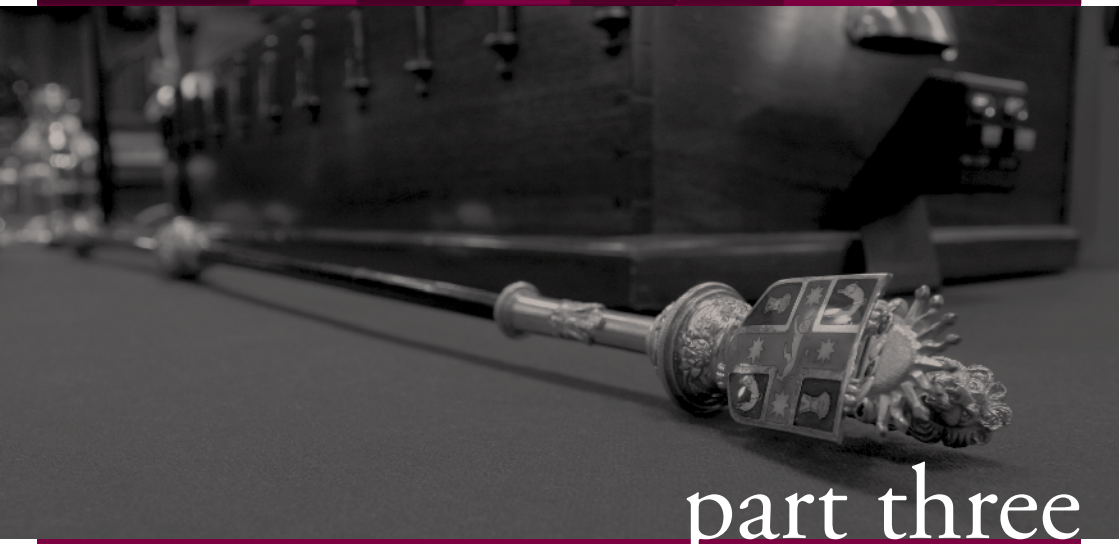
The Legislative Council and Responsible Government:

Egan v Willis and *Egan v Chadwick* – David Clune



part three

Part Three of the Legislative Council's History Project

President's foreword

It gives me great pleasure to welcome this third volume of the Legislative Council's oral history project. The two previous volumes dealt with the reconstitution of the Council into an elected body in 1978, and one of the main impacts of the "new" Legislative Council – a very active and effective committee system, which began in 1988. This volume "The Legislative Council and Responsible Government: *Egan v Willis* and *Egan v Chadwick*", deals with the next stage in the development of the revitalised NSW upper house – the struggle in the House and in the courts that confirmed the power of the House to order the production of state papers. It is this set of events, and the ongoing use of the powers by the Council, that led to the late Harry Evans, former Clerk of the Senate, describing the NSW Legislative Council as "being more courageous … than any comparable house" and "a world leader in this area".

Parliamentary historian David Clune once again draws on interviews with the key players in the events: Leader of the Government Michael Egan, Opposition Leader John Hannaford, the President Max Willis, various other members, clerks and departmental law officers. This volume provides a fascinating insight into the strategies on both sides which led to the highest court in the land in 1998 confirming, on the principle of "reasonable necessity", the power to order the production of state papers. This "SO 52" power, as it has become known among Council members, has been extensively used ever since, with more than 300 returns provided in the last two decades, and the limits of the power continuing to be explored by decisions of the House.

I am very grateful to all those who gave their time in interviews and in writing, editing and preparing this volume. This publication is timely, coming as it does in the lead up to the 20th anniversary of the High Court decision in *Egan v Willis*. It is an important record of a significant step forward for parliamentary democracy in New South Wales.

The Hon John Ajaka MLC
President

Preface and Acknowledgements

Like its predecessors, this publication is based on interviews with former members and staff of the Legislative Council resulting from the Council's Oral History Project.* They were conducted by David Blunt, the Clerk of the Parliaments, and David Clune, Consultant Historian to the Project, in Parliament House between November 2015 and September 2016

- John Evans, 5 November 2015
- John Hannaford, 10 December 2015
- Max Willis, 2 February 2016
- Michael Egan, 9 February 2016
- Elisabeth Kirkby, 11 February 2016
- Ron Dyer, 5 July 2016
- John Jobling, 7 July 2016
- Jenny Gardiner, 12 September 2016.

The original Hansard transcripts have been edited to eliminate extraneous material and repetition and to enhance clarity and readability. All quotes, unless otherwise acknowledged, are from this source. Sincere thanks go once again to the Hansard staff for their professionalism, support and interest in the project. The complete edited transcripts of these and all other interviews conducted as part of the project are available on the NSW Parliament's website: https://www.parliament.nsw.gov.au/lc/roleandhistory/Pages/Legislative-Council-Oral-History-Project.aspx

* For more detail about the project see D Blunt and A Stedman, 'The NSW Legislative Council's oral history project', *Australasian Parliamentary Review*, vol 31 no 1, Autumn/Winter 2016.

The author would like to thank Warren Cahill, Lynn Lovelock and Anne Twomey for their quotes and comments. Carl Green, Gareth Griffith, Les Jeckeln, Keith Mason, Greig Tillotson, Andrew Tink, Ken Turner and Bret Walker kindly read the draft. The responsibility for errors and omissions remains mine alone. Natasha Carr of Studio Rouge Designs has produced a fine publication. David Blunt, as always, was a pleasure to work with and a constant source of advice and support.

David Clune
August 2017

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Introduction

Although there were some outward similarities between the Parliament of NSW in the late 19th century and a hundred years later, there was a significant difference. From the establishment of a bicameral legislature in 1856 until the early 20th century, the Parliament was not dominated by political parties, and hence the executive. One consequence was the ability of members to act independently. Regardless of the attitude of governments, they debated without restraint and could establish committees, move motions and introduce bills.

Members could successfully move that the government table all state papers on matters they were interested in. Since responsible government, the Legislative Council had, following Westminster practice, allowed orders for the production of papers. When the upper house adopted a revised and expanded code of Standing Orders in 1895, Standing Order 18 stated: 'Any papers may be ordered to be laid before the House, and the Clerk shall communicate to the Chief Secretary any such order'.[1]

In the early 20th century, the growth of disciplined political parties allowed governments to exert almost complete control over the Legislative Assembly. The executive did not want backbenchers upsetting its agenda and they were often reduced to the role of 'division fodder'. In the Legislative Council, the overall trend was also towards a more party-dominated House, although some MLCs still exhibited a strain of independence. A consequence was that procedures such as orders for papers became obsolescent. Between 1901 and 1935, the Council passed 29 orders for papers, a low figure by 19th century standards. Between 1936 and 1990, there was one.

There was a dramatic change to this established order in the Fiftieth Legislative Assembly. After the 1991 election, the Liberal/National Coalition under Nick Greiner was only able to retain office with the support of three unaligned Independents: John Hatton, Peter Macdonald and Clover Moore.

[1] In 1927, 'the Premier's Department' was substituted for 'Chief Secretary'. See Appendix One for a detailed history of the call for papers in the Legislative Council's Standing Orders.

In return, they wanted the implementation of a charter of reform. One of their demands was a freer Legislative Assembly. Before the return to majority government in 1995, there was something of a renaissance of the 19th century model of parliament. One of the procedures revived was orders for papers. In the 1994 session, for example, 14 such orders were agreed to. This was to have a flow-on effect in the upper house which would lead to landmark legal cases which have 'reinforced and reinvigorated, if not redefined, the principle of responsible government in Australia'. [2]

Egan v Willis

After the 1995 election, which brought Labor to office under Bob Carr, the Government was in a minority in the Legislative Council. In a House of 42, there were 17 ALP MLCs, 18 Coalition and seven crossbenchers (two Australian Democrats, two Christian Democrats, one Green, one Shooter, one Better Future For Our Children).[3] This opened up some possibilities for the Opposition. The Clerk of the Legislative Council from 1989 to 2007, John Evans, recalls:

> John Hannaford, as Leader of the Opposition in the Council, wanted to get some papers about the closure of the Lake Cowal goldmine at West Wyalong. We sat down and had a discussion as to how we might call for the production of papers. I had remembered about all the precedents that occurred from 1856 right through until about the mid-1930s where the House had ordered the production of papers and they had been presented to the House. There was a time between 1991 and 1995 when in the Legislative Assembly there was a minority Coalition Government and the Independents had the balance of power. They used the process for ordering the production of papers. John Hannaford and I had a whole series of discussions about how we might go through the process of ordering the production of papers in the Legislative Council, and what would happen if it did not occur.

[2] G Carney, '*Egan v Willis* and *Egan v Chadwick*: the triumph of responsible government', in G Winterton ed, *State Constitutional Landmarks*, Federation Press, 2006, p298

[3] Three MLCs subsequently became Independents: Democrat Richard Jones in 1996, Labor's Franca Arena in 1997, Liberal Helen Sham-Ho in 1998.

According to Hannaford, who was Leader of the Government in the Legislative Council 1992 – 1995 and Leader of the Opposition 1995 – 1999:

> In relation to Lake Cowal, there was a strong bureaucratic report in favour of the project and it was rejected. Then, after all of this went on, Lake Cowal got approved.[4] In respect of both of those decisions, I suspect that there was ministerial interference. The issue for us was to find out the nature of that interference. That was the political imperative. The issue then was: what is the framework you need that would allow the upper house, as a house of review, to put in place an appropriate mechanism for accountability? That led to the drafting of the first lot of measures for calls for papers. Subsequently we have refined those measures but the key issue was the accountability of the executive to the parliament.

Michael Egan was Leader of the Opposition in the Legislative Council 1991 – 1995 and Leader of the Government and Treasurer 1995 – 2005. He was (and is) no admirer of the upper house:

[4] The mine was opened in 2006.

John Evans

> Neither the Senate nor the NSW upper house operate effectively as houses of review because they are party houses, and that requires fundamental change in their structure so that they work as they should. The upper house used to pride itself on how few times it amended legislation. That was when it had no legitimacy as an elected body. The attempt to democratise the upper house, I think, actually resulted in a lessening of democracy.

Egan completely rejected the idea that the Council could reassert its right to call for papers:

> The Opposition was claiming that the House had an untrammelled power to insist on the tabling of anything it wanted tabled. That, to any government, was completely unacceptable—particularly the tabling of cabinet documents. If cabinet documents have to be tabled then the whole notion of cabinet government falls down. Cabinet cannot work unless it can do so confidentially. Cabinet has to take collective responsibility for

John Hannaford

> everything; there is argument going backwards and forwards and ministers have to be able to say their piece. They have to be able to think aloud sometimes. You cannot put constraints on what can be said, but that would happen if it all becomes open to the public. Our first concern was to make sure that the cabinet processes worked properly and were not upset by everything having to be revealed in the public arena. Also, to a lesser extent, we were concerned—I was concerned—about organisations dealing with government and having to do so in the knowledge that some of their commercial intellectual property would become public. That is not the way businesses work. Why should government be the only institution that cannot deal confidentially with business?

In a preliminary skirmish, Egan had been found guilty of contempt of the Council, on the motion of Hannaford, on 13 November 1995 for failing to comply with three orders to produce papers. [5] Hannaford moved that the Treasurer be suspended for seven days and, if he continued to defy the House, that his seat be declared vacant. Christian Democrat MLC Fred Nile successfully amended the motion to refer the question of penalising Egan to the Council's Privilege and Ethics Committee. On 10 May 1996, the Committee found that it would not be appropriate to impose sanctions as the Parliament's power to call for papers was uncertain. By then, however, a court challenge was underway that would decisively clarify that point.

The Lake Cowal goldmine in central western NSW was originally welcomed by the Government. A Commission of Inquiry found that there was no significant environmental risk. However, Premier Carr subsequently refused permission for the project to go ahead on environmental grounds. The decision was politically controversial, with allegations of a behind-the-scenes deal. On 18 April 1996, Hannaford moved under Standing Order 18 for the tabling of 'all papers relating to the Government's consideration of the report of the Commission of Inquiry

[5] The requested documents concerned: the closure of veterinary laboratories; negotiations with Twentieth Century Fox relating to the Sydney Showground; the recentralisation of the Department of Education.

into the Lake Cowal gold mine and associated facilities'. During the debate, the Opposition successfully moved an amendment to add some safeguards in regard to documents subject to claims of privilege:

> (3) Where in the minister's opinion, the reasons for which must be tabled at the time this order is complied with, the publication of any document or part of a document to be tabled under this order is privileged and should not be made public, the documents, clearly identified, are to be delivered to the Clerk in a sealed package.
>
> (4) Where any document is tabled under paragraph (3):
>
> (a) the Clerk is authorised to permit any Member of the Legislative Council, but no other person, to inspect all or any of those documents; and
>
> (b) no person, including a Member, may publish or copy any of those documents or part of a document without an order of the House.

Egan's response was uncompromising:

> This absurd power exists only in the imaginations of the Leader of the Opposition and certain other members of this House. Crown Law officers advise that this House has no power, by motion or by resolution, to order the tabling of any documents … If the Opposition believes it can force one, two or three members of this House to table documents relating to telephone conversations, private discussions, and advice given to them by public servants, if they are prepared to throw overboard all public policy considerations of good administration and good government, then that principle must be taken to its logical conclusion. And that is, every conversation its members have ever had on the telephone for which a diary note exists, every letter they have ever written, every piece of paper that has ever come into their possession, will become the property of this House. [6]

[6] *NSWPD*, 18.4.96.

The motion was passed on 23 April by 21 votes to 18. The majority of the crossbenchers voted with the Opposition, with the exception of Green, Ian Cohen, and former Democrat, Richard Jones. Egan was given until 30 April to comply.

When the Council met on 1 May, the requested papers had not been tabled. Hannaford moved to censure Egan. His motion asserted the upper house's right under responsible government to scrutinise the executive in general and, in particular, to call for the production of documents 'under the implied or inherent powers of the House which are necessary to its existence or to the proper exercise of its functions'. The motion called on the Treasurer to produce all papers relating to Lake Cowal by 9.30am the next day.

Egan again responded with defiance. His remarks showed that conflicting definitions of responsible government were at the heart of the matter:

> The House does not have a right to do anything merely because the House asserts that right. Today the Leader of the Opposition argued that the government of this State is accountable to the Legislative Council. The constitutional principle, of course, is that the government of the day is responsible to the Legislative Assembly. That is the key … It would not matter if this House unanimously declared no confidence in the government of the day; the government of the day will survive so long as it has the support of a majority of members in the lower house. That is what is understood by the concept of responsible government.

The Treasurer added that cabinet had agreed that 'ministers should act on advice previously obtained from Crown Law officers and, accordingly, decline to comply with any orders from either house of parliament to table documents on the grounds that such orders are invalid and beyond their power'.[7]

Hannaford's motion was passed by 20 votes to 19. Cohen, Jones and Better Future For Our Children MLC, Allan Corbett, voted with the Government. Christian Democrats Fred and Elaine Nile, Shooter John Tingle, and Australian

[7] *NSWPD,* 1.5.96.

Democrat Lis Kirkby supported the Opposition.

The Council resumed on 2 May in an unaccustomed atmosphere of tension and anticipation, with a political and constitutional crisis looming. Hannaford immediately moved that the Treasurer be found guilty of contempt for his failure to comply with the previous day's order. The motion added that the Council

> regarding it as necessary to obtain information on any matter affecting the public interest and in order to protect the rightful powers and privileges of the House, and to remove any obstruction to the proper performance of the important functions it is intended to execute, hereby suspends the Treasurer from the service of the House for the remainder of today's sitting.

The motion also required Egan to explain to the House, on the next sitting day, his refusal to table the Lake Cowal papers and his defiance of three earlier orders to produce papers.[8] According to Hannaford:

> The position I took was that until the Government complied the Treasurer would have to stay out of the House. If another minister took over and continued to take that position then that minister would have had to have stayed out of the House … That is how I saw it. We took the view that you can only expel a member when he is bringing the House into disrepute. Egan was not doing that; he was taking a position of not being accountable to the Legislative Council. In sum, yes, we would have been prepared to go to the point where we would have sought to prohibit the presence of that minister or any other minister in the House until such time as the Government complied.

