

TO: SENATE PRIVILEGES COMMITTEE

FROM: PROFESSOR GEOFFREY LINDELL

SUBJECT: GUIDANCE FOR OFFICERS GIVING EVIDENCE AND PROVIDING INFORMATION

DATE: 7 JUNE 2011

SUBMISSION

Introduction

1. The purpose of this document is to provide a submission in relation to the above Inquiry and I am grateful to the Committee for having granted to me generous extensions of time to enable me to provide the submission to the Committee.

2. I wish to deal with one of the issues which the Committee is inquiring into, namely, the requirements to give evidence and produce documents in order to provide information to the Senate and its committees. In particular I wish to deal with the difficulties encountered by the Senate with the newly created Australian Information Commissioner to report on the failure of Ministers to produce documents to the Senate.¹

3. I believe I have the expertise to comment on such matters having regard to the knowledge I have gained in this area both as a former senior public servant and a senior academic with an established research interest in the fields of constitutional and parliamentary law. Amongst other things I have written widely on the scope of parliamentary inquiries and their powers to compel the giving of evidence.²

4. Finally, by way of introduction, I should indicate that my interest in the issue canvassed in this submission was first aroused when Professor McMillan drew my attention to the differences that have arisen between the Senate and himself in his capacity as the newly created Australian Information Commissioner. This was because of my interest in matters of parliamentary law. I have also known him as a professional colleague and friend since the time when we both lectured at the Australian National University Law School. However the views expressed in the submission are my own and the submission has been prepared independently of him or his office.

¹ *Department of the Senate Procedural Information Bulletin* No 247 dated 14 February 2011 (Occasional Note) and No 249 dated 28 March 2011 (Occasional Note – Conclusion) (“Senate Information Bulletins Nos 247 and 249”).

² “Parliamentary Inquiries and Government Witnesses” (1995) 20 *Melbourne University Law Review* 383 and “Current and Former Members and Ministers (and their Ministerial Staff): Immunity from Giving Evidence to Parliamentary Inquiries Established by Houses of Parliament in which they were not Members” (2002) 17 *Australasian Parliamentary Review* (Spring 2002 No 2) 111.

Summary of views

5. The views expressed in this submission are summarised below as follows:

- (i) The submission is concerned with whether the Senate possesses the power to compel public or private experts to ‘create documents’ in the sense of providing reports or expressing considered opinions on matters that fall within their expertise when:
- those witnesses have not previously provided those reports or expressed those opinions to anyone else; and
 - the reports or opinions are otherwise outside their personal knowledge or cannot be collated from documents within their possession.

The reports and opinions in question would also require fresh work before a report is made or an opinion is expressed.

(See para 6.)

- (ii) In my view there are strong reasons for thinking that the power referred to in sub-para (i) above does not exist in law. This means that the Senate may lack the power to compel witnesses to “create” documents for the same purpose under the undoubted power of the Senate to call for persons, papers and records. (See paras 7 – 25.)
- (iii) I respectfully suggest that the proper and legal course to follow when the Senate seeks a report to provide it with information and expert opinions it requires to fulfil its inquisitorial function, is to appoint paid special advisers or invite willing experts to attend round table discussions and seminars, to provide that information and expert opinions. (See para 21.)
- (iv) There are additional and equally strong reasons for thinking that the power in question does not exist in the case of statutory officers or bodies who only possess such powers and functions as are outlined in the legislation which creates those officials or bodies when those powers and functions do not include the preparation of the reports required to be produced by the Senate. (See paras 27 and 33.)
- (v) The additional reasons mentioned in sub-para (iv) above include the legal inability of statutory officials and bodies to perform functions and duties which are otherwise *inconsistent* with the performance of the powers and functions conferred by the legislation on those officials or bodies. paras 28 and 33.)
- (vi) Even though legislation is not presumed to override the privileges of the Parliament without a clear statutory intention to that effect, that principle does not apply to a power which does not form part of those privileges.

Different considerations may apply to the powers of the Senate as regards matters which relate to the way statutory officials or bodies exercise and perform the powers and duties conferred and imposed on them by legislation. (See para 29 – 30.)

- (vii) Even if the power of the Senate to order the ‘creation’ of a document exists in the sense denied in this submission so as to form part of the privileges of the Senate, the legislation which confers powers and imposes duties on statutory officials and bodies is likely to be seen as a sufficient statutory intention to rebut the presumption referred to in sub-para (vi) above as regards the exercise of the power of the Senate in relation to those officials and bodies. (See para 31.)
- (viii) The reasons referred to in sub-paras (iv) – (vii) above for denying the relevant power of the Senate may not however be inconsistent with such an official or body acceding to the request by the Senate to prepare a report in both their voluntary and personal capacity as long the performance of such a function was not inconsistent with the performance of their statutory functions and duties. (See para 32.)
- (ix) In my view the refusal of the Australian Information Commissioner to accede to the order of the Senate asking him to report on the failure of Ministers to produce certain documents to the Senate is well based having regard to the considerations referred to above in sub-paras (i) – (viii) above including the principles referred to in sub-para (iv) – (viii) above. (See paras 34-7.)
- (x) In my respectful opinion the recent and other practices and precedents relied on to support the alleged power of the Senate to prepare the kind of reports described in sub-para (i) above do not support the existence of that power. (See paras 38-42 and 44.)
- (xi) Unlike the position which prevailed before the passing of the *Parliamentary Privileges Act 1987* (Cth), there may now be scope for testing in a court of law the soundness of the conclusions referred to sub-paras (ii), (iv) and (x) above. (See paras 43-4.)
- (xii) A number of considerations militate against the wisdom or propriety of the Senate exercising the power denied in this submission. The preferable course, both as a matter of law and policy is for the Senate to appoint willing persons to act as special advisers to assist it and its committees or seek the willing participation of experts at round table discussions and seminars held for the same purpose. Such advisers and round table and seminar participants could provide the information and opinions needed to enable the Senate to perform the fact finding functions as part of the ‘Grand Inquest of the Nation’. (See paras 47 – 9.)

The relevant issues

6. The submission is concerned with whether the Senate possesses the power to compel public or private expert witnesses to provide reports or express considered opinions on matters that fall within their expertise when:

- those witnesses have not previously provided those reports or expressed those opinions to anyone else; and
- the reports or opinions are otherwise outside their personal knowledge or cannot be collated from documents within their possession.

The reports and opinions in question would also require fresh work before a report is made or an opinion is expressed. The Senate has asserted that it possesses this power and it is in this sense that it has asserted that it has the power to compel witnesses to “create” documents.

7. This in turn gives rise to four essential issues. The *first* is whether the power in question is conferred on the Houses of the Australian Parliament under s 49 of the Australian Constitution and, in particular, under the undoubted powers of both Houses to call for persons papers and records. The *second* concerns the effect of legislation which defines the functions and duties of statutory officials and bodies on the same power. A *third* issue concerns the justiciability of the foregoing issues. The *fourth* and final issue is concerned with the fairness of exercising the power in question even if contrary to the doubts expressed in this submission it is thought that the power nevertheless exists in law.

