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Mr Stephen Palethorpe
Secretary
Senate Finance and Public Administration References Committee
Parliament House
CANBERRA, ACT, 2600

Dear Mr Palethorpe,

Thank you for your invitation to make a submission to the Committee in relation to its inquiry on 'Independent Arbitration of Public Interest Immunity Claims'. As you may be aware, I have previously written on the subject with particular reference to public interest immunity claims in the NSW Legislative Council. A copy of the full paper is attached as an Appendix to this submission. It may also be found at http://ssrn.com/author=808822. A shorter version was published as: A Twomey, 'Executive Accountability to the Senate and the NSW Legislative Council' (2008) 23(1) *Australasian Parliamentary Review* 255-73.

In principle, I am supportive of the notion of an independent arbitrator to determine claims of public interest immunity with respect to Senate orders for the production of government documents. However, as my article points out, one needs to be very careful about how this is done. In particular, it is important to make the arbitrator's role clear in order to eliminate, as much as possible, the exercise of discretion and to confine the arbitrator to the application of accepted rules.

There are some major differences between the Senate proposal and the existing NSW scheme. The first is that the NSW scheme for the independent assessment of privilege claims is predicated upon a legal obligation on the part of the NSW Government to produce documents to the Legislative Council even though they are the subject of claims for privilege. This legal obligation was recognised by the High Court in *Egan v Willis* and by the NSW Court of Appeal in *Egan v Chadwick.* The only documents that are not subject to this obligation are those that would directly or indirectly reveal the deliberations of Cabinet. The findings of these courts were based upon common law principles of what is 'reasonably necessary' for the functioning of the Houses of the NSW Parliament.

The Senate, of course, falls into a different category. Its powers are identified by reference to the powers of the House of Commons at the time of federation (s 49 of the Commonwealth Constitution). The full extent of those powers has never been the subject of a ruling by the High Court. While one may draw analogies from *Egan v Willis* and *Egan v Chadwick,* there is no certainty that the Commonwealth Government is legally

obliged to produce privileged documents to the Senate, as ordered by the Senate. It may be that all privileged documents are excluded, or it may be that only some of them (such as Cabinet documents) are excluded, or it

may be that none are excluded. It should also be noted that the High Court in *Egan v Willis* did not deal directly with privileged documents. This was dealt with by the NSW Court of Appeal in *Egan v Chadwick*, but was never appealed to the High Court. It might well be that the High Court would have found all privileged documents protected. All one can say at the national level is that this is an area of continuing uncertainty.

In New South Wales, as it is under a legal obligation to do so, the Government produces all privileged documents (except for Cabinet documents which are excluded) to the Legislative Council. The documents for which privilege is claimed may only be seen by Members. If a Member wishes to challenge the status of these documents as privileged, he or she may do so and an independent legal arbiter is appointed to examine the documents and assess their status. The advice of the independent legal arbiter is not determinative, but it is used to inform a vote of the House on whether or not to make the documents public. Ultimately, the documents are in the control of the House and it can vote to make them public regardless of what the independent legal arbiter might say and regardless of whether or not they fall within established categories of privilege.

The Senate proposal is very different in nature. First, whether or not there is a legal obligation on the Government to produce privileged documents remains unclear. Usually the Senate claims that the Government is so obliged and the Government (regardless of its political composition) claims that it is not so obliged. Secondly, the proposed resolution of the Senate does not require that the documents be produced for evaluation by an independent arbitrator. Instead, it requires the Minister to make a statement 'setting out why it may not be in the public interest for the documents to be produced'. If the Senate does not accept the statement, 'the statement or report shall be referred to the independent arbitrator in accordance with this order'. So the independent arbitrator does not get to see and examine the documents to check whether or not they in fact fall within the claimed category of privilege. Instead, the independent arbitrator simply looks at the reasons given for not producing the documents. The independent arbitrator then reports to the Senate as to whether the 'reasons' are 'justified'.

This is highly problematic for two reasons. First, it is essentially futile. The Government need merely claim that the documents fall within an established category of privilege (eg that the documents are cabinet documents, or subject to legal professional privilege or are commercial-in-confidence, or that it is contrary to the public interest to release them). What then can the independent arbitrator say in response? If the Auditor-General never gets to see the documents, how can he or she say anything other than that the Government is justified in not releasing documents that are claimed to be commercial-in-confidence? The process would ultimately become a farce with the Government using accepted formulaic words to claim privilege, leaving the independent arbitrator with nothing substantive to do.

Secondly, if the independent arbitrator were to have a substantive role in assessing documents, the terms of the resolution are too broad as they require the independent arbiter to determine whether the reasons given for withholding the documents 'are justified'. This appears to give the independent arbitrator complete discretion without any legal criteria upon which to exercise that judgement. While most competent lawyers, for example, could assess documents to determine whether they fall within an established category of privilege, by reference to statutes and case-law, the task given to the independent arbiter is to decide whether something is 'justified', presumably according to his or her personal opinion. This does not appear to be appropriate. As you will see from the analysis in the Appendix to this submission, a similar approach has been taken by an independent legal arbiter in NSW who has regarded himself as a 'delegate of the Parliament' and exercised his own discretion in deciding what is in the public interest (based largely on his

view about what the public is interested in). This has led to uncertainty and unfairness and should not be replicated at the Commonwealth level. There are also significant legal and political issues with a House of Parliament 'delegating' its powers in such a manner to a third party.

In my view, there is no point in having an independent arbitrator at the Senate level unless:

> (1) agreement is reached (or a court makes a finding) as to which categories of documents must be produced by the Commonwealth Government to the Senate, pursuant to its orders, and which may be excluded; and
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> (2) the independent arbitrator is able to assess the documents that the Commonwealth Government claims fall within the excluded category to determine, on legal grounds, whether they in fact fall within that category or not.

Otherwise, there would seem to be little point in the exercise. If all that an independent arbitrator may do is say that a certain type of claim (eg internal working documents) should not be made, then the Senate is perfectly well equipped to make such a finding itself by way of a resolution.

This leads to the final issue of compliance. If the independent arbitrator reports that he or she does not accept the reasons given for failing to produce documents, what happens then? If the Government disagrees, it will presumably still refuse to produce the documents. After all, why should it be bound by the opinion of a person appointed by the Senate? If Governments have previously refused to produce privileged documents when ordered to do so by the Senate, why would they not continue to do so? Unless some kind of agreement is reached with the Government and unless the independent arbitrator fulfils a substantial role of assessing the relevant documents, then I cannot see the point in this proposal.

If you would like me to expand any further on these points, please let me know.

Yours sincerely,

Anne Twomey

APPENDIX

Executive Accountability to the Australian Senate and the New South Wales Legislative Council

By Anne Twomey*

This article analyses and compares the operation of the powers of two Australian parliamentary upper Houses, the Senate and the New South Wales Legislative Council, to require the Executive to produce state papers and to compel Ministers and public servants to give evidence to parliamentary committees. It considers the legitimacy of claims for privilege and analyses the operation of the recent NSW procedure of using an 'independent legal arbiter' to assess disputed claims of privilege. It also addresses the issue of whether a House of a federal Parliament can compel the attendance of a Member of the other House or a Minister of a State Parliament, or vice versa.

Introduction

One of the fundamental aspects of responsible government is that Ministers are responsible to the people through the Parliament, both collectively and individually, for their actions in government.

This responsibility is manifested in a number of ways. In order to continue as a Government, Ministers must retain the confidence of the lower house of Parliament. Ministers may also be questioned in the House in which they sit during Question Time. This paper considers a further aspect of accountability, being the power of the Houses or their committees to require that Ministers or their staff give evidence as witnesses or produce state papers to a House or its committees. In particular, this paper compares the operation of these powers in the Senate and the New South Wales Legislative Council.

Production of documents – New South Wales

Orders for the production of documents by the Houses of the New South Wales Parliament have neither a legislative basis, nor are related to the powers of the House of Commons in the Westminster Parliament. The Houses have only such powers to order the production of documents as are 'reasonably necessary' for the proper exercise of their functions.

The NSW Legislative Council's exercise of this power, while active in the nineteenth century, fell into disuse in the twentieth century. Prior to the 1990s, the last time it was exercised was in 1948.[1] Despite it not having needed or used for the functioning of the Legislative Council for most of the twentieth century, it was revived in 1995 and it was argued that it was indeed necessary to have this power in order to fulfil the legislative and scrutiny functions of the House.

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* Associate Professor of Law, University of Sydney. A shorter version of this paper was given at the ANU Public Law Weekend on 9 November 2007. My thanks to Stephen Frappell of the NSW Legislative Council and Rosemary Laing of the Senate for providing me with reference material.

[1] D. Clune and G. Griffith, *Decision and Deliberation – The Parliament of New South Wales 1856-2003* (Federation Press, Sydney, 2006), p. 651.

In *Egan v Willis* the NSW Court of Appeal and the High Court held that the power to require the production of state papers is reasonably necessary for the functioning of the NSW Legislative Council as it supports the principle of responsible government and the role of the Houses in legislating and scrutinising the actions of the Executive.[2] In this case it did not matter that the Treasurer was suspended by the Legislative Council for failing to produce papers within the portfolio of a Minister of the Legislative Assembly. The Legislative Council was able to bring the whole of the Executive to account by suspending one of its Members in the Legislative Council, who was a Minister, until such time as there was compliance with its order.

In *Egan v Chadwick*,[3] the New South Wales Court of Appeal held that the Legislative Council has the power to require the production of State papers that are privileged, including those subject to client legal privilege, commercial confidentiality and public interest immunity. The only exception was Cabinet documents, as the production of Cabinet documents that directly or indirectly reveal the deliberations of Cabinet would undermine the collective responsibility of Ministers, which is an essential aspect of the theory of responsible government.

Priestley JA pointed out in *Egan v Chadwick*[4] that the Legislative Council must also pay heed to the public interest, and not publish beyond itself documents if their disclosure would be contrary to the public interest. Hence special procedures were put in place to assess the validity of claims of privilege and to confine access to privileged documents to Members only.

Standing Order 52

Standing Order No 52 of the Legislative Council now sets out the rules for ordering the production of documents. It requires that the Government's return to the 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.' It is not clear how this requirement is legally supported. While the Legislative Council might have the power to require the production of 'State papers' that already exist, it would not seem to have the power to force the State to create papers. If the Legislative Council seeks information that is not in a State paper, then the appropriate method is to ask a question without notice or a question on notice seeking the information. By that means information can be supplied and new State papers might well be created.

Further, it is not reasonably necessary for the operation of the Legislative Council for the Government to provide an index. If an index is useful, then there is no impediment to Members or officers of the Legislative Council creating such an index themselves once the documents are received. There seem to be no legal grounds for further requiring the use of government resources other than those necessary to produce the papers. Nonetheless, the Government has voluntarily provided indexes in most cases,[5] even though it is very doubtful that it could be compelled to do so. The risk, however, in voluntary co-operation is that the courts have held that what becomes

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[2] *Egan v Willis* (1996) 40 NSWLR 650, per Gleeson CJ at 664-5; and *Egan v Willis* (1998) 195 CLR 424 per Gaudron, Gummow and Hayne JJ at [45].
[3] *Egan v Chadwick* (1999) 46 NSWLR 563.
[4] *Egan v Chadwick* (1999) 46 NSWLR 563, per Priestley JA at [142].
[5] This has been criticised as inconsistency in behaviour. See: S. Want, 'Orders for Papers in the Legislative Council of New South Wales: Developments and Challenges' (2007) 22(1) *Australasian Parliamentary Review* 76, at 82.

'conventional practice' over time is regarded as 'reasonably necessary'.[6] This provides a disincentive for voluntary co-operation lest it be regarded as a legal requirement by a court in the future.

