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APPENDIX 1

Our Ref: JGK:TC
15706

30 JUL 1996

Senator Bruce Childs
Chairman
Senate Select Committee on the Victorian Casino Inquiry
Parliament House
CANBERRA ACT 2600

Dear Senator Childs

Thank you for your letter of 19 July 1996 inviting me to make a written submission to the Senate Inquiry on the Victorian Casino.

The Victorian Government does not intend to make a submission to your inquiry.

As you would be aware, the State of Victoria is protected by its executive privilege against actions of the Commonwealth which threaten its autonomy or curtail its capacity to function effectively. Your inquiry is such an action as it threatens to breach the confidentiality of advice provided at the highest levels of the Victorian Public Service and possibly Cabinet confidentiality.

All Australian Governments, including the Commonwealth, rely heavily on the confidentiality of these processes in order to carry out their functions effectively. By seeking to obtain evidence from Ministers, Ministerial Staff and Public Servants, the Senate risks impeaching the confidentiality of these processes for all Australian Governments. The importance of this privilege has been acknowledged by the Senate itself, which has declined to compel State Ministers and Public Servants to appear before its committees.

Furthermore, the State of Victoria will assert its executive privilege if the Committee attempts to obtain evidence from current or former Ministers or Public Servants, either voluntarily or by compulsion of law. Any attempt to examine current or former Ministers or Public Servants will require them to disclose information relating to the Cabinet process and high level communications within the Victorian Public Service.

I consider your letter to be only further evidence that the public is not outraged by the process that was followed regarding the awarding of the Casino licence. Refer the results of the recent State election.

.../2

The inquiry is an abuse of the role of the Senate and an obvious waste of taxpayers' money.

For these reasons, and because I am confident that the process was carried out with the utmost integrity, I will not be making a submission to your inquiry.

Yours sincerely

Jeff Kennett

APPENDIX 2

ADVICES FROM THE CLERK OF THE SENATE

1. Letter to Senator Murphy on the powers of the Senate Select Committee on Unresolved Whistleblower Cases, 6 December 1994.

2. Letter to Select Committee on the Victorian Casino Inquiry about the powers of the Committee, 22 July 1996.

3. Letter to Select Committee on the Victorian Casino Inquiry on the effect of state statutes on the powers of the Committee, 13 August 1996.

4. Letter to Senator Abetz on the powers of the Committee, 15 August 1996.

5. Letter to Senator Abetz on the powers of the Committee, 15 August 1996.

6. Letter to Senator the Hon R Kemp on the powers of the Committee, 21 August 1996.

7. Letter to Select Committee on the Victorian Casino Inquiry concerning the Committee's powers to summon state officials, 19 September 1996.

8. Letter to Select Committee on the Victorian Casino Inquiry commenting on the advice received by the Committee from Professor Dennis Pearce, 8 October 1996.

AUSTRALIAN SENATE

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CLERK OF THE SENATE
lun/l/10195

6 December 1994

Senator S M Murphy
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Murphy

SELECT COMMITTEE ON UNRESOLVED WHISTLEBLOWER CASES — POWERS

Thank you for your letter of 6 December 1994 in which you seek advice on the powers of the Select Committee on Unresolved Whistleblower Cases, particularly the power to require the production of documents within the control of a state government.

The Select Committee has been given the powers, in paragraph (6) of its resolution of appointment of 1 December 1994, to require the attendance of witnesses, the giving of evidence and the production of documents. These powers are conferred on the Committee pursuant to standing order 34. The powers to require the attendance of witnesses, the giving of evidence and the production of documents are among the undoubted powers of the Senate under section 49 of the Constitution. The Senate may delegate these powers to its committees, but only the Senate may punish default as a contempt. The power to punish contempts is codified by the *Parliamentary Privileges Act 1987*.

There are no explicit limitations on these powers to require the attendance of witnesses, the giving of evidence and the production of documents. There are probably, however, two relevant implicit limitations on the powers.

First, the powers may be confined to inquiries into subjects in respect of which the Commonwealth Parliament has the power to legislate. There is judicial authority for the proposition that the Commonwealth and its agencies may not compel the giving of evidence and the production of documents except in respect of subjects within the Commonwealth's legislative competence (*Attorney-General for the Commonwealth v Colonial Sugar Refinery Co Ltd* 1913 15 CLR 182; *Lockwood v the Commonwealth* 1954 90 CLR 177 at 182-3), and, if the

matter were litigated, the High Court might well hold that this limitation applies to the inquiry powers of Senate committees.

