CHAPTER 3

An option for reform

3.1 During the inquiry, the committee was informed that in the 1990s the New South Wales (NSW) Legislative Council had its powers in respect of orders for papers[1] affirmed in the courts, and that this has resulted in that House having what the Clerk of the Senate described as 'the most effective regime for the production of documents of any Australian jurisdiction'.[2] This chapter examines the model used by the NSW Legislative Council to resolve disputed claims of privilege[3] over papers.

The NSW Legislative Council model

3.2 In his submission to the inquiry, the Clerk of the NSW Legislative Council, Mr David Blunt, explained that, unlike the Federal Parliament where powers are constitutionally based, the authority of the NSW Legislative Council to order the production of papers derives from the common law principle of 'reasonable necessity'.[4] The Council's power to order the production of papers, including documents in respect of which a claim of privilege could be made, was upheld by the courts in the 1990s in the *Egan* decisions:[5]

> …in New South Wales as a result of the *Egan* cases, particularly the decision in *Egan v Chadwick*, the executive government is required at law to produce to the Legislative Council all documents despite any claim of privilege, including a claim of public interest immunity, the only exception being certain cabinet documents. Therefore, documents that are subject to a claim of privilege are in fact produced to the Legislative Council. The government has no choice; it has to do that. Standing order 52…then sets out the procedure that the house has put in place to deal with returns to order and to deal with privilege claims.[6]

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1 Referred to in the Senate as orders for the production of documents.

2 Dr Rosemary Laing, Clerk of the Senate, *Advice to the Senate Legal and Constitutional Affairs Committee*, 7 January 2014, p. 3.

3 Referred to in the Senate as 'public interest immunity'.

4 Mr David Blunt, Clerk of the New South Wales Legislative Council, *Submission 1*, p. 1.

5 Mr David Blunt, Clerk of the New South Wales Legislative Council, explained in his submission that 'while the High Court in *Egan v Willis* clearly affirmed the power of the Council to order the production of state papers, it did not consider the production of papers subject to a claim of privilege by the executive… [and that t]his was not resolved until the decision in *Egan v Chadwick* in June 1999'. *Submission 1*, p. 3.

6 Mr David Blunt, Clerk of the New South Wales Legislative Council, *Proof Committee Hansard*, 11 February 2014, p. 2.

3.3 Mr Blunt emphasised that as a result of the *Egan v Chadwick* decision of the Court of Appeal, the executive government in NSW is required at law to produce papers to the Legislative Council.[7] It is this difference which perhaps explains why the non-compliance with orders for the production of documents common to the Senate occurs infrequently in NSW:

> Because of the requirement at law under the Egan and Chadwick decision, the government does not really have a choice. Once the order is agreed to by the House and communicated to the Department of Premier and Cabinet they are lawfully obliged to produce the documents.[8]

3.4 In his submission to the committee, Mr Blunt explained that when an order for papers has been agreed to by the NSW Legislative Council, the Director General of the Department of Premier and Cabinet, after coordinating the retrieval of the documents, is required to lodge:

> …the return comprising the documents with the Clerk of the Parliaments. If the House is not sitting the Clerk receives the documents out of session and announces receipt of the return on the next sitting day.[9]

3.5 Mr Blunt identified one instance, in 2013, where the Legislative Council became aware of a situation where there had not been full compliance with an order for the production of papers. He explained that non-compliance in that instance 'was treated as a matter that needed to be investigated by the privileges committee, and it was investigated quite seriously':[10]

> Following its becoming evident about 12 months ago that a 2009 order for papers may not have been fully complied with, that matter was referred to the Legislative Council's Privileges Committee for inquiry, and over much of last year the Privileges Committee conducted a very robust and quite intensive inquiry to get to the bottom of exactly why, who and when things happened to mean that that particular order was not complied with. I think that the way in which the committee undertook that inquiry, and the two reports that it produced as a result, have sent a very powerful signal to the public service in New South Wales that orders for papers by the Legislative Council are very significant and need to be fully complied with.[11]

3.6 Mr Blunt further explained that although, in the 15 years since the *Egan* cases, sanctions had not been needed:

> …it is now routine that non-government members give a contingent notice of motion so that, in the event of a minister failing to table documents in accordance with a resolution of the House, they may move for the

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7 *Proof Committee Hansard,* 11 February 2014, p. 5.

