public interest for it not to be publicly disclosed**."

4.8. Both Spigelman CJ and Priestley JA clearly identified in these extracts that the question whether it is in the public interest for the House to make public documents produced under an order for production is a very different question to the extent of the House's power to compel production of those documents.

The use of the term "privilege"

4.9. The legal or technical meaning of the term "privilege" is a claim that a document or information not be *produced* to a court. This is not altered by the fact that a court, in deciding a privilege claim, may in some circumstances exercise its discretion to inspect the documents for the purposes of determining the claim of privilege. If the claim of privilege is upheld, a court may not take into account or make any use of those documents.

4.10. It is therefore apparent that the expression "privilege" as used in Standing Order 52 is not used in its usual legal sense as a claim that documents or information not be produced (to the Legislative Council). That would mean that only Cabinet documents, and any documents within the scope of a statutory provision barring production to the House, would be "privileged" for the purposes of Standing Order 52. This provides an immediate reason to doubt that the arbiter, in determining whether documents should be tabled and therefore become public, is confined by reference to

[1] See also his Honour's observations (at [142] 594) in relation to the Council's duty to prevent "publication beyond itself" in circumstances analogous to those in which a court will uphold a claim of public interest immunity.

those categories developed by the common law to resolve the different question of whether individuals can be compelled to produce documents to a court.

4.11. If any comparison is to be drawn from court processes, a better analogy may be with the circumstances in which a court will consider granting public access to documents produced under subpoena, discovery or other compulsory court process. Generally, those documents only become publicly available if they are subsequently admitted into evidence. Any member of the public or the press who seeks access to documents produced under subpoena or compulsory process which have not been admitted into evidence will require leave of the court[2]. Courts may also decide whether to make non-publication or equivalent orders (now under the *Court Suppression and Non-publication Orders Act 2010*). The point of this comparison is that the matters a court will take into account in determining what use, including whether to grant public access, is to be made of documents produced to it under compulsory process are significantly different from the matters a court will take into account in determining an objection by a party or non-party to production of those documents under subpoena or other compulsory process.

The procedure adopted under Standing Order 52

4.12. If it were not for the procedure put in place by Standing Order 52 then, as discussed in *Egan v Chadwick*, it would be a matter for the House, in the exercise of its discretion in the public interest, to determine whether to table and make public documents produced to it in response to a call for papers.

4.13. Instead, in the procedure provided for in Standing Order 52 (and Standing Order 54), the House has decided that the "default" position is that, unless the Executive claims privilege over particular documents, all documents produced will automatically be tabled and become publicly available upon being produced by the Executive. This occurs even before the members of the House have had any opportunity to review the documents having regard to the function it is performing. (To the extent that the Standing Order would purport to permit the House to publish Executive documents other than for the purpose of a function which the House has, there would be a question as to its validity to that extent. It is not necessary to address that here, since this submission is concerned only with the test and approach in the case of documents which are claimed to be privileged under the Standing Order.)

The House's power to call for the production of documents from the Executive

4.14. It is important to understand the nature and purpose of the House's power to call for the production of documents, found to exist by the High Court in *Egan v Willis* [1998] HCA 71; (1998) 195 CLR 424. Spigelman CJ succinctly summarised these findings in *Egan v Chadwick*, as follows: (at [2] 565) references omitted)

[2] See for example *Uniform Civil Procedure Rules 2005* r. 33.9.

(i) Each House exercises a constitutional function to make laws pursuant to s. 5 of the *Constitution Act 1902*;

(ii) Each House performs the parliamentary function of review of executive conduct, in accordance with the principle of responsible government;

(iii) The Legislative Council has such powers as are reasonably necessary for the proper exercise of its functions; and

(iv) Production of documents by ministers is reasonably necessary for the performance of both functions (i) and (ii).

4.15. It is apparent that the High Court's finding that the Legislative Council may order the production of documents from the Executive was not because that capacity was, in itself, a function of the House. Instead, that power was found to exist only because it was reasonably necessary to support the exercise of the House's principal functions of making laws and of scrutinising the Executive. The power to order the production of documents is in that sense an ancillary power which exists in order to, and to the extent necessary to, support the House in the exercise of its principal functions of making laws and scrutinising the Executive.

4.16. It is therefore important to appreciate that it is not, of itself, a function of the House to require production of documents from the Executive in order to make them public.

