Leeder, Heather (SEN)

From: Macgill, David [David.Macgill@pmc.gov.au]
Sent: Thursday, 2 June 2011 12:46 PM
To: Committee, Privileges (SEN)
Cc: Lynch, Philippa
Subject: PM&C submission [SEC=UNCLASSIFIED]
Attachments: Submission.tif; Attachment A Commercial in confidence advice 2004.pdf; Attachment B PII claims - Sept 09 guidance to secretaries.pdf; Attachment C - AGS advice.pdf

Richard

Attached is PM&C's submission to the Privileges Committee inquiry into the guidance for officers giving evidence and providing information. As you will see, we are currently reviewing the Guidelines for Official Witnesses and hope to be able to provide to the Committee by the end of June.

I understand that the Committee is likely to authorise publication of the submissions it receives. Could you let me know when that happens, please?

Regards

David Macgill
Assistant Secretary
Parliamentary and Government Branch

Ph: 6271 5761

Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

Mr Richard Pye
Secretary
Senate Standing Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Mr Pye

SENATE PRIVILEGES COMMITTEE INQUIRY

The Department of the Prime Minister and Cabinet is pleased to provide the following material in response to the Committee's request for submissions to its inquiry into the adequacy and appropriateness of current guidance and advice available to officers giving evidence to Senate committees. I understand that the inquiry will have a particular focus on:

(a) the adequacy and applicability of government guidelines and instructions;

(b) the procedural and legal protections afforded to those officers;

(c) the awareness among agencies and officers of the extent of the Senate's power to require the production of information and documents; and

(d) the awareness among agencies and officers of the nature of relevant advice and protections.

This submission addresses in particular terms of reference (a) and (c) above.

The adequacy and applicability of government guidelines and instructions

The *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (the Guidelines) provide advice to Australian Public Service (APS) employees and other officials preparing to give evidence to parliamentary committees. The Guidelines were tabled in the Parliament in November 1989. The Guidelines are available here: http://www.dpmc.gov.au/guidelines/index.cfm.

While the Guidelines have not been updated since 1989, written supplementary advice has been issued on two occasions:

- In February 2004, the Department of the Prime Minister and Cabinet (PM&C) advised all secretaries of the approach being adopted in PM&C in relation to the motion agreed to by the Senate on 30 October 2003 relating to the making of claims to

withhold information from the Senate on the ground that is commercial-in-confidence. A copy of this advice is Attachment A.

- In September 2009, PM&C provided advice to all secretaries on the Senate order of 13 May 2009 relating to the process for making claims for public interest immunity (PII). A copy of this advice is at Attachment B. This advice has been circulated to all secretaries in the lead-up to each round of estimates hearings.

PM&C is currently reviewing the Guidelines to incorporate this advice and to address other issues that have been identified since 1989, including those raised by the Senate Foreign Affairs, Defence and Trade References Committee in the course of its inquiry into matters relating to events on *HMAS Success*, discussed below, and to expand on the guidance relating to secrecy provisions in legislation.

The Department expects to be able to provide revised Guidelines for the Committee's consideration by the end of June 2011.

In addition to the Guidelines, PM&C provides advice as required to officials of departments and agencies on their obligations as witnesses before parliamentary inquiries.

PM&C also provides advice of a general nature to departments and agencies on the limitations on the evidence that officials may give and the types of documents for which a public interest immunity claim might be made, as set out in paragraph 2.32 of the Guidelines. PM&C's approach to this function was described in evidence to the Senate Finance and Public Administration Committee in the course of its 2009 inquiry into *Independent arbitration of public interest immunity claims* (http://www.aph.gov.au/hansard/senate/commtee/S12652.pdf).

The *HMAS Success* inquiry

On 7 December 2009, in the lead up to the Senate Foreign Affairs, Defence and Trade References Committee inquiry into matters relating to events on *HMAS Success*, the Department of Defence (Defence) issued a circular (DEFGRAM) for employees and Defence personnel covering Defence participation in Parliamentary committees. This document was intended to remind staff of the correct procedures to be followed in their dealings with Parliamentary committees. It was subsequently withdrawn at the direction of the then Minister for Defence, Senator the Hon John Faulkner, and a revised circular was issued on 17 December 2009. However, the Foreign Affairs, Defence and Trade References Committee, which had expressed concern about the content of the 7 December circular, considered that the second DEFGRAM neither withdrew nor corrected the deficiencies in the first. Defence issued a third version of the DEFGRAM on 3 February 2010.

PM&C acknowledges that the current Guidelines are deficient in that they do not adequately address the situation raised in the *HMAS Success* inquiry. In particular, the advice at paragraph 2.50 of the Guidelines could be more clearly stated. PM&C considers that where a committee is inquiring into a particular event, it would be appropriate for any submission explaining relevant departmental policies or practices to be cleared in the usual way through the minister and departmental executive, and for the secretary to determine which employees should attend and give evidence in relation to those matters. However, employees whose involvement in the inquiry is a result of them being witnesses to the event in question should be able to explain their version of the event to the committee without clearing their evidence with the minister or departmental executive, or seeking their permission to attend.

An exception to the general rule about employees in this situation not clearing their evidence with the departmental executive would be where the proposed evidence might properly be the subject of a public interest immunity claim.

The Department intends to make this advice clear in the revised Guidelines.

The awareness among agencies and officers of the extent of the Senate's power to require the production of information and documents

The *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* and the supplementary advice set out in Attachments A and B provide detailed guidance on the Senate's power to require the production of information and documents.

There are many other documents which refer to the Guidelines, or provide additional information about the powers of the Parliament and the accountability obligations of APS employees, including:

- *Foundations of Governance*, a document published by the Australian Public Service Commission (APSC), in particular, the chapter on Accountability (http://www.apsc.gov.au/foundations/accountability.htm#relationshipplt)

- APSC Circular 2009/4: Disclosure of official information (http://www.apsc.gov.au/circulars/circular094.htm)

- *APS Values and Code of Conduct in Practice*, in particular, Chapter 2 of Section 1: Working with the Government and the Parliament (http://www.apsc.gov.au/values/conductguidelines4.htm)

- *Supporting Ministers, Upholding the Values*, in particular, Part 2.2.8 - Responding to questions on notice and appearing before parliamentary committees (http://www.apsc.gov.au/publications06/supportingministers2.htm)

PM&C considers that it would be reasonable to expect that most APS employees, particularly SES officers who are the most likely to appear before a parliamentary committee, would be familiar with some or all of these documents.

Power of the Senate to order the production of documents

PM&C considers that the Senate's power to require the production of documents in the possession of departments and agencies is well understood across the APS. However, the Department is aware that the Senate has on two recent occasions ordered the Productivity Commission to create and table reports on particular issues:

- On 16 November 2010, the Senate ordered that there be laid on the table a report by the Productivity Commission on the design of a process for the selection and ongoing review of the superannuation funds to be included in modern awards as default funds.

- On 12 May 2011, the Senate ordered that there be laid on the table a report by the Productivity Commission on the development of a sovereign wealth fund for Australia.

The Senate has also passed resolutions requiring the Australian Information Commissioner to provide a report to the Senate on the production of information and documents by a minister.

The Department has obtained advice from the Australian Government Solicitor on the Senate's powers to require statutory officers to produce reports in such circumstances. That advice states that the Senate does not have the power to require that such tasks be undertaken. A copy of the Australian Government Solicitor's advice is at Attachment C. The Department is aware that this advice is contrary to the views of the Clerk of the Senate on the matter. In the Department's view, however, and with respect to the Clerk, the advice of the Australian Government Solicitor is the correct statement of the Senate's powers.

Parliamentary Privilege

The Committee has expressed an interest in the application of parliamentary privilege to officers providing information to senators.