Secondly, it could well be held that the inquiry powers of the Senate do not extend to members of state parliaments and officers of state governments. There is no authority for this proposition, and the matter has not been litigated, but the High Court could arrive at such a conclusion by reference to the federal nature of the Constitution and the doctrine that the Commonwealth may not impose a requirement inimical to the integrity of the states (something like this reasoning was used in *Melbourne Corporation v the Commonwealth* 1947 74 CLR 31; *Queensland Electricity Commission v the Commonwealth* 1985 159 CLR 152).

Whatever the legal situation, it is a parliamentary rule, and a rule of the Senate, that the inquiry powers are not exercised in respect of members of the House of Representatives (standing order 178), and as a matter of first principle the same rule extends to members of state and territory parliaments. Senate committees as a matter of practice have in the past accepted this rule, and have not endeavoured to exercise their inquiry powers in respect of members of state parliaments or officers of state governments. Such persons have given evidence before Senate committees on invitation and voluntarily. The Senate has also accepted the application of the rule to state parliaments in making requests to state houses for the attendance of their members before the Select Committee on the Australian Loan Council (*Journals of the Senate*, 5 October 1993, p. 565-6)

It is possible that, should the matter be litigated, the courts would apply the parliamentary rule as a rule of law and find that the inquiry powers of the Senate do not extend to state or territory parliaments or state or territory officers.

If a Senate committee issues a subpoena requiring the attendance of witnesses, the giving of evidence or the production of documents and is met with a refusal, the committee has no power to take any further action, but can only report the matter to the Senate. It is then for the Senate to determine whether it should treat the refusal as a contempt and seek to impose any penalty. It is at the stage of the attempted imposition of a penalty that a person in receipt of a subpoena, such as a state minister, member of parliament or other office-holder, could challenge in the courts the exercise of the Senate's powers. It is possible that the attempted exercise of the inquiry powers could be challenged at an earlier stage, such as on the issue of a subpoena.

My advice to all Senate committees is that they should observe the parliamentary rule and the past practice and not seek to summon members of state or territory parliaments or state or territory officers, or to require them to give evidence or to produce documents. Such persons

should be invited to appear or submit documents if a committee desires to take evidence from them, and any invitation to state or territory officers should be directed to the relevant state or territory minister. In the event of an invitation being declined, a committee should not take the matter any further.

Please let me know if I can provide any further information or assistance in relation to this matter.

Yours sincerely

(Harry Evans)

AUSTRALIAN SENATE

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hc/proc/10922

22 July 1996

Mr Neil Bessell
Secretary
Select Committee on the Victorian Casino Inquiry
The Senate
Parliament House
CANBERRA ACT

Dear Mr Bessell

POWERS OF THE COMMITTEE

Thank you for your letter of 22 July 1996 in which you seek advice on questions concerning the powers of the Select Committee on the Victorian Casino Inquiry.

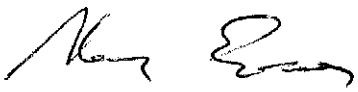
The advice dated 6 December 1994 to the Select Committee on Unresolved Whistleblower Cases, to which the first paragraph of your letter refers, still represents my advice in relation to the powers of Senate committees in respect of members of state parliaments and officers of state governments and the exercise of those powers. I would provide the same advice to the Select Committee on the Victorian Casino Inquiry. I would add only one point. The view may be taken that the Senate and its committees may compel the giving of evidence by state legislators and officials provided that the matter under inquiry is within the legislative competence of the Commonwealth Parliament. An equivalent view is apparently taken in the United States, although it appears to be based only on old precedents and not on any explicit judicial determination. Because of different constitutional provisions in the two countries, I would not draw the same conclusion in relation to the Australian situation, and I would not suggest that Senate committees act on any such assumption. In any event, regardless of the legal situation, the difficulties of enforcing compliance remain.