The motion was passed by 20 votes to 17. Corbett again voted no; Cohen and Jones were not present. Hannaford recalls:

> I would never have taken the majority of the crossbenches with me on a position that was seen to be politically opportunistic. It was a position of principle in relation to the role of the Leader of the Government and the

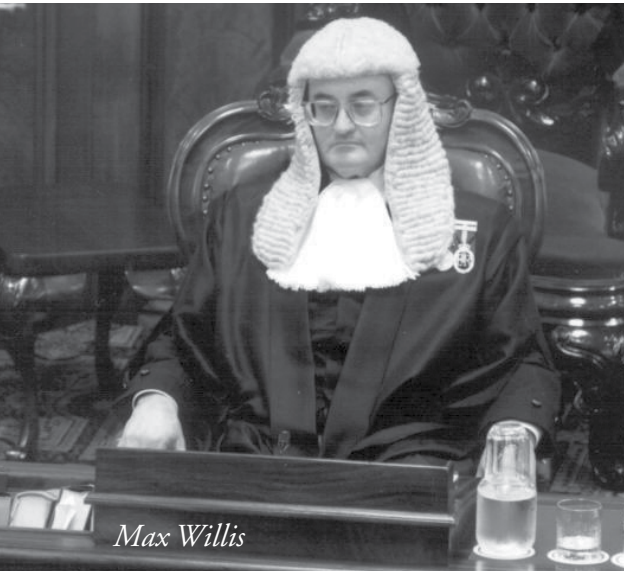
[8] This part of the motion was in abeyance during the legal proceedings resulting from Egan's suspension and was not proceeded with.

role of the Legislative Council in the process of government. That is why the Treasurer was suspended and removed from the chamber for defying a resolution of the House. Lis Kirkby took on board my thoughts and articulated them.

Kirkby was an Australian Democrat MLC 1981-98 and Leader of the Party during that period. In her view Egan's suspension and the ensuing cases were 'a vitally important part of the development of the Legislative Council and have given this Parliament the ability to exercise legal restraints on the government of the day to a greater extent than any other State Parliament. I would venture to say, in some ways a greater power than that of the Senate'.

President Max Willis ordered the Usher of the Black Rod, Warren Cahill, to remove Egan to the footpath outside Parliament House. The Treasurer refused to leave and the President adjourned the House for half an hour. Egan remembers the occasion vividly:

> You could feel the electricity in the building. The media generally did not listen to the upper house but immediately the gallery filled up. Everybody



Max Willis

Elisabeth Kirkby

left the chamber except me. I was sitting there. That was because the Crown Law officers had told me that to get the matter before the courts I had to be assaulted; the Usher of the Black Rod had to put his arm on me. Warren, being a very gentle man, did not do that. He stood in front of me, with his rod over his shoulder and said, "Mr Egan, I have to escort you from the chamber". I just sat there and said nothing. He stood there for a while, and for a while longer. You could feel the tension growing and growing. Finally, Max Willis adjourned the House. I knew that I had to sit there because if I left I would not get back in. Then the House reassembled. I do not know whether, in the meantime, Max or the Clerks had had a discussion with the Cabinet Secretary or the Crown Law officers. I do not think they did, because they did not mention it to me. The next time Warren came up I leant forward. I was concerned because I thought: "If I tell him he has to touch me that might negate the assault". But I had to take the chance and say: "Warren, you've got to touch me", which he did. Then he escorted me outside onto the pavement.

Warren Cahill

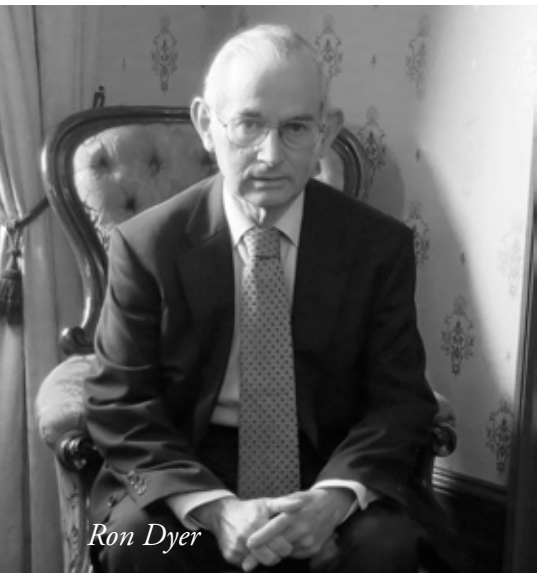
Michael Egan

Ron Dyer was a Minister and Deputy Leader of the Government from 1995-1999. He also has a clear recollection of the day:

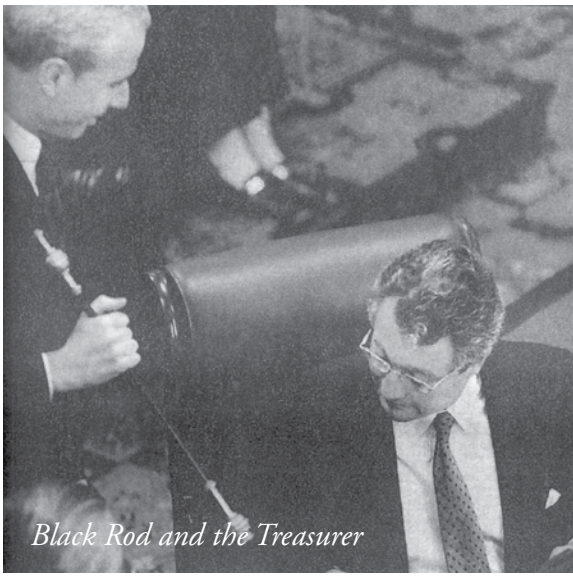
> Mike Egan declined to produce the papers in question and he was held to be in contempt of the House and was suspended and ended up out on the footpath. Warren Cahill was the Usher of the Black Rod and, in subsequent litigation, Mike, using a fair amount of hyperbole, referred to this burly parliamentary officer putting him out on the footpath in Macquarie Street … The thought that was going through my mind at that stage was: "Thanks, mate, for the heads up". I did not know what was going to happen. I stepped into his role and to the best of my knowledge I handled everything appropriately during Mike's absence and nothing untoward occurred, but when he came back he did not say: "Thanks, mate", or anything of that sort. He just got on with business.

As Clerk, John Evans was a key participant in these events:

> The President and I had given Black Rod specific instructions not to lay a hand on the minister, and no doubt the minister had his own



Ron Dyer



Black Rod and the Treasurer

instructions from the Crown Solicitor and others not to leave the chamber. So when the President directed Black Rod to remove Michael from the chamber, he refused to go. The President regarded that as being disorder and he left the chamber. Subsequently, Michael did accompany Black Rod out of the chamber and he escorted him out onto the footpath in Macquarie Street … That was seen by the Government as an opportunity to take legal action in the courts over an alleged assault that Black Rod had committed on the Treasurer. Of course, it was well known that there was no point in the Government trying to question the powers and privileges of the House by an action in the courts because of parliamentary privilege, and the courts generally accepted that they will not inquire into the proceedings of parliament. So it was, in a manner of speaking, agreed to between the parties that the vehicle for testing the powers of the upper house was the "assault" committed by Black Rod on the Treasurer.

Warren Cahill was in the spotlight. His recollection is that he did not attempt to remove Egan physically in the first instance:

The assault

Photography – Robert Pearce / Fairfax Syndication

Bret Walker SC

> When we retired to the President's office to confer, Max Willis was clear on the course of action to be taken and the Clerk concurred. My recollection is that I was given a clear instruction to take Egan by the arm and remove him from the chamber. The President and Clerk were perfectly aware of why I needed to do that and the implications. When we returned to the chamber I acted according to those instructions. I had Michael by the arm all the way to Macquarie Street.[9]

Egan immediately commenced legal proceedings in the NSW Supreme Court. He claimed that, as the Council had no power to compel him to produce documents, the finding of contempt and his subsequent suspension were invalid, and that his removal from the chamber constituted an unlawful trespass. It fell to Evans to organise the Council's response:

> I was in a bit of a dilemma—who are we going to get to appear for the Legislative Council? So I rang Ian Knight who was the Crown Solicitor and said: "Can you give me the names of some barristers around town who might know a bit about constitutional law?" He gave me two names: one was Leslie Katz SC and the other was Bret Walker SC. I rang Leslie Katz and he said he could not do it; he had provided some advice to the Government.[10] I then went to Bret Walker. I phoned him and, in naivety, I guess, said: "What do you know about cases such as *Kielly and Carson, Armstrong and Budd, Barton and Taylor?*" He responded and started to tell me all about them, what they were about and what was interesting. So we subsequently had conferences with him. I think it might have included the President initially. We discussed how we were going to proceed. So Bret Walker was obviously engaged by us as a barrister to represent our interests and what a bonus that has been for the Legislative Council over all these years.

[9] Email to David Blunt, Clerk of the Parliaments, 12.2.2017.
[10] Katz was appointed Solicitor-General in 1997 and appeared before the High Court for Egan.

In regard to the Council's power to order the tabling of papers, Evans was confident:

> I always felt from my knowledge of the practices and conventions of the House and my own reading of early constitutional law cases involving the Legislative Council that we were on solid grounds; we were never going to lose when we got to that stage. Bret Walker was also very confident that we would not lose in the Supreme Court.

Hannaford was convinced there would be a positive outcome for the upper house:

> I always took the view that what we did would be supported by the courts. From the moment the Government took on the challenge I never had a doubt that the Parliament's position would be supported, because the courts have a very strong view about accountability. Also the courts take the view that they are the final arbiter … The courts do not particularly like executive governments, so if they can make certain that they are accountable they will do so.

The case was heard by the Court of Appeal which handed down its decision on 29 November 1996.[11] It upheld the Council's power to order the production of State papers. Gerard Carney has explained the Court's reasoning:

> Since there was no statutory adoption of the privileges of the UK House of Commons [in NSW], as occurred elsewhere at the Commonwealth and State level, the Court applied the common law test of "reasonable necessity" to determine whether it was reasonably necessary for the Council to have such power in order to function. Gleeson CJ and Mahoney JA easily concluded that such a power was reasonably necessary for the proper exercise of the functions of the Council, which included the scrutiny of the executive … In contrast, Priestley JA relied on the

[11] (1996) 40 NSWLR 650.

> legislative function of the Council in holding that the Council should "have power to inform itself of any matter relevant to a subject on which the legislature has power to make laws".[12]

Egan did have a victory with his assault claim. While the Court upheld the Council's power to suspend him, it ruled that a member could only be removed from the chamber and its immediate vicinity. The exclusion of a member from the parliamentary precincts was excessive and punitive and therefore beyond the House's powers.[13] When Willis ordered Egan removed to the footpath in Macquarie Street, former Labor President John Johnson had taken a point of order arguing that this was *ultra vires*. Willis ruled against it:

> I wanted that issue decided by a court … I always held the view that what had been the practice in the Legislative Assembly, of excluding members who were ejected from the precincts of the parliament, was rather silly and childish, especially in the days when they had no electorate office. Really the ejection was from the proceedings of the House not from exercising other functions as a member of parliament. I did that purposely because if anything was to be tested, I wanted that to be tested and it came out the way that I believe it should have. But I never paid the $1 fine – Warren Cahill may have but I never did. Damages!

Cahill comments:

> Michael Egan was a kind-hearted man with a very good sense of humour. I think he was a very private man and very hardworking which was sometimes taken for being distant. While the case was proceeding he would sometimes drop into my office which was on the way back to his ministerial office from the chamber. He would tease me about disposing of my assets or I would lose them in the damages that I would have to

[12] G Carney, '*Egan v Willis* and *Egan v Chadwick*: the triumph of responsible government', in G Winterton ed, *State Constitutional Landmarks*, Federation Press, 2006, pp311-312.
[13] As previously mentioned, the NSW Parliament derives its powers from common law. The doctrine of 'reasonable necessity' means that any disciplinary action against a member has to be for protective rather than punitive reasons.

> pay. We would have some light-hearted banter and he would leave after a few minutes. I think on one of those evenings after the judgment he dropped into my office and handed me $1 as token recompense relating to losing the case and his jokes about the damages I would incur. I might be mistaken but I can't imagine myself handing Michael a dollar.[14]

Egan responded by seeking special leave to appeal to the High Court, which was granted on 6 June 1997. It was an eventful time for John Evans:

> When it went to the High Court in Canberra, Bret Walker asked me to go down there with him and we had various documents that had to go before the High Court. Bret used to have this rather large red pencil which he used to mark documents in his own handwriting, in addition to what the solicitors and lawyers had prepared for him. I well remember it was the middle of winter in Canberra. We stayed at the Hyatt Hotel. On the morning before the court case we walked to the High Court, and as we were walking along, Bret was going through in his mind the things he had to say and what he had to do. He said: "What do you think about this? What would happen if this happened?" It was really enthralling to be involved as part of the process. He was always picking my brains about what would happen if various outcomes came about. Hopefully, I was able to assist him. Anyway, he appeared before the High Court, and it was just brilliant to see him standing there addressing the Judges, in his usual eloquent manner with hardly any notes – it was just coming out of his mind. I think that the Judges of the High Court were impressed by Bret Walker although, of course, his performance would not finally influence their decisions. It was just brilliant to be there and witness what transpired.

Gareth Griffith has succinctly summarised the Court's decision, delivered on 19 November 1998:[15]

[14] Email to David Blunt, Clerk of the Parliaments, 12.2.2017.
[15] (1998) 195 CLR 424

> The High Court held that the NSW Legislative Council has the implied power to require one of its members, who is a minister, to produce state papers to the House, together with the power to counter obstruction where it occurs. The relevant test is that an implied power must be reasonably necessary for the exercise of the Council's functions: these include its primary legislative function, as well as its role in scrutinising the executive generally. In their joint majority judgment, Justices Gaudron, Gummow and Hayne concluded that, in determining what is reasonably necessary at any time for the "proper exercise" of the functions of the Council, reference is to be made to what, "at the time in question, have come to be conventional practices established and maintained by the Legislative Council". Central to the decision was the doctrine of responsible government and the relationship between this and the scrutiny or investigatory functions of the Council. In a dissenting judgment, which turned on the question of justiciability, Justice McHugh found that it was not for the courts to rule on the validity of the Legislative Council's resolution suspending a member who had failed to comply with a previous resolution ordering him to produce state papers to the House.[16]

Justice Kirby strongly affirmed the scrutiny powers of the Council:

> The reason why the accountability of ministers in the Council is not spelt out in terms in the Constitution Act itself, or in the Standing Orders, may be that it is so fundamental to the existence of a legislative chamber in our system of government, and necessary to the performance of that chamber's functions as such, that it was accepted as axiomatic that, if a house of the parliament insists and there is no lawful reason for resistance, a member, including a minister, must obey the house's demand. Whether that is the explanation or not, the legal power of the Council to make such a demand upon the executive government cannot

[16] G Griffith, *Egan v Chadwick and Other Recent Developments in the Powers of Elected Upper Houses*, NSW Parliamentary Library Research Service, Briefing Paper 15/99, p2.

be doubted. Where the representative of the executive government is a member of the Council, the power of the latter to suspend that member in order to coerce him or her to comply with its demand can likewise not be doubted. To deny the Council such powers would be to destroy its effectiveness as a house of parliament. The fact that the executive government is made or unmade in the Legislative Assembly, that appropriation bills must originate there and may sometimes be presented for the Royal Assent without the concurrence of the Council does not reduce the latter to a mere cipher or legislative charade. The Council is an elected chamber of a parliament of a State of Australia. Its power to render the executive government in that State accountable, and to sanction obstruction where it occurs, is not only lawful. It is the very reason for constituting the Council as a house of parliament.[17]

[17] (1998) 195 CLR 424 at [155].

The Legislative Council in session in 1995

Egan v Chadwick

In spite of his previous lack of success, the feisty Egan was not finished with the courts. In September 1998, the Government issued a contamination alert for Sydney's water supply. Residents were advised to boil water before drinking it. On 24 September, Hannaford moved that all documents relating to the contamination incident be tabled by 29 September. The motion was passed by 21 votes to 14. The only crossbencher to vote with the Government was John Tingle of the Shooters' Party. The Government responded that, based on advice from the Crown Solicitor, it would comply with the order, with the exception of documents where the legal doctrines of public interest immunity or legal professional privilege would apply.[18]

The question of whether the Council had the power to call for the tabling of privileged documents had been raised but not decided in the *Egan v Willis* cases. Justice Kirby, for example, said:

> There would, indeed, be exceptions to the obligation of a member, including a minister, to table documents demanded by a resolution of a chamber of parliament. Such exceptions could arise on grounds of individual privacy, confidentiality (as for example papers disclosing cabinet discussions) public interest immunity, as well as other grounds. At this stage of these proceedings it is unnecessary to say anything about such grounds of exemption.[19]

The Government thus had some reason to believe that the courts would support its stand.

On 13 October, Hannaford moved to censure Egan for his failure to table all the requested documents. He accepted that the Government was entitled to claim legal professional privilege or public interest immunity, but with a key reservation: such documents were to be made available to members of the Legislative Council.

