ADVICE NO. 20

EGAN V WILLIS AND CAHILL: AN ASSESSMENT

You asked for a note for the Privileges Committee on the implications of the High Court decision in *Egan v Willis and Cahill*.

The judgment of the court in this case is not directly applicable to the Senate, or indeed the Houses of the other state parliaments, because the New South Wales Houses, alone among all the Houses of Australia, do not possess a constitutional or statutory provision establishing their immunities and powers. They must rely on a body of common law about what powers are necessary or appropriate for a legislature.

The Legislative Council made an order for the production of documents and Mr Egan refused to produce the documents. The Council then suspended him from the sittings of the Council for a period, and had him escorted from the precincts. Mr Egan then brought the action in the New South Wales Supreme Court, which led to the judgments of the Court of Appeal and finally the High Court. Mr Egan sought a declaration as to the lawfulness of the Council's actions.

The Court of Appeal, then presided over by Chief Justice Gleeson, made a judgment very favourable to the powers of the Council (*Egan v Willis and Cahill* 1996 40 NSWLR 650). The court held that the Council has an inherent power to demand the production of documents and to impose a penalty on a minister for non-compliance. In so holding, the court developed the old British law about powers appropriate to "colonial" legislatures, while having regard to the United States law which holds that the power to enforce the production of documents is an inherent legislative power. The High Court was less expansive in its view of the powers of the Council. It held that it is among the functions of the Council to ask for the production of documents and that the particular sanction imposed was within its powers.

In this case no claim of public interest immunity was raised by Mr Egan, that is, there was no claim that the documents should be immune from production, in that their production would not be in the public interest, because they are the subject of legal professional privilege or on some other ground. The High Court therefore did not enter into the question of public interest immunity, but explicitly left it open.

Mr Egan now has another case against the Council before the New South Wales Supreme Court in which he is raising, in effect, a claim of public interest immunity on the ground of legal professional privilege. This case was also brought after the Council imposed a penalty of suspension upon him for refusal to produce documents. It will be interesting to see if Mr Egan can get the Supreme Court or the High Court to rule on the question of public interest immunity as it may apply to parliamentary demands for information.

Among the powers of the Senate under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*, which was passed pursuant to that section, are the powers to demand the production of documents and to punish defaults as contempts. It is significant that, in the United

States law, these powers are held to be inherent in a legislature. In the High Court judgment in *Egan,* however, Mr Justice Kirby signalled that he would like an opportunity to re-open the question of the constitutionality of the Houses' contempt powers, notwithstanding that their constitutionality has been thought to be settled long ago by both the clear words of the Constitution and an earlier judgment of the High Court.

In seeking to force the executive to provide information, the Senate has two kinds of remedies available to it, non-justiciable political remedies and justiciable legal remedies. An example of the first type of remedy would be the Senate refusing to consider any government legislation, or any government legislation in a particular portfolio, until information is produced in accordance with its requirements. Such action would not be justiciable. An example of a justiciable legal remedy would be the Senate imposing a penalty upon a government office-holder for refusal to supply information. The imposition of the penalty would be justiciable.

It is unlikely that a contest between the Senate and the executive over an executive refusal to supply information could be brought before the courts at any stage before the imposition of a penalty. If the Senate were to make an order for the production of documents or the attendance of a witness and issue a subpoena, the courts would not entertain any action to enforce compliance with the order or subpoena because there is no legal basis for such a judicial intervention. It is also unlikely that an application for a declaration as to the legality of the Senate's action would be entertained at that stage, and there would be no incentive on the part of the recipient of a subpoena to make an application. If the Senate were, however, to impose a penalty of fine or imprisonment for non-compliance, the legality of the penalty could be contested by the person on whom the penalty was imposed.

In such an action the principal legal issue, apart from the question of constitutionality which Mr Justice Kirby appears anxious to reconsider, would be whether the non-compliance amounted to improper obstruction of the Senate within the meaning of section 4 of the *Parliamentary Privileges Act 1987*, which provides for the imposition of penalties for such improper obstruction.

