APPENDIX H

OPINION OF MR TONY MORRIS QC

EX PARTE: SENATOR CHERRY KERNOT

RE: SENATE SELECT COMMITTEE ON CERTAIN ASPECTS OF FOREIGN OWNERSHIP DECISIONS IN RELATION TO THE PRINT MEDIA

OPINION

of

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EX PARTE: SENATOR CHERYL KERNOT

RE: SENATE SELECT COMMITTEE ON CERTAIN ASPECTS OF FOREIGN OWNERSHIP DECISIONS IN RELATION TO THE PRINT MEDIA

O P I N I O N

My advice has been sought by Senator Cheryl Kernot, the Leader of the Australian Democrats in the Commonwealth Parliament. The instructions which I have received from Senator Kernot by letter of 18 March 1994 are in the following terms:

> "I am writing to seek your advice on a matter before the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media.
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> "As you are aware, the Committee has requested Mr. Tony Hinton, a senior Treasury official who is Executive Member of the Foreign Investment Review Board, to produce documents containing advice from the Board to the Treasurer on the proposed purchase by foreign companies of an interest in the Fairfax newspaper chain.
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> "The Treasurer, Mr. Ralph Willis, has instructed Mr. Hinton not to produce the documents, and has written to the Committee arguing that disclosure of the documents would be contrary to the public interest. The Committee has not accepted the Treasurer's view, and is considering further steps it might take to obtain the documents. There is some chance that the conclusive decision as to which view should prevail will be made by a court.
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> "That being so, I seek your advice as to the likelihood that a court would find:
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> - that the documents sought by the Committee belong to a class of documents which should not be disclosed on public interest grounds; and
> - if not, that disclosure of the specific documents being sought by the Committee would nevertheless be contrary to the public interest, given the facts of the matter."

I should say, at the outset, that it is not immediately apparent to me that, as the law presently stands, there is any basis upon which a court could assume jurisdiction to reach a "conclusive decision as to which view should prevail". There is, of course, the possibility that the law will be changed, by Act of Parliament, so as to confer jurisdiction on a court to reach a conclusive decision in relation to this issue. Leaving aside that possibility, I can only conceive of one way in which the matter under dispute might imaginably arise as a justiciable issue before a court.

As the law presently stands, there is no alternative but for the Committee, at least in the first instance, to make its own decision in relation to the Treasurer's contention that disclosure of the documents would be contrary to the public interest. If the Committee were to reject the Treasurer's contention, and to direct Mr. Hinton to produce the documents at a private session of the Committee as contemplated by Rule 1(10) of the *Parliamentary Privilege Resolutions* of 25 February 1988 - and assuming that the Treasurer wee, in that event, to persist with his direction to Mr. Hinton not to produce the documents - Mr. Hinton would then be placed in the invidious position of having to choose between compliance with the Committee's direction and compliance with the direction of the Treasurer. Were Mr. Hinton to adopt the latter course, it would be open for the Committee to make a report to the Senate as a whole; and on the basis of that report, the Senate might resolve to impose a penal sanction (either a fine of up to $5,000.00, or imprisonment for not more than six months) in respect of Mr. Hinton.

If that were to happen, it is arguable that Mr. Hinton would be entitled to bring proceedings in a court of law, with a view to litigating the question whether or not the

Senate's resolution was lawful. It is open to argument that, in the scenario which I have mentioned, a justiciable issue would arise as to whether or not Mr. Hinton's failure or refusal to comply with the Committee's direction constitutes "an improper interference with the free exercise by [the Committee] of its authority or functions" within the meaning of Section 4 of the *Parliamentary Privileges Act 1987*; and in such proceedings it may be open to Mr. Hinton to contend that, whether or not his failure or refusal to comply with the Committee's direction constitutes an "interference with the free exercise of [the Committee's] authority or functions", it is not an improper interference, as the Treasurer's direction justified Mr. Hinton in failing or refusing to comply with the Committee's direction. Thus, in that way, it is theoretically possible that a court may ultimately be called upon to reach a "conclusive decision" as to whether or not the Treasurer is entitled to resist disclosure of the documents on the ground that such disclosure would be contrary to the public interest.

I do not, however, wish to be taken as accepting or endorsing the view that, even in the scenario which I have mentioned, the present issue could be the subject of a "conclusive decision" by a court of law. The decision of the High Court of Australia in The Queen v. Richards, ex parte Fitzpatrick and Browne, (1955) 92 C.L.R. 157, supports the view that, in relation to issues of this nature, courts of law will regard as conclusive the determination of the relevant House of the Parliament, so that, if the Senate were to determine that Mr. Hinton's failure or refusal to comply with a direction by the Committee to produce the documents constituted a contempt or a breach of privilege, the courts would not entertain any question as to the correctness of the Senate's determination. There is a view that the enactment of Section 4 of the

Parliamentary Privileges Act 1987 may have resulted in an alteration of the principles applied in Richards' Case, so that the courts might no longer treat as conclusive the determination of a House of the Parliament in relation to an issue of privilege. That is not a view to which I personally subscribe; but even on that view, it seems probable that the function of a court would be limited to deciding whether or not it was open to the House to find that a contempt or breach of privilege had occurred; it would be very difficult to contend that the court has the jurisdiction or power to substitute its own view for that reached by the Senate.

Nonetheless, I have been asked to consider this question on the hypothetical basis that "There is some chance that the conclusive decision as to which view should prevail will be made by a court"; and I shall therefore proceed on that assumption.

PUBLIC INTEREST IMMUNITY

The courts have long recognised that the interests of parties to a particular piece of litigation must, where necessary, be subordinated to the interests of the nation as a whole. One of the earliest reported cases of this nature was Anderson v. Hamilton, (1816) 2 Starkie N.P.C. 183; 2 Brod. & B. 157; 129 E.R. 917. In the course of that action, the Plaintiff sought to compel the production by a witness, the Earl of Liverpool, of correspondence which had passed between him (in his capacity as Secretary of State for the Colonial Department) and the defendant (in his capacity as Governor of Heligoland). Lord Ellenborough C.J. observed:

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> "... if the objection had been made by the noble Earl to the production of this correspondence as a matter of state, I should have given the fullest effect to that objection. I remember, upon some of the state trials, Lord Grenville was called to produce some letter which was supposed to have come to his hand, having been intercepted in the course of the post, or something of that kind. I speak from recollection: I do not know whether I am correct; but, upon the objection, it was thought that secrets of state were not to be take out of the hand of His Majesty's confidential servants. Now, I am very unwilling to have the evidence of what Lord Liverpool has written by way of observation on the Plaintiff's complaint ... . I do not like breaking in upon this correspondence; it might be pregnant with a thousand facts of the utmost consequence respecting the state of the government, the connection of parties, the state of politics, and the suspicion of foreign powers with whom we may be in alliance."

For many years, it was understood - at least in England - that a claim of "Crown privilege" by the responsible government minister was conclusive (see, for example, Duncan v. Cammell, Laird & Co., [1942] A.C. 624); although there were cases in which Australian Judges exercised the power to require the production of the documents in question, to examine them, and to determine whether a claim for "Crown privilege" was well-founded (see, for example, Queensland Pine Co. Ltd. v. The Commonwealth, [1920] St.R.Qd. 121).

