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***Egan v Chadwick* and Other
Recent Developments in the
Powers of Elected Upper Houses**

by

Gareth Griffith

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EXECUTIVE SUMMARY

The decision in *Egan v Chadwick* was handed down by the NSW Court of Appeal on 10 June 1999. As identified by Chief Justice Spigelman, the primary issue was the question ‘whether or not the power of the Legislative Council to call for documents extends to documents for which claims of legal professional privilege or of public interest immunity, could be made at common law’. In the event, 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 J’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.

The practical 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. It is suggested that, if *Sankey v Whitlam* (1978) 142 CLR 1 is a guide, a case by case approach is likely to be adopted, at least to those documents which are not clearly identified as disclosing the ‘actual deliberations of Cabinet.’

Central to all three judgments was the principle of responsible government. But, again, it was construed differently, with the Chief Justice arguing that certain indicia of that principle, notably ministerial responsibility, prevents the disclosure of documents revealing the deliberations of Cabinet. Meagher JA appeared to concur with that view, while Priestley JA arrived at a different understandings of the implications arising from the related principles of representative government and responsible government.

1 INTRODUCTION

This case, which is a successor to *Egan v Willis*, is the latest and, perhaps, the last chapter in a long-running dispute between the Executive Government, as represented by the person of the NSW Treasurer and Leader of the Government in the Legislative Council, on the one side, and the Upper House itself, as represented here by the President, the Clerk and the Usher of the Black Rod, on the other. The dispute concerns the call for the production of certain State papers by the Minister to the House. In particular, the High Court decision in *Egan v Willis* left questions of high constitutional importance unanswered, notably whether the power of the Legislative Council to call for State papers extends to documents for which claims of legal professional and/or public interest immunity could be made at common law. As Chief Justice Spigelman noted, ‘This issue was expressly left open in the prior proceedings’.¹ As for the landmark nature of the case, Priestley JA observed that ‘The court has been told that neither in the United Kingdom nor in Australia has the present question ever been decided by a court’.²

The importance of the issue at stake in the present case can be gauged by the fact that the question of the relationship between Parliament’s scrutiny or investigatory power and claims made by the Executive that disclosure of certain information would be contrary to the public interest has, for many years, been the subject of academic comment and political proposals for reform. For example, in 1977, after setting out the uncertainties attending that relationship in the context of the Australian Commonwealth Parliament, Enid Campbell said it was ‘imperative that an attempt be made to delineate the circumstances in which Crown privilege may be claimed’.³ Again focusing on the federal situation, Geoffrey Lindell wrote in 1995 of the possibility that Parliament’s investigatory power (the power ‘to call for persons, papers and records’) may be restricted by public interest immunity considerations. Lindell went on to predict that that possibility ‘has the capacity to raise a spectacular clash of powers between the Legislature and the Executive branches of government especially where the conflict arises from the refusal of the Executive to comply with the orders of the Senate’.⁴ As it happens, it is not in the federal sphere that the spectacular clash foreshadowed by Lindell has occurred, but in NSW, in the context of the ongoing struggle between the Executive and the Legislative Council.

This paper reviews the issues raised in this latest case and also presents an overview of the powers of the Council and elected Upper Houses generally as these have been defined by the High Court and the NSW Court of Appeal. It begins with a brief comment on the

¹ *Egan v Chadwick & Ors* (unreported, NSW CA 10 June 1999) at para 3. (Henceforth, *Egan v Chadwick*)

² *Egan v Chadwick* at para 117; para 49 and para 48 per Spigelman CJ.

³ E Campbell, ‘Parliament and the Executive’ in *Commentaries on the Australian Constitution* edited by L Zines, Butterworths 1977, p 114.

⁴ G Lindell, ‘Parliamentary inquiries and government witnesses’ (1995) 20 *Melbourne University Law Review* 383 at 395.

background to this series of cases.

2 BACKGROUND

In its judgment of 19 November 1998 the High Court held that the New South Wales 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 judgement, 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.

At an earlier stage in the proceedings, in a unanimous decision the New South Wales Court of Appeal had also found that 'A power to order the production of State papers is reasonably necessary for the proper exercise by the Legislative Council of its functions'.⁵ In arriving at this decision the Court of Appeal noted that, unlike its counterparts in Australia, the New South Wales Parliament has no legislation comprehensively defining its powers and privileges;⁶ certainly, in New South Wales the power to order the production of documents has not been specifically addressed in express terms,⁷ or by reference to the powers of the British House of Commons.⁸ To explain the relevance of this, the situation in Australia is that, in the absence of such legislation, the Parliaments do not possess the full range of powers and privileges enjoyed by the Parliament at Westminster, in particular the right to punish for contempt. Notably, it was decided in a series of nineteenth century cases that 'colonial' legislatures which derive their authority from Imperial statute have only such

⁵ *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 667 (per Gleeson CJ)

⁶ Note that the case did not concern the legislative capacity of the New South Wales Parliament. That the Parliament has the power to enact legislation, subject to the Australian Constitution, requiring that papers be produced to the Parliament or to a House of the parliament is not in doubt - G Griffith, *Egan v Willis & Cahill: Defining the Powers of the New South Wales Legislative Council*, NSW Parliamentary Library Occasional Paper No 5, March 1997, p 8.

⁷ *Constitution Act 1867* (Qld), section 42; *Parliamentary Privileges Act 1891* (WA), section 4; *Parliamentary Privilege Act 1858* (Tas), sections 1-3.

⁸ *Constitution Act 1867* (Qld), section 40A; *Constitution Act 1975* (Vic), section 19(1); *Constitution Act 1934* (SA), section 38; *Parliamentary Privileges Act 1891* (WA), section 1; *Constitution Act 1901* (Cth), section 49.

inherent powers and privileges as are reasonably necessary ‘to the existence of such a body, and the proper exercise of the functions which it is intended to exercise’.⁹ Two leading cases to note in this regard are *Kielley v Carson*¹⁰ and *Barton v Taylor*,¹¹ where it was decided that protective and self-defensive powers, not punitive, are necessary.¹²

As for the constitutional powers and status of the Legislative Council, it can be noted that in section 3 of the *Constitution Act 1902* (NSW) the expression ‘The Legislature’ is defined to mean the Sovereign with the advice and consent of the Legislative Council and the Legislative Assembly. The Legislature’s legislative powers are set out in general terms in section 5, with the Council enjoying the same status as the Assembly, except that money Bills must originate in the Lower House. Further, section 5A establishes a mechanism whereby money Bills can be passed without the consent of the Council. A distinctive feature of the New South Wales Constitution, therefore, is that the Upper House lacks the power to block supply,¹³ with the result that the Council’s legislative functions are subject to certain well-defined limitations. On the other hand, section 7A of the New South Wales Constitution Act entrenches those powers the Council does possess.

3 FACTS¹⁴

The primary facts of the case, which were summarised in the judgment of Priestley JA, were not in dispute. Briefly, on 24 September 1998 the Legislative Council passed a resolution directing the Government to produce by 29 September all documents relating to the contamination of Sydney’s water supply. On 29 September the Clerk of the Council received a letter from the Director General of the Cabinet Office, Roger Wilkins, stating that, further to advice sought from the Crown Solicitor, the Government would not table some documents on the grounds of legal professional privilege and public interest immunity.¹⁵ On 13 October a further resolution was passed again demanding that all documents be produced but providing that those which the Government claimed were subject to immunity on the above grounds be made available to Members of the Council only and not published or copied without an Order of the House. If any Member disputed the Government’s claim an independent arbiter would be appointed to adjudicate and report back to the House. Significantly, under this resolution, a document claimed and identified as a Cabinet document would not be made available to Council Members, although again the claim would

⁹ *Kielley v Carson* (1842) 4 Moo PC 63; 13 ER 225.

¹⁰ *Ibid.*

¹¹ (1886) 11 App. Cas. 197.

¹² G Griffith, *Parliamentary Privilege: Use, Misuse and Proposals for Reform*, NSW Parliamentary Library Briefing Paper No 4/1997, p 3.

¹³ It can only delay the passage of a money Bill by a month (section 5A (2)).

¹⁴ This account is based on D Clune, ‘New South Wales, July to December 1998’ (1999) 45 *Australian Journal of Politics and History* 259 at 262-263.

¹⁵ NSWPD, 13 October 1999, pp 8073-8074.

be subject to a right of appeal to an independent legal arbiter. The Government once more refused to comply. As a consequence, on 20 October the Treasurer and Leader of the Government in the Upper House, the Hon Michael Egan MLC, was suspended for five sitting days. The present case was the direct upshot of this order, with Mr Egan disputing the Council's power to order the production of documents subject to either legal professional privilege or public interest immunity, or to determine the validity of such claims.

On 19 November, the High Court handed down its judgment in *Egan v Willis*, an appeal by Mr Egan against an earlier suspension for refusal to table papers. Some days later, on 24 November, the Legislative Council passed a resolution ordering Mr Egan to produce documents that were the subject of four previous disclosure resolutions: the closure of veterinary laboratories; the negotiations with Twentieth Century Fox over the Sydney Showground; the decentralisation of the Department of Education; and the Lake Cowal gold mine project. Similar provisions were included referring to legal professional privilege, public interest immunity and Cabinet confidentiality to those in the resolution ordering production of the water contamination documents. The Government responded by asking Sir Laurence Street to make an independent assessment of which documents were privileged and should not be tabled, as result of which over 200 documents were withheld from the House. On 26 November, the Council passed a further resolution, adjudging Mr Egan to be in contempt of the House and giving him until the following day to produce all documents as specified. On his failure to comply, Mr Egan was suspended for the remainder of the session and removed from the Chamber by Black Rod (the third defendant in the present case). Throughout, Mr Egan claimed that the Council did not have the power to require the tabling of privileged documents.¹⁶

4 THE NSW COURT OF APPEAL'S DECISION IN *EGAN V CHADWICK*

Overview: Chief Justice Spigelman identified the primary issue as a question of 'whether or not the power of the Legislative Council to call for documents extends to documents for which claims of legal professional privilege or of public interest immunity, could be made at common law'.¹⁷ In the event, 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.¹⁸ For Spigelman CJ, on the other hand, the immunity

¹⁶ NSWPD, 27 November 1998, p 10827.