[18] *NSWPD*, 13.10.1998. Public interest immunity prevents the disclosure of evidence that would be damaging to the public interest. Legal professional privilege applies to communications between lawyer and client.
[19] (1998) 195 CLR 424 at [161].

They were not to be copied or published without an order of the House. Cabinet documents were exempt from disclosure. Hannaford added that if a member believed that the Government was 'trying to use a shield of legal professional privilege or public interest immunity in order to deprive the public of access to the documents', he or she ought to be entitled to dispute that claim.

Accordingly, the motion set out procedures to deal with such disagreements. When privilege was claimed 'the privilege should be identified, the reason for claiming it should be set out, and documents should be made available for examination by members so that they can determine whether an executive government has properly claimed privilege'. An independent legal arbiter (either a Queen's Counsel, a Senior Counsel or a retired Supreme Court judge) would be appointed by the President to evaluate and report on the validity of disputed claims. In regard to cabinet papers: 'Any document for which privilege is claimed and which is identified as a cabinet document shall not be made available to a member of the Legislative Council. The legal arbiter may be requested to evaluate any such claim'.[20]

Opposing the motion, Attorney-General Jeff Shaw argued:

> Documents that may be the subject of legitimate claims about legal professional privilege and public interest immunity are nonetheless required to be disseminated to members of this House. Such a procedure would be unprecedented. Assuming the security of those documents were maintained, it would nonetheless be a risky enterprise to disseminate to such a significant number of people documents the subject of a claim of legal professional privilege and/or public interest immunity … notwithstanding that there might be perfectly good and ultimately sustainable claims that the documents should not be produced.[21]

The motion was passed 23-14, with all the crossbenchers supporting it.

[20] *NSWPD*, 13.10.1998.
[21] *NSWPD*, 13.10.1998.

On 14 October, the Government delivered to the Clerk a large amount of the requested material, but withheld documents it claimed were privileged. As a result, on 20 October Egan was suspended for five sitting days or until he fully complied with the order of 13 October. The vote was 20-16, with crossbenchers Jones and Tingle siding with the Government. On this occasion, Egan left the chamber voluntarily. He commenced proceedings in the Supreme Court against new President Virginia Chadwick, the Clerk and Black Rod, contesting the Council's power to order the production of documents subject to legal professional privilege or public interest immunity, or to determine the validity of such claims.

The delivery of the High Court's decision in *Egan v Willis* led to another development in the saga. On 24 November 1998, Hannaford used the Council's newly authenticated power to move that Egan be required to produce all of the documents that had been requested on five previous occasions. The motion contained broadly similar provisions regarding claims of privilege as that of 13 October. It was passed 24-15, all the crossbenchers voting with the ayes.

The Government produced most of the requested papers but maintained its refusal to include those it regarded as privileged. Anne Twomey was the Manager of the Cabinet Office Legal Branch at the time of the later Egan cases and is now Professor of Constitutional Law at the University of Sydney. It was her unenviable task to go through the thousands of documents involved and make an initial assessment about privilege. She recalls that, 'as a matter of good faith', the Government then asked former Chief Justice Sir Laurence Street to verify independently that the documents 'really were privileged. He did so and agreed that the Government wasn't seeking to hide anything behind claims of privilege. From recollection, there was one borderline document that Sir Laurence said should fall in the non-privileged category, so we handed it over. All the rest were legitimately privileged'.[22] Egan tabled Street's report in the House.

[22] Email to the author, 11.3.2017.

Hannaford responded that the key question was who should determine whether privilege existed, the Government or the Legislative Council?[23] The House decided it was the prerogative of the Council and Egan was again found guilty of contempt on 26 November by 22-15 (Tingle being the only crossbencher voting no) and suspended the next day when he continued to defy the House. Black Rod was directed to remove Egan, but this time only from the House.

According to Warren Cahill, as he and Egan were crossing the chamber,

> Michael asked: "Aren't you going to touch me" (which I found extremely amusing) and I replied: "I think we have gone down that path before". When we passed the crowded government staff benches in the President's Gallery, Egan's advisers were whispering to him: "Has he touched you?"[24]

Twomey remembers that the Treasurer had been given

> strict instructions to stay in his place until he was touched, in order to support the "assault" claim. But Egan was too embarrassed, and got up and left without being touched. He then gave a media conference where he said with a big grin on his face that he was absolutely terrified and intimidated by this large man with a stick leaning over him. Black Rod was a very mild person, as everyone knew, who was only a little taller than Egan. Fortunately, the Court did not seem to be too worried about the assault issue and hopefully never saw the media conference.[25]

Egan subsequently added a claim of assault to his action.[26]

The Court of Appeal handed down its decision in *Egan v Chadwick* on 10 June 1999.[27] Griffith has provided a useful summary:

[23] *NSWPD*, 26.11.1998.
[24] Email to David Blunt, Clerk of the Parliaments, 12.2.2017.
[25] Email to the author, 12.3.2017.
[26] Priestley JA commented in his judgment in *Egan v Chadwick*: 'The only cause of action which made the plaintiff's claim securely justiciable was the assault alleged'. He added that this cause of action failed as the Council had the power to compel the production of documents for which legal professional privilege or public interest immunity were claimed. (1999) NSWLR 563 at 595.
[27] (1999) NSWLR 563.

> All three members of the Court of Appeal agreed that the Council's power to call for documents did extend to privileged documents, on the basis that such a power may be reasonably necessary for the exercise of its legislative function and its role in scrutinising the executive. However, there were different views on the question of the extent of the power to order documents. In particular, Priestley JA found no limitation on that power. Whereas the majority of Spigelman CJ and Meagher JA found that the power does not extend to ordering the production of cabinet documents. Meagher JA's formulation of the restriction was broader in this regard, with his Honour granting immunity to cabinet documents generally. For Spigelman CJ, on the other hand, the immunity applied to documents which, "directly or indirectly, reveal the deliberations of cabinet"; as for documents prepared outside cabinet for submission to cabinet, "depending on their content", these "may, or may not" also lie beyond the Council's power …[28]

Justice Priestley drew a distinction between the recognition of a right and its unrestrained use:

> Possession of the power to compel production does not mean that the power will be exercised unless the House is convinced the exercise is necessary; if exercised, it does not follow that the House will do anything detrimental to the public interest; the House can take steps to prevent information becoming public if it is thought necessary in the public interest for it not to be publicly disclosed.[29]

He added that, in exercising its power to call for documents, the Council has a duty 'to prevent publication beyond itself' of documents the disclosure of which will be 'inimical to the public interest because the security of the state, relations with other governments or the ordinary business of government

[28] G Griffith, *Egan v Chadwick and Other Recent Developments in the Powers of Elected Upper Houses*, NSW Parliamentary Library Research Service, Briefing Paper 15/99, Executive Summary.
[29] (1999) NSWLR 563 at 593.

will be prejudiced'. When the executive claims privilege, the Council has the responsibility of 'balancing the conflicting public interest considerations'.[30] Chief Justice Spigelman noted that if the public interest was harmed by the Council's use of its power to call for documents 'the sanctions are political, not legal'.[31]

This time, Egan chose not to appeal to the High Court. John Evans believes it was a wise decision:

> They would have lost on legal professional privilege and public interest immunity grounds. They might well have lost on cabinet documents, too, because I had done a reasonable amount of research about cabinet confidentiality. There had been various court cases, including in the Administrative Decisions Tribunal in NSW, where they were able to get hold of cabinet documents. If courts could get hold of them, why should the Parliament not be able to get hold of them? Probably wisely, the Government did not want to take it on appeal to the High Court. The Legislative Council has been left with significant powers.

After the *Egan v Chadwick* judgment, the Council could have demanded that all documents for which privilege was claimed, except cabinet papers, be tabled and made available publicly. Instead, heeding the warnings of the judges about exercising its power responsibly, the Council maintained the *status quo*. In 2004, Standing Order 18 was replaced by new Standing Order 52 which refined and codified the procedures developed during the Egan cases, including those relating to privileged documents.[32] Lynn Lovelock was Clerk of the Legislative Council from 2007 to 2011. She points out that there is 'an inherent tension between an executive government and a legislative body exercising its role as a house of review. In drafting what was to become Standing Order 52, I was always conscious of the fine line between asserting the power of the House to call the executive to account and the potential for abuse of that power'.[33]

[30] (1999) NSWLR 563 at 594.
[31] (1999) NSWLR 563 at 578.
[32] See Appendix One.
[33] Email to David Blunt, Clerk of the Parliaments, 13.2.2017.

Standing Order 52 has been frequently used. During the 53rd Parliament (2003-06), there were 145 orders for papers passed by the House. This proved to be a peak, although papers were still regularly called for. The procedure was used 94 times in the 54th Parliament (2007-10) and 69 times in the succeeding Parliament (2011-14).[34]

Assessment

The former Clerk of the Senate, Harry Evans, has written that the Egan cases represent 'a major shift in favour of parliament and against the executive':

> It is also a more satisfactory state of affairs than at the Federal level, where the Senate has been defied by governments, particularly during the Howard regime, in disputes over the production of documents. The Council has reaped the reward of being more courageous than its Federal counterpart, and, indeed, than any other comparable house. It is a world leader in this area …[35]

Max Willis has no doubt about the significance of *Egan v Willis*:

> It is one of the most important judgments relating to the law of parliament that has ever come down in any court in Australia. Its effects are not just restricted to the specific issues of the case; the ramifications are far wider, in that it gave the High Court an opportunity to really speak out on the definition and implications of representative government, of responsible government, not just the power but also the responsibility of houses of parliament and their role and interrelationship with the executive government. There is just so much in that judgment that it will echo down the centuries in terms of the law of parliament in this country—even if tomorrow we enact legislation in this State to cover these things.

Willis likewise regards *Egan v Chadwick* as a landmark:

[34] See Appendix Two.
[35] *Constitutional Law and Policy Review*, vol 9 no 1, May 2006.

> Although it decided on the specific issue there was really quite a divergence of opinion between the three judges on the issue of Crown prerogative – public interest immunity as it's now called. They are all hugely interesting approaches from one extreme to the other—Priestley at one end, Meagher at the other end and Spigelman somewhere in the middle—but put the two cases together and their consequences are really quite dramatic and long-lasting. I think they were very worthwhile cases and, since those cases, governments of NSW, of both political persuasions, have observed faithfully what the court decided … They very clearly say that, except as prescribed in the NSW *Constitution Act*, the powers and functions of the Legislative Council are the equal of the Legislative Assembly, without question.

Jenny Gardiner was a Nationals MLC 1991-2015 and Deputy President 2011-15. She also sees the impact of the Egan cases as momentous:

> To have the High Court of Australia articulate the powers of the House adds to its credibility in the public domain. It is not something the House

Jenny Gardiner

> simply asserts. It has been underlined by the highest court in the land and it is unquestionable as to those powers, which adds to the status of the institution. Its place, *vis à vis* the Legislative Assembly and the executive government, is cemented in our democracy. The oldest part of our system of government is more established now than it was ever before.

John Evans believes that one point in the joint majority judgment in the High Court is particularly noteworthy:

> The Judges say that what is reasonably necessary at any time for the proper exercise of the functions of the Legislative Council "is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council". This makes a very important point for practitioners of parliamentary practice and procedure: you establish all these practices and conventions by procedures and resolutions of the House and if they come to be tested by the courts at some time in the future they will have regard to them. I think that was a significant point about *Egan v Willis*: there was that long history of conventional practices of the Legislative Council, of orders for papers being complied with by the government, very few occasions where they were not, which led to the Court's conviction that this was something in our system of responsible government and superintendence of the executive that ought to take place.

Not unexpectedly, Michael Egan has a different view:

> The nature of responsible government means that the government cannot be responsible to two different entities that have different views. The courts will wake up to that one day. Just because the courts have decided one way, does not mean that in ten years, 15 years or 20 years down the track they will not change their minds. They changed their minds on excise duties three times during the last century. They change their minds all the time.

He adds: 'We were happy that we established that cabinet documents were exempt. I thought the courts got it wrong on privilege. Courts often get things wrong … The law is a lucky dip … One day I will be proven right. I might not be alive when it happens'.

The effectiveness of orders for papers

The Deputy Clerk of the Legislative Council, Steven Reynolds, has written that the NSW upper house has used the power to call for papers 'to a degree unique in Australian jurisdictions'. In general, the greater the control the government has over the chamber, the fewer the number of successful motions under Standing Order 52. There are, however, exceptions 'when governments have conceded that there is a public interest in releasing documents'. Reynolds cites a motion in February 2016 by a Greens MLC for the tabling of papers regarding patients at a major private hospital being given incorrect chemotherapy treatment. The Government agreed to the motion, and the tabled documents led to an inquiry which revealed five more such cases. It was an instance of a parliamentary process making 'a significant contribution to public policy and administration'.[36]

Michael Egan is firmly of the opinion that it is 'ludicrous that there can be a call for documents that involves sometimes hundreds of thousands of pieces of paper. No-one is going to go through them. In fact, on almost every occasion when papers have been tabled they have just sat in a room somewhere … That is not the way you scrutinise government'. Anne Twomey sides with Egan: 'Perhaps on the odd occasion there has been a benefit but I suspect in the long term the cost in time and money, and the reduction in government accountability due to the lack of a paper trail, would far outweigh any benefit obtained'. She believes that one particularly retrograde result of the frequent use of orders for papers is that controversial issues 'have since largely been dealt with orally, so there are no written documents that can be provided to the Legislative Council.

[36] S Reynolds, 'Making honey in the bearpit: parliament and its impact on policymaking', *Australasian Parliamentary Review*, vol 31 no 2, Spring/Summer 2016.

This has been very damaging for the way that governments operate and means that in the future there will be few written documents to explain why controversial decisions were taken'. [37]

Lynn Lovelock has noted that the Council has attempted to focus orders for papers more specifically to mitigate the burden placed on government agencies:

> Consequently, orders are drafted to directly target only relevant departments, to exclude any documents not specifically required, and to limit the time periods for which documents are sought. Nonetheless, specific targeting can be problematic where the executive government takes a restrictive approach in interpreting the already narrowly drafted order and in deciding which documents to supply. In such cases, the House has found it necessary to make a further order for the relevant documents before they have been supplied.[38]

In Ron Dyer's opinion, the use of Standing Order 52 has been constructive and effective: 'There have been all sorts of issues that have been raised where members have thought it appropriate or necessary to move a motion to call for papers. I am sure that in various cases that has shone some light on the matters at issue'. Max Willis also has a positive view about the operation of Standing Order 52:

> You are never going to achieve perfection but I think it is as good a mechanism as could be developed, and the way it has been utilised I think has been very commendable. I think the status of the independent arbiters has been without question, accepted by both sides, criticised only by a few academics, and by and large it works. In these kinds of grey areas you are never going to achieve the perfect solution because there is always a messy mix of law and politics.

[37] Email to the author, 11.3.2017.
[38] L Lovelock, 'The power of the NSW Legislative Council to order the production of state papers: revisiting the Egan decisions ten years on', *Australasian Parliamentary Review,* vol 24 no 2, Spring 2009.

Willis offers some sage advice: 'The Legislative Council will only ever press its case where it thinks that in political terms it will get away with it … It is the old story: if you have got a power, you diminish that power if you overuse it; you sustain the power if you use it prudently'.

Jenny Gardiner believes the power resulting from the Egan cases has, on the whole, been used responsibly:

> Obviously, any government is going to want to question the frequency of the call for papers and some members might occasionally resist a call for papers. I would make this point about the composition of the House: everybody has got a place in it and what matters to them, what particular project they want to embark upon, is as equally important as what some other person in another party might think is important. Therefore, if they want to pursue the government in a particular way, that is something that they ought to be able to do, and exercise their judgement as to whether they are calling for too many papers. I think it works itself out. Again, most people realise that there is a point where you decide what to concentrate on: you give this a miss and you go for that. Apart from anything else, members have only got certain resource capacities to follow these things up. Most do not want to be wasting taxpayers' money, so they make their decisions and prioritise things.

John Jobling became a Liberal MLC in 1984 and was Government Whip from 1988-95 and Opposition Whip 1995-2003. He sees orders for papers as a vital tool for enforcing accountability:

> The public servants will give you one page or two pages, but it is the whole story that you need to be able to understand the true picture, not that bit of the picture they have grudgingly given you. Therefore, I think the power is essential. You are going to see it used more and more and it will produce more effective outcomes for transparency.

However, Jobling sounds a warning about potential misuse:

> Where it is a litigant inside the chamber or a member pushing an activist's or a litigant's political view who can get the numbers, it just creates untold nuisance by having all these boxes put together and brought in here. In fact, there were so many on one occasion I think John Evans had to move out of his office. That is a dangerous situation that can bring the whole thing undone in time … Looking at it now, I can see a bit of a development in that direction which does cause me some worry … In a number of cases, with committees being Independent-controlled, I suspect it is becoming a fishing expedition. I might be doing them an injustice but I have the feeling that sometimes they really have not got anything: so let us get all the papers and when we go through them see if we can find something.

