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EGAN v WILLIS & CAHILL: DEFINING THE POWERS OF THE NEW SOUTH WALES LEGISLATIVE COUNCIL

by

Gareth Griffith

Occasional Paper No 5
March 1997

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ABSTRACT

Relying on the inherent common law powers of the Parliament, the NSW Court of Appeal held that the Legislative Council has the power to order the production of documents by a member of that House, even when that member is a minister of the executive government. This finding was achieved: first, by reference to the status the NSW Parliament enjoys, subsequent to the *Australia Acts 1986*, as part of a sovereign, independent and federal nation; and, secondly, by defining the function of scrutinising the workings of the executive arm of government as part of the 'necessary' powers of the Legislative Council.

1. INTRODUCTION

The unanimous decision of the NSW Court of Appeal in *Egan v Willis & Cahill* (henceforth *Egan v Willis*)[1] was handed down on 29 November 1996. In it the Court found, among other things, that 'A power to order the production of State papers is reasonably necessary for the proper exercise by the Legislative Council of its functions'. In arriving at this finding, the Court emphasised the 'uncertainty surrounding the power of the Legislative Council to compel the production of documents' and explained that, for historical and other reasons, there are 'differences between the New South Wales Parliament and other parliaments where such an issue might arise'.[2]

Whereas all the other Australian Parliaments have legislated to define their powers and privileges, either by reference to the powers enjoyed by the British House of Commons and/or in more express terms, the NSW Parliament has no legislation comprehensively defining its powers and privileges.[3] Briefly, to explain the relevance of this, the situation in Australia is that, in the absence of such specific 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 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'.[4] Two leading cases to note in this regard are *Kielley v Carson*[5] and *Barton v Taylor*,[6] where it was decided that protective and self-defensive powers, not punitive, are necessary.

That is the position currently in NSW where the Parliament has only the following powers and privileges: as are implied by reason of necessity; those imported by the adoption of the *Bill of Rights 1689*; such privilege as is conferred by the *Defamation Act 1974*; and such privilege as is conferred by other legislation, including the *Parliamentary Evidence Act 1901*. Some aspects of parliamentary privilege are the subject of legislation in NSW, therefore, but it remains the case that there is nothing like a comprehensive statutory regime in place. Certainly, unlike other Australian jurisdictions, in NSW the power to order

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1 *Egan v Willis* (SCNSW, unreported 29 November 1996 - CA40374/96;AD3008/96).

2 Ibid at 19 (per Gleeson CJ); at 4 (per Mahoney P); and at 1 (per Priestley JA). Note that each judgment is numbered separately.

3 Parliament of NSW, Legislative Council, Standing Committee Upon Parliamentary Privilege, *Report Concerning the Publication of an Article Appearing in the Sun Herald Newspaper Containing Details of In Camera Evidence*, October 1993, p 19.

4 (1842) 4 Moo PC 63; 13 ER 225.

5 Ibid.

6 (1886) 11 App. Cas. 197.

production of documents has not been addressed in express terms specifically,[7] or by reference to the powers of the British House of Commons.[8]

It is also the case that the extent and level of the inherent, common law powers of the NSW Parliament is 'a point of contention'.[9] Having reviewed these, the Legislative Council's Standing Committee on Parliamentary Privilege and Ethics concluded: 'The powers of the Parliament to order the tabling of papers and to enforce such orders by the imposition of sanctions are uncertain and the subject of conflicting legal opinion'.[10]

The present case offered an opportunity for the Court of Appeal to clarify these issues.[11] Of particular interest in *Egan v Willis* is the reasoning adopted by the Court to close (partially at least) the gap between the powers of the NSW Parliament and other comparable Parliaments. This was achieved, first, by reference to the status the NSW Parliament now enjoys as part of a sovereign, independent and federal nation, free of the vestiges of its colonial past; and, secondly, by defining the function of scrutinising the workings of the executive arm of government as part of the 'necessary' powers of the Legislative Council. In relation to the former, Priestley JA spoke of the 'enhancement of the powers of the New South Wales Legislature since *Armstrong v Budd* was decided' in 1969.[12] With reference to the latter, in *Egan v Willis* the powers at issue go to the heart of the legislature's capacity to scrutinise the activities of the executive.

On 3 December 1996 the Hon Michael Egan MLC informed the Legislative Council that the Government had commenced proceedings in the High Court to seek special leave to appeal against the Court of Appeal's decision.[13] It may be, therefore, that the Court of Appeal's definition of the powers of the NSW Parliament will be overturned. Indeed, the Court itself

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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.

9 NSW Attorney General's Department, *Discussion Paper - Parliamentary Privilege in New South Wales*, 1991, p 18.

10 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, p 24.

11 *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162. The High Court observed that disputes as to the existence of a power, privilege or immunity of a House of Parliament are justiciable.

12 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 12 (per Priestley JA); *Armstrong v Budd* (1969) 71 SR (NSW) 386.

13 *NSWPD*, 3 December 1996, p 2.

recognised that several important questions remain unanswered, notably with respect to the 'just exceptions' which might apply to the NSW Parliament's power to order the tabling of State papers.[14]

2. THE FACTS

The plaintiff in the case, the NSW Treasurer, Vice President of the Executive Council and Leader of the Government in the Legislative Council, Hon Michael Egan MLC, claimed to have been the victim of an unlawful trespass when he was physically removed from the precincts of Parliament on 2 May 1996. On the other side, the defendants, the President of the Legislative Council, Hon Max Willis MLC, and the Usher of the Black Rod claimed that the plaintiff was lawfully removed pursuant to a resolution suspending the plaintiff from the services of the Legislative Council for the remainder of that day's sitting. As Priestley JA observed, effectively the parties were the 'Executive Government on the one hand, and the Legislative Council on the other'.[15]

Mr Egan's eventual suspension was the culmination of a series of unsuccessful attempts by the Legislative Council over several weeks in October/November 1995 to compel the production to the Council of certain State papers concerning the following matters: the closure of veterinary laboratories; the Government's negotiations with Twentieth Century Fox regarding the conversion of the Sydney Showground into a film complex; and the recentralisation of the Department of Education.[16] On 13 November 1995 the Council adjudged the Leader of the Government guilty of contempt for his failure to comply with orders of the House relating to the tabling of the relevant documents held by the Government and suspended him for seven days. An amendment to the motion resulted in the Minister not being suspended but, instead, in the matter being referred to the Standing Committee on Parliamentary Privilege and Ethics 'for inquiry and report on what sanction should be enforced where a Minister fails to obey an order of the House to table papers by a certain date'.

