

Orders for Papers and Cabinet Confidentiality post *Egan v Chadwick*

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Abstract

This paper examines executive resistance to orders for papers by the Legislative Council post *Egan v Chadwick*. It argues that the government has increasingly used the convention of ‘cabinet confidentiality’ to resist attempts by the House to secure controversial State papers. A similar trend away from disclosure in relation to requests for government documents under Freedom of Information legislation, will also be discussed.

Introduction

It has never been doubted that it is in the public interest that deliberations of Cabinet should remain confidential in order that the Members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made...²

The *Egan* cases³ confirmed the power of the NSW Legislative Council to order the production of State papers, including documents for which claims of privilege could be made. These rulings are seen as a powerful affirmation of parliament’s role in reviewing the conduct of the executive government.⁴ In the three years following the 1999 decision in *Egan v Chadwick*, the NSW Legislative Council initiated 30 orders for papers. All of these orders were complied with, including those relating to documents subject to privilege claims.⁵ According to the Clerk of the Parliaments, Mr John Evans, the main tension arising between the government and the House during this period was whether ‘privileged’ documents should be made public once tabled, not whether or not they should be produced to the House.⁶ In only one instance did the government refuse to make a document public on the grounds that it was a cabinet minute and thus confidential.⁷

However, by the middle of 2005 it appeared that the post *Egan v Chadwick* ‘honeymoon’ was over. Commenting on returns for the period January-June 2005, the Clerk noted the ‘increasing frequency’ with which the government was claiming privilege on certain State papers, as well as excluding documents from returns said to be cabinet documents.⁸ At the end of 2005 the Clerk reported a rise in the number of ‘supplementary’ orders, initiated in an attempt to capture papers not included in earlier returns. While the reasons for not complying with an original order were not always offered, ‘cabinet confidentiality’ was claimed as grounds for exemption in several instances.⁹

This paper examines executive resistance to orders for papers by the Legislative Council post *Egan v Chadwick*. It argues that the government has increasingly used the convention of ‘cabinet confidentiality’ to resist attempts by the House to secure controversial State papers. A similar trend away from disclosure in relation to requests for government documents under Freedom of Information legislation, will also be discussed.

The main rationale for the maintenance of cabinet confidentiality is the convention of collective ministerial responsibility. This convention, like several others within our evolving system of responsible government, has changed considerably in recent years. Contrary to tradition, Ministers today rarely resign if found to have committed a serious error or omission. Does this mean therefore, that the principle of cabinet confidentiality should be relaxed? This paper also raises, but does not purport to answer, this complex question.

The paper begins with a brief description of orders for papers in the Legislative Council and an overview of the ‘Egan cases’.

The Egan Cases

The Egan cases refer to three court decisions in the late 1990s generated by the refusal of the former Treasurer and Leader of the Government in the House, Michael Egan, to produce certain government documents ordered by the Council. A brief overview of these cases is presented below. It is by no means a comprehensive account of the many complex issues that were dealt with in these judgements as these matters have been discussed in depth elsewhere.¹⁰

Resolutions pertaining to orders for papers have been passed by the Legislative Council since 1856 and in most cases these orders were complied with. By mid 1995 however, the government began to question the power of the Council to issue such demands and resisted its attempts to do so.¹¹ Unlike other Australian legislatures, the powers and privileges of the NSW Parliament have not been comprehensively codified and must therefore in most cases, be extrapolated from the relevant common law.¹² The nature and extent of these powers was a major theme in the Egan litigation.

Egan v. Willis & Cahill (1996) and Egan v. Willis (1998)

On 1 May 1996 the Legislative Council resolved to require Mr Egan to table various government documents relating to a goldmine at Lake Cowal. This resolution followed several previous unsuccessful attempts by the Council to secure State papers from the Mr Egan and the government and on a range of subjects. Following his refusal on this occasion, the Council deemed Mr Egan guilty of contempt, suspended him from its service for the remainder of the day, removed him from the House onto Macquarie Street and ordered him to appear on the next sitting day to explain his failure to comply with the Council's order.¹³

Mr Egan subsequently challenged the Council's resolution regarding his alleged contempt and his suspension from the House. The NSW Court of Appeal delivered its decision in 1996, finding in favour of the Council on all substantive issues, except the issue of trespass. Mr Egan's appeal from this decision to the High Court was dismissed in 1998. Both courts held that the key functions of the Legislative Council are to make laws and scrutinise the activities of the executive, and that the ability to order the production of State papers was a power 'reasonably necessary' to fulfil these functions.¹⁴ Indeed, as Gleeson CJ noted, the capacity for both Houses of Parliament to scrutinise the activities of the government is 'an essential safeguard against abuse of executive power.'¹⁵

While *Egan v. Willis* clarified that each House has the power to call for government documents, and to counter obstruction where this occurs, it did not decide whether this power extends to documents over which a claim of legal professional privilege or public interest immunity has been made.¹⁶ Mr Egan's further resistance to subsequent Council resolutions meant that it would not be long before this issue would also be resolved.