¹⁷ *Egan v Chadwick* at para 3.

¹⁸ *Ibid* at para 154.

applied to documents which, ‘directly or indirectly, reveal the deliberations of Cabinet’.¹⁹

Central to all three judgments was the principle of responsible government. But, again, it was construed differently, with the Chief Justice arguing that certain indicia of that principle, notably ministerial responsibility,²⁰ prevents the disclosure of documents revealing the deliberations of Cabinet. Meagher JA appeared to concur with that view, while Priestley JA arrived at a different understanding of the implications arising from the related principles of representative government and responsible government.

The decision of Spigelman CJ: The Chief Justice considered the *principle of responsible government* at some length, this being the background against which the issues of public interest immunity and legal professional privilege had to be decided. In summary, his argument was that:

- the Council’s power to scrutinise the Executive is derived from the principle of responsible government;
- this is because the scrutiny power provides a means of enforcing the responsibility of the Executive to the organs of representative government;
- the principle pervades the whole constitution of NSW;
- it was ‘received’ in 1855, although only by ‘accepted precedent’;
- the principle is the product of ‘historical development’, both in the United Kingdom and Australia;
- in Australia the principle has diverged from the original, not least because, unlike the United Kingdom, the Upper Houses of the Australian Parliaments are elected;
- the doctrine of ministerial responsibility (in either its individual or collective dimension) is one of the incidents of responsible government.²¹ It is by means of this doctrine, in combination with the ‘symbiotic relationship’ each House of Parliament has with the Executive, that the Executive is made responsible to the electorate;
- in the present case only collective ministerial responsibility is at issue and, by extension, the question of Cabinet confidentiality;
- the Cabinet is ‘the cornerstone of our modern system of government’ and the collective responsibility of the Cabinet is a constitutional ‘convention’;
- such conventions do not always need to be rigorously observed to remain relevant. Even if honoured in the breach, collective responsibility ‘has remained a distinctive

¹⁹ Ibid at para 70.

²⁰ Ibid at para 55. This is said to apply ‘either in its individual or collective dimension’.

²¹ Individual responsibility has traditionally been understood to mean that a minister is responsible to Parliament for the conduct of the department of which he or she is the political head. Collective responsibility, which is more relevant in this case, is generally taken to refer to the overall responsibility of the government to Parliament and the duty of each minister to support government policy, even when he or she may privately disagree with it. Collective responsibility is said to have three branches: the confidence rule - under which the government of the day must resign if it loses the confidence of the lower House; the unanimity rule - under which all ministers must be regarded as equally responsible for, and bound by, the discussions of the government; and the confidentiality rule - under which Cabinet deliberates in secret.

-
- characteristic’ of the system of government in NSW;
 - as the scrutiny function of the Council is derived from responsible government, ‘collective responsibility must be accepted as part of that system’;
 - this in turn is significant in determining whether a power which is said to be ‘reasonably necessary’ for the performance of this function, extends to Cabinet documents;
 - and, further, it is not a question of the *enforcement* of collective responsibility by a court, but of how that principle should be *recognised* in the application of a rule of common law of the constitution upon which it impinges.²²

Armed with this understanding of responsible government, the Chief Justice considered first the issue of *public interest immunity*, noting at the outset: ‘The ability of a House, or a Committee, of parliament to enforce access to documents, the disclosure of which is asserted by, or on behalf of, a Minister to be contrary to the public interest, has never been resolved as a matter of parliamentary practice’.²³ As he went on to explain, ‘Hitherto, in Australian parliamentary practice, a House has not sought to enforce demands to produce documents, when public interest immunity has been claimed’.

Reviewing case law on the subject, notably *Sankey v Whitlam*,²⁴ the Chief Justice noted that a claim of public interest immunity is ‘not absolute’, but that it requires the balancing by a court of ‘conflicting public interests’: in particular, at trial a judge must weigh incommensurable factors, namely, ‘the significance of the information to the issues in the trial, against the public harm from disclosure’. However, in keeping with the established ‘hands-off’ relationship between Parliament and the courts, his Honour acknowledged that in the present case ‘the courts should be very reluctant to undertake any such balancing’. In his view, ‘This does not involve a constitutional function appropriate to be undertaken by judicial officers’.²⁵ Having pronounced on the existence of the power to call for privileged documents, the courts should therefore leave the exercise of that power to the Houses of parliament themselves. As to the existence of the power, this was declared to be ‘reasonably necessary’ for the performance of the Council’s functions. However, that power is restricted by considerations arising from the doctrine of ministerial responsibility, as a consequence of which the Chief Justice concluded that the power is limited in nature. He explained:

...it is not reasonably necessary for the proper exercise of the functions of the Legislative Council to call for documents the production of which would

²² This distinction is discussed in a later section of this paper.

²³ *Ibid* at para 48.

²⁴ (1978) 142 CLR 1. Gibbs CJ said the general rule was that documents would not be ordered to be produced if it would be injurious to the public interest to disclose them (at 38). Sometimes however the administration of justice might be frustrated by the withholding of a document. In such a case the court must weigh the competing aspects of the public interest (at 39). In a case where the ordering of production of the document would put the interest of the State in jeopardy, no order should be made (at 39).

²⁵ *Egan v Chadwick* at para 52.

conflict with the doctrine of ministerial responsibility, either in its individual or collective dimension. The power is itself, in significant degree, derived from that doctrine. The existence of an inconsistency or conflict constitutes a qualification on the power itself.²⁶

He continued:

In order to avoid inconsistency between the power to call for documents and one of the bases on which it has been determined that the power is reasonably necessary (namely executive accountability derived from responsible government), the power should, at least, be restricted to documents which do not, directly or indirectly, reveal the deliberations of Cabinet.²⁷

Thus, documents which disclose the actual deliberations of Cabinet are beyond the power, this being a reference, presumably, to Cabinet Minutes. 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 In this way, a distinction was made between documents disclosing the actual deliberations within Cabinet, on one side, and reports or submissions prepared for the assistance of Cabinet, the confidential status of which would have to be decided on a case by case basis.

Spigelman CJ’s conclusion in respect of *legal professional privilege* was that ‘access to legal advice is reasonably necessary for the exercise by the Legislative Council of its functions’.²⁹ In saying so, his Honour was conscious of the fact that the emphasis on the accountability functions of the Council in the present case makes the approach adopted here hard to reconcile with the High Court’s views on the role of legal professional privilege in other contexts.³⁰ The present approach was, in effect, another instance of the court practising a ‘prudential restraint’ in regard to conflicts that arise between Parliament and the Executive, defining the question of what, if any access, should occur as a matter ‘of the occasion and of the manner’ of the exercise of a power, not of its existence. ‘If the public interest is thereby harmed’, explained Spigelman CJ, ‘the sanctions are political, not legal’.³¹

However, the Chief Justice did suggest that the limitations on the scope of the power to order documents subject to claims of public interest immunity, arising as a consequence of inconsistency with the principles of collective or individual ministerial responsibility, ‘may

²⁶ Ibid at para 55.

²⁷ Ibid at para 70.

²⁸ Ibid at para 57.

²⁹ Ibid at para 86.

³⁰ Ibid at para 85.

³¹ Ibid at para 87.

extend to documents covered by legal professional privilege at common law'.³²

The decision of Meagher JA: His Honour agreed with the Chief Justice's conclusions in respect of legal professional privilege. There was also broad agreement between them on the question of public interest immunity. As noted, the key difference was that Meagher JA's formulation of the scope of the immunity of Cabinet documents was in general terms. He said:

The Cabinet is the cornerstone of responsible government in New South Wales, and its documents are essential for its operation. That means their immunity from production is complete. The Legislative Council could not compel their production without subverting the doctrine of responsible government, a doctrine on which the Legislative Council also relies to justify its rights to call for documents.³³

The decision of Priestley JA: Central to Priestley JA's judgment are the related and mutually re-enforcing principles of *responsible government and representative government* which, following the High Court, can be said to characterise the system of government established by the Australian Constitution. It is these principles, he said, which must lie behind the formulation of the function of the Executive, on one side, and the functions of the Houses of Parliament, in particular the Legislative Council, on the other. As to the function of the executive, which is carried out 'through an outlay of public money' and in the public interest, it is:

to administer the carrying out of existing law in accordance with its policy from time to time, to keep all its administrative policies under review, and to formulate further policy which it thinks desirable in the public interest which can be put into effect either on the basis of the law as it stands or if Parliament passes legislation which will enable the further policy to be lawfully carried out.³⁴

Then, by reference to aspects of the High Court's judgment in *Egan v Willis*, Priestley JA explained that the function of the two Houses of Parliament is 'to keep the laws of the State under constant review so that they may be repealed, amended or added to in accordance with the public interest and the necessities of the time'. Reliance was placed on the nexus between representative and responsible government, as this was articulated in the majority judgment in *Egan v Willis*, where it was said that 'to secure accountability of government activity is the very essence of responsible government'³⁵ and, quoting JS Mill, 'that the task

³² Ibid at para 88.

³³ Ibid at para 154.

³⁴ Ibid at para 135.

³⁵ (1998) 158 ALR 527, para 42. The majority quoted with approval from the Electoral and Administrative Review Commission of Queensland's *Report on Review of Parliamentary Committees*.

of the Legislature was ‘to watch and control the government to throw the light of publicity on its acts’.³⁶

Against this background, Priestley JA concluded that the justification for *legal professional privilege* does not apply when a House of Parliament seeks the production of Executive documents. This is because it must have the power to call for information relevant to the function of reviewing, changing and adding to the statute law of the State.

For Priestley JA these considerations apply with equal force to *public interest immunity*. Moreover, he noted that a court has ‘the power to compel production to itself even of cabinet documents, even though the power will in regard to certain cabinet documents be used with the highest degree of circumspection’.³⁷ From this, his Honour went on to observe that ‘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’.³⁸ He concluded:

One result of this view is that, 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.³⁹

Clearly, the key to this minority view was the emphasis Priestley JA placed on the doctrine of representative government or democracy in defining what is meant by the related principle of responsible government and the legal implications which flow from it. He was, in this respect, following the course of the High Court’s discussion of representative government and responsible government in *Egan v Willis*. However, in that context the question of the implications of these doctrines for the immunity of Cabinet documents was left undecided. For the majority in *Egan v Chadwick*, the High Court’s views did not lead to the conclusion arrived at by Priestley JA.