8 *Proof Committee Hansard,* 11 February 2014, p. 4.

9 *Submission 1,* p. 4.

10 *Proof Committee Hansard,* 11 February 2014, pp 2–3.

11 *Proof Committee Hansard,* 11 February 2014, p. 2.

> suspension of standing orders immediately to allow a motion to be moved forthwith judging the minister guilty of a contempt of the House.[12]

3.7 Having explained the requirement at law for the NSW executive to comply with orders for the production of papers, Mr Blunt outlined the process followed by the NSW Legislative Council in circumstances where privilege was claimed:

> Where a claim of privilege is made, documents are kept in the custody of the Clerk and are available for inspection by members only. They are not to be copied or made public, and I can say that in 15 years there has never been a breach of that confidentiality; there has never been a leak in relation to a document that has been lodged subject to a claim of privilege.
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> If a member feels that a claim of privilege has been spread over too many documents or is not sufficiently strong or not otherwise valid, the member may initiate a process which leads to the appointment of an independent legal arbiter to evaluate and report to the house on the claim of privilege. So the role of the independent legal arbiter in the New South Wales Legislative Council model, whilst very important, does not touch on whether the documents will actually be produced. The documents have already been produced. Rather, the role of the arbiter in our model is about whether or not the documents will stay privileged or whether they will ultimately be made public.
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> The role of the arbiter in exercising that duty is to consider and report to the house whether or not the claim of privilege made by the executive government is valid and to recommend whether or not that claim should be upheld. The report of the arbiter themselves does not change the status of the document. It is merely a recommendation to the house. Ultimately, it is up to the house itself to decide whether or not to act on the arbiter's recommendation. Whilst in the overwhelming majority of instances the arbiter's recommendations are followed and implemented, it does not always happen. It is always up to the house; it is up to the member who has initiated the dispute to garner majority support in the house to have the arbiter's recommendation implemented.[13]

3.8 The procedure used by the Legislative Council in NSW has evolved over time and was finally incorporated into its standing orders in 2004 (standing order 52).[14] Mr Blunt stated:

> Under standing order 52, orders for papers are initiated by resolution of the House. On an order for papers being agreed to, the terms are communicated by the Clerk to the Director General of the Department of Premier and Cabinet, who liaises with the departments or ministerial offices named in the resolution to coordinate the retrieval of the documents requested.

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12 *Proof Committee Hansard*, 11 February 2014, pp 2–3.

13 *Proof Committee Hansard*, 11 February 2014, p. 2.

14 *Submission 1*, p. 3.

> …Where a claim of privilege is made over documents, the return must also include reasons for the claim of privilege. Documents returned…must be accompanied by an indexed list of all documents tabled, showing the date of creation of each document, a description of the document and the author of the document. Where documents are subject to a claim of privilege, a separate index of those documents is required to be provided.
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> Once the documents have been tabled in the House or received out of session by the Clerk, they are deemed to have been published by authority of the House, unless a claim of privilege has been made…Documents over which a claim of privilege has been made are kept confidential to members of the Legislative Council only in the Office of the Clerk and may not be copied or published without an order of the House.[15]
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> When documents are produced, or returned, as we say, from the executive government, if they are subject to a claim of privilege then the documents themselves remain in my custody, remain confidential. The index to those documents and the claim of privilege themselves are not privileged. So, the index will be published on our tabled-papers database, as will the claim of privilege. So, there is a degree of transparency there. Then, at the end of the process, if an arbiter is appointed and they report on the matter, then, once the report has been received, on the next sitting day the house will be advised that there is an arbiter's report. It remains confidential, though, until a member gives a notice of motion and moves a motion for the arbiter's report to be tabled and made public.[16]
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> There is a register kept in relation to both public documents returned to order and there is a separate register in relation to documents subject to a claim of privilege. Any member coming to inspect those documents signs in.[17]