So far as Australia is concerned, the matter has now been authoritatively resolved by the decision of the High Court in Sankey v. Whitlam, (1978) 142 C.L.R. 1. By that case, it was finally concluded that, in respect of oral or documentary evidence sought to be adduced in a court of law, the decision as to whether or not a claim for "Crown privilege" (or, as it is now more commonly called, "public interest immunity") should be upheld is to be made by the court; the views of the responsible minister, whilst accorded appropriate weight, are no longer taken as being decisive.

In Sankey v. Whitlam, the defendants (the Hon. E.G. Whitlam, the Hon. R.F.X. Connor, the Hon. Dr. J.F. Cairns, and the Hon. Mr. Justice Murphy) were charged with a conspiracy to effect a purpose that was unlawful under a law of the Commonwealth, namely the borrowing of money in contravention of the *Financial Agreement 1927*. The charges arose out of the so-called "Loans Affair", and concerned allegations that a breach of Commonwealth law had occurred when the defendants (a former Prime Minister and certain Ministers in his Government) had entered into negotiations with a person named Khemlani to arrange loans otherwise than in accordance with the *Financial Agreement 1927*. The Commonwealth was served with a *subpoena duces tecum* to produce documents, including Cabinet and Loan Council documents, in relation to those charges.

In dealing with the Commonwealth's claim for "Crown privilege", Gibbs A.C.J. said at pp.38-39:

> "It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence."

Likewise, at pp.58-59, Stephen J. said:

> "What are now equally well established are the respective roles of the court and those, usually the Crown, who assert Crown privilege. A claim to Crown privilege has no automatic operation; it always remains the function of the court to determine upon that claim. The claim, supported by whatever material may

> be thought appropriate to the occasion, does no more than draw to the court's attention what is said to be the entitlement to the privilege and provide the court with material which may assist it in determining whether or not Crown privilege should be accorded. A claim to the privilege is not essential to the invoking of Crown privilege. In cases of defence secrets, matters of diplomacy or affairs of government at the highest level, it will often appear readily enough that the balance of public interest is against disclosure. ... Just as a claim is not essential, neither it is ever conclusive, although, in the areas which I have instanced, the court's acceptance of the claim may often be no more than a matter of form. It is not conclusive because the function of the court, once it becomes aware of the existence of material to which Crown privilege may apply, is always to determine what shall be done in the light of how best the public interest may be served, how least it will be injured."

The present Chief Justice of Australia, Sir Anthony Mason, said at pp.95-6:

> "It is now recognized that in considering an objection to production on the ground of Crown privilege the court must evaluate the respective public interests and determine whether on balance the public interest which calls for non-disclosure outweighs the public interest in the administration of justice that requires the parties be given a fair trial on all the relevant and material evidence ... . In determining this question the court, though it will give weight to the Minister's opinion that the documents should not be produced, is entitled to inspect the documents and form its own conclusion upon the question whether the public interest will be better served by production or non-production."

Jacobs J. and Aickin J. adopted a similar approach.

Issues of a similar nature arose, more recently, in another case which attracted a certain degree of public notoriety: Alister v. The Queen, (1984) 154 C.L.R. 404. That was also a criminal case, involving charges of conspiracy to murder and attempted murder, in relation to the "Hilton Hotel bombing"; and one of the issues which arose at the trial related to the membership of each accused of an organization known as the "Ananda Marga", and their respective roles within that organisation. A *subpoena*

duces tecum was issued on behalf of the accused directed to the officer in charge of the Australian Security Intelligence Organization ("ASIO"). The trial Judge set aside the *subpoena*; but the High Court held (by majority) that it was an error not to require the production of any documents which may have answered the description in the *subpoena* to enable the court to discover whether any such documents existed and then to inspect them for the purpose of deciding whether they should have been disclosed to the accused. Of particular relevance are the following remarks of Brennan J. at p.455:

> "If there were an ASIO file of documents answering the description in the subpoena and if it contained a document showing the Crown case to be a fabrication and a frame-up, it is impossible to suppose that every consideration - of national security and justice to the accused alike - would not demand its inspection by the accused and, if admissible, its production in evidence."

From those cases, the following general principles may be distilled as applying where a claim for "Crown privilege" or "public interest immunity" arises in the course of litigation:

(1) A claim of "privilege" by or on behalf of the Crown, through the responsible Minister, is neither necessary nor conclusive. On the one hand, a court may exclude evidence in the public interest, even if no claim of privilege is made on behalf of the Crown. And on the other hand, even if such a claim is made on behalf of the Crown, the court must determine for itself whether or not the claim is sustainable. (It is for this reason that the expression "public interest immunity" has now largely superseded the expression "Crown privilege".)

(2) The court will, nonetheless, accord appropriate weight to the views of the responsible Minister, or those of the permanent head (or other representative) of the relevant government department.

(3) There are some categories of documents and information in respect of which such a claim is very likely to be upheld, save in the most extreme circumstances. They include (in the words of Sir Ninian Stephen) "defence secrets, matters of diplomacy or affairs of government at the highest level". Still, even in such cases, the court retains the ultimate power to determine whether or not the oral or documentary evidence in question should be admitted.

(4) A matter which, at one point in time, might have been the subject of a successful claim for exclusion in the public interest may cease to attract that protection, either because the matter has already ceased to be confidential (whether as a consequence of the documents being tabled in Parliament, or as the result of other forms of publicity), or simply because the effluxion of time means that information is no longer sensitive.[1]

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[1] Similar issues arose in the famous "Spycatcher" case, in which the British Government sought to restrain the publication of a book based upon information which Mr. Peter Wright had acquired in the course of his employment as a member of the British Secret Service (MI5). Powell J. refused to grant an injunction, as most of the information was either no longer confidential (in the sense that it had passed into the "public domain"), or was such that, as a result of the effluxion of time, its publication would not cause any detriment to the British Government. See Attorney-General for the United Kingdom v. Heinemann Publishers Australia Pty. Ltd., (1987) 8 N.S.W.L.R. 341. An appeal to the New South Wales Court of Appeal was dismissed ((1987) 10 N.S.W.L.R. 86), as was a subsequent appeal to the High Court of Australia ((1988) 165 C.L.R. 30).

(5) Ultimately, the function of a court of law, where a claim for "Crown privilege" or "public interest immunity" is advanced, involves a balancing exercise. The court must weigh up, on the one hand, the potential prejudice to the nation as a whole, if the evidence becomes public; on the other hand, the court must take into account the potential prejudice to the parties involved in the litigation if relevant evidence is excluded.

(6) The classes or categories of information which may be the subject of a successful claim for "public interest immunity" have never been - and probably are not capable of being - identified exhaustively. But it is possible, from the case-law, to identify a number of categories in respect of which claims for "Crown privilege" or "public interest immunity" have been upheld on previous occasions:

- Documents and information the disclosure of which may be prejudicial to national security;

- Documents and information the disclosure of which may be prejudicial to foreign relations;

- Documents and information the disclosure of which may prejudice the investigation or trial of a criminal offence;

- Documents and information relating to advice given to the Crown by the Government[2];

- Documents and information obtained by the Government, or by officers of the Government, in circumstances where the public disclosure of such documents or information might prejudice the Government obtaining such information on a confidential basis on future occasions[3];

- Documents and information, the disclosure of which may prejudicially affect Crown revenue or the national economy[4]; and

- Documents and information, the disclosure of which may prejudice the safety of a police informant or under-cover police investigation.