5 RECENT DEVELOPMENTS IN THE POWERS OF ELECTED UPPER HOUSES - AN OVERVIEW OF KEY QUESTIONS AND ISSUES

Taken together the *Egan v Willis* case (the decisions of the High Court and the NSW Court of Appeal) and *Egan v Chadwick* are a landmark in defining the powers and privileges of elected Upper Houses under the Westminster system of government. The following is a

³⁶ Ibid.

³⁷ *Egan v Chadwick* at para 140.

³⁸ Ibid at para 142.

³⁹ Ibid at para 143.

summary of the key matters decided (and left undecided) by this series of cases .

Does the NSW Parliament have the legislative capacity to order the production of State papers? None of the cases concerned the legislative capacity of the NSW Parliament. That the Parliament has the power to enact legislation, subject to the Australian Constitution, requiring that papers be produced to the Parliament or to a House of the Parliament is not in doubt.⁴⁰ That is the position in other Australian jurisdictions where the question of the power to order the production of papers has been addressed specifically,⁴¹ or by reference to the powers of the British House of Commons.⁴² In NSW, on the other hand, no relevant legislation has been enacted. Section 5 of the *Parliamentary Evidence Act 1901* does not apply.⁴³

Do the Legislative Council's Standing Orders serve as a source for the power to produce documents? No. The Legislative Council's Standing Order 18 provides:

Any papers may be ordered to be laid before the House and the Clerk shall communicate to the Premier's Department any such order.⁴⁴

In his submission to the Legislative Council's Standing Committee on Parliamentary Privilege and Ethics, Bret Walker SC makes the point that, further to Standing Order 18 (read in combination with Standing Orders 19-22),⁴⁵ it is apparent that: (i) a power is

⁴⁰ Ibid at 4 (per Mahoney P).

⁴¹ *Constitution Act 1867* (Qld), section 42; *Parliamentary Privileges Act 1891* (WA), section 4; *Parliamentary Privilege Act 1858* (Tas), sections 1-3.

⁴² *Constitution Act 1867* (Qld), section 40A; *Constitution Act 1975* (Vic), section 19(1); *Constitution Act 1934* (SA), section 38; *Parliamentary Privileges Act 1891* (WA), section 1; *Constitution Act 1901* (Cth), section 49.

⁴³ That section requires the attendance of an MP to give evidence before either one of the Houses of Parliament or before a parliamentary committee.

⁴⁴ The words 'and the Clerk shall communicate to the Premier's Department any such order' were added in 1927 on the ground that 'someone should be definitely named to carry out the duty': *NSWPD*, 22 November 1927, p 437; *Journal of the Legislative Council of NSW for the Session 1927*, Vol 103, p 29 and p 41.

⁴⁵ Standing Orders 19-22 provide: (19) The production of Papers concerning the Royal Prerogative, or of Despatches or other Correspondence addressed to or emanating from His Excellency the Governor, or having reference to the Administration of Justice, shall be asked for only by Address to the Governor; (20) All Papers and Documents laid upon the Table of the House by a Minister shall be considered public, and may be ordered to be printed on motion without notice, and it shall always be in order on the presentation of any document, except a Petition, Return to Address, or Order for the Member presenting it to move, without previous notice, that it be printed, and, if desired, that a day be appointed for its consideration; (21) Messages from the Governor or Legislative Assembly, Papers, and Returns may be presented or laid upon the Table at any time when other business is not before the House; and (22) The Clerk shall distribute to each Member of the Council a copy of each Paper printed by Order of the Council, and shall transmit to the Clerk of the Assembly a sufficient number of copies of all such Papers to the Members thereof.

assumed to order papers to be produced; (ii) the nature of the power is related to the Council's powers and duties of supervision or enquiry into the Executive; (iii) a distinction is observed between papers which may relate to the ordinary administration of the State on the one hand, and papers touching the royal prerogative, vice-regal correspondence and the administration of justice on the other hand; and (iv) the assumed power is directed to informing the Council, and through its records the people whom its Members represent, of the matter in such papers.⁴⁶ From this the submission proceeds to discount the possibility that Standing Order 18 can itself be regarded as a *source* of power, even when read with section 15(1)(a) of the NSW *Constitution Act 1902* which reads: 'The Legislative Council...shall, as there may be occasion, prepare and adopt...Standing Rules and Orders regulating...the orderly conduct of such Council...'. The better view is that Standing Order 18 should be regarded as a provision which merely *regulates* the exercise of a power which is inherent or implied in the Houses of the Parliament of NSW.⁴⁷ That interpretation was accepted by the Court of Appeal⁴⁸ and went unchallenged in the High Court.⁴⁹

How are the powers and privileges of the NSW Legislative Council to be defined?

Consistent with the decision in *Kielley v Carson*,⁵⁰ the High Court confirmed that, at common law, the Council has 'such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions'. Further, in order to decide whether a particular implied power is reasonably necessary for the Council to perform any constitutional function, the joint judgment confirmed that 'it is necessary to identify that function'.⁵¹ The relevant test therefore 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.

⁴⁶ Parliament of NSW, Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry Into Sanctions Where a Minister Fails to Table Documents*, May 1996, Appendix 4.

⁴⁷ *Ibid.* Bret Walker warned against reading section 15(1)(a) of the *Constitution Act 1902* 'as if it meant that Standing Orders could be made granting the Legislative Council such powers as it thought from time to time would be convenient or useful for the discharge of its functions. Such ample scope for this statutory power could have been bestowed by more apt words than the phrase '*regulating...the orderly conduct...*'. Both '*regulating*' and '*orderly*' suggest to me that parliament did not intend by paragraph 15(1)(a) to enable each of the Houses by Standing Order to change in a substantive way its powers, particularly in areas where civil liberties and the important constitutional relation of Parliament and the Executive are affected'. Enid Campbell agreed with that opinion at Appendix 5. Likewise, the Solicitor General and Crown Solicitor of NSW advised that Standing Order 18 (as well as the cognate Standing Order in the Legislative Assembly) are *ultra vires* the power to make Standing Orders conferred by section 15 of the NSW Constitution - at Appendix 2 and 3.

⁴⁸ (1996) 40 NSWLR 650 at 667 (Gleeson CJ).

⁴⁹ (1998) 158 ALR 527 at para 174 (Callinan J).

⁵⁰ (1842) 4 Moo PC 63; 13 ER 225.

⁵¹ (1998) 158 ALR 527 at para 48; (1998) 73 ALJR 75 at para 48 (per Gaudron, Gummow and Hayne JJ). The joint judgment confirmed the approach taken by Priestley JA in *Egan v Willis* (1996) 40 NSWLR 650 at 692.

The one dissenting voice was that of Justice McHugh. For him, although the ‘reasonably necessary’ test is appropriate in other contexts in determining the extent of the Council’s powers, it should not apply in this instance where the issue is the Council’s power to demand the tabling of papers. This is because it would permit an ‘invasive’ power to coerce private citizens, an issue which is discussed later in this paper.⁵²

What is meant by ‘necessary’ in this context? McHugh J was also of the view that the claimed power to order the production of papers would fail if the ‘reasonably necessary’ test were applied. This is because the Council would have to show that, in the absence of the power asserted, it would be ‘impossible’ to carry out the relevant function, a line of argument which, in his Honour’s opinion, must fail in the circumstances of the case.⁵³ The test of ‘necessity’ for McHugh J therefore was a strict one. It was not enough to show that the ‘suggested power is conducive to the proper exercise of the functions of the Council’.⁵⁴

On the other hand, Callinan J preferred the less rigorous approach adopted by Mahoney P in the NSW Court of Appeal: “Necessary”, he said ‘has, in the law, been used frequently to denote those things which are clearly adapted to the needs or the purposes of the body or function in question’.⁵⁵ That formulation would appear to be nearer to the majority view of how the word ‘necessary’ is to be understood in this context.

Is the question of what is ‘reasonably necessary’ fixed or variable? Again, according to the joint judgement of Gaudron, Gummow and Hayne JJ, the question as to what is ‘reasonable necessary’ is variable in nature. They explain: ‘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’.⁵⁶ In this way, the answer to the legal question of determining the extent of the Council’s powers is to be answered, in part at least, by reference to the ‘conventional practices’ of parliamentary politics.

What are the relevant functions of the Legislative Council? It is necessary to identify the relevant functions of the Legislative Council. For the High Court, the Council’s ‘primary function’ is the exercise of the legislative power under section 5 of the *Constitution Act 1902* (NSW) to make laws for the peace, welfare and good government of the State. Following the views expressed by Priestley JA in the NSW Court of Appeal, Gaudron, Gummow and Hayne JJ explained the ‘broad reach’ of that power and argued that it indicated ‘an imperative need for each chamber to have access to material which may be of help to it in considering not only the making of changes to existing laws or the enactment

⁵² (1998) 158 ALR 527 at para 82.

⁵³ *Ibid* at para 81.

⁵⁴ *Ibid*.

⁵⁵ *Ibid* at para 191; (1996) 40 NSWLR 650 at 677. Mahoney P noted that the test is not one of ‘mere convenience’ (at 676).

