NSW GOVERNMENT | Premier & Cabinet


Our ref: DPC13/01553
2014-119946

Mr David Blunt
Clerk of the Parliaments
Parliament House
Macquarie Street
SYDNEY NSW 2000

16 APR 2014

Dear Mr Blunt

**Order for Papers**

I refer to the following resolutions of the Legislative Council made on Wednesday 19 March 2014 and 26 March 2014 under Standing Order 52:

(a) the resolution calling for the production of documents relating to the management of Crown caravan parks by 9 April 2014,[1]

(b) the resolution calling for the production of documents relating to the draft Protection of the Environment Operations (General) Amendment (Native Forest Bio-material) Regulation by 9 April 2014,[2]

(c) the resolution calling for the production of documents relating to a planning proposal for Bronte RSL by 16 April 2014,[3]

(d) the resolution calling for the production of documents relating to acquisitions of land for the reserve system by 16 April 2014,[4]

(e) the resolution calling for the production of documents relating to the reform of planning laws in New South Wales by 16 April 2014,[5] and

(f) the resolution calling for the production of documents from the office of the former Minister for Finance and Services and Minister for the Illawarra by 16 April 2014.[6]

I note that the Government returned the documents referred to in paragraphs (a) and (b) above on Wednesday, 9 April 2014.

The Government is today returning the documents referred to in paragraphs (c) and (d) above.

---

[1] New South Wales Parliamentary Debates (Hansard), Legislative Council, 26 March 14, 2412.
[2] New South Wales Parliamentary Debates (Hansard), Legislative Council, 26 March 14, 2414.
[3] New South Wales Parliamentary Debates (Hansard), Legislative Council, 26 March 14, 2422.
[4] New South Wales Parliamentary Debates (Hansard), Legislative Council, 26 March 14, 2416.
[5] New South Wales Parliamentary Debates (Hansard), Legislative Council, 26 March 14, 2418-2419.
[6] New South Wales Parliamentary Debates (Hansard), Legislative Council, 19 March 14, 2379-2380.

In relation to the resolutions referred to in paragraphs (e) and (f), however, I am advised that it is not practicable to produce the documents sought within the timeframe specified for production.

I am further advised that, even aside from the timeframe, the terms of those orders either refer to no specific subject matter (in the case of the order for the production of documents from the office of the former Minister for Finance and Services and Minister for the Illawarra) or are otherwise broad and unwieldy (in the case of the order for the production of documents relating to the reform of planning laws in New South Wales) such as to place great practical difficulties upon compliance, including having regard to the costs associated with identifying, copying, reviewing for privilege, indexing and producing the documents.

The Government has obtained an opinion from the Solicitor General and Ms Mitchelmore of Counsel dated 9 April 2014,[7] which addresses a number of matters concerning the Legislative Council's power to compel the production of documents. A copy of that opinion is enclosed for your reference.

As you will see, that advice notes, among other things, that:

> "*It would be reasonable in our view, to query or dispute an order that contained an impractical deadline or referred to no specific subject matter in relation to the documents sought – but, for example, by location only – or referred to a subject matter that was so broad and unwieldy as to place great practical difficulties on compliance.*"

I am advised that the Government intends to raise this matter with the Council at the first available opportunity when Parliament resumes on 6 May 2014, and at that time provide further details as to the issues referred to above and a proposed approach to these resolutions.

Should you require any clarification or further assistance, please contact Mr Paul Miller, General Counsel, on telephone (02) 9228 4514.

Yours sincerely

Simon A Y Smith
Acting Secretary

[7] Sexton SC and Mitchelmore, "Question of Powers of Legislative Council to Compel the Production of Documents from Executive", SG 2014/05, 9 April 2014.

