



## PARLIAMENTARY PRIVILEGE IN PRACTICE

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to a seminar on

*Practice, Procedure and the Law of Parliament*

Conducted by Legalwise Seminars at UNSW CBD Campus

1 O'Connell Street, Sydney

Wednesday 27 March 2019

## **Introduction**

The 56th Parliament (2015-2019) has been a fascinating period in the development of the law and practice of parliamentary privilege in New South Wales. A number of important developments have taken place which have either resolved, confirmed (or at the very least progressed towards) a shared understanding in relation to a number of previously disputed or unresolved issues. This paper commences with a discussion of fundamental concepts in relation to parliamentary privilege. It then recaps a number of topical issues discussed at previous Legalwise seminars and highlights subsequent developments on each of those issues. Finally, the paper details important developments in the practice of parliamentary privilege that have taken place during the last 12 months in New South Wales, together with a particularly complex matter currently being considered at the Commonwealth level and which has implications for all parliaments.

## **What is parliamentary privilege?**

Parliamentary privilege consists of the immunities from the general law, and the rights and powers, of parliament and its members, as recognised at law as necessary for parliament to do its work of legislating and holding the executive government to account.

The most recognisable immunity from the general law is freedom of speech in debate, in both a House of Parliament and its committees. The most important rights are those for a parliament to control its own proceedings, and the right to the attendance and service of its members. The powers of parliament include those to maintain order, including by suspending members and removing and excluding visitors, the power to conduct inquiries and order the production of documents and to call and compel evidence from witnesses, and to determine its own membership (except where vested in another body by legislation) including the power to expel members. The latter power is self-protective. Some parliaments (but not the Parliament of New South Wales) enjoy the power to punish for contempt.

## **Sources of parliamentary privilege**

Parliamentary privilege in New South Wales rests on a number of sources. Most importantly the common law doctrine of “reasonable necessity,” under which the Parliament of New South Wales has been held by the High Court of Australia to possess those powers and immunities reasonably necessary for it to fulfil its functions of legislating and holding the executive government to account within the system of representative and responsible government. What is reasonably necessary evolves over time and is in some ways able to be found in the contemporary practices of parliament as recorded in its official records.

Secondly, by virtue of the *Imperial Acts Application Act 1969*, the United Kingdom’s *Bill of Rights 1688* applies as part of the statute law of New South Wales. Article 9 of the Bill of Rights provides that proceedings in parliament must not be questioned or impeached in any court or other place outside of parliament. This enables members and other participants in the parliamentary process (eg witnesses before parliamentary committees) to conduct themselves, including in saying what they need to say without fear or favour, without the threat of impeachment, imprisonment or other

legal action. Freedom of speech in parliament is not absolute, however – each House of Parliament has adopted its own rules of proceedings, its Standing Orders, which regulate proceedings and the conduct of members, including self-imposed limitations upon freedom of speech.

Thirdly, there is a range of other statutes of relevance to parliamentary privilege. Important amongst these in New South Wales is the *Parliamentary Evidence Act 1901*, which provides statutory backing for and procedures to be followed in the exercise of some aspects of the inquiry power (particularly by parliamentary committees). Other relevant statutes include the *Parliamentary Papers (Supplementary Provisions) Act 1975*, the *Defamation Act 2005*, the *Evidence Act 1995* and the *Interpretation Act 1987*. However, the Parliament of New South Wales, despite a number of failed attempts over the years, has never enacted comprehensive privileges legislation.

Fourthly, although not directly applicable in NSW, regard must be had to the *Parliamentary Privileges Act 1987 (Cwth)*. Section 16 of that Act has been held to accurately reflect and explain Article 9 of the *Bill of Rights*. The definitions in section 16 are therefore instructive as is the case law around the Commonwealth Act.