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2 The case of Sankey v. Whitlam demonstrates that, whilst "public interest immunity" is ordinarily accorded to Cabinet documents and papers concerned with policy decisions at a high level, the protection is neither absolute nor permanent. Even in respect of such documents, the court must balance the need for secrecy against the need to produce the documents in the interests of justice; and production will usually be ordered where a document has previously been published, or where the need to maintain confidentiality has ceased by effluxion of time. Moreover, the public interest which ordinarily requires the protection of Cabinet documents and similar papers may yield to a greater public interest, such as where disclosure is essential to a prosecution for misfeasance in public office.

3 Such protection may also be available, in some cases, to non-governmental organisations. Thus, in D. v. National Society for the Prevention of Cruelty to Children, [1978] A.C. 171, the House of Lords accorded immunity from disclosure in respect of the identities of persons who had provided confidential information to the Respondent - described in the judgment of Lord Denning M.R. as a "society of high repute" - concerning the neglect or ill-treatment of children.

4 This category is perhaps the most ephemeral. There are very compelling arguments to maintain the confidentiality of budget papers, and other documents dealing with (for example) proposals to impose new forms of taxation, to re-structure existing forms of taxation, or to bring about a change in interest rates or foreign currency exchange rates. However, the confidentiality of such documents largely disappears, once the proposal is put into effect: c.f. Sankey v. Whitlam, per Gibbs A.C.J. at p.42.

It is to be emphasised that those categories are not exhaustive, but merely illustrate some of the circumstances in which a claim for "public interest immunity" may be available. The mere fact that a document or information falls within one of those categories does not mean that a claim for "public interest immunity" will necessarily be upheld; it is still a matter for the court to balance the prejudice likely to arise from disclosure against the consequences which non-disclosure will have in the context of particular litigation.

(7) In almost every case, for the purpose of determining a claim for "public interest immunity", the appropriate course is for the relevant document to be produced to the court, or the substance of the relevant information to be communicated to the court, so that the court may carry out the "balancing exercise" required to determine the claim.

PARLIAMENTARY INQUIRIES

The principles discussed above are those which apply where objection is taken to the production of a document, or the disclosure of information, in the course of proceedings in a court of law. It is, however, a most fundamental mistake to imagine that the same principles necessarily apply where the production of documents is sought for the purposes of a Parliamentary inquiry. There are essentially three reasons for that, which I will deal with separately.

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1. Does "Public Interest Immunity" Apply ?

There is no doubt that each House of the Australian Parliament has the power to conduct, either directly or through committees, inquiries in relation to matters of public importance. Such a power is granted to each House of the Parliament by Section 49 of *The Constitution*, which provides:

> "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."

The following points are to be noted in relation to Section 49:

(1) It is apparent, from the words of the Section, that the "powers, privileges, and immunities" referred to are vested severally in the two Houses of the Commonwealth Parliament - that is to say, in each of the Senate and the House of Representatives - rather than in both Houses jointly. All of the "powers, privileges, and immunities" referred to in that Section are conferred on the Senate, to precisely the same extent as they are conferred on the House of Representatives.

(2) Section 49 contemplates that the Parliament as a whole may "declare" the scope of the "powers, privileges, and immunities" of each House. In this context, the expression "Parliament" plainly means the Federal Parliament,

which is defined in Section 1 of *The Constitution* as consisting of "the Queen, a Senate, and a House of Representatives". It follows that any "declaration" as to the scope of the "powers, privileges, and immunities" of either House for the purposes of Section 49 requires the concurrence of both Houses, as well as royal assent. Such a declaration may be made by an Act of Parliament in the ordinary way. There are, no doubt, some Acts of Parliament which enlarge or modify the "powers, privileges, and immunities" of the two Houses, and of the Parliament as a whole. But, as the Full Court of the High Court of Australia unanimously observed in the leading case of The Queen v. Richards; ex parte Fitzpatrick and Browne, (1954) 92 C.L.R. 157 [hereinafter referred to as "Richards' Case"] at p.168:

> "What the earlier part of s.49 says is that the powers, privileges and immunities of the Senate and of the House of Representatives shall be such as are declared by Parliament. It is dealing with the whole content of their powers, privileges and immunities, and is saying that Parliament may declare what they are to be. It contemplates not a single enactment dealing with some very minor and subsidiary matter as an addition to the powers or privileges; it is concerned with the totality of what the legislature thinks fit to provide for both Houses as powers, privileges and immunities. When it says that 'until declared' they shall be those of the Commons House of Parliament it means that until the legislature undertakes the task of providing what shall be the powers, privileges and immunities they shall be those of the Commons House of Parliament. We think, therefore, that in the absence of [a] general provision ... the latter part of the section continues to operate."

(3) In fact, the Parliament has to some extent defined the "powers, privileges, and immunities" of each House, by a "general" Act of the kind foreshadowed by the High Court in Richards' Case. That was done by the *Parliamentary Privileges Act 1987*. However, Section 5 of that Act is highly relevant; it provides -

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"5. Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force."

(4) It follows that, subject to the express provisions of the *Parliamentary Privileges Act 1987* (and of any other specific Act dealing with a particular aspect of the "powers, privileges, and immunities" of the Houses of Parliament), each House of the Parliament continues to enjoy all such "powers, privileges, and immunities" as were vested in the House of Commons in 1901.

In Quick and Garran's *Annotated Constitution of the Australian Commonwealth* (1901), it is observed at p.502 that:

> "The privileges of Parliament are enforced, and breaches thereof punished, by the power vested in each House to order the arrest and imprisonment of offenders. The power of commitment, with all the authority which can be given by law, is said to be the Keystone of Parliamentary privilege."

That is followed by a number of excerpts from the 10th edition of *May's Parliamentary Practice*, which include the following:

> "Either House may adjudge that any act is a breach of privilege and contempt; and if the warrant recites that the person to be arrested has been guilty of a breach of privilege, the courts of law cannot inquire into the grounds of the judgment, but must leave him to suffer the punishment awarded by the High Court of Parliament, by which he stands committed."
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> "It may be considered ... as established, beyond all question, that the causes of commitment by either house of Parliament, for breaches of privilege and contempt, cannot be inquired into by courts of law; but that their 'adjudication

> is a conviction, and their commitment, in consequence, an execution.' No other rule could be adopted consistently with the independence of either house of Parliament; nor is the power thus claimed by Parliament greater than the power conceded by the courts to one another."

The seminal authority dealing with the powers of the English Houses of Parliament to commit for contempt is the Case of the Sheriff of Middlesex, (1840) 11 Ad. & E. 273 [113 E.R. 419]. That case was a sequel to the equally famous cases of Stockdale v. Hansard, (1839) 9 Ad. & E. 1 [112 E.R. 1112] and 11 Ad. & E. 253 [113 E.R. 411]. The defendants in those proceedings, members of the Hansard family, were the proprietors of a publishing firm, who were authorised by the House of Commons to print and publish reports of proceedings in that House - their name lives on as the name given to the official printed reports of debates and proceedings, not only of the United Kingdom Parliament, but also of other parliaments within the Commonwealth of Nations. The members of the Hansard family were sued for libel, in respect of defamatory statements made in Parliament, and republished in their reports of parliamentary proceedings. The case came on for argument before the Court of Queen's Bench, which determined that it was no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by order of the House, printed and published by the defendants. At a subsequent trial, damages were awarded in the sum of £600.00.