NEW SOUTH WALES

SOLICITOR GENERAL

# QUESTION OF POWERS OF LEGISLATIVE COUNCIL TO COMPEL PRODUCTION OF DOCUMENTS FROM EXECUTIVE

We have been asked by the Crown Solicitor, who acts for the Secretary of the Department of Premier and Cabinet, to advise in relation to the powers of the Legislative Council to compel the production of documents from the Executive under Standing Order 52 of the Council and also in relation to the Council's power under Standing Order 53 to request certain documents by way of an address to the Governor.

We have set out below answers to the eleven specific questions asked but we should note at the outset that the questions do not relate to particular orders of the Council (with one possible exception), or to particular documents which are the subject of any order. Accordingly, the answers we have given are necessarily framed at a level of generality which is likely to require refinement depending on the particular circumstances of orders which are issued and/or the documents which such orders may cover. It should also be noted that, in the context of a specific order of the Council concerning the production of documents, any dispute between the Council and the Executive as to the operation of the order may only become justiciable in the unusual circumstances that occurred, for example, in Egan v Willis (1998) 195 CLR 424 where the issue before the court was an action of trespass.

**Powers and privileges of the Legislative Council**

In Egan v Willis Gaudron, Gummow and Hayne JJ considered (at [31]-[32], [48]) the powers and privileges of the Legislative Council to be those "necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute", quoting Keilley v Carson (1842) 13 ER 225 at 234. See also at [139]-[140] per Kirby J, [189] per Callinan J.

As Gleeson CJ noted in the Court of Appeal proceedings in Egan v Willis (1996) 40 NSWLR 650 (at 664), the then equivalents of SO 52 and SO 53 are not the source of the power to compel or request documents. Rather, those standing orders assume the existence of such powers and regulate their exercise.

Gleeson CJ also noted in the same proceedings (at 654) that the then equivalent of SO 52 referred to "what are sometimes called State papers, that is to say, papers which are created or acquired by ministers, officeholders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of the State of New South Wales". When the proceedings went on appeal, the High Court appeared to adopt this definition and it may be accepted that the reference to "documents" in SO 52 and SO 53 is a reference to State papers.

It may be noted that SO 52(1) requires the Clerk to communicate an order that documents be tabled to the Premier's Department. The Department does coordinate the return of documents in response to such orders but takes the view that, in accordance with the principles of responsible government and ministerial responsibility to Parliament, responsibility for producing the documents rests formally with the Ministers who represent the government in the Council.

**Terms of Standing Orders 52 and 53**

Standing Order 52 is in the following terms:

> **Order for the production of documents**
>
> (1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.
>
> (2) When returned, the documents will be laid on the table by the Clerk.
>
> (3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document

and the author of the document.

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

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

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

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

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

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

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

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

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

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

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

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

Standing Order 53 reads as follows:

**Documents from the Governor**

The production of documents concerning:

(a) the royal prerogative,

(b) dispatches or correspondence to or from the Governor, or

(c) the administration of justice,

will be in the form of an address presented to the Governor requesting that the document be laid before the House.

**Answers to specific questions**

Q1. From whom does the Legislative Council (LC) have the power to compel the production of documents?

In particular, does it only have the power to compel the production of documents that are within the control of Ministers (either directly or indirectly in the sense of being held by those departments and other agencies that are subject to their direction and control) or can it extend to production of documents held by statutory agencies not subject to Ministerial direction and control in respect of some or all of their functions (eg Public Service Commissioner, ICAC, state owned corporations)?

A1. The High Court appeared to assume in Egan v Willis (at 444) that custody and control was the relevant test for the production of documents by a Minister, although the notion of control would obviously extend to documents that a Minister can call for, as would be so in the case of Departments and non-statutory agencies.

In relation to statutory bodies, there is always a responsible minister in the sense of one designated under the Administrative Arrangements Order. However, whether or not a Minister can call for documents from such a body will depend on the terms of its relevant constituting statute, as is highlighted by the examples to which reference is made in the question.