The second paragraph of your letter, and the material attached to it, raises the question of whether the implied limitation on the Senate's powers of inquiry in respect of state legislators and officials might be held to extend to *former* state officials and consultants on the basis that they are bound by state legislation. It is possible that, if the matter were litigated, it could be so held. The courts may have difficulty in drawing a line between current officials and former officials and consultants, and would probably have regard to any relevant state legislation, but any such determination would obviously be a very significant extension of the implied limitation, if the latter were found to exist. The only advice I can give is that the Committee should carefully consider its position before attempting to require the attendance of, or the production of documents by, former state officials and consultants to whom the relevant state legislation applies.

This question, of course, is quite distinct from the question of whether state statutory secrecy provisions *prevent* the giving of evidence by current or former state legislators or officials or consultants. There is no doubt that, if any evidence is given by such persons voluntarily, the giving of that evidence cannot constitute an offence under the state statutory provisions. In this respect, the document attached to your letter is misconceived in suggesting that witnesses should not be put in a position whereby they will breach state law in the course of giving evidence, even though they cannot be prosecuted for such a breach. The point is that words spoken and acts done in the course of parliamentary proceedings, including the giving of evidence, cannot constitute an offence, because the statutory provisions cannot apply to such proceedings.

Please let me know if I can be of any further assistance.

Yours sincerely



(Harry Evans)

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hc/proc/10942

13 August 1996

Mr James Warmenhoven
Select Committee on the Victorian
Casino Inquiry
The Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Warmenhoven

POWERS OF COMMITTEE - STATE STATUTE

Your letter of 12 August 1996 seeks advice on two points concerning the relationship between the secrecy provisions of section 151 of the Victorian *Casino Control Act 1991* and parliamentary privilege.

Subsection 151(4) could not have any effect on a Senate committee which obtained information covered by the act. The reason for this is that a state statute cannot alter the operation of parliamentary privilege at the federal level, which can be affected only by a declaration of the Commonwealth Parliament under section 49 of the Constitution. In any event, even if there existed an express or implied authorisation for information to be divulged to a Senate committee, it could not be said that the committee obtained that information pursuant to that authorisation or pursuant to the state statute.

I do not think that the expression "court" in subsection 151(5) of the state act would be held to include a Senate committee. The latter is so far removed from the normal connotations of "court" that it would be held not to be included in the expression in the absence of express provision that it is included. The extension of the meaning of the expression in the act to certain other bodies would support this conclusion; it would be concluded that, had the state Parliament intended to include a Senate committee, it would have expressly included it in that extended definition. It would also be assumed that a state Parliament would not purport to regulate access to information by a Senate committee, which would be beyond its powers.

Please let me know if I can be of any further assistance.

Yours sincerely

(Harry Evans)

AUSTRALIAN SENATE

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hc/proc/10944

15 August 1996

Senator Eric Abetz
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Abetz

SELECT COMMITTEE ON THE VICTORIAN CASINO INQUIRY - POWERS

Your letter of 14 August 1996 seeks advice on matters relating to the powers of the Select Committee on the Victorian Casino Inquiry.

These matters are largely covered by the advices to the committee dated 22 July 1996, to which you have access as a member of the committee, and by the advice dated 6 December 1994 to the Select Committee on Unresolved Whistleblower Cases, which was published in the report of that committee. Copies of those advices are attached.

Those advices may be summarised as follows:

- It is a parliamentary rule of the Senate that members of other houses of parliament are not summoned, and in the past this rule has been accepted as extending to all state officials, so that, by long-established convention, Senate committees do not seek to summon such office-holders, but request state parliaments or governments to direct them to attend or to make them available.

- As a matter of law, the power of the Senate to compel the attendance of witnesses, the production of documents and the giving of evidence may not extend to members of state parliaments and state officials, which is another reason for Senate committees not seeking to summon such persons.

- Where former state officials and consultants to state authorities are bound by state legislation, it could be held that the implied limitation on the power to compel evidence extends also to those persons, and Senate committees should carefully consider their position before attempting to summon such persons.

These considerations apply regardless of any assertion of executive privilege by a state government, although such an assertion could be regarded as adding weight to them.

In the light of these considerations, my advice, as was indicated to the Select Committee on Unresolved Whistleblower Cases, is that Senate committees should not seek to summon such persons or to require them to give evidence or to produce documents; that, in respect of state office-holders, requests for their evidence should be directed to the relevant state bodies; and that, in the event of a request being declined, the committees should not take the matter any further.

