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***Egan v Willis & Cahill:*
The High Court Decision**

by

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Briefing Paper No 1/99

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EXECUTIVE SUMMARY

In its judgment of 19 November 1998 the High Court held by a 5 to 1 majority that the New South Wales Legislative Council has the implied power to require one of its members, who is a Minister, to produce State papers to the House, together with the power to counter obstruction where it occurs. The relevant test is that an implied power must be reasonably necessary for the exercise of the Council's functions: these include its primary legislative function, as well as its role in scrutinising the Executive generally. In their joint majority judgement, Justices Gaudron, Gummow and Hayne concluded that, in determining what is reasonably necessary at any time for the 'proper exercise' of the functions of the Council, reference is to be made to what, 'at the time in question, have come to be conventional practices established and maintained by the Legislative Council'.

Only Justices McHugh (dissenting) and Justice Kirby dealt with the issue of justiciability in detail. Justice McHugh found that it was not for the courts to rule on the validity of the Legislative Council's resolution suspending a member who had failed to comply with a previous resolution ordering him to produce State papers to the House. Justice Kirby, on the other hand, arrived at the novel conclusion that 'Notions of unreviewable parliamentary privilege and unaccountable determination of the boundaries of that privilege which may have been apt for the sovereign British Parliament must, in the Australian context, be adapted to the entitlement to constitutional review'.

Significantly, the issue of public interest immunity was not discussed in the case. Proceedings relevant to that issue are currently before the New South Wales Court of Appeal.

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Significantly, the issue of public interest immunity was not discussed in the case. Proceedings relevant to that issue are currently before the New South Wales Court of Appeal.

1. INTRODUCTION

On 19 November 1998 the High Court handed down its judgment in *Egan v Willis & Cahill* (henceforth *Egan v Willis*), a case which concerned the power of the New South Wales Legislative Council (the Council) to require one of its members, who is a Minister of the Crown and Leader of the Government in the Council, to produce State papers¹ to the House; further, the appeal concerned the Council's power to suspend that member should he fail to table the relevant papers. In the event, the High Court found that the Council does possess these powers, which can be described as implied or inherent in nature. In a dissenting judgment, Justice McHugh focused on the issue of justiciability and found that it was not for the courts to rule on the validity of the Council's resolution of 2 May 1996. On the other hand, Justices Gaudron, Gummow and Hayne in a joint judgment, as well as Justices Kirby and Callinan in separate judgments, found that the dispute was justiciable. The appeal was dismissed with costs.

That the appeal raised significant issues is not in doubt. Justice McHugh called it an 'important appeal',² while Justice Kirby commented, 'The questions presented for decision involve issues of high constitutional importance. It could scarcely be otherwise where the Court is asked to define the extent to which the Executive Government of a State is accountable to a democratically elected chamber of a Parliament and to the rule of law itself'.³

2. BACKGROUND

At an earlier stage in the proceedings, in a unanimous decision the New South Wales Court of Appeal had found that 'A power to order the production of State papers is reasonably necessary for the proper exercise by the Legislative Council of its functions'.⁴ In arriving at this decision the Court of Appeal noted that, unlike its counterparts in Australia, the New South Wales Parliament has no legislation comprehensively defining its powers and privileges;⁵ certainly, in New South Wales the power to order the production of documents

¹ These were defined by Gleeson CJ as 'papers which are created or acquired by ministers, office-holders, 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' - *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 654.

² *Egan v Willis* (1998) 73 ALJR 75 at 87. (Henceforth, *Egan v Willis*)

³ *Ibid* at 102.

⁴ *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 667 (per Gleeson CJ)

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

has not been specifically addressed in express terms,⁶ or by reference to the powers of the British House of Commons.⁷ To explain the relevance of this, the situation in Australia is that, in the absence of such legislation, the Parliaments do not possess the full range of powers and privileges enjoyed by the Parliament at Westminster, in particular the right to punish for contempt. Notably, it was decided in a series of nineteenth century cases that ‘colonial’ legislatures which derive their authority from Imperial statute have only such 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’.⁸ Two leading cases to note in this regard are *Kielley v Carson*⁹ and *Barton v Taylor*,¹⁰ where it was decided that protective and self-defensive powers, not punitive, are necessary.¹¹

As for the constitutional powers and status of the Legislative Council, it can be noted that in section 3 of the *Constitution Act 1902* (NSW) the expression ‘The Legislature’ is defined to mean the Sovereign with the advice and consent of the Legislative Council and the Legislative Assembly. The Legislature’s legislative powers are set out in general terms in section 5, with the Council enjoying the same status as the Assembly, except that money Bills must originate in the Lower House. Further, section 5A establishes a mechanism whereby money Bills can be passed without the consent of the Council. A distinctive feature of the New South Wales Constitution, therefore, is that the Upper House lacks the power to block supply,¹² with the result that the Council’s legislative functions are subject to certain well-defined limitations. On the other hand, section 7A of the New South Wales Constitution Act entrenches those powers the Council does possess.

3. FACTS

Briefly, the facts of the case are that the appellant, Hon M Egan MLC, the Leader of the Government in the Council and Treasurer, Minister for Energy, Minister for State Development and Minister Assisting the Premier, was ordered on 1 May 1996, by a resolution of the House, to table certain papers in the Council or deliver them to the Clerk. Consistent with a course of action earlier agreed upon by the Cabinet, Mr Egan did not comply with the order. On 2 May 1996, the Council passed a resolution: adjudging Mr

⁶ *Constitution Act 1867* (Qld), section 42; *Parliamentary Privileges Act 1891* (WA), section 4; *Parliamentary Privilege Act 1858* (Tas), sections 1-3.

⁷ *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.

⁸ *Kielley v Carson* (1842) 4 Moo PC 63; 13 ER 225.

⁹ *Ibid.*

¹⁰ (1886) 11 App. Cas. 197.

¹¹ G Griffith, *Parliamentary Privilege: Use, Misuse and Proposals for Reform*, NSW Parliamentary Library Briefing Paper No 4/1997, p 3.

¹² It can only delay the passage of a money Bill by a month (section 5A (2)).

Egan guilty of a contempt of the House (paragraph 2 of the resolution); suspending him from the service of the House for the remainder of the day's sitting (paragraph 3(a) of the resolution); and ordering him to attend in his place at the Table of the House on the next sitting day to explain his reasons for not complying with the orders of the House to table documents (paragraph 3(b) of the resolution). When Mr Egan refused to leave the House, the President of the Council (the first respondent) directed the Usher of the Black Rod (the second respondent) to escort Mr Egan from the chamber and the parliamentary precincts. In response to this, Black Rod removed Mr Egan out on to the footpath of Macquarie Street.

Mr Egan then asked the Supreme Court of New South Wales to declare that: first, paragraphs 2 and 3 of the resolution of 2 May 1996 were invalid; and, secondly, his removal into Macquarie Street constituted a trespass. On 29 November 1996, the Court of Appeal dismissed the claim for the first declaration. In respect of the second claim, the 'footpath point' as it is called, the Court of Appeal found for Mr Egan, concluding that the respondents had committed an actionable trespass against him.

This second, 'footpath point' was not at issue upon appeal to the High Court. Nor, indeed, was the claim relevant to paragraph 3(b) of the Council's resolution of 2 May 1996 which ordered Mr Egan to attend in his place on the next sitting day to explain his reasons for non-compliance with the House's orders; no argument had been presented to the Court of Appeal on that point and none was raised before the High Court. Instead, the appeal related to the validity of paragraphs 2 and 3(a) of the resolution of 2 May 1996, under which Mr Egan was found to be in contempt of the House and suspended for the remainder of the day respectively.