⁵⁶ *Ibid* at para 50.

of new laws but, as an anterior matter, to the manner of operation of existing laws'.⁵⁷ Priestley JA had expressed the position in these terms:

In my opinion it is well within the boundaries of reasonable necessity that the Legislative Council has power to inform itself of any matter relevant to a subject on which the Legislature has power to make laws. The common law as it operates in New South Wales today necessarily implies such a power...in the two parts ordinarily called Parliament of the three part Legislature. This seems to me to be a necessary implication in light of the very broad reach of the legislative power of the Legislature and what seems to me to be the imperative need for both the Legislative Assembly and Legislative Council to have access (and ready access) to all facts and information which may be of help to them in considering three subjects: the way in which existing laws are operating; possible changes to existing laws; and the possible making of new laws. The first of these subjects clearly embraces the way in which the Executive Government is executing the laws.⁵⁸

Viewed in this light, the scrutiny or investigatory power of the Legislative Council would appear to be a reasonably necessary extension of its primary legislative function. Indeed, Priestley JA had spoken in the NSW Court of Appeal of 'function' in the singular, stating that, to decide if a power is reasonably necessary for the Council to 'carry out its constitutional function, it is necessary to state what that function is'.⁵⁹

The High Court also identified a distinct 'scrutiny power' or, in the words of the joint judgment, 'the superintendence' function as the basis for ordering the production of State papers. The joint judgment spoke too of the 'immediate interrelation between that superintendence and law-making function in which the Legislative Council participates, together with the Legislative Assembly and the Crown'.⁶⁰ In the NSW Court of Appeal this secondary function was discussed in the greatest detail by Gleeson CJ who had said that the 'reasonable necessity' in question 'related both to the legislative functions of Parliament and also the role of the Parliament (including both Houses of Parliament) in scrutinising the executive'.⁶¹ He referred in this context to the British constitutional authority, Sir William Anson, who wrote in 1886 of that 'constant criticism and control of the executive which our system of Cabinet government puts in the hands of the legislature'. Gleeson CJ concluded:

⁵⁷ (1998) 158 ALR 527 at para 52; paras 146-149 (Kirby J); and paras 178-189 (Callinan J)

⁵⁸ (1996) 40 NSWLR 650 at 692-3. The only limitations on the power to investigate recognised but not determined by Priestley JA at this stage were those 'asserted by persons claiming privilege of various kinds'. As noted, his Honour adopted a different approach in *Egan v Chadwick*.

⁵⁹ *Ibid* at 692.

⁶⁰ *Ibid* at para 47.

⁶¹ (1996) 40 NSWLR 650 at 664-665.

The capacity of both Houses of Parliament, including the House less likely to be ‘controlled’ by the government, to scrutinise the workings of the executive government, by asking questions and demanding the production of State papers, is an important aspect of modern parliamentary democracy. It provides an essential safeguard against abuses of executive power.⁶²

What part does the concept of responsible government play in determining the functions of an elected Upper House? Gleeson CJ maintained the above line of argument in support of a distinct ‘scrutiny’ function, as did Mahoney P,⁶³ without relying directly on the concept of responsible government. The High Court, on the other hand, made that connection explicit, arguing that each House of Parliament performs the parliamentary function of review of executive conduct in accordance with the principle of responsible government. The joint judgment in the High Court stated in this regard:

A system of responsible government traditionally has been considered to encompass ‘the means by which Parliament brings the Executive to account’ so that ‘the Executive’s primary responsibility in its prosecution of government is owed to Parliament’. ...It has been said of the contemporary position in Australia that, whilst ‘the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people’ and that to ‘secure accountability of government activity is the very essence of responsible government’.⁶⁴

An interesting feature of this series of cases is the different attitude taken by the courts at various stages to the concept of responsible government. In the NSW Court of Appeal, only Gleeson CJ discussed the concept and then only to warn that ‘Care needs to be exercised in relating political concepts, which, although of great importance, are flexible, and may be differently understood by different people or at different times, to the principles of law’.⁶⁵ Of responsible government his Honour said:

It is a concept based upon a combination of law, convention, and political practice. The way in which that concept manifests itself is not immutable...The nature and extent of the responsibility which is involved in responsible government depends as much upon convention, political and administrative practice, and the climate of public opinion, as upon rules of law.⁶⁶

Thus, while it was acknowledged that the case at issue ‘may have an effect upon the shape

⁶² Ibid. at 665.

⁶³ Ibid at 677.

⁶⁴ (1998) 73 ALR 75 at para 42; and para 155 (Kirby J).

⁶⁵ (1996) 40 NSWLR 650 at 659.

⁶⁶ Ibid at 660.

of responsible government in this State', the view was taken by Gleeson CJ that the question in the case had to be answered 'according to law', and not in 'an appeal to political theory'.⁶⁷ In other words, for Gleeson CJ, the concept of responsible government was in no way decisive in determining the powers of the Legislative Council. Instead, reliance was placed on the established case law, aided by comparison with other comparable legislatures.

In the High Court, on the other hand, with the exception of Justice Callinan, the concept of responsible government was a central building block of all the judgments. Echoing Gleeson CJ's warning, Justice Kirby did concede that 'Care must be observed in the use of the notion of "responsible government" in legal reasoning'. Describing the concept as a 'political epithet rather than a definition which specifies the precise content of constitutional requirements', Justice Kirby said 'it is possible to accept the words as a general description of a feature of constitutional arrangements in Australia without necessarily being able to derive from that feature precise implications which are binding at law'.⁶⁸ Apparently, however, that was the very outcome the High Court achieved in *Egan v Willis*, for it was the 'conventional practices' associated with responsible government which made the scrutiny or superintendence power reasonably necessary in its view. As Spigelman CJ observed later in the NSW Court of Appeal, 'As was made clear in *Egan v Willis*, the role of the Legislative Council in reviewing executive conduct is derived from the principle of responsible government'.⁶⁹

As one would expect, in *Egan v Chadwick* the NSW Court of Appeal followed the High Court's lead. Thus, although the precise implication drawn from the responsible government varied as between Spigelman CJ and Meagher JA, on one side, and Priestley JA, on the other, the principle was central to all three judgments in the case.

Is responsible government to be interpreted as a legal rule by the courts? For Gleeson CJ responsible government is 'based upon a combination of law, convention, and political practice'. Using this observation as a starting point, it seems the answer to the stated question depends on which incident or aspect of the operation of responsible government is at issue. If the relevant incident is provided for by statute, it is to be enforced as a legal rule. For example, in *Lange* the High Court commented that the requirement that the Federal Parliament meet at least annually is one incident of responsible government. That requirement, which can be enforced at law, is provided for under section 6 of the Commonwealth Constitution and, for NSW, under section 11 of the *Constitution Act 1902*. On the other hand, where an incident of responsible government operates, as it usually does in NSW, only as a 'convention' of the constitution, by what has been described as 'the silent operation of constitutional principle',⁷⁰ then it is not to be applied as if it were a legal rule. The traditional view is that, at most, it may be recognised or noticed by the courts as part

⁶⁷ Ibid at 660-661.

⁶⁸ (1998) 158 ALR 527 at para 152.

⁶⁹ *Egan v Chadwick* at para 15.

⁷⁰ *Cooper v Stewart* [1889] 14 AC 286 at 293.

of the political background against which a legal ruling is to be made.

As suggested by Gleeson CJ, the core incidents of responsible government are in fact centred around a cluster of constitutional conventions and practices, whereby government ministers are individually and collectively answerable to the Parliament and can retain office only while they have the ‘confidence’ of the lower House. In the past, as Geoffrey Marshall has observed, this ‘confidence rule’ was said to be ‘a prime non-legal rule of the Constitution’.⁷¹

Spigelman CJ in the Court of Appeal confronted the question of how responsible government is to be interpreted by the courts in express terms, although only in relation to the convention of collective responsibility. He stated that it is not a question of the *enforcement* of that convention by a court, but of how that aspect of responsible government should be *recognised* in the application of a rule of common law of the constitution upon which it impinges.⁷² The argument here is that collective responsibility is to be understood as a ‘non-legal constitutional principle’ or as a ‘non-legal rule’ or convention in the constitution. As such, unlike a legal rule, it is not *enforced* by the courts, but it can be *recognised* as ‘something relevant to the interpretation of constitutional provisions (and other laws)...’.⁷³

Based on Professor Colin Munro’s discussion, Spigelman CJ noted Maitland’s view that non-legal rules are ‘of every degree of stringency and definitiveness’.⁷⁴ Once that is acknowledged, Munro continued, the way is open to view them ‘as on a continuum. Some few may be stated with precision, others are harder to formulate. Some are more or less invariably obeyed, while there are others to which, by degrees, a lesser sense of obligation adheres’.⁷⁵ The advantage of this approach, for responsible government, is that it permits aspects of it to be ‘more fluid and flexible than others’.⁷⁶ It permitted Spigelman CJ to comment:

The principle of responsible government - in both dimensions of individual

⁷¹ G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, Clarendon Press 1984, p 55. Marshall discusses the watering down of this confidence rule in the United Kingdom in recent times.

⁷² *Ibid* at para 47.

⁷³ G Lindell, ‘Responsible government’, from *Essays on Law and Government: Volume 1* edited by PD Finn, The Law Book Co Ltd 1995, p 82.

⁷⁴ Munro’s views are cited by Spigelman CJ in his discussion of the word ‘convention’ as this was understood by AV Dicey - *Egan v Chadwick* at para 44.

⁷⁵ CR Munro, *Studies in Constitutional Law*, Butterworths 1987, p 60.

⁷⁶ *Final Report of the Constitutional Commission*, Volume One, p 88.

ministerial responsibility and collective responsibility - is part of the Constitution of New South Wales. That proposition is not diminished in its force by the fact that the principle has not always been observed.⁷⁷

What can be said of the power to order the production of State papers in this context? Earlier in his judgment Spigelman CJ had observed that the Courts have had to recognise responsible government for the 'purpose of determining issues that are properly before them' and, as a consequence, 'the incidents of responsible government may be said to be indirectly enforced'⁷⁸ Is the High Court's exposition of the power to scrutinise the Executive of this kind? Alternatively, was the decision a rare instance of the 'direct application of a convention'.⁷⁹ Was the High Court applying law or a convention here? The answer seems to be that, while the test of 'reasonable necessity' is legal in nature, its application in *Egan v Willis* required recognition of certain conventions associated with responsible government. The emphasis on the protean political history of responsible government in NSW in the joint judgment would seem to point in this direction: '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'.⁸⁰ Logically, therefore, the argument appears to be that a constitutional convention is indirectly enforced when a legal power is derived, by implication, as a matter of reasonable necessity from it.