The defendants - the members of the Hansard family - refused to pay over the sum of damages which was awarded against them. The plaintiff thereupon took out a Writ

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of *Fieri Facias* - that is to say, a Writ of Execution directing the Sheriff of Middlesex to levy from the goods and chattels of the Hansards a sum equal to the amount of the judgment debt, interest and costs. In compliance with that Writ, the Sheriff did levy execution; but a further resolution was then passed by the House of Commons, declaring the levy a contempt of Parliamentary privilege, and ordering that the Sheriff repay the money to the Hansards. This placed the Sheriff in a most invidious situation: on the one hand, if he obeyed the Court and paid the money to the plaintiff (Stockdale), he was liable to imprisonment for contempt of the House of Commons; but on the other hand, if he obeyed the House of Commons, he would find himself in contempt of the Court, and liable for committal by the Court's order. In fact, the Sheriff was committed to prison pursuant to a resolution of the House of Commons, and that is the circumstance which gave rise to the seminal case to which I have referred.

Having been committed for contempt of the House of Commons, the Sheriff applied for a Writ of *Habeas Corpus ad Subjiciendum*. In all of the circumstances, one might have imagined that the Court of Queen's Bench would have been at great pains to find some basis to protect the Sheriff, whose imprisonment by the House of Commons was a direct consequence of his having complied with an order of that Court. But the Court found itself unable to assist the Sheriff, pronouncing the following propositions which have since attained general acceptance:

- That a warrant issued by the Speaker of the House of Commons is a good and sufficient answer to a Writ of *Habeas Corpus*.

- That the warrant need not set out the grounds upon which the House concluded that there had been a breach of its privilege, it being within the sole and exclusive jurisdiction of the House to determine the scope of its privileges, and whether or not a breach of those privileges had occurred in the circumstances of a particular case.

- That the Court could not enquire into the merits of the case, so as to review the determination of the House of Commons that a breach of its privileged had been committed.

There are many other cases in which similar principles have been applied; but it is unnecessary for present purposes to go beyond the decision of the High Court of Australia in Richards' Case, in which the members of the Court (Dixon C.J. and McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.) said at p.162 that:

> "... [T]he situation in England ... has been made clear by judicial authority. Stated shortly, it is this: it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms. This statement of law appears to be in accordance with the cases by which it was finally established, namely, the Case of the Sheriff of Middlesex."

Their Honours also adopted the remarks of the Privy Council in Speaker of the Legislative of Assembly of Victoria v. Glass, (1871) L.R. 3 P.C.App. 560, in which Lord

Cairns (speaking on behalf of the Judicial Committee) recognised that "the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a warrant, stating that the commitment is for contempt of the House generally, without specifying what the character of the contempt is".

It follows that, subject only to the provisions of the *Parliamentary Privileges Act 1987*, each House of the Australian Parliament - including, of course, the Senate - may require that any person attend before it to give evidence and to produce documents; and that it is competent for the Senate, if it concludes that a person has committed a contempt or breach of privilege by failing or refusing to answer a question or to produce a document, to issue a warrant for the committal of the person adjudged to be guilty of that offence.

The *Parliamentary Privileges Act 1987* altered the position which previously subsisted in respect of the privileges of both Houses of the Parliament, in the following respects:

- Section 4 contains a general definition of what conduct may be held to constitute a breach of privilege or a contempt of either House. It provides that:

> "4. Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member."

- Section 7 limits the penalties which may be imposed by either House for contempt or breach of privilege. Generally speaking, either House may impose a penalty of imprisonment for a period not exceeding six months, or a fine which is not to exceed $5,000.00 in the case of a natural person and $25,000.00 in the case of a corporation.

- Section 9 of the Act requires that either House, in imposing a penalty of imprisonment (but not, apparently, a fine) must, by the terms of the resolution imposing the penalty and by the terms of the warrant committing the person to custody, "set out particulars of the matters determined by the House to constitute that offence".

At first sight, it may not seem that those provisions substantially impact upon the traditional scope of Parliamentary privilege. But it would appear that those provisions were intended to take up the observation of the High Court in Richards' Case that "If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege": see also the authorities mentioned in Quick and Garran (*op.cit.*) at p.502, in support of the conclusion that "... if the causes of commitment were stated on the warrant, and appeared to be beyond the jurisdiction of the house, it is probable ... that their sufficiency would be examined".

In that light, Sections 4 and 9 take on added significance. Section 9 compels the House, in issuing a warrant for committal of a person for "an offence against that

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House", to "set out particulars of the matters determined by the House to constitute that offence". Section 4 limits and defines the matters which may constitute an offence; and it is therefore open for a court to determine whether or not the matters particularised in the Warrant (pursuant to Section 9) constitute a contempt or breach of privilege, as defined by Section 4.

It does not necessarily follow that a court is therefore entitled to re-examine at large the question whether or not a contempt or breach of privilege has occurred. Although views may differ, it seems to me quite arguable that the "particulars of the matters determined by the House" cannot be challenged, and that the court's function is limited to determining whether the matters so particularised amount to conduct of a kind which, in accordance with the definition in Section 4, is deemed to constitute an "offence against a House". Arguably, it may also be competent for a court to consider whether or not, on the evidence before the House, it was open to the House to determine the matters particularised in the resolution and Warrant; although, in my view, there is no compelling argument that the passing of the *Parliamentary Privileges Act* was intended to abrogate the long-settled rule that the determination of such matters by a House of the Parliament is conclusive. On no view, however, could it be argued that the *Parliamentary Privileges Act* confers upon the courts of law a general jurisdiction by way of appeal from determinations made by a House of the Parliament, or to exercise a general power of judicial review in respect of such determinations.

In simple terms, if a Warrant is issued which commits a person to a term of imprisonment not exceeding six months, or to a fine (in the case of a natural person)

not exceeding $5,000.00, and the Warrant sets out particulars of the matters determined by resolution of the House to constitute the offence, it seems to me that the only question for the court to consider is whether the matters so particularised are capable of amounting to, or of being intended or likely to amount to, an "improper interference with the free exercise by [the] House or committee of its authority or functions". Even on the widest view, the only additional jurisdiction which the courts may exercise is to decide whether the matters determined by the House to constitute the offence represent findings which were open to the House having regard to the evidence before it.

Thus, in the ordinary case, a Warrant might recite or set out the facts upon which it is based: on the wider view, a court may consider whether or not those findings were open to the House; and on the narrower view, the courts' role would be limited to determining, one way or the other, whether the facts recited in the Warrant amount to an "offence" as defined by Section 4.

Neither in Section 49 of *The Constitution*, nor in the provisions of the *Parliamentary Privileges Act*, is there to be found any provision expressly limiting the powers of the Houses of the Australian Parliament, by reference to the doctrine of "Crown privilege" or "public interest immunity". Of course, if an Act of the Parliament were to declare, pursuant to Section 49 of *The Constitution*, that the privileges of the Houses of the Parliament are limited in accordance with such a doctrine, then the provisions of that Act would prevail. But there is no such Act. Thus, if there is any valid limitation in respect of the privilege of either House of the Parliament, based on principles of

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"Crown privilege" or "public interest immunity", it must be found in the terms of Section 49 itself. The only possible basis for such a limitation is that the "powers, privileges and immunities ... of the Commons House of Parliament of the United Kingdom ... at the establishment of the Commonwealth" were subject to such a limitation.