First issue: scope of the power to call for persons, papers and records documents

8. The Houses of the Australian Parliament, their members and their committees enjoy the same powers privileges and immunities as those of the House of Commons in the United Kingdom at the establishment of the Commonwealth by reason of Con s 49.³ At that time in 1901 the House of Commons had the power to act and did act as the ‘Grand Inquest of the Nation.’⁴ In *Howard v Gossett*⁵ Coleridge J said:

“[T]he Commons are in the words of Lord Coke, the general inquisitors of the realm...it would be difficult to define any limits to which the subject matter of their inquiry can be bounded...they may inquire into everything which it concerns the public weal for them to know; and they themselves...are entrusted

³ The considerations raised in this submission with regard to the powers of the Senate and its committees are equally applicable to the House of Representatives and its committees. It needs to be remembered that the powers of the Senate to order persons, papers and records can only be exercised by Senate Committees to whom such powers have been delegated. Any references in this submission to the Senate should therefore also be taken to include those committees which have been given those powers by the Senate.

⁴ See as regards this term the authorities cited in Lindell "Parliamentary Inquiries and Government Witnesses" above n 2 at p 385 n 4. See also J Hatsell, *Precedents of Proceedings in the House of Commons* (1818) vol 2 at 158 and P Thomas, *The House of Commons in the Eighteenth Century* (Clarendon Press: Oxford, 1971) at p 14.

⁵ (1845) 10 QBD 359.

with determination of what falls within that category. Co-extensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, [and] to enforce it by arrest where disobedience makes that necessary...”⁶

9. It is also worth quoting in full a passage from a well known source of parliamentary law upon which reliance was placed in the relevant Senate Information Bulletin:

“The House of Commons has long maintained as a principle of its customary law that it is entitled to demand the use of every means of information which may seem needful, and, therefore, to call for documents which it requires. The claim may be enforced without restriction. In its most general form it is displayed in the right of the House to summon any subject of the state as a witness, to put questions to him and to examine the memoranda in his possession. Practically speaking in its constant thirst for information upon the course of administration and social conditions, the House generally turns to the departments as being the organs of the state which are best, in many cases exclusively, able to give particulars as to the actual conditions of the life of the nation and as to administrative action and its results from time to time.”⁷

The passage is highly significant and its correctness can be readily accepted as long as care is taken not to read more into the reference to “every means of information which may seem needful” than is reasonably justified. It will be important to refer again to this passage later in this submission.

10. As will be apparent from my previous writing I have in the past subscribed and continue to subscribe to the enjoyment of the widest powers of parliamentary inquiry and the co-extensive power to call for persons, papers and records. In particular I have not accepted that those powers are legally constrained by doctrines of Executive privilege which are applied to constrain the powers of ordinary courts of law to compel the giving of evidence and the production of documents. It is possible that this view should now be reconsidered even for the Houses of the Australian Parliament in the light of *Egan v Chadwick*⁸ and the recent judicial acknowledgments that the Australian Constitution impliedly incorporates essential features of the British doctrine of *responsible* government⁹ Those possibilities may be put to one side as not directly bearing on the issue canvassed in this submission.

⁶ *Ibid* at pp 379-380.

⁷ Senate Information Bulletin No 247 cited above n 1 at pp 8-9 quoting with approval from J Redlich, *The Procedure of the House of Commons - A Study of its History and Present Form* (1908) vol 2 at pp 39-40.

⁸ (1999) 46 NSWLR 563.

⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-9, 561. And see also G Lindell, “Responsible Government and the Australian Constitution – *Conventions* transformed into *Law*?: *Law and Policy Paper No 24* (ANU Centre for International and Public Law and Federation Press 2004) esp at pp 2-3 and 15-6. A majority of the NSW Court of Appeal recognised Cabinet secrecy but not legal professional privilege as a constraint on the power of the NSW Legislative Council to call for the production of documents.

11. I should also indicate that, like others,¹⁰ I have assumed in the past that the same power extends to compelling ordinary persons to give evidence when they do not have any connection with the government of the nation - even though the High Court may be tempted in the future to imply legal limits on the power in order to protect the rights of individuals.¹¹ However this submission is based on the same key assumption whatever limits on that power, if any, may be developed by the Court in the future. The assumption is important because if the power to compel public officials extends to compelling them to create documents in the sense asserted by the Senate it will also apply to ordinary individuals.

12. Finally in this connection, I am also prepared to assume as I have in the past that the mere potential for the abuse of a power is not a reason in itself for denying the existence of a power.¹² Some level of trust and good sense should be presumed on the part of those who exercise public power.

13. But it is not inconsistent with this presumption to realise that sometimes the obviously unfair results which flow from adopting a point of view regarding the scope of a power requires clear and persuasive authority to confirm the existence of that scope if it is to be read as leading to such a result. At the very least the unfair results would seem to require the exercise of caution before accepting the asserted scope of

¹⁰ See in particular the valuable discussion in G Taylor, "Parliament's Power to Require the Production of Documents – a Recent Victorian Case" (2008) 13 *Deakin Law Review* 17 esp at pp 38-43 where the author makes out a strong case in favour of the assumption outlined in the text above and cites some pre-1900 examples of the House of Commons ordering the production of documents from private individuals and bodies. Like the Houses of the Australian Parliament, the Houses of the Victorian Parliament enjoy the same powers privileges and immunities as the British House of Commons in 1901 and 1855 respectively. The learned author has undertaken careful research to explain why a statement to the contrary only began to appear in Sir Erskine May's famous work on Parliamentary Practice by the time the 4th edition was published in 1859. He concludes that it was probably only intended as a statement about "the wise use of the Parliament's powers, and certainly not a statement about their legal extent" (at p 40). The statement had suggested that the power could not be exercised in relation to private associations or from individuals not exercising public functions. It also seems to account for a similar limitation on the power to order the production of documents made in I Harris (ed), *House of Representatives Practice* (5th ed, 2005) at p 591 where reliance is placed on the 23rd ed of May at p 263 but the statement found on that page seems to contradict another statement on p 751 of the same edition ("There is no restriction on the power of committees ...order of reference.") I respectfully suggest that the suggested qualification in Harris requires re-examination in the light of the analysis by Associate Professor Taylor. For further support for the assumption in the text see Thomas above n 4 at p 24, P Leopold, "The Power of the House of Commons to Question Private Individuals [1992] *Public Law* 451 (despite the fact that reference is there made to what may have been the first instance in which a witness refused to produce documents to a committee of the British House of Commons since 1835) and D McGee, *Parliamentary Practice in New Zealand* (2005, 3rd ed) at p 428.

¹¹ Lindell "Parliamentary Inquiries and Government Witnesses" above n 2 at pp 390 -1. Note the refusal of McHugh J to accept that the implied powers of the NSW Legislative Council extended to compelling ordinary citizens to produce documents: see *Egan v Willis* (1999) 195 CLR 424 at [93] and cf Gaudron, Gummow and Hayne JJ who thought it was unnecessary to address that issue in that case at [56]. They also distinguished the powers of both Houses of the Australian Parliament because of the Con s 49: at [28] – [29]. The powers of the Houses of the New South Parliament are not as wide as the powers of the Houses of other Australian Parliaments which enjoy the powers of the British House of Commons.