In their majority joint judgment, Justices Gaudron, Gummow and Hayne formulated the central question in the appeal as follows:

whether there was any justification for the trespass constituted by [Mr Egan's] removal from the chamber (and other rooms for the use of members) to the limit of the parliamentary precinct. That question, in turn, presents an issue as to the powers of the Legislative Council with respect to pars 2 and 3(a) of the resolution of 2 May 1996.¹³

4. OVERVIEW OF THE DECISION

In fact, the members of the High Court differed in the relative weight they gave to the issues that were before the Court. The approach taken by Justices Gaudron, Gummow and Hayne, as noted in the previous section, was consistent with the view that there was one main ground of appeal. This was certainly the view taken by Justice Callinan who recited the sole ground found in the Notice of Appeal which claimed that the Court of Appeal 'erred in holding that the Legislative Council had an implied power to order the laying of documents on the table by the appellant, which order was enforceable by the imposition of the sanction

¹³ *Egan v Willis* at 77.

of suspension on the appellant'.¹⁴ From this starting point, Justice Callinan arrived at the conclusion supporting the Council's power to order State papers by a very direct route, stating 'It is obvious, I think, that the Legislative Council as a popularly elected House of Parliament and part of the legislature of the State may on occasions need to see certain documents in order to carry out its legislative and other roles effectively...On any view the Legislative Council must be armed with a power to do what is reasonably necessary for the proper exercise of its functions'.¹⁵ Nor, in the circumstances, was the order to suspend Mr Egan problematic, this being 'protective' not 'punitive' in nature.¹⁶ In effect, Justices Gaudron, Gummow and Hayne arrived at the same conclusion by a more circuitous means, notably a consideration of the accountability of the executive to the Houses of Parliament in a political system characterised by the institutions and practices of responsible government. The joint majority judgement held that the test for implying the powers of the Council is that they be reasonably necessary for the exercise of its functions: these include the primary legislative function in section 5 of the New South Wales Constitution Act, as well as the power of scrutinising the Executive generally (of the five majority judges, only Justice Callinan did not refer expressly to this power of scrutiny).

In his minority judgment, Justice McHugh also referred to the sole ground of appeal in the Notice of Appeal, but he did so as a prelude to his argument that there were in fact three questions at issue: first, whether the Council has the power to demand that a Minister should table papers 'relating to matters that have been dealt with by the Government'; secondly, if so, whether the Council has the power to suspend the Minister for failing to table the relevant State papers; and, superimposed on both of these, is the third question relating to the justiciability of the business of the Council which concerns the relationship between the courts and Parliament in the Westminster tradition. Only for Justice McHugh, who dissented in the case, did this justiciability issue prove to be decisive. The issue had only been raised by an intervener, the Attorney General for South Australia, but for Justice McHugh it had sufficient strength to carry him to the conclusion that the New South Wales Court of Appeal lacked the jurisdiction to make the declarations sought by Mr Egan concerning paragraphs 2 and 3 of the Council's resolution of 2 May 1996. He held that the New South Wales Court of Appeal should not have entertained the action for a declaration that the resolution of the Council was invalid; nor should it have made an imprecise declaration that the defendants committed an actionable trespass. Justice McHugh would have allowed the appeal, therefore, but as Mr Egan had failed on the substantial issue he propounded - the power of the Council to order a Minister to produce State papers - it was held he should pay any costs associated with the appeal.

Justice Kirby's approach was broader still, although it should be said that the matters he dealt with in some detail were touched upon by other members of the Court and the

¹⁴ Ibid at 118-119 (Callinan J). Justice Callinan did deal very briefly with the question of the effect of the Commonwealth Constitution or the Australia Acts on the powers of the Legislative Council, an issue which had been raised by the High Court itself under section 78B of the Commonwealth Judiciary Act (at 122)).

¹⁵ Ibid at 120 and 121.

¹⁶ Ibid at 122.

conclusion he arrived at was consistent with that of the majority. As noted, his view was that the Court was ‘asked to define the extent to which the Executive Government of a State is accountable to a democratically elected chamber of a Parliament and to the rule of law itself’. For him, as for Justice McHugh, there were really three issues before the court: *the justiciability point*; *the constitutional point*, which was raised by the Court itself and posed the question of the effect of the Commonwealth Constitution or the Australia Acts 1986 on the powers of the Legislative Council, as well as the authority of such nineteenth century cases as *Barton v Taylor*;¹⁷ and *the scope of the privilege point*, which referred to the implied or inherent power of the Council to order the production of State papers and to suspend the Minister when he had failed to comply with such an order. Justice’s Kirby’s views on each of these points are discussed *inter alia* in the remaining sections of this paper. It is enough to note at this stage that he found that none of the arguments supporting Mr Egan’s appeal in relation to these points could be sustained. In relation to the power of the Council to order the production of State papers, Justice Kirby found that this, as well as the ancillary power of suspension, were validated by reference to their reasonable necessity for the proper exercise of the Council’s legislative and scrutiny functions.

5. THE JUSTICIABILITY POINT

The non-justiciable argument: To some extent or other all the members of the High Court sought to define the role of the courts in a matter concerning the powers and privileges of a Parliament, thereby confronting the issue of justiciability. The issue was raised by the South Australian Solicitor General who submitted that, based on the authority of *Bradlaugh v Gossett*,¹⁸ the reasons behind the Council’s decision to suspend Mr Egan were not justiciable: ‘if it had arisen in South Australia’, Mr Selway explained, ‘the question of whether the House had the power to call for the documents would not be justiciable. The matter would be foreclosed by the finding that the suspension of a Member involved a proceeding in Parliament and the reason for that suspension, we would say, the court could not inquire into’.¹⁹ From this standpoint, therefore, the right result would have been for the Court of Appeal to say that there is a power to suspend but to end it there, for ‘the determination of whether the power was properly exercised or not is a political question to

¹⁷ These questions were raised by the High Court further to section 78B of the *Judiciary Act 1903* (Cth), which also referred to the ‘justiciability of disputed questions arising in relation to any purported exercise by the Council’ of its power to require the production of State papers.

¹⁸ (1884) 12 QBD 271. The case related to the exclusion of Charles Bradlaugh from the House of Commons. An atheist, Bradlaugh was not permitted to take the oath as required under the *Parliamentary Oaths Act 1866* on being elected to the House. He was held to have disturbed the proceedings of the House by attempting to administer the oath himself, for which conduct he was, by order, excluded from the Commons. The case upheld the exclusive jurisdiction of the Commons in matters relating to the management of the internal proceedings of the House; the court found that the reason for the Member’s expulsion was not justiciable.

¹⁹ High Court of Australia Transcripts, 17 June 1998 at <http://www.austlii.edu.au/au/other/hca/transcripts/1997/S75/2.htm>

be left to be resolved by political processes'.²⁰ On this submission, only the 'footpath point' was justiciable, on the ground that the Court had an obligation to determine whether the removal of Mr Egan to the public street constituted a 'proceeding in Parliament'.

Of the members of the High Court, only Justice McHugh concurred with this approach to the case. In effect he agreed that the *Bradlaugh* case correctly states the relationship between the Supreme Court of New South Wales and the State's Houses of Parliament, with Justice McHugh citing the views of Lord Coleridge CJ who stated: 'What is said or done within the walls of Parliament cannot be inquired into in a court of law...The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive'.²¹ Cited, too, was the High Court's formulation of the relationship between the courts and Parliament in *R v Richards: Ex parte Fitzpatrick and Browne* where it was said that it 'is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise'.²² A further point made by Justice McHugh was that this arm's length relationship between the courts and parliament does not arise as a consequence of Article 9 of the *Bill of Rights 1689*: it arises, instead, from the law of Parliament as customary law, something which the Bill of Rights merely confirms.

For Justice McHugh the present case involved an issue which concerned the relationship between the Council and one of its members and the internal administration of the business of the House. This being the case he found it difficult to see how the Court of Appeal had the jurisdiction to determine the issue. The question of the suspension of Mr Egan for obstruction was for the Council to determine: 'There was no need, therefore, for the Court of Appeal to determine whether the functions of the Council were such that reasonable necessity entitled it to demand the production of papers'.²³ In short, the appeal should have been disposed of on narrow grounds.