So far as I have been able to ascertain, there is no case - either before or since the establishment of the Commonwealth - in which it has even been suggested that there is such a limitation on the privileges of Parliament. On the contrary, the relevant authorities speak only of a general power, to compel attendance before the House and the furnishing of such information (oral or documentary) as the House may require. Lord Chief Justice Sir Edward Coke, in volume 4 of his *Institutes* (published in 1641), acknowledged the authority of the House of Commons, as "the general inquisitors of the realm", to conduct public examinations. In Burdett v. Abbot, (14 East 1 at 138), Lord Ellenborough, speaking of the House of Commons, said that, "independently ... of any precedents or recognized practice on the subject, such a body must *a priori* be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be". In Stockdale v. Hansard (*supra*, 9 Ad. & E. 115), Lord Chief Justice Denman said that "The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt". Littledale J., in the same case at p.168, added that "There is no doubt about the right as exercised by the two Houses of Parliament with regard to ... their right to summon witnesses to require

the production of papers and records ...; and as to any other thing which may appear to be necessary to carry on and conduct the great and important functions of their charge." Again, Patteson J. observed in the same case at p.213 that "The House is armed with ample powers to send for all persons who can give them information either before a committee, or at the Bar of the House." And in the case of Gosset v. Howard, (1845) 10 Q.B. 411 [116 E.R. 158], the Court of Exchequer Chamber (comprising Parke B. and Alderson, Coltman, Maule, Rolfe and Cresswell JJ.) observed at pp.450-51 [E.R., p.172]:

> "For it cannot be disputed that the House of Commons has by law the particular powers to take into custody which ... it is expressly averred to have exercised; and we have nothing to do with any other. First, that House, which forms the Great Inquest of the Nation (4 Inst. p.11), has a power to institute enquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even without disobedience, we need not enquire), bring them into custody to the Bar for the purpose of examination. And, secondly, if there be a charge of contempt and breach of privilege, and an order for the person charged to attend and answer it, and a wilful disobedience of that order, the House has undoubtedly the power to cause the person charged to be taken into custody and to be brought to the Bar to answer the charge: and, further, the House, and that alone, is the proper judge whether these powers or either of them are to be exercised."

The fact that courts of law apply a principle of "Crown privilege" or "public interest immunity" does not mean that either House of Parliament is governed by the same principles. There is not the slightest authority for the proposition that either House of the Parliament is obliged, in the conduct of a Parliamentary inquiry, to apply the rules and principles applied by courts of law. Indeed, there is strong authority to the contrary.

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Take, again, the Case of the Sheriff of Middlesex. It is perfectly plain that the Sheriff was acting in accordance with the order of a superior court; and, generally speaking, any person who does an act in accordance with the order of a superior court is entitled to an absolute privilege or immunity in respect of acts done in accordance with such an order. If the Sheriff had been sued in civil proceedings (such as for trespass, detinue, trover and conversion, or the like), or if he had been charged with a criminal offence (such as larceny or breaking and entering), it would be a complete defence to say that he was acting in accordance with an order of the Court. Plainly, if the Court had considered that the House of Commons was governed by the same substantive and procedural rules as a court of law, it would have held that the Sheriff was entitled to a privilege or immunity from suit, to the extent that he acted in accordance with the order of a superior court; and it seems to follow that the principles which govern courts of law in the exercise of their jurisdiction are not to be taken as any guide to the principles which govern Houses of Parliament in exercising their powers and privileges in accordance with the *lex et consuetudo Parliamenti* ("law and customs of Parliament"). As was observed by Gould J. in Brass Crosby's Case, (1771) 3 Wils.K.B. 188 at p.204 [95 E.R. 1005 at p.1013], "This Court cannot know the nature and power of the proceedings of the House of Commons; it is founded on a different law; the *lex et consuetudo Parliamenti*, is known to Parliament-men only."

My point, very simply, is this. Even if a document, or an item of information, were such that a court of law would not compel its disclosure in the course of ordinary litigation, it does not follow for a moment that either House of the Parliament is subject to a similar constraint. The powers of each House of the Parliament are very

extensive, and members of each House must, of course, exercise those powers with a proper sense of public duty. But if, within their own consciences, the members of either House are satisfied that the proper discharge of their Parliamentary functions requires the production of documents notwithstanding the Government's objection that production may be inimical to the public interest, there is no authority in this Country which can over-ride such a decision.

2. Proceedings in Closed Session

Fundamental to the doctrine of "Crown privilege" or "public interest immunity" is one underlying rationale: the fact that proceedings in courts of law ordinarily take place in public. Even on the rare[5] occasions when it is permissible for a court to take

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[5] In Russell v. Russell, (1976) 134 C.L.R. 495, Barwick C.J. at p.506 observed that "The courts of the States ... are in general required, because of the nature of the courts themselves and of the functions they perform, to sit and exercise jurisdiction in a place open to the public. The [Commonwealth] Parliament, in my opinion, has no power or authority to command the court of the State to sit in a place to which the public is not admitted." In the same case, Gibbs J. said at p.520:

> "It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' (Scott v. Scott, [1913] A.C. 417, at p.441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure' (McPherson v. McPherson, [1936] A.C. 177, at p.200)."

Stephen J., at p.532, said:

> "It would be an unnecessary and profitless digression to attempt any account of the long history and high significance attaching to open hearings in English courts of justice; it is all most eloquently exposed in the judgment of the members of the Full Court of Appeal in Scott v. Scott, ([1912] P. 241) and in the speeches of their Lordships in the appeal to the House of Lords ([1913] A.C. 417).

(continued...)

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evidence *in camera* - or to prohibit the publication of evidence - any document or oral testimony admitted into evidence must be disclosed to the parties and their legal representatives. In a jury trial, the evidence must also be disclosed to the ordinary citizens who comprise the Jury.

Generally speaking, therefore, when a document is sought to be tendered, or oral testimony is sought to be adduced, in proceedings in a court of law, the consequence of admitting the evidence is that it becomes public. In most cases, it is published to the world at large. In all cases, it is published - at the very least - to the parties and their legal representatives, and (in jury trials) to the members of the Jury. Thus, where a claim for "Crown privilege" or "public interest immunity" is advanced, the Judge must determine whether or not the circumstances of the case warrant that the document or information be made public, either in the sense of being published to the world at

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[5](...continued)

> "What I infer from all that was said in Scott v. Scott is that a tribunal which as of course conducts its hearings in closed court is not of the same character as one which habitually conducts its proceedings in open court. It is one of the 'ordinary incidents of English courts of justice' that its proceedings should be conducted in public (per Bramwell B. and per Williams J., H. (falsely called C.) v. C., ((1859) 29 L.J.(P. & M.) 29, at p.30), it being 'the primary function of the court ... to administer equal justice to all suitors in open court' (per Farwell L.J., Scott v. Scott, [1912] P., at p.287). Viscount Haldane L.C. said in that case, on appeal ([1913] A.C., at p.437), that, subject to three well established but only apparent exceptions, courts of justice must, as between parties, administer justice in public; the Earl of Halsbury (at p.440) spoke of every court of justice being open to every subject of the King, and Lord Shaw (at p.481) denied 'that it was open to the judges of England to turn their courts into secret tribunals'. In Dickason v. Dickason, (1913) 17 C.L.R. 50, at p.51, Barton A.C.J., speaking for the Court, referred to Scott v. Scott and described the admission of the public to attend proceedings as 'one of the normal attributes of a court'."

Restrictions on public access to courts, or on the publication of evidence given in courts, is generally confined to those criminal cases - for example, blackmail cases - in which there is a genuine need to protect the complainant; and cases involving sexual abuse of minors. Attempts to broaden the circumstances in which proceedings may be conducted *in camera*, or in which the publication of evidence may be suppressed, have been resisted by appellate courts in this country: see, for example, R. v. His Honour Judge Noud, ex parte MacNamara, [1991] 2 Qd.R. 86.

large, or (in rare cases) in the sense of being published to the parties and the members of the Jury.

