

**Submission  
No 5**

**INQUIRY INTO EXAMINATION, PUBLICATION AND USE  
OF CABINET DOCUMENTS BY LEGISLATIVE COUNCIL  
COMMITTEES**

**Name:** Mr John Evans  
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24 January 2022

The Honourable Peter Primrose MLC  
Chair  
Privileges Committee  
Legislative Council

Dear Mr Primrose

I refer to your letter of 29 November 2021 inviting me to make a submission to the inquiry into the examination, publication and use of cabinet documents by Legislative Council Committees.

Member may be aware that as the then Clerk of the Parliaments I was inextricably involved in events surrounding the *Egan* cases. It would come as no surprise then that I strongly hold the view that the House has power to order the production of Cabinet documents, including, in appropriate circumstances, those that might disclose the deliberations of Cabinet.

There is a useful article published by Council officers, Sharon Ohnesorge and Beverly Duffy, “Evading scrutiny: Orders for papers and access to cabinet information by the NSW Legislative Council”,<sup>1</sup> which deals with issues regarding Cabinet documents post *Egan v Chadwick* (1999) 46 NSWLR 563.

In a paper was presented at the annual Harry Evans Lecture at Parliament House, Canberra, on 1 December 2017, Brett Walker SC, discussed the *Egan* cases, and of particular relevance the issue of executive claims of cabinet secrecy and public interest immunity.<sup>2</sup> At page 9, discussing *Egan v Chadwick* he stated “The conceptual key to what I regard as the *Egan v Chadwick* error is the failure to accord to a parliamentary chamber the kind of control over its proceedings, for its functions, as the courts of law have now pronounced that they have over their own proceedings for their functions”.

Before I respond to the questions you have asked it might be useful for me to discuss my understanding of the concept of public interest immunity and Cabinet documents.

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<sup>1</sup> Sharon Ohnesorge, Principal Council Officer – Committees Beverly Duffy, Clerk Assistant – Committees Legislative Council of New South Wales - Paper to be presented at the Australasian Study of Parliament Group (ASPG) 2017 National Conference, Hobart 27-29 September 2017

<sup>2</sup> Justified Immunity or Unfinished Business? The Appropriateness of Parliamentary and Executive Immunities in the 21st Century, Bret Walker. Paper was presented at the annual Harry Evans Lecture at Parliament House, Canberra, on 1 December 2017. See discussion at pages 8 to 14.

The concept of public interest immunity is recognised by the Courts in determining claims for non-disclosure of Cabinet documents in civil and criminal proceedings. In determining claims the Courts weigh up or strike a balance between the competing claims of the public interest in immunity from disclosure and the public interest in obtaining access to and use of documents, including Cabinet documents.

There are many and varied descriptions of what constitutes the various classes of Cabinet document and those that disclose the “deliberations of Cabinet”. For example, in a recent case *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd (No 3)* [2020] FCA 1766, the Cabinet documents that were subject to a claim for public interest immunity were classified under 12 broad categories.<sup>3</sup>

In resolving competing claims of public interest immunity, the Courts (Judges) can inspect the documents and make a determination.

Justice Wigney in *ACCC v Ports* stated that in claims of public interest immunity, there are several factors or matters that must be addressed and considered in assessing the strength of the public interest in protecting the documents the subject of the claim from disclosure. Para 80

He went on to state that:

- “There could, for example, be little doubt that the public interest in preserving the confidentiality of the documents which comprised formal records of Cabinet decisions or deliberations was likely to be significantly greater than the public interest in preserving the confidentiality of documents that may simply have been obtained or used for the purpose of providing advice to Cabinet, including documents prepared by external advisers or consultants. That is particularly the case in respect of the documents containing advice which could not itself be said to disclose any Cabinet deliberations or decisions.” Para 81
- “the public interest in preserving the confidentiality of the class of documents as a whole is reduced, perhaps significantly, by the fact that the subject matter of the documents was considered to be no longer current or controversial.” Para 82
- “the public interest against disclosure of particular documents is likely to vary depending on the extent to which the documents record or disclose the Cabinet’s consideration of government policy, as opposed to specific commercial or contractual objectives or considerations.” Para 83

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<sup>3</sup> See para 43.

- “there is a fairly clear warrant for the Court to inspect the documents the subject of the claim to assess the strength of any public interest against disclosure. As will be seen, the need to inspect the documents is fortified by the apparent relevance and materiality of at least some of the documents to the substantive proceeding and the resulting public interest in favour of disclosure.” Para 84

More recently, the Independent Commission Against Corruption in its Operation Keppel inquiry dealt with the issue of Cabinet documents and disclosure before an inquiry. Assistant Commissioner McColl published a ruling on 17 October 2021<sup>4</sup>, in which the concept of public interest immunity in court proceedings was discussed at paragraphs 36 to 48, pages 9 to 11. The discussion and ruling provides a useful guide as to the balancing process involved in civil and criminal proceedings and how the principles can be applied to an inquiry process.

Assistant Commissioner McColl ruled that, certain categories of:

- documents recording any decisions made by Cabinet or a committee of Cabinet
- submissions to Cabinet or a committee of Cabinet
- advice or speaking notes in relation to any Cabinet or Cabinet committee submission,

can be tendered by Counsel Assisting and received in evidence and would form part of the public record of the inquiry - Para 57 (a). Further, that “the Commission will permit questions to be asked that disclose the contents of Cabinet Documents or content of Cabinet Deliberations but only to the extent reasonably necessary to expose to the public, and make it aware, of evidence relevant to the allegations being investigated in the Public Inquiry”. - Para 57 (c).

The issue in these matters is who has the greater public interest immunity – the Executive in claims of public interest immunity for non-disclosure of Cabinet documents or the Parliament in claims of scrutiny and superintendence of the Executive government. From the above discussion, in my opinion, the public interest in providing documents to Parliament for scrutiny outweighs the public interest immunity in non-disclosure to Parliament.

How might the Committee deal with Cabinet documents that comes into its possession?

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<sup>4</sup> Operation Keppel, “Ruling regarding the course that should be taken in the Public Inquiry in relation to Cabinet documents and Cabinet deliberations”, The Hon. Ruth McColl AO SC Assistant Commissioner 17 October 2021.

I do not believe there is any legal impediment to a committee making use of a leaked Cabinet document that comes into its possession. Cabinet “leaks” are sometimes published in the media without consequences. Committee proceedings and documents that come into its possession are protected by absolute privilege under the Defamation Act 2005, as well as Article 9 of the Bill of Rights 1688.

What process should a committee follow when Cabinet documents come into its possession?

Like the Courts and other tribunals, it involves a balancing act in determining the public interest against disclosure and the public interest in publishing information relevant to its inquiry and terms of reference. Of course, the Committee has power to summon witnesses and ask lawful questions concerning a Cabinet document.

If the ICAC has power by statute to order the production and disclosure of Cabinet documents, then surely the Council and its Committee as the “Grand Inquest of the Nation” has a concomitant power.

In a greater scheme of the House and a Committee dealing with issues of public interest immunity over Cabinet documents, I would suggest that an appropriate mechanism could be a resolution of the House or sessional order, comprising a procedure involving contesting a claim of public interest immunity confidentiality through an Independent Arbiter in a similar manner to that which applies to claims of privilege under SO 52.

Such a scheme would allow the Executive to make submissions to an Arbiter in determining whether Cabinet deliberations or Cabinet documents should be publicly disclosed.

Your sincerely

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Parliamentary Ethics Adviser