In the case of the Independent Commission Against Corruption, s 111 of the Independent Commission Against Corruption Act 1988 appears to prevent the Commissioner or an officer of the Commission from divulging any information in connection with the exercise of their functions under the legislation, being information acquired by reason of or in the course of the exercise of those functions, except in circumstances that would not be relevant to the response by a Minister to an order of the Council.

In the case of statutory State-owned corporations (SOC), s 20P of the State Owned Corporations Act 1989 allows the portfolio Minister, with the approval of the Treasurer, to give the board a written direction in relation to the SOC and its subsidiaries if the portfolio Minister is satisfied that, because of exceptional circumstances, it is necessary to give the direction in the public interest. Arguably

this would allow the portfolio Minister to call for documents sought by the Council. It might be noted, however, that there is no similar ministerial power in relation to company State-owned corporations.

In relation to the Public Service Commissioner, s 14(1) of the Government Sector Employment Act 2013 requires the Commissioner to report to the Premier in connection with the exercise of his or her functions but states that the Commissioner is not subject to the control and direction of the Premier in the exercise of those functions. There is also a more general requirement that the Commissioner prepare and forward a report to the Premier on his or her work and activities and the state of the government sector in relation to the period of twelve months ending on 30 June of each year: s 15(1). These provisions would not, in our view, allow the Premier to call for specific documents in the possession of the Commissioner that had been sought by the Council.

Q2. What (if any) general limits apply to the LC's power to make an order for the production of documents from the Executive, including in respect of its subject matter, volume of documents, or time frame for compliance?

In particular:

(i) Is there any basis for declining to comply with an order that:

(a) is "oppressive" or otherwise unreasonable, for example because it is practically unreasonable (or even impossible) to comply with fully;

(b) is not on its face related to any current inquiry, Bill, debate or other function of the LC; or

(c) is a mere "fishing expedition" (for example, an order for all documents at a particular location rather than relating to a particular subject)?

(d) might otherwise be characterised as "an abuse of process" (for example, if a member of the LC moves the motion for the Standing Order 52 order after access has been denied to the member in private litigation; or the documents otherwise relate to the subject matter of a current civil dispute or litigation and are apparently sought merely to aid one of the parties)?

(ii) Can an order compel production of documents which are subject to a statutory non-disclosure provision (that does not have an exception for disclosure in the administration of the Act or for other "lawful excuse")?

In particular, can the implied power of a House to order the production of documents which are "reasonably necessary" for the exercise of the functions of the House prevail over the will of the Parliament expressed in such a statute?

A2. (i) As Dixon CJ noted (at 162) in R v Richards; Ex parte Fitzpatrick and Browne (1955) 92 CLR 157 "it is for the courts to judge the existence in either House of Parliament of the privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise". Dixon CJ was speaking there particularly of the Australian Parliament but this statement has been accepted as a general proposition in relation to State parliaments as well. On the basis that orders under SO 52 are based on an accepted power of the Council to compel the production of documents, there is a relatively limited scope, in our view, for disputing the terms of the order. There is also the practical question of how such a dispute could be resolved in the absence of the kinds of actions taken to make the dispute justiciable in Egan v Willis.

In these circumstances it is doubtful, in our view, that an order needs to be related to a current inquiry, Bill or debate of the Council. In any event, a number of judicial observations about the scope of the Council's functions and its power to compel the production of documents suggest that currency is not essential when considering the question of reasonable necessity. In Egan v Willis, for example, Mahoney P described the Council's functions as including "to an appropriate extent and in the proper manner, the oversight of the activities of the Executive Government", with no indication that such oversight could not relate to past activities. In the High Court, Gaudron, Gummow and Hayne JJ also focussed on the notion of oversight, or "superintendence", without needing to decide its limits (at [46]-[47]). Priestley J took a broader view, stating that it was "well within the boundaries of reasonable necessity that the Legislative Council have power to inform itself of any matter relevant to a subject on which the legislature has power to make laws" (at 692).