John Hannaford has a similar concern:

> I started seeing lots of calls for documents and I wondered why. I started to wonder who was, in fact, looking at the documents. Were the documents

John Jobling

> being examined or were political games being played? I had heard that there were some instances where there was a call for documents, they were being produced and no-one was looking at the documents … I remember saying to somebody: "If those documents are not being examined for the purpose for which the order for production was made, it would be putting into disrepute the whole process of a call for papers".

According to Hannaford, some accountability measures are necessary:

> There ought to be a clear response to the Parliament that, as a result of an examination of these materials, there are no issues of concern, or these are matters of concern which are apparent to us and some further action ought to be considered. It seems that what has happened is that somebody, at least in relation to some matters, has seen problems in their examination of the material and that has triggered the establishment of committees. But it is *ad hoc*.

Hannaford believes that the MLC who moves for the tabling of documents should take responsibility for the examination of the papers produced:

> That person needs to be doing it in conjunction with somebody else because there have got to be checks and balances. What you might consider inappropriate behaviour in relation to administration might be viewed differently by somebody else. Then that person needs to report. Do they report to the House or could they report back to a particular committee? A committee could take on the responsibility of looking at the issue and forming a view that this is a matter of such serious maladministration that it ought to either come back to the House, with a request for a formal committee hearing, or the government ought to be looking at the processes.

John Evans provides a balanced assessment of the efficacy of calls for papers:

> Those that support the actions of the House would say it is doing a good job and making the government accountable to the Council. Of course, those in government probably do not like what the House does calling

> for papers. I think in most cases the resolutions of the House requiring the production of papers were sensible and there were various reforms introduced while I was there which have worked well. There may have been some occasions where the call for the order of papers might have been a bit excessive and, in hindsight, probably on some occasions, we could have used a staged process for the order of production of documents; get some initial ones and, once having done that, perhaps ask for some more … The system introduced of an independent arbiter and the subsequent requirements have worked in ensuring that those papers the government thinks are subject to legal privilege or public interest immunity are certainly made available for inspection by members and ultimately, through an independent person assessing those documents, deciding whether they should be public or not. In general I think that whole process has worked fairly well.

The independent legal arbiter

John Hannaford sees a potential flaw in the legal arbiter system:

> There is the potential for an arbiter to be appointed who might tend to favour the government's position in order to curry favour. I do not say that that has ever happened. A lot of the arbiters have, in fact, ruled against the government's claims but there is that potential. In hindsight, it would be preferable that there be appointed more than one arbiter to look at these important issues … If you had two expressing a unanimous view then it would require a lot of argument in the House to articulate a different view … If they had a unanimous view then they would be supporting each other. And it would minimise the risk of a political storm engulfing them.

Hannaford suggests that the House rather than the President should appoint the arbiter: 'The Clerk would provide advice. The President might consult with the parties to see whether or not there were difficulties. If there was consultation between the Leader of the Government and the Leader of the Opposition and they were in agreement, I would be surprised if the crossbenchers would voice dissent'.

Lynn Lovelock raises an important issue: how autonomous is the arbiter?

> John Hannaford was clear that cabinet documents were to be exempt from the orders process. However, he was equally clear that other documents subject to privilege claims should be made available to members, and that there should be a mechanism to allow a claim of privilege to be disputed. My concern was to ensure that the House did not concede its power to an outside body.

Standing Order 52 thus makes it clear that 'the decision of whether to uphold the claim of privilege rests with the House, and not with an arbiter. The arbiter simply provides a report to the House. It is still the decision of the House whether to uphold a claim of privilege, or to make a document public notwithstanding the claim'.[39] On a few occasions, the Council has rejected or varied the arbiter's recommendations.[40]

[39] Email to David Blunt, Clerk of the Parliaments, 13.2.2017.
[40] See Appendix One.

Lynn Lovelock

Virginia Chadwick

The role of the arbiter is a key one. If a tabled document is privileged, its value in terms of the House's scrutiny function is limited. The Clerk of the Legislative Council, David Blunt, explains that MLCs can 'inform themselves in relation to the contents of a privileged document and can discuss the contents only with fellow members. Without a successful challenge to the claim of privilege, there is virtually nothing more that can be done with such documents in the House or in committees'.

The first arbiter, Sir Laurence Street, formulated a two-step test. After determining that a claim of privilege was valid, he applied the further test of whether the public interest in disclosure over-rode that privilege. One of his successors, Terence Cole, went further:

> Where these two interests conflict, it will be a rare circumstance where the public interest in performing the constitutional role of government does not prevail. That is because of the pre-eminence of the constitutional parliamentary function of the Legislative Council, and its members, of reviewing the arrangements made or proposed by the executive government.[41]

Anne Twomey, on the other hand, has argued that the arbiter should be confined to the first stage of Street's test. She believes that it is not appropriate for a legal expert, which the arbiter is by definition, to adjudicate on broader questions involving the public interest, which inevitably have political overtones: 'The role of the independent legal arbiter should be confined to ensuring that the government does not "try one on" by attempting to include with the privileged documents other documents that could not reasonably be characterised as falling within an established category of privilege'.[42]

In 2014, the current arbiter, Keith Mason, set out the principles guiding his assessment of claims of privilege: 'The arbiter's primary task, as I see it, is to report whether legally recognised privileges as claimed apply to the disputed

[41] *Disputed Claim of Privilege: Nimmie-Caira System Enhanced Environmental Water Delivery Project*, Report of the Independent Legal Arbiter, 20 November 2012.
[42] Twomey, A, 'Executive accountability to the Senate and the NSW Legislative Council', *Australasian Parliamentary Review*, vol 23 no 1, Autumn 2008.

documents … ' However, he accepts that 'wider public interests also deserve acknowledgement'. As long as 'over-riding harm' is not done to the operation of the executive and bureaucracy, debate stemming from the public release of tabled documents 'is of the essence of representative democracy'. Mason specifically links consideration of the public interest in disclosure to the powers of the Council, as recognised in the Egan cases:

> The focus should always be on the needs of the House in performing its constitutional functions. With some snippets of confidential information the House's need will be met if only members are free to access them … With most information, however, the House's needs may indicate that it should be free to disseminate the information publicly unless there is clear over-riding need for the confidentiality urged by the executive.[43]

Mason is applying a new, single-step test. However, he cautiously incorporates public interest considerations and thus seems likely to arrive at conclusions similar to those of previous arbiters.

The confidentiality of cabinet documents

Gareth Griffith has noted that, after the judgment in *Egan v Chadwick*, the question for the future is 'how broadly or narrowly the courts will interpret the restriction on cabinet documents. The other side to this practical question concerns the steps governments may take to claim immunity for sensitive documents, be they defined as a class or otherwise'.[44]

Ron Dyer argues strongly that cabinet documents should remain confidential:

> As a lawyer, I agree with Spigelman CJ and Meagher JA, and the reasoning they adopted in *Egan v Chadwick*. Justice Meagher went further in his decision than Spigelman CJ did. The latter said that, in effect, to allow a call for cabinet documents would interfere with a key element in our system of responsible government, the doctrine of collective ministerial responsibility. The way cabinet works, all ministers go in

[43] *Disputed Claim of Privilege: Westconnex Business Case*, Report of the Independent Legal Arbiter, 8 August 2014.
[44] G Griffith, *Egan v Chadwick and Other Recent Developments in the Powers of Elected Upper Houses*, NSW Parliamentary Library Research Service, Briefing Paper 15/99, Executive Summary.

> there and when they make a decision they are bound by that decision. That is what collective ministerial responsibility is. Justice Meagher took a broader view by saying that the immunity of cabinet documents was complete. There is some distinction to be made. Cabinet documents can variously be minutes, correspondence from central agencies of government, such as the Premier's Department or the Treasury, or from line departments to the Department of Premier and Cabinet. They can comprise the minutes of cabinet itself. However, my view is close to Justice Meagher's. The traditional doctrine has been that cabinet meets confidentially and it is not open to anyone to prise that open. That secrecy does not have any sinister motive. It is a matter of all sorts of things being able to be said openly within that forum, sometimes in the course of robust debate, and all of those people coming out and hopefully adhering to that collective decision.

A crucial issue is the complexity of defining what constitutes a cabinet document. As John Evans observes:

> Is it purely the deliberations of cabinet that are not able to be revealed to the Parliament? Or is it documents and submissions prepared for consideration by cabinet? One would think that those things should not be subject to cabinet confidentiality. Lots of reports and documents are prepared by public servants that end up as submissions to cabinet. The Department of Premier and Cabinet seemed to think that you could put all those things in a wheelbarrow and claim them as being part of the deliberations of cabinet.

John Hannaford poses some key questions:

> Do I suspect that reports are generated and marked as for a cabinet committee or cabinet for the purposes of protecting those documents? Yes, I do, I believe that is accurate … Should there be a process in place whereby it could be assessed whether or not a claim of cabinet confidentiality is correct? Yes, there should be. Should the Parliament

> have access to cabinet documents? No. If a document has been prepared specifically for cabinet deliberation then it should not be available, but, if there has been a manipulation of the process, that should be disclosed and it might engender a different type of approach to the administration of documents.

Hannaford identifies the application of the exemption to cabinet committees as a particularly contentious issue:

> Are the records of the committees the deliberations of the cabinet? Are the committees of the cabinet a process whereby there can be detailed consideration of material which leads then to the production of reports back to the cabinet? … Subject to adequate safeguards against abuse, I think the committees of cabinet ought to be able to get the full and frank views of the bureaucracy and the advisers on matters they are considering. It might result in a lot of work being delegated so that the cabinet does not have to spend as much time on detailed matters. Therefore, I would say that cabinet committees ought to be treated as cabinet for the purposes of the protection of cabinet deliberations.

Jenny Gardiner regards the issue as one of balance. If the executive 'plays fair', so will the Parliament:

> I definitely do not think that governments should be playing games, trying to expand the number of documents that are attached somehow to the cabinet minutes or whatever, as a way of evading accountability. They can try that, but it usually does not work in a government's best interests, because they ruin their reputation—if they are found out—for accountability and transparency. I think we are living in an age where people expect transparency more so than ever. They expect to be able to know what is going on. They expect to be able to get to the truth, and a government that does not understand that usually comes undone. That boundary of true cabinet confidentiality should be preserved and protected. Once you play games around that you run into trouble. I think

> the Legislative Council has the right to probe to that edge and respect that edge, not to be fobbed off.

It may be that, at some future time, the Council and the courts move to delineate where that edge is and decide how to deal with boundary disputes.

Conclusion

The essence of the Egan cases was the relationship between the Legislative Council and responsible government. On one view, the group in the Legislative Assembly that has the confidence of the House (in other words, a majority) forms government. The executive is thus responsible to the Assembly, as it remains in office only while it maintains a majority in that chamber. The upper house, in this interpretation, has nothing to do with responsible government. An alternative view is that responsible government has another level: parliament is the body that, on behalf of the electors, holds ministers responsible for the actions of the executive. On this latter interpretation, the upper house, as part of the legislature, also has the right to enforce accountability. This is the view that the Supreme and High Courts upheld, with profound consequences for the Legislative Council and parliaments throughout Australia.

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Appendix one: Extract from the Legislative Council's Annotated Standing Orders – Standing Order 52

52. Order for the production of documents

(1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.

(2) When returned, the documents will be laid on the table by the Clerk.

(3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.

(4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to be have been presented to the House and published by authority of the House.

(5) Where a document is considered to be privileged:

(a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,

(b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:

(i) made available only to members of the Legislative Council,

(ii) not published or copied without an order of the House.

(6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.

(7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

(8) A report from the independent legal arbiter is to be lodged with the Clerk and:

(a) made available only to members of the House,

(b) not published or copied without an order of the House.

(9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

Development summary

1856	Standing order 23	Orders for papers
1870	Standing order 26	Orders for papers
1895	Standing order 18	Orders for papers
1922	Standing order 18	Orders for papers
1927	Standing order 18	Orders for papers
1998	Sessional order	Appointment of Independent Legal Arbiter
2003	Sessional order 52	Order for the production of documents
2004	Sessional order 52	Order for the production of documents

Standing order 52 regulates the House's power to order the production of documents concerning the administration of the State, including from ministers, departments and other entities. While SO 52 is not the source of the power, which is conferred on the House as a reasonably necessary power at common law,[45] the standing order outlines the administrative process by which orders will be made, communicated and returned, and provides for an arbitration mechanism in the event that a member disputes a claim of privilege made over a document.

[45] The power of the Legislative Council to order the production of state papers is derived from the common law principle of reasonable necessity. This principle finds expression in a series of 19th century cases decided by the Judicial Committee of the Privy Council between 1842 and 1886 in which it was held that while colonial legislatures did not possess all the privileges of the Houses of the British Parliament, they were entitled by law to such privileges as were 'reasonably necessary' for the proper exercise of their functions. (See *Kielly v Carson* (1842) 12 ER 225, *Fenton v Hampton* (1858) 14 ER 727, *Barton v Taylor* (1839) 112 ER 1112). This is discussed further in Lynn Lovelock and John Evans, NSW *Legislative Council Practice* (Federation Press, 2008) and David Blunt, "Parliamentary sovereignty and parliamentary privilege", 2015, Paper presented to a Legalwise Seminar, https://www.parliament.nsw.gov.au/lc/articles/Documents/ parliamentary-sovereignty-and-parliamentary-priv/Parliamentary%20Sovereignty%20and%20Parliamentary %20Privilege.pdf, retrieved 1 June 2016.

Operation

Orders made under SO 52

Orders for the production of documents are initiated by resolution of the House, agreed to on motion in the usual manner. The resolution states the offices, agencies and other bodies that are the subject of the order and the documents sought. The definition of a document extends to a number of materials and formats under the provisions of s 21 of the Interpretation Act 1987,[46] and returns have included maps, books, other publications and data in electronic format on CD and USB.[47]

The resolution must also nominate the date by which the return is required (SO 52 (4)). Returns to orders have been required between one day[48] and 28 days[49] from the date of the resolution. Between the late 1990s and 2013, orders routinely nominated a deadline of 14 days, with occasional variation to seven days or 28 days. However, following a 2013 Privileges Committee inquiry into the orders for papers process and feedback provided by the Department of Premier and Cabinet,[50] the House has moved to a default deadline of 21 days, although this is still subject to the discretion of the member proposing the motion and the House in considering the merits of an order on a case by case basis.

On several occasions, following a request from a department or a minister, the House has passed a resolution to extend the due date for an order previously agreed to[51] or to alter the terms of a resolution previously agreed to.[52]

[46] Under section 21 of the Interpretation Act 1987 a document means any record of information, and includes: (a) anything on which there is writing, or (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or (d) a map, plan, drawing or photograph.
[47] For example, returns regarding unflued gas heaters and the 'Going Home, Staying Home' reforms included data provided on a USB (*Minutes,* NSW Legislative Council, 19 May 2010, p 1831; 6 May 2015, p 51); a return regarding the Lower Hunter Regional Strategy included a roll of maps (*Minutes*, NSW Legislative Council, 9 May 2007, p 26); returns regarding Cessnock Council (*Minutes,* NSW Legislative Council, 2 June 2010, p 1873), the Building Australia Fund (*Minutes,* NSW Legislative Council, 31 August 2010, p 1994) and Barangaroo (*Minutes*, NSW Legislative Council, 21 September 2010, p 2060) contained information on CD.
[48] For example, *Minutes*, NSW Legislative Council, 13 October 1998, pp 749-52; 26 November 1998, pp 953-61. These orders were consequential upon earlier orders on the same subject, with longer deadlines, not having been complied with.
[49] For example, *Minutes*, NSW Legislative Council, 14 May 2009, p 1166; 11 March 2010, pp 1696-97; 1 December 2010, pp 2313-14.
[50] Privileges Committee, NSW Legislative Council, *The 2009 Mt Penny return to order,* Report No. 69, October 2013.
[51] For example, *Minutes*, NSW Legislative Council, 26 October 2006, p 316; 13 November 2013, p 2191.
[52] *Minutes*, NSW Legislative Council, 8 May 2014, pp 2486-2488; 15 May 2014, pp 2520-2521; 19 November 2014, pp 323-324.

On other occasions, departments have advised that they would not be able to produce the documents within the time specified. A supplementary return containing additional documents was then made some time after the original due date.[53]

When a resolution is agreed to, the Clerk writes to the Secretary of the Department of Premier and Cabinet[54] to communicate the terms of the order (SO 52 (1)). The Department then carries out the administrative function of coordinating the return by the due date from the offices and agencies named in the order.