The argument for justiciability: Among the curiosities of *Egan v Willis* was the sight of counsel for a House of the State Parliament seemingly arguing on behalf of the case for the courts to intervene in the business of the House. As formulated by Bret Walker SC, counsel for the respondents, the main issue for consideration was that *Fitzpatrick and Browne* raises difficulties of interpretation:

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

²⁰ Ibid.

²¹ *Egan v Willis* at 90; (1884) 12 QBD 271 at 275.

²² *Egan v Willis* at 90; (1955) 92 CLR 157 at 162.

²³ *Egan v Willis* at 93.

exercisable...the real question is: does the ground exist on the ground claimed?²⁴

This was, in effect, an invitation to the Court to look behind the suspension of Mr Egan to the reasons for it and to inquire as to whether those reasons were established on valid grounds. On this basis, there was every need for the Court of Appeal to determine whether the Council had the power to order the production of State papers. Those members of the High Court in the majority agreed, although only Justice Kirby found it necessary to deal with the justiciability issue in detail.²⁵

Justice Kirby presented a fourfold argument, the crux of which was that a court may consider the ‘ambit’ of a parliamentary power or privilege, but not any of the political considerations concerning its exercise; as in this case, the question of whether Mr Egan’s conduct merited suspension.²⁶ The first argument in support of this position began with the *Prebble case*,²⁷ notably its distinction between the right of a court to prove the occurrence of parliamentary events and the prohibition on questioning their propriety; it ended with a defence of the rule of law in the form of a plea on behalf of the right of a court to resolve legal controversies which are brought before it, whether or not these controversies have political implications.²⁸ Next, Justice Kirby pointed out that the members of the Legislative Council themselves ‘desired the ruling of the Supreme Court to define the limits of the Council’s powers,’²⁹ an argument which was said to be ‘relevant’ if not decisive in the circumstances of the case. A further argument was that, for the non-justiciability case to succeed, the string of colonial and post-colonial cases considering the lawfulness of the resolutions of the legislative chamber in question in directing the plaintiff’s arrest must have assumed that Article 9 was no obstacle to the exercise of their jurisdiction.³⁰ The fourth argument contended that overseas and colonial decisions alike must be adapted to the ‘modern Australian context’. This was based on the federal character of the Australian polity and introduced the consideration that the British formulation of the relationship between the Parliament and the courts must be adapted to local conditions where there is an established ‘entitlement to constitutional review’. The crux of this contention would seem to be that, just as such notions as parliamentary supremacy cannot survive in an unmodified state in a federation established under a written constitution, nor can the law of unreviewable parliamentary privilege. Indeed, on that last question Justice Kirby went so far as to say that,

²⁴ High Court of Australia Transcripts, 1 September 1998.

²⁵ The joint majority judgment said that, as the claim had been brought, it had to be decided (at 81). Justice Callinan only noted the observations of Chief Justice Gleeson in the Court of Appeal on the justiciability issue (at 119).

²⁶ *Egan v Willis* at 110.

²⁷ [1995] 1 AC 312 at 337.

²⁸ *Egan v Willis* at 107-108.

²⁹ *Ibid* at 108.

³⁰ *Ibid* at 108-109. Similar consideration are found in the joint judgment (at 81).

to the extent that State parliaments are provided for in the Australian Constitution, ‘they are rendered accountable to the constitutional text’. He explained:

Courts in this country, at least in the scrutiny of the requirements of the Australian Constitution, have generally rejected the notion that they are forbidden by consideration of parliamentary privilege, or of the ancient common law of Parliament, from adjudging the validity of parliamentary conduct where this must be measured against the requirements of the Constitution...³¹

Together, these arguments led Justice Kirby to conclude that ‘The controversy tendered here as to the existence and scope of the privilege relied upon is susceptible of judicial resolution’.³²

Comments on the justiciability point: The competing views of Justices McHugh and Kirby are worth noting in some detail because they suggest two very different approaches to the construction of the relationship between Parliament and the courts in this country. The McHugh version of that relationship is a continuation of the traditional Westminster model under which the privileges of Parliament are inherent to it and are not to be whittled down by the processes of judicial review; in this model we find the doctrine of parliamentary supremacy intact. Potentially, the Kirby version is a federal ‘constitutional’ model in which the balance of powers between the Parliament and the courts is weighted in favour of judicial review and where, it seems, any perceived contest between parliamentary supremacy and the principle of the rule of law must be decided in favour of the latter. Whether such an account was required to underpin the validity of justiciability in the present case is a matter for debate. Its interests lies in its formulation of the potential logical legal consequences of federation for the relationship between Parliament and the courts, a relationship which is pregnant with future possibilities. More particularly, its interest for the law of parliamentary privilege lies in the fact that Justice Kirby would set aside any notion of unreviewable parliamentary privilege, at least as far as the ‘scrutiny of the requirements of the Australian Constitution’ are concerned, an argument which, if accepted, may work a quiet revolution in the relationship between Parliament and the courts.

6. THE CONSTITUTIONAL POINT

As noted, this issue was raised by the Court itself and posed the question of the effect of the Commonwealth Constitution or the Australia Acts of 1986 on the powers and privileges of the Council; for Justice Kirby, it also placed a question mark over the continued relevance and authority of the relevant nineteenth century cases. Again, only Justices McHugh and Kirby thought it necessary to deal with this point in any detail and, again, their approaches

³¹ Ibid at 109.

³² Ibid at 110.

and conclusions were very different.³³ The point at issue was explained as follows:

that the Commonwealth Constitution's reference to and conferral of functions upon the Parliaments of a State or its Houses and its continuation of the Constitutions of each State of the Commonwealth may affect the powers or privileges of the Houses of the State Parliaments. And...that account may have to be taken of the Australia Act, including its references to the legislative and other powers of the State parliaments and its termination of responsibility of the United Kingdom government in relation to State matters.³⁴

Briefly, as it was not crucial to the outcome of the case, Justice McHugh focused on the Australia Acts and noted the 'radical suggestion' made by Mahoney P in the Court of Appeal that the effect of those Acts 'might in fututre cases warrant reconsideration of the principles upon which the implied powers of the individual Houses of Parliament are determined'.³⁵ The suggestion was rejected by Justice McHugh who could not see how these Acts had altered the legislative powers of the New South Wales Parliament which had already been declared to be 'plenary' within their territorial limits. If the argument was that individual Houses now had the power to coerce and punish individuals, Justice McHugh said it should not be countenanced.³⁶

Only Justice Kirby found the constitutional point meaningful in the context of the case, although nothing depended on the point in the final analysis. He wished to emphasise that the 'character' of the New South Wales Parliament and its constituent Houses, as well the powers and privileges of those Houses, had been changed when that Parliament became a component of 'a free, independent, democratic and federal nation' under the Australian Constitution. However, he thought the elucidation of these changes 'must await future cases'.³⁷ His other conclusion was that, in the light of these constitutional developments, the value of the 'colonial' cases from the nineteenth century on matters relevant to parliamentary privilege is now 'primarily historical rather than juridical'.³⁸

7. RESPONSIBLE GOVERNMENT AND ACCOUNTABILITY IN A

³³ The joint majority judgment said that as neither the Australian Constitution nor the Australia Acts would diminish the powers and privileges of the State Parliaments, it would be sufficient 'to apply the tests that have been applied in earlier authority' (Ibid at 83). Justice Callinan declared the constitutional point to be irrelevant (Ibid at 122).

³⁴ Ibid at 83.

³⁵ Ibid at 95. In the Court of Appeal, all the judges had relied to some extent on the enactment of the Australia Acts to support the argument that the functions of the Council and reasonable necessity implied a power to compel the production of documents (Ibid).

³⁶ Ibid at 95-96.

³⁷ Ibid at 111.

³⁸ Ibid at 111.

BICAMERAL LEGISLATURE

The question of responsible government: Does an Upper House of an Australian Parliament have the power to scrutinise the workings of the Executive? If that was the issue at the heart of *Egan v Willis*, it may seem an odd question to ask at this juncture, at the very close of the twentieth century, when this notion of the accountability of those entrusted with the executive power of the state to the duly elected representatives of the people constituted, as here, in one half of the legislature, would appear to be an axiom of liberal democratic thought and practice. Yet, the question was asked and some considerable time, energy and public money was spent in seeking an answer to it. What may have seemed axiomatic needed to be spelled out and explained: indeed, the power of the Upper House in New South Wales to order the production of State papers had to be tested and made secure by the devices of legal doctrine.