It is just possible that, in determining that issue, the court would determine any claim of the executive to public interest immunity, that is, any claim that disclosure of particular information is not in the public interest. I think it unlikely, however, that a court would get involved in this issue if it could be avoided. As in the *Egan* case, the court would probably determine only the question of power. A ruling in favour of the Senate's power would not necessarily have the effect of bringing about the production of the documents in dispute. The Senate would simply have to keep on imposing penalties, their lawfulness having been established, in the hope of enforcing compliance.

On the whole, the political remedies are likely to be more effective than a contest in the courts.

Other jurisdictions have not arrived at any better solutions. The Houses of the United States Congress, which operate independently of the executive, have not found a more satisfactory remedy, although they are usually successful in practice in extracting evidence from reluctant administrations. As noted above, the U.S. Houses possess inherent powers to require the attendance of witnesses, the giving of evidence and the production of documents, and to punish

contempts. They have also enacted a statutory criminal offence of refusal to give evidence. In relation to the Senate, there is also a provision for committee subpoenas to be enforced through the courts by civil process, but this provision does not apply to government officers. In serious cases of conflict between the Houses and the administration over the production of documents, administration officers are "cited" for contempt, but these matters usually end in some compromise and with documents handed over. The courts have not become involved in such disputes. When presented with an opportunity to determine a legislature-executive dispute and an executive claim of public interest immunity, a court backed away from doing so, with an indication that the matter should be settled politically and that nothing short of a prosecution for criminal contempt under the statute would make the court adjudicate (Australia has no such statute) (*US v House of Representatives* [sic], 1983 556 F Supp. 160). Contests between Congress and administration are still left to "the ebb and flow of political power" (Archibald Cox, quoted in Report of Senate Committee of Privileges, PP 215/1975, p. 47).

Please let me know if I can be of any further assistance in relation to this matter.

REASONABLY NECESSARY POWERS: PARLIAMENTARY INQUIRIES AND *EGAN V WILLIS AND CAHILL*

In all but one of the jurisdictions of Australia, the houses of the various parliaments, by constitutional or statutory prescription, subject to statutory alteration, possess the powers, privileges and immunities of the British House of Commons, either as at a particular date or for the time being.

The effect of these provisions is to confer upon the houses a set of immunities and powers which were acknowledged by the common law, and which in some instances were embodied in statute, before the maturity of the Australian parliaments. The principal immunity is the freedom of parliamentary proceedings from impeachment or question before any court or other tribunal (enacted in article 9 of the Bill of Rights, 1689), and the principal power is the power to conduct inquiries and, for that purpose, to compel the attendance of witnesses, the giving of evidence and the production of documents and to punish contempts.

The exception is New South Wales, which has no such constitutional or statutory provision. In that state the immunities and powers of the houses depend on a common law doctrine that they possess such immunities and powers as are reasonably necessary for the discharge of their legislative functions. This law, expounded in the context of subordinate colonial assemblies, has been developed with the change in the houses' status to that of legislatures of a state of an independent federation.[1] The effect of this doctrine is that the houses possess an immunity of their proceedings from impeachment or question seemingly virtually identical to the article 9, Bill of Rights immunity, but no general power to punish contempts, upon which the power to conduct inquiries may be regarded as ultimately dependent. The extent of their other powers is something of a grey area.

Ironically, it is one of the New South Wales houses, seemingly in the weakest position amongst Australian parliaments in relation to powers, which has taken the strongest action in the exercise of its powers, and thereby found itself in court for judicial determination of the lawfulness of its actions. The underlying problem is one common to all legislatures in the Anglo-American stream: in the exercise of their function of conducting inquiries, houses frequently need information from executive governments. What is the solution if governments refuse to hand over information required by a house? In legislatures following the so-called Westminster pattern, where the executive usually controls the lower house through a disciplined party majority, the question usually arises only in relation to upper houses, like the federal Senate or the New South Wales Legislative Council, which have non-government majorities and seek to exercise their powers independently (although, as will be seen, New South Wales once provided an exception also to this rule). In most jurisdictions, upper houses seeking information and governments reluctant to produce it have not pushed their respective claims to the boundaries; governments have usually produced the required information or some compromise has been reached. Where a significant disagreement has arisen, it has usually been regarded as a matter to be settled politically, which means in practice that the majority of the house concerned seeks to inflict maximum political damage on a recalcitrant government. Indeed, a few years ago when a senator