While an order is directed to the ministers or agencies named in the resolution, there is an expectation that if the resolution coincides with a change in the allocation of portfolios or the restructure of an agency, the order will nevertheless be complied with. The ramifications of such arrangements came to the attention of the Council in 2013, when it became apparent that a change in the allocation of portfolios in the Executive may have contributed to certain documents not being returned in response to an order for papers.[55]

The return to order

Documents returned to an order of the House are tabled immediately by the Clerk, or received out of session if the House is not sitting (SO 52 (2) and (4)). Returns must be accompanied by an indexed list of all documents returned, showing the date of creation, a description of the document and the author of the document (SO 52 (3)).

Documents returned over which no claim of privilege is made are immediately made public. However, in one case in 2009, the House resolved to delay the publication of documents in a return to order not covered by a claim of privilege, in response to concerns that the publication of information concerning the future configuration of the Hurlstone Agricultural High School would coincide with a period during which students would be sitting their HSC exams.[56]

[53] *Minutes,* NSW Legislative Council, 19 May 2010, p 1831 (see Minutes entry relating to unflued gas heaters) and subsequent return on 8 June 2010, p 1894; 22 June 2010, p 1936 (see index tabled relating to a return to order regarding NSW Lotteries) and subsequent return on 7 September 2010, p 2025; 26 November 2013, p 2260 (see index tabled relating to a return to order regarding Mr Matthew Daniel) and subsequent return on 30 January 2014, p 2310; 4 November 2014, p 219 (see index tabled relating to a return to order regarding Martins Creek and Wollombi Public Schools) and subsequent returns on 11 November 2014 p 253 and 13 November 2014, p 300; 6 May 2015, p 52 (see index tabled relating to a return to order regarding Parramatta Road Urban Renewal Project) and subsequent return also reported that day.

[54] SO 52 (1) refers to 'Premier's Department', as it was constituted in 2004.

[55] The circumstances that led to this series of events, and the manner in which this bore upon the return process, are discussed in Chapter 3 of the Privileges Committee, NSW Legislative Council, *The 2009 Mt Penny return to order,* Report No. 69, October 2013.

[56] Publication delayed (*Minutes,* NSW Legislative Council, 29 October 2009, p 1473); publication further delayed (*Minutes,* NSW Legislative Council, 11 November 2009, p 1498); documents published (*Minutes,* NSW Legislative Council, 12 November 2009, p 1516).

Claims of privilege

If privileged documents are contained within the return the Clerk announces the receipt of the privileged documents, but tables only the index provided under paragraph (3), as all documents tabled by the Clerk are otherwise immediately made public (SO 54). Privileged documents cannot be 'tabled' as they may only be made available to members of the Legislative Council (SO 52 (5)). Privileged documents are stored in the Office of the Clerk for security. Under SO 52 (5)(b)(ii) privileged documents must not be published or copied without an order of the House, and while members may view the documents they cannot make public the information contained therein. Privileged documents are nevertheless effective in informing members of the particulars of matters the subject of the documents, which in turn may be instructive in influencing further actions taken by members on the matter, or in determining their vote on the matter.

The House may decide to authorise the publication of privileged documents by way of a subsequent resolution to that effect. This ordinarily occurs following an assessment by an independent legal arbiter (see below), however the House is at liberty to pass such a resolution at any time. For example, in 2003 the House resolved to publish documents received in a return to order concerning the removal of Dr Shailendra Sinha from the Register of Medical Practitioners, which had previously only been authorised to be viewed by members of the Parliamentary Joint Committee on the Health Care Complaints Commission.[57]

On five occasions claims of privilege have been subsequently withdrawn by the department from which the documents originated. On three occasions, the claim was withdrawn following the publication of an independent legal arbiter's report that recommended that the House publish those documents;[58] on two occasions the claim was withdrawn following receipt of a dispute and referral to an arbiter, but prior to the arbiter reporting on the dispute.[59]

[57] *Minutes,* NSW Legislative Council, 30 October 2003, p 372.
[58] *Minutes,* NSW Legislative Council, 23 November 2006, p 436; 1 September 2009, p 1293; 3 June 2010, p 1884.
[59] *Minutes,* NSW Legislative Council, 6 May 2014, p 2458-59; 12 August 2014, p 2646.

On several occasions, a claim of privilege or confidentiality has been made over documents already provided as public documents. In one case, the Department of Premier and Cabinet lodged a claim for privilege on documents provided as public documents the previous month.[60] In another, the Secretary of Family and Community Services advised that due to the large number of documents provided in response to a return, there was a risk that certain sensitive information may have been included in the public documents. The Secretary recommended that the Clerk require any person accessing the public documents to certify that they would not disclose certain information, should it be contained in the documents.[61] The Clerk agreed to the request.

The arbitration mechanism

Under paragraph (6), any member may dispute the validity of a claim of privilege in relation to a particular document or documents by written communication to the Clerk. In doing so, members are encouraged to be as detailed as possible in their correspondence, identifying the particular documents disputed (based on the information contained in the index) and the reasons they believe the documents do not warrant a claim of privilege. On receipt of a dispute, the Clerk is authorised to release those specific documents to an independent legal arbiter for evaluation and report (SO 52 (6)). The arbitration mechanism was first incorporated into the standing orders in 2004, having been introduced by way of resolutions of the House during the Egan disputes (discussed under Background).

The arbiter is appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge (SO 52 (7)), in recognition of the complexity of the issues under consideration and the need for an arbiter to be highly experienced in determining issues of public interest. On one occasion, a second arbiter was appointed to evaluate a claim of privilege after the first arbiter appointed advised that he would be unable to complete the evaluation due to personal circumstances.[62]

[60] *Minutes,* NSW Legislative Council, 12 August 2014, p 2645.
[61] Correspondence from the General Counsel, Department of Premier and Cabinet, *Request for papers – 'Going Home, Staying Home'*, dated 20 November 2014, tabled *Minutes,* NSW Legislative Council, 6 May 2015, p 51.
[62] *Minutes,* NSW Legislative Council, 13 November 2012, p 1351.

SO 52 (6) requires that a report by an arbiter be provided within seven days. In practice, the House has not sought to enforce this deadline as the volume and complexity of the documents the subject of most disputes do not lend themselves to such a tight deadline. Most assessments are made within a matter of weeks; however in one case a report was provided almost a year after the documents were released, and was never made public.[63]

In some cases the arbiter has sought additional information or assistance, either from the Clerk or from the departments that have claimed privilege.[64] More recently, a newly appointed arbiter sought submissions from members and stakeholders on both the merits of a disputed claim of privilege and the role he was expected to perform as arbiter.[65] The arbiter took this approach in response to statements made in the House which questioned the first assessment made by that arbiter.[66] As a result of the submission process, the arbiter took the opportunity to set out his understanding of the broad principles by which an assessment should be determined. The arbiter also foreshadowed that he would likely elect to adopt the same process of seeking submissions from members to assist him in determining the merits of any future disputes referred to him for assessment.[67]

The arbiter's report is lodged with the Clerk. The report is only made available to members, unless the House otherwise orders (SO 52 (8)). The House is informed, but not bound, by the arbiter's determination, and the decision as to whether documents should be published remains the final prerogative of the House. On a small number of occasions, the House has not acted on the Arbiter's recommendation that certain documents be published[68] or has gone beyond the recommendation of the arbiter by resolving that information be

[63] *Minutes,* NSW Legislative Council, 9 May 2007, p 44 (Clerk announced that dispute had been referred to arbiter on 20 December 2006); 27 November 2007, p 367 (Clerk announced receipt of report).
[64] Report of Independent Legal Arbiter, *Documents on ventilation in the M5 East, Proposed Cross City and Lane Cove Road Tunnels*, 26 August 2004, pp 2-4, tabled *Minutes,* NSW Legislative Council, 14 September 2004, p 977; Report of Independent Legal Arbiter, *Papers on M5 East Motorway*, 25 October 2002, pp 2-4, tabled *Minutes,* NSW Legislative Council, 30 October 2002, p 445; Report of Independent Legal Arbiter, *Millennium Trains Papers*, 22 August 2003, tabled *Minutes,* NSW Legislative Council, 3 September 2003, p 265; Report of Independent Legal Arbiter, *Unflued gas heaters*, 4 June 2010, pp 4-5, tabled *Minutes,* NSW Legislative Council, 10 June 2010, p 1928.
[65] *Minutes,* NSW Legislative Council, 13 August 2014, p 2658.
[66] *Hansard*, NSW Legislative Council, 6 March 2014, pp 27157-27158.
[67] Report of Independent Legal Arbiter, The Honourable Keith Mason, *Report under standing order 52 on disputed claim of privilege: Westconnex Business case*, 8 August 2014, tabled *Minutes,* 13 August 2014, p 2658.
[68] *Minutes,* NSW Legislative Council, 8 May 2003, p 72 (report tabled; report recommended that documents be published but no subsequent motion to that effect was moved); 10 March 2010 p 1688 (House resolved that some, but not all, of the documents determined by the arbiter not to warrant a claim of privilege be published).

redacted from a greater volume of documents than that originally recommended by the arbiter.[69] In some cases, the House has not published a report provided by the arbiter.[70] As the recommendations remain confidential and available only to members it cannot be determined whether the House acted on the arbiter's recommendations in those cases.

In the majority of cases, if the arbiter has recommended that documents the subject of the dispute be made public, the member who lodged the dispute will seek to have the report tabled and published, by motion of notice in the usual way, so that the report and its recommendations can be discussed more openly and a determination made as to whether the documents in question warrant the claim of privilege. These procedures usually occur over successive days; however there has been some variation in procedure over the years. On one occasion a member gave a contingent notice that, on the report of the arbiter being published, he would move a motion for the publication of the documents, thereby accelerating the process of publication.[71]

Unusual proceedings in relation to claims of privilege

House resolves to publish documents prior to receipt of arbiter's report

On one occasion, prior to the adjournment of the House for the summer recess, the House agreed to a series of resolutions concerning several disputed returns that, if the arbiter's reports on the disputes found that the documents did not warrant the claims of privilege made, both the reports and documents in question were authorised to be published by the Clerk out of session.[72] This practice has been the subject of varied comment.[73]

[69] *Minutes,* NSW Legislative Council, 23 June 2010, p 1952.
[70] For example, reports regarding the Dalton reports into juvenile justice (2005); grey nurse sharks (2006); Boral Timber (2007); Hunter Rail Cars (2007); the 2007-08 Budget (2007); and the Lower Hunter Regional Strategy (2007) have been received and reported to the House, but the House has not resolved to publish the reports.
[71] *Minutes,* NSW Legislative Council, 26 November 2009, p 1574.
[72] *Minutes,* NSW Legislative Council, 18 October 2005, p 1644; 30 November 2005, p 1785-86; 1 December 2005, p 1815.
[73] Twomey, A. *Executive Accountability to the Australian Senate and the New South Wales Legislative Council*, Legal Studies Research Paper No. 07/70, The University of Sydney Law School, November 2007; Lynn Lovelock. 'The power of the New South Wales Legislative Council to order the production of State papers: Revisiting the *Egan* decisions 10 years on', *Australasian Parliamentary Review*, Spring 2009, Vol. 24 (2), 199-220.

Referral of privileged documents and arbiter's report to Privileges Committee

As an alternative to this practice, in the lead up to the final sittings of the 55th Parliament and the summer recess prior to a periodic election, the House resolved that, in view of the fact that the House was currently awaiting receipt of a number of returns to orders, and a number of disputed claims of privileges had been referred to the independent legal arbiter for evaluation and report, the Privileges Committee be authorised to undertake the role usually performed by the House in dealing with disputed claims of privilege over returns to order while the House was not sitting. The motion specified that this would extend to the committee being authorised to make public any documents over which privilege had been claimed but not upheld by the arbiter. Any member of the Council who had disputed a claim of privilege would be entitled to participate in the deliberations of the committee, but could not vote, move any motion or be counted for the purposes or any quorum or division unless they were a member of the committee.[74]

There have been occasions on which further alternative procedures have been followed in relation to the determination of claims of privilege. In October 2014, the House resolved that the Privileges Committee inquire into and report on the implementation of a report by an independent legal arbiter on papers relating to the VIP Gaming Management Agreement, entered into between the Independent Liquor and Gaming Authority (ILGA) and Crown Casino. The arbiter's report had recommended that information claimed by the Executive to be commercially sensitive and confidential be published, as the claim was not valid.[75] The committee invited submissions from the member who had lodged the dispute and, through the Department of Premier and Cabinet, from Crown Resorts Limited and the ILGA. The committee reported that, having reviewed the matter in reference to the submissions received, it supported the recommendation made by the arbiter in his report, and the House in turn resolved to publish the arbiter's report and the information the subject of the dispute.[76]

[74] *Minutes,* NSW Legislative Council, 20 November 2014, pp 365-367.
[75] *Minutes,* NSW Legislative Council, 23 October 2014, pp 201-202.
[76] Privileges Committee, NSW Legislative Council, *The Crown Casino VIP Gaming Management Agreement*, Report No. 72, November 2014.

The House authorises a committee to determine whether papers not subject to a claim of privilege should be published

On 12 November 2014, the House established a select committee to inquire into and report on the conduct and progress of the Ombudsman's inquiry 'Operation Prospect'. Later that month, under SO 52, the House ordered the production of a report prepared by Police Strike Force Emblems and other related documents. The resolution provided that, notwithstanding anything to the contrary in SO 52, any documents returned over which a claim of privilege was not made would:

a) subject to (b) below, remain confidential and available for inspection by members of the House only, and

b) stand referred to the Select Committee on the conduct and progress of the Ombudsman's inquiry 'Operation Prospect', which was authorised to determine whether the documents should subsequently be made public.[77]

Ultimately, the arrangement did not proceed as General Counsel for the Department of Premier and Cabinet lodged legal advice from the Crown Solicitor which stated that information concerning the administration of justice must be ordered from the Governor under SO 53 rather than from the Executive under SO 52.[78] As the House had adjourned for the summer recess, a subsequent order under SO 53 was not pursued.

The House authorises a committee to publish documents the subject of a disputed claim of privilege

In 2013, the House resolved to order the production of certain documents required by General Purpose Standing Committee No. 1 for the purposes of an inquiry into allegations of bullying at WorkCover NSW.[79] The committee had previously sought to order the documents directly from the Public Service Commissioner but had been refused.

[77] *Minutes,* NSW Legislative Council, 20 November 2014, pp 363-4.
[78] *Minutes,* NSW Legislative Council, 6 May 2015, p 52.
[79] *Minutes,* NSW Legislative Council, 13 November 2013, p 2171.

The key report received in the return and required by the committee was subject to a claim of privilege. The Chair disputed the claim, and the independent legal arbiter determined that the claim should not be upheld because the "privacy concerns that have been advanced [did] not establish a relevant privilege known to law".[80] The House then resolved that, notwithstanding the provisions of SO 52, the documents considered by the arbiter not to warrant privilege from publication be referred to the committee for the purposes of its inquiry, and that the committee have the power to authorise the publication of the documents in whole or in part, talking into consideration the recommendations made by the arbiter.[81] The committee later reported that the House's actions had empowered members to more freely question witnesses in relation to the matters revealed in the return to order.[82]

Register maintained by the Clerk

Under SO 52 (9), the Clerk is to maintain a register showing the name of any person examining documents tabled under this order. The register is not made available for perusal by other members or the public and is not regarded as a public document. The requirement for a register first appeared in the 2004 standing orders, the result of deliberations of the Standing Orders Committee (see commentary below).

Refusal to provide documents

On occasion in the years since the *Egan* decisions, the Secretary or Director General of the Department of Premier and Cabinet has advised that returns to orders, or particular documents within those returns, would not be provided for various reasons. These have included:

- Advice that two documents identified had not been provided because they "formed part of a Cabinet Minute dealing with Grey Nurse Sharks" and "Cabinet Minutes and documents are exempt from standing order 52 requests".[83]

[80] Report of Independent Legal Arbiter, The Honourable K Mason AC QC, *Disputed claim of privilege on the report regarding a former WorkCover NSW employee*, 5 March 2014, p 2; *Minutes,* NSW Legislative Council, 5 March 2014, p 2333.
[81] *Minutes,* NSW Legislative Council, 6 March 2014, p 2347.
[82] General Purpose Standing Committee No. 1, NSW Legislative Council, *Allegations of bullying in WorkCover NSW*, 2014, p 9.
[83] *Minutes,* NSW Legislative Council, 22 March 2005, p 1283.