For the High Court, much of the analysis concentrated on the doctrine of responsible government, as well it might for the dispute revolved around competing interpretations of that notion. Part of the difficulty is not just that responsible government is a hard doctrine to pin down, but that the framers of the various colonial and post-colonial constitutions, State and federal, decided for various reasons to avoid trying to spell out all its practical detail. It seems they heeded Sir Robert Garran warning in 1897: ‘Responsible government, as we know it, is a new thing, and a changing thing; it depends largely upon unwritten rules which are constantly varying, growing, developing, and the precise direction of whose development it is impossible to forecast’.³⁹ The nub of the problem is that there is no one agreed definition of what is meant by responsible government, nor does it appear to carry the same implications in all jurisdictions based on the Westminster model of government.⁴⁰ As Justice Gummow commented during the hearings for the present case, ‘Now the question is how are these doctrines imported from abroad to be fashioned domestically? It seems to me that has never been done’.⁴¹

The dichotomies of responsible government: The point can be made that the concept of responsible government encompasses many contrasting propositions. One dichotomy in the analysis was discussed by AH Birch in his classic 1964 book on *Representative and Responsible Government*. Birch noted the confusion that existed concerning the proper role of Parliament in relation to the Executive, a confusion which finds expression in the two languages in which that relation is described. The first is the language of the liberal view of the constitution which talks, among other things, of Parliament as a ‘watchdog’ scrutinising the Executive, the language typically used by ‘nearly all back-benchers, nearly all journalists,

³⁹ R Garran, *The Coming Commonwealth*, Angus and Robertson 1897, p 149.

⁴⁰ D Kinley, ‘The duty to govern and the pursuit of accountable government in Australia and the United Kingdom’ (1995) 21 *Monash University Law Review* 116 at 121. Kinley cites the comment made by Justice Holroyd in *Toy v Musgrove* (1888) 14 VLR 349 that ‘There is no cut-and-dried institution called responsible government, identical in all countries where it exists’.

⁴¹ High Court of Australia Transcripts, 17 June 1998 at <http://www.austlii.edu.au/au/other/hca/transcripts/1997/S75/2.htm>

and most academic commentators'. The second is the language used by those in power which talks of the responsibility of the Government to govern in accordance with its mandate, in which Parliament's 'function as a debating chamber in which public opinion is aired' is emphasised over and above its scrutiny or 'watchdog' role.⁴² For convenience these can be called the 'liberal' and 'Executive' views of responsible government respectively.

A second dichotomy suggests that responsible government comprises two different 'types' of accountability of the Executive to Parliament, namely, individual ministerial responsibility, on one side, and collective executive accountability of 'the Executive Government as a collective body to the Parliament', on the other.⁴³

A third dichotomy in the debate concerning responsible government relates to the distinction that is made between the Lower and Upper Houses of Parliament in this context. As it was argued on behalf of Mr Egan, this dichotomy contends that it is to the Lower House that the Crown looks to see which is the more numerous party to compose a ministry and it is only the Lower House which has the power to pass a vote of no confidence in a government and cause a government to resign.⁴⁴ The power of the Lower House over money bills is another aspect of this argument which seeks to highlight the distinctions in powers and functions between the two Houses. It was formulated succinctly in the submission of the South Australia Solicitor General who stated: 'we say that the Legislative Council does not have the power [to demand State papers] and we say that because of the nature of responsible government. We say that ultimately the government is responsible to the Lower House not the Upper House and that because of that differences in function there must be a difference in the relative powers of each House to call for documents in a compulsory way'.⁴⁵ At its starkest, the contention is that the Lower House may examine the Executive, but the Upper House not at all, notwithstanding that the Upper House 'is an essential part, except for certain money Bills - a central part of the law-making legislature...'. For Bret Walker SC, counsel for the respondents, this could 'not be correct'. It is perhaps a narrow conception of what is meant by responsible government, one that is suited to the United Kingdom where the House of Lords is an unelected chamber, but is less well adapted to Australian conditions where a broader view of responsible government, which takes account of the nature of our popularly elected Upper Houses, should be adopted. Indeed, the argument is made that the original intended use of the term 'responsible government' in this country was connected to the idea of self-government itself, that is, 'to the attainment of independence,

⁴² AH Birch, *Representative and Responsible Government*, George Allen and Unwin Ltd 1964, p 165. This thesis is re-worked in D Kinley, 'The duty to govern and the pursuit of accountable government in Australia and the United Kingdom' (1995) 21 *Monash University Law Review* 116.

⁴³ J Lipton, 'Responsible government, representative democracy and the Senate: options for reform' (1997) 19 *The University of Queensland Law Journal* 194.

⁴⁴ The Government made much of this argument during the course of the parliamentary debate - *NSWPD*, 1 May 1995, p 579.

⁴⁵ High Court of Australia Transcripts, 17 June 1998 at <http://www.austlii.edu.au/au/other/hca/transcripts/1997/S75/2.htm>

and with it the colony being responsible for its own government'.⁴⁶

What the High Court has said about responsible government: One view of the significance of *Egan v Willis* is that the case required the High Court to choose explicitly between the broader, liberal understanding of the collective accountability of the Executive to both Houses of Parliament, as against the narrower interpretation of responsible government based on the 'Executive' model, or where fundamental distinctions are made between the powers and functions of the two Houses of Parliament. The High Court had of course discussed the nature of responsible government in previous cases, acknowledging it to be a doctrine which is implied in the Commonwealth Constitution.⁴⁷ Indeed, Lipton maintains that 'Judicial comment has generally described responsible government as involving collective executive accountability to the "Parliament"'.⁴⁸ In the *Engineers case* of 1920, Lord Haldane's formulation of responsible government was cited with approval by the Court; in that formulation, responsible government was defined as 'a government under which the Executive is directly responsible to - nay, is almost the creature of - the Legislature'.⁴⁹ However, the precise scope of that doctrine, especially as it applies to the relationship between the Executive and the Upper Houses of Parliament, has not been articulated; nor has the 'liberal' understanding of responsible government in any concerted way. In *Engineers* it was the control exercised by the 'elective Chamber' in Newfoundland which was used to exemplify the operation of responsible government.

Before the recent freedom of political discussion cases were in place, the tendency was to admit that responsible government was too protean a term to be defined, but generally to relate it to its core meaning whereby government, although formally carried out in the name of the Crown, is in reality conducted by Ministers who are members of Parliament.⁵⁰ The suggestion here is that the reliance on the implication of representative government (or

⁴⁶ D Kinley, 'The duty to govern and the pursuit of accountable government in Australia and the United Kingdom' (1995) 21 *Monash University Law Review* 116 at 120. Winterton has commented that colonial responsible government had two aspects - internal self-government on non-Imperial matters, and a colonial executive enjoying the confidence of the local legislature - and that these were 'really two sides of the same coin': G Winterton, Parliament, *The Executive and the Governor-General*, The Federation Press 1983, p 74.

⁴⁷ For example, in the landmark *Engineers Case* (1920) 28 CLR 129 at 147 the High Court recognised the 'general influence' of the principle of responsible government in the Australian Constitution; in the *Boilermakers Case* (1956) 94 CLR 254 at 275, responsible government was described by the High Court as 'the central feature of the Australian constitutional system'.

⁴⁸ J Lipton, 'Responsible government, representative democracy and the Senate: options for reform' (1997) 19 *The University of Queensland Law Journal* 194 at 203-204. Lipton cites the comments of Justices Dawson and McHugh in *Australian Capital Television Limited v Commonwealth* (1992) 177 CLR 106 at 184-5 and 230 respectively.

⁴⁹ (1920) 28 CLR 129 at 147.