3.9 Where a claim of privilege by the executive over some or all of the documents returned is disputed by a member of the Legislative Council, the Clerk is authorised to release the disputed document or documents 'to an independent legal arbiter appointed by the President'.[18] Mr Blunt informed the committee that '[t]he appointment of the arbiter has never been a partisan matter. There has never been any disputation or disquiet amongst members that I am aware of'.[19]

3.10 The committee sought to understand how the use of an independent arbiter assisted with the resolution of contested claims of privilege over papers. Mr Blunt explained:

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15 *Submission 1*, pp 3–4.

16 *Proof Committee Hansard*, 11 February 2014, p. 7.

17 *Proof Committee Hansard*, 11 February 2014, p. 5.

18 *Submission 1*, p. 4.

19 *Proof Committee Hansard*, 11 February 2014, p. 4.

> In considering the validity of a claim of privilege, the arbiter is not bound to merely consider whether or not a document is privileged at law, including as declared in *Egan v Chadwick*, as a judge would do. Ultimately, the arbiters evaluating claims of privilege do so in a different manner to a judge. They do, however, do it in a way which has developed consistently over a number of years and in a way which the house has found to be satisfactory. Put most simply, this has involved the arbiter ultimately weighing two competing interests: on the one hand, the public interest in accountability and transparency of the executive government, and, on the other hand, the interest in confidentiality for the reasons articulated by the government in the privilege claim.[20]

3.11 The independent arbiter must present a report to the NSW Legislative Council with a recommendation whether or not a claim of privilege should be upheld. Mr Blunt informed the committee that in most cases the member responsible for disputing the government's claim of privilege, will, on receipt of the arbiter's report, move that it be tabled and made public.[21] He further explained that in circumstances where the arbiter's report is tabled and the arbiter has recommended that the claim of privilege be denied, a member will usually 'give notice of a motion requiring the Clerk to lay the documents considered not to be privileged on the table of the House and to authorise them to be published'.[22] If the arbiter's report upholds the claim of privilege, the papers remain restricted to members only.[23]

3.12 Mr Blunt emphasised, however, that the independent arbiter makes a recommendation to the House and that the House is not bound to accept the arbiter's recommendation:

> …the House, as the final arbiter on any claim of privilege, may vote to make the documents public at any time, notwithstanding the recommendation of the arbiter.[24]

3.13 Whilst appearing before the committee, Dr Rosemary Laing, Clerk of the Senate, described the NSW model as 'the best system around at the moment for adjudicating these matters':

> [NSW has] chosen a system of adjudication and the council has a process whereby if there is a claim like a public interest immunity claim made in response to an order for production of documents, the process nonetheless involves the documents being handed into the custody of the Clerk and if there is a contested subset of those documents then an independent arbiter is

20 *Proof Committee Hansard,* 11 February 2014, p. 2.

21 *Submission 1*, p. 4.

22 *Submission 1*, p. 4.

23 *Submission 1*, p. 4.

24 *Submission 1*, p. 4.