Egan v. Chadwick (1999)

In October 1998, a little more than one month before the High Court dismissed Mr Egan's appeal in *Egan v. Willis*, the Legislative Council passed a resolution calling on the government to table documents relating to Sydney's 'water crisis', including documents which the government claimed were exempt on the grounds of legal professional privilege and public interest immunity. The resolution incorporated a procedure to determine the status of documents over which such claims could be assessed. The procedure was designed to provide some protection to documents claimed to be privileged (using an independent arbitration process) at the same time as ensuring such documents would still be provided to the House.¹⁷ The current Council practice regarding orders for papers in the Council is set out in standing order 52.¹⁸

The Government maintained its refusal to provide the documents, leading to a further finding of contempt against Mr Egan and his suspension from the House. Mr

Egan challenged these orders in the NSW Court of Appeal, seeking a declaration that the Council's power to call for papers did not extend to documents subject to public interest immunity or legal professional privilege. The Court of Appeal delivered its decision eight months later, in June 1999. It found that the power of the Legislative Council to compel the executive to produce State papers *did* extend to documents for which a claim of legal professional privilege or public interest immunity had been made, with one limitation: the majority (Spigelman CJ and Meagher JA) found the power was limited in the case of cabinet documents. Priestley JA, however, found that there was no limitation to the power on the basis that:

...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.¹⁹

The rationale for the exception recognised by the majority, the convention of collective ministerial responsibility, is discussed towards the end of this paper.

A key difference of opinion within the majority was how broadly one defines cabinet documents. For Spigelman CJ the immunity applied to documents which 'directly or indirectly, reveal the actual deliberations of cabinet' and may or may not include documents prepared outside Cabinet for submission to Cabinet. Meagher JA, in contrast, would grant immunity to cabinet documents generally and it would seem, in perpetuity.²⁰ Following the decision, the Clerk of the Senate, Mr Harry Evans, suggested that by restricting the immunity to documents that reveal the 'deliberations of cabinet', governments would be constrained from seeking immunity in relation to a far wider class of documents:

The judgement therefore does not provide ministers with a very useful escape clause: they cannot simply turn all documents into cabinet documents by wheeling them through a cabinet meeting, as allegedly happened in Queensland on one occasion.²¹

Unfortunately, recent experience in NSW suggests that *Egan v Chadwick* has not persuaded the executive to adopt a reasonable approach to the cabinet exemption, as the next section of the paper will demonstrate.

Orders for Papers in NSW — a Fourth Phase?

In a paper published in 2002, the Clerk of the Parliaments identified three phases in the development of orders for papers in the NSW Legislative Council since the first Egan case in 1996.²² In the first stage (1996-1998) the House made its initial attempts to compel State papers, and this power was disputed. During the second phase (1998-1999), presumably bolstered by two significant court victories (*Egan v Willis & Cahill*; *Egan v Willis*) the Council ordered and received various State papers, including documents over which privilege was claimed. In the third phase (delineated by the Clerk in 2002 as 1999-2002, although arguably this period

extended up until 2004) the government furnished documents in relation to 30 orders, including documents said to be privileged. The main area of contention during this time was whether documents which were claimed to be privileged, and had been tabled in response to an order of the House, should be ordered to be made public.²³ This period could perhaps be described as the ‘honeymoon’ phase in the history of orders for papers in the Legislative Council, during which time the Council’s power to compel the production of State papers seemed uncontroversial and highly productive. The Clerk concluded:

The Court of Appeal’s unequivocal decision in support of the Council’s power to access privileged documents has brought an end to dispute in the House over that particular issue.²⁴

Recent events however, suggest a *fourth* and less harmonious phase in this account, commencing towards the end of 2004 and marked by an increasing resistance by the executive to the Council’s demand for State papers. As intimated by the Clerk in June 2005, the post *Egan v Chadwick* honeymoon was definitely over:

The government is claiming privilege on certain documents with increasing frequency, resulting in an independent legal arbiter assessing the claim of privilege. During the six-month period [to June 2005] a number of documents were not provided from various returns to orders because they were said to be Cabinet documents and therefore excluded from the return. In most cases the Director General of the Premier’s Department provided the returns with no explanation for the missing documents.²⁵

In two recent instances the government declined to provide documents on the basis of cabinet confidentiality. The first concerned a report by Mr Robert Gledhill in relation to his review of the *Noxious Weeds Act 1993*; the second was in relation to reports by Mr Vern Dalton regarding juvenile justice. In both cases the government refused to furnish documents in response to the order, even though the Gledhill Report was tabled in the House just two days later²⁶ and the report by Mr Dalton had already been published.²⁷

During debate on the Dalton reports the Hon Catherine Cusack suggested that in light of the judgement in *Egan v Chadwick*:

...the Parliament and the public are entitled to the Dalton report and associated documents. The Executive must not be allowed to escape accountability by stapling photocopies to the back of a Cabinet Minute. Not only is this practice inappropriate because it fosters a climate of cover up, it is a deliberate attempt by a Minister to fetter the powers of this House to perform its duty in making the Executive accountable. It is a serious matter and our responsibility to pursue it is crystal clear.²⁸

In reply, the Hon John Della Bosca argued that the reports should not be released because they were part of a Cabinet submission on the subject and, therefore, legitimately regarded as confidential. He informed the House of the process he employed to determine whether a document should be considered cabinet in confidence:

Basically a simple test is applied: if a document is used to form the basis of a submission to Cabinet, it is a Cabinet document. If it walks like a duck and talks like a duck, it probably is a duck.²⁹

The fourth phase in the development of orders for papers is also distinguished by the initiation of an increasing number of supplementary orders in an attempt to secure documents not included in original returns. During the six months between July to December 2005, the House made five supplementary orders for papers including one relating to Grey Nurse Sharks. In March 2005, the Clerk tabled correspondence from the Premier's Department asserting that two documents concerning Grey Nurse sharks were exempt because they 'formed part of a Cabinet Minute'.³⁰ In response to the government's refusal to provide these documents, the House passed a supplementary order, which included the following paragraph:

That, if any document falling within the scope of this order is not produced as part of the return to order on the grounds that it formed part of a Cabinet Minute, or was held for consideration as part of Cabinet deliberations, a return be prepared showing the date of creation of the document, a description of the documents, the author of the document and the reasons why the production of the document would 'disclose the deliberations of cabinet' as discussed by the Court of Appeal in *Egan v Chadwick*...³¹

The Premier's Department subsequently advised that it was not going to produce the two documents in question, nor the index required by the supplementary resolution:

An index of documents not produced because of the Cabinet exemption has not been provided. After considering advice from the Crown Solicitor, the Government does not concede that the Council has the power to impose such a requirement.³²

In this instance, the government refused to provide certain documents to the House, without which it is not possible to activate the independent arbitration process established by the Council to assess such claims of privilege. The government's refusal to furnish these documents was based on the decision in *Egan v Chadwick* that a claim of privilege in relation to 'true' cabinet documents will always be upheld. For this reason, Standing Order 52 does not make any specific mention of the procedure in relation to cabinet documents. The absence of a procedure to evaluate claims of cabinet in confidence has generated a convenient escape clause for the government, one seemingly anticipated by the House prior to *Egan v Chadwick* and demonstrated by the wording of the resolution that sparked that action:

Any document for which privilege is claimed and which is identified as a Cabinet document shall not be made available to a Member of the Legislative Council. *The legal arbiter may be requested to evaluate any such claim.*³³

While the legal arbiter may on occasion evaluate a privilege claim based on the cabinet document exemption, it would appear this evaluation must be conducted without the benefit of the documents in question or detail regarding the rationale for its exemption.

Increasingly frustrated by the refusal of the government to furnish documents in response to calls for papers, the Hon Catherine Cusack placed a motion on the Notice Paper on 6 June 2006 in which she bemoaned the ‘...unrestrained and unexplained use of Cabinet confidentiality as a basis for claiming exemption from an order for the production of State papers’, suggesting that if a claim of cabinet confidentiality is made, the House should be informed of the nature of the document and the reasons why its disclosure would reveal Cabinet deliberations.³⁴