To that extent, there is no analogy whatsoever with the proceedings of a Parliamentary inquiry. The committee conducting such an inquiry has an absolute discretion to receive evidence at a private session, and to regulate the use which may be made of that evidence. Indeed, rule 1(10) of the *Parliamentary Privilege Resolutions* of 25 February 1988 expressly provides that, where evidence is required to be given over objection, it must be confined to private sessions of a committee, unless the committee concludes that it is "essential to the committee's inquiry" that the evidence be made public.

It follows that there is no real analogy with the dilemma faced by courts of law in ruling upon such claims. For a court of law, there are only two choices: to admit the evidence, and thereby make it public, with whatever consequences that may have for the nation as a whole; or to exclude the evidence altogether. A Parliamentary committee may take the *via medium* of requiring that the evidence be given, but preventing its publication.

In this context, there is a much closer analogy between Parliamentary inquiries and inquiries conducted by Royal Commissions and Commissions of Inquiry. And it is a very common feature of Royal Commissions and Commissions of Inquiry for evidence to be taken in private, where the Commissioner or Commissioners are of the view that publication of the evidence would be contrary to the public interest. The taking of

evidence in private is expressly authorised by both Commonwealth and State legislation in relation to Royal Commissions and Commissions of Inquiry; and it has become a ubiquitous feature of such inquiries - for example, the Petrov Inquiry, the Stewart Inquiry, the Woodward Inquiry, the Costigan Inquiry, the Fitzgerald Inquiry, and many more besides.

Although reported cases are few, it may be taken that evidence received by a Royal Commission or Commission of Inquiry sitting in private may be excluded from evidence in subsequent proceedings before a court of law, for the very reason that a court of law may not (generally speaking) sit in private. Certainly, in London and County Securities Ltd. v. Nicholson, [1980] 3 All E.R. 861, Browne-Wilkinson J. seemed to accept that information provided confidentiality to an administrative inquiry might well be excluded from evidence, if it were to be shown that the confidence is of a kind which the public interest requires to be protected. It rather seems that a similar view was taken by Lord Denning M.R. in Re Pergamon Press Ltd., [1971] 1 Ch. 388 at p.400; and by the Full Court of the Federal Court of Australia in Bercove v. Hermes, (No.3), (1983) 51 A.L.R. 109, per Bowen C.J., Lockhart and Beaumont JJ., especially at pp.114 to 116.

Looking at the matter in a slightly different way, it may be said that the opportunity to take evidence in private is a weighty consideration to be taken into account when performing the "balancing exercise" adverted to by the High Court of Australia in cases like Sankey v. Whitlam. Where the only alternative is for evidence to be made public - which is generally the situation as regards proceedings in a court of law - the balance

may fall very heavily in favour of excluding the evidence altogether. But where evidence can be taken in private - as is the case in Royal Commissions and Commissions of Inquiry, and in Parliamentary inquiries - it would require very compelling reasons indeed to exclude evidence from consideration by a Royal Commissioner or a member of a Commission of Inquiry, or by the members of a Parliamentary committee. Indeed, it is difficult to imagine a case in which public policy considerations would prevent relevant evidence being received by the members of a Parliamentary committee, on the clear basis that dissemination of the evidence will be confined to the members of that committee and their staff.

3. The Importance of the Issues

It is also a mistake to think that one can look at a document and express a concluded view, one way or the other, as to whether it is capable of attracting "Crown privilege" or "public interest immunity". As Stephen J. observed in Sankey v. Whitlam at p.58, there are some categories of documents in respect of which "it will often appear readily enough that the balance of the public interest is against disclosure"; namely "defence secrets, matters of diplomacy or affairs of government at the highest level". But even in respect of such documents, it remains necessary to weigh the public detriment which may result from disclosure against the prejudice which will arise in the circumstances of a particular case if the evidence is excluded.

Clearly, that "balancing exercise" accommodates the consideration that, in a particular case, there is a public interest which militates in favour of disclosure, and which out-

weighs the public detriment which may result from disclosure. Indeed, the High Court considered that Sankey v. Whitlam was such a case. Thus, at pp.46-47, Gibbs A.C.J. said:

> "The documents in categories one, two and three are all 'state papers' within the meaning I have given to that expression. They belong to a class of documents which may be protected from disclosure irrespective of their contents. ... [I]f the documents can be withheld, the informant will be unable to present to the court his case that the defendants committed criminal offences while carrying out their duties as Ministers. If the defendants did engage in criminal conduct, and the documents are excluded, a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by Ministers in the execution of their office."

In short, it is recognised that there are cases in which the public interest favouring disclosure out-weighs the public interests favouring non-disclosure, even as regards the most sensitive classes of documents and information.

In civil proceedings before a court of law, the only prejudice which is likely to result if relevant evidence is excluded is a prejudice to the parties to the litigation, or at least one of them. The prejudice may be a small or a substantial one, depending upon whether the evidence is likely to affect the outcome of the litigation, and depending upon the amount of money, or the value of property, at stake in the proceedings. Essentially, however, the prejudice will be a private rather than a public one.

The situation is slightly different in criminal proceedings. If a person is unjustly convicted of a criminal offence as a result of the withholding of relevant evidence, that is not merely a prejudice to the person immediately concerned; it is also a prejudice

to the public interest, to the extent that the public does have an interest that the criminal law be administered with fairness and justice. And, on the other hand, if the withholding of relevant evidence will lead to the acquittal of a person who is in fact guilty, there is a very strong public interest that the evidence be admitted. Significantly, the two leading High Court decisions in this field both concerned criminal proceedings: in Sankey v. Whitlam, the evidence under consideration was evidence sought to be adduced to prove the guilt of the defendants; in Alister v. The Queen, (1984) 154 C.L.R. 404, the evidence under consideration was sought to be adduced for the purpose of proving the defendants' innocence.

It may be said, however, that an even higher issue of public interest arises when a House of the Parliament deems a matter worthy of investigation by way of a Parliamentary inquiry.

Section 49 of *The Constitution* is premised on the assumption that both Houses of the Australian Parliament - not only the House of Representatives, but the Senate as well - are to possess and exercise the "powers, privileges and immunities ... of the Commons House of Parliament of the United Kingdom". Each House, independently, is charged with the function of acting as "the general inquisitors of the realm", or "the grand inquest of the nation".

In my opinion, it is not without significance that the founding fathers, in drafting the constitution which was subsequently approved by public referendum in each of the then Australian Colonies, foresaw that the Senate would exercise "powers, privileges

and immunities" co-extensive with those of the House of Representatives, and with those of the House of Commons in England. Given the structure of our Federation, and the fact that the Senate is elected on a very different franchise from the House of Representatives, it cannot have been beyond contemplation that the Government would, from time to time, be unable to command a majority in the Senate. *The Constitution* is thus predicated on the assumption that, even where the Government faces a hostile Senate, it is competent for the Senate to exercise its "powers, privileges and immunities" to inquire into matters which the Senate as a whole conceives to be of public importance.

The Australian Senate is often criticised as failing to fulfil its intended mandate to represent the interests of the States or, more accurately, the people of each State as separate polities. It is true that, in the Senate as in the House of Representatives, individual members organise themselves and (generally) vote along "Party lines". But that, in itself, is not inconsistent with the Senate's intended function. If a majority of Australians return a government of one political complexion through the election of members of the House of Representatives, that government undoubtedly has a right to govern. But if a majority of voters in a majority of States elect a majority of Senators of a different political complexion, then those Senators have both the Constitutional right, and the duty, to protect the interests of their constituents.