### **Resources on parliamentary privilege**

There is a very small number of scholars who have published on parliamentary privilege.<sup>1</sup> Most relevant to practitioners in this field are the practice books on parliamentary law and procedure published by parliaments themselves. These are most relevant because privilege matters are, wherever possible, dealt with internally by parliaments themselves, most likely through their Privileges Committees. The bodies of precedent from those committees, for example as to what constitutes contempt in each jurisdiction, is particularly important. As noted above, the practice of a parliament is also taken into account by the courts in determining what is reasonably necessary for the exercise by parliament of its functions – given the significance of the common law doctrine of “reasonable necessity” in NSW in the absence of comprehensive privileges legislation, this body of precedent is particularly significant. The primary texts for practitioners in Australia are:

- *Odgers’ Australian Senate Practice (as revised by Harry Evans)*, 14<sup>th</sup> edition edited by Dr Rosemary Laing, 2016
- *House of Representatives Practice*, 7<sup>th</sup> edition edited by D R Elder, 2018
- *McGee’s Parliamentary Practice in New Zealand*, 4<sup>th</sup> edition edited by Mary Harris & David Wilson, Oratia, 2017
- *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24<sup>th</sup> edition edited by Sir Malcolm Jack, LexusNexis, 2011.

In New South Wales there are two publications of note from the Legislative Council, and one from the Legislative Assembly:

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<sup>1</sup> Foremost amongst these is Enid Campbell, *Parliamentary Privilege*, The Federation Press, 2003.

- *New South Wales Legislative Council Practice*, Lynn Lovelock & John Evans, The Federation Press, 2008
- *Annotated Standing Orders of the New South Wales Legislative Council*, Susan Want & Jenelle Moore, edited by David Blunt, The Federation Press, 2018
- *New South Wales Legislative Assembly Practice Procedure & Privilege*, edited by Russell D Grove, 2007.

### **Previous papers delivered at Legalwise Seminars in 2015, 2016 and 2017**

Attention is also drawn to a number of recent papers and articles published on the Parliament of New South Wales public website. These include three papers delivered at Legalwise seminars on parliamentary and public law, held in 2015, 2016 and 2017. Each of these papers is briefly recapped below.

#### *Parliamentary privilege and the separation of powers*

The 2015 paper<sup>2</sup> charts the development of parliamentary privilege through the following key stages:

- The battle between the UK House of Commons and the monarch as to the appropriate role for and freedom of speech in parliament, resulting in the establishment of parliamentary sovereignty codified in the Bill of Rights of 1688.
- Key nineteenth century cases delineating the respective roles of the courts and the UK Parliament and in relation to the law of parliamentary privilege, resulting in the recognition that whilst it is for the courts to recognise the existence of a particular privilege it is then up to parliament to determine how it is applied within the appropriate sphere of parliamentary “exclusive cognisance.”
- Another series of nineteenth century cases which determined the limits of parliamentary privilege in colonial legislatures to only those privileges “reasonably necessary” for the performance by parliaments of their functions (rather than the full suite of privileges enjoyed by the UK Parliament).
- The response of most colonial legislatures to enact privileges legislation, in most instances insisting on the application of the privileges of the UK Parliament at a particular date.
- Finally, the relatively recent response of specific parliaments to bad judicial decisions to enact further privileges legislation (eg the Australian Parliament in 1987 and the New Zealand Parliament in 2014).

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<sup>2</sup> D Blunt, *Parliamentary Sovereignty and Parliamentary Privilege*, Paper presented at a seminar on the Fundamentals of Law: Politics, Parliament and Immunity conducted by Legalwise Seminars, Sydney, 16 June 2015. This and the other papers referred to in the following footnotes are all accessible on [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au) thence Legislative Council, Articles on the Council.

The paper argues that parliamentary privilege could best be understood as an outworking of the separation of powers between the three branches of government: legislative, executive and judicial; and the recognition at law and in practice of a comity between them.

#### *Parliamentary access to information held by the executive government*

The 2016 paper<sup>3</sup> focusses on a number of contemporary privilege issues faced by the NSW Legislative Council and its committees.

Firstly, the paper discusses statutory secrecy provisions and parliamentary committee inquiries. Having outlined a series of disputes between Legislative Council Committees and New South Wales government agencies since 2000, the paper details the way in which these issues played out in the context of the committee inquiry into “Operation Prospect” in early 2015. This inquiry saw senior Police officers, NSW Crime Commission representatives and the Ombudsman, either in submissions or in answers to questions, provide information to the Committee that would have otherwise been precluded by statutory secrecy provisions. The paper poses the question whether the Legislative Council’s position, that parliamentary privilege in effect “trumps” statutory secrecy, would now be recognised as the law in New South Wales.