¹² Lindell "Parliamentary Inquiries and Government Witnesses" above n 2 at p 390.

the power.¹³ I believe that the first question addressed in this submission involves the need for the caution mentioned.

14. It is clear that witnesses subpoenaed by the Senate to give evidence or produce documents, as is the case with witnesses in ordinary court proceedings can be required to answer relevant questions or produce relevant documents. But the issue here relates to the insufficiency of the answers or the inability to produce the documents where this results from the:

- inability of witnesses to provide meaningful information because the question raises matters outside their field of knowledge or, if the witnesses are experts, they had not previously had to consider the issue on which their expert opinion was required ; or
- in the case of an order to produce documents, they are not in the possession of the witnesses or could not be created by collating information from documents that are within the possession of the witnesses.

In short the expert witnesses concerned - whether public or private - would have to undertake fresh work which would involve time and effort and possibly also without adequate remuneration to prepare a report in the circumstances mentioned above.

15. The normal and long accepted notion of evidence is that a witness in ordinary court proceedings can only provide evidence based on things acts or events and words which the witness has become directly aware by their own observation *ie* what the witness has seen, heard, felt, smelt and tasted.¹⁴ So far as expert witnesses in those proceedings are concerned the practice that is followed in Australia and England is that as a general rule the court will not in its discretion compel an unwilling expert to give evidence where the expert has had no connection with the facts or the history of the matter in issue in any court proceedings.¹⁵ Regard is had to the necessity of the expert having to spend time and study collating material to prepare to take part in a trial in which the expert witness had no professional interest. The position may be different if the expert has already given an opinion on the issue in question.¹⁶ It is possible that the same rules of practice may be followed in the United States.¹⁷

16. This is surely significant even though it is true that the rules of evidence in court proceedings which are generally *adversarial* in nature do not apply to constrain the manner in which evidence is obtained by parliamentary committees which are

¹³ *Reid v Sinderberry* (1944) 68 CLR 504 at pp 510 per Latham CJ and McTiernan J.

¹⁴ A Wells, *An Introduction to the Law of Evidence* (1963) at para 1.16.

¹⁵ See eg *Re Application of Forsythe; Cordova v Philips Roxan Laboratories* (1984) 2 NSWLR 327, *Seyfang v G D Searle & Co* [1973] QB 148 and *Cross on Evidence* (LexisNexis Online) para 13265 where other authorities are cited to the same effect (as available to me in May 2011 <http://www.lexisnexis.com.proxy.library.adelaide.edu.au/au/legal/results/pubTreeViewDoc.do?nodeId=TAAHA_ABAADAAI&pubTreeWidth=23%25>).

¹⁶ *Harmony Shipping Co SA v Davis* [1979] 3 All ER 177 and *Cross* above n 15 para 13265 where other authorities are cited to the same effect.

¹⁷ See the cases cited in L Berlin "Can a Radiologist Be Compelled to Testify as an Expert Witness" 185 *American Journal of Roentgenology* 36 in nn 6-11 (available to me online as at 7 May 2011 <<http://www.ajronline.org/cgi/content/full/185/1/36>>). I have not however found it necessary to make an exhaustive search of the American position.

essentially *inquisitorial* in character. A few examples will suffice to show the sweeping and wide ranging nature of the power of Senate to call for persons papers and records if the practice described above in relation to court proceedings is not applied in this context. If the power existed to force expert witnesses to give opinions and prepare reports on matters with which they had no previous connection the following results would flow:

- ✚ practising and retired lawyers as well as retired judges could be required to express opinions about the law on new matters;
- ✚ medical research workers could be required to carry out research and report in regard to matters not previously researched; and
- ✚ car manufacturers could be required to report on the effectiveness of safety devices which had yet to be fitted to newly manufactured cars

17. The foregoing examples show that if the power exists it would mean that in effect the expert witnesses could be conscripted into the service of the Senate by having to perform new work against their will and possibly without adequate remuneration for their services. It would be apt to describe such a service as “civil conscription” – the phrase found in Con s 51(xxiiiA).¹⁸ The traditional view has been since the famous historical struggles between the Crown and Parliament during the 17th century that explicit legislative authority is needed to authorise governmental authorities to require ordinary citizens to pay tax or lend money to the government and one would think the same applies to the conscription of labour.¹⁹

18. It follows that *explicit* judicial or parliamentary authority should be required to uphold a view of the power which is alleged to authorise this kind of compulsion. But such judicial and other authority that I am aware of, has not gone beyond upholding the powers of the House of Commons and its Committees in 1901 to require the giving of evidence or the production of documents. They have not extended to requiring private individuals or public officials to perform new tasks which involve particular skills within their sphere of expertise. My researches into old²⁰ and, with

¹⁸ Regarding the power of the Australian Parliament to make laws for “the provision of ... medical and dental services (but not so as to authorise any civil conscription)”.

¹⁹ This recalls the remarks of a famous Chief Justice of NSW, namely, Sir Frank Jordan who had occasion to refer to war time regulations and directions made under them which required ordinary civilians to accept employment nominated by war time Commonwealth officials. He thought the regulations “according to their natural construction would have reduced the population to a state of serfdom more abject than any which obtained in the Middle Ages”: *Ex parte Sinderberry; Re Reid* (1944) 44 NSW SR 263 at p 266. He also thought there was nothing “in the Australian Constitution which authorised the Executive Government to impose upon the people of Australia the status of villeinage.”: *ibid.* It is significant that he also referred the famous John Hampden who figured in the 17th century disputes referred to in the text: at p 270. The decision of the Court to hold the relevant regulations and direction invalid was later reversed on appeal to the High Court because of the exigencies of the war under the extended aspect of the federal legislative power to make laws with respect to defence: Con s 51(vi) as to which see the case on appeal cited in n 13 above.

²⁰ Hatsell above n 4 (including vol 2 ch X at pp 151-162), Sir R Palgrave and A Bonham Carter (eds), *Sir Erskine May's Parliamentary Practice* (10th ed , 1893) (in chs XV, XVI and XXI and pp 384 and 509)(‘May’s Parliamentary Practice’), E Blackmore, *Manual of the Practice, Procedure, and Usage of the House of Assembly of the Province of South Australia* (1885) (inc pp 113 -7, 166 – 170) and same

one significant exception, new texts²¹ on parliamentary law and the relevant judicial authorities have failed to yield authority for such a sweeping and far ranging power. A similar absence can be found in the some leading texts which deal with the coercive powers of Royal Commissions and other public inquiries which play an inquisitorial role.²²

19. Moreover some of the statements which I did find tend to assume that witnesses would only be required to give evidence on matters within their existing knowledge. Thus in one reputable source of the subject it was stated:

“When an inquiry is instituted, and an examination of witnesses undertaken by the house, in its *inquisitorial* capacity, it is customary for the member, on whose motion or suggestion the inquiry has been engaged in, or for some of the members voting with him for inquiry, to take the lead in the examination of the witness, by making the proper motions for calling them in, and either by suggesting or putting such introductory questions to each witness, as may be necessary to bring forward *the facts relating to the subject of the inquiry which are within his knowledge; in other words, to examine the witness in chief*” (emphasis added).²³

In another passage from the same work it is stated in regard to the production of documents:

“When information is wanted by either house, *respecting any matter which is within the appropriate functions, or known to be in the possession of any department, or public officer*, the course is to pass a resolution, directing the head

Manual for the Legislative Council of the same Parliament (1889) (inc at pp 88-90 and 115, L Cushing, *Elements of the law and practice of Legislative Assemblies in the United States of America* (1866) Pt V chs III and IV and Redlich above n 7 (inc vol 2 inc Pt II ch III, and Pt VI ch at pp 187 – 197 and cf the passage quoted earlier in the text of this submission above at para 9 and cited at n 7.