- That it was not practicable to produce the documents sought.[84]
- That, on the advice of the Crown Solicitor, orders for papers in place at the time of prorogation had lapsed and returns would not be provided. The House subsequently agreed to four new resolutions when the new session of Parliament commenced, noting that "there are many established conventions recorded in the Journals of the Legislative Council where the government has complied with an order of the House for state papers in the subsequent session, notwithstanding the prorogation of the House".[85]
- The document sought by the order was tabled by a minister as general ministerial tabling.[86]

There have been cases where documents sought have not been returned, or where the Department advised that no documents were held.[87] Where this occurs, it is assumed that the documents have not been provided because they fall within the class of Cabinet documents; however the House retains the prerogative to further pursue the matter should it so choose.[88]

In cases where documents are not provided, the onus is on the House to pursue the matter. In some cases, the House has chosen not to take any further action.[89] In others, particularly where members have identified that documents may be missing from a return, the Clerk, at the request of the member, has written to the Department of Premier and Cabinet to forward the member's concerns and invite a response. On several occasions these inquiries have led to additional documents being tabled.[90] In one particularly significant example, a member wrote to the Clerk to advise that documents published in the course of an Independent Commission Against Corruption investigation had not been provided by a department in a return regarding the same matter. The matter ultimately led to two Privileges Committee inquiries regarding possible non-compliance with SO 52.[91]

[84] *Minutes,* NSW Legislative Council, 6 May 2014, p 2458.
[85] *Minutes,* NSW Legislative Council, 25 June 2006, pp 49-50, 53-57; 6 June 2006, pp 70-71; 8 June 2006, p 119.
[86] *Minutes,* NSW Legislative Council, 25 October 2006, p 305, 26 October 2006, p 320; 17 March 2010, p 1718.
[87] *Minutes,* NSW Legislative Council, 8 June 2010, p 1894; 14 February 2012, p 669.
[88] The decision in *Egan v Chadwick* (1999) 46 NSWLR 563 was not conclusive as to the powers of the House to order the production of Cabinet documents. See comments made by Mr Bret Walker SC, Keynote Address, *Proceedings of the C25 Seminar marking 25 years of the committee system in the Legislative Council*, 20 September 2013, pp 7-11.
[89] *Minutes,* NSW Legislative Council, 8 June 2010, p 1894; 14 February 2012, p 669.
[90] For example, *Minutes,* NSW Legislative Council, 27 March 2012, p 834; 15 October 2013, p 2032; 6 May 2015, pp 52-53.
[91] Privileges Committee, NSW Legislative Council, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report No. 68, April 2013; *The 2009 Mt Penny return to order*, Report No. 69, October 2013.

Orders directed to statutory bodies and related entities

If the House seeks to order the production of documents from a statutory body or other similar entity not under the direct control of a minister, the resolution is communicated by the Clerk directly to the head of that body, with a courtesy letter also copied to the Secretary of the Department of Premier and Cabinet. This practice came about as the result of an attempt to order the production of documents from Greyhound Racing NSW in recent years. No return was received from GRNSW and correspondence from the Department of Premier and Cabinet advised that s 5 of the *Greyhound Racing Act 2009* provides that GRNSW does not represent the Crown and is not subject to direction or control by or on behalf of the Government. With the concurrence of the President, the Clerk subsequently sought advice from Mr Bret Walker SC on some of the legal issues raised by the matter. Mr Walker advised that, in his opinion, bodies with public functions, such as GRNSW, are amenable to orders for papers addressed to them directly by the Council, and are compelled to comply with such an order. Failure to do so would result in the responsible officer being in contempt of Parliament.

The House opted to pursue the matter. However, in August the Government had passed the *Greyhound Racing Prohibition Act 2016*, which included a s 27 which stated that the Minister may, at any time after the assent of the Act and until the dissolution of GRNSW, require GRNSW to produce any specified record and may make the information publicly available. The House was therefore obliged to take this new arrangement into account in its pursuit of the greyhounds matter. The new resolution agreed to by the House noted the order for papers originally made, noted the advice provided by Bret Walker SC, noted the provisions of s 27 of the Act, and called on the Minister for Racing to require GRNSW to produce the documents originally ordered in September 2015, together with any related documents created until the date of the resolution. In October 2016, the Clerk tabled a return received directly from the Administrator of GRNSW. The return comprised of both public documents and documents over which a claim of privilege was made and which were made available only to members.

The receipt of the return from GRNSW, and the willingness on the part of GRNSW to liaise directly with the Clerk in the provision of several additional returns to that order for papers in the subsequent months, is taken to be indicative of the acceptance by the executive government of the correctness of Mr Walker's advice.

Background

The standing orders have contained provisions for the House to order the production of state papers since 1856. The power of the Legislative Council to order papers was routinely exercised between 1856 and the early 1900s. However, orders for papers ceased to be a common feature of the operation of the Council during the years leading to 1920, with the occasional exception up to as late as 1948.

The 1856 and 1870 standing orders provided that all orders for papers made by the Council must be communicated to the Colonial Secretary by the Clerk (1856 SO 23; 1870 SO 26). The Colonial Secretary was the senior portfolio in the colonial legislature.

In 1895, the standing orders were amended to reflect a change in that officer's title, with the Clerk then required to communicate with the Chief Secretary of the Colony.[92] In 1922 the requirement to communicate the order to the Chief Secretary was omitted on the recommendation of the Standing Orders Committee.[93] During consideration of the report in committee of the whole the Chair noted that the Standing Orders Committee had recommended the amendment because the Legislature had by then moved under the purview of the Premier's Department rather than the Colonial Secretary. The Committee recommended the provision be left open rather than providing that communication be forwarded to the Premier's Department because the Legislature at a future time may be placed under another department. The Clerk would simply communicate with the Minister with portfolio responsibility for matters pertaining to the Legislature.[94] (The concept that the Legislature sits under the purview of an agency of the Executive Government is a repugnant concept in the modern day.

[92] Although the title was not officially changed in statute until 1959, under the Ministers of the Crown Act.
[93] *Minutes,* NSW Legislative Council, 2 August 1922, pp 32-3; 3 August 1922, pp 36-37; 16 August 1922, p 43. The report was not made in response to a reference from the House.
[94] Hansard, NSW Legislative Council, 3 August 1922, p 793; *Minutes,* NSW Legislative Council, 3 August 1922, pp 36-7.

It is likely that these references in debate refer to the minister or agency allocated as the principal liaison between the Government and the Legislature, rather than the minister or agency having any purported oversight of the Legislature.)

In 1927, the standing order was further amended to insert a requirement that the Clerk communicate the terms of any orders made to the Premier's Department, as it was then known, also on the recommendation of the Standing Orders Committee.[95] During consideration of the report in committee of the whole a shift in views was apparent, with the Chair observing that the addition was necessary as there was nobody to whom the duty was assigned following the amendment made in 1922, and it was thought that someone should definitely be named to carry out the duty.[96]

The adoption of provisions regarding privileged documents – the Egan cases

During the 1990s, the Council, now a democratically elected House, revived the exercise of its power to order papers. This precipitated the Egan cases, which were prompted by the refusal of the Treasurer and Leader of the Government in the Legislative Council, the Honourable Michael Egan, to produce certain state papers ordered by the Council. Mr Egan refused to produce papers on a number of occasions, regarding a number of subjects, ultimately leading to the matter being pursued in the courts.[97] Over the course of this period, the Council not only sought to clarify the scope of its powers to order the production of documents from the Government and related entities, but also refined the administrative processes that applied to the order for papers process.

Following the initial failure of the Government to table the documents ordered,[98] the matter was referred to the Privileges Committee to report on the sanctions that should apply where a minister fails to table documents.[99]

[95] *Minutes,* NSW Legislative Council, 15 November 1927, p 29; 25 November 1927, p 56. The report was not made in response to a reference from the House.
[96] Hansard, NSW Legislative Council, 22 November 1927, p 437; *Minutes,* NSW Legislative Council, 22 November 1927, p 41.
[97] *Egan v Willis and Cahill* (1996) 40 NSWLR 650; Egan v Willis (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563.
[98] The documents related to orders regarding the closure of veterinary laboratories (ordered *Minutes,* NSW Legislative Council, 18 October 1995, p 232); the development of the Sydney Showground site (ordered *Minutes,* NSW Legislative Council, 25 October 1995, p 264); the restructure of the Department of Education (ordered *Minutes,* NSW Legislative Council, 26 October 1995, p 279); and the proposed Lake Cowal Gold Mine (ordered *Minutes,* NSW Legislative Council, 23 April 1996, p 63).
[99] *Minutes,* NSW Legislative Council, 13 November 1995, pp 292-296.

Following the referral, but prior to the committee reporting, the Leader of the Government was suspended from the House, which provided the trigger for commencement of legal proceedings.[100] The Privileges Committee provided its report several weeks later and stated that, in view of the proceedings commenced, the power to order the production of documents was (at that time) uncertain and sanctions would therefore not be appropriate. However, the committee further reported that, if the Council did possess the power to order documents, a mechanism for assessing public interest claims for each individual case should be implemented in order to address conflicts between the Council and the Executive over claims of public interest immunity.[101] The committee observed that an equivalent arbitration model was not available in other Houses, so a mechanism was subsequently developed in consultation between the Clerks and the Leaders of the Government and the Opposition for inclusion in future resolutions of the House.

Several months after the Privileges Committee's report was tabled, the Court of Appeal handed down the first of the *Egan* decisions, ruling that the power to order the production of documents was a reasonably necessary power of the Council (*Egan v Willis & Cahill*)[102] (confirmed on appeal by the High Court in 1998 in *Egan v Willis*[103]). However, the Court did not rule on the power of the House to order documents over which a claim of privilege was made – this instead became the subject of further proceedings commenced after a series of resolutions were agreed to by the House in 1998.

On 24 September 1998 (prior to the decision in the Court of Appeal being handed down), the House agreed to a new resolution ordering the production of documents concerning the contamination of Sydney's Water Supply.[104] On 13 October 1998, the President reported receipt of correspondence from the Director-General of Premier's Department advising that following advice received from the Crown Solicitor, the Government would not comply with the order for papers because the documents were covered by legal professional privilege or public interest immunity privilege.[105]

[100] *Minutes,* NSW Legislative Council, 2 May 1996, pp 112-118 (suspension of Leader of the Government); 14 May 1996, pp 125-126 (President informed House of the commencement of legal proceedings in *Egan v Willis and Cahill*).
[101] Privileges Committee, NSW Legislative Council, *Inquiry into sanctions where a minister fails to table documents*, Report No. 1, May 1996, pp 19, 23, 24.
[102] *Egan v Willis and Cahill* (1996) 40 NSWLR 650.
[103] *Egan v Willis* (1998) 195 CLR 424.
[104] *Minutes,* NSW Legislative Council, 24 September 1998, pp 730-731. The resolutions passed in 1998 did not direct the order to a department or agency, and asked for all documents relating to the subject matter.
[105] *Minutes,* NSW Legislative Council, 13 October 1998, p 740.

Later that day, the House agreed to another resolution censuring the Leader of the Government, and calling on the Leader to table the documents the following day, subject to a number of additional criteria. These criteria reflected the first adoption of procedural provisions to address privileged documents in returns to orders:

- documents subject to claims of legal professional privilege or public interest immunity would be clearly identified and made only available to members, and would not be published or copied without an order of the House,
- in the event that a member disputed the validity of a claim of privilege made over the documents in writing to the Clerk, the Clerk would be authorised to release the disputed document to an independent legal arbiter who was either a Queen's Counsel, a Senior Counsel or a retired Supreme Court judge, appointed by the President, for evaluation and report within five days as to the validity of the claim,
- any document identified as a Cabinet document would not be made available to members, however the legal arbiter could be requested to evaluate any such claim,
- the President would advise the House of any report from an independent arbiter, at which time a motion could be made forthwith that the disputed document be made (or not made) public without restricted access.[106]

The following day, the Government tabled the public documents regarding Sydney's Water Supply, but did not table the documents over which privilege was claimed. The President subsequently informed the House that further legal proceedings (*Egan v Chadwick & Ors*)[107] had been commenced by the Leader of the Government, claiming that the Council had "no power to order the production of documents the subject of legal professional privilege or public interest immunity, or to determine itself a claim for legal professional privilege or public interest immunity", and claiming that the orders made by the Council in that regard were beyond its power.[108]

[106] *Minutes,* NSW Legislative Council, 13 October 1998, pp 744–747, 749-752.
[107] *Egan v Chadwick* (1999) 46 NSWLR 563.
[108] *Minutes,* NSW Legislative Council, 14 October 1998, pp 759-60.

On 20 October 1998, the Clerk tabled further documents received from the Government over which no claim of privilege was made.[109] The President then tabled an opinion from Mr Philip Taylor, Barrister, relating to the Leader of the Government's failure to fully comply with the resolution of the House of 13 October 1998, and the House, on motion of the Leader of the Opposition, judged the Leader of the Government in contempt and suspended him from the Chamber for five sitting days or until the 13 October resolution was complied with.[110] On 22 October 1998, the President informed the House that amended summonses were issued from the Supreme Court in the matter of Egan v *Chadwick & Ors*, with the plaintiff (Mr Egan) claiming that the Council's order of 20 October was punitive and thus beyond the powers of the House. Mr Egan sought an injunction restraining the House from suspending him.[111]

In November 1998, following the ruling by the High Court in *Egan v Willis*[112] but prior to a decision being handed down in *Egan v Chadwick*, the House ordered the production of all documents previously ordered by the House since 1995 and not yet provided, including those covered by privilege. The resolution once again incorporated provision for privileged documents to be made available only to members, and for an independent legal arbiter to assess any disputed claim of privilege, including documents identified as Cabinet documents. However, the previous requirement that documents covered by privilege be "clearly identified" was replaced with a requirement that a return be prepared showing the date of creation, description and author of any document for which a claim of privilege was made and the reason made for the claim of privilege (which later became the index required under SO 52 (5)(a)(b).[113]

Several days later, the Attorney General tabled a selection of the documents requested, but did not provide the privileged documents. The Attorney General additionally tabled a report prepared by Sir Laurence Street, whom the Government had asked to assess the validity of the claims of privilege on the documents not provided.[114] This was a notable development in the dispute

[109] *Minutes,* NSW Legislative Council, 20 October 1998, p 772.
[110] *Minutes,* NSW Legislative Council, 20 October 1998, pp 773-776.
[111] *Minutes,* NSW Legislative Council, 22 October 1998, pp 796-797.
[112] *Egan v Willis* (1998) 195 CLR 424.
[113] *Minutes,* NSW Legislative Council, 24 November 1998, pp 920-27.
[114] *Minutes,* NSW Legislative Council, 26 November 1998, pp 946-47.

between the House and the Government. Rather than provide the documents to the Council and allow the arbiter to assess the validity of the claim of privilege from publication, the Government had instead provided the documents to the arbiter and used the arbiter's assessment as authority for *non-production* of the documents, contrary to the House's resolution. The House immediately resolved that the documents be produced[115] and, when the resolution was not complied with, once again suspended the Leader of the Government.[116]

On 2 December 1998, the House adopted a sessional order to formalise the procedures for privileged documents for all orders for papers agreed to by the House, using the terms of the November 1998 resolution.[117]

In 1999, the House did not readopt the sessional order; however soon after the commencement of the new parliamentary session the Court of Appeal handed down its judgement in *Egan v Chadwick*, which confirmed the power of the House to order the production of documents covered by legal professional or public interest immunity privilege.[118]

Further development of the rules for orders for papers following the Egan cases

The first order for papers agreed to by the House in 1999, which ordered the production of documents previously ordered and not yet provided, included a provision for privilege to be claimed. However, rather than require that an arbiter assess the validity of any claim the subject of a dispute, in keeping with previous resolutions and the 1998 sessional order, the order instead provided that a dispute would be resolved by a resolution of the House.[119]

Notwithstanding, after that initial resolution, every subsequent order made included provision for an independent legal arbiter to make an assessment on any claims the subject of a dispute. The terms of the resolutions adopted varied slightly to those adopted previously, but generally formed the basis for those incorporated into SO 52(6) to (8) in 2004, which set out the dispute

[115] *Minutes,* NSW Legislative Council, 26 November 1998, p 947, 948-51, 952-61.
[116] *Minutes,* NSW Legislative Council, 27 November 1998, p 970.
[117] *Minutes,* NSW Legislative Council, 2 December 1998, p 998-1000.
[118] *Egan v Chadwick* (1999) 46 NSWLR 563.
[119] *Minutes,* NSW Legislative Council, 23 June 1999, pp 148-150.

mechanism, and the terms of SO 52(4), which made provision for the Clerk to receive documents out of session if the House was not then sitting.