Secondly, the paper deals with orders for the production of papers from statutory bodies, in the context of a response received from the Department of Premier and Cabinet (DPC) to an order for the production of papers from Greyhound Racing NSW. Whilst not explicitly refusing to comply with the order, DPC had advised that as Greyhound Racing NSW was not subject to direction or control by a minister, any order for paper would need to be communicated directly with that body. The Legislative Council had obtained legal advice from Bret Walker SC which confirmed that Greyhound Racing NSW was subject to the requirement to comply with an order for the production of documents (as well as including some other interesting observations, discussed below). At the time of the delivery of the 2016 paper this matter was yet to be resolved.

Thirdly, the paper discusses an aspect of the intersection of the powers of parliamentary committees to obtain information and the rights of private individuals through consideration of the application of the privilege against self-incrimination. The paper outlines some of the difficulties with the terms of the *Parliamentary Evidence Act 1901* and the great responsibility which comes from the existence of the considerable powers available to parliamentary committees in New South Wales.

#### *Immunities from seizure of documents*

The 2017 paper<sup>4</sup> by the Deputy Clerk of the Legislative Council, Steven Reynolds, focusses on a key area in contemporary practice concerning parliamentary privilege: namely, the immunity

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<sup>3</sup> D Blunt, *Parliamentary Privilege: New South Wales still at the cutting edge*, Paper presented to a seminar on Parliamentary Law conducted by Legalwise Seminars, Sydney, 10 June 2016.

<sup>4</sup> S Reynolds, *Parliamentary Privilege and Searches by Investigatory Agencies*, Paper presented to a seminar on Parliamentary Law conducted by Legalwise Seminars, Sydney, 9 June 2017.

attaching to documents deemed to fall within the definition of proceedings in parliament. The paper outlines the approach to this issue adopted by the New South Wales Legislative Council and its Privileges Committee in relation to the seizure of documents by the NSW Independent Commission Against Corruption from the parliamentary office of the Hon Peter Breen MLC in 2003, including the three-step test adopted by the Privileges Committee to determine whether or not a members' documents fall within the definition. There is also a discussion of the memoranda of understanding subsequently entered into by the New South Wales Presiding Officers and the ICAC and NSW Police respectively, as well as the ways in which Notices to Produce documents and other things are now dealt with in the wake of the Breen matter.

Finally, the paper outlines the approach taken by the Australian Senate and its Privileges Committee in dealing with a similar matter involving the seizure of documents by the AFP during the course of an investigation into leaks from the NBN Co, and which involved the execution of search warrants on the office of a Senator, the home of a staffer to the Senator and a search of the servers at the Australian Parliament House. In this instance the Senate Privileges Committee (and the House of Representatives Privileges Committee) found there had been an improper interference with the duties of the Senator (and also a Member of the House of Representatives) and upheld claims of privilege over the documents, with the effect the material was withheld from use in the investigation or in any proceedings. However, no (intentional) contempt of parliament was found. In reaching this conclusion the Senate Committee adapted (and improved) the three-step test developed by the NSW Legislative Council Privileges Committee. At the time of the delivery of the Reynolds' paper, a further inquiry by the Senate Privileges Committee into the parliamentary privilege and the intrusive use of covert powers by investigatory agencies was still on foot.

### **Recent developments and current issues**

A number of developments have taken place which have either resolved, confirmed (or at the very least progressed towards) a shared understanding in respect of a number of the matters discussed in the previous papers. These are discussed below, together with a complex issue currently being grappled with by the Australian Parliament but of ongoing relevance to all parliaments.