The issues presently under consideration by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media are issues of undoubted public interest. It has been suggested that some wrong-doing has taken

place on the part of the Executive Government. It is irrelevant, for present purposes, whether there is any truth in those suggestions. The fact remains that there is a matter of national importance which the Australian Senate has deemed fit to investigate; and that in itself is a highly relevant factor in the "balancing exercise" which is called for by the decisions of the High Court.

THE PRESENT CASE

I have been furnished with a copy of a letter from the Treasurer, Mr. Willis, which argues that disclosure of the documents under consideration would be contrary to the public interest.

The letter from Mr. Willis asserts what might be described as an "ambit claim". It does not descend into an examination of particular documents. Rather, it asserts that the documents fall into a number of categories, each of which should be excluded from the Committee's consideration.

As Stephen J. observed in Sankey v. Whitlam (*supra* at pp.62-63):

> "Those who urge Crown privilege for classes of documents, regardless of particular contents, carry a heavy burden. As Lord Reid said in Rogers v. Home Secretary, [1973] A.C. 388 at p.400, the speeches in Conway v. Rimmer, [1968] A.C. 910 have made it clear 'that there is a heavy burden of proof' on those who make class claims. Sometimes class claims are supported by reference to the need to encourage candour on the part of public servants in their advice to Ministers, the immunity from subsequent disclosure which privilege affords being said to promote such candour. The affidavits in this case make reference to this aspect. Recent authorities have disposed of this ground as a tenable basis for privilege. Lord Radcliffe in the Glasgow

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> Corporation Case remarked ([1956] S.C.(H.L.) 1 at p.20) that he would have supposed Crown servants to be 'made of sterner stuff', a view shared by Harman L.J. in the Grosvenor Hotel Case ([1965] Ch. 1210, at p.1255): then, in Conway v. Rimmer (*supra*), Lord Reid dismissed the 'candour' argument but found the true basis for the public interest in secrecy, in the case of Cabinet minutes and the like, to lie in the fact that were they to be disclosed this would 'create or fan ill-informed or captious public or political criticism. ... the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind' (*supra*, at p.952); and see as to the ground of 'candour' per Lord Morris (at p.959), Lord Pearce (at pp.987-988) and Lord Upjohn (at pp.933-934). In Rogers v. Home Secretary ([1973] A.C. 388 at p.413) Lord Salmon spoke of the 'candour' argument as 'the old fallacy'."

My attention has helpfully been drawn to the decision of the Administrative Appeals Tribunal in the long-running case of Re Lordsvale Finance Ltd. and the Department of the Treasury, (1985) 9 A.L.D. 16; 3 A.A.R. 301; (1986) 12 A.L.D. 321; (1986) 12 A.L.D. 327. But that was a case of a very different character, involving the question whether access under the *Freedom of Information Act* should be excluded in the case of F.I.R.B. documents. To the extent that there was a "balancing exercise" to be undertaken in that case, it involved a balance between a foreign company's qualified statutory right to obtain access to documents, and the public interest in maintaining the confidentiality of those documents. Its relevance is merely to show that F.I.R.B. documents fall within a class of documents which are eligible to sustain a claim of public interest immunity; nothing in that case suggests that such a claim would in fact be sustained, in a case where powerful considerations militated in favour of disclosure.

The first (and I think most plausible) category of documents in respect of which the Treasurer has asserted a claim for public interest immunity includes advice from the F.I.R.B. or from the Treasury to the Government. I think it is fair to say that, if the claim

cannot be sustained in relation to that category, it cannot be sustained in relation to any of the categories adumbrated in the Treasurer's letter. I propose, therefore, to confine my attention to documents falling within that category.

One simply cannot anticipate how a court might determine a claim for "public interest immunity" in respect of such documents, without considering the hypothetical circumstances in which such a claim might arise. One conclusion which emerges, above all else, from the decision of the High Court in Sankey v. Whitlam is that such claims are not to be decided in a vacuum; they are to be decided having regard to the particular circumstances of the case presently before the Court. As Gibbs A.C.J. said in that case at pp.41-42:

> "The fundamental principle is that documents may be withheld from disclosure only if, and to the extent that, the public interest renders it necessary. That principle in my opinion must also apply to state papers. ... [T]he subject matter with which the papers deal will be of great importance, but all the circumstances have to be considered in deciding whether the papers in question are entitled to be withheld from protection, no matter what they individually contain.
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> "If state papers were absolutely protected from production, great injustice would be caused in cases in which the documents were necessary to support the defence of an accused person whose liberty was at stake in a criminal trial, and it seems to me to be accepted that in those circumstances the documents must be disclosed: Duncan v. Cammell, Laird & Co. ([1942] A.C. 624, at pp.633-634); Conway v. Rimmer ([1968] A.C. 910, at pp.966-967, 968); Reg. v. Lewes Justices, ex parte Home Secretary, ([1973] A.C. 388, at pp.407-408)."

Let one assume, for example, an hypothetical case in which a person faced a criminal charge involving allegations that he or she corruptly used his or her influence to achieve a particular result in relation to an application to the Foreign Investment

Review Board, perhaps for party political reasons. I stress that the example is only an hypothetical one; I do not suggest for a moment that any person has conducted himself or herself in a way which could possibly justify the bringing of such a prosecution. But if such a situation arose, it is to my mind unthinkable that the accused person would be denied access to F.I.R.B. and Treasury documents which might be relevant to showing that he or she was innocent of the charge; and it is to my mind equally unthinkable that the prosecution would be denied access to such documents in order to prove that person's guilt, particularly if he or she occupied high political office at the relevant time[6].

It is quite conceivable that the balance might tilt in the other direction, if the question arose in the course of civil litigation. But even then, I am not convinced that a court would necessarily uphold a claim of "public interest immunity". Again, by way of an hypothetical example, one might take the case of a prominent political personage who institutes proceedings for defamation in relation to a public statement which casts aspersions on his or her conduct as regards the matters presently under investigation by the Select Committee. I think it highly likely that, in such a case, the court would permit the plaintiff to have access to such documents, with a view to proving his or her innocence; and by the same token, it is also probable that a court would allow the defendant in such proceedings to have access to F.I.R.B. and Treasury documents which may assist in proving the truth of the defamatory imputations.

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6 cf. Sankey v. Whitlam (*supra*), and particularly the observation of Gibbs A.C.J. at p.47 that "if the defendants did engage in criminal conduct, and the documents are excluded, a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by Ministers in the execution of their office."

Thus, if the issues presently under consideration arose in a court of law, it is quite conceivable that the claim for "public interest immunity" would be rejected. But what must be emphasised is that the court's decision would be governed by the circumstances of the particular case. If the documents in question were irrelevant, or of only marginal relevance, production would almost certainly be refused. If the issues arising in the litigation did not raise any questions of public importance, so as to outweigh the potential detriment which would result from disclosure, it is unlikely that production would be ordered. But if the documents were highly relevant, and the case involved issues of considerable public significance, it is quite probable that a court would require the documents to be produced.

Moreover, and perhaps more fundamentally, a court would not, in any case, determine the question without first inspecting the documents so as to form its own view as to the extent of any public prejudice likely to result from their disclosure. Since the decisions of the High Court in Sankey v. Whitlam and Alister v. The Queen, it is difficult to imagine any case in which a court would not avail itself of the opportunity to inspect the documents in question, before ruling on a claim for "public interest immunity".