From 2004, SO 52 formalised these arrangements, with two additions:

- the time within which the arbiter must provide a report on a dispute was extended from five calendar days to seven (SO 52(6)), and
- on the motion of a Government member during the Standing Orders Committee's consideration of the proposed new standing orders, SO 52 (9) was inserted to require that the Clerk maintain a register showing the name of any person who examines a return.[120]

[120] Standing Orders Committee, NSW Legislative Council, *Report on proposed new Standing Rules and Orders*, Report No. 1, September 2003, p 118.

Appendix Two: List of Orders for Papers in the Legislative Council 1996-2016

When Passed	Papers Applied For
23 April 1996	Lake Cowal Gold Mine
24 September 1998	Sydney Water Supply
13 October 1998	Sydney Water Supply (Further Order)
24 November 1998	Closure of Veterinary Laboratories
24 November 1998	Restructure of the Department of Education
24 November 1998	Development of the Sydney Showground Site
23 June 1999	Sydney Water Corporation and contamination of Sydney's water supply
1 July 1999	Documents relating to Northside Storage Tunnel
15 September 1999	Delta Electricty
23 September 1999	Integral Energy
14 October 1999	M5 Motorway Project
21 October 1999	M2 Motorway Project
10 November 1999	M2 Motorway Project – Further Order
25 November 1999	M5 Motorway Project – Further Order
30 November 1999	Report "The Race to Qualify"
24 November 1999	Redevelopment of Walsh Bay
30 November 1999	Coorabin Landfill
4 April 2000	Closure of Veterinary Laboratories/ Department of Education & Training
5 April 2000	Rural Community Impact Statements
6 April 2000	M5 East Ventilation Stack
26 May 2000	Roads and Traffic Authority
16 November 2000	FreightCorp
7 March 2001	Native Vegetation Conservation Act 1997
7 March 2001	Ethnic Affairs Commission Program Review
28 March 2001	M5 East Ventilation Stack – Further Order
30 May 2001	North Head Quarantine Station
30 May 2001	Hawkesbury-Nepean Catchment Management Trust

6 June 2001	Land Clearing by TransGrid
18 September 2001	Wellington Local Aboriginal Land Council
14 November 2001	M5 East Motorway
14 November 2001	Companion Animals Register
12 December 2001	Managing Director, Hunter Water Corporation
8 May 2002	Long Term Strategic Plan for Rail
8 May 2002	Mogo Charcoal Plant
25 June 2002	Randwick/Botany Industrial Complex
26 June 2002	M5 East Motorway – Further order
5 September 2002	M5 East Motorway – Further order
19 September 2002	Development of Crown Land (Woodward Park)
24 October 2002	Opinion Polls
24 October 2002	NSW Police
24 October 2002	Batemans Bay Sporting Shooters Association
30 October 2002	Inspector-General of Corrective Services
20 November 2002	NSW Government IT Tender
21 November 2002	Proposed Port Botany Expansion
4 December 2002	Development Application at Fox Studio
5 December 2002	Health Claims and Consumer Protection Advisory Committee
5 December 2002	Treasury Costings
7 May 2003	Millennium Trains
	Millennium Trains – additional documents tabled
29 May 2003	Dr Shailendra Sinha
24 June 2003	Cross City Tunnel
25 June 2003	Millennium Trains – Publication of Papers
	Millennium Trains – additional documents tabled
1 July 2003	Construction at Fox Studios
3 July 2003	Junee Correctional Centre
3 July 2003	Education
	Education – additional documents tabled
17 September 2003	Millennium Trains – Tabling of privileged documents
17 September 2003	Callan Park
17 September 2003	M5 East Tunnel Ventilation

17 September 2003	Tamworth West Public School
17 September 2003	M5 East Tunnel Ventilation
17 September 2003	Callan Park
18 September 2003	Redbank 2 Power Station
16 October 2003	Murrumbidgee Agricultural College
29 October 2003	Cross City Tunnel
30 October 2003	Dr Shailendra Sinha
18 November 2003	M5 East and other road tunnels' ventilation – Tabling of privileged documents
18 November 2003	Ports Growth Plan Ports Growth Plan – additional document tabled
20 November 2003	Oil Seeds
20 November 2003	Tamworth West Public School
	M5 East and other road tunnels' ventilation – tabled according to Report of Independent Legal Arbiter
4 December 2003	Camden and Campbelltown Hospitals
25 February 2004	Sydney Water
9 March 2004	Amalgamation of City of Sydney and South Sydney councils
10 March 2004	Camden and Liverpool Hospitals
10 March 2004	Westmead Children's Hospital
10 March 2004	Metro Edgley Development on Luna Park Site
18 March 2004	Austeel Project in Newcastle
	Austeel Project in Newcastle – additional documents tabled
	Austeel Project in Newcastle – additional documents tabled
31 March 2004	Axiom Education Consortium
31 March 2004	Axiom Education Consortium – additional papers tabled
31 March 2004	Axiom Education Consortium – additional papers tabled
11 May 2004	Mini-Budget
11 May 2004	Mini-Budget
11 May 2004	Mini Budget
12 May 2004	Acmena Juvenile Justice Centre, Grafton
12 May 2004	Acmena Juvenile Justice Centre, Grafton
1 June 2004	Tunnel Ventilation Systems

1 June 2004	Tunnel Ventilation Systems – additional papers tabled
2 June 2004	Department of Primary Industries merger
28 June 2004	Recruitment within Local Government
29 June 2004	2004-2005 Budget
1 September 2004	Class Sizes
1 September 2004	Luna Park Site
1 September 2004	Sydney's Water Supply
1 September 2004	Sydney's Water Supply – additional papers tabled
16 September 2004	Tunnel Ventilation Systems – Tabling of privileged documents
16 September 2004	Proposed primary school at Lake Cathie
21 September 2004	Axiom education consortium – Tabling of privileged documents
21 September 2004	Zoological Parks Board of New South Wales
21 September 2004	Beacon Hill High School
21 October 2004	Orange Grove Designer Outlets Centre, Liverpool Additional documents
28 October 2004	Dalton Reports into Juvenile Justice
16 November 2004	Greater Southern Area Health Service
8 December 2004	Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2004
8 December 2004	Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2004 – Tabling of additional documents
8 December 2004	Redfern-Waterloo Authority
8 December 2004	Development of Lands at Callan Park
22 February 2005	Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2004 Lands at Callan Park
24 February 2005	Grey Nurse Shark
24 February 2005	Audit of Restricted Rail Lines
24 February 2005	Road Tunnel Filtration
2 March 2005	Coastal Shack Licences in the Royal National Park
3 March 2005	Wood Product Extraction Operations
23 March 2005	Audit of Restricted Rail Lines – Further order

23 March 2005	Development of Lands at Callan Park – Further order
6 April 2005	Sinclair Reports concerning Brigalow Belt South Bioregion
3 May 2005	Proposal to introduce a Photographic Card
4 May 2005	Sinclair Reports concerning Brigalow Belt South Bioregion – Further order
4 May 2005	Ambulance Services
5 May 2005	Corrective Services Industries
5 May 2005	Gledhill Report
5 May 2005	Publication "Making a Difference for Boys"
6 May 2005	Student Absenteeism
7 June 2005	Tunnel Air Quality
22 June 2005	Audit of Restricted Rail Lines – Further order – Tabling of privileged documents
22 June 2005	Circular Quay Pylons
22 June 2005	Budget Documents
22 June 2005	Land Valuations
22 June 2005	Lane Cove Tunnel
23 June 2005	Proposed Sale of Vaucluse High School
14 September 2005	Budget Documents – Further order
15 September 2005	M4-M5 Cash Back Scheme
15 September 2005	Interstate Parolees
15 September 2005	Transfer of Parolees
15 September 2005	Address to the Governor – Papers relating to Otto Darcy-Searle
21 September 2005	Proposal to introduce a photographic card – Further order
22 September 2005	Circular Quay pylons – Tabling of privileged documents
12 October 2005	Purchase of Yanga Station
18 October 2005	Privileged Documents – Cross City Tunnel
18 October 2005	Cross City Tunnel – Further order
	Correspondence from Premier's Department relating to questions raised by member regarding the further order for Cross City Tunnel papers

9 November 2005	Swansea Bridges
9 November 2005	Tallowa Dam
9 November 2005	Desalination Plant
9 November 2005	Desalination Plant – Tabling of masked privileged documents
16 November 2005	Cross City Tunnel – Further order – Tabling of privileged documents
16 November 2005	Purchase of Yanga Station – Further order
	Purchase of Yanga Station – Further order – additional documents
16 November 2005	Luna Park Leases and Agreements
	Luna Park Leases and Agreements – additional documents
16 November 2005	Ombudsman Review Reports
16 November 2005	Women's Refuge Movement
17 November 2005	Marina Development at Careel Bay
30 November 2005	Proposals for Construction of Roads
30 November 2005	Coal Industry Workers Compensation Scheme
30 November 2005	Desalination Plant – Tabling of privileged documents
1 December 2005	Grey Nurse Shark – Further order
1 December 2005	Newcastle Transport Plan
1 December 2005	Tunnel ventilation documents [M5 East tunnel ventilation] – Tabling of privileged documents
1 December 2005	Tunnel ventilation documents [tunnel ventilation systems] – Tabling of privileged documents
1 December 2005	Tunnel ventilation documents [road tunnel filtration] – Tabling of privileged documents
1 December 2005	Tunnel ventilation documents [tunnel air quality] – Tabling of privileged documents
1 December 2005	Tunnel ventilation documents [Lane Cove tunnel] – Tabling of privileged documents
1 December 2005	Tunnel ventilation documents [M5 East tunnel ventilation – Tunnel ventilation systems – Road tunnel filtration – Tunnel air quality – Lane Cove tunnel] – Tabling of masked privileged documents
1 March 2006	Audit of Expenditure and Assets

8 March 2006	Firearms safety training
8 March 2006	Australian Target Shooters Club
8 March 2006	Lane Cove Tunnel – Further order (1)
5 April 2006	Firearms safety training – Further order
3 May 2006	Lane Cove Tunnel – Further order (2)
3 May 2006	Broadacre Project
3 May 2006	Dioxin Levels in Sydney Harbour Additional documents tabled
3 May 2006	Sale of PowerCoal Assets
3 May 2006	Incident at Acmena Juvenile Justice Centre
4 May 2006	Tariro Unit, Metro West Residences, Westmead
4 May 2006	Tunnel filtration
4 May 2006	"Yasmar", Haberfield
4 May 2006	Sale of "Strathallen", Goulburn
10 May 2006	Snowy Hydro Limited
10 May 2006	Darkinjung Local Aboriginal Land Council
10 May 2006	Redfern Waterloo Street Team
25 May 2006	Snowy Hydro Limited – Further orders (paragraph 6 of the resolution)
25 May 2006	Snowy Hydro Limited – Further orders (paragraph 1 of the resolution)
6 June 2006	Tunnel filtration – Further order
6 June 2006	Redfern Waterloo Street Team – Further order
7 June 2006	2006-2007 Budget
7 June 2006	Canterbury Multicultural Aged and Disability Support Services Inc.
7 June 2006	Lane Cove Tunnel – Further order (8 March 2006) – Tabling of privileged documents
7 June 2006	Luna Park leases and agreements – Tabling of privileged documents
7 June 2006	Dioxin levels in Sydney Harbour – Tabling of privileged documents
7 June 2006	Audit of Expenditure and Assets – Tabling of privileged documents

7 June 2006	Sale of PowerCoal assets – Tabling of privileged documents
7 June 2006	Snowy Hydro Limited – Further orders – Tabling of privileged documents
8 June 2006	School Education Infrastructure in Tamworth
8 June 2006	Darkinjung Aboriginal Land Council – Further order
31 August 2006	Ombudsman review of Police Powers (Drug Detection Dogs) Act 2001
5 September 2006	Taronga Zoo Asian elephants
20 September 2006	Lane Cove Tunnel – Further Order (20 September 2006)
21 September 2006	Sydney Harbour development applications
21 September 2004	Beacon Hill High School – additional documents tabled
28 September 2006	Bankstown Handicapped Children's Centre
18 October 2006	Gladesville Hospital site
18 October 2006	Funeral Industry
18 October 2006	Hunter Rail cars
18 October 2006	Boral Timber
18 October 2006	M5 East tunnel filtration
18 October 2006	Spit Bridge widening
19 October 2006	Lane Cove Tunnel Project Deed
19 October 2006	State finances
19 October 2006	Police report into Cronulla riots – Paragraph 1 of the resolution
	Paragraph 2 of the resolution
25 October 2006	Police report into disturbances following Cronulla riots – Paragraph 1 of the resolution
	Paragraph 2 of the resolution
25 October 2006	Ombudsman review of Firearms Amendment (Public Safety) Act 2002
25 October 2006	Maldon-Dumbarton rail line
25 October 2006	Ombudsman review of Police Powers (Drug Detection in Border Areas Trial) Act 2003

14 November 2006	Gretley mine disaster
	Gretley mine disaster – additional documents tabled
14 November 2006	PowerCoal cable snap
15 November 2006	Lane Cove Tunnel integration group
15 November 2006	M5 East tunnel air quality
15 November 2006	Clinical service plans for health services
16 November 2006	East Darling Harbour, Sydney Urban Design Competition
21 November 2006	Callan Park – Further Order
21 November 2006	Tunnel filtration – Further order – Tabling of privileged documents
21 November 2006	Tunnel filtration – Further order – Tabling of masked documents
22 November 2006	Carlton United Breweries site
	Carlton United Breweries site – additional documents tabled
22 November 2006	Desalination Plant – Further order
22 November 2006	Taronga Zoo Asian elephants – Tabling of privileged documents
22 November 2006	Taronga Zoo Asian elephants – Tabling of masked documents
22 November 2006	Maldon-Dumbarton rail line – Tabling of privileged documents
22 November 2006	M5 East tunnel filtration – Tabling of privileged documents
23 November 2006	Warragamba Dam
23 November 2006	Hunter and Central Coast water supply
23 November 2006	Lower Hunter Regional Strategy
23 November 2006	Operation Retz
	Operation Retz – unedited copy of the reconstructed report and annexures
23 November 2006	Grey Nurse shark surveys
22 November 2006	State finances – Tabling of privileged documents
10 May 2007	Election promises cost offsets
6 June 2007	Iron Cove Bridge

7 June 2007	Law Reform Commission report
20 June 2007	2007-2008 Budget
28 June 2007	State Finances 2007-2008
28 June 2007	Coffs Harbour Port
25 October 2007	Review of PADP program
14 November 2007	Betting exchanges and corporate bookmakers
28 November 2007	Spit Bridge widening – Further order
29 November 2007	Tcard Project
3 April 2008	Employment of Mr Joe Scimone
9 April 2008	Appointment of Dr Graeme Reeves
9 April 2008	Catherine Hill Bay
9 April 2008	World Youth Day 2008
9 April 2008	Iron Cove Bridge – Tabling of privileged documents
7 May 2008	North West metro-link
7 May 2008	Appointment of Dr Graeme Reeves – Further Order
7 May 2008	Report on occupational health and safety legislation
15 May 2008	Report of the Owen Inquiry
15 May 2008	"Yasmar", Haberfield – Further order
5 June 2008	2008-2009 Budget
24 June 2008	ACT/NSW cross border health agreement
24 September 2008	Oakton audit of PADP program
24 September 2008	Budget projections
25 September 2008	Catherine Hill Bay – Further order
30 October 2008	Annual reviews of root cause analysis
26 November 2008	Tillegra Dam
	Tillegra Dam – Tabling of privileged document
3 December 2008	Mini-budget 2008-2009
5 March 2009	Hurlstone Agricultural High School
12 March 2009	CBD Metro Rail
12 March 2009	Cross Border Transport Taskforce
6 May 2009	RTA Freedom of Information requests
	RTA Freedom of Information requests – additional documents tabled

7 May 2009	Lake Innes Nature Reserve
12 May 2009	Inner West Busway Project
13 May 2009	Triple-0 Operators
	Triple-0 Operators – additional documents tabled
14 May 2009	Treasury Modelling for Developer Levies
3 June 2009	PADP Lodgement Centres
4 June 2009	Wallaga Lake
18 June 2009	Carbon Pollution Reduction Scheme
18 June 2009	CityRail Easy Access Program
24 June 2009	2009-2010 Budget
24 June 2009	Projections of Capital Spending
2 September 2009	Mr Tony Stewart MP
2 September 2009	Address to Governor – Papers relating to Mr Tony Stewart MP
3 September 2009	Treasury modelling restructure of Government agencies
8 September 2009	Savings Implementation Plans
9 September 2009	Inner West Busway project – Tabling of privileged documents
23 September 2009	Building the Education Revolution Program
	Building the Education Revolution Program – additional documents tabled
	Building the Education Revolution Program – additional documents tabled
23 September 2009	M4 East extension
24 September 2009	Land in or around Badgerys Creek
24 September 2009	Double Bay development
20 October 2009	Agricultural high schools in New South Wales
20 October 2009	Tillegra Dam – Further order
29 October 2009	Focus groups
29 October 2009	Coastal management
11 November 2009	Dalwood Assessment Centre
12 November 2009	Exploration Licence – Mt Penny
26 November 2009	Health care data
26 November 2009	Coastal management – Tabling of privileged documents