If the committee, as have all Senate committees in the past, accepts the tenor of this advice, in fairness to persons in the relevant categories who are invited to attend they should be advised that the committee does not intend to subpoena them.

Without knowing the terms of the Victorian government's claim to executive privilege, it is not possible for me to consider whether potential witnesses should be advised of it, but, as I have indicated, the existence of such a claim is not the decisive factor in determining whether to subpoena relevant persons.

Please let me know if I can be of any further assistance.

Yours sincerely

(Harry Evans)

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15 August 1996

Senator Eric Abetz
The Senate
Parliament House
CANBERRA ACT 2600

Fax: 002 243709

Dear Senator Abetz

SELECT COMMITTEE ON THE VICTORIAN CASINO INQUIRY - POWERS (2)

As requested, and in clarification of the earlier advice of today's date, I confirm that Victorian police, members and employees of the Victorian Casino and Gaming Authority, members and employees of the Victorian Casino Control Authority, and persons employed by the Totalisator Agency Board while it was a state government instrumentality, are all state officials within the meaning of the earlier advice, and persons who formerly fell into those categories are former state officials within the meaning of the advice.

Please let me know if I can be of any further assistance.

Yours sincerely

(Harry Evans)

AUSTRALIAN SENATE

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hc/proc/10958

21 August 1996

Senator the Hon R. Kemp
Manager of Government Business in the Senate
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Kemp

POWERS OF SENATE COMMITTEES

You have asked for a note on the article by Geoffrey Lindell, "Parliamentary Inquiries and Government Witnesses", *Melbourne University Law Review,* 20:2, December 1995.

At pp. 387-91 of the article Mr Lindell advances arguments (though without coming to firm conclusions) against the propositions that the powers of the Commonwealth Houses and their committees to compel evidence are limited to matters within the legislative competence of the Parliament and may not be exercised in respect of state officials.

The article does not refer to any authorities other than those of which I was aware when compiling the advices which I gave to various Senate committees, and there is nothing in the article to modify those advices.

In relation to the first proposition, the article does not advert to decisions of the United States Supreme Court to the effect that the inquiry powers of the Congress are limited to its legislative competence. As Australia is a federation like the United States rather than a unitary state like the United Kingdom, the American law is likely to be persuasive. Moreover, a large part of the basis of that law is the protection of individual rights, a matter on which the High Court has recently been sensitive.

In relation to the second proposition, if the matter were litigated the High Court would be likely to have regard to the possibility of the system of government being brought to a halt by the Commonwealth and state houses establishing inquiries into overlapping subjects and summoning large numbers of each other's officers. The same officers could be summoned by different houses to appear at the same time. An implied immunity might well be seen as necessary to preserve the system of government itself.

In any event, the undetermined legal question is less important that the matter of comity between houses of parliaments and between Commonwealth and states. It is a parliamentary rule that houses do not summon each other's members and officers. Senate committees have always accepted that, as a matter of comity between Commonwealth and states, they should not seek to summon state officials.

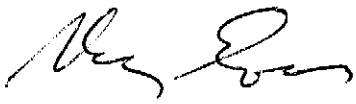
There are two errors in the article, which I have drawn to the attention of the author.

Subsection 16(4) of the Parliamentary Privileges Act does not provide for the waiver of any immunity (p. 411 of the article). It simply provides that a court shall not compel the production of parliamentary evidence taken in camera and, as part of the description of in camera evidence, describes it as evidence which has not been published by a House or a committee. In other words, evidence may be taken in camera but if it is subsequently published by a House or a committee it ceases to be in camera evidence and does not attract the special protection of subsection 16(4), but still attracts the protection of the other provisions of section 16.

Secondly, Fitzpatrick and Browne were not imprisoned for defamation of the House or its members (p 412), but for attempting, by means of a publication, to intimidate a member. Such an offence could still be punished under the Parliamentary Privileges Act.

Please let me know if I can be of any further assistance.

Yours sincerely



(Harry Evans)

AUSTRALIAN SENATE

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hc/lett/11011

19 September 1996

Senator Bruce Childs
Chair
Select Committee on the Victorian Casino Inquiry
Parliament House
CANBERRA ACT 2600

Dear Senator Childs

COMMITTEE POWERS - STATE OFFICIALS

Following a reference to the matter at the estimates hearing relating to the Department of the Senate on 16 September 1996, Senator Kemp asked that I expand on my advice to the committee in relation to the lack of United States authorities and precedents on the power of federal parliamentary committees to compel evidence from state officials. He also asked that I provide this supplementary advice to your committee.