Then on 2 May 1996, twelve days before the Committee's report was itself tabled,[17] the Legislative Council again adjudged the Leader of the Government guilty of contempt, this time for his failure to comply with an order of the House, dated 23 April 1996, requiring the tabling of documents relating to the Government's decision to veto a gold mine at Lake Cowal in the States's central west.[18] The order required the tabling of documents by 30

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14 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 22 and 28 (per Gleeson CJ).

15 Ibid at 1 (per Priestley JA).

16 *NSWPD*, 13 November 1995, p 2988.

17 *NSWPD*, 14 May 1996, p 828.

18 *NSWPD*, 2 May 1996, p 692 and p 703.

April 1996. Responding to the resolution of 23 April 1996, the Cabinet made a determination on 29 April 1996 in these terms: 'That Cabinet agreed that Ministers should act on advice previously obtained from Crown Law Officers and, accordingly, decline to comply with any orders from *either House of Parliament* to table documents *on the grounds that such orders are invalid and beyond power*' (emphasis added).[19] Consistent with this determination, the relevant documents were not tabled by the Government.

On 1 May 1996 the House agreed to a motion censuring the Leader of the Government and calling on him to table the documents or deliver them to the Clerk before 9.30 a.m. the next day. That resolution was not complied with and, as noted, on the following day the Leader of the Government was adjudged to be guilty of contempt. The House further ordered in this regard on 2 May 1996 that the Leader of the Government 'attend at the Bar of this House on the next sitting day' to explain his reasons for non-compliance with all the above orders requiring the tabling of documents.

In accordance with Standing Order 262 and 'practice', upon the suspension of Mr Egan, the President of the Legislative Council directed the Usher of the Black Rod to escort the Member from 'the precincts of Parliament'.[20] This was taken to mean that the Leader of the Government be removed, not only from the Legislative Council Chamber and from the rooms set apart for the use of its Members, but into Macquarie Street.[21] In the event Mr Egan defied the order of the House and was removed against his will. Standing Order 262 of the Legislative Council provides:

> When a Member is suspended from the service of, or removed from the House, he shall be excluded from the House and from all the rooms set apart for the use of the Members.

3. THE ISSUES

As indicated by Mahoney P, to a significant extent the issues argued before the Court of Appeal were confined to the following matters of principle:

- whether the Legislative Council has power to require a Member of that House to produce papers to it;

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19 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 3 (per Mahoney P). That same constitutional argument was relied on by the Leader of the Government in refusing to comply with the order of the House, a stance which resulted in his suspension on 2 May 1996: *NSWPD*, 1 May 1996, p 580.

20 *NSWPD*, 2 May 1996, p 712.

21 *NSWPD*, 2 May 1996, p 713. The President's interpretation was questioned by the Hon JR Johnson MLC who referred to the views expressed in the 1988 *Report of Proceedings of Eighteenth Conference of Presiding Officers and Clerks*.

- (if it has) whether it has power to require that of a minister of the executive government; and
- (if it has) whether it has power, upon refusal to produce such papers, to impose the sanction of removal of the Member from the House.[22]

From this it would seem that the case before the Court of Appeal did not address those issues of public interest immunity which the Government had raised in the course of debate on the motions requiring the tabling of documents in October and November 1995.[23] Gleeson CJ noted in this respect, 'The only reason advanced, either by Cabinet or the plaintiff, for the refusal to produce documents is the Legislative Council's asserted lack of power to order their production'. His Honour added, however, that the issue of immunity could 'be raised at a later stage if the dispute goes further; but no such issue has arisen yet'.[24]

4. THE DECISION

The Court of Appeal held:

- the Legislative Council has such implied or inherent powers as are reasonably necessary for its existence and for the proper exercise of its functions;
- a power to order the production of State papers is reasonably necessary for the proper exercise by the Legislative Council of its functions;
- the resolution of the Legislative Council suspending the plaintiff was within power as a measure of self-protection and coercion;
- the resolution of the Legislative Council was not shown to be invalid; and
- the Standing Orders of the Legislative Council warranted the removal of the plaintiff only from the Legislative Council Chamber and not from the land occupied by the NSW Parliament. The extent of the removal was, therefore, excessive and there had

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[22] *Egan v Willis* (SCNSW, unreported 29 November 1996) at 1 (per Mahoney P).

[23] *NSWPD*, 26 October 1995, p 2402; these grounds are discussed in the report of the Standing Committee on Parliamentary Privilege and Ethics, *Inquiry Into Sanctions Where a Minister Fails To Table Documents*, May 1996, p 2. The report notes that, at various times, the Government argued that: the documents were subject to public interest immunity; the documents were 'commercial in confidence' documents; it was against public policy to release documents that would be defined under the *Freedom of Information Act* as internal working documents; and that the documents were subject to legal professional privilege.

[24] *Egan v Willis* (SCNSW, unreported 29 November 1996) at 28 (per Gleeson CJ).

been a trespass.

The basis for each of these findings can be considered separately.

5. A LACK OF STATUTORY POWER

The case did not concern 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.[25] As noted, that is the position in several Australian jurisdictions. In NSW, on the other hand, no relevant legislation has been enacted.[26] What is relevant is the Legislative Council's Standing Order 18 which 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.[27]

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),[28] it is apparent that: (i) a power is 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

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[25] Ibid at 4 (per Mahoney P).

[26] Section 5 of the *Parliamentary Evidence Act 1901* does not apply. That section requires the attendance of an MP to give evidence before either one of the Houses of Parliament or before a parliamentary committee.

[27] 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.

[28] 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.

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.[29] 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.[30] That interpretation was accepted by the Court of Appeal.[31]

6. THE IMPLIED OR INHERENT POWERS OF THE LEGISLATIVE COUNCIL

For the source of the relevant power, therefore, we must look to the common law implied or inherent powers of the NSW Parliament. These have been defined by the courts over the years and, in this regard, the State's colonial heritage has played a significant part. For the purposes of the present discussion two key points can be made.