⁵⁰ *NSW v Commonwealth* (1975) 135 CLR 337 at 364-5 (per Barwick CJ).

democracy) in the freedom of political communication cases⁵¹ has coloured the High Court's subsequent discussion of responsible government itself.⁵² With these reflections in mind, the precise question in *Egan v Willis* was whether the more 'liberal' view of responsible government which has emerged in recent years can accommodate a limited notion of the responsibility of the Executive to an Upper House of a State Parliament. Presumably, it was such a limited notion that Gleeson CJ had in mind when he said that the case 'may have an effect upon the shape of responsible government in this State'.⁵³

Of particular interest in this context is the decision in *Lange v Australian Broadcasting Corporation*⁵⁴ where the ground for the right of freedom of political communication was reconsidered, significantly (and perhaps surprisingly)⁵⁵ in such a way as to base it specifically on those sections of the Australian Constitution dealing with both representative and responsible government, in which context the term 'representative government' can be taken to refer broadly to the free and direct election of members of Parliament by the people at periodic elections.⁵⁶ Perhaps more than any other, that decision underlined the conceptual affinity and legal interrelationship between the two principles. More specifically, during the course of the Court's analysis of what is entailed by responsible government, it stated that section 49 of the Commonwealth Constitution was held to provide the source of coercive authority 'for each chamber of the [Federal] Parliament to summon witnesses, or to require the production of documents, under pain of punishment for contempt' (emphasis

⁵¹ Lipton cites statements made by Justices Dawson and McHugh in *Australian Capital Television Limited v Commonwealth* (1992) 177 CLR 106 at 184 and 230 respectively.

⁵² In the *Engineers case* (1920) 28 CLR 129 the doctrine of responsible government was used by the High Court as a reason for not following United States decisions.

⁵³ *Egan v Willis* (1996) 40 NSWLR 650 at 660.

⁵⁴ (1997) 189 CLR 520 at 557-559.

⁵⁵ K Booker, A Glass and R Watt, *Federal Constitutional Law: An Introduction*, Butterworths 1998, p 236

⁵⁶ (1997) 189 CLR 520 at 557-567. The requirement of freedom of communication was declared to be a 'consequence of the Constitution's system of representative and responsible government', this being an implication drawn from the text and structure of the Constitution, notably from sections 7, 24, 64, 128 and related sections. The terms 'representative government' and 'representative democracy' have been discussed in considerable detail by the High Court in recent years, notably in *McGinty v Western Australia* (1996) 186 CLR 140. In effect, different views have emerged as to the meaning and content of these terms, with Justice Toohey commenting: 'It is one thing to say that the Australian Constitution contains an implication of representative democracy. It is another to give content to that implication' (at 199). In *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 Justice McHugh considered that the Australian Constitution contains only a requirement of representative government, not the wider notion of representative democracy (at 199). Representative government, he said is 'no more than a system under which the people were governed by representatives elected in free elections by those eligible to vote' (at 201).

added).⁵⁷ In fact, the High Court listed those aspects of the Commonwealth Constitution which are intended to provide for the institutions of responsible government and representative democracy alike. In relation to responsible government, the full bench included the following indicia:

The requirement that the Parliament meet at least annually, the provision for control of supply by the legislature, the requirement that Ministers be members of the legislature, the privilege of freedom of speech in debate, and the power to coerce the provision of information provide the means for enforcing the responsibility of the Executive to the organs of representative government.⁵⁸

Responsible government in New South Wales: Some, but not all, of these elements are found in the New South Wales *Constitution Act 1902*,⁵⁹ of which it can be said that, in some respects, it makes less express provision for responsible government than either the Commonwealth Constitution or those of several other States.⁶⁰ Be that as it may, just as the High Court has acknowledged in the past that responsible government is implied in the Commonwealth Constitution, so too has it remarked that, with the establishment of the bicameral legislature of New South Wales under the *Constitution Act* of 1855, ‘the principles of responsible government were introduced and with that came the principles and conventions and general tradition of British parliamentary procedure’.⁶¹ This was confirmed in *Egan v Willis*, with Justice McHugh observing:

⁵⁷ (1997) 189 CLR 520 at 558-559.

⁵⁸ *Ibid* at 559.

⁵⁹ Section 11 of the New South Wales Constitution Act requires one session of Parliament to be held in each year; sections 39 and 45 establish the rule that there can be no expenditure of government funds without parliamentary authorisation; Article 9 of the *Bill of Rights 1689* (freedom of speech in Parliament) is in force in New South Wales by operation of the *Imperial Acts Application Act 1969*. On the other hand, there is no requirement that a Minister be a member of the Legislature; and there is no equivalent of section 49 of the Commonwealth Constitution. For a summary of the aspects of responsible government in the New South Wales Constitution Act see the comments of Gleeson CJ in *Egan v Willis* (1996) 40 NSWLR 650 at 660. Section 35B provides that there is an Executive Council to advise the Governor in the government of the State

⁶⁰ G Winterton, *Parliament, The Executive and the Governor-General*, Melbourne University Press 1983, pp 74-75. On an historical note, Winterton comments: ‘It is, of course, of the essence of responsible government that Ministers should be members of the legislature, and three Colonies [South Australia, Victoria and Western Australia] provided expressly that some Ministers at least *must* be members of the legislature’. The South Australian provision was the model for section 64 of the Commonwealth Constitution which prevents a Minister from holding office for more than three months ‘unless he is or becomes a senator or a member of the House of Representatives’. See section 66, *Constitution Act 1934 (SA)* as discussed in - B Selway, *The Constitution of South Australia*, The Federation Press 1997, p 79.

⁶¹ *Clayton v Heffron* (1960) 105 CLR 214 at 251 (per Dixon CJ, McTiernan, Taylor and Windeyer JJ).

To a person familiar with the history of British parliamentary institutions and the constitutional history of New South Wales, it seems plain enough that the Constitution of 1855 gave the people of New South Wales self-government by means of a system of responsible government...In my opinion, there can be no doubt that from 1855 the system of responsible government existed in New South Wales, as it existed in the United Kingdom, in so far as that system could be adapted to the circumstances of the Colony. The *Constitution Act 1902* (NSW), the current successor of the Constitution of 1855, makes that even plainer.⁶²

Responsible government in the joint majority judgment: The joint majority judgement discussed responsible government in the context of ‘the functions of the Legislative Council’ and proceeded on the basis that, to be valid, the implied powers of the Council must pass the test of ‘reasonable necessity’, as formulated in *Kielley v Carson*. In constructing that argument the judgment ventured into an historical commentary on responsible government, observing how that doctrine finds expression in the present Constitution Act, but also in that of 1855.

Out of this historical analysis the judgment emerged with four propositions. First, that the characteristics of a system of responsible government are fluid, and that its formulation in 1855 in New South Wales did not necessarily reflect closely the shape that system has taken from time to time at Westminster.⁶³

Secondly, embracing the ‘liberal’ understanding of responsible government, the judgment endorsed JS Mill’s view that the legislature has a task ‘to watch and control the government’; and it added to this the contemporary Australian understanding that, whilst ‘the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people’ and that ‘to secure accountability of government activity is the very essence of responsible government’.⁶⁴

A third proposition was that, because the party which ‘controls’ the Lower House and therefore forms the government may not, in turn, control the Upper House, this does not undermine the latter’s claim to form an important element in the system of responsible government: ‘Rather, there may be much to be said for the view that it is such a state of affairs which assists the attainment of the object of responsible government of which Mill

⁶² *Egan v Willis* at 97-98; at 83 (per Gaudron, Gummow and Hayne JJ); and at 114 (per Kirby J).

⁶³ *Ibid* at 84.