Privileged documents under Standing Order 52

Standing Order 52 also deals with privilege. Where the Government claims that a document is privileged, the Government may prepare a return describing the document and the reasons for the claim of privilege. The privileged documents then may be made available only to the Members of the Legislative Council and may not be published or copied without an order of the House.[7] A Member may dispute the validity of the claim of privilege, in which case the matter is referred to an 'independent legal arbiter' who assesses the claim within seven days. This report is normally tabled in the House.[8] In practice, if the arbiter disallows a claim of privilege the documents are made public and if the arbiter upholds the claim of privilege, they are usually restricted to Members only and not made public.[9] However, it should be noted that all privileged documents (except Cabinet documents) are surrendered to the Clerk, and the House could vote to make them all public at any time, regardless of their privileged status.[10]

The task of the 'independent legal arbiter' is to evaluate and report on the validity of a claim for privilege.[11] Standing Order 52 provides that the independent legal arbiter must be a Queen's Counsel, Senior Counsel or a retired Supreme Court Judge. This is because the assessment to be made is a legal judgment based upon the rules of privilege developed by the common law and statute. The independent legal arbiter is appointed by the President of the Legislative Council to fulfil this task.

However, in practice at least one independent legal arbiter has taken the view that his role is far more significant. He has contended that 'Parliament is supreme' in determining the public interest with respect to the disclosure of documents,[12] that he is the 'delegate of the Parliament'[13] and that he makes 'determinations in the exercise of the plenary parliamentary authority that has been delegated to [him].'[14] The independent legal arbiter has further stated that it is 'plainly wrong' to assert that the 'arbiter is bound, as for example is a Court, to uphold a claim of privilege that is technically valid'. He then continued:

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[6] *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at [50]; and *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [30].

[7] Compare the Victorian requirement that such documents only be made available to the mover of the motion for the order: Victoria, Legislative Council, Sessional Order 21.

[8] Note, that in at least three cases (Grey Nurse sharks No 1, Hunter Rail cars and Boral Timber) the independent legal arbiter's report has not been tabled.

[9] J. Evans, 'Orders for Papers and Executive Privilege: committee inquiries and statutory secrecy provisions' (2002) 17(2) *Australasian Parliamentary Review*, 198 at 206.

[10] For example, in 2000 the Legislative Council resolved to make public documents that were subject to a claim of privilege without an assessment being made of the claim by an independent legal arbiter: NSW, *Parliamentary Debates*, Legislative Council, 17 November 2000, p. 10250.

[11] NSW, Legislative Council, Standing Order 52(6).

[12] Report of Sir Laurence Street – Papers on Sale of PowerCoal Assets, 27 June 2006, pp. 5-6.

[13] Report of Sir Laurence Street – Papers on Cross City Motorway, 20 October 2005, p. 2; Report of Sir Laurence Street – Papers on the Lane Cove Tunnel, 22 May 2006, p. 3; and PowerCoal above n. 12, p. 5.

[14] Lane Cove Tunnel, above n. 13, p. 4.

> The arbiter's duty, as the delegate of Parliament, is to evaluate the competing public interests in, on the one hand, recognizing and enforcing the principles upon which legal professional privilege is recognized and upheld in the Courts, and, on the other hand, recognizing and upholding an over-riding public interest in disclosure of the otherwise privileged documents.[15]

First, it is 'plainly wrong' to assert that the independent legal arbiter is a 'delegate of the Parliament'. According to s 3 of the *Constitution Act* 1902 (NSW), the New South Wales Parliament (or the 'Legislature', as it is described) is comprised of the Queen (i.e. the Executive), the Legislative Assembly and the Legislative Council. Of the three arms of the Parliament, the independent legal arbiter only has the authority of one and his or her actions in many cases would be rejected by the other two.[16] It remains an unresolved question as to what the legal position would be if the Legislative Council required a Minister, being one of its Members, to produce state papers within the custody and control of a Minister who was a Member of the Legislative Assembly, and the Legislative Assembly ordered that the papers not be surrendered.[17]

No Act of the New South Wales Parliament delegates any power to the independent legal arbiter. At most, the independent legal arbiter fulfils a function conferred upon him or her[18] by the Legislative Council. Standing Order 52 gives the President the power to appoint an independent legal arbiter and provides that the Clerk is authorised to release disputed documents to an independent legal arbiter 'for evaluation and report within seven calendar days as to the validity of the claim [of privilege]'. It does not delegate the powers of the House to the independent legal arbiter. Nor does it confer any powers on the independent legal arbiter. It merely provides that the independent legal arbiter may view the disputed documents to evaluate and report on (not even 'determine') the validity of the claims for privilege.

Further, there is doubt as to whether a House could, if it so desired, delegate its powers to a person who is not a Member.[19] Certainly the Parliament as a whole may delegate legislative power to a statutory office holder or other non-Member by way of an Act of Parliament.[20] Legislation, such as s 48A of the *Public Finance and Audit Act* 1983 (NSW), may also permit a parliamentary committee to appoint a person to conduct an inquiry. Further, a House can ask a person to assess documents for it, as has occurred at the Commonwealth level.[21] It is a different thing altogether, however, for a House

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[15] Ibid.

[16] Note Spigelman CJ's observation that while the proceedings in *Egan v Chadwick* were 'in form a conflict between the Executive and the Legislative Council, in substance they are a conflict between the Legislative Assembly and the Legislative Council': (1999) 46 NSWLR 563, at [8].

[17] *Egan v Chadwick* (1999) 46 NSWLR 563 per Spigelman CJ at 567. See also: *Egan v Willis* (1998) 195 CLR 424, per Kirby J at 483-4; *Egan v Willis* (1996) 40 NSWLR 650, per Gleeson CJ at 663; and J. McMillan, 'Parliament and Administrative Law' in G. Lindell and R. Bennett (eds), *Parliament – The Vision in Hindsight* (Federation Press, Sydney, 2001) at 374.

[18] So far only three persons have been appointed as arbiter, all of them male. Hence references to past actions of an arbiter use the term 'he'.

[19] R. Grove (ed.), *NSW Legislative Assembly Practice, Procedure and Privilege* (NSW Parliament, Sydney, 2007), p. 295.

[20] *Cobb and Co Ltd v Kropp* [1967] 1 AC 141; and *VAW (Kurri Kurri) Pty Ltd v Scientific Committee* (2003) 58 NSWLR 631.

[21] Mr Stephen Skehill was engaged twice by the Senate as a consultant to examine documents to assess parliamentary privilege, but he was not a 'delegate' of the Senate: Commonwealth, *Parliamentary Debates*, Senate, 5 December 2000, p. 20668 and 27 August 2001, p. 26625; and Senate, Committee of Privileges, 'Execution of Search Warrants in Senators' Offices – Senator Harris', 114th Report, August 2003. Stephen Odgers SC was appointed as an Independent Assessor to assess evidence and documents relevant to an inquiry, but again was not a delegate exercising the powers of the House: Commonwealth, Senate, Select Committee on a Certain Maritime Incident, *Report*, October 2002, p. 183. Campbell has noted that the act of seeking 'advice' from a third party on privilege 'could not be regarded as an impermissible delegation of parliamentary powers': E.

to purport to delegate its powers to a non-Member or non-officer,[22] or for that person to assert that he or she is exercising the powers of a House in making a decision. This would be a radical and probably unprecedented step, giving rise to all sorts of issues concerning parliamentary privilege.[23] The terms of Standing Order 52 do not suggest that the House has purported to take such a step.

Legal Professional Privilege

In *Egan v Chadwick*, Spigelman CJ and Meagher JA held that the Legislative Council may require access to 'legal advice on the basis of which the Executive acted, or purported to act' in order to make an informed assessment of the justification for an Executive decision.[24] In practice, the Legislative Council requires the production of documents that would otherwise be protected by legal professional privilege, which fall outside the narrow category of advices upon which the Government has acted or purported to act. The independent legal arbiter has contended that the 'public has a right to know what legal advice was sought and what legal advice was received by Government instrumentalities'[25] regardless of whether it was acted upon.

The only protection given to documents otherwise the subject of legal professional privilege under Standing Order 52 is that they may only be made available to Members, unless the House orders otherwise. This means that parties to litigation against the Government would not have free access to all the Government's legal advice. However, a Member may challenge the claim to privilege, in which case it is sent to the independent legal arbiter for evaluation. The way in which these documents are dealt with by the independent legal arbiter remains controversial.

Spigelman CJ observed in *Egan v Chadwick* that:

> One feature which distinguishes a claim of legal professional privilege from a claim of public interest immunity, is that in the case of the former there is no process of balancing conflicting public interests. The law has already undertaken the process of balancing in determining the rule.[26]

The courts are therefore only called upon to ascertain whether claimed documents fall within the category of legal professional privilege. They do not consider how sensitive the documents are or balance their value against the public interest in their availability to the court in legal proceedings.

The independent legal arbiter, seeing his role as that of a delegate of the Parliament rather than a legal adviser, has instead decided that even though a claim for legal professional privilege is 'technically

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Campbell, *Parliamentary Privilege*, (Federation Press, Sydney, 2003) p. 176. A delegation of powers, however, might well be regarded as impermissible.

[22] Note that the UK House of Commons has appointed a Parliamentary Commissioner for Standards to conduct inquiries for it, but UK House of Commons Standing Order 150 appoints the Commissioner as 'an officer of this House'.

[23] See, for example, *Hamilton v Al Fayed* [1999] 1 WLR 1569 at 1584, where an inquiry and report of the House of Commons Parliamentary Commissioner for Standards were held to fall within the 'proceedings of Parliament' and were therefore the subject of parliamentary privilege.

[24] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [86]; and per Meagher JA at [152].

[25] Report of Sir Laurence Street – Papers on M5 East, Cross City and Lane Cove Tunnels, 1 November 2006, p. 2.

[26] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [75]. See also Priestley JA at [121] and [125].

valid' he will reject the claim in relation to documents that are not sufficiently sensitive, in his view, to be withheld.[27]

More significantly, where matters of current interest to the public are raised, such as the reliability and safety of trains, all legitimate legal professional privilege claims have been overruled. In the case of the Millennium Trains, the independent legal arbiter observed:

> These public concerns to which I have referred may ultimately prove to be utterly unfounded and fanciful, but plainly they exist and public confidence in this whole project will be re-assured by an awareness that a general approach of publication has been adopted with only limited exceptions.[28]

Somehow, it is hard to imagine that the reasonable person on the Bondi train would feel particularly reassured if they knew (which is unlikely) that the legal correspondence between the State Rail Authority and its lawyers was now available to be viewed in the office of the Clerk of the Legislative Council.

Legitimate claims to legal professional privilege have been overruled on public interest grounds on a number of other occasions in relation to air ventilation stacks,[29] the cross-city tunnel,[30] tunnel air quality,[31] road tunnel filtration[32] and the Lane Cove Tunnel[33] whereas there was considered to be no overriding public interest in disclosing documents concerning the contemplated prosecution of the Department of Mineral Resources concerning the Gretley Mine Disaster.[34] There does not appear to be any objective criteria by which such judgments are made – simply an assessment of the degree of public interest or concern in a topic. To this extent the independent legal arbiter is acting as an inadequate form of opinion poll.

However, another independent legal arbiter has noted that 'if privileged documents are not necessary for the exercise by the Legislative Council of its constitutional function of review, the claim for privilege should be upheld. That is the position in relation to draft advices, or advices in relation to draft documents not executed.'[35] Indeed, it is arguable that if documents are not necessary for the exercise of the constitutional functions of the Legislative Council, then there is no power to compel their production at all.[36]

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[27] Report of Sir Laurence Street – Papers on M5 Motorway and Tunnel, 27 April 2001, p. 3; Report of Sir Laurence Street – Papers on Cross-City Motorway, 4 September 2003, p. 5; Report of Sir Laurence Street – Papers on Lane Cove Tunnel, 24 January 2006, p. 3.
[28] Report of Sir Laurence Street – Papers on Millennium Trains, 22 August 2003, p. 9.
[29] Report of Sir Laurence Street – Papers on M5 East, Lane Cove and Cross City Tunnel Ventilation, 4 November 2003, p. 10; and Report of Sir Laurence Street – Papers on Ventilation of M5 East, Lane Cove and Cross City Tunnels, 26 August 2004, p. 8.
[30] Report of Sir Laurence Street – Papers on Cross City Motorway, 15 November 2005, p. 3.
[31] Report of Sir Laurence Street – Papers on Tunnel Air Quality, 24 January 2006, pp. 4-5.
[32] Report of Sir Laurence Street – Papers on Road Tunnel filtration, 24 January 2006, pp. 5-6; and Report of Sir Laurence Street – Papers on M5East, Cross City Tunnel and Lane Cove Tunnel, 24 January 2006, p. 4; and M5 East, above n. 25, p. 4.
[33] Lane Cove Tunnel, above n. 13, pp. 1-2.
[34] Report of Sir Laurence Street – Papers on Gretley Mine Disaster, 9 May 2007, p. 2.
[35] Report of the Hon T R H Cole – Papers on the Desalination Plant, 20 December 2005, p. 10.
[36] *Attorney-General (Cth) v MacFarlane* (1971) 18 FLR 150.