First, it was established in a series of cases in the nineteenth century that the powers and privileges of colonial legislatures are not co-extensive with those of the British Houses of Parliament because, as Enid Campbell explains, 'the latter rest on ancient law and custom and the supremacy of the Imperial Parliament'.[32] In particular, it was decided by the Privy Council in *Kielley v Carson*[33] that the Legislative Assembly of Newfoundland lacked power

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[29] 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.

[30] 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.

[31] *Egan v Willis* (SCNSW, unreported 29 November 1996) at 25 (per Gleeson CJ).

[32] E Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press 1966, p 17.

[33] (1842) 4 Moo. PC 63; 13 ER 225.

to order the arrest of a stranger so that he might be brought before the Assembly to be punished for a libel on a member of the Assembly concerning his conduct as a member of that body. The British House of Commons, it was said, exercised penal jurisdiction not because such jurisdiction was incidental to the powers of a representative legislature, but by 'ancient usage and prescription' connected to the fact that, together with the House of Lords, it had inherited the jurisdiction of the High Court of Parliament.[34] In *Egan v Willis*, Gleeson CJ observed:

> Whilst the English Houses of Parliament, originally a court, have, by the law and custom of parliament, power to punish for contempt, such a power has the potential to work as an infringement of the liberties of the subject. The claims of local colonial legislatures to have power to punish citizens, outside courts of law, and outside the operation of the ordinary legal system, were strongly resisted.[35]

After the enactment of the *Colonial Laws Validity Act 1865* it was clear that colonial legislatures had the capacity to confer on themselves the same (or even greater) privileges as those enjoyed by the British Houses of Parliament. To repeat, this has not occurred in NSW. Alone among the Australian States, the NSW Houses of Parliament 'lacks any general power to punish breaches of privileges and contempt'.[36]

Secondly, it was decided in *Kielley v Carson* that colonial legislatures have only such powers 'as are *necessary* to the existence of such a body, and the proper exercise of the functions which it is intended to execute' (emphasis added).[37] That formula was refined by Lord Selborne in *Barton v Taylor*, a case concerning the power of the NSW Legislative Assembly to suspend a member from the service of the House, where it was said that 'Whatever, in a *reasonable* sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority' (emphasis added).[38] Continuing, Lord Selborne observed, 'For these purposes, protective and self-defensive powers only, and not punitive, are necessary'.[39] That approach was followed in

[34] E Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press 1966, p 19.

[35] *Egan v Willis* (SCNSW, unreported 29 November 1996) at 29 (per Gleeson CJ).

[36] E Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press 1966, p 26.

[37] (1842) 4 Moo. PC 63 at 88; 13 ER 225 at 234.

[38] (1886) 11 App. Cas. 197 at 203.

[39] Ibid. It was decided that suspension under the Standing Orders for a definite period was reasonably necessary in terms of the functions of the House, but that punitive action and unconditional suspension during the pleasure of the Assembly were not permitted,.

Armstrong v Budd,[40] a case affirming 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. There Wallace P added the further refinement that:

> the critical question is to decide what is 'reasonable' *under present-day conditions and modern habits of thought* to preserve the existence and proper exercise of the functions of the Legislative Council as it now exists (emphasis added).[41]

7. *EGAN V WILLIS* - FORMULATING A CONTEMPORARY VIEW OF THE 'FUNCTIONS' OF THE LEGISLATIVE COUNCIL

In arriving at the above conclusion, Wallace P made the following observations on the constitutional history of NSW:

> Now whilst this Court is not necessarily bound by all decisions of the Privy Council on appeals from other countries, the decisions to which I have referred contain dicta of a relevant and general application and so we are bound by them, even though uttered over 125 years ago. Yet such dicta must in my opinion be construed and applied in the light of modern conditions and current constitutional situations. Thus the members of the Privy Council who decided the cases to which reference has been made lived in an age when New South Wales if not in every sense a colony was customarily described as such by the Privy Council...and long before the establishment of a Commonwealth of Australia Constitution and the enactment of the *Statute of Westminster*. The constitutional scheme under which Australia has been organized and governed since 1901 is that the States have plenary powers subject to the stated powers of the Federal Government and subject also to certain residual qualifications such as those which derive from the *Colonial Laws Validity Act*, the Third Charter of Justice and the Ordinances dealing with appeals from State courts direct to the Privy Council. But to speak of the New South Wales Parliament - the oldest in the Commonwealth - as a colonial legislature would today be an anachronism, even though it is not within the *Statute of Westminster*. Nevertheless it cannot be overlooked that any power of our Legislative Council to expel a member on the stated ground can only derive from the fact that we were established by, and gained our common law from, England.[42]

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40 (1969) 71 SR (NSW) 386.

41 Ibid at 402.

42 Ibid at 401-402.

The judgments in *Egan v Willis* extend that train of thought which, on one side, acknowledges the significance of our common law heritage but, on the other, insists that it must be interpreted in terms of the contemporary constitutional situation. For Priestley JA, *Armstrong v Budd* is authority for the proposition that in considering whether the Legislative Council has 'the implied power claimed in the present case the court must consider the common law as it stands today'.[43] Elaborating on the same theme, Gleeson JC observed:

> The development of the New South Wales Parliament from a subordinate colonial legislature to a legislature of a State which is part of a sovereign, independent, and federal nation, is of central importance to the application, in modern circumstances, of the common law principles relating to the powers of parliament.[44]

The most significant development in this respect since *Armstrong v Budd* was the passing of the *Australia Acts* in 1986 which, in relation to the Australian States, severed the remaining vestiges of their colonial status. The changes brought about by the *Australia Acts* included: the *Colonial Laws Validity Act 1865*, which restricted but continued in operation the common law rule giving supremacy to British statutes, ceased to apply to the States (section 3);[45] section 11 of the *Australia Acts* ended the possibility of appeals from any Australian court (other than the High Court) to the Privy Council; and under section 10 Her Majesty's Government in the United Kingdom is declared to have no responsibility for the government of any State.