⁶⁴ *Ibid*. In fact the statement from JS Mill was taken from Mill’s theoretical discussion of a legislature’s ‘proper functions’ in a representative democracy, a discussion which did not purport to be merely descriptive of the institutions and practices of the day - JS Mill, *Utilitarianism, On Liberty, and Considerations on Representative Government*, JM Dent 1972, p 239.

spoke in 1861'.⁶⁵ This is an important reflection which underscores the point that an Upper House which, for reasons of electoral law, may not always reflect the division of power between the major parties in the Lower House, may itself strengthen the institution of Parliament and, with it, the operation of the system of responsible government. The reflection needs to be read alongside the many commentaries on the decline, real or imagined, of Parliament and parliamentary oversight of the Executive, especially as this has been affected by the rise of party politics. As the joint judgment remarked, 'The contemporary operation of a system of responsible government reflects the significant role of modern political parties, one of which, or a coalition of which, in the ordinary course "controls" the legislative chamber or, in a bicameral system, at least the lower House'.⁶⁶ In such circumstances an Upper House which is not controlled by a dominant political grouping, as is the case at present in the New South Wales Legislative Council and the Australian Senate, may be seen as enhancing the institution of Parliament, as well key elements of the system of responsible government.⁶⁷

Fourthly, the joint judgment maintained that, under the constitutional arrangements of 1855, 'There was an assumption of a measure of examination of the executive by the legislature as well as legislative control over taxation and appropriation of money'. Under these arrangements there was, too, the assumption 'by the Legislative Council of a measure of superintendence of the conduct of the executive government by the production to it of State papers'.⁶⁸ This is what the Court of Appeal had referred to as the Council's function of 'scrutinising the workings of the executive, from which there arose, as a matter of reasonable necessity, the power to order the production of State papers'.⁶⁹ In the Court of Appeal, for Chief Justice Gleeson in particular, the necessity arose from two sources, namely, the scrutiny functions of the Council, on one side, and its legislative functions, on the other.⁷⁰ This was also the case for Justices Gaudron, Gummow and Hayne who then went on to explain the significance of the scrutiny function in terms of the 'immediate interrelation between that superintendence and the law-making function in which the

⁶⁵ *Egan v Willis* at 85.

⁶⁶ *Ibid* at 83.

⁶⁷ The joint majority judgment was in similar terms to the comments of Gleeson CJ in the Court of Appeal - *Egan v Willis* (1996) 40 NSWLR 650 at 665. In fact, it could be argued that this aspect of the Legislative Council work pre-dates the introduction of direct elections. The Council was reconstructed in 1934 as a non-party 'house of review and a house of safeguard' and, in this capacity, continued to be indirectly elected by members of the two Houses of the New South Wales Parliament till 1978. The intention was that it should 'be capable of examining measures on their merits from the point of view of the country as well as the city' - K Turner, *House of Review? The New South Wales Legislative Council, 1934-68*, Sydney University Press 1969, p 31.

⁶⁸ *Egan v Willis* at 86.

⁶⁹ *Egan v Willis* (1996) 40 NSWLR 650 at 665.

⁷⁰ *Ibid* at 664-665.

Legislative Council participates, together with the Legislative Assembly and the Crown'.⁷¹

Particularly significant in this respect was the Council's 'primary' legislative function, as indicated by section 5 of the New South Wales Constitution Act. As Priestley JA had pointed out in the Court of Appeal, this legislative function indicated 'an imperative need for each chamber to have access to material which may be of help to it in considering not only the making of changes to existing laws or the enactment of new laws but, as an anterior matter, to the manner of operation of existing laws'.⁷² Also noted in the joint judgment was: the longstanding practice of the production of State papers to the Council; the provision in Standing Order 29 for the putting to Ministers of questions relating to public affairs; and the convention and parliamentary practice which involves the representation in the Council by a Minister in respect of portfolios held by members of the Lower House. All of which led to the conclusion which encapsulates the test which is to be applied for implying the powers of the Council:

What is 'reasonably necessary' at any time for the 'proper exercise' of the functions of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.⁷³

Comments on the joint majority judgment: Perhaps a difficulty with the joint majority judgment is that, at the close, it attempts to say too much in too short a space. Having discussed the system of representative government at some length it concludes with a less than comprehensive analysis of three related yet distinct issues, namely: the 'superintendence function' arising from responsible government itself; the Council's primary legislative functions; and the longstanding practices of the Council. While the judgment has much to say that is of interest on the subject of responsible government, quite how that doctrine connects with the final outcome is not entirely clear. Are the conventional practices mentioned in the judgment themselves indicia or manifestations of responsible government? Do all such conventional practices qualify as constitutional functions of the Council, the proper exercise of which is to be satisfied by the reasonable necessity test? Or is only that in referring to these practices the Court was paying due regard to matters which are part of the 'business' of Parliament, thereby reaffirming the arm's length relationship between courts and legislatures which is itself a part of the system of responsible government? Nor is the relationship between the 'superintendence' and 'legislative' functions of the Council spelled out. Does this aspect of the joint judgment add anything to Justice Callinan's judgment which focused on the Council's legislative functions without making express reference to responsible government? The answer may be that responsible government, however practised and defined, is the essential backdrop against which the various functions exercised by a legislative chamber should be discussed, but whether that backdrop can of itself answer the questions posed by legal doctrine may be another matter. Yet, for all that,

⁷¹ *Egan v Willis* at 86.

⁷² *Ibid.*

⁷³ *Ibid.*

it may be that the backdrop is essential to the argument, shaping it by implication if not expressly.

Justice Kirby’s reflections on responsible government: Justice Kirby introduced the subject of responsible government at the close of his discussion of the Council’s legislative function, in which, with assistance from American authorities,⁷⁴ he dismissed the claim that the Council merely ‘participates in legislation’ in some subordinate way or that it must ‘simply respond to legislation presented by the Executive Government’.⁷⁵ For Justice Kirby it was clear that the limitations on the Council’s legislative functions and powers ‘to initiate legislation are strictly confined and highly specific’, and that, in other respects, ‘the Council is an essential chamber with large legislative powers’.⁷⁶ The US argument that a legislative body cannot legislate ‘wisely or effectively’ in the absence of relevant information, which it must at times seek from those who possess it, was said to apply with greater force in Australia under the system of responsible government where Ministers are members of the legislature, and their availability to assist the legislature in the performance of its lawmaking functions is therefore ‘more immediate’.⁷⁷ It was noted, too, that a principle of responsible government is that, ‘whilst in the chamber, a member is a person under the lawful authority’ of the chamber’. Then, bringing this aspect of the doctrine of responsible government to bear on the Council’s legislative function, Justice Kirby stated that a member must conform to the chamber’s lawful demands:

A demand incidental to the performance by the chamber of its legislative functions is such a demand. A demand for documents containing information relevant to the discharge of those functions, either now or in the future, cannot of itself be unlawful. All just exceptions aside, such a demand is prima facie essential to the existence of that body as a legislative chamber. It is *reasonably necessary* to the discharge of its functions as such. (emphasis added)⁷⁸

Having dealt with the ‘legislative function’ issue, Justice Kirby turned next to the Court of Appeal’s second ground for upholding the legality of the Council’s resolution, based on the argument that, as an incident of responsible government, the Council has the power to scrutinise the Executive. Taking his cue from Chief Justice Gleeson’s cautionary remarks,⁷⁹ Justice Kirby began with a warning:

⁷⁴ *Quinn v United States* 349 US 155 (1955); *McGrain v Daugherty* 273 US 135 (1927).

⁷⁵ *Egan v Willis* at 113.

⁷⁶ *Ibid.*

⁷⁷ *Ibid* at 114.