Public interest immunity

When it comes to public interest immunity, courts balance the public harm from the disclosure of documents against the significance of the information to the issues at trial.[37] The rules concerning public interest immunity are therefore directed at identifying the category of documents, the disclosure of which may cause public harm. It is then up to the judge to balance that potential harm against the relevance and significance of that information for the legal proceedings in question. In order to minimise harm, a court may sever the parts of a document most relevant to the litigation so they can be used while keeping confidential the parts that would cause most harm if disclosed.[38] Alternatively, it might restrict disclosure to the legal advisers of the parties[39] or impose restrictions upon the reporting of proceedings. There is also the further limitation that documents disclosed in discovery may only be used 'for the purposes of the litigation in question, and not for any ulterior purpose, even after being put in evidence in open court.'[40]

It is a different matter when parliamentary proceedings, rather than court proceedings, are involved. While the rules for the identification of the category of privileged documents remain the same, the balancing exercise ought then to involve an assessment of the significance and relevance of the documents for parliamentary proceedings, as opposed to legal proceedings.[41] As Spigelman CJ has pointed out, judges do not have the relevant experience to balance the public harm from disclosure of documents against the significance of the information for the legislative or accountability functions of a House of Parliament. Moreover, he considered it inappropriate for a court to determine the importance of information for a parliamentary function.[42] Lindell has also argued that if the courts were to have such a role imposed upon them there may be a need to establish 'objectively determinable criteria' to define what is meant by the public interest. This could be done by prescribing factors to define classes of evidence that are protected.[43]

It is arguable that the evaluative role of the independent legal arbiter should be confined to deciding whether the documents fall within a privileged category. There are good grounds for arguing that the independent legal arbiter should not undertake the balancing task as, like a judge, the arbiter does not have the relevant experience to make such an assessment. This is consistent with the fact that the independent legal arbiter is a 'legal' arbiter with legal qualifications who is engaged to undertake a 'legal' evaluation of the validity of the claim to privilege.

However, even if the independent legal arbiter's task extends further to making this balancing assessment, the public harm from disclosure ought to be balanced against the relevance and significance of the document to the proceedings of the Legislative Council and the need for it to be made public in the course of those proceedings. It should be remembered that the documents for which privilege is claimed are already made available to Members of the Legislative Council and

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[37] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [51] – [52]; *Alister v R* (1983) 154 CLR 404; and *Sankey v Whitlam* (1978) 142 CLR 1, per Gibbs ACJ at 38-40 and per Stephen J at 49 and 58.
[38] *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090, per Lord Keith of Kinkel at 1135.
[39] *INP Consortium Ltd v John Fairfax Holdings Ltd* (unreported, Federal Court, Sheppard J, 18 July 1994).
[40] J. D. Heydon, *Cross on Evidence* (Butterworths, 6th Australian Edition, 2000), p 785, referring to *Riddick v Thames Board Mills Ltd* [1977] QB 881; and *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.
[41] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [52]. See also: E. Campbell, 'Parliamentary Inquiries and Executive Privilege' (1986) 1 *Legislative Studies* 10 at 12.
[42] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [52]-[53].
[43] G. Lindell, 'Parliamentary Inquiries and Government Witnesses' (1995) 20 MULR 383 at 406.

therefore already may be used to inform Members in fulfilling their functions of voting, introducing bills or asking questions of Ministers in Parliament. The question, therefore, ought to be whether the public harm caused by disclosure outweighs the need for such material to be made public in the fulfilment of the functions of the Legislative Council (eg in parliamentary debate or a committee report). As with the courts, consideration ought to be given as to whether the potential harm involved in making a document public could be limited by limiting access to the document[44] (eg maintaining the limitation to access by Members of the House only) or by limiting the use which can be made of the document (eg only for the purposes of parliamentary proceedings, with any other use being treated as contempt of Parliament).[45]

The independent legal arbiter has taken a different, and arguably incorrect, view of this balancing process. Instead, the arbiter has considered whether the general public is 'interested' in the topic and balanced the public harm from disclosure against the public interest in 'contributing to the common stock of public knowledge and awareness'.[46] The independent legal arbiter has therefore taken the policy decision that the public interest in the State's river systems outweighs Delta Electricity's 'legitimate claim for public interest immunity'.[47] Public interest in the Sydney Harbour foreshore and the Quarantine Station,[48] the ventilation of tunnels[49] and the 'place of Luna Park as part of the cultural heritage of Sydney'[50] have all been regarded as grounds for overriding public interest immunity. How, one wonders, is a retired judge qualified to make the judgment, as he has, that the public interest in the cross-city tunnel is lower than the public interest in millennium trains?[51] Should the public interest in new schools be measured, as it has been, by reference to the architectural magnificence of the headquarters of the Department of Education in Bridge Street?[52]

The independent legal arbiter appears to regard himself as a barometer for public opinion. Documents upheld as privileged in 2003 were later reassessed by the same independent legal arbiter as no longer being privileged. In 2006, the independent legal arbiter noted that since his report of November 2003, 'the public interest pendulum has swung significantly in favour of disclosure of what can be generically described as tunnel documentation'.[53] In another report he noted that a major consideration was that 'continuing non-disclosure has the potential to diminish public confidence in the RTA's handling of this project.' He was concerned that '[c]oncealment is a fertile ground for suspicion and loss of confidence' and that it was therefore in the public interest that there be a 'total

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[44] See, for example, *INP Consortium Ltd v John Fairfax Holdings Ltd* (unreported, Federal Court, Sheppard J, 18 July 1994), where access was limited to nominated legal representatives and undertakings were given to the Court to protect the confidentiality of the documents.

[45] Note the observation by Priestley JA at [139] that 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' and at [142] that the Council 'has the same duty to prevent publication beyond itself of documents the disclosure of which will… be inimical to the public interest…': *Egan v Chadwick* (1999) 46 NSWLR 563. See also: G. Carney, '*Egan v Willis* and *Egan v Chadwick:* The Triumph of Responsible Government' in G. Winterton (ed.), *State Constitutional Landmarks* (Federation Press, Sydney, 2006) at 329.

[46] Report of Sir Laurence Street – Papers on Delta Electricity, 14 October 1999, p. 3.

[47] Ibid, pp. 4-5.

[48] Report of Sir Laurence Street – Papers on Quarantine Station, 31 July 2001, p. 3.

[49] Tunnel Ventilation, above n. 29, p. 7.

[50] Report of Sir Laurence Street – Papers on Luna Park Leases, 19 June 2006, p. 3.

[51] Millennium Trains, above n. 28; and Cross City Motorway, above n. 27, p. 3.

[52] The independent legal arbiter regarded the 19th century sandstone building as 'eloquent of the comparable stature accorded to it alongside other great Departments of State': Report of Sir Laurence Street – Papers on Axiom Education Consortium, 15 July 2004.

[53] M5 East, above n. 32, p. 2.

lifting of all the existing constraints on disclosure'.[54] In a later finding on the same subject the independent legal arbiter observed that it was time for the RTA 'to stand up and be counted' and that only in this manner could 'suspicion, innuendo and false rumour be put to rest'.[55] Later again, he argued that making the material public will 'demonstrate that the need to attend to due process and legal complications was responsibly addressed by RTA's top management.'[56]

In other cases the independent legal arbiter concluded that the privileged documents should be released because they show the 'impressive record of the administration and formulation of policy'[57] and that the government has behaved with a 'commendable degree of careful attention' to a problem.[58] Two points can be made about these reports. First, that realistically it is most unlikely that the media would report upon the 'impressive record' or 'commendable' actions of the government, leading to a restoration of public confidence. Secondly, this reasoning bears little, if any, connection with the rationale for the power to require their production: that production of the documents is reasonably necessary for the Legislative Council to fulfil its legislative and scrutiny roles.

The few areas in relation to which public interest immunity has been upheld by the independent legal arbiter, regardless of the general public interest in the subject matter of the documents, are the protection of the identity of informers,[59] the protection of the privacy of complainants[60] and the prevention of the publication of infrastructure details, such as plans and specifications, that could be used to mount a terrorist attack.[61]

Commercial in confidence

Similarly, with respect to claims of commercial confidentiality, the independent legal arbiter has noted that courts balance the protection of a person's commercially sensitive material against the interest of the due administration of justice. However, the arbiter decided that his role was to balance the 'legitimate interests of RTA in protecting the commercially sensitive information in its possession' against the 'public interest in making the documents available to the public for the purpose of contributing to the common stock of public knowledge and awareness in relation to the information'.[62] As discussed above, the balancing of interests should instead take into account the need to make these documents public in the course of exercising the functions of the Legislative Council.

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[54] Cross City Motorway, above n. 13.
[55] Cross City Motorway, above n. 30, p. 4.
[56] M5 East, above n. 25, p. 4.
[57] Report of Sir Laurence Street – Papers on Audit of Restricted Rail Lines, 16 June 2005, p. 10.
[58] M5 East, above n. 29, p. 5.
[59] Report of Sir Laurence Street – Papers on M5 East Motorway, 25 October 2002.
[60] M5 East, above n. 29, p. 3; Report of M J Clarke QC – Papers on Taronga Zoo Asian Elephants, 6 December 2006, p. 2; and Report of Sir Laurence Street – Papers on Maldon-Dumbarton Railway Line, 12 December 2006, pp. 2-3.
[61] Report of the Hon T R H Cole – Papers on Circular Quay Pylons, 17 August 2005, p. 7.
[62] Report of Sir Laurence Street – Papers on M2 Motorway, 7 December 1999, p. 4. See also: Report of Sir Laurence Street – Papers on Mogo Charcoal Plant, 28 May 2002 (re timber resources); Report of Sir Laurence Street – Papers on Oasis Development, 6 January 2003 (re Oasis development); Cross City Motorway, above n. 30 (re cross-city tunnel); Report of M J Clarke QC – Papers on the audit of expenditure and assets, 26 June 2006 (re Sydney Ferries); Report of M J Clarke QC – Papers on State Finances, 16 January 2007 (re Sydney Catchment Authority)

Another independent legal arbiter has taken the view that persons or corporations who advance proposals to Government should anticipate that where they relate to the provision of prospective services in competition with government instrumentalities, it is likely that details of such proposals will become public.[63] However, in this case the independent legal arbiter balanced the public interest in confidentiality against the public interest 'in permitting the Legislative Council perform that task [of reviewing the actions of the Executive Government].'[64] While this is a preferable approach, it is still not made clear how or to what extent the publication of the documents is needed to perform that task. For example, could that task be fulfilled by Members quoting in the House from the parts of those documents that are necessary to bring the Executive to account, rather than publishing all of the documents and not using them at all in parliamentary proceedings?