For Mahoney P, the *Australia Acts* altered 'the grundnorm of the Australian legal system', making the legislatures of the States (subject to the provisions and effect of the Australian Constitution) 'independent political entities in a federal system'; the State parliaments are said, therefore, to have 'plenary powers appropriate to such legislative bodies', with these powers deriving, not from a grant of power made by the British Parliament, 'but from their characters as organs representative of the democratic societies which they represent'.[46]

Further, just as the inherent powers of the State legislatures, and accordingly, of the Houses composing them, are to be understood in this expanded context, so too are the functions which they perform. In other words, there is no longer any question of the powers and functions of the Legislative Council being read down by reference to any aspect of its

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43 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 7 (per Priestley JA); at 21-22 (per Mahoney P).

44 Ibid at 15 (per Gleeson CJ).

45 The same level of legal independence had been gained at the Federal level by the *Statute of Westminster 1931*, which was adopted in 1942.

46 Ibid at 22 (per Mahoney P).

colonial heritage.[47] There has, therefore, been an enhancement of the powers of the NSW Parliament since *Armstrong v Budd.* Priestley JA commented in this regard: 'It is in the light of that present situation that the question what is reasonably necessary for the Legislative Council to exercise its functions properly must be considered'.[48]

8. THE POWER TO ORDER THE PRODUCTION OF STATE PAPERS AND THE FUNCTIONS OF THE LEGISLATIVE COUNCIL

That, in turn, begged the more immediate question concerning the nature of the Council's functions in the present constitutional situation. For Gleeson CJ the issue could not be resolved by an appeal to political theory, by reference to such protean concepts as responsible government, representative democracy or accountability. The question of the Legislative Council's power was legal in nature and had to be answered, said Gleeson CJ, 'according to law'.[49] In pursuit of this 'legal' answer his Honour looked to the powers possessed by comparable legislative bodies, notably the British Parliament and the Australian Senate. With respect to the British Parliament, *Erskine May's Parliamentary Practice* states: 'Each House has the power to call for the production of papers by means of a motion for a return'.[50] For the Australian Senate, *Odgers' Australian Senate Practice* observes that 'The Senate may make an order for the production of documents' and goes on to say that such 'orders for returns' are 'relatively common' and to note that 'Documents called for are usually the subject of some political controversy..'.[51] In addition, Gleeson CJ cited the relevant legislative provisions in the various Australian States. Agreeing with this comparative line of analysis, Mahoney P commented, 'As the Chief Justice has indicated, the power to obtain information is seen as a necessary incident of other comparable legislatures'.[52]

The importance of the developments associated with the *Australia Acts* to the rationale of the decision becomes clear in this light, for without those statutes such comparisons would be more difficult to make, requiring even further qualification. Central to the Government's argument in *Egan v Willis* was that the power claimed by the Legislative Council 'was not

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47 Ibid at 26 (per Gleeson CJ); at 22-23 (per Mahoney P); and at 12 (per Priestley JA).

48 Ibid at 12 (per Priestley JA).

49 Ibid at 18 (per Gleeson CJ).

50 CJ Boulton ed, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st ed, Butterworths 1989, pp 213-214. The comment is made that this power is rarely resorted to in modern times, though it 'has continuing importance as it may be delegated to committees, enabling them to send for papers and records'. It is added: 'There is, however, a general rule that papers should only be ordered on subjects which are of a public or official character'.

51 H Evans ed, *Odgers' Australian Senate Practice*, 7th ed, AGPS 1995, pp 453-454.

52 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 9 (per Mahoney P).

necessary to its existence or the proper exercise of its functions', an argument which looked to the relevant nineteenth century cases for support and to the restricted conception of the inherent powers of the NSW Parliament found therein.[53] This argument was submitted to the Court notwithstanding the fact that resolutions requiring the tabling of documents are anything but novel. Indeed, Gleeson CJ said in this regard:

> The Court has been given details of many occasions, going back to 1856, when the Legislative Council has passed resolutions requiring the production to the Council of State papers. It appears that, in the great majority of such instances, the requirement has been obeyed without demur.[54]

Looking closer at the history of the Legislative Council, from its establishment in 1823[55] to 1843[56] the members of the Council were all nominated by the Governor to serve an essentially advisory function. Between 1843 and 1856 the Legislative Council was partly elected and partly nominated by the Governor. After the establishment of a form of responsible government in NSW in 1856 Council members were nominated initially for five years and thereafter for life by the Governor on the advice of the Executive Council, a situation which remained in place till 1933.[57] Members of the Legislative Assembly, on the other hand, were elected under a franchise which, after 1858, approximated a form of universal male suffrage. Subsequent to the reforms of 1933 Legislative Council members were elected by members of the two Houses, a system which remained in place till 1978 when the Upper House was at last elected by direct popular vote, using a system of proportional representation. However, membership of the Council remained on a part-time basis until as late as 1984.[58] As to its functions, the Council was designed to interpose 'a safe, revising, deliberative and conservative element between the Lower House and Her

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53 Ibid at 5 (per Priestley JA).

54 Ibid at 6 (per Gleeson CJ).

55 4 Geo IV c.96.

56 5 and 6 Vic c. 76 of 1842.

57 18 and 19 Vic c.54 of 1855. Before the reforms of 1933 a maximum number of members was not specified, leaving the way open for governments to swamp an uncooperative Legislative Council: B Page, *The Legislative Council of NSW: Past, Present and Future*, NSW Parliamentary Library 1990, p 1.

58 K Turner, 'Some changes in the NSW Legislative Council since 1978' in GS Reid (ed), *The Role of the Upper Houses Today*, proceedings of the Fourth Annual Workshop of the Australasian Study of Parliament Group, University of Tasmania, 1983. Upper House members received salary parity with Lower House members from 19 April 1985, with the Parliamentary Remuneration Tribunal commenting that the demand upon MLCs 'so exceed those previously required that the office of Legislative Councillor is no longer comparable to such office prior to 1978': *Report and Determinations of the Parliamentary Remuneration Tribunal*, 31 May 1985, p 17.