[1] The cases go back to *Kielley v Carson* (1842) 4 Moo PC 63; the principal modern case is *Armstrong v Budd* (1969) 71 SR (NSW) 386.

suggested that the political issue should be turned into a legal issue by statutory reference to the courts, the Senate Committee of Privileges unanimously rejected such a measure and insisted that such contests should continue to be pursued politically.[2] In New South Wales, however, the parties to a dispute *did* push their claims to the boundaries, and headed for the courts.

The majority of the Legislative Council would no doubt say that this was due to the stubbornness of the Treasurer, Mr Egan, a member of the Council, in flatly refusing to produce documents demanded by the Council. In relation to a number of matters of great political controversy, including some involving allegations of government malfeasance, the Council passed orders for the production of documents and Mr Egan refused to produce them on the basis that such orders were not within the powers of the Council. Finally, exasperated by his obduracy, the Council in 1996 suspended him from its sittings, and he was escorted from the parliamentary precincts by the Usher of the Black Rod. He then went to the New South Wales Supreme Court seeking a declaration that the Council had acted beyond its powers.

A significant feature of the case was that Mr Egan made no claim of privilege or public interest immunity, that is, no claim that he should be immune as a matter of law from producing the documents because of the nature of the documents or the effect of their disclosure. He did not claim, for example, that production of the documents would be contrary to the public interest because they were the subject of legal professional privilege or cabinet deliberations. Instead, the case focussed on the lawfulness of the Council's action in demanding the documents and in dealing with him for default.

In denying the power of the Council, Mr Egan relied on a gloss on the principles of responsible government, which, according to his interpretation, requires that the executive government be accountable to the lower house alone and have no responsibility to the upper house. This argument had the virtue of overcoming one of those political inconsistencies which haunt politicians from time to time. Mr Egan's party, when in opposition, and when the then government did not have a majority in the Legislative Assembly, made great use of orders for production of documents, and forced that government to disgorge mountains of documents about various embarrassing matters. That was different, said Mr Egan, because that was in the Assembly, to which the government is alone responsible.

This Egan doctrine of responsible government was given short shrift in the courts, and was not the determinant of the case. The courts focussed on the question of whether the Council has the power to act as it did.

The Court of Appeal, to which the case was removed by consent from the Supreme Court, delivered an answer most favourable to the Council and unfavourable to Mr Egan.[3] Applying the doctrine that the Council possesses the powers reasonably necessary for the exercise of its functions, the court held that the Council has the power to order the production of "State papers", and, by appropriate means, to enforce such an order. It was held that, while there is no general power to punish for contempt, the suspension of the Treasurer from the Council was an

[2] 49th Report of the Committee, PP 171/1994, in relation to the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994.
[3] *Egan v Willis and Cahill* (1996) 40 NSWLR 650.

appropriate means of seeking to ensure compliance with the order. In ejecting Mr Egan right out of the building, however, the Council acted beyond its powers (this became known as the "footpath point"). Chief Justice Gleeson, in applying the doctrine of reasonable necessity, referred to the effect of the *Australia Acts 1986* in raising the status of the New South Wales houses above that of a colonial legislature, and adopted the reasoning of the American law that the power to compel evidence is necessary to a legislature.[4] While that law extended the power to the punishment of contempts, he limited it to self-protection and coercion. The other two Justices, Mahoney and Priestley JJ, while agreeing with this reasoning, noted that no question of privilege or public interest immunity was raised, and that such a question could arise for future determination.

