PARLIAMENT OF VICTORIA
LEGISLATIVE COUNCIL
ORDERS FOR PAPERS

OPINION

I am asked to advise the Clerk of the Legislative Council of Victoria on a number of questions arising in relation to the power of the Council to order documents to be produced to it. I will call such a procedure "an order for papers".

2 These questions have arisen in circumstances which included the adoption on 14th March 2007 of a Sessional Order for the arrangements to apply in the production of documents. That Sessional Order is derived from the terms of Standing Order 52 of the Legislative Council of New South Wales, which was devised in light of the experience in New South Wales recorded in *Egan v Chadwick* (1999) 46 NSWLR 564.

3 Subsequently, the present circumstances in Victoria include the claim on 11th April 2007 from the Attorney-General and the Solicitor-General to the Select Committee on Gaming Licensing, essentially refusing to disclose certain documents which were the subject of orders for papers.

4 The relevant powers of the Council, subject to statutory modification or regulation, are founded in subsec 19(1) of the *Constitution Act 1975* (Vic). Its provisions provide for House-of-Commons equivalency as at 21st July 1855 (ie responsible self-government).

5 Subsection 19(2) of the *Constitution Act* expressly provides for legislation with respect to the privileges, immunities and powers of the Council, its committees and members, but no relevant legislation affects the general subject-matter. Some questions arise, however, in relation to specific legislation with respect to certain secrecy provisions appertaining to particular regulatory schemes.

6 Under para 43(1)(f) of the *Constitution Act*, the Council may make standing rules and orders for the conduct of all business and proceedings in it. The Sessional Order noted above was adopted as contemplated by Standing Order 25.02.

7 Further, Standing Order 24.10 simply authorizes a select committee to "send for persons, documents and other things" (cf sec 28 of the *Parliamentary Committees Act 2003* (Vic)).

8 The general importance of the rôle of the Legislative Council, like that of any House in any Parliament in Australia, in responsible government lies in its capacity to scrutinize the workings of government, and particularly those of the Executive, whose members (ie the Ministers) sit in one or other of the Houses (in a bicameral system). This need not be elaborated. I regard it as beyond serious question. The principles can be seen in the background and outcome of *Egan v Willis* (1996) 40 NSWLR 650, (1998) 195 CLR 424 and *Egan v Chadwick*. (New South Wales does not have a House-of-Commons equivalency provision, but the explanations of principle in the High Court do not leave any scope for distinguishing its Houses of Parliament from other Australian Houses in this regard.)

9 It is tolerably clear from the precedents discussed in Ch XXI of *Erskine May's Parliamentary Practice* 10th Ed (1893) that orders for papers were well established as within the power of the House of Commons before 1855. That chapter starts with the words – "Parliament is invested with the power of ordering all documents to be laid before it, which are necessary for its information. Each House enjoys this authority separately, but not in all cases independently of the Crown".

10 Against this background, I answer the specific questions I have been asked as follows.

11 ***(1) Does the Legislative Council possess an inherent power under the Constitution Act 1975 to call for the production of documents in accordance with the Sessional Order adopted on 14th March 2007?***

The Council does have such a power, in general terms.

12 As noted above, the Council does have a general power to order papers. There is no precedent for a successful claim on behalf of the Executive to resist all and any orders for papers. If the Executive were to take such a position (which I do not understand to be the case), and the conflict were to take shape so as to be litigated, I confidently predict that a court would regard *Egan v Willis* as binding and applicable judicial authority against the Executive.

13 The power in question is not, in my opinion, properly called "inherent", at least in Victoria. The point probably does not matter. Upon the historical showing that the House of Commons had such a power in 1855, there is express statutory

provision in the *Constitution Act* for the same power in the Legislative Council of the Parliament of Victoria. On the other hand, for reasons to do with the fundamental character of a House as the grand inquest of the nation, if it had not been a power expressly granted in Victoria, then in my opinion it probably would have been an implied power, inherent in the nature of a parliamentary chamber (as was held for the New South Wales Legislative Council in *Egan v Willis*).

14 The Sessional Order does not purport to do more than regulate the Council's own procedures. It is no objection to it that Cabinet secrecy is not specifically referred to, nor the position where other legislation entrenches on the Council's power to order papers. (I note that so-called "Executive privilege" is catered for by the Sessional Order.) Cabinet secrecy and statutory prohibition on disclosure are dealt with by substantive law, as to the former in accordance with the principles noted in *Egan v Chadwick*, and as to the latter as a matter of statutory interpretation.