#### *Orders for papers from statutory bodies*

The question of whether statutory bodies are subject to orders for the production of documents was, at least as far as the NSW Legislative Council is concerned, resolved in late 2016.<sup>5</sup> The legal advice from Bret Walker SC on this matter tabled in the Legislative Council in November 2015 which affirmed that statutory bodies, including so called "independent" entities, groups or persons with public functions, are amenable to orders for the production of documents and compelled to comply with such orders on pain of the responsible officer being in contempt of the House. Ultimately, relying on this advice (and during the period between the enactment of legislation banning greyhound racing and the government's announcement of its intention to repeal the

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<sup>5</sup> For further information see D Blunt, *The Accountability of Statutory Bodies to Parliament: the case of Greyhound Racing NSW*, Paper delivered to the 48<sup>th</sup> Presiding Officers and Clerks Conference, Sydney, 4 July 2017.

legislation), the Legislative Council agreed to a follow up order for papers and over 150 boxes of documents were produced directly by Greyhound Racing NSW. A complex dispute as to certain claims of privilege was eventually resolved, subsequent to the report of the independent legal arbiter, the Hon Keith Mason AC QC, and a number pertinent matters from the papers produced and subsequently made public were used in the parliamentary debate on the repeal bill. This was the first time that a statutory body had produced documents directly to the House as a result of an order for papers, providing a powerful precedent.

*“Cabinet information” and the development of parliamentary privilege*

The first half of 2018 saw significant developments take place in relation to the powers of the New South Wales Legislative Council to order the production of documents which had been withheld by governments on the basis that they were “cabinet information.”<sup>6</sup> The House agreed to a series of orders for papers in respect two controversial capital projects (relating to Sydney Stadiums and the re-location of the Powerhouse museum) and a report of a consultant on a policy matter (the Tune report on out of home care). Although some documents were produced in response to the Sydney Stadiums order, the return included no business cases. The orders concerning the Powerhouse museum and the Tune report were precise in scope, and in response to those orders neither of the required documents were produced, with the Leader of the Government insisting the powers of the Legislative Council did not extend to “cabinet information.”

The Leader of the Government was censured for his non-compliance with the orders of the House and further ordered to produce the documents by the next day or attend in his place to explain the reasons for his continued non-compliance. The next sitting day began with the President tabling correspondence from the DPC advising that there were no further documents for tabling and attaching advice from the Crown Solicitor. It was anticipated that a motion would be moved to suspend standing orders to enable a further motion to be moved holding the Leader of the Government in contempt and suspending him from the service of the House in order to compel compliance. (It was further anticipated that the matter may be heading for the Supreme Court!) However, when the Leader of the Government was called upon to address the House as to his reasons for continued non-compliance he advised that the documents would now be produced voluntarily.

The business cases and the Tune report were produced: the Tune report was immediately provided in full and made public; the business cases were provided in full subject to claims of privilege, with redacted versions made public. Not content with the somewhat ambiguous manner of the provision of the documents and the continued assertion by the Leader of the Government and DPC that the powers of the House did not extend to requiring the production of “cabinet information”, the Leader of the Opposition moved a motion which sought to crystallize the position of the House. The motion, agreed to by the House on 21 June 2018, rejected the

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<sup>6</sup> For further information see D Blunt, *Orders for Papers and Parliamentary Committees: an Update from the New South Wales Legislative Council*, paper delivered at the 49<sup>th</sup> Presiding Officers and Clerks Conference, Wellington, 10 July 2018. See also S Ohnesorge & B Duffy, “Evading Scrutiny: Orders for Papers and Access to Cabinet Information by the New South Wales Legislative Council,” (2018) 29 *Public Law Review* 118.

Government's use of the definition of "cabinet information" in the *Government Information (Public Access) Act 2009* in these matters as the Government's reliance on that definition "is likely to have led to a much broader class of documents being withheld from production to this House." The motion asserted the power of the House to require the production of Cabinet documents such as those produced on this occasion, and that the test to be applied in determining whether a document falls within this category is, at a minimum, that articulated by Spigelman CJ in *Egan v Chadwick*. Some 20 years after the Egan cases, the Legislative Council had now staked out its ground in relation to its powers in respect of Cabinet documents. The terms of the resolution of 21 June are attached as Appendix One.