⁷⁸ *Ibid.*

⁷⁹ *Egan v Willis* (1996) 40 NSWLR 650 at 659. Chief Justice Gleeson remarked, ‘Care needs to be exercised in relating political concepts, which, although of great importance, are flexible, and may be differently understood by different people or at different times, to principles of law’

Care must be observed in the use of the notion of ‘responsible government’ in legal reasoning. It is a political epithet rather than a definition which specifies the precise content of constitutional requirements.⁸⁰

Nonetheless, Justice Kirby did then proceed to employ the concept of responsible government in order to arrive at a legally binding conclusion, thereby seemingly adding credence to Ronald Dworkin’s observation that ‘Lawyers and judges cannot avoid politics in the broad sense of political theory’.⁸¹ In any event, one can hardly expect judges to avoid political concepts in a context such as the present case, when the powers of a political institution are to be determined and where the legal instrument establishing that institution is deliberately vague, assuming as it does an understanding of certain practices and conventions. Having issued the warning, Justice Kirby appears to have turned a blind eye to it. Thus, after detailing the methods by which the Council may render ministers accountable, Justice Kirby concluded:

It is by such scrutiny that the system of government established by the Constitution Act and envisaged by the Australian Constitution permits effective public debate, facilitates the democratic choice of the members of the chambers and allows periodic judgement of the government by the electors. The suggestion that only the Lower House has the power to extract documentary information from the Executive Government...involves a view of the accountability of the Executive Government to Parliament, including the Council, which is alien to the system of government which the Constitution Act establishes and the Australian Constitution envisages...⁸²

Responsible government and representative government: In this way, echoing the decision in *Lange* and other freedom of political communication cases, Justice Kirby endorsed the ‘liberal’ view of responsible government, in which the Council’s power, as an ‘elected chamber of a Parliament of a State of Australia’, to render the Executive Government accountable and to sanction obstruction where it occurs is ‘not only lawful’: for Justice Kirby, ‘It is the very reason for constituting the Council as a House of Parliament’.⁸³ The reference here to the Council as an ‘elected chamber’ begs the question whether Justice Kirby would have arrived at the same legal conclusion if the Council was an appointed or indirectly elected chamber? The question has some practical significance in light of the fact that the Council has only been elected by direct popular vote since 1978. There is also a point of legal and conceptual analysis to be made: does the doctrine of

⁸⁰ *Egan v Willis* at 114. The term ‘Responsible ministers of the Crown’ was called an ‘epithet’ by Sir Samuel Griffith and one which ‘is used in common conversation to describe the form of government that we have’ - *Official Report of the National Australasian Convention Debates*, Sydney 1891, Volume 1, Legal Books Pty Ltd 1986, p 767.

⁸¹ R Dworkin, *A Matter of Principle*, Harvard University Press 1985, p 147.

⁸² *Egan v Willis* at 114.

⁸³ *Ibid* at 115.

representative government (or democracy) operate, of necessity, in tandem with the system of responsible government, with the former standing as a pre-requisite for the latter, or operating as an essential element in its definition? That would seem to be implied in much of the analysis in *Egan v Willis*,⁸⁴ as it is elsewhere. This paper has already noted this aspect of the *Lange* case, where the right of freedom of political communication under the Commonwealth Constitution was said to be a consequence of the system of representative and responsible government. It must be emphasised, however, that the focus there was on the text and structure of the Commonwealth Constitution. More generally, in the *Australian Capital Television case* Justice McHugh juxtaposed the two, commenting that representative government ‘involves the conception of a legislative chamber whose members are elected by the people’ and that responsible government ‘involves the conception of a legislative chamber where the Ministers of State are answerable ultimately to the electorate for their policies’.⁸⁵ For obvious reasons, the link between responsible and representative government is especially important for the ‘liberal’ understanding of responsible government, where the emphasis is on the accountability of the Executive to a Legislature directly elected by the people. The High Court’s tendency in recent years to emphasise that link has been discussed.

Any discussion of the relationship between responsible and representative government must acknowledge that these are both complex and evolving terms. Indeed, such a discussion may only serve to strengthen the argument that their operation changes from place to place and time to time. There is also the point that Lower and Upper Houses may serve different requirements or conceptions of responsibility and representativeness, thereby making any attempt at generalisation particularly hazardous.

⁸⁴ For example, Justice Callinan also refers to the Council as ‘a popularly elected House of Parliament’ (at 120). At 84-85 Justices Gaudron, Gummow and Hayne commented that in *Lange* reference was made to those provisions of the Commonwealth Constitution which prescribe the system of responsible government as necessarily implying ‘a limitation on legislative and executive power to deny *the electors and their representatives* information concerning the conduct of the executive branch of government throughout the life of a federal Parliament’ (emphasis added).

⁸⁵ (1992) 177 CLR 106 at 230. Justice McHugh’s subsequent reference to Sir Samuel Griffith may suggest that responsible government in this context related to the power of the Lower House to pass a vote of no-confidence in a Minister, with Justice McHugh citing Griffith’s comment that the effect of responsible government ‘is that the actual government of the State is conducted by officers who enjoy the confidence of the people’. In fact, Griffith recognised that, in principle, ministers need not be members of the Legislature - SW Griffith, *Notes on Australian Federation, Queensland Government Printer 1896*, pp 17-18. Brian Galligan has explained that, in attempting to combine responsible government with legislative bicameralism, Griffith favoured a minimalist conception of responsible government: ‘The essence of responsible government was not that...ministers were located primarily in the lower house and went out of office when defeated on an important measure in that house, but simply that ministers were appointed by the head of state and might or might not hold seats in parliament’ - B Galligan, ‘The founders’ design and intentions regarding responsible government’ in *Responsible Government in Australia*, edited by P Weller and D Jaensch, Drummond Publishing 1980, pp 2-3.

Eschewing that course, this paper contents itself with making a number of observations which are more particular to New South Wales political experience. The agreed view in the present case was that responsible government was introduced into New South Wales in the 1850s, and with it the power to order the production of State papers, but very little was made of the fact that, from 1856 to 1933, members of the Council were nominated by the Governor on the advice of the Executive Council, initially for five years and thereafter for life.⁸⁶ Admittedly, members of the Legislative Assembly were elected under a franchise which, after 1858, approximated a form of universal male suffrage, and it may be that a 'representative' Lower House is the decisive factor where the relationship between responsible and representative government is at issue. Stated another way, it may be that the extent to which representative government is necessary to the definition of responsible government is limited to the core aspect of responsible government in which an elected Lower House 'controls' the government of the day. A further observation is that it has never been the practice in New South Wales for all the Ministers of State to be drawn from the Assembly. The question which arises from this is how could those Ministers who were drawn from an appointed Legislative Council be 'answerable ultimately to the electorate for their policies'? The answer is surely that those Ministers were indirectly answerable to the electorate, and could therefore be accommodated within the system of responsible government, for the reason that their ministerial positions would have been vacated as soon as the governments they served lost either the confidence of the Lower House or an election. However, the answer itself suggests some of the difficulties which arise in combining responsible government with a bicameral legislature, particularly where the Upper House is not directly elected. In any event, the fact is that Council members routinely served as ministers from the 1850s to the time of the Council's reconstruction in 1933, with one life appointment even serving as Acting Premier in 1904.⁸⁷

Observations of this kind may point again to the difficulties involved in making neat legal doctrine consistent with untidy political experience. None of which is to deny that developments in representative government inform and shape the evolution of responsible government; the judgments in *Egan v Willis* are ample testimony to that. The majority judgments at least define one aspect of responsible government in a way which is consistent with the 'liberal' understanding of the role of Parliament in a polity founded on representative government. As such, it helps to explain the way responsible government can be combined with a bicameral legislature in an Australian context.

Justice McHugh's reflections on responsible government: An issue which Justice Kirby

⁸⁶ Between 1933 and 1978 Council members were elected by members of the two Houses. On this issue, the joint majority judgment noted that the position of the Council had been 'enhanced' since the 1850s by 'its change to an elective body and by the arrival of the universal franchise' (at 85). For Justice McHugh the 'evolution' of responsible government had not affected the functions of the Council in any way (at 96).