The protection of submissions and evidence is discussed in paragraph 2.39 to 2.42 of the Guidelines. It was also considered in Chapter 8 of the report of the former House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into whistleblowing protections within the Australian government public sector. The report made three recommendations that are relevant to the Committee's inquiry. They, and the government's response to those recommendations, are set out below:

> Recommendation 22:
> *The Committee recommends that the Public Interest Disclosure Bill include Commonwealth Members of Parliament as a category of alternative authorised recipients of public interest disclosures.*
>
> Government Response: Not agreed.
>
> The Government notes that parliamentary privilege and the implied right to freedom of political communication already provide some protection to Members of Parliament and persons who provide information to them in certain circumstances. The Government also refers to its responses to Recommendations 23 and 24.
>
> Recommendation 23:
> *The Committee recommends that, if Commonwealth Members of Parliament become authorised recipients of public interest disclosures, the Australian Government propose amendments to the Standing Orders of the House of Representatives and the Senate, advising Members and Senators to exercise care to avoid saying anything in Parliament about a public interest disclosure which would lead to the identification of persons who have made public interest disclosures, which may interfere in an investigation of a public interest disclosure, or cause unnecessary damage to the reputation of persons before the investigation of the allegations has been completed.*
>
> Government Response: Agreed in principle.

While the Government does not consider Members of Parliament should be authorised recipients under the scheme, it may be that they will from time to time become aware of a matter which is a public interest disclosure. Accordingly, the Government will consider whether to support the introduction of amendments advising Members of Parliament to exercise care in how such a matter is handled, were they to become aware of the substance of a public interest disclosure. For instance, the Government is concerned to avoid the identification of persons who have made public interest disclosures, interference in an investigation of a public interest disclosure, or unnecessary damage to the reputation of persons before the investigation of allegations has been completed.

Recommendation 24:
The Committee recommends that the Public Interest Disclosure Bill provide that nothing in the Act affects the immunity of proceedings in Parliament under section 49 of the Constitution and the Parliamentary Privileges Act 1987.

Government Response: Agreed.

For the avoidance of doubt, the PID Bill will provide that nothing in the Act affects the immunity of proceedings in Parliament under section 49 of the Constitution and the *Parliamentary Privileges Act 1987.*

The Government is developing legislation reflecting its response to the recommendations to the report for introduction this year. The proposed legislation will establish a framework for investigating allegations of wrongdoing in the Australian public sector through appropriate channels prior to any public disclosure. The framework will offer broad protections to persons who report wrongdoing in accordance with the scheme, including safeguards from victimisation and immunity from criminal liability, civil penalty and civil action such as defamation.

The Department will provide a further submission when the review of the Guidelines is complete. As I indicated earlier, I expect the review to be finalised by the end of June.

Officials from the Department will be pleased to assist the Committee with its inquiry if necessary.

Yours sincerely

Barry Sterland PSM
Acting Deputy Secretary
Governance

2 June 2011

(E) (A)

Sent to all Secretaries + ANAO, Omb, ONA, IGIS, NADC.
Sue 12/2/04

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3-5 NATIONAL CIRCUIT
CANBERRA, A.C.T. 2600

Mr M J Taylor
Secretary
Department of Agriculture, Fisheries and Forestry
Core 1, Level 4, Wing 2
Edmund Barton Building
Cnr Kings Ave & Blackall Street
BARTON ACT 2600

Dear Mr Taylor

Several agencies have asked this department for advice on the effect of the motion agreed to by the Senate on 30 October 2003 relating to the making of claims to withhold information from the Senate on the ground that it is commercial-in-confidence.

The attached paper has been prepared to provide guidance to employees of this department if the issue arises when they are giving evidence to a Senate Committee. You might wish to adopt the guidance in your department and provide copies to agencies within your portfolio.

Should you wish to discuss this matter, please contact me, on 6271 5786, or David Macgill, Assistant Secretary, Parliamentary and Government Branch, on 6271 5761.

Yours sincerely

Barbara Belcher
First Assistant Secretary
Government Division

11 February 2004

PROVISION OF COMMERCIAL-IN-CONFIDENCE MATERIAL TO THE SENATE

Purpose: To remind staff of Senate requirements regarding the provision of commercial-in-confidence material.

Background: On 30 October 2003 the Senate agreed to the following motion on commercial-in-confidence material:

> That the Senate and Senate committees shall not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information.

Comment: In accordance with paragraph 2.28 of the "Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989", staff are reminded that any claim to withhold information from the Senate on the grounds public interest, including commercial-in-confidence, must be made by a minister and accompanied by a statement setting out the basis for the claim.

In practice, and particularly at Estimates hearing, Senate Committees have not always pressed a request for material when officials have indicated that they believe there are grounds for considering it confidential. The Senate order set out above does not mean that officials should no longer indicate that they consider that material might appropriately be withheld. However, if the Committee presses its request, officials should refer it to the relevant minister. It will frequently be necessary at that point for officials to brief the minister on the reasons for their belief that the material is confidential and it would be appropriate for them to ask the Committee for time to allow this to occur. If the minister subsequently decides to withhold any material, the Senate order requires that he or she, rather than an official, makes the claim for confidentiality.

In briefing the minister, staff are reminded that there is no general basis to refuse disclosure of commercial information to the Parliament even if it has been marked "commercial-in-confidence". The appropriate balance between the interests of accountability (ie. the public interest in disclosing the information) and appropriate protection of commercial interests (ie. the public interest in the information remaining confidential) should be assessed for each case.

As a general guide, it would be inappropriate to disclose information that could disadvantage a contractor and advantage their competitors in future tender processes, for example:

(a) details of commercial strategies or fee/price structures (where this would reveal information about the contractor's cost structure or whether the contractor was making a profit or loss on the supply of a particular good or service);
(b) details of intellectual property and other information which would be of significant commercial value; or
(c) special terms which are unique to a particular contract, the disclosure of which may, or could reasonably be expected to, prejudice the contractor's ability to negotiate contracts with other customers or adversely affect the future supply of information or services to the Commonwealth.

The following information would normally be disclosed:

(a) details of contracting processes including tender specifications, criteria for evaluating tenders, and criteria for measuring performance of the successful tenderer (but not information about the content or assessment of individual tenders);
(b) a description of total amounts payable under a contract (ie as a minimum the information that would be reported in the Commonwealth Gazette or, for consultants, the information that would be reported in an agency's annual report);
(c) an account of the performance measures to be applied; and
(d) factual information about outcomes.

Where commercial information has been received on the basis of undertakings of confidentiality, this does not automatically preclude release to the Parliament. Staff should consider the public interest balance, as part of their advice to the minister, and may wish to seek the views on the possible release of the document of any person(s) or organisation(s) to whom undertakings were given (as would occur under sections 27 or 43 of the FOI Act). In most cases, the sensitivity of commercial-in-confidence material would diminish with time and this should be taken into account when assessing the public interest balance.

Any public interest immunity claim should be supported by reference to the particular detriment that would flow from release of the information in the particular case.

6

ESTIMATES HEARINGS AND PUBLIC INTEREST IMMUNITY CLAIMS: SENATE ORDER OF 13 MAY 2009

Background

On 13 May 2009, the Senate passed an Order setting out the process for making claims of public interest immunity (PII) in committee proceedings. A copy of the order is attached.

2. The Senate Procedure Committee reviewed the operation of the Order in August 2009. A copy of the Procedure Committee's report can be downloaded from http://www.aph.gov.au/Senate/committee/proc_ctte/reports/2009/report3/index.htm.

3. Officials who are expected to appear at Estimates and other Parliamentary committee hearings need to be familiar with the requirements of the Order and the grounds for claiming public interest immunity as set out in the Guidelines.

4. The process for claiming public interest immunity described in the Order is largely consistent with the process that is set out in paragraphs 2.19 to 2.38 of the *Government Guidelines for Official Witness before Parliamentary Committees* (the Guidelines) published by the Department of the Prime Minister and Cabinet at http://www.dpmc.gov.au/guidelines/docs/guidelines_govt_docs.pdf. While the Guidelines explain the process for making public interest immunity claims to protect against the disclosure of information or documents at committee hearings, it has been relatively uncommon in practice for officials appearing as witnesses at committee hearings, particularly Estimates hearings, to be asked to provide copies, for example of departmental briefs to ministers. The Order of 13 May 2009 makes it seem more likely that officials and ministers will be asked to provide information or documents of this kind at Senate committee hearings, including Estimates hearings, than has been the case in the past.