²¹ Joint Paper by Attorney-General Sen I J Greenwood QC and the Commonwealth Solicitor - General, Mr R J Ellicott QC, “Parliamentary Committees: Powers Over and Protection Afforded to Witnesses” Commonwealth Parliament : *Parliamentary Paper* No 168 Oct 1972 (inc pp 12 – 6, 18-20, 23- 4, 30 – 2), *May’s Parliamentary Practice* (23rd ed 2004) (inc chs 8-10, 26 and pp 130, 173-4, 756 – 762), Harris above n 10 (inc chs 17, 18 and pp 591, 652 – 656 and 662 – 4) and McGee above n 10 ch 30 (inc pp 427 – 432) . The exception is H Evans (ed) *Odgers Australian Senate Practice* (12 th ed 2008) at pp 397-9, 453 - 460 esp at pp 454 – 6 (and generally chs 16-19 and Online *Supplement* updates to 31.12.10 <<http://www.aph.gov.au/senate/pubs/odgers/supplement.htm#p443>>) (‘Odgers 12th ed’).

²² See L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982) esp Ch VI (including pp 103 – 6), S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001) esp Ch 2 and Australian Law Reform Commission *Report No 111: “Making Inquiries: A New Statutory Framework”*(2009) esp Chs 11 (including pp 257-277), 17, 18, and 19 (including pp 490 – 500) and the corresponding chapters in *Discussion Paper No 75: “Royal Commissions and Official Inquiries”*. The way expert assistance is to be obtained by Royal Commissions and Public Inquiries is to provide for the appointment of experts in any field as advisers to provide technical or specialist advice which of course presupposes the willingness of such persons to be appointed to perform that task: ALRC Report No 111 at pp 151-3, 374 and see also DP No 75 at pp 124 – 8.

²³ Cushing above n 20 at p 383 para 965. The work in questions also draws on British and Canadian practice even though it is concerned with legislative bodies in the United States.

of that department or officer, to prepare and lay before the house a statement containing the information in question (emphasis added).”²⁴

Finally in the same work it is stated

“When a question has been propounded to a witness, without objection, or if objected to, has been directed by the house to be put or answered, it is then the duty of the witness forthwith to answer it directly, plainly, fully, and truly, *according to the best of his knowledge*, and in a respectful manner, both towards the house and members individually” (emphasis added).²⁵

20. Furthermore such precedents as I was able to find which involved the practice of the English House of Commons up to 1901 or even since that time²⁶ do not seem, with respect, to provide explicit support for the position asserted in the Senate Information Bulletins cited at the beginning of this submission. Reliance was placed in one of those Bulletins on three examples of orders to “non-departmental bodies” to provide returns on various matters.²⁷ These consisted of:

- the returns of incomes earned by pilots required to be provided by the Corporation of Trinity House of Depford Strond – a fraternity of mariners described as being independent of government which was given the exclusive power to licence River Thames pilots (1830)²⁸;
- returns of particulars respecting holdings in Ireland put up for sale by the Irish Land Commissioners (1890)²⁹; and
- a document containing detailed information by each savings bank in the Great Britain regarding the conduct of their business including amongst other things the names of their officers and their respective salaries and allowances, the number of accounts remaining open, rates of interest charged, the amount of management expenses, the total amounts of funds invested with them the days

²⁴ *Ibid* at p 368 para 928. See also for the same kind of reference to documents in the possession of witnesses in McGee above n 10 at p 428 (“The power to summons...inquiry being prosecuted.”)

²⁵ Cushing above n 20 at p 390 para 984. Significantly a similar statement may be found in the 12th ed of Odger’s *Australian Senate Practice* where it is stated that “[o]rders 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*” (emphasis added and in Odger’s 12th ed above n 21 at p 454). However it is clear from what is stated further on in that book that the current author or authors would not confine the authority of the Senate to that situation. Reference is made to what appear to be the precedents relied on in Senate Information Bulletin No 247 discussed below in para 39 of this submission.

²⁶ *May’s Parliamentary Practice* (23rd ed 2004) cited above in n 21.

²⁷ Senate Information Bulletin No 247 at p 9.

²⁸ *Journals of the House of Commons* vol 85, 23 March 1830 at p 10 ((British History Online: as available to me on 31.5.11 < <http://www.British-history.ac.uk/report.aspx?compid=16201&strquery=depford>>. The other numerous items cited for the same day which are to be found on pp 216-223 in the official Journal record which was cited in the Senate Information Bulletin No 247 (and which correspond to pp 1-14 in the online version) - including the item under “Account of Pilotage, presented” on p 2 - did not relate to the order referred to in the same Senate Information Bulletin.

²⁹ *Journals of the House of Commons* vol 146, 4 December 1890 at p 29.

and hours in each week during which they conduct business with their customers (1891).³⁰

A close examination of the sources of information cited for these orders which were in the form of brief and succinct entries in the *Journals of the House of Commons* fails to shed further light on the nature of the orders mentioned or whether they involved any debate about the making of them. In the absence of further details regarding those orders they may all be consistent with the ability of those bodies to have compiled the necessary returns from documents and other information collected and in the possession of those bodies.

21. I mentioned earlier that such precedents as I was able to find which involved the practice of the English House of Commons up to 1901, and even since that time, did not seem to provide explicit support for the position asserted in the Senate Information Bulletins cited at the beginning of this submission.³¹ However one of the sources consulted pointed to committees of the House of Commons being empowered to appoint specialist advisers either to supply information which is not readily available or to elucidate matters of complexity within the committees' order of reference with such persons being normally paid for work done on a daily basis.³² In fact the Senate has itself appointed such persons as happened with the appointment of a senior barrister as an 'Independent Assessor' to make an assessment of the evidence and documentation in the 'child overboard affair.'³³ As indicated earlier this is also what is contemplated for Royal Commissions and other Public Inquiries.³⁴ In recent years committees of both Houses of Parliament have also found it useful to invite willing experts to attend round table discussions and seminars held for essentially the same purpose. I respectfully suggest that this is the proper and legal course to follow when the Senate seeks a report to provide it with information and expert opinions it requires to fulfil its inquisitorial function.

22. I also referred earlier to the remarks of Redlich which suggested that the House of Commons had long maintained as a principle of its customary law that it was entitled to demand the use of every means of information which may seem needful and, therefore, to call for all documents which it requires. The remarks also went on to uphold the right of the House to summon any subject of the state as a witness, to put questions to him and examine any memoranda in his possession.³⁵ There are two comments to make about the remarks which were quoted in full earlier. The first is that like the passages from Cushing when the general remarks are read in the context of particular instances of what is meant it may well be the case that witnesses were only expected to respond to questions in relation to documents when the documents were in their possession. There was no suggestion of the document being "created" for that purpose. Secondly, and more generally, a distinction should be drawn between, on the one hand, the ends or objectives to be served which is to gather

³⁰ *Journals of the House of Commons* vol 146, 17 February 1891 at p 95.

