Enough of Executive Arrogance?: *Egan v Chadwick and Others*∗

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A previous article referred to the judgements of the New South Wales Court of Appeal and the High Court in the case of *Egan v Willis and Cahill* relating to the power of the Legislative Council of New South Wales to require the production of government documents.[1] Both courts, the High Court on somewhat narrower grounds, found that the Legislative Council had the ability to demand the production of documents and to impose a penalty of suspension on a council minister for refusal to respond.[2] There was every indication, however, that the minister concerned, the Treasurer, Mr Egan, was not content to let the matter rest there.

Mr Egan again refused to produce documents in response to an order of the council, and again went to court, this time in an attempt to establish that the powers of the council do not allow it to require the production of documents claimed to be protected by legal professional privilege or documents the subject of a public interest immunity claim. The Court of Appeal has now delivered its judgement in that case, *Egan v Chadwick and others*.[3] The court unanimously rejected Mr Egan's argument, and found that the council has the power to require the production of such documents.

∗ This article was first published in *Constitutional Law and Policy Review*, May 1999.

1 H. Evans, 'Reasonably necessary powers: parliamentary inquiries and *Egan v Willis and Cahill*', *Constitutional Law and Policy Review*, February 1999.

2 (1996) 40 NSWLR 650; (1998) 158 ALR 527.

3 (1999) NSWCA 176 (10 June 1999).

The court, restrained by the judgement of the High Court in the earlier case, confined itself to the doctrine that the powers of the Legislative Council are such as are reasonably necessary for the performance of its functions. Spigelman CJ stated the question before the court:

> Is it reasonably necessary for the proper exercise of the functions of the Legislative Council of New South Wales, for its power to require production of documents to extend to documents which, at common law, would be protected from disclosure on the grounds of legal professional privilege or public interest immunity?

The Chief Justice, with whom Meagher JA agreed, answered this question in the affirmative. To restrict the powers of the council in the manner suggested by Mr Egan would be an intrusion of the court into matters which should be determined by the legislature itself. Having regard to the principle that ministers are responsible to the council, access to legal advice provided to government is reasonably necessary for the council to perform its functions, and it is for the council to weigh any claim of public interest immunity.

The majority also found, however, that the principle of responsible government, which the law recognises but does not seek to enforce, a recognition which was illustrated by a comprehensive examination of earlier judgements, imposes one restriction upon the council's powers. Because responsible government requires the collective responsibility of cabinet and the confidentiality of cabinet deliberations, the council may not require the production of documents which record the deliberations of cabinet.

It appears that this category of documents is much narrower than the category of 'cabinet documents' which is often cited by governments as a protected class. The judgement therefore does not provide ministers with a very useful escape clause; they cannot simply turn all documents into cabinet documents by wheeling them through a cabinet meeting, as allegedly happened in Queensland on one occasion.

The other Justice, Priestley JA, did not find even that restriction on the council's powers. He made the telling point that government documents are generated at public expense for public benefit:

> Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.

Just as the courts examine documents for which protection is claimed to determine where the balance of public interest lies, so must the Legislative Council have this capacity. Cabinet documents yield to the principle of government accountability, of which he made a ringing declaration:

> … notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no *legal right* to *absolute* secrecy is given to any group of men

> and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy.

As indicated in the previous note, all of this has limited direct relevance to other Australian houses of parliaments, because of the different law under which they operate. They rely on constitutional or statutory prescription of their powers, albeit by reference to those of the British House of Commons, rather than common law. It would be difficult, however, in the light of this judgement, for any court to find that those houses, with the positive prescriptions they possess, have any lesser power.

The judgement did not compel Mr Egan to hand over the documents in dispute. As the court found, it is for the council to determine the remedy for any continuing refusal to produce the documents, and such a remedy must be political rather than legal. The judgement simply established that Mr Egan had no *legal* grounds for his refusal in respect of most of the documents, and it was on legal grounds that he chose to argue by going to the court.

This is the wider significance of the judgement: it undercuts ministers who seek to turn political questions about whether information should be disclosed to the legislature into legal questions. Governments of all persuasions, in resisting legislative demands for documents, have claimed legal barriers to doing so, and produced opinions of solicitors-general in support of such claims. The Court of Appeal has reinforced the point that the question of where the greater public interest lies is not a legal question.

It appears that on this occasion Mr Egan is not appealing to the High Court to attempt to obtain a reversal or modification of this judgement. The Legislative Council passed another resolution requiring the production of documents which were the subject of claims of legal professional privilege and public interest immunity and which related to the Sydney water contamination affair. Mr Egan produced several boxes of documents which the council did not publish but reserved for examination by its members.

This apparent change of attitude may have had something to do with the reaction of the media. As the previous article observed, Mr Egan and his government had been let off rather lightly by the commentators in his previous conflicts with the council. On this occasion the fourth estate was more critical. An editorial in *The Australian* referred to Mr Egan's 'sheer unmitigated gall' and his expenditure of an estimated $2 million in legal fees, and concluded: 'Enough is enough, Mr Egan. Your arrogance has gone too far'.[4]

It may be too much to ask that no minister will henceforth be arrogant, but the judgement of the court struck a significant blow for accountability of the executive to parliament.

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4 'Government must be accountable', *Australian*, 11 June 1999, p. 10.