#### *Parliamentary committees' powers to require the production of documents*

Whilst the first half of 2018 saw significant developments take place in relation to the powers of the Legislative Council in respect of cabinet documents, the second half of 2018 saw equally important developments in relation to the powers of parliamentary committees to order the production of documents. In the years immediately following the Egan cases a number of committee orders for the production of documents were complied with by government agencies. However, in 2001 the Crown Solicitor advised that government agencies should resist such orders and recommend that the committee pursue the matters through the House under Standing Order 52. This advice was reflected in the guidelines for public servants appearing before parliamentary committees and remained the position of the executive government in NSW up until 2018. Over the years Legislative Council committees and members have found creative ways to obtain information, usually through the Committee Chair moving a motion in the House on behalf of the committee, after the committee has already agreed to such a course of action "notwithstanding the power of the committee to order the production of documents."<sup>7</sup>

This all changed during the course of 2018.<sup>8</sup> In part, the change was precipitated by an observation by Bret Walker SC in his 2015 advice referred to above concerning the power of the Legislative Council to order the production of documents from Greyhound Racing NSW and other statutory bodies. Mr Walker suggested that the reference in section 4 of the *Parliamentary Evidence Act* (the power to summons a person to attend and) to "give evidence" was likely to include not only oral evidence but also the production of documents during their attendance. A carefully worded summons could therefore potentially be used by a committee to require the production of a document.

The Legislative Council's Portfolio Committee No. 5 was conducting an inquiry into the proposed replacement of Windsor Bridge. Faced with repeated refusal by Transport for NSW to produce a business case for the replacement, in May 2018 the committee issued a summons for the Secretary to attend and produce the document. In due course the Secretary attended and indicated that he was producing the document voluntarily "without any concession to the Committee's power."

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<sup>7</sup> For further information and examples of this creative approach see B Duffy & D Blunt, *Information is power: recent challenges for committees in the NSW Legislative Council*, paper delivered by B Duffy at the 45<sup>th</sup> Presiding Officers and Clerks Conference, Apia, Samoa, 30 June 2014.

<sup>8</sup> S Reynolds, *Two steps forward one step back: Committees power to order papers and the Crown Solicitor*, presentation to Biennial Clerks' meeting, Hobart, 25 January 2019.



Although the result was somewhat ambiguous (the committee asserting that it had compelled the production of the document, the witness asserting it had been produced voluntarily), unbeknown to the committee, it seems that the actions of the committee in this matter had prompted the provision of ground breaking legal advice.

This subsequently came to light in the most curious of ways. Amongst those apparently concerned about the assertion of committee powers was the Auditor-General, who faced with likely requests to assist two other Legislative Council Committees inquiring into particularly controversial government projects (Sydney Stadiums and the CBD and South East Light Rail) sought the advice of the Crown Solicitor. The Auditor-General is required to include as an appendix to the annual financial audit report on the total state sector accounts, any legal advices received during the preceding 12 months from the Crown Solicitor. Consequently, two very enlightening advices were made public.

In those advices the Crown Solicitor deferred to the apparently recent opinion of the Solicitor-General to the effect that “it is more likely than not that if the question were to be the subject of a decision of a court, a finding would be made that a committee of the New South Wales Parliament has the power to call for a witness to attend and give evidence, including by production of a document.” Furthermore, the Solicitor-General had advised that he preferred the view that the power would be found to reside in Standing Order 208 (c) and reasonable necessity rather than the *Parliamentary Evidence Act*, but that the true source of the power would likely emerge in any court proceedings regardless of the power actually relied upon by a committee which precipitated the proceedings. The position asserted by Legislative Council committees (but resisted by the executive government) for 17 years had been vindicated.

During the remaining months of 2018 two Legislative Council committees confidently asserted their powers to order the production of documents. In one case successfully, obtaining a Gateway Review document in relation to the CBD and South East Light Rail project. The other case, involving a request and then a summons under Section 4 of the *Parliamentary Evidence Act* for a draft report of the Inspector of Custodial Services proved to be more complex. The refusal of the Inspector to produce the draft report led to the committee obtaining, through the Clerk, verbal advice from Bret Walker SC (written advice on this matter is still awaited) and the Inspector obtaining (and providing to the committee) advice from the Acting Crown Solicitor and Ms Anna Mitchelmore SC. A redacted version of an opinion from the Solicitor-General was also provided. Each of these advices have subsequently been published by the committee in its report. Ultimately, the committee decided in all of the circumstances not to seek to enforce the provisions of the summons or the *Parliamentary Evidence Act* in respect of the Inspector. However, as the committee made plain in its report, the firm but judicious assertion by Legislative Council committees of their powers over recent months has led to legal advice being provided, which now binds public servants into the future, apparently accepting the long held position of the Legislative Council and its committees.