Two recent incidents provide further evidence of the government’s attempts to broaden the scope of the cabinet documents exemption, notwithstanding the Chief Justice’s intention in *Egan v Chadwick* to restrict this category. In September 2005, the Director General of the Premier’s Department issued a memorandum to all CEOs, including the Clerk of the parliaments advising that all documents prepared for the 2005-2006 Budget Estimates hearings should indicate that they have been prepared for submission to Cabinet.³⁵ At a recent client seminar on Freedom of Information conducted by the Crown Solicitor’s Office, attendees were advised that when engaging consultants to prepare reports they should ensure these reports clearly state that one of the possible purposes of the report is submission to Cabinet.³⁶ The government’s apparent disinclination towards disclosing sensitive material has also been noted by the media. In October 2005, the *Daily Telegraph* editorialised:

... it is clear the Government much prefers secrecy over transparency. For what our inquiries show is that this Government routinely uses the tactic of claiming ‘legal or public immunity privilege’ in an attempt to prevent the release of almost 70 per cent of reports to the Legislative Council.³⁷

Cabinet Confidentiality and Freedom of Information (FOI)

Executive resistance to requests for government information on the grounds of Cabinet confidentiality does not appear to be confined to the parliamentary arena, as indicated by recent comments by the NSW Ombudsman:

We have seen a marked increase this year in agencies claiming Cabinet confidentiality as a reason for refusing access to documents...It is not clear whether more documents are being refused on this ground because more applications are being made for high level government records. We are concerned that agencies may be inappropriately classifying documents in this way to avoid releasing them to the public.³⁸

Commenting in October 2005 on the Ombudsman’s critique of the Government’s ‘lacklustre’ FOI performance, the *Sydney Morning Herald*, editorialised that:

As events of recent weeks have amply demonstrated, especially the Government’s determination to prevent the release of critical information on the Cross City Tunnel...A review of the Freedom of Information Act — a key plank in the structure of a modern, democratic state — has been a plaintive request of the state’s

administrative watchdog for more than a decade. It is a request that has been ignored for long enough.³⁹

Such a review was apparently rejected by the Premier, Mr Emma and the head of the Cabinet Office, Roger Wilkins, because they believed there was no public demand for such a review.⁴⁰

Similar concerns about the misuse of the principle of cabinet confidentiality to justify withholding government information have also been raised in Victoria. The Victorian Civil and Administrative Tribunal recently overturned a decision by a government agency not to release a report regarding the Federation Square development.⁴¹ The agency argued that the document was cabinet-in-confidence. An Opposition member, Louise Asher, asked the Ombudsman to investigate this alleged misuse of the principle of ‘cabinet confidentiality’:

The cabinet confidentiality reason has been used a lot to deny access to documents, and in this instance it is now absolutely clear that to argue that this was a cabinet-in-confidence document is a nonsense....⁴²

Recent FOI Case Law

Two recent decisions in the Administrative Decisions Tribunal (ADT) regarding access to government documents under FOI legislation indicate a significant disparity in the interpretation of the exemption clauses in the *Freedom of Information Act* 1989. Under that Act, an agency may refuse to release a document if it is considered to be a ‘Cabinet document’.⁴³ The various categories of Cabinet documents are set out in Cls 1 Sch 1. The last category (e) is the ‘the broadest and least exact’:⁴⁴

1. Cabinet documents

(1) A document is an exempt document:

- (a) if it is a document that has been prepared for submission to Cabinet (whether or not it has been so submitted), or
- (b) if it is a preliminary draft of a document referred to in paragraph (a), or
- (c) if it is a document that is a copy of or part of, or contains an extract from, a document referred to in paragraph (a) or (b), or
- (d) if it is an official record of Cabinet, or
- (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.⁴⁵

In a recent tribunal decision, *Cianfrano v Director General, NSW Treasury* (2005), the Tribunal President, O’Conner DCJ distinguished between ‘narrower’ and ‘broader’ approaches to the interpretation of cl 1 (1)(e)

The main difference in the two approaches has to do with the extent to which it is necessary to prove in order to establish the exemption that Cabinet actually

deliberated or made a decision in relation to the information which is the subject of the claim for exemption.⁴⁶

Persuaded by the arguments of Counsel for the Respondent, Ms Margaret Allars, O'Conner DCJ favoured a broader approach:

Under the broader approach Ms Allars submitted that it is enough to obtain the benefit of sub-category (e) to show that the information related to a matter of concern to Cabinet, even if neither the information nor the matter was ultimately the subject of discussion, careful consideration or decision-making.⁴⁷

The President did not believe it was necessary to examine other relevant cases concerning this clause and found that in this particular case, the agency had reasonable grounds for invoking the Cabinet documents exemptions and had made the correct and preferable decision:⁴⁸

On this occasion it is not, the Tribunal considers, necessary to form a concluded view on the difference in the approaches found in the case law of other jurisdictions with exemptions equivalent to sub category (e).⁴⁹

It is unfortunate that O'Conner DCJ did not subject this question to greater analysis. While the majority in *Egan v Chadwick* sought to uphold the principle of cabinet confidentiality the Chief Justice also sought to restrict the exemption to only those documents that revealed the actual deliberations of Cabinet, so as to allow the House to undertake its important role in scrutinising the executive as effectively as possible. This role is being hampered by the government's attempts to seek blanket exemptions for too wide a class of documents in both parliament and the courts.