The argument may suggest that the judicial approach to the connection between legal doctrine and parliamentary conventions involves a peculiar arrangement, one which arises from the unique relationship our system of government establishes between parliament and the courts, under which both exercise mutual respect and understanding for their respective rights and privileges.⁸¹ This is particularly so if the decision in *Egan v Willis* implies that the determination of what is 'reasonably necessary' for the 'proper exercise' of the functions of a House of Parliament - and therefore its powers - is to be informed by what is in fact already done as a matter of conventional practice by the House.⁸² Is it the case therefore that

⁷⁷ *Egan v Chadwick* at para 45

⁷⁸ *Ibid* at para 10.

⁷⁹ G Marshall, *Constitutional Conventions*, (N 71), p 15.

⁸⁰ (1998) 158 ALR 527 at para 50.

⁸¹ G Griffith, *Parliamentary Privilege: Use, Misuse and Proposals for Reform*, NSW Parliamentary Library Briefing Paper No 4/1997, pp 15-17. It is agreed that the courts can determine the existence or otherwise of a power or privilege claimed by a House of Parliament.

⁸² CR Munro, *Studies in Constitutional Law*, (N 75) pp 52-60. Munro presents a succinct account of the different approaches to identifying 'what are conventions?'. His preference was for the approach associated with AV Dicey who did not attempt a definition of conventions: 'They were illustrated by examples, and negatively defined by the fact that they were not court-enforced. Any non-legal matters relevant to the constitution were, for Dicey, conventions'. To this formulation, *Egan v Willis* seems to add that conventions may be 'indirectly enforced' by the courts.

the law relating to Parliament is, to a significant extent, a creature of parliamentary practice itself?

Must constitutional conventions be practised in fact for them to be ‘recognised’ by the courts? The joint judgment in *Egan v Willis* did indicate that, if they are to assist in the interpretation of the ‘proper exercise’ of its functions, any relevant constitutional practices must be ‘established and *maintained* by the Legislative Council’ (emphasis added). However, it is generally acknowledged that certain aspects of responsible government vary in ‘strength and clarity’ and are maintained with more fluidity and flexibility than others.⁸³ Particularly notorious in this regard is the slippery yet all-important convention of ministerial responsibility, in both its individual and collective dimensions. As Geoffrey Marshall wrote in a British context in 1984, the convention has to be formulated in some such form as: ‘Ministers generally do or should do X in circumstances Y (but with various exceptions)’.⁸⁴

With this in mind, the suggested arrangement discussed in the previous section becomes more peculiar still when we observe, in company with Spigelman CJ,⁸⁵ that certain conventional practices need only be honoured in the breach to be recognised by the courts. If this interpretation is correct, not only is the power of a House of Parliament to be derived at law from what is done in fact; it is also to be derived, it seems, by what ought to happen as a matter of constitutional principle but, in reality, may only be done if it is deemed to be politically convenient. In this way, legal doctrine in this field is informed (and perhaps even determined) both by conventional practice and what, for want of a better description, can

⁸³ *Final Report of the Constitutional Commission*, Volume 1, p 88.

⁸⁴ G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, (N 71) p 54. Marshall offers the following checklist: (1) The prerogatives of the Crown are exercised on the advice of Ministers (except in such cases as they are not); (2) The government resigns when it loses the confidence of the House of Commons (except when it remains in office); (3) Ministers speak and vote together (except when they cannot agree to do so); (4) Ministers explain their policy and provide information to the House (except when they keep it to themselves); (5) Ministers offer their individual resignations if serious errors are made in their Departments (except when they retain their posts or are given peerages); and (6) Every act of a civil servant is, legally speaking, the act of a Minister (except those that are, legally speaking, their own). For an account of the empirical operation of ministerial responsibility in Australia see - E Thompson and G Tillotson, ‘Caught in the act: the smoking gun view of ministerial responsibility’ (1999) 58 *Australian Journal of Public Administration* 48-57. Thompson and Tillotson report that collective ministerial responsibility does remain ‘alive’ in Australia: ‘If ministers cannot publicly support a cabinet decision or the general direction of government policies, they resign’. But the same authors add that this does not apply where there are clashes on policy issues within the Coalition: ‘Coalition governments need a separate category with respect to collective cabinet responsibility’. Returning to Marshall’s formulation the proposition seems to be that in Australia ‘Ministers speak and vote together (except when they cannot agree to do so, in particular when Coalition partners disagree about policy issues)’.

⁸⁵ *Egan v Chadwick* at para 43. The reference was to collective responsibility only.

be called the necessary constitutional fictions of parliamentary practice.⁸⁶

What is the constitutional purpose of responsible government? Part of the difficulty, analytically, is that responsible government itself is such a protean and multi-faceted phenomenon. It is characterised variously as a ‘concept’,⁸⁷ a ‘principle’,⁸⁸ a ‘doctrine’,⁸⁹ a ‘system’⁹⁰ and as a ‘notion’ or ‘epithet’.⁹¹ Are these alternative characterisations significant? If it is a system, is responsible government no more than the sum of its individual but connected incidents or parts, a complex web of laws, conventions and practices joined more by historical accident and practical necessity than by some over-arching idea or purpose? On the other hand, if it is a concept, doctrine, notion or principle, are its incidents or parts to be evaluated ultimately in terms of their relationship with, or contribution to, some fundamental constitutional purpose or over-arching idea?

In *Egan v Willis* the High Court did not delve expressly into these matters. However, it has been remarked that in recent years the High Court has tended to discuss the nature and purpose of responsible government in tandem with the related political concept of representative government.⁹² This has been especially evident in the freedom of political discussion cases and it may suggest an answer to the question that has been raised. One view, presented by Deane and Toohey JJ in *Nationwide News*, is that responsible government is incorporated in the Commonwealth Constitution ‘as a system of government devised to permit observance of the doctrine of representative government in a constitutional monarchy in which executive powers are formally vested in a non-elected sovereign’.⁹³ In the same case, Brennan J referred to the principle of responsible government

⁸⁶ C Turpin, ‘Ministerial Responsibility’ from *The Changing Constitution*, 3rd edition, edited by J Jowell and D Oliver, Clarendon Press 1996, pp 109-151. Turpin explains the centrality of ministerial responsibility to a Westminster-style Constitution and at the same time discusses the ‘admixture of myth’ involved in its operation. He writes, ‘If ministerial responsibility is not the sole organizing principle of the constitution it is nevertheless essential to it; yet it is something malleable and precarious in practice, depending as it does upon procedure and custom, upon intangible understandings and traditions, and upon political circumstances’ (pages 150-151). Note that the joint judgment acknowledged that conventional practices ‘might be varied or abrogated by legislation’ (para 51).

⁸⁷ (1996) 40 NSWLR 650 at 659 (Gleeson CJ).

⁸⁸ *Egan v Chadwick* at para 45 (Spigelman CJ).

⁸⁹ *Ibid* at para 154 (Meagher JA).

⁹⁰ (1998) 158 ALR 527 at paras 38 and 46 (Gaudron, Gummow and Hayne JJ); para 99 (McHugh J).

⁹¹ *Ibid* at para 152 (Kirby J).

⁹² G Griffith, *Egan v Willis & Cahill: The High Court Decisions*, NSW Parliamentary Library Briefing Paper No 1/1999, p 10.

⁹³ (1992) 177 CLR 1 at 71. It is cited in G Lindell, ‘Responsible Government’, (N 73) p 85. For Lindell, this formulation was preferable to the approach associated with the *Engineers case* (1920) 28 CLR 129 under which implications could be derived from responsible government

as a 'constitutional imperative' intended 'to make both the legislative and executive branches of the government of the Commonwealth ultimately answerable to the Australian people.'⁹⁴ This can be said to accord with a more 'liberal' view of responsible government which emphasises the role of Parliament as a 'watchdog' scrutinising the Executive on behalf of the electorate, as against the alternative view in which emphasises the responsibility of the Government to govern in accordance with its mandate and in which Parliament's 'function as a debating chamber in which public opinion is aired' is emphasised over and above its scrutiny or watchdog role.⁹⁵ It could be said that this more liberal view has always been implicit in the High Court's association of responsible government with the 'control' exercised by Parliament 'in the long run' over the Executive.⁹⁶ The point to make is that the connection between the Executive, Parliament and the electorate has received greater focus and emphasis in recent years. Consistent with this approach, in *Lange*, in a seven member joint judgment, the High Court included 'the power to coerce the provision of information' in a list of matters which, in the Commonwealth context, 'provided a means of enforcing the responsibility of the executive to the organs of representative government'.⁹⁷

The High Court has certainly clarified the constitutional purpose of responsible government in recent years which, it can be argued, has permitted a more expansive view of what the principle entails, in particular as this relates to the powers of elected Upper Houses.

Under responsible government, is the 'formal' responsibility of the Executive only to the Lower House? That is the traditional view, based largely on British precedent.

as one of the 'general doctrines of government which underlie the Constitution and form part of its structure'. Lindell's comments are directed towards the Commonwealth Constitution, but would seem to apply with equal force to the Constitutions of the States.

⁹⁴ (1992) 177 CLR 1 at 47. As with 'representative government', for Brennan CJ it seems the principle of responsible government 'can be given the status of a constitutional imperative, but only in so far as the meaning and content of that principle are implied in the text and structure of the Constitution' - *McGinty v WA* (1996) 186 CLR 140 at 170. Query whether this argument, developed at the federal level, would apply in the States where only certain 'manner and form' provisions of their Constitutions are entrenched.

⁹⁵ AH Birch, *Representative and responsible government*, George Allen and Unwin Ltd 1964, p 165.

⁹⁶ *NSW v The Commonwealth* (1975) 135 CLR 337 at 364-365 (Barwick CJ). In the *Engineers case* (1920) 28 CLR 129 Lord Haldane's formulation of responsible government as 'a government under which the Executive is directly responsible to - nay, is almost the creature of - the Legislature' was cited with approval (at 147). Indeed, it has been said that 'Judicial comment has generally described responsible government as involving collective executive accountability to the Parliament' - J Lipton, 'Responsible government, representative democracy and the Senate: options for reform' (1997) 19 *The University of Queensland Law Journal* 194 at 203-4. That constitutional conventions are the means by which the will of the majority of the electors is, 'in the long run', given effect was also discussed by AV Dicey - *Introduction to the Study of the Law of the Constitution*, 9th edition, pp 422-23.