15 ***(2) If the answer to question (1) is yes, what are the powers of the Legislative Council to compel a Member to produce the documents sought and to deal with the Member for contempt for failure to comply with an Order of the House requiring the Member to produce the documents?***

Ultimately, in appropriate cases the Council could suspend such a Member in an attempt to prevent his or her continued obstruction of the Council's business.

16 All Members are elected to serve in the Council according to their oaths, and according to law. Their duties include compliance with resolutions and Standing Orders so as to permit the orderly discharge of business. In accordance with the non-

punitive principle vindicated in *Egan v Willis*, a Member who obstructs the business of the Council by refusing – without cause – to answer an order for papers could be suspended from the service of the Council.

17 *(3)* ***Would any sanctions available to the Council against the Member failing to produce documents include the power of suspension and ultimate declaration of the Member's seat as vacant?***

No as to expulsion.

18 There is a tension between suspension of an obstructive Member, as discussed in 16 above, and abrogation of the electors' choice which would follow from declaring a Member's seat vacant, ie expelling him or her. In my opinion, that tension will be resolved in favour of the reasonable necessity (as explained in *Egan v Willis*) of a self-protective step such as suspension being adequate as the sanction against non-production upon an order for papers. Suspension being adequate, expulsion would be excessive. Further, the basic democratic provisions providing for the seating of elected representatives as Members are in my opinion highly likely to be regarded as paramount.

19 I would reserve, as presently hypothetical and as depending wholly upon extreme circumstances, the question whether a Member might, by conduct including defiance of an order for papers, so act as to justify expulsion. I merely note that I cannot see that any such case would be properly described as expulsion (merely) for non-production of papers ordered to be produced.

20 ***(4) Other than Cabinet documents, are any of the following reasons which might be claimed in support of the non-production of documents valid:***

> ***(a) Executive privilege or public interest immunity (as distinct from Cabinet documents)***
>
> ***(b) Commercial-in-confidence***
>
> ***(c) Legal professional privilege***
>
> ***(d) Sub-judice convention***
>
> ***(e) Privilege against self-incrimination?***

(a) no, (b) no, (c) mostly not, (d) no, (e) yes.

21 As to (a), as my answer to question 5 below indicates, the category of Cabinet documents is not clear beyond dispute. Partly, this is because the practices of responsible and parliamentary government evolve. In my opinion, the reasoning of Spigelman CJ, with whom Meagher JA agreed, in *Egan v Chadwick* at 46 NSWLR 573-574 [48]-[54] is compelling. Where a document is not to be regarded as a Cabinet document, there should be no public interest reason to keep it from the people's representatives, the legislators, in the Council.

22 As to (b), at best in favour of non-production, this category would be a subset of public interest immunity. As such, it has no better claim for immunity against an order for papers. It is for the Council to determine, in its assessment of the public interest, how secrecy of this kind should be observed. In my experience, there is no difficulty in restricted access and redacted publication, where public disclosure would hurt the public interest.

23 As to (c), subject to what I note below in relation to the Solicitor-General, the matter should be approached on the basis of the argument I successfully presented for the New South Wales Legislative Council in *Egan v Chadwick*, per Spigelman CJ at 46 NSWLR 576-579 [72]-[88], also agreed in by Meagher JA. It follows that access to legal advice being 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.

24 As to (d), I assume that there is no suggestion of abandoning the traditional parliamentary convention respecting the current or pending judicial consideration of particular cases. However, in my opinion, properly understood, that convention has never stifled parliamentary discussion where public opinion is engaged, and it is probably best applied as a form of institutional courtesy to the judiciary.

25 In any event, there would be no sense if the Executive could be forced to produce confidential legal advice, but could not be forced to produce information about pending litigation.

26 As to (e), I regard this as the most difficult question in this bracket. Clear words or necessary implication are required, in all other contexts, to abrogate the common law privilege against self-incrimination – which is available only to individuals ie natural persons, not corporations. However, it might be that parliamentary privilege as in Article 9 of the *Bill of Rights* could be seen as a protection of persons forced to give evidence to the Council or one of its committees, by rendering tender of a record of it in a criminal court a breach of parliamentary privilege. On balance, I regard the privilege against self-incrimination as

insufficiently substituted by such reasoning, which after all involves the possibility of the Council waiving its privilege.

27 *(5)* ***Is it possible to adequately define a Cabinet document?***

Not precisely.

28 However, the discussion by Spigelman CJ in *Egan v Chadwick* at 46 NSWLR 574-576 [55]-[71], agreed in by Meagher JA, provides useful guidance, as well as indications of the most likely source of difficulty. In particular, his Honour notes 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. 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.