The following brief summary of US material is provided accordingly.

It is clear from a line of Supreme Court judgments that the Houses of the US Congress have an inherent power to compel the giving of evidence and the production of documents and to punish defaults as contempts. The Congress has also legislated to provide for the prosecution of such contempts in the courts. It is also clear that the inquiry powers of the Houses are limited to matters within their legislative competence.

There are no judicial authorities dealing explicitly with the question of whether state office-holders may be compelled.

Finding no relevant authorities, I directed inquiries to the Clerks of the two Houses in Washington, both of whom were kind enough to provide me with very full replies.

In both Houses the view is apparently taken that the Houses and their duly authorised committees can compel evidence from state officials, provided that their inquiries are directed to matters within the legislative competence of the Congress.

The Clerk of the Senate referred me to only one precedent, a case in 1873 in which a Senate committee, inquiring into "whether there is any existing State government in Louisiana, and how and by whom it is constituted", successfully subpoenaed a state legislative official. This precedent, however, relates to the time when the southern states were still under military occupation. Such an inquiry could also be regarded as supported by the provision in article IV, section 4 of the Constitution, whereby:

> The United States shall guarantee to every State in this Union a Republican Form of Government.

This provision, which has been construed by the Supreme Court as an injunction on the political branches of the federal government, may be regarded as giving the Congress a general power of supervision over state governments which has no equivalent in Australia.

The Clerk of the House of Representatives drew my attention to a precedent in 1877, again involving the troublesome state of Louisiana, in which state officials were imprisoned for contempt for failing to produce subpoenaed documents relating to the conduct of a presidential election. Apart from the ancient character of this precedent, the period in which it occurred and the absence of any challenge to the House's action, it relates to a peculiarity of US constitutional arrangements, whereby the states control the conduct of presidential elections. It is notable that, in debate in the House, it was argued that the inquiry was an invasion of state sovereignty.

In 1962 a state official successfully appealed against conviction for contempt of Congress for failing to produce documents in response to an inquiry by a House subcommittee. The appeal was upheld on the ground that the appellant had properly responded to that part of the subcommittee's requirement which was within its powers, and that the information refused to the subcommittee related only to a matter which was outside the scope of the subcommittee's authority to investigate. The US Court of Appeals deliberately refrained from adjudicating on the contention of the appellant that the subcommittee subpoena amounted to "an unconstitutional invasion of powers reserved to the States", and strongly suggested that such matters should not be resolved by resort to the criminal process. The official concerned was not a normal state public servant, but an officer of a body established by two states under a state-to-state compact subject to congressional approval under article I, section 10 of the Constitution. This constitutional provision also has no Australian equivalent. (*Tobin v US* 1962 306 F.2d 270)

State officials constitute only about 8% of all witnesses who appear before congressional committees, and, like the vast majority of witnesses, appear by invitation. The committees appear to avoid issuing subpoenas for such officials, and the Houses appear to avoid clashes between governments such as could result from any attempt to enforce such subpoenas.

Having considered all of these matters, I think that it can be said that the question in issue has not been substantively considered in the United States, and that the situation there is not of substantial assistance in a consideration of the question in Australia.

I would have no objection to this note being provided to Professor Pearce.

Yours sincerely

(Harry Evans)

AUSTRALIAN SENATE

CLERK OF THE SENATE

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hc/proc/11015

8 October 1996

Senator the Hon R. Kemp
Deputy Chair
Select Committee on Victorian Casino Inquiry
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Kemp

VICTORIAN CASINO INQUIRY COMMITTEE:
POWERS: ADVICE OF PROFESSOR PEARCE

You have asked for my comments on the advice dated 4 October 1996 to the committee by Professor Dennis Pearce concerning matters relating to the powers of the committee which were the subject of advices I provided to the committee on 22 July, 13 August and 19 September 1996.

Professor Pearce's advice and mine are in substantial agreement on significant points, and there is only one substantive point of disagreement between our advices.