⁹⁷ *Lange v The Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559; *Egan v Chadwick* at para 20 (Spigelman CJ).

Although that view has long been recognised to be problematic in Australia,⁹⁸ due largely to the fact that at the federal level the Senate has the power to block supply, it has had its advocates in this country.⁹⁹ For example, in its Final Report the Constitutional Commission stated:

Part and parcel of the notion of parliamentary government is ‘responsible government’, whereby the ministers are individually and collectively answerable to the Parliament and can retain office only while they have the ‘confidence’ of the lower House, that is, the House of Representatives in the case of the Commonwealth and the Legislative Assembly or House of Assembly in the case of the States.¹⁰⁰

On one view, after *Egan v Willis* this traditional approach must be modified in NSW and, in all probability, in other Australian jurisdiction with elected Upper Houses. As Spigelman CJ pointed out, the approach which favours limiting formal responsibility to the Lower House is not consistent with the reasoning of the High Court in both *Lange v Australian Broadcasting Corporation*¹⁰¹ and *Egan v Willis*. In support, his Honour quoted the following passage from the joint judgment in the latter case:

One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the Ministers must command the support of the lower House of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of a chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them.¹⁰²

In other words, in those Australian jurisdictions with a bicameral legislature the meaning of responsible government extends beyond the continuing need for the government of the day to retain the confidence of the Lower House. That requirement remains intact, but

⁹⁸ B Galligan, ‘The founders’ design and intentions regarding responsible government’ from *Responsible Government in Australia* edited by P Weller and D Jaensch, Drummond Publishing 1980, pp 1-10.

⁹⁹ These were discussed by Spigelman CJ at para 36. McHugh J’s formulation of responsible government in the *Australian Capital Television* case (1992) 177 CLR 106 at 230 appears to be in similar terms, referring as it does to only one legislative chamber. However, there may be scope for an alternative interpretation. McHugh J noted that ‘responsible government involves the conception of a legislative chamber where the Ministers of State are answerable ultimately to the electorate for their policies’.

¹⁰⁰ *Final Report of the Constitutional Commission*, Vol One, para 2.177.

¹⁰¹ (1997) 189 CLR 520.

¹⁰² (1998) 158 ALR 527 at para 45.

responsible government is not reducible to it. In addition, the power to scrutinise the Executive is fundamental to responsible government and is enjoyed by any elected legislative chamber in the Westminster model. However, this is not to say that all chambers of this kind have the same powers in a broader sense, or that the Executive has the same responsibility to Lower and Upper Houses of Parliament. As it was explained in a previous Parliament Library Briefing Paper on the *Egan v Willis* case:

Instead, what emerges generally from this case is confirmation that the Executive can be responsible to both chambers of the legislature, but that different degrees of responsibility can be owed to each: as Rufus Davis stated, 'because government is responsible to one and the same public, it is thereby responsible, if in different ways, to the two Houses of the one parliament'.¹⁰³ Picking up on Lipton's discussion of this issue, it can be added that the case suggests that that shared responsibility is less problematic in New South Wales than, for example, it is in relation to the Australian Senate, for at the State level there is no possibility of the Upper House blocking supply. In that regard, at least, the relationship between the two Houses of State Parliament are well defined and lack any potential for a conflict in which the Executive is seemingly made responsible to two masters. Thus, while the case is authority for establishing the accountability of the Executive to both Houses of Parliament, in no way does it determine the different levels of responsibility owed to different Upper Houses, where some may and others may not have the power to block supply.¹⁰⁴

This, in turn, suggests an alternative viewpoint on the question of the 'formal' responsibility of the Executive to the Houses of Parliament, one which is consistent with the traditional understanding, as articulated by the Constitutional Commission. For this purpose a distinction can be made between government 'responsibility', on one side, and government 'accountability' or 'answerability', on the other. Under this distinction, ministers are *accountable* to both Houses for the administration of their departments. In addition to which, by the exercise of their scrutiny power in examining, analysing and exposing to public view the actions, decisions and workings of the Executive, Upper Houses generally can assist in making governments, plus the bureaucracies which serve them, more democratically *accountable*.¹⁰⁵ The government is not, however, on this understanding, *responsible* to an Upper House because 'it does not need to retain the confidence of that House to remain in

¹⁰³ SR Davis, *Theory and Reality: Federal Issues in Australia, England and Europe*, University of Queensland Press 1995, p 99.

¹⁰⁴ G Griffith, *Egan v Willis: The High Court Decision*, NSW Parliamentary Library Briefing Paper No 1/1999, pp 23-24.

¹⁰⁵ *Royal Commission into the Constitution Act 1934 Tasmania*, 1982, p 39 and p 69.

office'.¹⁰⁶ According to this alternative interpretation, *Egan v Willis* can be seen to have endorsed the expanded view of Upper Houses, that is, as Houses of review and scrutiny, without altering in any way the 'formal' responsibility of the Executive to the Lower House only.¹⁰⁷

What are the implications of responsible government for Cabinet confidentiality? This was the central question in *Egan v Chadwick*. If the constitutional purpose of responsible government is to give effect to the doctrine of representative government in a constitutional monarchy, then what implications does this have for the operation of collective ministerial responsibility and, with it, what Lindell has called the 'ancillary' doctrines of Cabinet secrecy and Cabinet solidarity?¹⁰⁸ That collective responsibility is still an operative doctrine in Australia has been recently affirmed by the High Court,¹⁰⁹ a point noted in the joint judgment in *Egan v Willis*.¹¹⁰ It has also been affirmed that, where disclosure to the courts is at issue, the immunity granted to Cabinet documents is not absolute.¹¹¹ What has not been discussed by the High Court is the potential for conflict between the varying aspects of responsible government. In particular, one would expect there to be a tension between the requirements of accountability and 'open government', on one side, and those of Cabinet confidentiality, on the other. Lindell touched upon this when, after explaining why Cabinet secrecy is an indicator of government strength and stability, he added:

This is not to imply, however, that the interests of stable government furthered by secrecy should prevail over the equally competing interest of the public's right to know about the conduct of governmental affairs.¹¹²

That tension may exist between the constitutional purpose of responsible government and the ancillary doctrine of Cabinet confidentiality was explored in some detail by Spigelman

¹⁰⁶ G Winterton, *Monarchy to Republic*, Oxford University Press 1994, pp 51-52. Winterton cites the Tasmanian Royal Commission's comment that 'a vote of no confidence in the Council does not have any direct effect. In that sense, therefore, the Government does not depend on the "confidence" of the Upper House and is not "responsible" to it' - *Royal Commission into the Constitution Act 1934 Tasmania*, 1982, p 31. Again, the fact the Legislative Council in NSW cannot block supply may be said to add further weight to this observation.

¹⁰⁷ This alternative interpretation was suggested by George Winterton.

¹⁰⁸ G Lindell, 'Responsible government', (N 73) pp 78-79.

¹⁰⁹ *The Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 615.

¹¹⁰ (1998) 158 ALR 527 at para 43.

¹¹¹ *Sankey v Whitlam* (1978) 142 CLR 1 at 38-43 where Gibbs ACJ concluded that 'although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest' (at 43); *The Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 616.

¹¹² G Lindell, 'Responsible government', (N 73) p 79.

CJ in *Egan v Chadwick*. Early in his judgment, his Honour alluded to the relationship between responsible government and representative government, citing among other things the views of Isaacs J on the duties of Members of Parliament under the Westminster system of government to scrutinise and criticise the Executive and of responsible government as the ‘main constitutional safeguard the community possesses’.¹¹³ However, the judgment grafted ministerial responsibility onto that framework readily enough, stating that ‘Insofar as the function of the Legislative Council to review Executive conduct is derived from the system of responsible government, collective responsibility must be accepted as part of that system’.¹¹⁴ Later, when denying that the power to order State papers applies to documents which disclose ‘actual Cabinet deliberations’, Spigelman CJ argued that the power cannot conflict with the doctrine of ministerial responsibility for, ‘in significant degree’, the power itself is ‘derived from that doctrine’.¹¹⁵ The reasoning here is that ministerial responsibility is a key mechanism for achieving a major goal of responsible government, namely, the accountability of the executive to Parliament. Thus, seemingly resolving the tension between the scrutiny required by open government and Cabinet confidentiality, Spigelman CJ concluded:

In order to avoid inconsistency between the power to call for documents and one of the bases on which it has been determined that the power is reasonably necessary (namely executive accountability derived from responsible government), the power should, at least, be restricted to documents which do not, directly or indirectly, reveal the deliberations of Cabinet.¹¹⁶

By way of comment, it can be said that the argument was theoretical not empirical in nature. It did not, for example, consider how collective responsibility can work against executive accountability: that ministerial solidarity can provide a ‘shield for government against parliamentary scrutiny’; or that the most serious obstacle to accountability is said to be ‘the secrecy of government, and the inequality of information between government and Parliament’.¹¹⁷ Nor did it confront the familiar argument that ‘the principles of Cabinet and ministerial solidarity and confidentiality now appear little more than political practices or usages which may be departed from whenever this is convenient to the government’.¹¹⁸ The

¹¹³ *Egan v Chadwick* at para 24. Isaacs J had also quoted Lord Haldane’s definition of responsible government as ‘a government under which the executive is directly responsible to - nay is almost the creature of - the legislature’ (at para 25).

¹¹⁴ *Ibid* at para 46.

¹¹⁵ *Ibid* at para 55.

¹¹⁶ *Ibid* at para 70.

¹¹⁷ C Turpin, ‘Ministerial responsibility’, (N 86) p 110 and p 146.

¹¹⁸ E Barendt, *An Introduction to Constitutional Law*, Oxford University Press 1998, p 122. For a recent discussion of collective responsibility as a ‘managerial device’ and a critique of Cabinet secrecy see - C Brady, ‘Collective responsibility of the Cabinet: an ethical,

Chief Justice's judgment left the necessary constitutional fictions intact.