If such a challenge were justiciable, there may be a basis for contending that an order is invalid if the member moving the motion has only a private motivation for seeking access to the documents in question, it being difficult to see that an order of that nature would be reasonably necessary for the proper exercise of the Council's functions. We note, however, that given the order is that of the Council and separate from the actions of any individual member, the possibility that an order so motivated would be made is likely to be slight.

It would be reasonable in our view, to query or dispute an order that contained an impractical deadline or referred to no specific subject matter in relation to the documents sought – but, for example, by location only – or referred to a subject matter that was so broad and unwieldy as to place great practical difficulties upon compliance.

(ii) In one sense the question of whether a statutory non-disclosure provision provides a proper basis for a refusal to produce documents in compliance with an order under SO 52 is one of statutory construction. Does the relevant statutory provision intend to apply to such an order made by a House of the Parliament? This is a difficult question.

It is reasonably clear that the following authorities, although referring specifically to the role of parliamentary committees, would take the view that a statutory non-disclosure provision could only affect the powers of the Council if it did so by express reference or necessary implication:

- Lovelock and Evans, New South Wales Legislative Council Practice (Federation Press, 2008) at 512-516;
- Odgers, Australian Senate Practice (Commonwealth of Australia, 2008) at 66;
- 1985 joint opinion by the then Commonwealth Attorney General, Mr Bowen and the then Commonwealth Solicitor General, Dr Griffith QC (cited in Odgers); and
- Opinion of Mr Walker SC of 2 November 2000 cited in Lovelock and

Evans at 514.

We are inclined to agree that this view accords with the role of the Parliament in a system of responsible and representative government, although the matter can hardly be free from doubt and it is not possible to predict with confidence what view a court might take on this issue.

Q3. Can the LC order the production of documents relating to the matters referred to in Standing Order 53?

In particular:

(i) In respect of documents relating to those matters, is the LC limited to making a non-obligatory "request" to the Governor?

(ii) Broadly speaking, what do "administration of justice" and the other matters referred to in Standing Order 53 encompass?

A3. (i) Under the terms of SO 53 the address to the Governor can be in the form of a request only. It might be possible to mount an argument that the matters referred to in SO 53 can also be the subject of an order under SO 52. However, it appears that the Council itself has taken the view that this is not so. See Lovelock and Evans at 593-596.

(ii) It is far from clear, in our view, what is encompassed by the categories of documents referred to in SO 53. The "royal prerogative" may be taken to be a reference to the common law or non-statutory powers of the Crown derived from the Sovereign, one such power being the prerogative of mercy which is exercised by the Governor on the advice of the Executive Council. The reference to "dispatches" perhaps refers to communications between the Governor and the UK government, although "correspondence" is on its face a very broad term that could extend to all written communications by the Governor with third persons.

As to documents "concerning the administration of justice", Lovelock and Evans cite (at 595) an opinion of the Crown Solicitor of 2002 to the effect that documents have reference to the administration of justice (as the predecessor

to SO 53 provided) if they contain material touching on or concerning court proceedings or a police investigation leading to the administration of justice. It might be thought that documents dealing with the system of courts in general and not only particular proceedings would also fall within this category.

Q4. Does the LC have the power to specify the form in which documents must be produced, such as electronic or printed?

A4. The tenor of SO 52 suggests the production of documents in printed form: the order is for documents to be "tabled in the House" and when returned they are to be "laid on the table by the Clerk".

However, it may be convenient for the Council to request that the documents be provided in a different form and also convenient for the Executive to supply the documents in, for example, electronic form. We do not consider that the terms of the order would preclude the Council from adopting or sanctioning that course. If production of the documents in a different form to how they are maintained in the Department is likely to be productive of significant cost – for example, providing a hard copy of the contents of a large electronic database – that may present a practical difficulty in terms of compliance which could be a basis for raising a query or dispute, to which we have referred above in the context of question 2.

Q5. Does the LC have the power to require the creation of a new document, such as an index of the documents produced?