Summary of advice

5. It is important that the public interest is not inadvertently damaged as a result of information or documents being released without a proper assessment of the possible consequences. Accordingly, if an official is asked to provide information or documents to a Senate committee:

- if the official is satisfied that its disclosure would not harm the public interest, he or she should advise the minister that the material can be provided;
- if the official is satisfied that the disclosure of the material would damage the public interest, he or she should advise the committee that the material cannot be provided and explain how its disclosure would damage the public interest; and
- if the official is uncertain whether the disclosure of the material would damage the public interest, he or she should take the question on notice.

The grounds for claiming public interest immunity and the process for making such a claim at Estimates hearings are set out below.

Grounds for a public interest immunity claim

6. While the parliament has the power to require the production of documents, it is acknowledged that the Government holds some information the disclosure of which would be contrary to the public interest. Where the public interest in the information remaining confidential outweighs the public interest in its disclosure, the Government would normally make a public interest immunity claim.

7. There are several recognised and accepted grounds on which ministers may rely when claiming public interest immunity in relation to information or documents requested by the Senate or a Senate committee. These are set out at paragraph 2.32 of the Guidelines. As the Procedure Committee notes in its report, however, it is conceivable that new grounds could arise.

8. By way of example, public interest immunity claims may be made in relation to information or documents whose disclosure would, or might reasonably be expected to:

- damage Australia's national security, defence or international relations;
- damage relations between the Commonwealth and the States;
- disclose the deliberations of Cabinet; and
- prejudice the investigation of a criminal offence, disclose the identity of a confidential source or methods of preventing, detecting or investigating breaches of the law, prejudice a fair trial or endanger the life or safety of any person.

9. It is, of course, possible for more than one ground to apply to the same document, in which case all relevant grounds should be specified.

Deliberative documents

10. A public interest immunity claim may also be made in relation to material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government *where disclosure would be contrary to the public interest* [emphasis added – see paragraph 2.32(d) of the Guidelines]. Because the Senate Order requires ministers to specify the harm that could result from disclosure of information or a document of this kind, claims for public interest immunity on this ground will involve a greater degree of judgment and subjectivity, and may therefore be less readily accepted, than claims based on the various grounds described in paragraph 8 above.

11. Information and documents whose disclosure would not damage the public interest should be provided to Parliamentary committees as soon as possible. It is important, however, that officials and ministers do not inadvertently damage the public interest by disclosing information that ought to remain confidential. Officials and ministers therefore need to consider carefully whether particular documents should be the subject of a public interest immunity claim before they are released. This will frequently not be possible in the relatively short timeframe available for Estimates hearings, particularly as the responsible minister and relevant officials may need to devote their time to the hearings. If the request relates to a small number of documents, it may be possible to respond before the committee completes its hearings. If a large number of documents have been sought, or if the issues involved are complex, the minister may need to advise the committee that it will not be possible to respond until a later date (although it may be possible to provide some documents, or parts of some documents, while the committee is sitting).

12. In briefing ministers on the question whether it is appropriate to disclose information or documents to a committee, officials must assess and balance the public interest in disclosure of the information or document against the public interest, if any, in maintaining its confidentiality. This is a similar process to that which is undertaken when officials provide advice to ministers in relation to a Senate order to produce documents, or in deciding

whether to provide access to documents under section 36 of the *Freedom of Information Act 1982* (although it should be noted that the provisions of the FOI Act have no direct application to questions about the provision of information to a Senate committee), or in response to an order to discover documents that are relevant to litigation involving the Commonwealth.

13. It may also be appropriate to decline to provide information or documents if to do so would unreasonably disclose personal information or disclose material that could be the subject of a claim for legal professional privilege.

Process for claiming public interest immunity

14. Public interest immunity claims must be made by ministers. However, Senate committees, particularly Estimates committees, receive most of their evidence from officials, and it is they who are most likely in the first instance to be asked to provide information or documents that might be the subject of a public interest immunity claim.

15. The Senate Order describes in some detail the process leading up to a claim for public interest immunity. An official who considers that he or she has been asked to provide information or a document that might properly be the subject of a public interest immunity claim could either:

- advise the committee of the ground for that belief and specify the damage that might be done to the public interest if the information or document were disclosed (paragraph 1 of the Order); or
- take the question on notice.

The official could also refer the question to the minister at the table, but it is unlikely that the minister would be well-placed to make a considered decision on the question at that time.

16. The public interest in not disclosing information or documents on any of the grounds described in paragraph 8 above is self-evident and in many cases the need for such a claim would be readily apparent to officials at the hearing. If it is not, the official should ask if the question can be taken on notice so that it can be properly considered and the minister briefed.

17. It would be reasonable to expect that an official's evidence that a document is a Cabinet document or that, in his or her view, disclosure of the information or document in question might damage Australia's national security, for example, would be accepted by individual senators and committees with the result that the matter would not be taken further.

18. If that is not the case, however, the committee or the senator may request the official to refer the matter to the responsible minister (paragraph 2 of the Order). This would frequently mean that the question would need to be taken on notice. It is possible that the minister at the table, if he or she is not the relevant portfolio minister, may wish to ascertain the portfolio minister's views on the possible release of the information or document.

19. If the minister concludes that it would not be in the public interest to disclose the information or document, he or she "shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document" (paragraph 3 of the Order).

20. Paragraph 4 of the Order is not relevant for the purposes of Estimates committees, which cannot take evidence in camera, but needs to be considered in the context of other committee hearings.

21. If a committee considers that a minister's statement in support of a public interest immunity claim does not justify the withholding of the information or document, it can report the matter to the Senate (paragraph 5 of the Order). In that event, the Senate would probably consider whether to order that the documents be produced. If the committee decides not to report the matter to the Senate, the senator who sought the information or document may do so (paragraph 6 of the Order).

22. In recent years, officials and ministers have not normally been pressed for copies of deliberative documents, particularly during Estimates hearings, with questions being limited to whether ministers have been briefed on particular issues and, if so, when that occurred. Paragraph 7 of the Order makes it clear, however, that committees will not accept a claim for public interest immunity based only on the ground that the document in question is a deliberative document: a minister must also specify the harm to the public interest that may result from the disclosure of the information or document that has been requested. Again, the need to give careful consideration to the issues involved will frequently mean that the matter has to be taken on notice.

23. Finally, the Order recognises that there may be occasions when it would be more appropriate for the head of an agency, rather than the minister, to make a claim for public interest immunity (paragraph 8 of the Order). This might occur, for example, in relation to information or documents held by agencies that have a significant degree of independence from Government, such as law enforcement agencies, courts and tribunals, the Auditor-General, Commonwealth Ombudsman and some regulatory agencies.

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31 May 2011

David Macgill
Assistant Secretary
Parliamentary and Government Branch
Department of the Prime Minister and Cabinet
One National Circuit
BARTON ACT 2600

Dear Mr Macgill

Power of the Senate to order the Information Commissioner or the Productivity Commission to report to the Senate

1. We refer to your request for advice of 24 May 2011 in relation to this matter.

BACKGROUND

Senate orders

2. On 26 October 2010 and 23 November 2010, the Senate agreed to orders requiring the Information Commissioner to report to the Senate on disputes between the executive and the Senate as to production of documents by the executive to the Senate.

3. On 16 November 2010, the Senate agreed to an order requiring the Productivity Commission (Commission) to provide to the Senate by 31 May 2011 a report which sets out the design of a process for the selection and ongoing review of the superannuation funds to be included in modern awards or enterprise agreements as default funds.

4. On 12 May 2011, Senator Bob Brown gave notice that he intends to move the Senate to make an order which would require the Commission to provide to the Senate by 20 September 2011 a report on the development of a sovereign wealth fund for Australia.

5. The terms of the orders and proposed order are set out in the Attachment. For the purposes of this advice, we will treat the proposed order as having been made and we will refer to all of the orders as the relevant orders.