For Priestley JA in *Egan v Chadwick*, it is the part responsible government plays in ensuring the principles of representative government are upheld that is the driving force in his judgment, one which overrides any absolute claim to Cabinet confidentiality or any of the other incidents of responsible government. On this basis, the accountability of the Executive to the electorate cannot, as a matter of principle, be legally qualified in nature. As noted, Priestley JA observed that a court has 'the power to compel production to itself even of cabinet documents, even though the power will in regard to certain cabinet documents be used with the highest degree of circumspection'.¹¹⁹ From this, his Honour went on to say that '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'.¹²⁰ Priestley JA concluded that:

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 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.¹²¹

That argument can be said to have the strength of logical neatness. Whether it is too neat to unravel the mysteries of the silent principles which inform our system of government is another matter.

Which Cabinet documents are to be excluded from scrutiny? The more practical question for the future is how broadly or narrowly the courts will interpret the restriction on Cabinet documents. Meagher JA had referred to Cabinet documents as a class whereas the Chief Justice took a more restrictive line, saying only that documents which disclose the actual deliberations of Cabinet are beyond the scrutiny power, this being a reference, presumably, to Cabinet Minutes. 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.¹²² 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. If *Sankey v Whitlam* is a guide, then it is likely that a case by case approach will be adopted, at least to those documents which are not clearly identified as disclosing the 'actual deliberations of Cabinet.'

constitutional or managerial tool?' (1999) 52 *Parliamentary Affairs* 214-229.

¹¹⁹ *Egan v Chadwick* at para 140.

¹²⁰ *Ibid* at para 142.

¹²¹ *Ibid* at para 143.

¹²² *Ibid* at para 57.

What powers does the Legislative Council have to enforce an order for the production of State papers? The fact that the NSW Parliament has, alone of all Australian Parliaments, decided not to legislate in this field means that, while it has the power to take certain self-protective measures, it does not have the power to impose penalties for contempt or breach of privilege. In *Egan v Willis*, the NSW Court of Appeal was called to decide whether, at common law, the Legislative Council has the power to suspend a Minister from the service of the House of which he or she is a Member should he or she not comply with the House's order. The court found that the Council had such a power, though the action of forcibly removing Mr Egan from the precincts of Parliament into Macquarie Street ('the footpath point') was excessive and thus a trespass to the person.¹²³

The case re-affirmed the view that the inherent powers of the Houses of the NSW Parliament are 'protective and self-defensive' and not punitive in nature. A potentially difficult distinction was drawn in this respect between the power to coerce but not to punish. Gleeson CJ expressed the position thus:

Whilst the Legislative Council has such coercive powers as are reasonably necessary to compel compliance with an order for production of State papers, it has no power to punish anybody for failing to comply with such an order. The practical availability and utility of coercive measures will depend upon the circumstances of an individual case, and may be affected by constitutional conventions and proprieties as well as by legal consideration.¹²⁴

In her commentary on the case Professor Campbell stated:

The court's approach to the suspension issue suggests that in determining the validity of suspensions by Houses in the situation of the Houses of the NSW Parliament, courts may be invoking tests of reasonableness applied in determining the validity of administrative acts, and perhaps also some notion of proportionality. In concluding that the forcible ejection of the Minister from not merely the chamber but also from the precincts of Parliament was unlawful, the court must surely have been applying some notion of proportionality.¹²⁵

The 'footpath point' was not at issue upon appeal to the High Court. However, the case confirmed that 'Each House may impose sanctions on a member of the House for the

¹²³ E Campbell, 'Parliament privilege and orders for production of state papers' (1997) 8 *Public Law Review* 219.

¹²⁴ (1996) 40 NSWLR 650 at 667 (Gleeson CJ).

¹²⁵ E Campbell, 'Parliament privilege and orders for production of state papers' (1997) 8 *Public Law Review* 219 at 223.

purpose of inducing compliance by a member, but not for the purpose of punishing a member'.¹²⁶ It was acknowledged that distinguishing between coercion, or 'merely inducing compliance' with an order of the Council, on one side, and punishment, on the other, may be difficult.¹²⁷ Interestingly, the joint judgment also thought that making such a distinction could well 'distract attention from more important considerations of identifying what is the power that has been exercised and whether, or to what extent, the courts may review what has been done in parliament'.¹²⁸ For Callinan J, the question whether 'there is a relevant distinction and what it is, between "defensive" actions by the House of Parliament and punitive ones' did not have to be resolved.¹²⁹ In his discussion of the suspension of Mr Egan, however, he appeared to apply a test of proportionality, as suggested by Professor Campbell, stating 'To suspend for a relatively brief period a member elected by popular vote may be one matter: to suspend him for a long period or to expel him, and to declare that member's seat vacant may perhaps be different matters altogether'.¹³⁰

In *Egan v Chadwick*, where Mr Egan had been suspended 'for the remainder of the session, or until he fully complies with this Order, whichever occurs first', the Court of Appeal declined to comment on the validity of the Council's resolution.¹³¹

Does the power to order the production of documents extend to private citizens, their affairs and their documents? This was one of the questions left unanswered by the High Court in *Egan v Willis*, in which only the ordering of State papers from a member of the Legislative Council (who is also a Minister) was at issue.¹³² For his part, Kirby J did comment that 'Quite different considerations would arise were a resolution to be directed to a non-member or a Minister sitting in the other chamber or to a stranger'.¹³³ Likewise, the joint judgment spoke of 'Altogether different considerations' arising in cases involving persons who are not members of the House concerned.¹³⁴ Whilst these 'different considerations' were not discussed, such comments were enough to make Harry Evans,

¹²⁶ *Egan v Chadwick* at para 2 (Spigelman CJ); (1998) 158 ALR 527 at paras 53-56 (Gaudron, Gummow and Hayne JJ).

¹²⁷ (1998) 158 ALR 527 at para 55; at para 158 (Kirby J). Kirby J said that suspension of a member for a day and the use of minimal force to remove him from the chamber and the precincts, when he would not leave voluntarily, 'could not on any view be characterised as punishment'.

¹²⁸ *Ibid* at para 55.

¹²⁹ *Ibid* at para 184.

¹³⁰ *Ibid* at para 194.

¹³¹ *Egan v Chadwick* at para 89 (Spigelman CJ). This was because a new Parliament had subsequently been elected and therefore the suspension was no longer operative.

¹³² (1998) 158 ALR 527 at para 56. For Callinan J, a question which did not need to be resolved was that of the 'extent to which a House possesses powers of compulsion with respect to private citizens, their affairs, and their documents' (at para 184).

¹³³ *Ibid* at para 157.

¹³⁴ (1998) 158 ALR 527 at para 56.

Clerk of the Senate, write of ‘the horror which seems to be aroused in judicial breasts at the idea of houses compelling evidence from private citizens, although that has also long been recognised as essential to the power to conduct inquiries’.¹³⁵

This issue was taken up in the dissenting judgment of Justice McHugh who argued that to grant such a power to a House of Parliament would effectively permit that parliamentary chamber, by mere resolution, to alter the law: ‘A House’, Justice McHugh emphasised, ‘is not a legislature’.¹³⁶ As noted, his Honour accepted that the ‘reasonably necessary’ test is appropriate in other contexts in determining the extent of the Council’s powers, but he argued that it should not apply in this instance where the issue is the Council’s power to demand the tabling of papers. This is because, if answered in the affirmative, the test leads as a matter of logic to the conclusion:

If it exists as an essential incident of the exercise of the Council’s functions, it must logically extend as far as authorising searches and seizures of ministers and also of private citizens who have relevant information. If it is the functions of the Council that furnish the power, the identity of the person who has the relevant information is surely irrelevant. A court should be slow to conclude that the functions of any institution necessarily imply the existence of such an invasive power’.¹³⁷

One argument may be that the legislative function of the Legislative Council, as defined in the joint judgment, may have too broad a reach, for it is hard to see how, logically, the requirement to have ‘all facts and information’ relevant to the making, unmaking and scrutiny of laws can be translated into a power which is restricted to the ordering of State papers. Information held by private citizens must also be relevant to that process from time to time and, if so, what is to prevent the Council, or any comparable House of Parliament, from ordering the production of that information and, if necessary, enforcing its order by coercive measures? Whether the same conclusion can be drawn from the scrutiny power may be less clear. In any event, considerations of this kind led Justice McHugh to argue that the power in question could be established without reference to the Council’s functions, on the alternative basis that, bearing in mind the particular relationship between Mr Egan and the Council, the power ‘inheres’ in a parliamentary chamber operating under the

¹³⁵ H Evans, ‘Reasonably necessary powers: parliamentary inquiries and *Egan v Willis and Cahill*’ (1999) 1 *Constitutional Law and Policy Review* 64 at 66.

¹³⁶ (1998) 158 ALR 527 at para 92 The point that is made here is that a general power to compel the production of documents may be attained by an Act of Parliament, but not otherwise. Justice McHugh acknowledged that the British House of Commons has power at common law to compel the production of documents but explained that this arises because it is also a court of record, something which cannot be said of the Houses of the NSW Parliament.

¹³⁷ (1998) 158 ALR 527 at para 82 and para 62. Other members of the High Court noted that the question of the power of the Council to coerce private citizens was not at issue in the case - para 56 (Gaudron, Gummow and Hayne JJ); paras 156-157 (Kirby J); para 184 (Callinan J).

Westminster system of responsible government.¹³⁸

What other questions have recent cases left unanswered? A number of these were outlined by the courts. One is the question of stalemate between the Houses of Parliament. Spigelman CJ commented in the Court of Appeal:

No doubt, the lower House could pass a resolution forbidding any Minister delivering the documents to the upper House. Indeed it could require delivery to the lower House. It is not appropriate to speculate what, if any, legal remedy may be available to resolve any stalemate between the Houses.¹³⁹

In the High Court, Callinan J added to the list the question ‘whether *Armstrong v Budd* was correctly decided’.¹⁴⁰ Noted, too, was the jurisdictional question whether, ‘notwithstanding anything that was said in *R v Richards; Ex parte Fitzpatrick and Browne*, a House should be absolutely entitled to suspend for a lengthy period, or expel a member, rather than, as here, merely suspend him for a brief period’.¹⁴¹

Have recent developments altered the relationship between Parliament and the courts? No. In all the relevant recent cases the courts have been at pains to stress that the traditional relationship of ‘mutual respect’ is to be maintained.¹⁴² As explained in *Erskine May*, a series of cases in the nineteenth century forced a comprehensive review of this whole issue, from which it became clear:

that the law of parliament was part of the general law, that its principles were not beyond the judicial knowledge of the judges, and that it was the duty of the common law to define its limits could no longer be disputed. At the same time, it was established that there was a sphere in which the jurisdiction of the House of Commons was absolute and exclusive.¹⁴³

In the leading case of *Stockdale v Hansard*, the court accepted that the Houses of

¹³⁸ Ibid at para 93.