Not satisfied with this judgment, Mr Egan appealed to the High Court. (It is remarkable that there has not been more political comment on the propriety of a minister spending so much of the taxpayers' money on seeking to establish that the government does not have to provide information to Parliament.)

While the High Court dismissed the appeal, its answers to the questions raised were less clear-cut and provided more hints of future trouble from the parliamentary perspective.[5]

The new Chief Justice of the High Court did not sit on the case, having participated in the judgment of the Court of Appeal. Justices Gaudron, Gummow and Hayne, while sounding a cautionary note about limits to the Court's jurisdiction in areas of executive/legislative conflict, were content to apply the reasonable necessity test and to find that the Council had not crossed the boundary between self-protection and coercion on the one hand and punishment on the other. They pointed out, however, that questions of privilege or public interest immunity were not raised by the case, and nor was the question of the power of the Council to coerce private citizens. These matters were explicitly not examined. This was in response to submissions by Mr Egan's counsel, who painted disturbing pictures of the Council ransacking cabinet documents and seizing the private correspondence of hapless citizens.

Justice McHugh agreed that the appeal should fail on the basis on which it was pursued, but considered that technically it should have been allowed, so as to require the Court of Appeal to make a narrower order. He considered that the power to suspend a member inheres in the Council and that Mr Egan's case should be dismissed on that ground alone. The court should not determine the power of the Council to require the production of documents by ministers, but if the reasonable necessity test is applied, he would find that the Council does not have that power. Such a power would extend to private citizens, and the Council does not have any power to compel private citizens. The Council can *ask* for information and can suspend a member for obstructing it in that regard.

Mr Justice Kirby noted that the case did not provide an opportunity to determine whether the powers of the federal houses under section 49 of the Constitution, long held to include the power to punish contempts,[6] should be reinterpreted and read down to exclude that power. One senses that he would like an opportunity to engage in this exercise. He accepted the established test of

[4] *McGrain v Daugherty* (1927) 273 US 135; *Quinn v US* (1955) 349 US 155.
[5] *Egan v Willis and Cahill* (1998) HC 71.
[6] *R. v Richards, ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

reasonable necessity, but not necessarily the old cases relating to it. He agreed that the reasoning of the United States cases in relation to the power of investigation is applicable to the Council, but that the Council has no implied power to punish contempts. He found no error in the Court of Appeal's judgment.

Justice Callinan also accepted the reasonable necessity test and found that the Council's action was reasonably necessary and not punitive, but also noted that there was no question of public interest immunity.

This judgment is not the end of the matter. In November 1998 Mr Egan again refused to produce documents to the Council, and was again suspended from its sittings. He is again going to the Supreme Court to seek a ruling on the Council's powers, but on this occasion his claim is that the documents in question are protected by legal professional privilege, and the Council does not have the power to compel the production of such documents. It will be interesting to see how the courts deal with this question.

So far, the judgments are relevant only to the New South Wales houses because of the different foundation on which their immunities and powers rest. There is plenty of material in the judgments, however, to concern the houses in the other jurisdictions. It may be that the courts will be able to determine questions of public interest immunity only in relation to the New South Wales houses, but it is difficult to see how any pronouncements on that subject could be prevented from flowing over into the other jurisdictions in one form or another. There is also the hint from Mr Justice Kirby that section 49 of the Commonwealth Constitution should be reinterpreted to exclude the contempt power, notwithstanding the long-established and recently reiterated American law that such a power is inherent in a legislature. Then there is the horror which seems to be aroused in judicial breasts at the idea of houses compelling evidence from private citizens, although that has also long been recognised as essential to the power to conduct inquiries.

That power is seldom exercised, in that witnesses, official or non-official, are seldom coerced, and most evidence is taken voluntarily. All houses will have to be cautious in any exercise of the power in the future. As parliamentary matters, like all matters in modern society, are drawn more frequently into litigation, it can safely be predicted that this case, and Mr Egan's next case, will not be the last. The possibility of a clash between legislatures and courts cannot be ruled out.