Majesty's Representative'.[59] Broadly speaking, it can be said that the Council had developed into a House of review by the 1860s, the operation of which was complicated, as RS Parker suggests, by the forces of class and, later, party allegiances.[60]

In any event, the Court of Appeal in *Egan v Willis* was convinced that, under the present constitutional situation, a power to order the production of State papers, which is possessed by comparable legislatures, 'is reasonably necessary for the proper exercise by the Legislative Council of its functions'.[61] Both Gleeson CJ and Priestley JA referred in this regard to American authority, notably *Quinn v United States*,[62] where it was held that the power to compel evidence is coextensive with the power to legislate. However Gleeson CJ was most explicit in stating that the 'reasonable necessity' at issue 'related both to the legislative functions of Parliament and also to the role of the Parliament, (including both Houses of Parliament), in scrutinising the executive'.[63] 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'.[64] Gleeson CJ concluded:

> 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.[65]

Gleeson CJ's legal justification was founded therefore upon the concept of necessity and based on the argument that the performance of Parliament's scrutiny and legislative functions require the power for either House to obtain information by compelling the production of documents. Importantly, no distinction could be drawn for these purposes between the Upper and the Lower Houses. This was contrary to what the Government had claimed in the course of the parliamentary debate where much was made of the fact that,

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59 RS Parker, *The Government of New South Wales*, University of Queensland Press 1978, p 197.

60 Ibid, pp 203-206; an analytical account of the functions of the Legislative Council is found in - K Turner, *House of Review? The NSW Legislative Council, 1934-68*, Sydney University Press 1969.

61 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 26 (per Gleeson CJ); at 7 (per Mahoney P); and at 13 (per Priestley JA).

62 (1955) 349 US 155.

63 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 27 (per Gleeson CJ).

64 WR Anson, *The Law of the Constitution*, The Clarendon Press 1886, p 319.

65 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 28 (per Gleeson CJ).

under the doctrine of responsible government, it is the support of the Lower House that is vital to the survival of any government, with the Upper House playing a subordinate role as a House of review.[66]

For Priestley JA, who emphasised the 'constitutional functions' of the Legislative Council based on the general legislative powers granted to it under section 5 of the NSW *Constitution Act 1902*, the position of the Upper House was expressed in these broad 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.[67]

Mahoney P spoke in similar, if somewhat narrower, terms[68] saying that the concept of necessity requires the courts to consider the functions of the Houses of Parliament in the light of the changes in society itself. Whereas in earlier times, according to His Honour, the Legislature might have relied on 'the knowledge or the assumptions of its members' in the performance of its legislative functions, there is now an imperative need for it to be informed properly about the matters before it. He continued:

> It is, I think, to be expected that legislation in this State will now be based,

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66 *NSWPD*, 1 May 1995, p 579.

67 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 13-14 (per Priestley JA). The only limitations on the power to investigate recognised by Priestley JA were those 'asserted by persons claiming privilege of various kinds', something which is discussed later in this paper.

68 Mahoney P distinguished between Parliament's 'legislative functions' and those functions 'which it has merely to inquire and authorise inquiry upon matters which interest it'. The significance of this was drawn out when he added: 'Where the Crown or the legislative arm of government is concerned merely with an inquiry, it has the power to obtain but in general not to compel information' (Ibid at 10 per Mahoney P). Thus, for Mahoney P at least, the power to *compel* the production of documents was necessary to the Parliament's legislative functions (however defined), but not otherwise.

> not upon assumptions or ideologies, but upon what that information shows to be necessary and appropriate. It is not merely convenient but necessary that the legislature have access to information of every kind relevant to the informed discharge of its functions.[69]

9. COMMENTS

Mahoney P was clear that, with respect to the investigative powers of the Upper House, no distinction is to be made 'between Members of the Legislative Council who are Ministers and Members who are not'.[70] However, it could be argued that the right of the Legislative Council to be informed about matters relevant to legislation applies in stronger terms to the disclosure of information by Ministers, especially to the extent that the rationale for the inherent power is found in the scrutiny of the Executive by the House of Review. It is worth emphasising that the relevant resolution of the Council was directed towards Mr Egan in his capacity 'as the representative of the government in the House' and further to the doctrine of Cabinet collective responsibility.[71] What is clear is that, under the principle of necessity, only documents relevant to the 'necessary functions' of the House must be tabled.

Taking up Gleeson CJ's statement that the Court's reasoning could not be based on the unstable concepts of political theory, another comment is that the 'legal' doctrine of necessity would itself appear to be founded on what might be called the political *grundnorm* of representative democracy and the supremacy of parliament. This is to suggest that, in this context at least, the distinction between legal and political concepts is an artificial one: at its strongest the Court's preference for legal certainty over political uncertainty requires us to define the necessary functions of a quintessentially political institution without using the language of politics. Another observation to make in this regard is that the Legislative Council has undergone significant reform since the time of *Armstrong v Budd*, all of which must strengthen the claim that the Council's necessary powers are to be interpreted more widely, consistent with its standing as a House of review constituted along contemporary, democratic lines. Thus, since 1978 its members have been directly elected by popular vote and have, since 1984, been remunerated on a full time basis; since reconstitution members have been more active in their parliamentary duties in the chamber itself;[72] moreover, a feature of recent years has been the development of Upper House Standing Committees to

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[69] Ibid at 9 (per Mahoney P).

[70] Ibid at 15 (per Mahoney P).

[71] Ibid at 41 (per Gleeson CJ).

[72] B Page, *The Legislative Council of NSW: Past, Present and Future*, NSW Parliamentary Library 1990, p 9.

the point where there are now four in all.[73] These reforms are central to the credibility of the Council as a viable House of review, comparable to the Australian Senate and other like institutions. Would the Court of Appeal have arrived as readily at the conclusion it did, the *Australia Acts* notwithstanding, if members of the Legislative Council were still part-time legislators, elected by indirect means and lacking a system of standing committees to provide a basis for its reviewing function?