Not long after the judgement in *Cianfrano*, the Tribunal came to a very different conclusion regarding this clause. In *National Parks Association of NSW v Department of Lands and anor* (2005) Hennessy DP rejected the broader approach adopted by O'Conner DCJ in *Cianfrano*, in favour of a narrower conception of the category.⁵⁰ In doing so, he referred to an unreported 1996 District Court decision, *Simos v Wilkins*.⁵¹ This decision introduced an important factor to assist the adjudication of disputes regarding category (e) — that is — timing:

*... cl 1 (1) (e) appears to refer to a document which contains matter which came into existence either during or after a meeting of Cabinet so that it can disclose the information referred to therein.*⁵²

Hennessy DP was also persuaded by the reasoning in *Re Hudson and Department of the Premier, Economic and Trade Development* (1993) where Albietz J argued that only the documents created at the same time, or subsequent to, active discussion and debate within Cabinet, were capable of disclosing Cabinet deliberations.⁵³ Hennessy DP found that:

A broader interpretation is not consistent with the ordinary meaning of the words and would allow agencies to abuse the exemption by attaching documents to Cabinet submissions in an effort to avoid disclosure under the FOI Act.⁵⁴

In his most recent Annual Report, the NSW Ombudsman is clearly persuaded by the reasoning in the *National Parks* case:

A recent decision of the ADT (*National Parks Association of NSW Inc v Department of Lands* [2005]) has made it clear that agencies must adopt a narrow interpretation of the Cabinet document exemption....We intend to continue monitoring this issue closely.⁵⁵

Responsible Government, Collective Responsibility and Cabinet Confidentiality

The nature of responsible government and one of its most important conventions, the collective ministerial responsibility of Cabinet, is a significant theme in the Egan litigation, and integral to any discussion of the power of a House of Parliament to order State papers. Responsible government describes the system of government inherited by Australia from Britain which has existed in NSW since 1855.⁵⁶ It is difficult to offer a precise definition of responsible government, as many of its features have developed as traditions rather than as written rules, and are constantly evolving.⁵⁷ According to Sir Robert Garran:

Responsible government as we know it, is...a changing thing; it depends largely upon unwritten rules which are constantly varying, growing, developing, and the precise direction of whose development is impossible to forecast.⁵⁸

Several of the key features or conventions of our system of responsible government were explored during the Egan cases, including that of ministerial responsibility and cabinet confidentiality. Ministerial responsibility may be both individual and collective:

A Minister is individually responsible to the Parliament for the administration of his or her departments or agencies. This means that a Minister can be questioned in the Parliament upon this subject and can be required by the House...to account for his or her actions or failure to act.⁵⁹

Collective ministerial responsibility requires that:

... Ministers share responsibility for major government decisions, particularly those made by the Cabinet and, even if they personally object to such decisions, Ministers must be prepared to accept and defend them or resign from the Cabinet.⁶⁰

An important, some may argue, fundamental, aspect of Collective Ministerial accountability is the convention of Cabinet confidentiality:

The maintenance of this confidentiality is necessary to support the collective responsibility of all members of the Cabinet for its decisions. If records of Cabinet meetings or copies of Cabinet minutes were made available and used to show that a particular Minister had argued against the ultimate decision of Cabinet, this would undermine the collective responsibility of Ministers.⁶¹

As Lord Reid suggested in *Conway v Rimmer (1968)* the traditional reason for protecting this class of documents was not to shield Ministers or other servants of the Crown from all criticism but rather 'ill-formed or captious public or political criticism.'⁶² The acceptance of the conventions of ministerial responsibility and cabinet confidentiality in *Egan v Chadwick* was a critical factor in the majority's decision that Council's power to order State papers did not extend to Cabinet documents.⁶³

An uncritical acceptance of the principle of cabinet confidentiality does not address the fact that the convention of ministerial accountability, on which the principle is based, has changed. While traditionally, it was expected that a Minister would resign if they or their agencies were found to be responsible for major errors or failures, this is rarely the case now:

It has become far less common in recent years for Ministers to uphold this tradition. Indeed, in many cases Ministers now actively seek to transfer any mistakes to public servants and attempt to shield themselves from responsibilities by claiming not to have been informed...Such an attempt to shift responsibility is not only contrary to the tradition but undermines the system of responsible government imposed by the *Constitution Act*.⁶⁴

That some of the accepted conventions of responsible government have not always been observed, does not seem to have undermined the belief in the need to adhere to these principles. As Spigelman CJ noted in *Egan v Chadwick*, collective responsibility to parliament remains a distinctive feature of the system of government in New South Wales, 'even if sometimes honoured in the breach'.⁶⁵ If it is true, as Mason CJ suggested in *Commonwealth v Northern Land Council*, that it has never been doubted that it is in the public interest that deliberations of Cabinet should remain confidential, perhaps this 'fact' should be lamented rather than accepted. As Gareth Griffith suggests, the argument relied on by Spigelman CJ in *Egan v Chadwick* for the maintenance of the principle of cabinet secrecy is problematic:

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. 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.' The Chief Justice's judgement left the necessary constitutional fictions intact.⁶⁶

Should the nexus between responsible government and cabinet secrecy be maintained in its current form, particularly given other significant developments in our contemporary political system, a system in which coalition governments are increasingly common, cabinet 'leaks' not infrequent and where citizens demand a greater level of accountability from their representatives? It is interesting to note

that in 2000, the Welsh Assembly announced that the minutes of Cabinet meetings would be published on the internet as part of the government's commitment to openness and freedom of information.⁶⁷ While the need to bolster the accountability function of the legislature can be increasingly discerned in the courts and in the media, it would appear that there is little judicial or political support for diluting the principle of cabinet confidentiality.

Conclusion

While the *Egan* cases may have clarified the legal basis for the legislature's power to require government documents, the 'fourth' phase in the recent history of orders for papers in NSW reveals a concerted effort on the part of the executive to withhold sensitive State papers from parliamentary scrutiny and public exposure.

An increasing number of documents are not being returned to the Council on the grounds of cabinet confidentiality and yet the House has no way of knowing if the government's claims relate to 'true' cabinet documents or a wider class of documents that should not attract this immunity. An important step in enabling the Council to fulfil its accountability function is to ensure such documents are evaluated by the independent legal arbiter as occurs with other papers subject to privilege claims. Documents for which a claim of privilege is upheld would not be released to the House, thus avoiding the unauthorised leaks of 'true' cabinet documents. At the very least, the House should pursue its recent attempt to secure additional details regarding documents for which the government seeks an exemption. In the meanwhile, recent actions by the executive to resist the release of State papers will be subject to further criticism in the media and in the 'court of public opinion'. ▲

End Notes

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- ¹ The paper was completed as part of the 2005 ANZACATT Parliamentary Law, Practice and Procedure course. The author would like to thank the following people for their advice and suggestions in relation to this paper: the Clerk of the Parliaments, Mr John Evans, the Deputy Clerk, Ms Lynn Lovelock, Ms Velia Mignacca, Ms Susan Want and Mr Steven Reynolds.
 - ² *The Commonwealth v Northern Land Council* (1992-93) 176 CLR 604, para 6 per Mason CJ.
 - ³ The 'Egan cases' refer to three significant judgements pertaining to the power of the NSW Legislative Council to require the production of government documents: *Egan v Willis and Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 158 ALR 527 and *Egan v Chadwick & ORS* (1999) 46 NSWLR 563.
 - ⁴ H. Evans, Enough of Executive Arrogance? *Egan v Chadwick and others*, *Constitutional Law and Policy Review*, Vol 2, No 1, May 1999, p12.