His advice, of course, deals only with questions of law and not with questions of parliamentary practice and propriety; in particular, he does not advise on the matter of comity between the Houses of the Commonwealth Parliament and the Houses of state parliaments.

In relation to questions of law, Professor Pearce's advice agrees with mine on the following points:

- There is probably a legal barrier to the summoning of members of state parliaments (he considers that former members of state parliaments are also protected in so far as their activities as members are under inquiry).

- The Senate's powers of inquiry are probably limited to matters within the legislative competence of the Commonwealth Parliament.

- There is probably a limitation on those inquiry powers in relation to the states in so far as inquiries may not curtail the capacity of state governments to function.

These probable legal limitations on the Senate's powers of inquiry would provide a basis for a legal challenge to any particular inquiry, a point to which I shall return.

Professor Pearce considers that the probable limitation on inquiries where the capacity of a state to function would be curtailed is a limitation on the *inquiries which may be made* as distinct from a limitation on the ability to summon witnesses. This is the only substantial point of disagreement between our advices. He regards the limitation on inquiries which may be made as a limitation on questions which may be put to witnesses and to which answers may be demanded. There are two points which I would make in relation to this.

First, even if Professor Pearce is correct, and the limitation is a limitation on the inquiries which may be made rather than a limitation on the power to summon witnesses, the issue of a subpoena to a relevant witness could be sufficient to found a legal challenge to the exercise of inquiry powers, and a court could determine the legal issues on the basis of such a challenge.

Secondly, Professor Pearce's advice does not deal with orders for the production of documents which may be made by the committee, and which would be the other major mechanism by which the committee could pursue its inquiries. With orders for the production of documents it would be much more difficult to determine whether the inquiries which are thereby made give rise to the relevant legal limitation. An order for the production of documents would provide a firmer basis for a legal challenge.

In respect of the limitation on the inquiry powers in relation to the capacity of states to function it is, as Professor Pearce concedes, not possible to give a concluded opinion. I remain of the view that a court could hold that the Senate and its committees may not compel state officials, whether by means of summonses to appear, by questions put to them when they appear or by orders for the production of documents.

It is to be noted that the matters which Professor Pearce considers may fall within the limitation relating to the capacity of states to function are significant and substantive matters so far as the inquiry of the committee is concerned. The committee may well consider whether summoning state officials is a course on which it should embark, even if any summons to such a witness does not immediately trigger a legal challenge, given that any questions about the matters referred to by Professor Pearce could be expected to do so.

Professor Pearce agrees with my advice that a state statutory secrecy provision in itself does not prevent the disclosure of information to a Senate committee. He does not, however, relate the existence of such a provision to the compellability of state officers and the limitation on the inquiry power in respect of the capacity of states to function. The existence of such a provision may well lend support to the relevant limitation. In other words, the fact that a state parliament has enacted special provisions to restrict access to certain information may be taken into account in determining whether dealing with such information is vital to the capacity of the state to function.

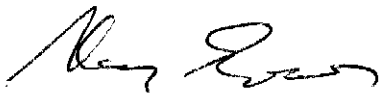
In considering the non-legal issue of comity between federal and state parliaments, Professor Pearce does not refer to what might be called the "two-way-street" aspect of comity. There is built into it an element of the Biblical golden rule of doing unto others as you would have them do unto you. If the Senate can summon state officials to appear in the course of an

inquiry into matters within the legislative competence of the Commonwealth, a state House presumably can summon Commonwealth officers to appear in the course of an inquiry into matters within the legislative competence of the state. The Senate and its committees need to consider this aspect of the matter. Is the Commonwealth, represented in this instance by the Senate, ready to allow state Houses to summon Commonwealth officers? The possibility of retaliatory inquiries cannot be ruled out. Mutual cooperation can be seen as the safeguard against mutual and escalating interference in each other's operations.

As has been indicated, a legal challenge may not await questions put to witnesses and answers insisted upon, but may be set off by the first issue of a subpoena. Professor Pearce's concluding paragraph needs to be considered in that light.

My view is that the possible legal difficulties analysed by Professor Pearce, combined with the consideration of comity, the difficulty of enforcement, and the invariable practice of Senate committees in the past of not seeking to summon state officials, strongly suggest that that invariable practice should be adhered to in the future.

Yours sincerely



(Harry Evans)