### *Investigative agencies use of covert methods of gathering evidence*

Subsequent to the conclusion of the privilege matters arising from the AFP's actions in the Conroy/NBN matter referred to earlier and discussed in the 2017 paper, in March 2018 the Senate Privileges Committee reported on its inquiry into *Parliamentary privilege and the use of intrusive powers*.<sup>9</sup>

The inquiry report notes the protocols established by the Presiding Officers of the Australian Parliament and the AFP in relation to the execution of search warrants on members' or senators' offices, and the provision for claims of privilege to be made and determined. However, it notes that for the exercise of intrusive powers by investigative agencies which involve access to telecommunications information and metadata, not only is there no protocol in place but the exercise of the powers will often occur without the knowledge of the target of the investigation, meaning there is no opportunity for a senator the subject of the exercise of such powers to claim privilege. The committee report argues that the exercise of such intrusive coercive powers had the potential to have a chilling effect on the flow of information to senators. A particular area of concern is metadata that can potentially identify whistleblowers. The AFP had declined to reveal during the inquiry whether or not parliamentarians had been the subject of covert metadata preservation orders. The Committee recommended the Presiding Officers, in consultation with the executive government, develop protocols setting out the processes to be followed by law enforcement and intelligence agencies when exercising such intrusive and covert powers.

Subsequently, on 6 December 2018, the Senate agreed to a motion moved by the Leader of the Opposition regarding parliamentary privilege and the seizure of material by executive agencies. The resolution which is attached, as appendix two, reaffirms the right of the Senate to determine claims of privilege over material sought to be seized or accessed by executive agencies, regardless of the form of the material (ie including metadata), the means by which those agencies seek seizure or access, and the procedures followed. For clarity the resolution highlighted that these rights adhere against the covert use of intrusive powers, by which agencies may seek to seize or access information connected to parliamentary proceedings without the use or presentation of warrants. Finally, the resolution calls on the Attorney General to work with the Presiding Officers to address these matters through the development of a new protocol as a matter of urgency.

### **Conclusion and a final somewhat cheeky observation**

The 2015 paper presented at this seminar located the law and practice of parliamentary privilege within the separation of powers and comity between the three arms of government. The issues outlined in the 2016 and 2017 papers, and the more recent developments discussed in this paper, have arisen where one of those arms of government, most often the executive government, and the parliament have different and conflicting objectives. It was therefore refreshing to note a striking feature of a very recent case. In November 2018 representatives of the Retail Food Group sought an injunction to stay the directions of the Parliamentary Joint Committee on Corporations and Financial Services for them to appear before the committee. In the High Court of Australia, Justice Gordon sitting alone, dismissed the application with costs. Justice Gordon's brief judgment

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<sup>9</sup> 168<sup>th</sup> Report, tabled 28 March 2018. [www.aph.gov.au](http://www.aph.gov.au) thence Senate, Committees, Privileges Committee.

restates a number of fundamental principles of parliamentary privilege.<sup>10</sup> Of particular interest from a New South Wales Legislative Council perspective, she dismissed the relevance to the powers delegated to the joint committee of the fact that the joint committee does not punish for non-compliance with its directions, with that being the responsibility of the Senate. This is interesting because of the basis of the NSW Crown Solicitor's advice questioning the power of Legislative Council committees to order the production of documents on the grounds that the committees themselves cannot enforce such an order, but rather must report non-compliance to the House for it to be dealt with by the House. However, as outlined above, things appear to have finally moved on from those arguments.

What was also of interest, though, from the decision is the reference to the submissions made by the Commonwealth Attorney-General asserting the powers of the committee.<sup>11</sup> I very much look forward to the day when crown law officers in New South Wales make submissions in support of the powers of NSW Legislative Council committees - perhaps when a committee next strikes a difficulty obtaining evidence or a critical document from a person or organisation that is not part of the NSW executive government?