Senate Standing Order 164

6. As we understand it, the Senate has purported to exercise the power in Senate Standing Order 164 which provides that:

> (1) Documents may be ordered to be laid on the table, and the Clerk shall communicate to the Leader of the Government in the Senate all orders for documents made by the Senate.
>
> (2) When returned the documents shall be laid on the table by the Clerk.
>
> (3) If a minister does not comply with an order for the production of documents, directed to the minister, within 30 days after the date specified for compliance with the order, and does not, within that period, provide to the Senate an explanation of why the order has not been complied with which the Senate resolves is satisfactory:
>
> (a) at the conclusion of question time on each and any day after that period, a senator may ask the relevant minister for such an explanation; and
>
> (b) the senator may, at the conclusion of the explanation, move without notice – That the Senate take note of the explanation; or
>
> (c) in the event that the minister does not provide an explanation, the senator may, without notice, move a motion in relation to the minister's failure to provide either an answer or an explanation.

Interpretation of orders

7. We understand the order of 26 October 2010 to require the Information Commissioner to review the adequacy of the grounds given by the executive for refusing to produce information related to certain mining tax proposals and to report to the Senate in relation to the release of the information. The report is to include, 'if applicable', the Information Commissioner's 'arbitration' on the release of the information. It is not clear what is meant by arbitration being applicable. It may be possible to read the order as requiring a report to be laid on the table if any exists at the relevant time, but it would appear that this was not the intention. In our view, it is clear that the order is intended to require the Information Commissioner to assess the executive's claims and produce to the Senate a report on the adequacy of those claims.

8. The order of 23 November 2010 is in the same form as the order of 26 October 2010 but relates to documents about GST arrangements between the Commonwealth and the States and Territories.

9. We understand the order of 16 November 2010 to be an order to the Commission to produce a report which sets out the design of a process for the selection and ongoing review of the superannuation funds to be included in modern awards or enterprise agreements as default funds, and which meets the other requirements specified in the order. Again, it may be possible to read the order as requiring a

report to be laid on the table if any exists at the relevant time, but it would appear that this was not the intention.

10. We understand the sovereign wealth order to be an order to the Commission to produce a report on the development of a sovereign wealth fund for Australia, having regard to the matters in paragraph (c) of the order. Again, it does not appear that the intention of the order was to require a report to be laid on the table only if a report exists at the relevant time.

11. In all cases, the use of the term order, rather than request, makes it clear that the Senate is purporting to require creation and production of the relevant report, such that failure to do so may be the basis for a finding of contempt of the Senate. Although paragraph (c) of the sovereign wealth order 'requests' the Commission to consider options in preparing the report, paragraph (b) 'orders' production of the report.

Information Commissioner

12. The Information Commissioner is appointed under s 14(1) of the *Australian Information Commissioner Act 2010*. Section 10(1) of that Act gives the Information Commissioner the following functions:

> (a) the information commissioner functions;
>
> (b) the freedom of information functions;
>
> (c) the privacy functions.

13. These functions are defined in ss 7-9 of the Australian Information Commissioner Act. Section 7 provides:

> The ***information commissioner functions*** are as follows:
>
> (a) to report to the Minister on any matter that relates to the Commonwealth Government's policy and practice with respect to:
>
> (i) the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by the Government; and
>
> (ii) the systems used, or proposed to be used, for the activities covered by subparagraph (i);
>
> (b) any other function conferred by this Act or another Act (or an instrument under this Act or another Act) on the Information Commissioner other than a freedom of information function or a privacy function.

Section 8 sets out the freedom of information functions which include:

> ...

(d) providing information, advice, assistance and training to any person or agency on matters relevant to the operation of the *Freedom of Information Act 1982*;

...

(f) making reports and recommendations to the Minister about:

(i) proposals for legislative change to the *Freedom of Information Act 1982*; or

(ii) administrative action necessary or desirable in relation to the operation of that Act;

(g) monitoring, investigating and reporting on compliance by agencies with the *Freedom of Information Act 1982*;

(h) reviewing decisions under Part VII of the *Freedom of Information Act 1982*;

...

(k) any other function conferred on the Information Commissioner by the *Freedom of Information Act 1982*;

(l) any other function conferred on the Information Commissioner by another Act (or an instrument under another Act) and expressed to be a freedom of information function.

14. Section 9 sets out the privacy functions which include functions conferred on the Information Commissioner by the *Privacy Act 1988*.

15. The functions of the Information Commissioner do not include any function which would encompass reporting on or arbitrating disputes between the executive and a House of the Parliament as to production of documents by the executive to the House.

16. Neither the Australian Information Commissioner Act nor any other Act or other legislative instrument gives the Information Commissioner power to require production to him of the Treasury documents on which the orders of 26 October 2010 and 23 November 2010 would require him to report.

Productivity Commission

17. The Commission is established by s 5 of the *Productivity Commission Act 1998*. Its functions are set out in s 6:

(1) The functions of the Commission are:

(a) to hold inquiries and report to the Minister about matters relating to industry, industry development and productivity that are referred to it by the Minister; and

(b) to provide secretariat services and research services to government bodies as directed by the Minister; and

(c) on and after 1 July 1997, to receive and investigate complaints about the implementation of competitive neutrality arrangements in relation to Commonwealth government businesses and business activities and to report to the Minister on its investigations; and

(d) to provide advice to the Minister about matters relating to industry, industry development and productivity, as requested by the Minister; and

(e) to undertake, on its own initiative, research about matters relating to industry, industry development and productivity; and

(f) to promote public understanding of matters relating to industry, industry development and productivity; and

(g) to perform any other function conferred on it by this Act; and

(h) to do anything incidental to any of the preceding functions.

...

18. Parts 3 and 4 of the Productivity Commission Act establish procedures for requiring the Commission to hold inquiries and report to the Minister, or give advice to the Minister. There is no express authority in the Productivity Commission Act for the Senate to compel the Commission to provide a report to it.

SUMMARY OF ADVICE

19. You ask for advice about the power of the Senate to order a person or body to create a report and then produce the report to the Senate, and in particular the power to make the relevant orders.

20. Under s 49 of the Constitution, the powers of the Senate are as 'declared by the Parliament' (i.e., by Act of the Parliament), and until so declared, are 'those of the Commons House of Parliament of the United Kingdom ... at the establishment of the Commonwealth'.

21. Generally, the powers of the Senate include a power to punish for contempt a person who fails to comply with an order of the Senate to produce documents which are in existence, subject to any appropriate public interest immunity claim.

22. In our view, it is clear that the powers of the Senate do not extend to compelling production of documents which are not in existence, and which the person to whom the requirement is directed would need to create from information not held by or known to the person. The powers of the Senate do not extend to requiring the Information Commissioner to obtain and consider documents, review them and the grounds specified by the Government for its failure to produce them to the Senate, create a report on these matters and produce the report to the Senate, as the orders of 25 October 2010 and 23 November 2010 purport to do. Nor do they extend to requiring the Commission to design a process, create a report about the process and produce the report to the Senate, as the order of 16 November 2010 purports to

do. Nor do they extend to requiring the Commission to gather information, consider options, reach a conclusion, create a report and produce the report to the Senate, as the sovereign wealth order purports to do.

23. No such power has been declared by Act of Parliament. Nor is there a basis for any such power in the powers of the House of Commons at the establishment of the Commonwealth. The practice of the Senate since federation is not a source of power. In any case, that practice does not support the existence of such a power.

REASONS

24. A House of the Parliament can **request** that a person produce to it any documents or do anything else (including prepare a report). However, it is necessary to consider the scope of the power to make an **order** for production of documents which is enforceable against a person, in that failure to comply may amount to a contempt of the House. This advice proceeds on the basis that we are considering the scope of the Senate's power to require production of documents on pain of contempt of the Parliament.

25. It is well established that, subject to appropriate public interest immunity claims, both Houses of the Commonwealth Parliament have a power to compel production of documents on pain of contempt of the Parliament.[1]

26. However, it is necessary to consider the scope of the power to produce 'documents'. It is necessary to consider whether the Senate has power to compel a person to produce to it a document which is not already in existence, and which is not created from information held by or known to the person. This is the task set out in the relevant orders. Each order would involve work to obtain information, consider a range of factors, reach a conclusion and create a report based on this new information and thinking which could be produced to the Senate.