¹³⁹ *Egan v Chadwick* at para 8.

¹⁴⁰ (1998) 158 ALR 527 at para 184. *Armstrong v Budd* (1969) 71 SR (NSW) 386 affirmed that the NSW Legislative Council has the power to expel a Member in special circumstances, provided its exercise is not a cloak for punishment of the offender. This is one of several outstanding questions noted by Justice Callinan. The others have been dealt with in other sections of this paper.

¹⁴¹ Ibid.

¹⁴² *Egan v Chadwick* at para 90 (Spigelman CJ); *Sue v Hill* (1999) 163 ALR 648 at para 250 (Kirby J).

¹⁴³ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edition, Butterworths 1997, p 150. (Henceforth, *Erskine May*).

Parliament have exclusive jurisdiction over their own internal proceedings; at the same time, however, it was held that it is for the courts to determine whether or not a particular claim of privilege fell within that category.¹⁴⁴ Neither of the Houses of Parliament had exclusive power to define their powers and privileges, therefore, because if they did they could alter the law by mere resolution. *Bradlaugh v Gossett*¹⁴⁵ upheld the exclusive jurisdiction of the Commons in matters found to relate to the management of the internal proceedings of the House.¹⁴⁶ In *Egan v Willis*, Gleeson CJ summed up these developments as follows:

As the High Court observed in *The Queen v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162, after a long period of controversy in England, it was established that disputes as to the existence of a power, privilege or immunity of a House of Parliament are justiciable in a court of law. The same principle applies in Australia. However, whilst it is for the courts to judge the existence in a House of Parliament of a privilege, if a privilege exists it is for the House to determine the occasion and the manner of its exercise.¹⁴⁷

One general rule, therefore, is that the courts will inquire into the existence and extent of a power or privilege, but not its exercise.¹⁴⁸ That is not to say this rule always provides a clear guide. Thus, in the High Court, Bret Walker SC, counsel for the respondents, argued that the main issue for consideration was that *Fitzpatrick and Browne* raises difficulties of interpretation:

It is one thing to talk about the existence of a power, it is another thing to say that that power may be exercised in all cases whatever and...it is misleading to talk simply of a power to suspend a member without appreciating that the existence of the power may call, of necessity, into

¹⁴⁴ Erskine May, p 152.

¹⁴⁵ (1884) 12 QBD 271.

¹⁴⁶ Erskine May, p 154. The case related to the exclusion of Charles Bradlaugh from the House of Commons. An atheist, Bradlaugh was not permitted to take the oath as required under the *Parliamentary Oaths Act 1866* on being elected to the House. He was held to have disturbed the proceedings of the House by attempting to administer the oath to himself, for which conduct he was, by order, excluded from the Commons. The case upheld the exclusive jurisdiction of the Commons in matters relating to the management of the internal proceedings of the House; the court found that the reason for the Member's expulsion was not justiciable.

¹⁴⁷ *Egan v Willis* (SCNSW, unreported 29 November 1996) at 3 (per Gleeson CJ), at 18 (per Mahoney P). Note that section 9 of the *Parliamentary Privileges Act 1987* (Cth) may make the findings of a House of the Federal Parliament capable of judicial review by providing that, where a House imposes a penalty of imprisonment, 'the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence'.

¹⁴⁸ *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 350 (per Lamer CJ).

question whether a ground exists upon which that power can be said to be exercisable...the real question is: does the ground exist on the ground claimed?¹⁴⁹

This was, in effect, an invitation to the Court to look behind the suspension of Mr Egan to the reasons for it and to inquire as to whether those reasons were established on valid grounds. The alternative approach was raised by the South Australian Solicitor General who submitted that, based on the authority of *Bradlaugh v Gossett*,¹⁵⁰ the reasons behind the Council's decision to suspend Mr Egan were not justiciable. Only Justice McHugh agreed with this alternative approach, arguing that, as the case concerned the relationship between the Council and one of its members and the internal administration of the business of the House, the appeal should have been disposed of on narrow grounds.¹⁵¹ Of the majority, only Justice Kirby found it necessary to deal with the justiciability issue in detail.¹⁵² The joint judgment said that, as the claim for trespass to the person had been brought, it had to be decided.¹⁵³ The same approach was taken in *Egan v Chadwick*.¹⁵⁴

Did Justice Kirby suggest a constitutional limitation on parliamentary privilege? Yes. In *Egan v Willis*, Justice Kirby presented a fourfold argument on the justiciability point. The last of these contended that overseas and colonial decisions alike must be adapted to the 'modern Australian context'. This was based on the federal character of the Australian polity and introduced the consideration that the British formulation of the relationship between the Parliament and the courts must be adapted to local conditions where there is an established 'entitlement to constitutional review'. The crux of this contention would seem to be that, just as such notions as parliamentary supremacy cannot survive in an unmodified state in a federation established under a written constitution, nor can the law of unreviewable parliamentary privilege. Indeed, on that last question Justice Kirby went so far as to say that, to the extent that State parliaments are provided for in the Australian Constitution, 'they are rendered accountable to the constitutional text'. He explained:

Courts in this country, at least in the scrutiny of the requirements of the Australian Constitution, have generally rejected the notion that they are forbidden by consideration of parliamentary privilege, or of the ancient common law of Parliament, from adjudging the validity of parliamentary conduct where this must be measured against the requirements of the

¹⁴⁹ High Court of Australia Transcripts, 1 September 1998.

¹⁵⁰ (1884) 12 QBD 271.

¹⁵¹ (1998) 158 ALR 527 at paras 65-70. Those grounds were that 'the Council has the power to suspend a member who is obstructing the business of the Council and that it is for the Council to judge whether its business is obstructed' (at para 78).

¹⁵² Justice Callinan only noted the observations of Chief Justice Gleeson in the Court of Appeal on the justiciability issue (Ibid at para 179).

¹⁵³ Ibid at paras 25-26.

¹⁵⁴ *Egan v Chadwick* at para 14 (Spigelman CJ).

Constitution...¹⁵⁵

Harry Evans has read this as a ‘hint’ that section 49 of the Commonwealth Constitution ‘should be reinterpreted to exclude the contempt power, notwithstanding the long-established and recently reiterated American law that such a power is inherent in a legislature’.¹⁵⁶ In fact, the hint may travel as far as the power of State parliaments to punish for contempt. For that matter, it may even travel beyond that power, although that is the most likely candidate to meet with judicial disapproval. Continuing the debate, in *Sue v Hill*, when Kirby J had another opportunity to discuss these matters, he emphasised that ‘Restraint is the watch-word’ for courts in their interpretation of the powers and privileges of Parliament. He added, however, that although the federal Parliament’s power to surrender its privileges is a matter for it to decide, that power was ‘subject to the Constitution’.¹⁵⁷

More generally, in *Egan v Willis* Justice Kirby wished to emphasise that the ‘character’ of the New South Wales Parliament and its constituent Houses, as well the powers and privileges of those Houses, had been changed when that Parliament became a component of ‘a free, independent, democratic and federal nation’ under the Australian Constitution. However, he thought the elucidation of these changes ‘must await future cases’.¹⁵⁸ His other conclusion was that, in the light of these constitutional developments, the value of the ‘colonial’ cases from the nineteenth century on matters relevant to parliamentary privilege is now ‘primarily historical rather than juridical’.¹⁵⁹

Must account be taken of the Australia Acts 1986 when determining the powers and privileges of the State Parliaments? In *Egan v Willis* only Justice McHugh dealt with this issue, noting the ‘radical suggestion’ made by Mahoney P¹⁶⁰ in the Court of Appeal that the effect of the *Australia Acts 1986* ‘might in future cases warrant reconsideration of the principles upon which the implied powers of the individual Houses of Parliament are determined’.¹⁶¹ The suggestion was rejected by Justice McHugh who could not see how these Acts had altered the legislative powers of the New South Wales Parliament which had already been declared to be ‘plenary’ within their territorial limits. If the argument was that individual Houses now had the power to coerce and punish individuals, Justice McHugh said it should not be countenanced.¹⁶²

¹⁵⁵ (1998) 158 ALR 527 at para 133(4).

¹⁵⁶ H Evans, (N 135) at 66.

¹⁵⁷ (1999) 163 ALR 648 at paras 250-251.

¹⁵⁸ (1998) 158 ALR 527 at para 140.

¹⁵⁹ *Ibid* at para 139.

¹⁶⁰ (1996) 40 NSWLR 650 at 685-686.

¹⁶¹ (1998) 158 ALR 527 at para 88. In the Court of Appeal, all the judges had relied to some extent on the enactment of the *Australia Acts* to support the argument that the functions of the Council and reasonable necessity implied a power to compel the production of documents.

¹⁶² *Ibid* at para 90.

6 CONCLUSIONS

It is clear that *Egan v Willis* and its successor *Egan v Chadwick* have raised significant issues, some of which had not previously been before the courts. Although the cases refer specifically to the Legislative Council of NSW where, unusually, the powers and privileges of Parliament have not been clarified by statute, in many important respects they can be assumed to have implications for elected Upper Houses generally in Australia and, possibly, beyond. For the first time the courts have decided on the application of the doctrine of public interest immunity where the point at issue is the disclosure of government documents to a House of Parliament. The precise application of that doctrine to Cabinet documents may not be entirely clear, but principles established in *Egan v Chadwick* will surely form the basis of future practice in this regard. That decision is based upon an elucidation of a power of scrutiny which, to a significant extent, has been found to derive from the principle of responsible government. Indeed, the cases are, if nothing else, important landmarks in the judicial discussion and treatment of that key constitutional principle. Even if the conventions of responsible government still cannot be said to be enforced by the courts, they are most certainly recognised by them and employed with considerable freedom and vigour when relevant aspects of the law of parliament fall to be decided.