- ⁵ Two of the orders were not complied with in a strict sense. See J Evans, *Orders for papers and executive privilege; committee inquiries and statutory secrecy provisions*, paper presented to Australasian Study of Parliament Group, Victorian Chapter, 2002 Annual Conference – Parliamentary Privilege, 12 October 2002, fn 28, p17.
- ⁶ *ibid.*, p3.
- ⁷ *ibid.*, p9.
- ⁸ Legislative Council of New South Wales, *Procedural Highlights*, No 20, January to June 2005, p5.
- ⁹ Legislative Council of New South Wales, *Procedural Highlights*, No 20 July to December 2005, pp7-8.
- ¹⁰ See for example: Mantziaris, C. *Egan v. Willis and Egan v. Chadwick: Responsible Government and Parliamentary Privilege*, Research paper 12, 1999-2000, Parliament of Australia, Parliamentary Library, December 1999, and Griffith, G. *Egan v Willis & Cahill: The High Court Decision*, NSW Parliamentary Library Research Service, Briefing Paper No 1/99; Griffith, G. *Egan v Chadwick and other recent developments in the powers of elected upper houses*, Briefing Paper No 15/99.
- ¹¹ *Egan v Willis and Cahill* (1996) 40 NSWLR 650, page 654, per Gleeson CJ.
- ¹² Evans, J. *Parliamentary Privilege Order for papers and executive privilege; committee inquiries and statutory secrecy provisions*, paper presented to Australasian Study of Parliament Group, Victorian Chapter, 2002 Annual Conference, 12 October 2002, p3.
- ¹³ Mantziaris, C. *Egan v. Willis and Egan v. Chadwick: Responsible Government and Parliamentary Privilege*, Research Paper 12, 1999-2000, Parliament of Australia, Parliamentary Library, December 1999, p4.
- ¹⁴ Evans, J. *Parliamentary Privilege Order for papers and executive privilege; committee inquiries and statutory secrecy provisions*, paper presented to Australasian Study of Parliament Group, Victorian Chapter, 2002 Annual Conference, 12 October 2002, pp3-4.
- ¹⁵ *Egan v Willis & Cahill* (1996) 40 NSWLR 650 at 665.
- ¹⁶ Evans, J. *Parliamentary Privilege Order for papers and executive privilege; committee inquiries and statutory secrecy provisions*, paper presented to Australasian Study of Parliament Group, Victorian Chapter, 2002 Annual Conference, p5.
- ¹⁷ *ibid.*, p6, Under this procedure, documents subject to such claims were to be lodged with the Clerk of the House and made available only to Members of the House and not copied or published without an order of the House. In the event of a dispute by any Member to the validity of any privilege claim, the disputed document was to be referred to an independent legal arbiter for assessment. On receipt of the arbiter's report, a motion could be moved in the House that the disputed document be made public. Cabinet documents were not to be made available to Members, but disputes regarding such documents could be referred to the arbiter.
- ¹⁸ Legislative Council of New South Wales, *Standing Rules and Orders*, May 2004.
- ¹⁹ *Egan v Chadwick & ORS* (1999) 46 NSWLR 563 at 595 per Priestley. Emphasis in the original.
- ²⁰ *ibid.*, at 597 per Meagher.
- ²¹ Evans, H. 'Enough of Executive Arrogance? Egan v Chadwick and others', *Constitutional Law and Policy Review*, Vol 2, No 1, May 1999, p11.
- ²² Evans, J. *Parliamentary Privilege Order for papers and executive privilege; committee inquiries and statutory secrecy provisions*, paper presented to Australasian Study of Parliament Group, Victorian Chapter, 2002 Annual Conference, October 2002.
- ²³ *ibid.*, pp8,9.
- ²⁴ *ibid.*, p8.