A5. It may be noted that SO 52(3) provides that a return under the order made is to include an index list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document. If the return comprises more than a small number of documents, it could be argued with some justification, in our view, that an index of the kind described in SO 52(3) is incidental to the power to compel production and so reasonably necessary for the effective functioning of the House. It may, of course, also be convenient for the Executive to provide such an index where a claim for privilege in relation to some documents is to be made under SO 52(5).

Apart from an index, however, we do not consider that a requirement to create documents, including edited versions of existing documents, would properly fall within the scope of the Council's power, which applies to the production of State papers.

Q6. Does the LC have the power to require the Executive to produce documents that were not in existence at the date the resolution was passed?

It is to be noted that it is common practice for orders to purport to require agencies to produce all documents created after the passing of the order that relate or refer to the production of documents pursuant to the order.

A6. There is a good argument, in our view, that SO 52 only envisages documents that were in existence at the date of the order. It is difficult to see how an order can identify a document and so demand its production if the document has not yet been brought into existence.

We note that this question was discussed in the report of the Council's Privileges Committee of 31 October 2013 entitled The 2009 Mt Penny return to order. It was noted in the report that it is standard practice for orders for papers made by the Council to include within the terms of the order a final paragraph requiring the production of "any document which records or refers to the production of documents as a result of this order of the House" (at para 5.56). The Clerk to the Council observed, however, that this paragraph was never intended to capture documents relating to the internal arrangements for the collation of a return but was designed to ensure that any legal or other advice which went to the scope of an order, or sought to clarify its terms should be provided (at para 5.61). In any event, as we have already suggested, it is doubtful, in our opinion, that an order can validly refer to documents that have not yet come into existence at the date of the order.

Q7. Does the LC have the power to compel the production of documents that are subject to parliamentary privilege, such as a house folder note or other paper prepared for the use of Ministers in responding to questions put to them in the Legislative Assembly?

A7. Although the two categories of privilege considered in Egan v Chadwick (1999) 46 NSWLR 563 were those of public interest immunity and legal professional privilege,

the decision suggests, in our view, that parliamentary privilege would not be a basis for refusing to produce documents sought under SO 52. All three members of the Court of Appeal rejected legal professional privilege as a basis for refusing production of Executive documents and the majority – Spiegelman CJ and Meagher JA – were prepared to except Cabinet documents only (as to the scope of which there may be some debate) from production on the basis of a public interest immunity claim. See Spiegelman CJ at [69] and [85]; Meagher JA at [152]-[154]. Priestly JA would have included Cabinet documents in the requirement for production (at [141]-[143]).

Q8. Is the LC required to provide conduct money or otherwise reimburse the Executive for the costs of complying with an order for the production of documents?

A8. There is no basis, in our view, for implying in the power to compel production the provision of conduct money or reimbursement of the Executive for the costs of complying with the order for production.

Q9. What steps might the Executive take to satisfy itself of the validity of an order, including seeking further information from the LC?

A9. There are no formal steps that the Executive might take vis à vis the Council to satisfy itself of the validity of an order for production. The Executive can obviously obtain its own legal advice as to the validity of an order but there remains, as already noted above, the difficulties associated with challenging an order by way of court proceedings.

Q10. In what circumstances would a court hold a challenge to the validity of an order to be judiciable?

A10. Egan v Willis is a rare example where a challenge to the validity of an order under the then equivalent of SO 52 was justiciable. It may be possible to construct a justiciable challenge to a general order to the Executive made under SO 52 but this would obviously be far from easy.

Q11. What steps could the Executive take to ensure that a challenge to the validity of an order would be held to be justiciable?

A11. See the answer to Question 10.

Please do not hesitate to contact us in relation to any of the matters raised in this advice.

**M G SEXTON SC**

**A M MITCHELMORE**

9 April 2014

**Secretary**
**Assistant Director General, Policy & Legal**
**Crown Solicitor's Office (Mr Tom Chisolm)**