Of course, without having seen the documents myself, I am at a disadvantage in attempting to foresee whether or not a claim for "public interest immunity" would be upheld in relation to all or any of them. I do, however, have the advantage of having seen a document which purports to be a copy of one of the documents under consideration; it is a copy of a Foreign Investment Review Board Minute dated 5 December 1991, which appears to have been the subject of a wide-ranging media

"leak"[7].

Having carefully perused that document, I must say that I am entirely at a loss to understand how it can be argued that production of the document might be inimical to the public interest. The document does not appear to contain any information which could be regarded as having any degree of continuing commercial sensitivity. One cannot seriously imagine that the members of the Foreign Investment Review Board would be less candid in providing advice to the Treasurer or the Government, were documents of this character to be available for public scrutiny: to echo the words of Lord Radcliffe in the Glasgow Corporation Case as adopted by Stephen J. in Sankey v. Whitlam, one would imagine that members of the F.I.R.B. are "made of sterner stuff". It is, of course, conceivable that commercial organisations might feel more reluctant in disclosing their commercial secrets to bodies like the F.I.R.B. if they were aware that such documents could ultimately become open to public scrutiny; but it does not appear to me that this particular document discloses any commercial secrets. It may be said that the workings of the F.I.R.B., and of the Treasury, may to some extent be prejudiced if the manner in which they operate becomes public information; but I cannot see anything in this particular document which might be thought to disclose some highly-sensitive *modus operandi* which justifies concealment of its contents.

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[7] I note, for example, that it was the subject of an interview between Mr. Laurie Oakes and the Treasurer, Mr. Willis, which was screened on the Nine Network television programme "*Sunday*" on 6 March 1994. From a transcript of that broadcast, I observe that Mr. Willis made no attempt to dispute the authenticity of this document.

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One is left with the very strong impression that the only real reason for opposing disclosure of this document is to protect the Government from criticism: criticism of the kind reflected in the interview between Mr. Oakes and Mr. Willis to which I have referred. I should say at once that that is not an altogether irrelevant consideration. As Lord Reid observed in Conway v. Rimmer, it may be entirely valid to maintain secrecy in respect of Cabinet minutes and the like, as disclosure could "create or fan ill-informed or captious public or political criticism", and might result in "the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind". Nonetheless, if the document which I have seen is representative of the documents falling within "Category 1", it cannot in my view be said that it underwrites a strong claim for "public interest immunity". Were a document of this character to be inspected by a Judge with a view to determining such a claim, in a case where the contents of the document were highly relevant to the issues being litigated, I think it quite unlikely that the claim would be upheld.

I do not know whether the document which I have seen is representative of the documents falling within the Treasurer's "Category 1". But, as an example of the documents falling within that category, it does not encourage much confidence in the view that the claim for "public interest immunity" which has been made by the Treasurer is well-founded.

Of course, it is one thing to say that a court would probably over-rule a claim for "public interest immunity" in respect of documents falling within "Category 1". For the

three reasons previously identified, the approach taken by a court of law in respect of documents sought to be adduced in evidence in proceedings before the court should not be taken as determinative of the way in which the Select Committee should determine the matter for itself in the present case. And, in the event that proceedings came before a court in which the court was called upon to make a "conclusive decision" in relation to the Treasurer's claim, I am strongly of the view that the court would apply very different considerations from those which would obtain if the same question arose in the course of ordinary litigation. For the three reasons previously mentioned, the arguments in favour of disclosure are very much stronger in the case of a Parliamentary inquiry, than in the case of proceedings before a court of law.

Nonetheless, if one proceeds on the hypothetical assumption that this question might arise in proceedings in a court of law to which the documents are relevant, then, if the court were satisfied that the issues arising in those proceedings were of sufficient public importance to out-weigh the risk of prejudice which might result from disclosure of the documents, it is unlikely in the extreme that the Court would hold, either that the documents belong to a class of documents which should not be disclosed on public interest grounds, or that disclosure of specific documents would be contrary to the public interest.

SUMMARY OF CONCLUSIONS

For the reasons stated, I am of opinion as follows:

1. It may not be doubted that the categories of documents referred to in the Treasurer's letter are categories of documents which are eligible to support a claim for "public interest immunity". It does not, of course, follow that such a claim would or should be upheld.

2. Were this issue to arise in ordinary litigation before a court of law, one cannot predict with certainty the way in which the question would be resolved. That is because, in such proceedings, the appropriate course would be for the court to:

   - Examine the documents individually, to ascertain the extent of any potential prejudice to the public interest arising from their disclosure; and

   - Weigh-up that potential prejudice against the detriment which may be caused if the documents are excluded from evidence in the circumstances of the particular case.

3. There may well be cases in which, if these documents were sought to be adduced in evidence in a court of law, a claim for "public interest immunity" would be upheld. But I am very firmly of the opinion that, provided the

documents were shown to be relevant to the issues arising in the case, and provided that those issues were of some public importance, the claim for "public interest immunity" would in all probability be over-ruled.

4. In particular, having had the opportunity to peruse a document which purports to be a copy of one of the documents in contention, I am entirely unimpressed with the proposition that disclosure of that particular document would be contrary to the public interest. I am unable to discern any feature of that document which could possibly support the view that public disclosure would be inimical to the public interest. Of course, I am not able to say whether that document is representative of the documents in respect of which the Treasurer has asserted a claim of "public interest immunity".

5. Notwithstanding my view that (depending on the circumstances of the particular case) it is unlikely that a claim for "public interest immunity" would be upheld by a court of law in respect of the documents under consideration, I feel it important to emphasise that it is most inappropriate for the Select Committee to approach this issue by reference to the way in which a court of law might determine the matter if it were to arise in the course of an hypothetical law-suit. I say that for three reasons:

- It is not, and has never been, the law, that the Houses of the Parliament, or the committees of either House, are governed in relation to Parliamentary inquiries by the principles applied by courts of law in

determining claims for "public interest immunity".

- Documentary and oral evidence given in a court of law is, generally speaking, accessible to the public. Thus, in determining claims for "public interest immunity", Judges are constrained to consider the consequences if the evidence is adduced and thereby becomes public. A Parliamentary committee is entitled to receive such evidence in a private session, and by doing so may allay any public prejudice which would arise if the evidence were disclosed in a public forum. A better analogy is offered by Royal Commissions and Commissions of Inquiry, which frequently receive evidence in closed hearings which might well be excluded if the same evidence were sought to be adduced in the public hearings of a court of law.

- Most fundamentally, the Senate and its various committees discharge an important public function when they investigate matters which the Senate deems to be of sufficient public importance to warrant such investigation. Thus, in the case of a Parliamentary inquiry, it is not a simple matter of balancing the public interest in maintaining confidentiality against the private interests of litigants; it is a matter of balancing one public interest against another public interest. Under *The Constitution*, the Senate - no less than the House of Representatives - has the power and the duty to investigate matters of public concern; and in pursuing such investigations, it is entirely inappropriate for the Senate

to constrain itself by analogy with the constraints applied by courts of law in determining issues of "public interest immunity".

6. I am quite confident that, if the Senate or the Select Committee were to determine that the public interest requires production of the documents in question in the course of the Select Committee's current inquiry, there is no significant risk that the decision could successfully be challenged in a court of law, even assuming that a court of law would have (or might be granted) jurisdiction to entertain such a challenge.

I advise accordingly.

With compliments,

ANTHONY J.H. MORRIS Q.C.
Chambers,
21 March 1994