- ²⁵ Legislative Council of New South Wales, *Procedural Highlights*, No 20, January to June 2005, p5.
- ²⁶ *ibid.*, p6. The Gledhill Report was tabled two days after the return.
- ²⁷ Legislative Council of New South Wales, *Minutes of Proceedings*, No 80, Tuesday 9 November 2004, p1099. A copy of the report was not provided as part of the return even though it had been publicly released. A letter dated 4 November 2004 from the Director General of the Premier's Department explained that even though the report had by this stage been publicly released, 'this did not alter the fact that it formed part of the Cabinet process and was not included with other documents captured by standing order 52. The report was, however, attached to the letter.
- ²⁸ The Hon Catherine Cusack MLC, Legislative Council New South Wales, *Hansard*, 28 October 2004, pp12185.
- ²⁹ The Hon John Della Bosca MLC, Legislative Council, New South Wales, *Hansard*, 28 October 2004, p12188.
- ³⁰ Legislative Council *Minutes of Proceedings*, No 95, Tuesday 22 March 2005, p1283.
- ³¹ Legislative Council of New South Wales, *Procedural Highlights* No 20, July to December 2005, p6.
- ³² Correspondence from Director General, NSW Premier's Department to Clerk of the Parliaments concerning Order for Papers—Grey Nurse Sharks Further Order, 15 November 2005. The advice from the Crown Solicitor is privileged and thus confidential.
- ³³ Legislative Council Resolution of 13 October 1998, reproduced in *Egan v Chadwick & ORS* (1999) 46, NSWLR 650 CHECK per Priestley (emphasis added).
- ³⁴ Legislative Council of New South Wales, *Notice Paper*, No 4, Tuesday 6 June 2006, p181.
- ³⁵ Correspondence from the Director General, Premier's Department, Mr C. Gellatly, to the Clerk of the Parliaments, regarding forthcoming Budget Estimates process, 7 September 2005.
- ³⁶ Crown Solicitors Office, *Freedom of Information Client Seminar*, Sydney, 21 September 2005.
- ³⁷ 'The Public has a right to know', *Daily Telegraph*, 19 October 2005.
- ³⁸ NSW Ombudsman, *Annual Report*, 2004-05, p129.
- ³⁹ 'FoI nets less and less – Editorial', *Sydney Morning Herald*, 17 October 2005.
- ⁴⁰ *ibid.*
- ⁴¹ *Asher MP v Department of Infrastructure (General)* (2005) VCAT 410.
- ⁴² P. Austin, Government faces probe over secret documents', *The Age*, 8 September 2005. While the Ombudsman investigated the compliant, his report, somewhat ironically, has not been made public (personal conversation, Victorian Ombudsman Office, 25 January 2006).
- ⁴³ *Freedom of Information Act* 1989, s 25 (1).
- ⁴⁴ *Cianfrano v Director General, NSW Treasury* (2005), NSWADT 7 at para 27.
- ⁴⁵ *Freedom of Information Act* 1989, sch 1, cl 1 (1)(a-e).
- ⁴⁶ *Cianfrano v Director General, NSW Treasury* 2005, NSWADT 7, para 44. A narrow approach to this question is demonstrated in *Re Hudson and Department of the Premier, Economic and Trade Development* 1993 1 QAR 123 and a broader approach reflected in the decision in *Re Toomer and Department of Agriculture, Fisheries and Forestry* 2003 AATA 1301.
- ⁴⁷ *Cianfrano v Director General, NSW Treasury* (2005), NSWADT 7 at para 46.
- ⁴⁸ *ibid.*, at para 49.
- ⁴⁹ *ibid.*, at para 47.

- ⁵⁰ *National Parks Association of NSW v Department of Lands and anor* (2005) NSWADT 124.
- ⁵¹ *Simos v Wilkins*, District Court, NSW, Cooper J, 15 May 1996 at para 17.
- ⁵² Quoted in *National Parks Association of NSW v Department of Lands and anor* (2005) NSWADT 124, para 36.
- ⁵³ *Re Hudson and Department of the Premier, Economic and Trade Development* 1993 1 QAR 123 at para 141.
- ⁵⁴ *National Parks Association of NSW v Department of Lands and anor* (2005) NSWADT at para 37.
- ⁵⁵ NSW Ombudsman, *Annual Report*, 2004-05, pp129-30.
- ⁵⁶ Twomey, A., *The Constitution of New South Wales*, The Federation Press, Sydney 2004, p27.
- ⁵⁷ *ibid.*, p8.
- ⁵⁸ Sir Robert Garran, quoted in G Griffith, *Egan v Willis & Cahill: The High Court Decision*, NSW Parliamentary Library Research Service, Briefing Paper No 1/99, p10.
- ⁵⁹ Twomey, A., *The Constitution of New South Wales*, The Federation Press, Sydney 2004, p693.
- ⁶⁰ *ibid.*, p694.
- ⁶¹ *ibid.*, p694.
- ⁶² Quoted in *Sankey v Whitlam* 1978 142 CLR 1 as per Gibbs ACJ at para 38.
- ⁶³ It has been suggested that Henry Fawcett, a talented British Liberal MP in the mid-1800s would have made it into the cabinet, if not for the fact that he was blind. As a blind MP, he would have had to rely on a secretary to read him the Cabinet Minutes and it was apparently unthinkable that anyone other than a minister could be privy to such important information. See McKie, D, 'Your first mistake', *The Guardian*, 20 July 2006, p24.
- ⁶⁴ Twomey, A. *The Constitution of New South Wales*, The Federation Press, Sydney 2004, p693.
- ⁶⁵ *ibid.*, p694.
- ⁶⁶ Griffith, G, *Egan v Chadwick and other recent developments in the powers of elected upper houses*, Briefing Paper No 15/99, p25.
- ⁶⁷ Palmers Oz Politics, www.ozpolitics.info/inst/exec.htm, accessed 8/9/05 p60f8.