⁸⁷ BR Wise MLC was Acting Premier from 27 February 1904 to 25 March 1904 and from 4 April 1904 to 27 May 1904. Note, too, the argument that, in the nineteenth century, the Council was at times reluctant to accept the conventional limits to its powers over money bills - K Turner, *House of Review? The New South Wales Legislative Council, 1934-68*, Sydney University Press 1969, p 15.

did not think it necessary to explore at length was whether the Council's powers should be characterised as inherent or implied in nature. For Justice McHugh, on the other hand, the distinction was crucially important. He could not accept that the power to compel a Member of the House to produce documents was an *implied* power deriving, by reasonable necessity, from the legislative functions of the Council. In his view such an argument would have to pass the 'impossibility' test, by which a legislative chamber relying on 'reasonable necessity' would have to show that it would be impossible, in the absence of the power asserted, to carry out the relevant function.⁸⁸ This, the Council could not do, as it was impossible to conclude that, without the relevant papers, the Executive's conduct could not be 'the subject of effective examination by the House'.⁸⁹ Besides, the power claimed here by implication would interfere with or erode fundamental rights, for 'it must logically extend as far as authorising searches and seizures of Ministers and also of private citizens who have relevant information'.⁹⁰

Justice McHugh was, however, of the opinion that a legislative chamber does have an *inherent* power to order the production of documents from a person who is not only a member of the Council but a Minister of the Crown and Leader of the Government in the House. This power, which 'inheres in its very existence as a legislative chamber or which is essential in the true sense to the carrying out of its functions',⁹¹ exists because Mr Egan, by reason of his membership of the Council and his position as a Minister of the Crown, 'has a special relationship with the House which entitles it to obtain the information'. Justice McHugh then made the connection with the doctrine of responsible government explicit, stating: 'When the nature of parliamentary government under the Westminster system of responsible government is properly understood, it is apparent that the power which the respondents claim is one that inheres in the very notion of a parliamentary chamber which is a co-ordinate part of a legislature in such a system'.⁹² For that system to work effectively, Justice McHugh explained, 'the Houses of Parliament must have access to information relating to public affairs and public finances which is in the possession of the government of the day'.⁹³ If the Council is to carry out one of its 'primary functions' as a legislative chamber under the Westminster system, Justice McHugh reasoned, 'it must be entitled to seek information concerning the administration of public affairs and finances'.⁹⁴ That

⁸⁸ *Egan v Willis* at 93-94.

⁸⁹ Justice McHugh suggested that a Select Committee, exercising its powers under the *Parliamentary Evidence Act 1901* (NSW) could obtain 'a great deal of information' concerning the issues in question.

⁹⁰ *Ibid* at 94. On the other hand, both the joint majority judgment (at 87) and that of Justice Kirby (at 115-116) made it clear that different considerations 'might' or 'would' arise if a resolution ordering the production of documents were directed to persons who are not members of the House concerned; such persons were described by Justice Kirby as 'non-members or a Minister sitting in the other chamber or to a stranger'.

⁹¹ *Ibid* at 96.

⁹² *Ibid* at 97.

⁹³ *Ibid* at 99.

⁹⁴ *Ibid*.

governments are made and broken in the Lower House does not mean that the Council lacks a power which is itself fundamental to responsible government; for, it too is part of the legislature of New South Wales. Then revisiting the theme of justiciability for a moment, Justice McHugh said that this function of obtaining information about the administration of government was part of the internal business of the Council, which led him to conclude: 'If the Legislative Council wishes to conduct its business by asking questions of Ministers of the Crown present in that Chamber, I can see nothing in parliamentary history that would deny it that right. Indeed, the whole story of parliamentary procedure supports it'.⁹⁵

To adapt a theme from Professor Zines,⁹⁶ for those concerned to ensure responsible government as a foundation of parliamentary supremacy, there is much to commend Justice McHugh's approach. Just as Justice McHugh's argument in relation to justiciability seeks to uphold the established relationship between Parliament and the courts, his careful formulation of the inherent power of a legislative chamber to order the production of papers from a person in a clearly defined relationship to that chamber would appear to establish that power on firm grounds, free of the complications and limitations which may attend any discussion of 'reasonable necessity' in this context and any implications the power may have for the rights of citizens generally. Importantly, the argument is grounded on an appreciation of what 'inheres' in the very existence of a legislative chamber and, as such, it tells us that its scrutiny powers are an irreducible or essential component of such a chamber. In that sense we are left in no doubt as to the origin and purpose of the power in question; as well it appears to be a broader power than the power of 'necessity' traditionally formulated in the nineteenth century. In this way, the status of Parliament as an institution in our constitutional system is confirmed. Further, in contrast to Justice Kirby,⁹⁷ who was more concerned to emphasise the uniquely Australian character of his argument, Justice McHugh's is supported by the full weight of parliamentary history and tradition.

Different degrees of responsibility: But if the inherent power to scrutinise the Executive is fundamental to responsible government and is thereby enjoyed by any legislative chamber in the Westminster model, this is not to say that all chambers of this kind have the same powers in a broader sense, or that the Executive has the same responsibility to Lower and Upper Houses of Parliament. Instead, what emerges generally from this case is confirmation that the Executive can be responsible to both chambers of the legislature, but that different degrees of responsibility can be owed to each: as Rufus Davis stated, 'because government is responsible to one and the same public, it is thereby responsible, if in different ways, to

⁹⁵ Ibid at 100.

⁹⁶ L Zines, *The High Court and the Constitution*, 4th Edition, Butterworths 1997, p 392. In the context of his discussion of the freedom of political discussion cases, Zines writes of the judicial implication of representative government as an aid to the 'major principle' of parliamentary supremacy.

⁹⁷ It can be suggested that, in this respect at least, Justice Kirby's approach was not unlike Justice McHugh's, with the former stating that the power of scrutiny was 'the very reason for constituting the Council as a House of the Parliament' (at 115).

the two Houses of the one parliament'.⁹⁸ Picking up on Lipton's discussion of this issue, it can be added that the case suggests that that shared responsibility is less problematic in New South Wales than, for example, it is in relation to the Australian Senate, for at the State level there is no possibility of the Upper House blocking supply. In that regard, at least, the relationship between the two Houses of State Parliament are well defined and lack any potential for a conflict in which the Executive is seemingly made responsible to two masters. Thus, while the case is authority for establishing the accountability of the Executive to both Houses of Parliament, in no way does it determine the different levels of responsibility owed to different Upper Houses, where some may and others may not have the power to block supply. In this respect, the system of responsible government retains its character as a moveable feast, which must yet be pursued and digested by lawyers and judges if they are to make sense of such matters as parliamentary powers and privileges.

8. CONCLUSIONS

It has been said that this was an important appeal and there is no doubt that its outcome has significant implications for establishing the powers of the Upper Houses of the Australian Parliaments, as well as for understanding the way responsible government can be combined with a bicameral legislature in an Australian context. It is perhaps the closest the High Court has come to specifying whether or not the Executive is to be considered responsible to both Houses of Parliament, or only to the Lower House. Yet, the answer to that question remains, of necessity, partial in nature. Nonetheless, in deciding that by a combination of the Council's legislative and scrutiny functions the Upper House in New South Wales has a power to order the production of State papers, together with the power to counter obstruction where it occurs, the High Court has defined one aspect of responsible government in a way which is consistent with the 'liberal' understanding of the role of Parliament in a polity founded on representative government. In doing so, it has confirmed the vital part an Upper House may play in ensuring the accountability of the Executive, especially where, as in the case in New South Wales and the Senate at present, there is a different balance of political power to that found in the Lower House. It is a legal conclusion replete with political implications.

As noted, Justice McHugh did not rely on the 'reasonable necessity' argument in support of the power to order State papers, but said instead that the power inheres in a legislative chamber. Whether that minority view finds favour in any future case remains to be seen.

Only Justices McHugh (dissenting) and Justice Kirby dealt with the issue of justiciability in detail. Justice McHugh found that it was not for the courts to rule on the validity of the Legislative Council's resolution suspending a member who had failed to comply with a previous resolution ordering him to produce State papers to the House. Justice Kirby, on the other hand, arrived at the novel conclusion that 'Notions of unreviewable parliamentary privilege and unaccountable determination of the boundaries of that privilege which may

⁹⁸ SR Davis, *Theory and Reality: Federal Issues in Australia, England and Europe*, University of Queensland Press 1995, p 99.

have been apt for the sovereign British Parliament must, in the Australian context, be adapted to the entitlement to constitutional review’.

Significantly, the issue of public interest immunity was not discussed in *Egan v Willis*. That is to be debated and decided, it seems, in the forthcoming case, *Egan v Chadwick, Evans and Cahill*.