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<sup>10</sup> *Anthony James Alford & Anor v Parliamentary Joint Committee on Corporations and Financial Services* [2018] HCA 57.

<sup>11</sup> *Ibid*, at paragraph 37.

**30 COMPLIANCE WITH ORDERS FOR PAPERS**

Mr Searle moved, according to notice:

1. That this House notes that, on 5 June 2018, this House:
  - (a) censured the Leader of the Government as the representative of the Government in the Legislative Council for the Government's failure to comply with orders for the production of documents under standing order 52 dated 15 March 2018, 12 April 2018 and 17 May 2018,
  - (b) ordered that, under standing order 52, there be laid upon the table of the House by 9.30 am on 6 June 2018 certain of those documents not previously provided to the resolutions dated 15 March 2018, 12 April 2018 and 17 May 2018, and
  - (c) ordered that, should the Leader of the Government fail to table the documents by 9.30 am on 6 June 2018, the Leader of the Government was to attend in his place at the Table at the conclusion of prayers to explain his reasons for continued non-compliance.
  
2. That this House notes that on 6 June 2018:
  - (a) the Leader of the Government failed to table documents in compliance with the resolution of 5 June 2018,
  - (b) the Clerk tabled correspondence from the Deputy Secretary, Cabinet and Legal, Department of Premier and Cabinet in relation to the order of 5 June 2018, which stated that "after considering advice from the Crown Solicitor, a copy of which is enclosed, I advise that there are no further documents for production", and
  - (c) on the President calling on the Leader of the Government to explain his reasons for continued non-compliance, in accordance with the resolution of 5 June 2018, the Leader of the Government stated that "further to the earlier advice of Ms Karen Smith, the Department of Premier and Cabinet will provide the documents sought to the Clerk of the Legislative Council by 5.00 pm on Friday".
  
3. That this House notes that, on 8 June 2018, the Clerk received:
  - (a) correspondence from the Secretary, Department of Premier and Cabinet, noting that:
    - (i) "all of the documents referred to in the resolution are Cabinet documents",
    - (ii) "the Legislative Council has no power to require such documents to be produced",
    - (iii) "on this occasion, however, the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production",
  - (b) redacted documents relating to Sydney Stadiums and unredacted documents relating to the Tune Report on the out-of-home-care system, and
  - (c) a submission identifying documents relating to Sydney Stadiums and the Powerhouse Museum relocation business case which have been "provided on a confidential basis for inspection by members of the Legislative Council only."

4. That this House notes that on 12 June 2018, the Clerk published redacted documents relating to the Powerhouse Museum relocation business case, received on 8 June 2018, which had been treated as confidential until separated by representatives of the Department of Planning and Environment.
5. That this House notes that:
  - (a) the only established mechanism by which the Department of Premier and Cabinet may lodge documents with the Clerk directly, or by which ministers and government agencies may make a claim of privilege, is under standing order 52, in response to an order for the production of documents,
  - (b) in response to the House ordering the Leader of the Government to stand in his place at the Table to explain his reasons for non-compliance with the order of 5 June 2018, the Leader of the Government advised the House that “the Department of Premier and Cabinet will provide the documents sought to the Clerk of the Legislative Council by 5.00 pm on Friday”, and
  - (c) the correspondence and documents provided by the Department of Premier and Cabinet and received by the Clerk on 8 June 2018 and 12 June 2018 were administered by the Clerk in accordance with, and under the authority of, the provisions of standing order 52, including by treating the documents “provided on a confidential basis” in the same manner as documents subject to a claim of privilege.
6. That this House rejects the statement made by the Secretary of the Department of Premier and Cabinet on behalf of the Government that the documents provided on 8 June 2018 and 12 June 2018 were provided voluntarily.
7. That this House notes with concern the following statements made by the Government regarding the power of the Legislative Council to order the production of documents:
  - (a) on 1 May 2018, in response to a question without notice regarding the non-production to the House of the full business case in relation to the Powerhouse Museum, the Leader of the Government informed the House of the Government’s position that “no Cabinet information will be produced or referred to in responding to a resolution made under standing order 52”,
  - (b) on 5 June 2018 during debate on the motion to censure the Leader of the Government, the Leader of the Government stated:
    - (i) “I represent the Government’s view as it relates to the order for production of Cabinet documents”,
    - (ii) “The majority judgement in *Egan v Chadwick* did decide the matter: the law is settled and it is well established”,
    - (iii) that the Government’s view is based on “the very clear position at law that the Legislative Council cannot compel the [Government] to hand over Cabinet documents”, and
  - (c) in correspondence received by the Clerk on 8 June 2018, the Secretary of the Department of Premier and Cabinet stated that “the Government has decided to provide the documents sought to the Legislative Council on a voluntary basis, even though the Council has no power to require such production”.