A final comment refers to a tantalising suggestion made by the Chief Justice that the contest between the Executive and the Upper House in the present case 'may have an effect upon the shape of responsible government in this State'.[74] However, this may derive from his Honour's somewhat expansive conception of what is meant by the term 'responsible government'; presumably, it is not intended to imply that the support of the Upper House should be at least as important as that of the Lower House to the survival of the government. In other words, the present case does not appear to develop the notion of the 'responsibility' of the Executive to the Upper House beyond what is appropriate to a House of review.[75]

10. SANCTIONS AVAILABLE TO THE LEGISLATIVE COUNCIL

Having established that the Council has the power to order the production of State papers, it remains to be seen what sanctions are available to it in the event of non-compliance with such an order. John Evans, Clerk of the Parliaments, has said in this regard:

> The power to call for the production of documents is of little practical use if the House does not have power to enforce its orders. The Legislative Council's powers in this area are based on its inherent common law powers.
>
> The Courts have held that the inherent powers do not include a power to punish for contempt, as such a power is not considered to be necessary to the existence of the House and the proper exercise of its functions. However, in certain cases the Courts have confirmed the existence of inherent powers to impose sanctions on Members who have disobeyed

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73 These Standing Committees are on: Parliamentary Privilege and Ethics; State Development; Social Issues; and Law and Justice. Another feature of recent years has been the holding of Joint Estimates Committees, from 1991 to 1994; interestingly, in 1995 and 1996 there have only been Legislative Council Estimates Committees.

74 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 18 (per Gleeson CJ).

75 However, as the events of 1975 showed, at the federal level at least the position of an Upper House in relation the doctrine of responsible government can be controversial. Gough Whitlam has spoken in this regard of 'Barwick's theory of the Australian constitution' which boils down 'to the proposition that, to be legitimate, an Australian Government must have a majority in both Houses of Parliament...': EG Whitlam, 'The coup twenty years after', National Press Club, 8 November 1995.

> orders of the House. A distinction appears to have been drawn between the use of sanctions to punish (which is not lawful), and the use of sanctions to enforce, or give effect to, lawful orders of the House.[76]

Again, therefore, the extent of the power to sanction is said to be governed by the principle of necessity. On that basis, the present 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.[77]

In this case Hon Michael Egan MLC was, by resolution: adjudged guilty of contempt; suspended from the services of the House for the remainder of the day's sitting; and ordered to attend in his place at the table of the House on the next sitting day to explain his conduct. These latter measures were found, in the circumstances of the case, to be self-protective and coercive in nature and, therefore, consistent with the Legislative Council's powers to 'preserve the integrity of its own procedures' and 'to compel compliance with its orders' respectively.[78] Only in removing Mr Egan from the precincts of Parliament and into Macquarie Street ('the footpath point') had the Council transgressed its powers, it being the case that Standing Order 262 required that a Member be excluded only 'from the House and from all the rooms set apart for the use of the Members'.

11. COMMENTS ON THE SANCTIONS AVAILABLE TO THE LEGISLATIVE COUNCIL

The present case leaves the 'coercive' powers of the Council relatively undefined, leaving these to be settled on a case by case basis. Further, the coercive powers used on this occasion were hardly onerous in nature. The question is whether the measures used here would tend to be at the upper limits of what is available to the Council or, conversely, would harsher measures be considered appropriate in certain cases, thereby blurring the already difficult distinction between coercion and punishment? What would these measures be, one

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[76] J Evans, Powers of the Legislative Council to order the production of documents', *27th Conference of Presiding Officers and Clerks*, Hobart 1996.

[77] *Egan v Willis* (SCNSW, unreported 29 November 1996) at 32 (per Gleeson CJ).

[78] Ibid at 41-42 (per Gleeson CJ).

might ask, and in what circumstances would they pass the test of what is 'reasonably necessary' under present day conditions and modern habits of thought? For example, would suspension from the House until such time as the required documents are produced be an appropriate sanction in certain circumstances? In *Barton v Taylor*[79] the Privy Council found in favour of the power to suspend a Member during the continuance of the current sitting in order to protect the House (in this case the Legislative Assembly) against obstruction or disturbance of its proceedings. However, the power did not extend to justify punitive action, such as the unconditional suspension of a Member for an indefinite time. Whether a sanction of this kind would be considered appropriate in any particular case to enforce an order to produce documents is another matter. Brett Walker SC had this to say on the issue:

> On balance, and with real doubt, I advise that the Legislative Council has the power at first to suspend for a specified period a Member from the service of the House in order to prevent that Member from taking part in proceedings which that Member has impeded by his or her disobedience. Eventually, if the defiance continued beyond the period of suspension, there must be a respectable argument for the power to expel that Member and thereby vacate his or her seat, by a broad analogy with *Armstrong v Budd*. That is, just as a person of impaired integrity may be expelled, so (it would be argued) should a person who, regardless of his or her good faith, insists upon substituting his or her personal judgement of his or her obligations to the House for the formal judgement of the House. There is much to be said for the proposition that the Legislative Council needs to have the power to remove from itself Members who defy its own exercise of power to inform debate before it.
>
> Naturally, the propriety of such drastic action will depend entirely on the existence of such power to expel, and that could be adjudicated in the courts of law.[80]

It may be that a purposive test could be applied to distinguish between punitive and coercive powers in this context: on this basis, it is not what happens to the offender that matters, viewed in terms of degrees of severity, but the purpose motivating the action of the House. In this regard, Patricia Leopold has commented, albeit in a British context, that 'If the House decided to commit a reluctant witness [before a committee] to prison, this would be the exercise of a coercive rather than a punitive power, since the object would be to obtain

79 (1886) 11 AC 197.

80 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.

the evidence required, rather than to punish the individual concerned'.[81] But, again, in NSW any action would have to satisfy the overriding test of necessity.

Be that as it may, in *Egan v Willis* Gleeson CJ suggested that the issue of appropriate sanctions would revolve as much around constitutional conventions and proprieties as legal considerations. Importantly, it may be the case that, at least in the context of this kind of conflict between the Executive and Parliament, sanctions may tend to have more symbolic value than any real practical effect.[82] It can be suggested that, to a significant extent, the purpose of such sanctions is to make the largely political point that the Executive is not playing the constitutional 'game' according to the rules. Of course, continued recalcitrance on the part of the Executive may entail some political costs and this may, in turn, prompt the government of the day to release the required documents.[83] Indirectly, therefore, sanctions may have some instrumental value but, as suggested in the following discussion of the subject of public interest immunity, it may be best to resolve the conflicts that arise politically, not legally. Again, some of the parliamentary mechanisms discussed in the next section of the paper for the resolution of conflicts of this kind would, it is hoped, obviate the need to explore the use of more coercive sanctions by either House of the NSW Parliament.