Commercial confidentiality has been upheld by the independent legal arbiter with respect to documents relating exclusively to unsuccessful tenders.[65] Similarly, privilege has been upheld in preliminary or draft documents in some cases,[66] but not in concluded contracts.[67]

Cabinet documents

Chief Justice Spigelman in *Egan v Chadwick* referred to the need to protect from disclosure documents that would reveal the deliberations of Cabinet as this would be inconsistent with the doctrine of collective ministerial responsibility.[68] His Honour sought to distinguish between Cabinet documents that record the actual deliberations of Cabinet, which must remain privileged, and documents 'prepared outside Cabinet for submission to Cabinet', which may or may not give rise to an inconsistency with collective ministerial responsibility.[69] This distinction has led to allegations being made that documents submitted to Cabinet are illegitimately being categorised as Cabinet documents in order to be excluded from scrutiny by the Legislative Council.[70]

This argument arises partly because of confusion amongst the judiciary and academic commentators about the nature of 'Cabinet Minutes'. In New South Wales, Cabinet Minutes are not minutes taken of what is said in Cabinet. Indeed, no such minutes are taken in New South Wales, although some such records are made at the Commonwealth level.[71] In New South Wales, only the decisions of Cabinet are recorded.

Cabinet Minutes comprise the submissions and recommendations made to Cabinet by individual Ministers. They reveal the position put to the Cabinet by the Minister primarily responsible for the subject of the Minute. Other Cabinet documents include comments made by other departments on

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[63] Desalination Plant, above n. 35, p. 7.
[64] Ibid.
[65] Road Tunnel Filtration, above n. 32, p. 3; PowerCoal, above n. 12, p. 3;
[66] Report of Sir Laurence Street – Papers on Snowy Hydro Ltd, 16 August 2006, pp. 4-7.
[67] PowerCoal, above n. 12, p. 3.
[68] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [57].
[69] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [57]. This comment follows the distinction drawn by the High Court in *Commonwealth v Northern Land Council* (1993) 176 CLR 604, per Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ at 614.
[70] See the discussion in: G. Griffith, 'Parliamentary Privilege: Major Developments and Current Issues' *Background Paper No 1/07,* NSW Parliamentary Library Research Service, pp. 25-6; and B. Duffy, 'Orders for Papers and Cabinet confidentiality post *Egan v Chadwick*' (2006) 21(2) *Australasian Parliamentary Review* 93, at 98.
[71] See the discussion of Cabinet notebooks in *Commonwealth v Northern Land Council* (1993) 176 CLR 604.

Cabinet Minutes, criticising them and seeking a different outcome, and advice to the Premier setting out the different views of Ministers and agencies and an argument as to the preferable resolution of such conflicts. All these documents, while prepared prior to Cabinet, show the arguments that Ministers intend to put to Cabinet and when compared with the outcome, indirectly reveal the deliberations of the Cabinet. For example, if the resulting Cabinet decision is contrary to the position advocated by the Minister in a Cabinet Minute, it would show that the Minister had been overruled by his or her colleagues and would fracture collective Cabinet responsibility. That is why Cabinet Minutes, and documents commenting on them, are protected.

In *Egan v Chadwick*, Spigelman CJ accepted that Cabinet Minute 237-98 would reveal the deliberations of Cabinet because it would 'reveal the views of one of the Ministers who was responsible for administering the decisions to be made by Cabinet on this matter'.[72] His Honour concluded that the power of the Legislative Council to order the production of documents 'should, at least, be restricted to documents which do not, directly *or indirectly*, reveal the deliberations of Cabinet'.[73] On this basis Cabinet Minutes are excluded from the Legislative Council's power to require the production of documents because they would indirectly reveal the deliberations of Cabinet. Meagher JA took the broader view that the immunity of Cabinet documents from production was 'complete'[74]

More difficult is the status of reports that are attached as appendices to Cabinet Minutes. In such cases the report is usually attached because the Minister seeks permission to publish the report or it is used as evidence to support the Minister's recommendation to Cabinet (eg new legislation to deal with issues raised in the report). If, for example, the legislation or other action approved by Cabinet were contrary to the substance of the report, release of the report could breach collective Cabinet responsibility, because it would be known that the Minister responsible for introducing the legislation or taking the action supported a different position in the Cabinet. On the whole, in claims of public interest immunity, the courts have accepted that both Cabinet Minutes and their annexures are privileged,[75] unless other factors apply, such as the Minutes being very old and no longer politically sensitive and the annexure being factual material only.[76] Privilege has also been extended to documents 'brought into existence within government departments and instrumentalities for consideration in formulating a submission to cabinet' where they might have the indirect effect of revealing Cabinet deliberations.[77]

The NSW Legislative Council has nevertheless been critical of the Government for declining to provide it with reports that form part of Cabinet Minutes. A motion was placed on the Notice Paper for 6 June 2006 which accused the Government of an 'arrogant and unacceptable abuse of the

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[72] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [68]-[69].
[73] *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [70]. [My emphasis.] See also: *Commonwealth v CFMEU* (2000) 171 ALR 379, where the Full Federal Court reached the same conclusion.
[74] *Egan v Chadwick* (1999) 46 NSWLR 563, per Meagher JA at [154].
[75] *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources* [2003] NSWLEC 322, per McClellan CJ at [21]; *National Tertiary Education Industry Union v Commonwealth* [2001] FCA 610, per Weinberg J at [77]; *Victoria v Seal Rocks Victoria (Australia) Pty Ltd (No 2)* [2001] VSC 249, per Byrne J at [26]. Cf *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2001] FCA 1080, where a more limited view of the privilege was taken.
[76] *Adelaide Brighton Cement v South Australia* [1999] SASC 379, per Debelle J at [23].
[77] *Lanyon Pty Ltd v Commonwealth* (1974) 129 CLR 650, per Menzies J at 653; and *Victoria v Seal Rocks Victoria (Australia) Pty Ltd (No 2)* [2001] VSC 249, per Byrne J at [31]-[36].

Cabinet process' for claiming privilege in relation to documents that form part of Cabinet Minutes.[78] It further stated that there must be a limitation on the power of the Executive to claim Cabinet confidentiality and that if this were not achieved by conventions of respect and comity, it may ultimately be imposed by law.[79] Calls have been made for claims to Cabinet confidentiality to be determined by the independent legal arbiter.[80]

There was also a dispute about NSW Cabinet documents in 2005 with respect to studies concerning the Grey Nurse shark population. They formed part of a Cabinet Minute and were therefore regarded by the Government as exempt from the Legislative Council's order. On 1 December 2005 the Legislative Council then ordered that if the documents were not produced on the grounds that they formed part of a Cabinet Minute, a detailed index be prepared stating the reasons why the production of each document would disclose the deliberations of Cabinet. It is difficult to see how this could have been done without making the disclosure which would cause the damage. One could hardly reply that publishing the studies would show that Cabinet had rejected the recommendations of a particular Minister, as this would defeat the purpose of Cabinet confidentiality. The Crown Solicitor advised the NSW Government that the Legislative Council did not have the power to impose such a requirement. The Government therefore declined to comply and no further action was taken.[81]

Costs, risks and results

The action of the NSW Legislative Council in establishing the Standing Order 52 procedure and the role of an independent legal arbiter is unprecedented in Australia. It is also a model that other Legislative Councils may choose to adopt. The Victorian Legislative Council in 2007 introduced Sessional Order 21, which is based upon the NSW Legislative Council's Standing Order 52. Indeed, the Victorian Legislative Council also went so far as to suspend the Victorian Treasurer for his failure to produce documents ordered by the Legislative Council, but has not pursued the matter further.[82] An assessment of the costs, risks and consequences of such a procedure is therefore relevant not only in New South Wales, but in other States that adopt a similar procedure.

Since 1999 there have been at least 181 orders by the NSW Legislative Council for the production of documents, of which privilege was claimed by the Government for some or all of the documents on at least 108 occasions and reports were issued by the independent legal arbiter on at least 39 occasions.[83] Indeed, more orders were made for papers in 1999-2003 than in the previous 99 years.[84] Government estimates of the cost of collecting, copying and indexing these documents run into millions. The Legislative Council has also faced significant costs in engaging Senior Counsel or former Supreme Court judges as independent legal arbiters and storing massive numbers of documents.[85] The costs would be worth it if the result were better government. Whether this is in fact the case may be doubted.[86]

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[78] See the discussion of this motion by Gareth Griffith, above n. 70, pp. 32-4.
[79] NSW, Legislative Council Notice Paper No 4 – 6 June 2006, pp. 180-2.
[80] Duffy, above n. 70, at 104.
[81] See the discussion of this incident in: Want, above n. 5, at 82.
[82] Victoria, *Parliamentary Debates*, Legislative Council, 19 September 2007, p. 2752; 10 October 2007, p. 2983; 31 October 2007, p. 3234; 21 November 2007, pp. 3535-3548; and 22 November 2007, p. 3630.
[83] NSW Legislative Council statistics. For an earlier version of these statistics, see: Want, above n. 5, at 79.
[84] Clune and Griffith, above n. 1, p. 654.
[85] Want, above n. 5, at 85.
[86] See the discussion below.

In addition to costs, there are also considerable risks involved. Restricting privileged documents to the view of Members is, at least in theory, a frail shield. While privileged documents may not be made public without an order of the House, they may still be seen by all Members of the House. As the NSW Crown Solicitor has pointed out, this means that Members could require access to state papers concerning security details for visits by the US President and other world leaders, such as the Sydney meeting of APEC, and the details of police investigations into possible criminal conduct by Members.[87] There are some types of information that it is simply unwise to spread to a large number of people, no matter how trustworthy and responsible they are.

Further, where access to documents is restricted to Members, it is not clear whether a Member is prevented from telling a commercial competitor about details included in a document otherwise subject to commercial confidentiality, or passing on to a litigant information to which the litigant would not otherwise be entitled and which might undermine the fairness of legal proceedings. In practice, this does not yet appear to have been a problem. This might be because Members have respected the confidential nature of privileged documents and not exploited their access to them, or it might be because very few Members apparently ever take the time or make the effort to examine the documents themselves.[88]

The Legislative Council is often more effective in achieving the production of documents than it is in using them to hold the Executive to account or for the purposes of introducing legislation. On 6 April 2000, the New South Wales Treasurer made a speech noting the use made by Members of the state papers that had been produced because they were 'reasonably necessary' for the fulfilment of the Legislative Council's functions. He noted that with respect to documents tabled about Walsh Bay on 9 December, not one Member had looked at the papers. With respect to an order concerning the M5 motorway, one Member had looked at the privileged documents and none had looked at non-privileged documents. With respect to the M2 motorway documents, one Member had looked at the privileged ones and none had looked at the non-privileged ones.[89]

Most remarkable was the consideration of documents concerning Sydney Water and the contamination of Sydney's water supply. It was the withholding of the privileged Sydney Water documents which had led the Legislative Council to suspend the Treasurer, resulting in the *Egan v Chadwick* ruling that that the House could compel their production because it was reasonably necessary for the proper exercise of its functions. After the Court of Appeal's judgment in *Egan v Chadwick* was handed down, the Legislative Council again called for the tabling of these privileged documents on the basis that the House, on behalf of the people of New South Wales, had the right to know about the safety of the water supply.[90] The documents were tabled on 29 June 1999. Apparently, these documents were so 'necessary' for the House to fulfil its functions that by 6 April 2000 only one Member had been to look at them.[91] Subsequently, the Legislative Council resolved

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[87] I V Knight, 'Government Lawyers, the Executive and the Rule of Law', 12 September 2006, p. 3. See also the risk to police undercover officers raised in debate upon the resolution requiring the production of the report on Operation Retz by the NSW Police: NSW, *Parliamentary Debates*, Legislative Council, 23 November 2006, p. 4706.

[88] It has also been pointed out that Members 'may not have the legal or financial skills necessary to interpret' privileged documents: Want, above n. 5, at 80. See also: Clune and Griffith, above n. 1, p. 655.

[89] NSW, *Parliamentary Debates*, Legislative Council, 6 April 2000, p. 4285, per Mr Egan.

[90] NSW, *Parliamentary Debates*, Legislative Council, 23 June 1999, pp. 1132-3.

[91] NSW, *Parliamentary Debates*, Legislative Council, 6 April 2000, p. 4285, per Mr Egan.

that all these privileged documents be published without any restriction on access,[92] presumably so that others, such as the media, could hold the government to account instead of the Legislative Council.