The House's power to make public documents produced to it by the Executive

4.17. The nature and scope of the power to order the production of documents affects the nature and scope of the related power of the House to make public documents which have been produced to the House. That latter power also presumably exists because it is reasonably necessary for the performance of the House's functions of making laws and of scrutinising the Executive. One would therefore expect (leaving aside for the moment documents over which the Executive claims "privilege") that the House would make public only those specific documents returned under a call for papers the publication of which has a sufficient connection with the particular exercise of the House's law-making or scrutiny functions which supported the making of the order for documents. Even with a carefully crafted order, it could be expected that many documents returned would ultimately, on inspection by the members, turn out to be either entirely or substantially unrelated to the particular exercise of the function of the House which supported the making of the order.

4.18. The fact that the House has purported to adopt as the default position that all documents produced without a "privilege" claim having been made by the Executive are automatically tabled and made public, emphasises the importance of the assessment of the claims for "privilege" under Standing Order 52. It also supports the view that the arbiter's task in reporting and evaluating on the validity of a claim of "privilege" should not be construed narrowly so as to apply only to documents which

would fall within the categories recognised by courts in determining objections to the *production* of documents.

Conclusions

4.19. The Department of Premier and Cabinet therefore submits that the use of the term "privilege" in Standing Order 52 is not confined to those categories of privilege which mean documents are privileged from production in legal proceedings: although those categories and the principles underlying them may offer guidance to the arbiter. The term "privilege" in Standing Order 52 is used as a convenient way to describe a claim by the Executive that, on balance, certain documents which the Executive was compelled to produce should not be made public and does not purport to prescribe or confine the nature of the arbiter's approach in evaluating and reporting to the House on the Executive's claim.

4.20. It is also significant that, as observed by Professor Twomey, once documents are produced to the House there are various uses that members may make of them without needing to table the documents and make them public[3]. Professor Twomey correctly identifies that the public interest balancing exercise is to weigh the public harm caused by disclosure against the need for such material to be made public **in the fulfilment of the functions of the Legislative Council**.

Further comment

4.21. It is respectfully submitted that the former legal arbiter Sir Laurence Street QC did not correctly state the nature of the "public interest" balancing process[4], in that the former arbiter did not appreciate the required connection between any public interest in disclosure and the exercise of a function of the House.

4.22. In other respects, however, the former arbiter's approach appears consistent with this submission. In particular, Sir Laurence Street QC made clear that he was considering claims of "privilege from their [the documents] being disclosed to the public", and also that there were important differences between the responsibility of courts, in ruling on claims that documents were privileged from production and in Parliament in exercising its functions to require documents from the Executive and then to make them public[5].

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[3] Twomey, A. "Executive Accountability to the Australian Senate and the New South Wales Legislative Council", (November 2007), *Legal Studies Research Paper No 07/70*, University of Sydney Law School. (Later published in shorter form in Autumn 2008, 23(1) *APR* 257).

[4] See Sir Laurence Street, Report of the Independent Arbiter, 22 August 2003, *Millennium Trains Papers*, at 6-7; and, Second Report of the Independent Arbiter, 20 October 2005, *Papers on Cross City Motorway Consortium* at 1-2. cited by Legislative Council Privileges Committee in its Report 69 (October 2013), *The 2009 Mt Penny return to order* (at 81).

[5] *Papers on Cross City Motorway Consortium.*

5. What process should the legal arbiter adopt?

5.1. Standing Order 52 is relevantly silent as to the procedure that may be adopted by the independent legal arbiter in evaluating the claim.

5.2. It is noted that the original privilege determination and claim made by the Executive on the return of documents pursuant to an order under Standing Order 52 is frequently required to be made under circumstances of considerable constraint. The exigencies of preparing documents for return (often within a timeframe of 14 days) mean that the Executive is often unable to address fully the privilege claims in its submissions on return of the documents. In addition, at the time of return, the Executive is of course unaware which, if any, of the claims may be disputed by a member and on what grounds.

5.3. The Department of Premier and Cabinet therefore appreciates the procedure adopted in this matter, which provides the Executive with a much better opportunity both to put submissions in relation to a claim which is disputed and to assist the arbiter.

5.4. In determining whether the public interest in the House publishing the documents in the exercise of a function outweighs the public interest in the documents not being published, it will be necessary for the arbiter to understand:

i) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of that function;

ii) how publication of the documents is reasonably necessary for the House to fulfil that function; and

iii) the reasons why the Executive submits that, on balance, documents claimed to be privileged should not be published.

I V Knight
Crown Solicitor

21 July 2014