12. JUST EXCEPTIONS AND THE ISSUE OF PUBLIC INTEREST IMMUNITY

An unresolved issue which remains to be discussed is that relating to public interest immunity. The point to make here is that, having found that a power to order the production of State papers exists, the Court did not suggest that it was of an absolute nature. On the contrary, just as necessity was said to govern the source of that power, it also governs its extent. Paraphrasing Gleeson CJ, necessity can be said to embrace such a power 'subject to just exceptions'. His Honour elaborated:

> The present case does not require a consideration of the extent to which there may be power to compel the production of private documents... Nor does the present case require a decision as to what constitute just exceptions. No claim for public interest immunity or any other form of privilege has so far been made in relation to the documents called for by

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81 PM Leopold, 'The power of the House of Commons to question private individuals' (Winter 1992) *Public Law* 548.

82 A contrast can be drawn here with the expulsion of a Member, where there is a different balance between the symbolic and practical effect of the sanction in question.

83 The experience of the Senate with the loans affair in 1975 and the bottom of the harbour controversy in 1982 may be instructive in this regard. There the penalty imposed on the government for refusing to table documents was a concerted political attack leading into general elections which in both cases were lost by the government of the day.

resolutions of the Legislative Council.[84]

In the context of parliamentary investigative powers, the issue of public interest immunity[85] begs a number of questions. First, directly at issue in this case is the question whether the power of the Houses of the NSW Parliament (or of any other Australian Parliament for that matter) to order the production of documents is qualified by a right on the part of Ministers of the Crown to determine that the relevant documents shall not be produced on the ground that their disclosure would be against the public interest.[86] If limits on the power of the Houses of Parliament do apply, a second question is: should these be adjudicated by a third party, namely, the courts? At issue, therefore, is whether a matter of this sort is justiciable in nature and, if so, what implications may this have for the doctrine of the supremacy of parliament?

In assuming that the issue of public interest immunity might be raised 'at a later stage', Gleeson CJ seems to have taken the view that it is a justiciable matter to be determined, presumably, by reference to the principle of necessity viewed in terms of the Council's informed discharge of its functions.[87] However, the situation is far from clear. Gleeson CJ had noted earlier that the relevant legislation in the other Australian jurisdictions was silent on the subject of public interest immunity; but that, where conflicts have arisen in NSW and elsewhere with respect to the tabling of State papers, 'they have usually been resolved in a practical manner'.[88] Indeed, it has been said that 'the resolution of public interest immunity claims by political means has averted the need for any final determination of the question whether such claims apply to parliamentary proceedings as a matter of law'.[89] With that in mind, the question of public interest immunity viewed in a parliamentary context has been declared on many occasions to be largely political, not procedural, in nature. For example, *Odgers' Australian Senate Practice* states:

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84 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 28 (per Gleeson CJ).

85 The term 'public interest immunity' is now said to operate as a generic expression in judicial proceedings, basically indicating that the public interest would be harmed by the disclosure of the relevant documents and incorporating claims that disclosure would prejudice the rights of litigants in legal proceedings, or that the commercial interests of corporations might be damaged. It has superseded terms such as Crown privilege and Executive privilege.

86 E Campbell, 'Parliamentary inquiries and executive privilege'(1986) 1 *Legislative Studies* 10.

87 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 28 (per Gleeson CJ); Mahoney P thought the issue of public interest immunity 'may require consideration in an appropriate case' (at 15).

88 Ibid at 23-24 (per Gleeson CJ).

89 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, p 19.

> The existence of the claimed right of public interest immunity in respect of parliamentary proceedings has not been adjudicated by the courts and is not likely to be. Several Senate committees have considered the question in the past two decades but have not been able to develop agreed procedures or criteria for determining whether a claim for public interest immunity should be granted. A common thread emerging from the deliberations of those committees is that the question is a political, and not a procedural, one. There appears to be a consensus that the struggle between the two principles involved, the executive claim for confidentiality and the Parliament's right to know, must be resolved politically.[90]

One example is that the Senate Committee of Privileges recommended against the proposal embodied in the Parliamentary Privileges Amendment (Enforcement of Lawful Orders Bill) 1994 that, in the case of a Senate demand for material being refused by the government, the Federal Court should act as an independent arbitrator. In the Committee's view, removing responsibility for making determinations of this sort from the Senate to the courts was inappropriate: 'The Committee asserted that ultimate power lay within the Senate and it was for the Senate to assert that power'. At the same time, the possibility of appointing an independent arbiter, such as a retired judge, to examine material on behalf of the Senate was suggested by the Committee.[91]

A more general consideration is that the kind of conflict at issue here between the Parliament and the Executive is an expression of their differing functions and interests, reflecting in a positive way the complex political processes at work in a representative democracy based on the Westminster model of responsible government. It may follow from this that the political judgments to be made in relation to the disclosure of politically (or otherwise) sensitive information is best left to the political process itself. Further, such conflicts may be expected to continue where, as in NSW at present, the Government is not in control of a majority of seats in the Upper House. Responding to this, the Legislative

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90 H Evans (ed), *Odgers' Australian Senate Practice*, Seventh Edition, AGPS 1995, p 481.

91 A Lynch and B Allan, 'Privilege and the Australian Senate: a brief history' (1996) 64 *The Table* 9 at 21. It is noted that the balance of advantage on claims of public interest immunity has shifted to a considerable degree from the executive to the Senate over the past two decades: 'No longer will the Senate accept the executive's blanket assertion of privilege or public interest immunity. This refocussing parallels the demands of the courts to test such blanket claims'. Thus, following *Sankey v Whitlam* (1978) 142 CLR 1, in judicial proceedings the mere assertion by a Minister that documents are subject to public interest immunity is not conclusive. In NSW the Wran Government responded to the case by passing the *Evidence (Amendment) Act 1979* which gave the Attorney General the power to certify that any communication was a confidential government communication and that disclosure to the courts would not be allowed in the public interest. The power was described at the time as 'An arbitrary executive decree from which no appeal lies': Editorial, 'Crown privilege in NSW' (1979) 3 *Criminal Law Journal* 129. The relevant provisions were repealed by the Greiner Government under the *Evidence (Crown Privilege) Amendment Act 1988*.