8. That this House notes that in the judgements of Chief Justice Spigelman and Justices Meagher and Priestley in the Court of Appeal in *Egan v Chadwick* (1999), in relation to Cabinet documents:
- (a) Spigelman CJ held that:
    - (i) a distinction has been made between documents which disclose the actual deliberations within cabinet and documents in the nature of reports or submissions prepared for the assistance of Cabinet,
    - (ii) it is not reasonably necessary for the proper exercise of the functions of the Council to call for documents the production of which would conflict with the doctrine of collective ministerial responsibility by revealing the “actual deliberations of Cabinet”,
    - (iii) however, the production of documents prepared outside Cabinet for submission to Cabinet may, or may not, depending on their content, be inconsistent with the doctrine of collective ministerial responsibility to Cabinet,
  - (b) Meagher JA took the view that the immunity of cabinet documents from production was “complete”, arguing that the Legislative Council could not compel their production without subverting the doctrine of responsible government, but without exploring the distinction between different types of Cabinet documents drawn by Spigelman CJ, and
  - (c) Priestley JA noted that:
    - (i) a court has “the power to compel production to itself even of Cabinet documents”,
    - (ii) the “function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity”, and
    - (iii) “... notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no legal right to absolute secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy”.
9. That this House notes that:
- (a) the Government apparently relies on the broad definition of “Cabinet information” adopted in the Government Information (Public Access) Act 2009,
  - (b) the Legislative Council rejects the proposition that the test in the Government Information (Public Access) Act 2009 of what constitutes Cabinet information is applicable to Parliament,
  - (c) the Government’s apparent reliance on the definition in the Government Information (Public Access) Act 2009 is likely to have led to a much broader class of documents being withheld from production to this House than that articulated by the majority of the NSW Court of Appeal in the judgments of Spigelman CJ and Priestly JA in *Egan v Chadwick*, the provision of which is necessary for the Legislative Council to fulfil its constitutional role, and

- (d) the true principle from *Egan v Chadwick* concerning the power of the House to order the production of Cabinet documents is, at a minimum, that articulated by Spigelman CJ, and that the Government has failed to undertake the discrimination between classes of documents required by the reasoning of Spigelman CJ.

10. That this House asserts that it has the power to require the production of Cabinet documents such as those produced on 8 June 2018 and 12 June 2018 and that the test to be applied in determining whether a document is a Cabinet document captured by an order of the House is, at a minimum, that articulated by Spigelman CJ in *Egan v Chadwick*.

Debate ensued.

Question put.

The House divided.

Ayes 21

Mr Borsak	Mrs Houssos	Mr Secord
Mr Brown	Mr Mason-Cox	Ms Sharpe
Mr Buckingham	Mr Mookhey	Mr Shoebridge
Mr Donnelly *	Mr Moselmane *	Mr Veitch
Dr Faruqi	Mr Pearson	Ms Voltz
Mr Field	Mr Primrose	Ms Walker
Mr Graham	Mr Searle	Mr Wong

\* Tellers

Noes 20

Mr Amato	Mr Franklin	Mr Martin
Mr Blair	Mr Green	Mrs Mitchell
Mr Clarke	Mr Harwin	Revd Mr Nile
Mr Colless	Mr Khan	Dr Phelps
Ms Cusack	Mr MacDonald	Mrs Taylor
Mr Fang *	Mrs Maclaren-Jones *	Ms Ward
Mr Farlow	Mr Mallard	

\* Tellers

Question resolved in the affirmative.