27. For the purposes of this advice, it is not necessary to consider whether the Senate has the power to compel a person to produce to it a document which is not already in existence, to the extent to which the document compiles information (i.e., puts together materials from various sources[2]) held by or known to the person or otherwise provides information held by or known to the person. Nor is it necessary to consider whether the power to compel production of a document extends to production of a document not already in existence which analyses or expresses an opinion about information held by or known to the person. The relevant orders seek to exercise a much broader power.

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1 *Odgers' Australian Senate Practice*, 12th ed., 2008, pp.30, 58-61, 415-416, 441-445; *House of Representatives Practice*, 5th ed., 2005, pp.591, 643-644; Campbell, *Parliamentary Privilege*, 2003, p.152.

2 See *Macquarie Dictionary*, online edition, definition of 'compile'.

Section 49 of the Constitution

28. Sections 49 and 50 of the Constitution provide that:

> 49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.
>
> 50. Each House of the Parliament may make rules and orders with respect to:
>
> (i) the mode in which its powers, privileges, and immunities may be exercised and upheld;
>
> (ii) the order and conduct of its business and proceedings either separately or jointly with the other House.

29. Under s 49 of the Constitution, the Senate has two sources of power, a declaration by the Parliament (i.e., an Act of the Parliament), and the powers of the House of Commons at the establishment of the Commonwealth in 1901.[3]

30. It is clear that, at 1901, the House of Commons had power to punish a person for contempt of the House where the person failed to comply with an order that the person attend to give evidence or produce documents, including under a 'return to order' (the equivalent of an order made under Senate Standing Order 164).[4] Subject to any limitation on the power in s 49 of the Constitution, and any declaration by the Parliament, s 49 would provide each House of the Commonwealth Parliament with the same power.

31. There is a possible limitation on the power conferred by s 49 of the Constitution derived from the limitations on the legislative power of the Commonwealth which may preclude the use of compulsory powers by a House of the Parliament to inquire into matters on which the Commonwealth Parliament cannot legislate.[5] However, the Commonwealth Parliament would be empowered to legislate in relation to all of the matters the subject of the relevant orders.

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3 Another possible source of the powers of a House of the Parliament is an implication of power necessary to the functioning of the House: see Greenwood QC and Ellicott QC, *Parliamentary Committees: Powers over and Protection Afforded to Witnesses*, 1972 – Parliamentary Paper No. 168, p.3; *Odgers*, p.59. However, any such power is unlikely to extend the power to compel production of documents. The Parliament can also make laws with respect to 'matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof ...' (Constitution, s 51(xxxix)).

4 *Erskine May's Parliamentary Practice*, 10th ed., 1893, pp.507-510.

5 *Odgers*, pp. 59-60; *House of Representatives Practice*, pp.645-647; Campbell, pp.153-154; Greenwood and Ellicott, pp.8-9.

32. There may also be limitations on the use of compulsory powers against members of the other House of the Parliament and in relation to State members of parliament and office-holders, but the relevant orders do not give rise to any such issue.[6]

33. The Parliament has declared some of the relevant powers, privileges and immunities in the *Parliamentary Privileges Act 1987*. That Act preserves the powers, privileges and immunities conferred by s 49 of the Constitution other than as expressly provided by the Act (s 5). It regulates to some extent the contempt powers of the Houses (e.g., in relation to levels of penalty (s 7)) but does not make any declaration affecting the question of the scope of the power to compel production of documents. There are no other Acts which relevantly declare the general scope of this power.

34. Therefore the central question is whether the House of Commons at 1901 could have required the executive (including an officer like the Information Commissioner and a body like the Commission) to create a report and produce the report to the House as purportedly required by the relevant orders.

Power of the House of Commons at the establishment of the Commonwealth

35. The Commons were 'the general inquisitors of the realm' – they could investigate any subject matter and, ancillary to performance of this function, could compel the attendance of witnesses.[7] The purpose of the investigation could have been in aid of the legislative function of the House and possibly also in aid of a function of scrutinising, and offering advice to, the executive.[8] At the least, the House of Commons had power to require presentation to the House of documents held by public offices and bodies (returns by order and by address) and, by way of select committees, to 'send for persons, papers, and records' because these are the instances of the power to produce documents mentioned in the 1893 edition of Erskine May's *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (*May*).[9]

36. It is not clear that the Houses of the Commonwealth Parliament have the function of 'general inquisitor'.[10] Nevertheless, they have the power to compel attendance of witnesses and require production of documents at least in order to make inquiries in aid of their legislative function, and perhaps also a function of scrutinising, and

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6 *Odgers*, pp. 60-61; *House of Representatives Practice*, pp.655-656.

7 *Howard v Gosset* (1845) 10 QB 359 at 379-380.

8 See the discussion in Greenwood and Ellicott, pp.3-5.

9 10th ed., 1893, pp.507-510, 384.

10 *Attorney-General (Cth) v MacFarlane* (1971) 18 FLR 150; Greenwood and Ellicott, pp.6-7; Campbell, pp.154-155.

advising, the executive.[11] The Standing Orders of the Senate and the House of Representatives give the Houses the returns by order and committee powers.[12]

37. Yet there is nothing to suggest that the powers of the House of Commons at 1901 extended to requiring production of documents not in existence and not derived from information held by or known to the person required to produce them, or that these powers were ever used by the House of Commons for this purpose.

38. *May* states that 'Parliament is invested with the power of ordering all documents to be laid before it, which are necessary for its information'.[13] 'Information' means, in essence, knowledge of facts or circumstances.[14] The statement is made under the heading 'Accounts, Papers, and Records Presented to Parliament' by way of introduction to a description of the procedures for returns by order and by address. The examples given of documents obtained are existing documents or documents containing matters of fact known to the person required to produce them.[15]

39. The other instance of the use of a power to compel the production of documents described in the 1893 edition of *May* is the power of select committees to send for persons, papers and records. The discussion in *May* concerns existing documents.

40. In addition, *May* states that the purpose of a select committee is 'to consider or to take evidence upon any matters, and to report their opinion, for the information and assistance of the house'.[16] The power to send for persons, papers and records is said to be needed because the object of select committees is usually to take evidence. Under the power, 'witnesses may be summoned by an order ... and must bring all documents that will be required for the use of the committee'.[17]

41. Thus *May* makes clear that witnesses can be summoned by order to give oral evidence and to produce documentary evidence. Not surprisingly, one judge of the Australian High Court has presumed that the power of the House of Commons to compel production of documents derives from its status as a court of record.[18] It is true that there are significant differences between taking evidence in aid of the judicial function and taking evidence in aid of the legislative function. However, the origin of the powers to compel attendance and production of documents as a process for taking evidence from witnesses, vested in an institution which was a court of record, strongly suggests that the powers were directed at obtaining

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11 *Odgers*, p.59; Campbell, p.155.

12 Senate Standing Orders 34(1), 164; House of Representatives Standing Orders 200, 236.

13 p.507.

14 *A New English Dictionary on Historical Principles* (1901), p.274; *Macquarie Dictionary*, online edition.

15 pp.507-510.

16 p.378.

17 p.384.

18 *Egan v Willis* (1998) 195 CLR 424 at 472 [92], McHugh J.

information held by or known to the person to whom the order was directed, not at compelling a person to undertake original work to create documents for production to that body.

42. There can be no denying that the power of the House of Commons at 1901 to require production of information was extensive. However, in 1908 Redlich described the power 'in its most general form' as being 'to summon any subject of the state as a witness, to put questions to him and to examine any memoranda in his possession'.[19] This is a conception of the power entirely consistent with the power of a court to summon witnesses and produce documents, and entirely consistent with the understanding at 1901 of the power of the House of Commons as disclosed by *May* – i.e., in both cases, a power not extending to ordering the creation of documents derived from information not held by or known to the person required to produce.

No power to compel persons to undertake tasks

43. Furthermore, having regard to both the ordinary understanding of a power to produce documents and broader principle, it would be difficult to maintain that the power to require a person to produce documents extended to requiring the creation of documents which were not derived from information held by or known to the person. The effect of such a power would be to require a person to undertake a task, and then create a document evidencing this. In the case of the order of 16 November 2010, for instance, the effect of the order would be to compel the Commission to design a process for selection of default superannuation funds for modern awards and enterprise agreements (albeit that the Commission would also be required to record its design in a document to be provided to the Senate). This would in substance be a power to require the undertaking of a task, not the provision of a document.