³¹ Above text accompanying n 26.

³² *May's Parliamentary Practice* (23rd ed 2004) cited above in n 20 at p 768-9.

³³ Select Committee on A Certain Maritime Incident: *Report* (Oct 2002) eg at pp xv and xxxv. The reasons for appointing such a person were, in part at least, based on the unwillingness of the Government of the day to allow government witnesses to give evidence before that Committee but this does not alter the potential role which such Assessors may perform in other situations.

³⁴ Above n 22

³⁵ Quoted above para 9.

information as part of the Grand Inquest of the Nation and, on the other hand, the means that could be used to obtain such information. This is so despite the reference by Redlich to “every means of information which may seem needful”. Hence the need for caution in reading too much into what was said when an attempt is made to justify the wide ranging and sweeping powers asserted in the Senate Information Bulletins cited at the start of this submission.³⁶

23. In my view the more reasonable approach to the question addressed in this submission is to assume that in the absence of any explicit statement to the contrary the power which the House of Commons possessed as at 1901 only gave it the power to ask questions which presuppose the ability of individuals to respond from their existing knowledge or require the production of documents which are within their possession. This would extend to giving evidence about their recollection of documents which were once in their possession. It may also cover information which may be collated from documents and other sources in their possession. Questions and documents which do not fall within those bounds could properly and lawfully elicit an inability to answer those questions based on the existing knowledge of a witness or the failure to produce documents not in the possession of the witness or incapable of being compiled from information contained in documents in the possession of the witness. In the case of expert witnesses this would include a failure of the expert witness to express an opinion on matters with which the experts had no connection in the past or the present. This would then leave it to the witness to indicate whether that person is willing to consider the matter raised. But such a willingness would be voluntary and the Senate would not be able to go further and conscript witnesses to perform unpaid services in providing information sought by the Senate.

24. So far I have assumed that there is no relevant difference for present purposes between public and private witnesses. Doubtless it may be argued that witnesses who are public officials are, like those who occupy parliamentary office, servants of the public. It is also true that the Houses of Parliament play an undoubted role in oversighting and holding to account the Government and its officials and public instrumentalities and their officers and employees. But this does not make them servants and employees of the Parliament in the sense of being open to control and directions by the Houses of Parliament in the sense that applies to any servant or employee in the relevant legal sense. This is especially so when it is remembered that under the system of British responsible government recognised under the Australian Constitution it is the Ministers who are formally responsible for the actions of their subordinate taken on behalf of those Ministers and not the subordinates themselves.³⁷ The limits within which Parliament or either house of Parliament can exercise control over the executive government was aptly summarised in a classical work on British constitutional law:

“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

³⁶ Above n 1.

³⁷ J Griffith and M Ryle, *Parliament: Functions, Practice and Procedures* (Sweet and Maxwell: London, 1989) (“The Minister in charge of a department of State is responsible for the decisions and actions he takes and for those taken in his name by his subordinates.”) at p 34. This states the theory which underpins the legal position whether or not that responsibility can be regarded as effective under modern conditions.

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 his duty. Its power over the executive is exercised indirectly, but not the less effectively, through the responsible ministers of the Crown. These ministers regulate the duties of every department of the state, and are responsible for the proper performance to parliament as well as the Crown.”³⁸

25. The conclusion that I have therefore reached on the first issue is that if reliance is to be placed on Con s 49 and the law and practice which applied to the House of Commons as at 1901, there are strong reasons for thinking that the Senate does not possess the power to compel public or private expert witnesses to provide reports or express considered opinions on matters that fall within their expertise when:

- those witnesses have not previously provided reports or expressed any considered opinions to anyone else, and
- the reports or opinions are otherwise outside their personal knowledge or cannot be collated from documents within their possession.

As indicated before, the reports and opinions in question would also require fresh work before a report is made or an opinion is expressed. This means that the Senate may lack the power to compel witnesses to “create” documents for the same purpose under the undoubted power of the Senate to call for persons, papers and records.

Second issue: effect of legislation which defines the functions and duties of statutory officials and bodies

(a) General principles

26. It is now necessary to consider the effect of legislation which defines the functions and duties of statutory officials and bodies on the powers of both Houses to call for persons, papers and records and, in particular, the power that has been questioned in this submission as it applies, if at all, to officials or bodies whose functions are derived from legislation. I have already suggested that there are strong reasons for thinking that the Senate does not have the legal power to compel expert witnesses to “create” documents in order to provide reports on matters with which they have not had any connection in the past so under the undoubted power of the Senate to call for persons papers and records.

27. It is clear that there are strong additional reasons for thinking that the same power cannot be exercised in the case of *statutory* officials or bodies who only possess such powers and functions as are specified in the legislation which creates those officials or bodies when those powers and functions do not include the preparation of the reports required to be produced by either House of Parliament or its committees. This follows from the basic principle of public law that statutory bodies and officials only enjoy

³⁸ May, *Constitutional History of England* (1882) vol II at pp 85-6 quoted with approval in Greenwood and Ellicott above n 21 at p 4. Of course the degree of responsibility exercised by Ministers with regard to independent statutory authorities may be somewhat attenuated and will depend upon the degree of independence conferred upon them. But depending again on the degree of independence conferred this does not make them subject to direction from either Houses of the Parliament in the sense indicated in the passage quoted in the accompanying text.

such powers and functions as fall within the powers and functions they are authorised or required to perform or, as are otherwise reasonably implied from those powers or functions, as being incidental to their exercise or performance. Unlike the Crown or corporations chartered by the Crown they do not possess the legal capacity to exercise other powers or functions. These principles are too well known to require the citation of authority but they have their origins in the emergence of the principle of statutory *ultra vires* in the late 19th Century.³⁹

28. It is also equally clear that the overriding force of legislation has the effect of ensuring statutory officials and bodies cannot perform functions and duties which are otherwise *inconsistent* with the performance of the powers and functions conferred by the legislation on those officials or bodies.⁴⁰

29. It may be acknowledged that there is also a well known and sound principle of statutory construction to the effect that legislation is not presumed to override parliamentary privilege without express words to that effect. Like Professor Carney I believe the principle is likely to be interpreted today as enabling parliamentary privilege to be overridden by necessary implication or a clear intention to that effect even in the absence of express provisions to the same effect.⁴¹ With that in mind there are two responses to the argument used in the Senate Information Bulletins that this presumption has *not* been rebutted as regards the alleged power of the Senate to require the “creation” of documents in the sweeping and wide ranging sense referred to in this submission.

30. In the *first* place the presumption has no application if on a proper examination the alleged power is found not to be part of the powers privileges or immunities of the Senate under Con s 49 and it has already been suggested that there are strong reasons for thinking that the power does not exist. This is not to deny that the presumption may need to be rebutted if the statutory officials and bodies are to be immune from the ordinary powers of the Senate to call for persons papers or records as regards matters which relate in the case of statutory bodies or officials to the way they have exercised and performed their statutory powers and functions. Whether the presumption is rebutted for a parliamentary inquiry into those matters will crucially depend on the degree of independence which was intended to be accorded to them by the legislation which provides for their establishment. That of course would turn on the construction of the relevant provisions of the same legislation.