As there have now been over 180 orders for the production of documents, it would be interesting to find out how often, if at all, the documents produced are looked at by Members. Susan Want, the Acting Director Procedure of the Legislative Council, wrote in 2007 that 'anecdotal evidence suggests that some returns receive only a cursory inspection.'[93] There is no need for anecdotal evidence, as Standing Order 52 requires the Clerk to keep a register recording who looks at the documents tabled under that order. However, the Clerk has refused access to the register as it might result in the House being held in disrepute.[94] Transparency is apparently only a burden to be imposed by the Legislative Council upon the Executive, but not to be exercised by the Legislative Council itself.

One might well ask for whom is the production of these documents really intended if Members themselves are not interested enough to read them? Again, the record of those who have viewed the documents would be useful to show the extent to which the media, commercial bodies and community groups make use of tabled documents. In the absence of such factual evidence, one can only rely on anecdotal evidence, which suggests that most often the orders appear to be made to satisfy the demands of private lobby groups, such as those concerned about the ventilation of tunnels. On other occasions orders may simply be fishing expeditions, undertaken in the hope that media representatives might be sufficiently interested to find something embarrassing for the government. Occasionally disgruntled litigants lobby for orders to be made to help them in their litigation. Certainly commercial organisations make use of public access to documents, as there is some anecdotal evidence that companies putting proposals to government have used tabled commercial-in-confidence documents to copy innovative financial structures.

It also appears that Standing Order 52 is being used as a backdoor means to thwart the exemptions in the *Freedom of Information Act.* People denied access to material that is exempt, by law, under the *Freedom of Information Act* can simply obtain the material by lobbying a Member of the Legislative Council to seek the production of documents.[95] Such a motion is likely to receive sufficient support if there is a possibility that it might cause the Government trouble.[96]

It should always be remembered that the reason documents may be required to be produced is because it is reasonably necessary for the House to fulfil its functions. As the current President of the Legislative Council, Peter Primrose, has previously observed:

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[92] NSW, *Parliamentary Debates*, Legislative Council, 17 November 2000, p. 10250.
[93] Want, above n. 5, at 84.
[94] Telephone call from Stephen Frappell, Legislative Council, 31 October 2007, advising that the Clerk had denied the author access because it might bring the Legislative Council into disrepute.
[95] For example, members of the 'Save Beacon Hill High School Committee' sought the production of documents under Order 52 after failing to obtain access to information through freedom of information requests: NSW, *Parliamentary Debates*, Legislative Council, 22 November 2006, p. 4580.
[96] Note that in the 1999-2002 Session, out of 30 orders made, 27 were initiated by independents and minor parties and only three by the Coalition Opposition. The cross-benchers do not appear to have had any difficulty in securing Opposition support for their motions. See: Clune and Griffith, above n. 1, p. 654.

> This House can order the production of documents only for the purposes of its legislative function or executive accountability. It cannot order the production of documents for other purposes such as assisting others in litigation.[97]

From a policy point of view, one must also ask oneself whether this process has resulted in better government. Have government processes been improved because of the potential for scrutiny, or have government processes been made worse because of reluctance to put advice on controversial matters in writing, resulting in government by Chinese whispers? It is impossible for someone outside Government to answer this question accurately. However, there does appear to be anecdotal evidence that fewer documents are being produced about controversial decisions and more matters are being dealt with through oral briefings.[98] This is a trend that commenced with *Freedom of Information* legislation, but appears to have increased in the face of Standing Order 52. For example, legal advice on controversial matters may be requested to be made orally first before it is allowed to be placed in writing.

Some commercial bodies dealing with the NSW Government have reacted to the prospect of Legislative Council orders by no longer providing the Government with material that would otherwise have been treated as 'commercial-in-confidence'. Instead, government officers may be invited to inspect commercial records but not be permitted to take copies or record what they have viewed. This reduces transparency and makes it difficult for the many arms of government to have access to all the information they need to make rational decisions. It also means that records are incomplete and people in the future will have no paper trail to tell them how important and controversial decisions were made.

How can the system be improved?

Despite the above criticism of the practice of the Legislative Council in requiring the production of state papers, it is overall quite a sensible system. It just needs to be refocused and rebalanced so that it fulfils its purpose while at the same time not damaging or undermining the system of government. As Gibbs ACJ stated in *Sankey v Whitlam*, '[n]o Minister, or senior public servant, could effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public.'[99] There is good reason for some matters being regarded as privileged. The challenge is to get the right balance between privilege and accountability. How then might the operation of the system be improved?

1. The production of documents should only be ordered if it *truly* is reasonably necessary for the exercise of the functions of the Legislative Council. Are the documents necessary for a committee to complete its inquiry? Are they needed to inform Members with respect to a Bill? Are they intended to be used to bring Ministers to account *in the Legislative Council*?
2. The scope of the requests needs to be narrowed to those documents that are actually needed, not broad fishing expeditions.[100]

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[97] NSW, *Parliamentary Debates*, Legislative Council, 17 November 2000, p. 10247.
[98] P. Maley, 'Bureaucrats use word of mouth to avoid paper trail trap' *The Australian*, 6 November 2007, p. 2. See also the *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007.
[99] *Sankey v Whitlam* (1978) 142 CLR 1, per Gibbs ACJ at 40.
[100] See also the criticism by Want that Members should better target orders, not undertake trawling exercises, and 'ensure that orders are not unnecessarily burdensome on the government nor capture documents not required.': Want, above n. 5, at 84.

3. If Members order the production of documents, they ought to be committed to using them for the purpose for which they were ordered, that is, for the purposes of the functions of the Legislative Council.
4. While it may be appropriate to make non-privileged documents public, privileged documents should be limited to Members to inform them in the exercise of their parliamentary functions.
5. The role of the independent legal arbiter should be confined to ensuring that the Government does not exploit the system by attempting to include with the privileged documents other documents that could not reasonably be characterised as falling within an established category of privilege.

Production of documents – Senate

Source of the power and its exercise

In contrast to New South Wales, the Senate's power to require the production of documents is derived from s 49 of the Commonwealth Constitution.[101] It states that the Senate's powers, privileges and immunities and those of its Members and committees shall be such as are declared by the Parliament, and until declared shall be those of the United Kingdom House of Commons at the establishment of the Commonwealth. Some of the privileges of the Houses have been declared by the *Parliamentary Privileges Act* 1987, but most of their powers remain to be determined by reference to the powers of the House of Commons in 1901.[102]

On 16 July 1975 the Senate passed a resolution that affirmed its power to require the production of files and papers, based upon the powers of the United Kingdom House of Commons. It stated that subject to the determination of all just and proper claims of privilege, it is the obligation of persons to produce documents as required by the Senate. It also declared that if a claim of privilege is made, based on an established ground, 'the Senate shall consider and determine each such claim'.[103] As a matter of *power*, the Senate claims that it has power to require the production of all government documents, but 'it is acknowledged that there is some information held by government which *ought* not to be disclosed'.[104] This is consistent with the position of the House of Commons in 1901.[105] As Senator Evans once noted, the Senate may have the 'technical power' to compel evidence, 'but the way in which it should be exercised in practice should be regarded as subject to all sorts of conventions and limitations'.[106]

The Senate became active in requiring the production of government papers in the 1990s. In the 1993-96 Parliament the Senate made 53 orders for the production of documents, of which the government did not comply with four. In the 1996-8 Parliament there were 48 orders, 5 of which

[101] The effect of s 49 is now preserved by s 5 of the *Parliamentary Privileges Act* 1987 (Cth).
[102] *Parliamentary Privileges Act* 1987 (Cth), s 5.
[103] Commonwealth, *Journals of the Senate*, 16 July 1975, p. 831.
[104] H. Evans (ed.), *Odgers' Australian Senate Practice*, (CanPrint Communications, Canberra, 11th ed., 2004) p. 464. [My emphasis.]
[105] Senator Greenwood and R. J. Ellicott, *Parliamentary Committees: Powers Over and Protection Afforded to Witnesses*, Parliamentary Paper 168/1972, at pp. 71-2.
[106] Commonwealth, Senate Standing Committee of Privileges, *Hansard*, 18 August 1994, p. 19.

involved non-compliance.[107] In 2002, 36 orders were made, with a further 35 made in 2003 and 21 in 2004. The numbers dropped dramatically once the Government took control of the Senate in 2005, with 18 orders for production being made in the first half of 2005 before the Senate changeover and none in the rest of 2005. In 2006 there was only one order for production and in 2007 there were none.[108]

Enforcement of the power

Rather than seeking a legal adjudication in the courts on whether or not privilege can be claimed in response to an order for the production of documents, the Senate has taken the view that the question is political, rather than legal, and that any conflict must be resolved politically.[109] In 1994 the Leader of the Australian Democrats, Senator Kernot, introduced a Bill that would have allowed the courts to determine claims for privilege in the Senate by balancing prejudice to the public interest against the public interest in the free conduct of parliamentary inquiries.[110] The Bill would have allowed the courts to enforce lawful Senate orders for the production of documents and would have permitted non-disclosure if disclosure 'would be substantially prejudicial to the public interest' and not outweighed by 'the public interest in ensuring that a House and its committees can conduct inquiries freely'.[111] This proposal was rejected by the Privileges Committee which considered that such matters should be dealt with by the relevant House.[112] The courts too, have generally been reluctant to adjudicate upon matters concerning disputes within the Parliament or between a House and the Executive,[113] and have suggested that such matters are better dealt with by 'compromise and cooperation rather than confrontation'.[114]

The ultimate power of the Senate is to impose a penalty of a fine or imprisonment for contempt of Parliament resulting from a failure to obey a valid order of the Senate. Such action, under the *Parliamentary Privileges Act* 1987, would no doubt draw the courts into the controversy. The Senate has been reluctant to use this most extreme of its powers because of the 'probable inability of the Senate to punish a minister who is a member of the House of Representatives, and the unfairness of imposing a penalty on a public servant who acts on the directions of a minister.'[115]

The Senate has instead exercised 'punitive' and 'coercive' remedies. The punitive remedies punish the government by making it difficult for it to manage government business. This might include the extension of question time,[116] the removal of procedural advantages for Ministers, the delay of government legislation[117] and restrictions on the ability of particular Ministers to handle government

[107] R. Laing, 'Remedies Against the Executive for Non-Compliance with Orders for the Production of Documents – Recent Developments in the Australian Senate' (2001) 69 *Table* 29, at 30.
[108] Australian Senate, Consolidated General Statistics 1991-2000 and 2001-7.
[109] Evans, above n. 104, p. 465.
[110] *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill* 1994 (Cth).
[111] See the discussion of the Bill in: Campbell, above n. 21, p. 160.
[112] Evans, above n. 104, p. 478. See also: Lindell, above n. 43, at 407.
[113] *Halden v Marks* (1995) 17 WAR 447; and *Crane v Gething* (2000) 97 FCR 9.
[114] *United States v House of Representatives* 556 F Supp 150 (1983), at 153.
[115] Evans, above n. 104, p. 483; and Laing, above n. 107, at 36 with respect to the MRI 'scan scam'.
[116] See, for example, the extension of question time because of the refusal of the Minister for Family and Community Services to table a report: Commonwealth, *Parliamentary Debates*, Senate, 19 October 1999, p. 9933.
[117] See, for example, the deferral of two Bills in 2003 until the Government produced related documents ordered by the Senate: Commonwealth, *Parliamentary Debates*, Senate, 12 August 2003, p. 13298. Note, however, that a political deal was later done in relation to the passage of these Bills: Evans, above n. 104, p. 482.

business.[118] While these remedies might be effective (as was the suspension of the Treasurer of New South Wales) in forcing government compliance, there has been greater reluctance amongst Opposition Members, who see themselves as an alternative government, to take such action.[119] It has also been argued that restricting the ability of a Minister to operate in the Senate merely gives him or her a holiday from accountability and does nothing to increase scrutiny.[120]

Coercive remedies used in the Senate include those that result in obtaining production of information by alternative means, such as committee inquiries and the use of others, such as the Auditor-General, to obtain the information.[121]

Public interest immunity

As Geoff Lindell noted in 1995, the 'extent, if any, to which executive privilege operates as a legal restriction on the power of the Houses of Parliament to require official witnesses to answer questions or produce documents, remains an open question.'[122] However, he formed the view that public interest immunity does not legally limit the powers of inquiry derived from s 49 of the Constitution.[123] The court decision of *Egan v Chadwick,* while giving some support to this view, does not provide a definitive answer, as it concerned the common law or inherent powers of a House of Parliament, which are likely to be different to those of the Commonwealth Parliament that derive from s 49 of the Constitution.[124]

The Senate has taken the view that it is up to it to determine whether claims for privilege are valid. This approach is often regarded as analogous to that of the courts which no longer accept conclusive certificates from Ministers as to privilege, but instead determine the validity of privilege claims themselves.[125] It is also argued that the Executive should not be a judge in its own cause in making public interest immunity claims. Equally, however, the Senate should not be a judge in its own cause either. Once the information is revealed to the Senate for the purposes of it assessing the claim for privilege, the damage resulting from publication may have already been done. While the NSW Legislative Council may have achieved a greater level of balance with the use of an independent legal arbiter, as shown above, that system is not ideal either.