> appointed to assess the documents in light of the claim of public interest immunity that is made and then to provide a report.[25]

3.14 The Clerk remarked that 'it is a system that…from this distance appears to have worked well'.[26]

3.15 The Clerk explained that the use of an independent arbiter to resolve disputes had been considered by the Senate in the past:

> We should not ignore the fact that the Senate, although not having a systematic process for arbitration, has also used this idea in the past. In the early 1990s, for example, in the context of a disputed claim to information about government leasing of commercial buildings in Melbourne and claims of commercial-in-confidence, the Senate ordered the Auditor-General to conduct an inquiry and the Auditor-General, using his powers, did conduct an inquiry and present a report to the Senate which appeared to be satisfactory to the Senate at the time[27]…It is certainly a method that has been commended by the Senate's Privileges Committee and the Privileges Committee itself has used an independent arbiter in certain situations. It is something that the Finance and Public Administration Committee looked into in 2009, early 2010 but it concluded that it was not an appropriate mechanism at that stage. The next appearance of the idea was in the agreements for parliamentary reform in the last parliament, but again there was no outcome from those agreements in terms of a tangible process.[28]

3.16 The Clerk expressed the view that the NSW Legislative Council's appointment of retired Supreme Court judges as arbiters was a 'good idea' as:

> It has the safeguards of having an independent person who is used to making those kinds of balancing determinations between competing claims.[29]

3.17 The Clerk suggested that the NSW Legislative Council's system of adjudication 'seems to be preferable to persisting with a stand-off between two potentially irreconcilable claims'.[30]

3.18 Mr Blunt explained that when the system was first implemented in the NSW Legislative Council 15 years ago, there was 'a degree of nervousness in the

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25 Dr Rosemary Laing, Clerk of the Senate, *Proof Committee Hansard*, 31 January 2014, pp 2–3.

26 *Proof Committee Hansard*, 31 January 2014, p. 3.

27 The Clerk noted that '[t]he Senate can no longer order the Auditor-General to do such things because the Auditor-General's legislation was changed in 1997 to guarantee his independence from being directed by anybody, including a house of the parliament'. *Proof Committee Hansard*, 31 January 2014, p. 3.

28 *Proof Committee Hansard*, 31 January 2014, pp 2–3.

29 *Proof Committee Hansard*, 31 January 2014, pp 2–3.

30 *Proof Committee Hansard*, 31 January 2014, p. 3.

parliamentary community' but that from a parliamentary perspective, 'everyone is delighted with the result'.[31] He further advised the committee that in the NSW Legislative Council's 2013 Privileges Committee inquiry, that committee had an opportunity to reflect on the independent arbitration process and its effectiveness:

> …they deliberated at great length. The report that they produced suggested four improvements, but overall the result was, I think, a very firm endorsement of the fundamentals of the system as it operates at the moment.[32]

Committee view

3.19 As discussed in chapter 2, the Senate has a right to information and documents, and considerable scope to exercise this right through its inquiry powers. The Senate's committee system is one of 'inherent flexibility'[33] and one mechanism by which the Senate exercises its powers to obtain information. The committee notes that in the past, the ability of committees to take evidence *in camera* or receive evidence in altered form has been used to 'pursue the sought-after information'.[34] On this occasion, however, this committee has been unable to garner further information from the government relevant to documents ordered on 14 November and 3 December 2013 and subject to a contested claim of public interest immunity (see chapter 2).

3.20 This committee's experience is symptomatic of an entrenched and ongoing challenge facing the Senate in obtaining information and documents which the executive does not wish to disclose. As noted in chapter 2, there may be valid reasons why certain information should not be publicly released and the committee is sensitive to such claims for public interest immunity where they are made on valid grounds. However, there may also be occasions where a government does not wish to release information on account of it being politically embarrassing or of contestable legality. Withholding such information does not accord with principles of good governance, and prevents the Senate from fulfilling its scrutiny and accountability functions.

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31 *Proof Committee Hansard*, 11 February 2014, p. 8.

32 *Proof Committee Hansard*, 11 February 2014, p. 4. 'One of the small number of changes to the system that the Privileges Committee recommended last year was that the standard return period in an order for papers go up to 21 days, so that it not place an inordinate burden on the Public Service. So, 21 days is the average time for documents to be returned. It is up to members how quickly they come and inspect the documents. Once a dispute is lodged in relation to a claim of privilege and an arbiter is appointed, then under the standing order they have seven days to produce their report. In some cases they have been given extensions. Then, once the report is provided, the various procedural steps that have to happen in the house for the status of the documents to change take three sitting days. It is also important to emphasise that those three sitting days provide an opportunity for careful consideration and deliberation on those matters'. *Proof Committee Hansard*, 11 February 2014, p. 9.

