ADVICE NO. 23

EGAN V CHADWICK AND OTHERS

On 25 November 1998 I provided the Committee with a note on the judgments of the New South Wales Court of Appeal and the High Court in the case of *Egan v Willis and Cahill* relating to the power of the Legislative Council of New South Wales to require the production of government documents. Subsequently the editors of the journal *Constitutional Law and Policy Review* asked for an article on the judgments. Attached is a copy of the article which will be published shortly and which may be of interest to the Committee.

The Court of Appeal has now delivered another judgment in a related case, *Egan v Chadwick and others* (judgment delivered 10 June 1999, not yet reported). Mr Egan again went to the Court in an attempt to establish that the powers of the Legislative Council do not allow it to require the production of documents claimed to be protected by legal professional privilege or documents the subject of a public interest immunity claim. The Court unanimously rejected this argument, and found that the Council has the power to require the production of such documents.

The Court, restrained by the judgment of the High Court in the earlier case, confined itself to the doctrine that the powers of the Legislative Council are such as are reasonably necessary for the performance of its functions. Chief Justice Spigelman stated the question before the Court:

> Is it reasonably necessary for the proper exercise of the functions of the Legislative Council of New South Wales, for its power to require production of documents to extend to documents which, at common law, would be protected from disclosure on the grounds of legal professional privilege or public interest immunity?

The Chief Justice, with whom Justice Meagher agreed, answered this question in the affirmative. The Chief Justice found that to restrict the powers of the Council in the manner suggested by Mr Egan would be an intrusion of the Court into matters which should be determined by the legislature itself. Having regard to the principle that ministers are responsible to the Council, access to legal advice provided to government is reasonably necessary for the Council to perform its functions, and it is for the Council to weigh any claim of public interest immunity.

The Chief Justice also found, however, that the principle of responsible government, which the law recognises but does not seek to enforce (a recognition which he illustrated by a comprehensive examination of earlier judgments), imposes one restriction upon the Council's powers. Because responsible government requires the collective responsibility of cabinet and the confidentiality of cabinet deliberations, the Council may not require the production of documents which record the deliberations of cabinet. It appears that this category of documents is much narrower than the category of "cabinet documents" which is often cited by governments as a protected class.

The other Justice, Justice Priestley, did not find even that restriction on the Council's powers. He made the telling point that government documents are generated at public expense for public benefit:

> Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.

Just as the courts examine documents for which protection is claimed to determine where the balance of public interest lies, so must the Legislative Council have this capacity. Cabinet documents yield to the principle of government accountability, of which he made a ringing declaration:

> …. notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no *legal right* to *absolute* secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy.

As indicated in the previous note, all of this has limited direct relevance to the Senate because of the different law under which the Legislative Council operates, but it would be difficult, in the light of this judgment, for any court to find that the Senate, with the positive prescription of section 49 of the Constitution, has any lesser power.

It is possible for the High Court to reverse or modify this judgment on appeal, but this is unlikely.

The judgment of the Court does not compel Mr Egan to hand over the documents in dispute. As the Court found, it is for the Council to determine the remedy for any continuing refusal to produce the documents, and such a remedy must be political rather than legal. The judgment simply establishes that Mr Egan has no *legal* grounds for his refusal in respect of most of the documents, and it was on legal grounds that he chose to argue by going to the Court.