Council's Standing Committee on Parliamentary Privilege and Ethics recommended that a permanent mechanism be devised to facilitate the assessment of Executive claims that documents ordered to be tabled in the House should not be produced on public interest grounds. The suggested mechanisms included assessment of claims by: the Supreme Court; an officer designated by statute; the Presiding officer; or by a committee of the House.[92] A further suggestion was the tabling of documents with restricted access, something the leader of the Australian Democrats in the NSW Parliament, Hon Elisabeth Kirkby MLC, had argued for in relation to the Lake Cowal papers.[93] With the exception of the proposal involving the Supreme Court, any approach of this sort would appear to have the virtue of maintaining confidentiality while at the same time upholding the supremacy of parliament in clear terms. In addition, such an approach would address the nub of the observation made by Gleeson CJ to the effect that 'Powers of the kind here in question are exercised in a context in which conventions and political practices are as important as rules of law'.[94]

To this can be added the cautionary observation that 'because different aspects of the public interest are involved, that is, the proper functioning of Parliament as against the due administration of justice, the question of disclosure of documents to the Parliament is not the same question as disclosure of documents to the courts'.[95]

This is not to say that public interest immunity claims do not apply to parliamentary proceedings as a matter of law. Writing in 1986 Enid Campbell commented, with reference to *Stockdale v Hansard*,[96] that the courts do assert a jurisdiction to determine the ambit of the powers and privileges of the Houses of Parliament and, she continued, 'an assertion by a Minister of a right to determine that evidence be withheld from a parliamentary agency, on public interest grounds, is essentially an assertion that parliamentary powers of investigation are legally limited'. Her view, therefore, was that the matter would be found to be justiciable, an argument which, it might be said, applies *a fortiori* in the case of the NSW Parliament where the role played by the courts is enhanced by the lack of a parliamentary privileges statute. Campbell's guess at the time was that, in the absence of any settled parliamentary law on the subject and in the absence also of any clear recognition of any limitations on their investigatory powers by the Houses of Parliament themselves, the courts would limit their own jurisdiction by finding that, legally, the 'Houses are not bound

92 Ibid at 20.

93 *NSWPD*, 18 April 1996, p 220. Note that Standing Order 308 of the NSW Legislative Assembly provides: 'A Minister presenting a paper may move forthwith, "That inspection of the paper be restricted to Members only and that no copies or extracts thereof be permitted". Such question shall be put forthwith and decided without amendment or debate'.

94 *Egan v Willis* (SCNSW, unreported 29 November 1996) at 23 (per Gleeson CJ).

95 AR Browning (ed), *House of Representative Practice*, Second Edition, AGPS 1989, p 582.

96 (1839) 9 Ad. & E.1.

to accede to a ministerial claim, but may do so in their discretion'. Campbell went on to explain that for a court to find otherwise, that is, to hold that a Minister does have the right, on public interest grounds, to resist parliamentary demands for information would involve the court in a definition of the nature and scope of the ministerial privilege: 'Judicial law making of that order would probably be regarded as an illegitimate exercise of judicial power'.[97] The implication is that the supremacy of parliament would be compromised by judicial law making of this kind.

However, as the Legislative Council's Standing Committee on Parliamentary Privilege and Ethics discovered, opinions differ on this issue. Having reviewed the case law (such as it is), the then Solicitor General, Keith Mason QC, concluded, 'It could be productive of a terrible injustice if a House asserted a power, beyond even that claimed by the Courts, to require production of any category of documents'. Citing American authority, *Senate Select Committee on Presidential Campaign Activities v Nixon*,[98] he observed:

> The principle that, in the absence of statute, public interest immunity prevails against an implied parliamentary power to call for documents is recognised in the United States, even though the power of the Houses of Congress to call for papers equates that of the House of Commons.[99]

In any event, should the matter arise at some later stage the courts (consistent with the approach adopted by the NSW Court of Appeal) are likely to seek any guidance they can find in the law and practices of 'comparable' (following the *Australia Acts 1986*) legislatures in Australia and elsewhere.

13. CONCLUSIONS

Egan v Willis stands as an important landmark in defining the powers of the NSW Legislative Council and, by extension, the Houses of the NSW Parliament generally. Indeed, together with the recent Canadian case of *New Brunswick Broadcasting Co v Nova Scotia*

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[97] E Campbell, 'Parliamentary inquiries and executive privilege' (1986) 1 *Legislative Studies* 10 at 15. Campbell thought it unlikely that the courts would take refuge in Article 9 of the English Bill of Rights 1689 by finding that a refusal to accede to a parliamentary demand for information constitute 'proceedings in Parliament' into which the courts cannot inquire. Reference was made in this regard to *Attorney General for the Commonwealth v MacFarlane* (1971) 18 FLR 150.

[98] 498 F 2d 725 (1974) (US CA, DC Cir).

[99] 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, p 19 and Appendix 2.

(Speaker of the House of Assembly),[100] the present case may prove important for identifying what have been called the 'inherent constitutional privileges' of Parliament, the relevance of which may often survive legislative intervention in this complex area of the law. More specifically, it can be said that *Egan v Willis* makes a significant contribution towards defining the functions of a House of review under the contemporary constitutional situation.

Should special leave to appeal to the High Court be granted the case may prove to be more significant still. Looking to the future, one of the big questions which remains to be determined is whether public interest immunity claims apply to parliamentary proceedings as a matter of law.

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100 [1993] 1 SCR 319. The case concerned the exercise of the privileges of the Members of the Nova Scotia House of Assembly to exclude independent television cameras from the House. One question for the Court was whether this violated the respondent's freedom of expression under the *Canadian Charter of Rights and Freedoms*. A related question was whether the House was immune from *Charter* review. The majority view was that the *Charter* did not apply to the exercise of what were termed 'inherent constitutional privileges'.

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