31. *Secondly*, however, even if the wide sweeping and far ranging power does exist as part of the powers privileges and immunities of the Senate, in my respectful opinion the statutory *ultra vires* principle explained above would be sufficient to rebut the relevant presumption by necessary implication as a sufficient indication of the intention of the Parliament even in the absence of express provisions to the same effect.

³⁹ See eg *McLeod v Australian Securities Investment Commission* (2002) 211 CLR 287 at pp 292 and 305 and for the origins of the statutory *ultra vires* principle see eg *London County Council v Attorney General* [1902] AC 165, *Attorney-General v Smethwick Corporation* [1932] 1 Ch 562 at p 577 and S A de Smith, *Judicial Review of Administrative Action* (2nd ed, 1968) at pp 85-6.

⁴⁰ See eg *McLeod* (2002) 211 CLR 287 at p 305

⁴¹ See the helpful discussion in G Carney, *Members of Parliament: law and ethics* (2000) at pp 200-2 and 203. The principle was recognised in *Duke of Newcastle v Morris* (1970) LR 4 HL 661

32. In what has been said so far the assumption has been that the Senate has directed its requirement to give evidence or produce documents to a statutory body or official and not the actual persons who are those officials or comprise those bodies when those persons act voluntarily and only in a personal capacity. It is perhaps possible that those persons could accede to the requests made by the Senate to prepare the kind of reports discussed in this submission.⁴² However for this to be so those persons would have to be seen to act voluntarily with the ability to decline any such request and provided also that the performance of such a function did not detract or impair their ability to perform their normal statutory powers and functions. Otherwise they would in all probability be seen to act inconsistently with the powers and functions conferred on them by legislation.

33. Leaving that possibility aside, to effectively add to the powers and functions conferred on the officials and bodies by their empowering legislation could compromise their ability to perform their statutory powers and functions eg in terms of the deployment of time and resources. Any inconsistency or lack of statutory authority could obviously be cured by amending legislation in order to enable such officials or bodies to accede to the orders or requests of the Senate or indeed the House of Representatives and their respective committees. Needless to say however such legislation requires the approval of both Houses of the Parliament and of course the assent of the Crown and a mere resolution of either House would not suffice for this purpose.⁴³

(b) Application to the Australian Information Commissioner

34. In the Senate Information Bulletin No 247 reference was made to documents tabled in the Senate following the resumption of business on 9 February which consisted of the responses from the Australian Information Commissioner to the orders of the Senate. Those orders asked him to report on the reasons proffered by the government for not complying with earlier orders about the proposed mining tax and a proposal to vary the GST agreements for a different health funding model. As I understand what he was required to do was to perform a function which required him to review the adequacy of the grounds specified by the Government for its refusal to produce information sought by the Senate and if necessary to arbitrate on that refusal. The Commissioner was reported to have argued that he could not comply with the order because what it required him to do was beyond the powers and functions conferred upon him by his statute.⁴⁴

⁴² There may be some analogy here with the possible inability of the States and the Commonwealth to impose duties as distinct from mere functions and powers on their respective public authorities and officers. One difference would be however that the relevant power as distinct from a duty would be conferred on those bodies and officers themselves as distinct from the persons acting in those capacities.: see generally G Lindell, "Advancing the Federal Principle through the Intergovernmental Immunity Doctrine" in H Lee and P Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (ch 2) at pp 46 - 50

⁴³ Con ss1 and 58 and *Stockdale v Hansard* (1839) 9 A&E 1; 112 ER 1112. As was stated by McHugh J in *Egan v Willis* (1999) 195 CLR 424, "Resolutions of a parliamentary chamber cannot alter the law" at [92].

⁴⁴ See Senate Resolutions adopted on 26 October 2010 (notice of motions 59, 60 and 61: 26/10/2011 *Journals of the Senate* ('*Journals*') at pp 206, 207 -9)), 22 November (notice of motion 116: 22/11/2010 *Journals* at p 367) and 23 November (notice of motion 121: 23/11/2010 *Journals* at pp

35. In my view the ground of his refusal is, with respect, well founded. That ground is additional to the general denial of the relevant power of the Senate under Con s 49 already considered. So far as I am aware the preparation of reports for either House of Parliament was not a function or power conferred on the Commissioner in ss 7 – 12 of the *Australian Information Commissioner Act 2010* (Cth) Act or something that could be regarded as reasonably incidental to the functions and powers conferred on the Commissioner.⁴⁵ Moreover there are I think grounds for suspecting that the performance of such a function or power would be inconsistent with those provisions because:

- if it involved him in arbitrating in disputes between the Senate and the Government this may detract from the harmonious relations the Commissioner would need to enjoy with Government Ministers and officials in respect of matters he is required to deal with under his Acts;
- it may involve dealing with issues which may arise under his Act which would have to be dealt with according to different criteria and procedures under that Act and perhaps giving rise to questions of pre-judgment and bias; and
- it may require the deployment of significant time and resources which impairs the ability of his office to deal with the powers and functions conferred on him under his Act implications especially if the task which the Senate seeks to have the Commissioner perform becomes a regular occurrence.

36. There is the added anomaly that the Commissioner may need to obtain possession of the very documents which the Government was unwilling to produce to the Senate for the purpose of examining those documents with a view to report to the Senate on whether the refusal on the part of the Government was justified. It is doubtful whether the Government would accede to producing the documents to the Commissioner when it was unwilling to produce them to the Senate.

37. Nothing in the foregoing regarding the Commissioner purports to cover the power of the Senate to require the Commissioner to provide evidence or documents regarding the exercise of the powers or functions conferred on the Commissioner under the legislation which establishes that office. Such an order would raise the considerations referred to above in para 30 of this submission. That however is not the situation addressed in the submission since it is assumed that what the Commissioner has been asked or required to do falls outside his statutory remit.

(c) Practice and Precedents

395-6). Apparently a similar response was received from the *Productivity Commission* when it refused to comply with an order to produce a document on superannuation default funds in industrial awards and agreements: Senate Information Bulletin No 247 at p 1.

⁴⁵ The same view can be taken in relation to the *Productivity Commission* mentioned in the preceding note as to which see ss 6 and 7 of the *Productivity Commission Act 2010* (Cth).

38. Despite the general legal principles outlined above, and their application to the Australian Information Commissioner, it is suggested in the Senate Information Bulletin No 249 that the alleged power to order and request statutory bodies and officers to prepare reports for the Senate is supported by recent practice and precedents. I respectfully disagree.

39. Those practices and precedents have involved instances where certain statutory bodies or officials have acceded to orders and requests made by the Senate and may be summarised as follows:

(1) *Auditor-General*

It seems that the Auditor-General has acceded to such orders or requests to prepare audit reports both before and after the *Audit Act* 1901 (Cth) was replaced by the *Auditor-General Act* 1997 (Cth).