Private citizen

44. Assuming that the power of the Houses to compel production of documents extends in the same way to private citizens as to the executive,[20] such a power would mean that a House of the Parliament could compel a private citizen to undertake original work (including conducting wide ranging reviews and arbitrating disputes) for the purposes of a House of the Parliament.

45. In our view, it is clear that such a broad power was not within the powers of the House of Commons at the establishment of the Commonwealth acting on its own (i.e., without legislation). On that basis, it is not within the powers of the Senate acting on its own. The power of the Senate to require production of a document does not extend to impose a legal obligation on a private citizen to undertake a task,

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19 Redlich, *Procedure of the House of Commons: A Study of its History and Present Form*, 1908, cited in Department of the Senate, *Procedural Information Bulletin No. 247*, 14 February 2011, p.8.

20 See *Odgers*, pp.416, 444.

and then create a document recording this to be produced to the Senate, where failure to comply with the obligation would render the citizen liable for contempt.

Executive

46. Even if the power of the Houses to compel production of documents extends only to the executive (including statutory bodies and offices), the same is true. A power to require production of documents is not a power to require original work to be undertaken, at least where not derived wholly from information held by or known to the person required to produce the document.

47. In any case, it is quite clear that the power of a House of the Parliament to require production of documents cannot be exercised to usurp the powers of the executive. Acceptance that the Senate has the power asserted in the relevant orders would involve acceptance that a House of the Parliament could usurp the executive power by directing the activities of persons and bodies (whether Ministers, public servants or statutory office-holders or bodies) across the whole of government, regardless of the resources available to them and subject only to a requirement that they provide a report to the House.

48. This would clearly be inconsistent with the proper roles of the Parliament and the executive, whether at 1901 or now.

49. In 1882, May in his *Constitutional History of England* stated that:

> Parliament has no direct control over any single department of the state. It may order the production of papers for its information; it may investigate the conduct of public officers and may pronounce its opinion upon the manner in which every function of government has been or ought to be discharged; but it cannot convey its orders or directions to the meanest executive officer in relation to the performance of this duty. Its power over the executive is exercised indirectly, but not the less effectively, through the responsible ministers of the Crown.[21]

50. To like effect is Hearn, in *Government of England* (1886):

> Although in matters of state Parliament possesses so unlimited a power of criticism, it has not the smallest share of direct authority. It may censure and complain of any proceeding in which the prerogative has been improperly exercised. It may remonstrate against any anticipated act of the Crown. It may recommend the adoption of any line of policy. It may express its opinion that any officer or any public body to whom any discretionary power is entrusted by law should exercise that power in a particular manner. But these powers are merely acts of admonition. The legal responsibility of action still remains with the person in whom the discretion is vested. It is the duty of Parliament to advise but not to command the Crown. ... It cannot of itself issue orders even to the doorkeepers of any public departments.[22]

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21 Vol. II, 1882, pp. 85-86, quoted in Greenwood and Ellicott, p.4.

22 2nd ed., 1886, p.149.

51. Anson in *The Law and Custom of the Constitution* (1911) states that 'the power of the House of Commons to criticize the action of the executive and to call ministers to account is undoubted, but it is distinguishable from the direct interference with executive action which would ensue from Parliamentary inquiries held on transactions which were in course of being carried though by ministers', and notes, in this context, that the executive can always hold inquiries on its own account.[23]

52. This principle is reinforced for the Commonwealth Parliament by the structure of the Australian Constitution, within which s 49 sits. The Constitution provides for different functions for the Parliament and the executive, and a level of separation between them. Of course Ministers are required to be members of the Parliament (s 64), and are accountable to the Parliament in fundamental ways pursuant to the principle of responsible government. But executive power is vested in the executive by s 61 of the Constitution, and not in the Parliament, let alone one House of the Parliament.

53. We note also that contemporary understanding of the inability of a House of the Parliament to direct the executive as to the performance of its functions is the same as it was at federation. *House of Representatives Practice* (5th ed., 2005) states:

> Other than in relation to matters such as its power to send for persons, documents and records and its powers in regard to enforcing its privileges, decisions of the House alone have no legal efficacy on the outside world. The House, as a rule, can only bring its power of direction into play in the form of an Act of Parliament—that is, only in concert with the other two components of the legislature, the Sovereign and the Senate. This is the only means by which the House can direct (rather than influence) departments of State, the courts and other outside bodies to take action or to change their modes of operation.[24]

54. Of course the executive for this purpose includes the statutory bodies and officers which are part of the Commonwealth and enjoy the privileges and immunities of the Crown. The Information Commissioner and the Commission have a measure of independence from Ministers but nevertheless are part of the Commonwealth and enjoy the privileges and immunities of the Crown.[25]

55. Therefore in our view the House of Commons at 1901 could recommend a course of action, including after inquiring into the matter itself, but it could not require the executive to inquire into a matter or adopt a policy or otherwise exercise the executive power or statutory power in a particular way. By operation of s 49 of the Constitution, the powers of the Senate are limited in the same way. We think therefore that the relevant orders of the Senate are not within its powers.

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23 Volume I: The Parliament, 4th ed., 1911, p.378.

24 p.313.

25 The functions of the Information Commissioner and the Commission are determined to a large extent by the relevant Ministers. Their employment regimes are subject to the *Public Service Act 1999* (Australian Information Commissioner Act ss 5(3), 23; Productivity Commission Act s 44), and their financial management regimes are subject to the *Financial Management and Accountability Act 1997* (*Financial Management and Accountability Regulations 1997*, reg 5, Schedule 1, items 164A, 177).

Post-federation practice

56. The practice of the Senate since federation is not a source of power for the Senate. It is necessary to find the Senate's powers in a declaration by the Parliament, or the power of the House of Commons at the establishment of the Commonwealth, or some other source in or derived from the Constitution. We acknowledge that the practice of the Senate may provide some evidence of the powers of the House of Commons at the establishment of the Commonwealth. However, we do not think that the practice of the Senate supports the power to make the relevant orders.

Standing Orders

57. The Standing Orders of the Houses continue to reflect the position at 1901 – i.e., they contain descendants of the 'return to order' provision and the committee power to send for persons, papers and records.[26] The Standing Orders continue generally to be used to obtain from the executive documents held by the executive or derived from information held or known by it.[27] Committees continue to summon witnesses to give evidence and produce documents, suggesting a power to obtain information held or known by them.[28]

Odgers' Australian Senate Practice

58. *Odgers' Australian Senate Practice* (12th ed., 2008) (*Odgers*) asserts no more than a power to require production of documents compiled from information held by a person or to make statements about matters. *Odgers* states that:

> Orders for the production of documents may require the production of documents in the possession of a person or body, or the creation and production of documents by the person or body having the information to compile the documents ... . Some orders require the production by the relevant officers or bodies of statements about particular matters ... .[29]

59. Even accepting that the power to produce documents extends to compilation, the first sentence in this statement in *Odgers* first appeared only in the 7th edition of that publication in 1995, and the second sentence of that paragraph in the 8th edition in 1997, both well after 1901. Statements to this effect did not appear in the earlier editions. In particular the 1st edition which was published in 1953 stated only that:

> The Senate, on motion upon notice, may order Accounts and Papers to be laid upon the Table. As an illustration, on the 30th June, 1943, motion was made, upon notice, that all papers in relation to the differentiation in the payment of travelling allowances to officers of the Commonwealth Public Service be laid on the Table of the Senate.[30]

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26 See footnote 12 above.

27 See *Odgers*, pp.442-444.

28 See, for example, *Odgers*, p.59, Ch 17; *House of Representatives Practice*, Ch 18.

29 *Odgers*, p.442. No change to this statement is made by the 2010 Supplement.

30 p.209.