29 *(6)* ***Other than Members and Officers of the Assembly, do Select Committees of the Legislative Council possess an unfettered right to compel the attendance of all other persons, including Ministerial advisers to give evidence?***

Yes.

30 A critical distinction is between compulsion to attend to give evidence, and compulsion to answer particular questions. Conventionally, and for good reason, Houses have not required public servants, or Ministerial advisers, to answer questions

about policy, in such a way as to endanger the necessary confidence between Ministers and public servants. Guideline 19 reflects this conventional approach.

31 Assuming there is no intention on foot in the Council to alter that conventional position, there is no reason why such persons should not be required to give evidence outside that conventionally proscribed area. In particular, Ministerial advisers are not a caste which has been given the benefit of parliamentary precedent in this direction, let alone as at 1855. Of course, the usual rôle of Ministerial advisers means that in most cases their attendance would be sought to answer policy questions of a kind conventionally reserved for Ministers.

32 *(7)* ***Other than Cabinet documents, does a Select Committee possess the power to seek any other document, including a document held by an Assembly Minister?***

Generally, yes. No, except by mere request, in the case of a document held by a Member (including a Minister) of the Assembly.

33 As advised above, a Select Committee is authorized to seek the production of documents, with compulsion generally, subject to exceptions of the kind noted above. I stress that, subject to limited delegation by the Council, a Select Committee acts on behalf of the Council with full capacity to use those powers of the Council delegated to it.

34 On the other hand, as also advised above, the key to sanctioning non-production in answer to an order for papers, in the case of the Executive, in my

opinion most effectively turns on the nexus of membership of the House. (I am not addressing in this Opinion the different question of punishment for contempt committed by strangers who defy an applicable order for papers. This Opinion focusses on orders for papers in the classic responsible-government sense of the production of papers to assist a House in its task of scrutinizing Executive administration.)

35 Relations between the Houses do not, historically, conventionally or currently, sanction any purported compulsion by one House against a Member (Minister or not) of the other House. In my opinion, this is unaffected by the general notion of responsible government, viz that the Executive is accountable to the Houses of Parliament. In my opinion, none of the precedents in Westminster or this country supports a distinction between a Minister in the other House and a Member in the other House, whereby the former may be compelled by an order for papers but the latter not. Arrangements of a familiar kind by which Ministers, say, in the Council have allocated to them responsibility to answer questions in relation to portfolios whose Ministers sit in the Assembly, were of some importance in the background to *Egan v Willis*. In my opinion, they are arrangements which recognize the significance of membership of a House in the compulsion of a Minister to produce in answer to an order for papers.

36 Standing Order 18.03, in relation to evidence from a Member or Officer of the Assembly, reflects this ancient restraint. It does not limit the breadth of the principle, which clearly comprehends purported compulsion to produce documents, as well.

37 ***(8) Are any of the grounds in question (4) also valid in relation to the non-production of documents sought by a Select Committee of the Council?***

The position is the same as for the Council.

38 This position might be qualified, but only if and to the extent to which a resolution of the Council narrowed the powers it delegates to a Committee – as it well may, if the proposed inquiries were expected to venture into sensitive areas, and the Council wished to make ground rules.

39 **Generally**, I have the following short comment about the position put by the learned Solicitor-General for Victoria in her letter to the Select Committee on Gaming Licensing, dated 11th April 2007. In my opinion, Ms Tate SC's propositions and reasoning concerning the position of the opinions of the Law Officers are correct, if I may say so with respect. They are none the less powerful for being largely based on conventions.

40 On the other hand, I would reserve, until asked specifically, the question of the correctness of Ms Tate's assertions concerning the confidentiality or secrecy provisions of the *Gambling Regulation Act 2003* (Vic), which assertions are similar to those made by the learned Attorney-General in his letter dated 11th April 2007, in the letter from the Deputy Commissioner of the Victoria Police on behalf of the Chief Commissioner apparently sent the same day, and the letter from the Executive Commissioner of the Victorian Commission for Gambling Regulation dated 11th April 2007.

41 It is a matter of statutory interpretation whether such provisions extend so far as to prevent a House of Parliament from obtaining information it considers necessary for scrutiny of administration of laws such as those regulating gambling. In my opinion, the proper commencement is to doubt the application of such general provisions to restrict the specific and paramount rôle of a House of Parliament. However, no specific question has been raised with me concerning this important topic.

FIFTH FLOOR,

ST JAMES' HALL.

4th June 2007 Bret Walker