The Senate has generally accepted claims for public interest immunity where the documents, if disclosed, could:

- prejudice legal proceedings (especially where a jury is involved, but not in relation to appellate court proceedings);
- prejudice law enforcement investigations;

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[118] Laing, above n. 107, at 30.
[119] Laing, above n. 107, at 31.
[120] Commonwealth, *Parliamentary Debates*, Senate, 13 October 1999, per Senator Faulkner at pp. 9531-2.
[121] Laing, above n. 107, at 30.
[122] Lindell, above n. 43, at 398.
[123] Ibid at 403. See also: Campbell, above n. 41, at 15.
[124] H. Evans, 'The Parliamentary Power of Inquiry: Any Limitations?' (2002) 17(2) *Australasian Parliamentary Review* 131 at 133.
[125] H Evans, 'Public Interest Immunity Claims in the Senate' (2002) 13 *Public Law Review* 3, at 4. See also: Letter by the Clerk of the Senate to Ms McDonald, 11 November 1999, in Senate Community Affairs Committee, *Report on Proposals for Changes to the Welfare System,* 22 November 1999, Appendix 5.

- damage commercial interests (such as disclosing tenders before the call for tenders is closed);[126]
- unreasonably invade the privacy of individuals;
- disclose the deliberations of Cabinet or the Executive Council;
- prejudice national security or defence; or
- prejudice Australia's international relations or relations with the States.[127]

The Senate has rejected claims for privilege on the ground that a document is a 'working document' or provides some form of advice to government. Unless some form of particular harm to the public interest could be identified if it were to be disclosed, the Senate has concluded that internal government papers and advice must be provided. It has also expressly rejected as excuses the claim that disclosure will 'confuse the public debate' or 'prejudice policy considerations' as well as rejecting the notion that all advice to Ministers is subject to Cabinet confidentiality.[128]

The Commonwealth Government has produced its own guidelines for official witnesses appearing before parliamentary committees that list categories of information which in the Commonwealth's view could fall within a claim for public interest immunity.[129] In doing so, it draws on the exemptions listed in the *Freedom of Information Act,* although the Senate has not accepted that such exemptions apply to it. The guidelines list standard categories concerning material that could damage national security or international relations, Cabinet documents and material that could prejudice the administration of justice. They also include in clause 2.32(d) the following scarcely comprehensible, although extremely comprehensive, category of claimed privilege:

> material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of Government where disclosure would be contrary to the public interest.[130]

This category is presumably intended to be capable of covering almost all government documents. This is because most submissions by public servants are required to include some kind of recommendation, even if it be only that the information reported be noted.

One difficult area has been how to deal with Senate calls for the production of documents where the matter is before a court, a royal commission or another inquiry. The Fraser Government refused to produce 'Bottom of the Harbour' documents because they might prejudice forthcoming litigation.[131]

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[126] See also the 'Statement of Principles on Commercial Confidentiality and the Public Interest' by the Australasian Council of Auditors-General, which was referred to by: Commonwealth, Senate, Employment, Workplace Relations and Education References Committee, *Order for production of documents on university finances,* October 2003, p. 14; and the Senate's resolution concerning commercial-in-confidence claims: Commonwealth, *Parliamentary Debates,* Senate, 30 October 2003, p. 17220. See also: Evans, above n. 104, p. 481.

[127] H. Evans, Grounds for Public Interest Immunity Claims', 19 May 2005, pp. 2-4.

[128] Commonwealth, *Parliamentary Debates,* Senate, 25 November 1999, p. 10751. See also: Evans, above n. 104, pp. 479-80.

[129] Commonwealth, *Parliamentary Debates,* Senate, 30 November 1989, pp. 3693-702.

[130] See also: *Freedom of Information Act* 1982 (Cth), s 36(1).

[131] Note, however, the Senate's resolution that the documents be published but with material removed by the royal commissioner (later amended to a former judge) to ensure that there would be no prejudice to the conduct of legal proceedings: Commonwealth, Senate, *Parliamentary Debates,* 23 September 1982, p. 1238 and p. 1256.

The same justification was given by the Howard Government in 1998 with respect to documents concerning the waterfront dispute. The Senate has recognised a *sub judice* convention, under which debate or inquiry is limited to avoid prejudicing proceedings before a court. There must, however, be a real danger of prejudice to those proceedings by publicly debating the matter in the Senate. Such a danger is more likely to arise where a jury is involved, or where proceedings are preliminary before a magistrate's court.[132] If witnesses were likely to be influenced or if judges were forced to abort trials, that would be contrary to the public interest.[133]

In 1999 the Government refused to produce documents in relation to the MRI 'scan scam' on the ground that there was a risk of prejudice to administrative inquiries and in 2001 it refused to produce documents in relation to the HIH Insurance collapse because a royal commission was to be held into the matter.[134] Again, in 2006 the Government instructed officers not to answer questions at Senate Estimates about the AWB Iraq bribery scandal because it was a matter before the Cole Commission. The Clerk of the Senate advised that the Senate's *sub judice* convention did not apply to executive commissions of inquiry. The Senate's Procedural Information Bulletin states that the government seemingly accepted that point and said that it was not claiming public interest immunity, but rather that it was 'simply a refusal to answer based on the desirability of leaving relevant questions to the commission of inquiry.'[135]

There are good arguments on both sides of this issue. On the one hand, it is often undesirable for two inquiries to be held simultaneously into the same matter, as it diffuses the resources of the parties to respond and causes each inquiring body to be looking over its shoulder at the evidence received by the other. There is also the potential for conflicting findings. On the other hand, if an executive inquiry has limited terms of reference and cannot address important issues, it might be appropriate for a Senate inquiry to complement, rather than compete with, its work.

The Senate has not tested the extremes of its powers.[136] It has not punished Ministers or public servants for contempt for failing to produce documents. This may be so for a number of reasons. First, any Opposition contemplating the prospect of election to Government is aware that what it does unto others it will have done unto itself. Secondly, there has been a marked reluctance to have courts become involved, lest the Senate's powers might not be as great as threatened. Thirdly, it has generally been regarded as unfair to make findings of contempt against public servants who are acting on ministerial direction. Finally, a policy of moderation and reasonableness makes great sense. Extreme actions would be likely, in the end, to bring the Senate into disrepute.

An adjudicator of privilege

The difficulty with the claim that the Senate must decide upon privilege is that the point of maintaining privilege may be destroyed if the documents are revealed to the Senate for it to decide upon the claim of privilege.[137] The Senate has rejected the use of the courts to determine privilege.

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[132] Commonwealth, Senate, 'Orders for production of documents', Brief No. 11, p. 3.
[133] Letter to Ms McDonald, above n. 125.
[134] Evans, above n. 125, at 4-6. See also: Commonwealth, *Parliamentary Debates*, Senate, 23 May 2001 p. 24214; and 24 May 2001 pp. 24334-5 regarding the Government's refusal to produce the documents.
[135] Commonwealth, Senate, *Procedural Information Bulletin No 189*, 20 February 2006, p. 2.
[136] Evans, above n. 125, at 6. See also: Evans, above n. 104, p. 468.
[137] Campbell, above n. 41, at 16.

Occasionally the use of an independent third party to determine privilege issues has been raised.[138] The Joint Select Committee on Parliament noted in 1984 that while it is 'theoretically possible that some third body could be appointed to adjudicate between' the contentions of the Executive and the Parliament on claims for privilege, 'the political reality is that neither would find this acceptable'.[139] Accordingly, it was considered that such clashes should be left to the political field.

However, the Senate Privileges Committee suggested in 1995 that the use of a third party might be an acceptable solution, noting that the Senate had previously asked the Auditor-General to fulfil such a role with respect to government claims that documents were commercial-in-confidence.[140] The Auditor-General was used to fulfil this role in the 'Casselden Place Affair' in 1994.[141]

In 1982 when the Senate ordered the production of documents concerning 'bottom of the harbour' tax schemes, it sought to rebut Government arguments that this would threaten the fair administration of justice in relation to prosecutions against tax avoiders by having a third party edit the documents before they were tabled in the Senate. It was first proposed that the royal commissioner, Mr Costigan, do so,[142] but he declined. It was then proposed that a former judge, Sir John Minogue, delete material which might prejudice the outcome of legal proceedings, but the Government still refused to produce the documents.[143] The dispute was terminated by the dissolution of the Parliament and a change of government.

So far, no system has been developed by the Senate, akin to that used in New South Wales and Victoria, to allow a third party to assess the status of documents.

Power to summon and question witnesses – Senate

Privilege

The Senate's resolution on privilege of 25 February 1988 recognises that witnesses may raise objections to the giving of evidence, impliedly recognising claims of public interest immunity. Clause 1(10) of the Resolution sets out a procedure to apply where the witness objects to answering a question on any ground, including relevance or privilege. The witness is to be invited to state the ground for the objection. The committee then considers whether to insist upon an answer to the question, having regard to both relevance and the importance of the information to its inquiry. If it decides to require the witness to answer the question, the witness must be informed of the reasons why and required to answer the question in private session, unless the committee determines that it is 'essential' to its inquiry that the answer be in public. If the witness still declines to answer the question, the committee is to report the facts to the Senate.

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[138] Lindell, above n. 43, at 404; Campbell, above n. 41, at 16; and Campbell, above n. 21, pp. 175-6.
[139] Commonwealth, Joint Select Committee on Parliamentary Privilege, *Report*, October 1984, Parliamentary Paper 219/1984, p. 154. See also Evans, above n. 104, p. 474.
[140] Commonwealth, Senate Committee of Privileges Committee, 'Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, Casselden Place reference', *52nd Report*, March 1995, Parliamentary Paper 21/1995, p. 5. See also: Evans, above n. 104, p. 479.
[141] Commonwealth, *Parliamentary Debates*, Senate, 22 June 1994, pp. 1818-9.
[142] Commonwealth, *Parliamentary Debates*, Senate, 23 September 1982, p. 1105.
[143] Commonwealth, *Parliamentary Debates*, Senate, 25 November 1982, p. 2820. See also: Evans, above n. 104, p. 473; and Evans, above n. 125, at 4.

Clause 6(12) states that a witness before the Senate or a committee shall not 'without reasonable excuse' refuse to answer any relevant question when required to do so and Clause 6(13) provides that a person shall not 'without reasonable excuse' refuse to attend before the Senate when ordered to do so or refuse to produce documents when ordered to do so.

In clause 3 the Senate declares that it will take into account, when determining matters of contempt, that its power to deal with contempt should be used 'only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions.' It must also take into account whether a person who committed the alleged act of contempt 'had any reasonable excuse for the commission of the act'. What is a 'reasonable excuse' or an 'improper act' is not defined.

If a question fell outside the committee's terms of reference or outside the constitutional powers of the committee to compel evidence, then this would appear to be a reasonable excuse to refuse to answer the question.[144] The extent to which privilege provides a reasonable excuse remains unclear, but given that it is a resolution of the Senate that is to be interpreted, rather than a law, it is ultimately a matter for the Senate to decide, subject to any overriding law or convention.