60. The orders to produce cited in *Odgers* to support the statement quoted at paragraph 58 above were all made from 1992, again well after 1901. The only exceptions are examples given in a 1993 advice of the Clerk of the Senate (discussed below), none of which involved a requirement to produce documents not compiled from information held or known by a person (i.e., 19th century British statistics, VIP flights (1967) and unproclaimed legislation (1988)).

61. Furthermore, the examples given in *Odgers* to support these statements do not establish a consistent practice since 1901 which could provide evidence of a power in the House of Commons at 1901 to compel production of documents not in existence, and which need to be created from information not held by or known to the person ordered to produce them. This is not surprising given that *Odgers* does not assert such a power.

62. In support of the proposition in the first sentence in the statement quoted at paragraph 58 above, *Odgers* cites a 1993 Senate debate in which advice of the then Clerk of the Senate dealing with this issue was incorporated.[31] The Clerk advised in much the same terms as the first extracted sentence from *Odgers* above, also using the language of 'compiling' documents from 'information'. The 'occasional' examples the Clerk cited in support of his advice were:

— production to the British Parliament in the 19th century of statistics compiled by government bodies – details were not provided but use of the word 'compilation' suggests that the relevant information was held by the government bodies;

— production of documents relating to VIP flights 'which clearly required the creation of documents containing information culled from various records';

— production of lists of unproclaimed legislation;

— production by the Auditor-General of a statement answering questions about reports provided by Australia Post to the Prices Surveillance Authority.

63. *Odgers* also cites production of an indexed list of departmental files and production by a Minister of information as to certain financial contributions already made.

64. The examples given to support the proposition in the second sentence of the quotation from *Odgers* in paragraph 58 above (statements of officers or bodies) are production of:

— a report by the Australian Securities Commission (ASC) of the *First Corporate Law Simplification Act 1995* – the report was based on information in the ASC's databases;[32]

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31 *Senate Hansard*, 27 September 1993, pp.1165-1166.

32 *Report to the Senate: Review of the First Two Years of Operation of Certain Amendments of the First Corporate Law Simplification Act 1995*, 1998, [1.4].

- a statement by a Minister as to progress of an inquiry, proposed finalisation date and likely tabling date, and a copy of the report of the inquiry when finalised;
- a report, commissioned by a Minister, of an ASC investigation into a sale of a company's assets;
- a statement of a Minister explaining an alleged failure to monitor and control sites of genetically-engineered crops and details of action being taken, when and how the Minister was informed, how he reacted and other factual information; and
- indexed lists of departmental and agency files.

65. In the context of orders to produce documents, *Odgers* also refers to a number of other reports to the Senate by the Auditor-General in 1994 and 1995 before that office was constituted under the *Auditor-General Act 1997* and given immunity from parliamentary and executive direction.[33] However, it is not clear that the Auditor-General accepted that he was compelled to provide the relevant documents.

66. In the case of a report into leasing arrangements for a building in Melbourne, the Auditor-General presented his report to the President and the Speaker '[i]n accordance with the authority contained in the *Audit Act 1901*' to undertake a special investigation.[34] He stated that:

> On 22 June 1994, the Senate agreed to an order **requesting** the Auditor-General to investigate and table a report on fourteen specific matters relating to tenancy arrangements in the Casselden Place building in Melbourne. .... The Auditor-General **consented** to the Order and has now completed the investigation. This report of the findings of the investigation is tabled in accordance with the Order for production of the document.[35] [emphasis added]

67. One at least of the other orders requires that there be laid on the table a report by the Auditor-General which takes into account information publicly available information (relating to the financial statements of Australian National Line) and 'information which the Auditor-General requires and is authorised or empowered to obtain'. However, this report also states that it is undertaken '[i]n accordance with the authority contained in the *Audit Act 1901*' and specifically refers to the Senate's order as a 'request'.[36]

68. Even if the Auditor-General had accepted that he was compelled by the Senate's orders to provide the reports, it may be that at that time there was some acceptance of the view that the Auditor-General's position was distinguishable from that of other

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33 p.444.

34 *Audit Report No. 4 1994-95: Project Audit: Special Investigation into Casselden Place Building, Melbourne*, p.iii.

35 *Audit Report No. 4 1994-95*, p.1.

36 *Audit Report No. 11 1994-95: Project Audit; ANL Valuation Issues*, pp. iii, ix, 1.

members of the executive, given that the office had been described as working 'first and foremost for the Parliament' or as a 'constitutional orphan' (neither directly part of the legislature nor the executive).[37]

69. *Odgers* also refers to orders requiring the Australian Competition and Consumer Commission (ACCC) to report to the Senate.[38] The production of these reports seems to have been treated by the ACCC as authorised by s 29(3) of the *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010*).

70. *Odgers* also refers to a report by the Human Rights and Equal Opportunity Commission on mandatory sentencing laws.[39] As acknowledged in *Odgers*, however, the resolution of the Senate merely 'requested' the Commission to provide the report.

71. Most of the examples cited by *Odgers* involved production of documents compiled from information held or known by a person. The only exceptions are where the Senate did not purport to compel production or the executive did not accept, or clearly accept, that there was compulsion to produce.

Erskine May

72. We note that the 23rd edition of *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (2004) discusses the descendants of the returns power and the committee inquiry power.[40] No statements are made equivalent to the statements from *Odgers* cited at paragraph 58 above and no other suggestion is made that the powers extend to require production of documents not in existence, and which need to be created from information not held or known by the person. It notes that a select committee has formally ordered a private society to produce information, but only information possessed by the society.[41]

Practice generally

73. It is also noted more generally that the fact that the executive has in the past complied with orders to produce documents does not necessarily demonstrate the existence of a power in the House of Commons at 1901, and thus the Senate, to compel provision of the documents on pain of contempt. There are a number of reasons why the executive may treat any such order as a request and, in its discretion, comply with it. In particular, if the Senate is of the view that information would be helpful, and the executive is agreeable to providing it, then the executive in doing so does not demonstrate the existence of a power to compel provision of the

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37 Joint Committee of Public Accounts, *Report No. 346: Guarding the Independence of the Auditor-General*, 1996, pp.37-44.

38 p.444.

39 p.444.

40 pp.263-264, 757-758.

41 p. 758.

document on pain of contempt. It is clearly not possible to presume that an executive body which has not disputed the power of the Senate to make an order has done so because there is no basis to make a challenge.[42]

Conclusion

74. Therefore in our view the practice of the Senate does not provide evidence that the powers of the House of Commons at the establishment of the Commonwealth extended to compelling production of documents which were not in existence, and which the person to whom the requirement was directed would need to create from information not held by or known to them.

Senate Standing Order 164

75. The relevant orders were purportedly made in exercise the power in Senate Standing Order 164(1). This is quoted above in paragraph 6 and provides that '[d]ocuments may be ordered to be laid on the table'. As we have noted, we do not think this Standing Order is evidence of a relevant power of the House of Commons at the establishment of the Commonwealth. In any case, we do not think that this Standing Order in its terms extends to compelling production of documents which are not in existence, and which the person to whom the requirement is directed would need to create from information not held by or known to them, including to making the relevant orders.

Relationship between Senate power to produce documents and statutory functions of Information Commissioner and Commission

76. The Australian Information Commissioner Act sets out the functions and powers of the Information Commissioner. The Productivity Commission Act sets out the functions and powers of the Commission and the mechanism for the conduct of inquiries by the Commission. The functions of the Information Commissioner and the Commission extend to anything incidental to any of their other functions[43] and this would extend to producing to a House of the Parliament documents they hold related to any of their functions.

77. The functions of the Information Commissioner and the Commission do not extend to compliance with the relevant orders. A statutory office-holder or body can perform only the functions that it is given by statute.[44] The powers of the Senate alone cannot extend to the conferral of additional functions on statutory office-holders and bodies.

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42 See Department of the Senate, *Procedural Information Bulletin No. 249*, 28 March 2011, p.11.

43 Section 10(2) of the Australian Information Commission Act provides that the Information Commissioner has power to do all things necessary or convenient to be done for or in connection with the performance of the specified functions. Section 6(1)(h) of the Productivity Commission Act expressly confers incidental functions on the Commission.