2 December 2009	Marine parks
2 December 2009	Tillegra Dam – Further order (2 December 2009)
25 February 2010	Tillegra Dam – Further Order (25 February 2010) Paragraphs 1 and 2 of the resolution
	Tillegra Dam – Further Order (25 February 2010) Paragraph 3 of the resolution
	Tillegra Dam – Further Order (25 February 2010) – Tabling of privileged documents
25 February 2010	CBD Metro Rail – Further order
10 March 2010	2009-2010 Budget – Tabling of privileged documents
11 March 2010	Gentrader contracts
	Gentrader contracts – additional documents tabled
17 March 2010	Metropolitan Transport Plan 2010
17 March 2010	Sydney's landfill capacity
18 March 2010	Calga Springs Sanctuary
18 March 2010	Address to Governor – Papers relating to bushranger Thunderbolt
12 May 2010	Unflued gas heaters
	Unflued gas heaters – additional documents tabled
13 May 2010	Calga Sand Quarry
19 May 2010	Cessnock Council
	Cessnock Council – Additional document tabled
20 May 2010	NSW Lotteries
	NSW Lotteries – Additional documents tabled
20 May 2010	Audit of CBD Metro Compensation Claims
1 June 2010	Nepean Hospital
8 June 2010	NSW Fire Brigades
9 June 2010	Building Australia Fund
	Building Australia Fund – Additional documents tabled
10 June 2010	2010-2011 Budget
10 June 2010	2010-2011 Budget finances
23 June 2010	NuCoal
23 June 2010	CBD Metro Rail – Further order – Tabling of privileged documents

24 June 2010	Nepean Hospital – Further Order
24 June 2010	Hazard reduction planning
1 September 2010	Barangaroo
	Barangaroo – additional documents tabled
2 September 2010	Tillegra Dam – Further Order (2 September 2010)
2 September 2010	Illawarra Advantage Fund
2 September 2010	Kings Highway Realignment
7 September 2010	Repco Rally
8 September 2010	The Choices of Life Incorporated
22 September 2010	Alcohol Licensing Enforcement Command
20 October 2010	NSW Solar Bonus Scheme
21 October 2010	Coal seam gas exploration
26 October 2010	Flashpoint Fire Services
10 November 2010	Tillegra Dam – Further Order (10 November 2010)
25 November 2010	Address to the Governor – Papers relating to Birdon Marine Pty Ltd
25 November 2010	Review of the security industry
25 November 2010	Alcohol Licensing Enforcement Command – Further Order
25 November 2010	Local health networks
25 November 2010	Birdon Marine Pty Ltd
1 December 2010	Rest area at Varroville
1 December 2010	Thirlmere Lakes
2 December 2010	Revised HEZ Desktop Biobank Assessment
4 May 2011	Election of Mr John Frederick Flowers MP
26 May 2011	Shenhua Watermark Coal Project
21 June 2011	Mental Health Inquiry process
23 June 2011	Development of KFC restaurant
4 August 2011	Industrial Relations Amendment (Public Sector Conditions of Employment) Bill 2011
25 August 2011	Chemical release from Orica Limited's Kooragang Island site
	Chemical release from Orica Limited's Kooragang Island site – Additional documents tabled

26 August 2011	Impact of proposed carbon price legislation on public transport
9 September 2011	2011-2012 Budget
9 September 2011	2011-2012 Budget finances
	2011-2012 Budget finances – Additional document tabled
16 September 2011	Casino, Liquor and Gaming Control Authority
16 September 2011	Tillegra Dam—Further order (16 September 2011)
24 November 2011	Economic analysis of domestic solid fuel heaters
14 February 2012	Aboriginal Cultural Heritage Advisory Committee
15 February 2012	Ministerial Audit of the NSW Police Force
7 March 2012	WorkCover Prosecutions
	WorkCover Prosecutions – Additional documents tabled
	Disputed claim of privilege – WorkCover Prosecutions – Tabling of privileged documents
24 May 2012	Booz and Company (Aust) Pty Ltd report
13 June 2012	2012-2013 Budget Finances
13 June 2012	2012-2013 Budget
23 August 2012	Nimmie-Caira System Enhanced Environmental Water Delivery Project
	Disputed claim of privilege – Nimmie-Caira System Enhanced Environmental Water Delivery Project – Tabling of privileged documents
27 February 2013	Former NSW Department of Primary Industries employee
25 March 2013	Heritage order on "Peroomba", Warrawee
	Heritage order on "Peroomba", Warrawee – Additional documents tabled
1 May 2013	Heritage order on "Peroomba", Warrawee – Further order
30 May 2013	Yaralla Estate
19 June 2013	2013-2014 Budget
19 June 2013	2013-2014 Budget finances
29 August 2013	Yaralla Estate – Further Order
29 August 2013	Department of Family and Community Services caseworker numbers
12 September 2013	Lobbyists

12 September 2013	Transport for NSW Contracts
17 October 2013	Bus Contracts
17 October 2013	NSW Health Labour Expenses Cap
24 October 2013	Executive Appointments
31 October 2013	Mr Matthew Daniel
	(as emended) 13 November 2013
31 October 2013	(as amended 19 November 2013
13 November 2013	Report on actions of former
	WorkCover NSW employee
14 November 2013	Windsor Bridge
21 November 2013	Governance Review of the Game Council
27 November 2013	Racing Agreements
4 March 2014	WestConnex Business Case
6 March 2014	Crown Lands Review
19 March 2014	Documents from the former Minister for Finance and Services
26 March 2014	Management of Crown Caravan Parks
26 March 2014	Draft Protection of the Environment
	Operations (General) Amendment
26 March 2014	Acquisition of Land for the Reserve System
26 March 2014	Reform of Planning Laws in NewSouth Wales
26 March 2014	Planning Proposal for Bronte RSL
8 May 2014	CBD and South East Light Rail Project
15 May 2014	Documents from office of former Minister for Finance and Services
18 June 2014	2014-2015 Budget Finances
18 June 2014	2014-2015 Budget
19 June 2014	Governance Review of the Game Council
14 August 2014	Ministerial Consultative Committees
11 September 2014	Medicare co-payments
18 September 2014	VIP Gaming agreement
15 October 2014	Martins Creek and Wollombi Public Schools
16 October 2014	Newcastle East End Development
16 October 2014	Byron Central Hospital and Maitland Hospital

23 October 2014	Planning in Newcastle and Hunter Region
23 October 2014	Going Home, Staying Home Reforms
5 November 2014	Northern Beaches Health Service Redevelopment
5 November 2014	Aboriginal Land Claims Regarding Beaches and Coastal Lands
6 November 2014	Crown Lands Act White Paper Consultations
18 November 2014	Drayton South Coal Project
18 November 2014	Parramatta Road Urban Renewal Project
19 November 2014	CBD and South East Light Rail Project
20 November 2014	Report of Police Strike Force Emblems
20 November 2014	NSW Health Infrastructure and Private-Public Partnerships
20 November 2014	Nurse to Patient Ratios
20 November 2014	Address to Governor – Papers relating to the administration of justice
25 June 2015	2015-2016 Budget
25 June 2015	2015-2016 Budget Finances
9 September 2015	Greyhound Welfare
18 November 2015	Learning Management and Business Reform Report
25 February 2016	Under-dosing of Chemotherapy Patients
23 June 2016	Budget Finances 2016-2017
23 June 2016	Budget 2016-2017
11 August 2016	Government's Advertising Campaign Relating to the Greyhound Racing Industry
14 September 2016	Greyhound Welfare – Further Order
16 November 2016	Indoor Sports Stadium Near Wentworth Park Sporting Complex Trust

Appendix Three: List of Independent Arbiters and their Reports 1998-2017

Order	Arbiter	Date
Legislative Council's Order for production of documents – Assessment of privilege dated 25 November 1998 together with a list of documents for which privilege is claimed Closure of certain veterinary laboratories Twentieth Century Fox and the Sydney Showground Closure of regional offices of the Department of Education Proposed Lake Cowal gold mine	Sir Laurence Street	25/11/98
Delta Electricity	Sir Laurence Street	14/10/99
M2 Motorway Project	Sir Laurence Street	7/12/99
M5 East Ventilation Stack	Sir Laurence Street	27/4/01
North Head Quarantine Station	Sir Laurence Street	31/7/01
Wellington Local Aboriginal Land Council	Sir Laurence Street	17/10/01
Mogo Charcoal Plant	Sir Laurence Street	28/5/02
M5 East Motorway	Sir Laurence Street	25/10/02
Development of Crown Land (Woodward Park)	Sir Laurence Street	6/1/03
Millenium Trains	Sir Laurence Street	22/8/03
Cross City Tunnel	Sir Laurence Street	4/9/03
M5 East and other road tunnels' ventilation	Sir Laurence Street	4/11/03
Millenium Trains	Sir Laurence Street	18/12/03
Axiom Education Consortium	Sir Laurence Street	15/7/04
Tunnel Ventilation Systems	Sir Laurence Street	26/8/04

Audit of Restricted Rail Lines – Further Order	Sir Laurence Street	16/6/05
Circular Quay pylons	the Honourable Terrence Cole QC	17/8/05
Cross City Tunnel	Sir Laurence Street	20/10/05
Cross City Tunnel – Further Order	Sir Laurence Street	15/11/05
Desalination Plant	the Honourable Terrence Cole QC	20/12/05
Tunnel Ventilation Documents [Lane Cove Tunnel]	Sir Laurence Street	24/1/06
Tunnel Ventilation Documents [M5 East Tunnel Ventilation]	Sir Laurence Street	24/1/06
Tunnel Ventilation Documents [Road Tunnel Filtration]	Sir Laurence Street	24/1/06
Tunnel Ventilation Documents [Tunnel air quality]	Sir Laurence Street	24/1/06
Tunnel Ventilation Documents [Tunnel Ventilation Systems]	Sir Laurence Street	24/1/06
Lane Cove Tunnel – Further order	Sir Laurence Street	22/5/06
Luna Park leases and agreements	Sir Laurence Street	19/6/06
Dioxin levels in Sydney Harbour	Mr M J Clarke QC	21/6/06
Audit of Expenditure and Assets	Mr M J Clarke QC	26/6/06
Sale of PowerCoal assets	Sir Laurence Street	27/6/06
Snowy Hydro Limited – Further Order	Sir Laurence Street	16/8/06
Tunnel filtration - Further order	Sir Laurence Street	1/11/06
Taronga Zoo Asian elephants	Mr M J Clarke QC	6/12/06
Maldon-Dumbarton rail line	Sir Laurence Street	12/12/06
M5 East tunnel filtration	Sir Laurence Street	28/12/06
State finances	Mr M J Clarke QC	16/1/07
Gretley mine disaster	Sir Laurence Street	9/5/07
Iron Cove Bridge	Sir Laurence Street	18/3/08
Tillegra Dam	Sir Laurence Street	20/1/09
Inner West Busway project	Sir Laurence Street	23/7/09

Coastal Management	Sir Laurence Street	17/11/09
2009-2010 Budget	Sir Laurence Street	11/12/09
Unflued gas heaters	Sir Laurence Street	4/5/10
CBD Metro Rail - Further order	Sir Laurence Street	7/5/10
Tillegra Dam	Sir Laurence Street	18/5/10
WorkCover Prosecutions	Sir Laurence Street	17/4/12
Nimmie-Caira System Enhanced Environmental Water Delivery Project	the Honourable Terence Cole QC	20/11/12
WorkCover NSW employee	the Honourable Keith Mason AC QC	25/2/14
WestConnex Business Case	the Honourable Keith Mason AC QC	8/8/14
VIP Gaming Management Agreement	the Honourable Keith Mason AC QC	21/10/14
Byron Central Hospital and Maitland Hospital	the Honourable Keith Mason AC QC	5/12/14
Greyhound welfare – further order	the Honourable Keith Mason AC QC	14/2/17


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Appendix Four: Biographical Details of the Interviewees

- John Evans PSM: Born 18 May 1947. Evans served on the Legislative Council staff from December 1971 to July 2007. His first position was as Clerk of Printed Papers. From there he progressed to Usher of the Black Rod and subsequently Clerk Assistant and Deputy Clerk. He became Clerk of the Parliaments in 1989. Following his retirement, Evans was appointed Parliamentary Ethics Adviser in June 2014.

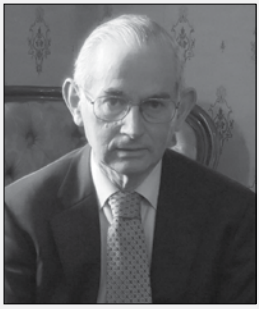
- John Hannaford: Born 21 January 1949. Member of the Legislative Council representing the Liberal Party 1984 – 2000. Served in various portfolios, including Attorney-General and Health. Held the positions of Leader of the Government in the Legislative Council 1992 – 1995 and Leader of the Opposition in the Legislative Council 1995 – 1999. Hannaford was the first Chair of the Standing Committee on State Development. Prior to entering parliament he was a solicitor.

- Max Willis: Born 6 December 1935. Member of the Legislative Council representing the Liberal Party 1970 – 1999. Served in a number of positions including Leader of the Opposition in the Legislative Council 1978 – 1981 and President of the Legislative Council 1991 – 1998. Willis was the first Chair of the Standing Committee on Social Issues. Prior to entering parliament he was a solicitor.

- Michael Egan AO: Born 21 February 1948. Member of the Legislative Council representing the Labor Party 1986 – 2005. Served in various portfolios, including Treasury, Energy, and Gaming and Racing. Held the positions of Leader of the Opposition in the Legislative Council 1991 – 1995 and Leader of the Government in the Legislative Council 1995 – 2005. Egan was also Member for Cronulla in the Legislative Assembly 1978 – 1984. Prior to entering parliament he worked as a public servant, for the Australasian Meat Industry Employees' Union, and as an adviser to the Commonwealth Minister for Housing and Construction and Aboriginal Affairs, Les Johnson.

- Elisabeth Kirkby OAM: Born 26 January 1921. Member of the Legislative Council representing the Australian Democrats from 1981 – 1998. Kirby served as the NSW Parliamentary Leader of the Australian Democrats 1981 – 1998. She was a long-serving member of the Standing Committee on Social Issues and served on many other committees. Prior to entering parliament Kirkby was an actor.

- Ron Dyer OAM: Born 11 April 1943. Member of the Legislative Council representing the Australian Labor Party from 1979 – 2003. Dyer served as Minister for Community Services, Aged Services, and Public Works and Services. He was also the Deputy Leader of the Government in the Legislative Council 1995 – 2003 and Chair of the Standing Committee on Law and Justice 1999 – 2002. Prior to entering parliament, Dyer was a solicitor and later a member of Ron Mulock's ministerial staff.



- John Jobling OAM: Born 21 April 1937. Member of the Legislative Council representing the Liberal Party from 1984 –2003. Jobling served as the Government Whip (1988 – 1995) and Opposition Whip (1995 – 2003). He was also the Chairman of the State Development Committee in 1995. Prior to entering parliament Jobling was a pharmacist.
- Jenny Gardiner: Born 16 October 1950. Member of the Legislative Council representing The Nationals from 1991 – 2015. She became Deputy Leader of the Party in the Council in 2003. Gardiner was a member of the ICAC, Privileges and Electoral Matters Committees and served on a number of General Purpose and select committee inquiries. She was Deputy President and Chair of Committees from 2011 – 2015. Prior to entering parliament, Gardiner was the General Secretary of the NSW Branch of the National Party from 1984 – 1991.

Legislative Council of NSW History Monographs:

D Clune, *Keeping the Executive Honest: the modern Legislative Council committee system*, Number One, 2013.

D Clune, *Connecting with the People: the 1978 reconstruction of the Legislative Council*, Number Two, 2017.

D Clune, *The Legislative Council and Responsible Government: Egan v Willis and Egan v Chadwick*, Number Three, 2017.

The author

Dr David Clune OAM was for many years the Manager of the NSW Parliament's Research Service and the NSW Parliamentary Historian. He is currently an Honorary Associate in the Department of Government and International Relations at the University of Sydney. Dr Clune has written extensively about NSW politics and history and is the author with Gareth Griffith of *Decision and Deliberation: the Parliament of NSW, 1856-2003*.

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