Instructions to public servants not to answer questions

Since the Government gained control of the Senate, it has more frequently instructed public servants not to answer questions on particular subjects.[145] It is not clear whether it is a 'reasonable excuse' for a public servant to refuse to answer a question upon an instruction from the Minister.[146] However, the view has consistently been taken that it would be unfair to punish a public servant for contempt in such circumstances.[147]

The power of the Commonwealth Government to order statutory officers or employees of statutory authorities not to answer questions has been the subject of debate. In 2006 during the AWB Iraq bribery scandal, the Commonwealth apparently instructed public servants not to answer any questions on the matter as it was before a commission of inquiry. This 'wheat gag' was said not to apply to the Wheat Export Authority because it was a statutory authority that was not subject to government direction. The officers of other statutory authorities such as the Australian Taxation Office, AUSTRAC and AUSTRADE, in contrast, were said to be subject to the 'wheat gag' because they were subject to ministerial direction, although it appeared that no written ministerial direction had been given as required. Officers of ASIC, however, took the view that they were not subject to the 'wheat gag'. The Clerk of the Senate pointed out that the power of a Minister to direct public

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[144] Evans, above n. 104, p. 422. See also: I. C. Harris, *House of Representatives Practice*, (Department of the House of Representatives, Canberra, 4th ed, 2001) p. 636; and *Tobin v United States of America* 306 F 2d 270 (1962).

[145] See, for example, the refusals to answer questions during the 2007 Estimates hearing, ranging from the 'Wheat Gag' to the refusal to name the provider of the costumes for the APEC leaders on the ground that it would spoil the surprise: Commonwealth, Senate, Standing Committee on Finance and Public Administration, *Additional Budget Estimates*, 12 February 2007, pp. 190-1. Compare the position in 1995 when it was said that the Commonwealth Government 'has not gone so far as to claim the ability to direct civil servants who give evidence to parliamentary committees "not [to] answer questions which are or appear to be directed to the conduct of themselves or other names officials"': Lindell, above n. 43, at 395-6.

[146] Lindell, above n. 43, at 409 and 419-20; and Campbell, above n. 41, at 14.

[147] Campbell has also pointed out that the *Egan* litigation dealt only with Ministers and a court might take a different view on whether public servants could be held in contempt for acting on ministerial instructions in not giving evidence: Campbell, above n. 21, p. 161.

servants and statutory authorities does not override the power of the Senate to compel the production of evidence.[148] It might, however, activate the principle that persons should not be held in contempt of Parliament for acting on ministerial instructions.

There is also a possibility that a Minister's instruction to a public servant (or statutory authority) not to give evidence, even though the claim of privilege has been considered and rejected by the Senate, amounts to influencing the witness with respect to his or her evidence to the Senate, in breach of s 12 of the *Parliamentary Privileges Act* 1987 (Cth).[149]

Compellability of Members of the other House and State Houses

The Senate has recognised that it does not have power to compel the attendance of Members of the House of Representatives or Members of State Houses of Parliament or State office-holders.[150] It may request them to attend and give evidence,[151] and on a number of occasions they have done so.[152] However, there is no power of compulsion.

Section 49 of the Commonwealth Constitution gives the Members of both Houses the same immunities as those of the Members of the House of Commons at the establishment of the Commonwealth. This included immunity from being compelled to appear before and give evidence to the other House or its committees. Further, the Clerk of the Senate has argued that it is a matter of comity between the Houses that the Members of one House be immune from compulsory examination by the other and that an immunity may arise also from the application of art 9 of the *Bill of Rights* 1689.[153]

Both Houses have the power to order their own Members to appear and answer questions.[154] It is therefore likely that a House could compel one of its own Members to appear before the other House to answer questions,[155] although such action is highly unlikely.[156]

As for compelling Members of State Houses to appear before a committee of a Commonwealth House, there are two concerns. First, that the Houses of the Commonwealth Parliament might not have the power to compel evidence unless the inquiry concerned matters within Commonwealth legislative power.[157] If this is the case, an inquiry into a State matter might not entail the power to compel evidence from State Members of Parliament or office holders. Secondly, compelling State

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[148] Commonwealth, Senate, *Procedural Information Bulletin No 189*, 20 February 2006, pp. 2-4.
[149] Lindell, above n. 43, at 421.
[150] Evans, above n. 104, p. 423.
[151] Commonwealth, Senate, Standing Order 178. See also: House of Representatives, Standing Order 252.
[152] See examples listed in: Evans, above n. 104, p. 424.
[153] Evans, above n. 124, at 135. Lindell, on the other hand argues that the Senate is not a place 'out of Parliament' and that article 9 does not apply: G Lindell, 'Current and Former Members and Ministers (and their Ministerial Staff): Immunity from Giving Evidence to Parliamentary Inquiries Established by Houses of Parliament in which they were not Members' (2002) 17(2) *Australasian Parliamentary Review* 111 at 118.
[154] Commonwealth, Senate Standing Order 177; and House of Representatives Standing Order 249.
[155] Evans, above n. 104, p. 425.
[156] The House of Representatives resolved in 1993 that it is not appropriate that any Member of the House of Representatives be required to appear before a committee of the Senate against the Member's will: Commonwealth, House of Representatives, *Votes and Proceedings*, 1993-05, pp. 342-3. See also: Harris, above n. 144, pp. 641-2.
[157] See Lindell, above n. 43, at 386-9 and the analogous position in: *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644; and *Lockwood v Commonwealth* (1954) 90 CLR 177.

Members or office holders to give evidence might be contrary to the *Melbourne Corporation* principle[158] and constitutional implications derived from the federal system.[159] Further, the arguments for comity are intended to avoid the prospect of tit-for-tat inquiries that affect the ability of the Houses to function properly.[160]

Former Members of Parliament

Perhaps the biggest controversy has concerned whether the Senate has the power to compel evidence from former Members of the House of Representatives. This issue arose during the 'children overboard' inquiry of the Select Committee on a Certain Maritime Incident. The Minister primarily involved in the incident, Peter Reith, was not seeking re-election. The House of Representatives had already been dissolved at the time the incident occurred and as he had not nominated for re-election, he could only be accountable as a former-Member. There were duelling opinions between the Clerks of the two Houses, with assistance from Senior Counsel and academics, as to whether Mr Reith could be summoned before the Senate Committee.

The Clerk of the Senate, Harry Evans, and Bret Walker SC took the view that former Ministers could be summoned by the House of which they had not previously been a Member. Any immunity that they had as Members of the House of Representatives ceased when they ceased to be Members. It was not an immunity in relation to their office or actions as Minister and therefore did not carry on to protect former Ministers.[161] Walker noted that as former Members no longer have any public duty to attend to the business of their House, there is 'no functional rationale for any such immunity'.[162]

The Clerk of the House of Representatives, Ian Harris, took the view that the principle behind the immunity of current Members, which he saw as the independence of the Houses,[163] had to continue after a person ceased to be a Member or otherwise the independence of the House would be undermined. In his view, this immunity attached not only to the Member's role as a Member of Parliament but also to the ministerial duties for which he or she is responsible to that House.[164] The Clerk was concerned that the examination of a Minister from the other House after his or her retirement 'could prove a significant fetter on the freedom of action of both the member and the House concerned.'[165] Lindell has concluded that although a former Member could be summoned by

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[158] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. See now, however, the reformulation of this principle in *Austin v Commonwealth* (2003) 215 CLR 185, which refers to the impairment of the 'constitutional powers' of the States.

[159] See the detailed discussion of these arguments in: Commonwealth, Senate Select Committee on the Victorian Casino Inquiry, *Compelling Evidence*, 5 December 1996, pp. 7-19; and Advice by Professor Pearce, Appendix 3. See also: Evans, above n. 124, at 134-5; and I. Harris, 'Rights and Obligations of a Legislature in a Federal, Bicameral System' (2002) 17(2) *Australasian Parliamentary Review* 97 at 106-7.

[160] Letter by the Clerk of the Senate to Senator Cook, 22 March 2002 and Letter by the Clerk of the House of Representatives to the Speaker, 19 August 2002, both in, A Certain Maritime Incident, above n. 21, Appendices. See also: H. Evans, 'Restrictions on Inquiry Powers in Federal Systems' (1997) 65 *Table* 33 at 34-5.

[161] Evans, above n. 124, at 136; and A Certain Maritime Incident, above n. 21, Appendices, Opinion by Bret Walker SC, 16 May 2002.

[162] A Certain Maritime Incident, above n. 21, Appendices, Opinion by Bret Walker SC, 16 May 2002, at p. 9.

[163] See also on this point: Lindell, above n. 43, at 395.

[164] A Certain Maritime Incident, above n. 21, Appendices, Letter by the Clerk of the House of Representatives to Mr Holmes, 2 April 2002. See further on this point: Lindell, above n. 153, at 119.

[165] A Certain Maritime Incident, above n. 21, Appendices, Letter by the Clerk of the House of Representatives to Mr Holmes, 2 April 2002. See also the opinion of Alan Robertson SC, 26 June 2002 in the Appendices of the same Report; and Harris, above n. 159, at 102-3.

the other House and would be required to attend, he or she would have the protection of an immunity from having to answer questions relating to his or her conduct as a former Minister or former Member.[166] Even if such a general immunity is not accepted, public interest immunity could still be claimed, where appropriate, as this privilege does not attach to the Member, but rather to the privileged document.

In response to these arguments, it should first be noted that there is no judicial authority on the issue and no clear cut answer. There are good arguments to be made on both sides. However, it was made clear by the High Court in *Egan v Willis* that while a government is responsible to the lower House, in the sense that it is formed from the party holding the confidence of that House and will fall if it ceases to hold the confidence of the House, it is also responsible to the upper House in the sense that it is accountable to that House for its acts and it may be scrutinised by that House.[167] Hence, the Treasurer, who was a Member of the Legislative Council, could be suspended for failing to produce state papers that fell within the portfolio of Ministers who were Members of the Legislative Assembly.

This argument is consistent with the fact that Ministers in the upper House represent Ministers in the lower House in Question Time and in Estimates Committees. Ministers are held responsible for their responses to questions, even if they are conveying information provided by a Minister in the other House.[168] Accordingly, where a Minister is a Member of one House, there is no immunity from the scrutiny of his or her acts and the subject matter of his or her portfolio by the other House (subject to any application of public interest immunity). The only constraint is that the Minister himself or herself could not be compelled to give evidence in the other House. This is consistent with provisions such as s 14 of the *Parliamentary Privileges Act* 1987 (Cth) and s 15 of the *Evidence Act* 1995 (Cth) that give Members an immunity from attending courts or tribunals while the House is sitting and for periods before and after. Both are based upon the principle that Members should not be impeded from performing their duties and that there should be no interference with their capacity to do so. For the same reason, one House cannot compel a Member of the other House to appear before it and answer questions. Nor could a House enforce any power to do so as this would most likely interfere with the duties of the Member to his or her own House. This immunity attaches to the Member as a Member and does not attach to information concerning that Member's actions as a Minister. This information can still be obtained by orders made by the other House for the production of documents, the examination of public servants within the Minister's Department[169] and the asking of questions on notice and without notice to a Minister representing the Minister in the other House.

On this basis, it is reasonable to conclude that once a person is no longer a Member and there is no risk of interference with the performance of the Member's duties, he or she could be summoned by the other House to account for his or her actions as a Minister. While it might be argued that the prospect of such scrutiny might constrain the Minister's actions while a Minister and limit his or her

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[166] Lindell, above n. 153, at 122.
[167] *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at [45]; *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [38]. See also: Campbell, above n. 21, p. 163; and Carney, above n. 45, p. 324. Note, however, Lindell's observation that that while an upper House may have the ability to inquire into ministerial conduct this does not necessarily mean that it can exercise coercive authority: Lindell, above n. 153, at 129.
[168] Evans, above n. 104, p. 455 and p. 457.
[169] Lindell, above n. 43, at 395.

freedom, it should be remembered that there is no dispute that former Members remain accountable to their own House after they cease to be a Member, and that majority control of that House may change, leading the former Minister to be examined by a hostile House.