44 *MacLeod v Australian Securities Investment Commission* (2002) 211 CLR 287 at 302 [44], 305 [57].

78. The Information Commissioner can of course report to the Minister on the government's policy and practices in relation to the production to Houses of the Parliament of information held by the government.[45] This function could be performed after a request from the Senate.

79. Equally, the Commission can make inquiries and report to the Minister on matters that are referred to it by the Minister,[46] and can undertake, on its own initiative, research about matters.[47] These powers of the Minister and the Commission could be exercised, in accordance with the terms of the Productivity Commission Act, after a request from the Senate.

80. The Australian Information Commissioner Act and the Productivity Commission Act contain no express limitation on the powers and privileges of the Houses of the Parliament. However, in the present context, there is no conflict between the powers of the Houses and the functions and powers of the Information Commissioner and the Commission under those Acts. The Houses of the Parliament do not have power to require the Information Commissioner and the Commission to undertake the tasks set out in the relevant orders. The statutory functions and powers of the Information Commissioner and the Commission do not authorise them to undertake the tasks.

81. The principle that statutory office-holders and bodies cannot be given functions except by statute is consistent with, and supports, accepted understandings of the relationship between the Houses of the Parliament on the one hand, and the executive and its agencies on the other – i.e., that one House alone cannot direct the activities of the executive and its agencies.

82. Please let us know if we can provide any further assistance.

Yours sincerely

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45 Australian Information Commissioner Act, s 7(a).

46 Productivity Commission Act, s 6(1)(a).

47 Productivity Commission Act, s 6(1)(e).

ATTACHMENT

Information Commissioner

1. On 26 October 2010, the Senate agreed to the following order:

That the Senate—

(a) notes that:

(i) the Government has refused to provide information requested by the Senate about key assumptions it has used to estimate revenue from its original as well as its revised mining tax proposals,

(ii) specifically, the Government has refused to provide information about changes to commodity price, production volume and exchange rate assumptions and any other variables relevant to its mining tax revenue estimates,

(iii) in its response to the relevant order of the Senate, the Government justified its refusal to provide the information on the basis that, `commodity price forecasts underpinning the terms of trade forecasts are based in part on information provided by companies that is commercial in confidence. Disclosure of these individual commodity price forecast may therefore prejudice negotiations between private companies',

(iv) the information sought by the Senate is published by the Western Australian State Government in its budget papers as a matter of course, and

(v) information published by the Western Australian Government includes its commodity price assumptions developed after relevant information about commodity price expectations is obtained from relevant mining companies, which includes at least some of the companies involved in the mining tax negotiations with the Federal Government;

(b) based on the Government's response does not accept that there are any legitimate public interest grounds for the Government to refuse to provide the requested information;

(c) orders that there be laid on the table by noon on Thursday, 28 October 2010:

(i) all the Government assumptions used to estimate the revenue from the Resource Super Profits Tax as contained in the 2010-11 budget, including, but not limited to, the assumptions on commodity prices, production volumes and exchange rates, and

(ii) all the Government assumptions used to estimate the revenue from and overall fiscal impact of the Minerals Resource Rent Tax/expanded Petroleum Resource Rent Tax arrangement announced on 2 July 2010, including all changes to assumptions used for the 2010-11 budget;

(d) notes the agreements between the Government and other parties and independents to refer disputes about public interest disclosures to the Information Commissioner, who will arbitrate on the release of documents; and

(e) orders that, if the Government does not produce the information required by this order within the specified timeframe, there be laid on the table by 15 November 2010, a report on the matter by the Information Commissioner, including a review of the adequacy of the grounds specified by the Government for its refusal to produce the information and, if applicable, his arbitration on the release of the information.

2. On 23 November 2010, the Senate agreed to the following order:

That the Senate—

(a) notes that:

(i) the Government has refused to provide the information requested by the Senate in relation to advice to Government about the requirement for unanimous agreement from all parties to change the GST arrangements,

(ii) the Government did not justify its refusal by pointing to a recognised public interest ground and by explaining any harm to the public interest from releasing that information,

(iii) both the 1999 *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations* (GST Agreement) as well as the *Intergovernmental Agreement on Federal Financial Relations in 2008* require unanimous agreement from all parties to make any changes to GST arrangements,

(iv) there is no unanimous agreement to change the GST arrangements, and

(v) in its Incoming Government Brief, Treasury advised the Government that 'Western Australia has indicated that it is not prepared to agree to proposed amendments to the IGA notwithstanding that they preserve the current arrangements for Western Australia' and that 'as changes can only be made to the IGA by unanimous agreement of all parties, alternative approaches may need to be considered to give effect to the financing arrangements for other jurisdictions';

(b) orders again that there be laid on the table by 5 pm on Thursday, 25 November 2010, any advice (including legal advice and advice from the Solicitor-General or the Australian Government Solicitor) to the Department of the Prime Minister and Cabinet or the Department of the Treasury, or advice from these departments to their respective Ministers, concerning the need for unanimous agreement to vary GST arrangements;

(c) notes the agreements between the Government and other parties and independents to refer disputes about public interest disclosures to the

Information Commissioner, who will arbitrate on the release of documents; and

(d) orders that, if the Government does not produce the information required by this order within the specified timeframe, there be laid on the table by 15 December 2010, a report on the matter by the Information Commissioner, including a review of the adequacy of the grounds specified by the Government for its refusal to produce the information and, if applicable his arbitration on the release of the information.

Productivity Commission

3. On 16 November 2010, the Senate agreed to the following order:

That the Senate—

(a) notes that:

(i) the current process to select default superannuation funds under modern awards is not transparent, not objective or evidence based, not competitive and not subject to systematic review,

(ii) the top ten most commonly listed default funds under modern awards are all union based industry super funds, with these ten funds listed as default super funds in modern awards 330 times,

(iii) the Cooper Review into superannuation also confirmed that current default superannuation fund arrangements undermined competition as new employees typically become a member of a default fund, and

(iv) a competitive, transparent and efficient superannuation industry is critically important to maximise value for all superannuants;

(b) endorses the Labor Party's commitment before the 2010 election to instruct the Productivity Commission to design a process for the selection and ongoing review of the superannuation funds to be included in modern awards or enterprise agreements as default funds; and

(c) orders that there be laid on the table, no later than 31 May 2011, a report by the Productivity Commission on the design of a process for the selection and ongoing review of the superannuation funds to be included in modern awards or enterprise agreements as default funds, with the requirements that:

(i) the process is to be based on objective criteria and evidence and be subject to systematic review, so that the selection and ongoing review of eligible default funds is transparent and competitive,

(ii) the process is to help maximise employees' retirement incomes by ensuring that only those superannuation funds that deliver – and continue to deliver – the best results to their members are

able to be included as default fund options in modern awards and enterprise agreements, and

(iii) in designing the process the Productivity Commission make reference to the existing sophisticated system of superannuation fund ratings which has evolved over the past 20 years and is already used widely by employees, employers and financial planners in making decisions on fund selection.

4. On 12 May 2011, Senator Bob Brown gave notice of the following motion:

That the Senate—

(a) notes that:

(i) the current resources boom is generating enormous wealth from which all Australians should reap the benefits,

(ii) a sovereign wealth fund could help fund the needs of future generations, as well as seeking to improve budget measures in the immediate budget cycle,

(iii) approximately 36 countries have sovereign wealth funds which currently manage more than $4.2 trillion worth of assets globally, and

(iv) a recent statement by the International Monetary Fund called on Australia to establish a sovereign wealth fund to protect the economy from shock falls in commodity prices and 'save revenue to ensure a more equal distribution of its benefits across generations and reduce long-term fiscal vulnerabilities from an ageing population and rising health care costs';

(b) orders that there be laid on the table, no later than 20 September 2011, a report by the Productivity Commission on the development of a sovereign wealth fund for Australia; and

(c) requests that the Productivity Commission in preparing its report consider options for the establishment of a sovereign wealth fund in Australia, including:

(i) regulatory framework,

(ii) how funds are invested and managed,

(iii) funding mechanisms,

(iv) transparency and accountability,

(v) governance structure,

(vi) how capital and returns should be utilised, and

(vii) any other related matters.