33 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 8.

34 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 8.

3.21 The committee takes the view that this inquiry has clearly demonstrated the shortcomings in the Senate's current procedures for obtaining documents subject to a contested claim of public interest immunity and subsequently resolving those disputed claims.

3.22 To date, the Senate has not developed procedures or criteria for determining whether a claim for public interest immunity should be granted. The committee believes that the status quo is unsatisfactory and will only ensure that the Senate continues to be frustrated by such disputed claims into the future. In addition to the requirements outlined in the Senate's resolution of 13 May 2009, a clear process is needed to resolve disputed claims of public interest immunity.

3.23 The committee sees merit in the independent arbitration model used by the NSW Legislative Council and acknowledges the high regard in which this process is held. In the committee's view, such a process, or some version of it, may well be adapted to the Senate. Indeed, the committee is aware that the Committee of Privileges has previously supported a process for independent arbitration.[35]

3.24 The committee therefore proposes that the Senate Procedure Committee consider in detail:

- the process for independent arbitration in the NSW Legislative Council, including that House's standing order 52;
- the applicability of the NSW Legislative Council's model of independent arbitration to the Senate;
- any adaptations or amendments needed to the NSW Legislative Council's model in order to implement a similar model of independent arbitration in the Senate;
- any amendments to Senate practice and procedure required to implement a model of independent arbitration; and
- suitable candidates for and / or qualifications required of an independent arbiter.

3.25 One of the strengths of the NSW Legislative Council model is the legal requirement of the executive to provide documents to that House, as a result of the *Egan* decisions. This differs from the situation that is the subject of this inquiry, where the dispute comprises both a failure to fully comply with orders for the production of documents and a related claim of public interest immunity. It is clear to the committee that without the ability to inspect documents, it is impossible to conduct any

35 Committee of Privileges, *52nd Report*, 1 March 1995, available: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/~/media/wopapub/senate/committee/priv_ctte/completed_inquiries/pre1996/report_052/report_pdf.ashx (accessed 18 February 2014).

meaningful process of determining whether a claim of public interest immunity over them is valid.

3.26 Given federal governments have a persistent record of non-compliance with Senate orders for the production of documents where these are considered sensitive in nature, the committee considers it unlikely that agreement could be reached allowing such documents to be provided in a way that enables senators to inspect them, as is the case in the NSW Legislative Council. For this reason, the committee draws attention to the proposal in the 52nd Report of the Committee of Privileges that disputed documents are provided directly to an independent arbiter for evaluation. The committee suggests that the Procedure Committee, in respect of accessing and inspecting documents subject to a disputed claim for public interest immunity, has particular regard to this proposal in the 52nd Report of the Committee of Privileges.

Recommendation 2

3.27 The committee recommends that the Senate refer the following matter to the Procedure Committee for inquiry and report, as a matter of urgency:

- **the process for independent arbitration in the NSW Legislative Council, including that House's standing order 52;**
- **the applicability of the NSW Legislative Council's model of independent arbitration to the Senate;**
- **any adaptations or amendments needed to the NSW Legislative Council's model in order to implement a similar model of independent arbitration in the Senate;**
- **any amendments to Senate practice and procedure required to implement a model of independent arbitration;**
- **suitable candidates for and / or qualifications required of an independent arbiter;**
- **in respect of accessing and inspecting documents subject to a disputed claim for public interest immunity, the proposal in the 52nd Report of the Committee of Privileges whereby disputed documents are provided directly to an independent arbiter for evaluation; and**

in respect of any such inquiry, the Procedure Committee have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session.

Senator Penny Wright
Chair