The *Audit Act* did not apparently make any provision for the Auditor-General to carry out investigations or audits at the request of Parliament. It seems that on one occasion the Auditor-General suggested that part of the task requested or ordered by the Senate could be carried out by the *Department of Finance* which had expertise in the area and that the remaining part of the task would be done by in the normal course of audits of the department of and bureau in question. Whatever may be the position with other instances involving the Auditor-General before 1997, and despite the characterisation of the first of these requests as being described as ‘unusual’ by the Auditor-General, this occasion can furnish no support for the view that the Auditor-General acted outside the statutory authority conferred on his office, if as seems likely, the normal course of audits refers to audits carried out under the *Audit Act*

It seems that in 1997 the independence of the Auditor-General was sought to be guaranteed by the provisions of s 8 of the *Auditor-General Act* 1997(Cth) which were designed to give effect to the recommendations of the Joint Committee on Public Accounts in 1989.⁴⁶ These provisions were intended to enshrine the independence of the Auditor-General by

- [1] limiting the powers of the Parliament to act in relation to the Auditor-General to those specified in the same Act or other legislation (sub-ss 8(2) and 8(3); and
- [2] by protecting the Auditor-General from direction by anyone (sub-s 8(4)).

The *Explanatory Memorandum* is said to have clarified this provision as a declaration for the purposes of Con s 49, limiting the power of the Parliament in that regard. Presumably the inference to be drawn from what is stated in the Senate Information Bulletin is that without the ‘declaration’ mentioned, the Senate could have continued to require the Auditor-General to prepare reports

⁴⁶ *The Auditor-General : Ally of the people and Parliament* (March 1989) Report No 296 referred to by the Minister in his Second Reading Speech in Parliamentary Debates (*House of Representatives*) vol 210 (12 December 1996) at p 8342

outside the statutory remit of that office and that these were the express provisions needed to put an end to that practice.

However if this inference was intended to be drawn as an accurate reflection of the parliamentary intention behind the enactment of the provisions in s 8 of the *Auditor-General Act*, it is, with respect, far from clear that the inference is supported by the parliamentary record or that it is consistent with what has apparently occurred since s 8 was enacted.

In order to examine the soundness of what is to be inferred it is necessary to set out in full the terms of s 8 of the *Auditor-General Act* which state:

- (1) The Auditor-General is an independent [officer](#) of the Parliament.
- (2) The functions, powers, rights, immunities and obligations of the Auditor-General are as specified in this Act and other [laws of the Commonwealth](#). There are no implied functions, powers, rights, immunities or obligations arising from the Auditor-General being an independent [officer](#) of the Parliament.
- (3) The powers of the Parliament to act in relation to the Auditor-General are as specified in or applying under this Act and other [laws of the Commonwealth](#). For this purpose, *Parliament* includes:
 - (a) each House of the Parliament; and
 - (b) the members of each House of the Parliament; and
 - (c) the committees of each House of the Parliament and joint committees of both Houses of the Parliament.
 There are no implied powers of the Parliament arising from the Auditor-General being an independent [officer](#) of the Parliament.
- (4) Subject to this Act and to other [laws of the Commonwealth](#), the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not subject to direction from anyone in relation to:
 - (a) whether or not a particular audit is to be conducted; or
 - (b) the way in which a particular audit is to be conducted; or
 - (c) the priority to be given to any particular matter.

The reasons for doubting the soundness of the inference can now be outlined. In the *first* place a close examination of the relevant parts of the Explanatory Memorandum,⁴⁷ the Minister's Second Reading Speech and the relevant parts of the Report of the Joint Parliamentary Public Accounts⁴⁸ fails to contain any:

- (a) reference to Con s49 (explicitly at least); or
- (b) reference to the pre-existing practice which the Auditor-General had described as "unusual" when it first began.

⁴⁷ House of Representatives *Auditor-General Bill* 1996 (Cth) at pp 1-5.

⁴⁸ See above n 46 in chs 5 ("Independence and Accountability") and 18 ("Legislation").

Secondly, the terms of s sub-s 8(4) which were designed to free the Auditor-General from direction are only concerned with the possibility of a direction with the exercise of the powers and function of the Auditor-General which *did come within the terms of that or any other Act* eg in the way audits are carried out. If the analysis put forward in this submission is correct no legislation was needed to prevent the Auditor-General being required to perform tasks *outside* his statutory remit, by the Senate or anyone else

Thirdly, there remains the provisions which, as indicated before, purport to limit the powers of the Parliament in relation to the Auditor-General to those specified in sub-ss 8(2) of the *Auditor-General Act* or any other legislation. For this purpose ‘Parliament’ was defined to include each House, its committees and its members. As with the provisions of sub-s 8(2), the reference in sub-s 8(1) to the “Auditor-General being an independent officer of Parliament” was not to be taken as conferring “implied powers” on the Parliament in relation to the Auditor-General. If this provision was intended to put an end to the powers of the Senate to order the production of a report by the Auditor-General under Con s49, the reference to ‘implied powers’ hardly seems apt to describe the powers possessed Senate under that section of the Constitution.⁴⁹ More importantly, the denial of those implied powers was confined to only those that could otherwise have been derived from the declaration of the Auditor-General as being “an independent officer of the Parliament” in sub-s 8(1) *ie* as being some kind of employee or servant and so open to direction and control. As already seen, the powers of either House to order the production of documents is not limited to or exercisable only as regards officers and employees of the Parliament.

Finally, if the inference is to be drawn that without the provisions of s 8 the Senate could have continued to require the Auditor-General to carry out investigations and prepare reports outside the statutory remit of that office, and s 8 is read as now precluding such reports, it is difficult to reconcile this interpretation of s 8 with the investigations and reports that have since 1997 been carried out and prepared at the *request* of and not the *order* of the Senate when those investigations and reports fell outside the statutory powers and functions of the Auditor-General.

(2) *Australian Securities Commission (ASC) and Australian Securities and Investment Commission (ASIC)*

It seems that ASC and ASIC have likewise responded to orders made by the Senate to produce reports on matters that may be assumed to have been outside their statutory functions. Those functions included the power of ASC to do whatever was necessary for or in connection with or reasonably incidental to the performance of its functions.⁵⁰ There was apparently no mention in the legislation of responding to requests by the Parliament or either

⁴⁹ The expression ‘implied powers’ is that usually used to describe the powers of Parliament which like the NSW Parliament only possessed such implied powers as were reasonably for the existence and not those of the British House of Commons.

⁵⁰ Reference was made as regards ASC the *Corporations Act 1989* (Cth) ss-sub 11(4).

House or their Committees. I am prepared to assume that this was also the case with its successor, ASIC, and that the functions performed by order of the Senate did indeed fall outside the statutory remit of both of those bodies.

(3) *Australian Competition and Consumer Commission*

Although numerous orders have been directed to the ACCC established under the *Trade Practices Act 1974* (Cth) the provisions of that Act required the Commission to comply with directions of the Minister and requirements of Parliament by providing:

“If either House of the Parliament or a Committee of the either House, or of both Houses, of the Parliament requires the Commission to furnish to that House or Committee any information concerning the performance of the function of the Commission under this Act, the Commission shall comply with the requirement.