In practice, on at least one occasion in 1994 former Ministers who were former Members of the House of Representatives,[170] were summoned to give evidence to the Senate Select Committee on the Print Media, and obeyed the summons.

Ministerial advisers

During the 'children overboard' inquiry, there was also a dispute about whether ministerial advisers could be summoned to give evidence to the Senate Committee. On the one hand it was argued that it is the Minister who is responsible to the Parliament and who takes responsibility for the actions of his or her office[171] and that ministerial advisers are only answerable to their Minister.[172] On this basis it is inappropriate to examine ministerial advisers about their advice to the Minister. There is also a concern that it would affect complete candour between advisers and Ministers. On the other hand, it was argued that the role of ministerial advisers has expanded to such an extent that they make decisions on their own account and control what information is passed to Ministers.[173] Ministers now regularly deny responsibility for acts on the basis that they were not informed by their advisers. If Ministers cease to take responsibility for the acts of their advisers, then their advisers must be made responsible through parliamentary committees for their actions.[174]

It should also be noted that Ministers' offices comprise personal staff who provide political advice and are employed under the *Members of Parliament (Staff) Act* 1984 (Cth) and departmental liaison officers, who are public servants that provide the link between the Ministers and their Departments. It has always been the case that public servants may be called before parliamentary committees. However, in the case of the 'children overboard' inquiry, the new Minister for Defence refused permission for certain public servants to appear in addition to ministerial advisers.[175] Again, the difficulty was that the Senate did not consider it appropriate to punish public servants or ministerial advisers for contempt when they were obeying the instructions of Ministers.[176]

Power to summon and question witnesses – New South Wales

The Privy Council held in *Fenton v Hampton* that it was not 'necessary' for the functioning of the Tasmanian Legislative Council that it have the power to compel witnesses to give evidence or produce documents.[177] In *Egan v Willis,* McHugh J noted that the NSW Legislative Council could not rely on 'necessity' to support a power to compel non-Members to give evidence or produce

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[170] They were the former Prime Minister, Mr Hawke, and the former Treasurer, Mr Kerin.
[171] A Certain Maritime Incident, above n. 21, Appendices, Letter by the Clerk of the House of Representatives to Mr Holmes, 3 April 2002.
[172] Harris, above n. 159, at 101.
[173] A Certain Maritime Incident, above n. 21, pp. 173-87; and Appendices, Letter by the Clerk of the Senate to Senator Cook, 22 March 2002. See also: Campbell, above n. 21, p. 175.
[174] Evans, above n. 124, at 137; and R. Ray, 'Compulsion? Privilege Claimed by the Executive: recent cases and debates' (2002) 17(2) *Australasian Parliamentary Review* 190 at 193-4.
[175] A Certain Maritime Incident, above n. 21, p. 193.
[176] Ray, above n. 174, at 196.
[177] *Fenton v Hampton* (1858) 11 Moore 347; 14 ER 727.

documents.[178] The Houses of the NSW Parliament also do not have an inherent power to punish for contempt.

That is why, in New South Wales, the power of the Legislative Council to summon witnesses and require them to answer questions is dealt with by the *Parliamentary Evidence Act* 1901 (NSW). Sub-section 4(1) provides that *any person* (not being a Member of the Council or Assembly) may be summoned to attend and give evidence before the Council or Assembly. Accordingly, as a matter of law, any other person may be summoned, including private citizens, public servants,[179] ministerial advisers[180] and former State Members of Parliament.[181]

The only exclusion is for Members of the Legislative Council or Assembly who are dealt with by s 5. It provides that their attendance to give evidence 'shall be procured in conformity (so far as practicable) with the mode of procedure observed in the British House of Commons'. In practice, this means that one House will request the other to authorise the attendance of one of its Members before the first House or its committee. The second House may authorise its Member to attend the first House or its committee, but the decision as to whether to do so is usually left to the Member.[182] A House has the power to compel one of its own Members to attend the House or one of its committees, for the purpose of examination, but it cannot compel the attendance of a Member of the other House.

If a person summoned under s 4 of the *Parliamentary Evidence Act* fails to attend and the Presiding Officer is satisfied that the witness's non-attendance 'is without just cause or reasonable excuse', he or she may certify the facts to a Supreme Court Judge who 'shall issue a warrant' for the apprehension of the person who may be held in custody to be produced for the purpose of giving evidence until discharged by an order of the Presiding Officer.[183] No guidance is given as to what amounts to 'just cause or reasonable excuse'.

Summoning Members of the Commonwealth Parliament would theoretically be covered by s 4 of the Act, although this may be inconsistent with the application of s 49 of the Commonwealth Constitution or other Commonwealth legislation, such as the *Parliamentary Privileges Act* 1987 (Cth), rendering the State law ineffective to the extent of the inconsistency. Further, Gleeson CJ noted in *Egan v Willis* that unresolved questions affect the exercise of the power to compel evidence and witnesses, including the role of the 'conventions and courtesies observed in relations between the two Houses in a bicameral legislature.'[184] His Honour went on to stress that the powers of the Houses are 'exercised in a context in which conventions and political practices are as important as

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[178] *Egan v Willis* (1998) 195 CLR 424, per McHugh J at 468.

[179] The NSW Government has formally advised public servants that if summoned to attend a Committee, the officer should attend as ordered: 'Guidelines for Appearing Before Parliamentary Committees' Premier's Department Circular C2003-47.

[180] In 2004, while the Chief of Staff to the Premier appeared voluntarily before the Inquiry into Approval of the Designer Outlets Centre – Liverpool, the Chief of Staff to the Assistant Planning Minister declined to do so. He was eventually summoned and did appear before the Committee on 30 August 2004: NSW Legislative Council General Purpose Standing Committee No 4, *The Designer Outlets Centre, Liverpool*, Report No 11, December 2004, p. 5 and p. 109.

[181] For example, the former Premier, Bob Carr, and former Treasurer, Michael Egan, appeared before the Joint Select Committee on the Cross City Tunnel: NSW, Joint Select Committee on the Cross City Tunnel, *Cross City Tunnel, First Report*, February 2006, p. 4. They did so voluntarily, but it is doubtful that they would have had any legal ground to object to a summons.

[182] NSW, Legislative Assembly, Standing Orders 325-328; and R. Grove (ed.), *NSW Legislative Assembly Practice, Procedure and Privilege* (NSW Parliament, Sydney, 2007), pp. 248-9.

[183] *Parliamentary Evidence Act* 1901 (NSW), ss 7-9.

[184] *Egan v Wills and Cahill* (1996) 40 NSWLR 650, per Gleeson CJ at 663.

rules of law.'[185] Houses of both Parliaments have recognised that they cannot or ought not compel the Members of another Parliament to give evidence before them.[186]

Once a witness appears before a NSW House or committee, regardless of whether or not he or she is a Member, the witness is subject to s 11. It provides that if any witness refuses to answer any 'lawful question', the 'witness shall be deemed guilty of a contempt of Parliament'. The Presiding Officer may issue a warrant for the witness to be committed into custody and, if the House so orders, to gaol, for any period not exceeding one calendar month. There is no formal court involvement[187] and the only express excuse provided for is in relation to religious confessions. The key to this provision is the reference to 'lawful question'. It is common for legislation concerning court procedures to provide that the refusal of a witness to answer any 'lawful question' amounts to contempt of court.[188] It has been held that a 'lawful question' is one that the witness is compellable to answer according to the established usage of law.[189] Accordingly, a witness could not be held to be in contempt of court if he or she declined to answer a question on the ground of a legally recognised privilege.

The use of the term 'lawful question' in s 11 of the *Parliamentary Evidence Act* makes clear that not all questions will be regarded as lawful and that there may well be valid reasons for a person to refuse to answer a question. A question that is outside the committee's terms of reference would be likely not to be a 'lawful question'.[190] To the extent that common law privileges, such as legal professional privilege, apply to all proceedings in which evidence may be compelled, s 11 may also recognise privilege as a valid reason for declining to answer a question.[191] This has been the subject of several opinions by NSW Solicitors-General and the Crown Solicitor.[192] The matter has not been determined by a court.[193]

Conclusion

There is a strong public interest in both the accountability of the Executive to the Houses of the Parliament and the ability of a government to govern without undue interference. Governments should not abuse their position by refusing to produce documents and provide evidence that is

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[185] *Egan v Wills and Cahill* (1996) 40 NSWLR 650, per Gleeson CJ at 663

[186] See, for example: Compelling Evidence, above n. 159, p. 23; and Grove above n. 182, p. 296. See also: Campbell, above n. 21, p. 164.

[187] Cf s 13 of the *Parliamentary Evidence Act* 1901 (NSW) which makes it an offence for a witness willfully to make any false statement. Conviction of such an offence is determined by a court, which also imposes punishment for a term not exceeding five years.

[188] See, for example, *Magistrates' Court Act* 1989 (Vic), s 134; and *Local Court Act* 1989 (NT), s 34. The same term was used at least as far back as 1852 with respect to contempt of the Court of Chancery.

[189] *Crafter v Kelly* (1941) SASR 237.

[190] In the United States a public official was prosecuted for contempt of Congress for refusing to produce documents subpoenaed by a Congressional Committee. His conviction was overturned on the ground that the Committee's terms of reference only allowed it to inquire into the 'activities and operations' of the authority concerned. It could therefore subpoena documents concerning *what* the authority had done, but not its administrative communications and internal memoranda showing *why* it had done it: *Tobin v United States of America* 306 F 2d 270 (1962) at 276.

[191] Grove above n. 182, p. 251.

[192] See the opinions listed in: Grove above n. 182, p. 251, fn. 28.

[193] While in *Egan v Chadwick* (1999) 46 NSWLR 563, it was held that privilege was not a valid ground for refusing to produce most types of documents pursuant to an order of the Legislative Council, this decision was based upon the inherent powers of the House with respect to Members of the House. Section 11, in contrast, expressly refers to 'lawful questions', recognizing that questions may be unlawful, and applies generally to members of the public who appear before Committees, not just Members of Parliament.

reasonably necessary for the Houses to fulfil their functions appropriately. The Houses of Parliament should not abuse their position by trawling for documents that they do not genuinely need or intend to use for parliamentary purposes or by publishing privileged documents when it is not reasonably necessary to do so. What is needed is moderation, balance and a dose of that comity that is so often discussed but so little applied between the Executive and upper Houses.

One of the difficulties with this subject is the uncertainty concerning the rules. Sometimes uncertainty can have a beneficial effect as a constraining force. For example, uncertainty as to the extent of the vice-regal reserve powers may mean that neither party to a political conflict is prepared to press matters to the extreme. Rules based on custom or convention also have the benefit of being more flexible in dealing with new or unexpected circumstances, unlike rules codified into law.

The uncertainty with regard to the powers of the Houses, however, has the disadvantage of leaving public servants and others in the awkward predicament of having to choose which order to obey when they conflict. It also leads to conflict when different views of the rules are developed by different parties to disputes. There is much to be said for clarifying the powers of the Houses by statute, such as the *Parliamentary Evidence Act.* Legislation also has the advantage of establishing a consensus position, as it must be agreed by both Houses and the Executive.

Finally, the use of an independent third party to ensure that claims for privilege are being made appropriately and are not being abused by the Executive is a good idea if it is properly constrained. Consideration should be given to giving guidance to any third party adviser on the classes or categories of privilege which are deemed acceptable. It is inappropriate (and possibly invalid) for a third party adviser to purport to exercise the powers of a House in attempting to balance competing public interests. If the Houses of other Parliaments, such as the Victorian Parliament,[194] are to follow the example of the New South Wales Legislative Council, they would be wise to consider what is happening there in practice, and take great care to limit the role of any independent legal arbiter to one appropriate to his or her function.

[194] See Victoria, Legislative Council, Sessional Order 21, 2007, discussed above.