It is possible that these provisions may confirm the existing power of the Houses under Con s 49 since it relates to information of the Commission within its knowledge concerning the exercise and performance of its statutory powers and functions, although as indicated before this would depend on the degree of independence that body was intended to enjoy. However even if it did confirm the power under s 49 this would not and does not support a power to require the preparation of a report on new matters within in its expertise when they do not deal with the way the Commission has or has not exercised or performed its *statutory powers and functions* in the past.

(4) *Human Rights and Equal Opportunities Commission (HREOC)*

It also seems that that the Senate asked HREC to carry out particular inquiries and report to the Senate. It was not an order for the production of documents in the strict sense and as such was not thought to have involved a formal exercise of its statutory powers. HREOC apparently responded nonetheless in a letter which included numerous attachments which detailed relevant inquiries *it had conducted in the past*.

This instance does not, with respect, bear on the issue presently in question since it did not seem to involve HREOC carrying out any new investigation beyond merely listing previous inquiries which were carried out presumably within its statutory remit.

Moreover the response given by the Manager of Government Business which is quoted in the Information Bulletin is consistent with the view expressed in this submission:

“In any case, for the Senate’s information the Government notes that the Commission is an independent statutory body with powers of inquiry. As such the Senate cannot bind or direct the Commission to exercise those powers. It is a matter for the Commission to determine how it would respond to such a request by the Senate...

The Government also notes that while the Commission could conduct an inquiry on its own motion, under the *Human Rights and Equal Opportunity Commission Act* 1986 the results of such an inquiry must be reported to the Attorney-General and not directly to Parliament”⁵¹

40. It will be noticed that a specific response has already been provided to some of the instances and precedents summarised above and it now remains to provide a more general response to the extent that the instances and precedents may still be thought to bear on the issue in question *ie* to the extent that they can be seen as instances where statutory bodies and officials have responded to orders or requests to prepare reports and investigations *outside* the powers and functions conferred upon them in the legislation which provides for their establishment.

41. *Firstly*, the Senate (and the House of Representatives) cannot by their own actions or conduct acting alone create new powers which they do not already possess under Con s49 or legislation passed under Con ss49 and 51(xxxvi). The issue is and remains whether the claimed powers were possessed by the House of Commons as at 1901 subject always to the effect of overriding legislation passed by the Australian Parliament. At most, all that previous instances or precedents can provide is evidence of an understanding of how the powers possessed by the House of Commons have been interpreted in Australia. As such it should be accorded respect but it cannot be regarded as conclusive.

42. *Secondly*, if the views I have expressed in this submission are accepted, it will mean that the Senate and others:

[1] may have acted on a mistaken view of the scope of the Senate’s powers; and

[2] the persons who make up the statutory bodies or are appointed as the statutory officials who acceded to the orders or requests of the Senate voluntarily decided to act in a personal capacity although the question still remains whether this would be consistent with the legislation which established the same bodies and officials.

Third issue: justiciability

43. In the Senate Information Bulletin No 247 reference was made to early Senate practice which was to make regular use of orders for the production of documents both in existence and created for that purpose.⁵² By way of example it is stated that in the first three sessions of the Australian Parliament (1901-03) the Senate agreed to 54 orders. It was also stated that the power to order the production of documents exercised by the Senate and access disputes in relation to such documents were resolved by political settlement and the exercise of self-restraint on the part of the

⁵¹ Although it is indicated that those considerations would only have applied to *inquiries* conducted pursuant to the Act and not to an order to produce a document, the compilation of a new document which involved the production of a report into the matter identified by the Senate would have required an inquiry albeit without the benefit of the powers given to inquire by the Act.

⁵² At p 10.

Houses and not by testing the limits of the power in the courts assuming such access disputes were justiciable.

44. It is important to appreciate that before 1987 each of the Houses of Parliament had it within their powers to order the imprisonment of persons who did not comply with their orders to give evidence or produce documents without a court having the ability to review the legal validity of the power to give evidence or produce documents. This could be done by framing the warrant of imprisonment in general terms alleging a breach of parliamentary privilege: see *R v Richards Ex p Fitzpatrick and Browne*⁵³. Even leaving aside whether the instances mentioned in para 43 above did involve ordering the creation of documents in the sense which is questioned in this submission, the inability of a court to review the validity of the orders made by the Senate means that the orders made on those occasions cannot provide a safe indication of the legal validity of what was done.

45. The position was in any event changed with the enactment of the *Parliamentary Privileges Act 1987* (Cth). In the *first* place s 4 makes it clear that for an offence against the Parliament to be proved it must be shown that the impugned conduct constitutes an improper interference with the free exercise by a House or committee of its authority or functions. *Secondly*, by reason of s 9, any warrant of imprisonment must now state the particulars of the conduct which is alleged to have amounted to a breach of privilege. As the Explanatory Memorandum made clear the purpose of s 9 was to attract the power of a court to determine whether the ground for imprisonment is sufficient in law to amount to a contempt of the House.⁵⁴ This means that any attempt by either House to use imprisonment as a sanction for failing to obey its orders may now be open to legal challenge on the ground that the order was itself not lawful especially in the light of *Egan v Willis*⁵⁵ and *Egan v Chadwick*⁵⁶ even though those cases dealt with the NSW Parliament and not a Parliament which, like that of the Australian Houses of Parliament, enjoyed the powers of the House of Commons.

46. The importance of these considerations is that they help to underline the possibility that the conclusions reached in paras 25 and 35-6 above of this submission which denied the existence of the legal powers asserted by the Senate with respect to the Australian Information Commissioner and other statutory bodies in relation to the 'creation' of documents, may well be capable of being tested in a court of law.

Fourth issue: Propriety of exercise

47. A number of considerations militate against the wisdom or propriety of the Senate exercising the power doubted in this submission. The first is the risk of legal challenge based on the same doubt.

48. The second is that the legal reasons that were advanced to deny the existence of the relevant power of the Senate may also constitute important policy reasons for not exercising the power in question. This is so even if, contrary to the views expressed in this submission, the power is thought to exist. It is not, with respect, fair or

⁵³ (1955) 92 CLR 157.


⁵⁴ See Lindell above n 2 at p 417.

⁵⁵ (1998) 195 CLR 424.

⁵⁶ (1999) 46 NSWLR 563.

appropriate for expert witnesses whether public or private to be forced to perform new work for the Senate or its Committee against their will and - at least in the case of private witnesses - without adequate remuneration. So far as statutory bodies and officials are concerned it also seems unwise for them to be asked to perform such a function when it can be seen to clash with or be in conflict with the powers and functions conferred upon them under or by the legislation which provide for their establishment and legal existence.

49. Finally I respectfully suggest that rather than conscript expert public or private witnesses into providing information and opinions on matters of concern to the Senate, the preferable course, both as a matter of law and policy, is for the Senate to appoint willing persons to act as special advisers to assist it and its committees or, as indicated earlier, seek the willing participation of experts at round table discussions and seminars held for the same purpose.⁵⁷ Such advisers and round table and seminar participants could provide the information and opinions needed to enable the Senate to perform the fact finding functions as part of the 'Grand Inquest of the Nation'.

A handwritten signature in cursive script, appearing to read 'G. Lindell', is written over a solid black rectangular redaction box.

Geoffrey Lindell

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7 June 2011

⁵⁷ Above para 21.