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Senator the Hon P. Cook
Chair
Select Committee on a Certain
Maritime Incident
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

COMPELLABILITY OF FORMER MINISTERS: A FURTHER POINT

During the Australasian Study of Parliament Group annual conference in Melbourne on 11-12 October 2002, which was devoted to parliamentary privilege, I had a brief debate with Professor Geoffrey Lindell on the question of compellability of former ministers. The committee will recall that Professor Lindell provided an advice giving equivocal support to the position of the Clerk of the House of Representatives that former House of Representatives ministers may not be compelled to give evidence in a Senate inquiry.

Most of the points covered in this discussion were also covered in the material which the committee already has on the subject, but there was one point which is implicit in that material but which was drawn out significantly. The committee may be interested in having a brief note on this point to add to the material in its possession.

The parliamentary convention whereby the Senate does not seek to summon current members of the House of Representatives applies regardless of the subject matter of the inquiry. For example, the Senate could not compel Mr Peter Reith to give evidence about his contacts with the defence contracting firm Tenix so long as he remained a member of the House of Representatives, regardless of whether those contacts had anything to do with his duties as a minister or as a member. Professor Lindell agrees on that point.

I asked whether, if the Senate wished to conduct an inquiry into that matter, it could now compel Mr Reith according to Professor Lindell's view. He indicated that it could, on the basis that the matter did not concern Mr Reith's performance of his functions as a minister. The claimed immunity of former ministers, he said, extends only to matters for which they were accountable to the House of Representatives while they were members of that House. In other words, the immunity of current members, according to this view, survives when they cease to be members, but only partially survives, in relation to particular subjects. The

immunity of current members is unlimited as to subject matter, but when they cease to be members it narrows down to particular subject matters, which means that it transforms from an immunity unrelated to subject to a subject-based immunity. Professor Lindell conceded that point.

This would give rise to very difficult questions and situations in which the courts would be very reluctant to be involved. For example, could not Mr Reith's contacts with Tenix be seen to be intimately related to his functions as a minister? Professor Lindell said no. But it would be highly unlikely that an inquiry into that matter would be limited to Mr Reith's capacity other than as a minister. Would the postulated Senate committee be allowed to summon Mr Reith to give evidence about his contacts with Tenix, but would a court injunction be sought as soon as he was asked questions about contacts with Tenix while he was still a minister? Would a contact be regarded as having been made in his ministerial capacity if it occurred in his ministerial office or on his ministerial telephone? How would a court determine the permissible area of questioning, without closely examining the proceedings of the committee concerned? What would be the legal principle on which the court would decide the permissible area of questioning?

I think it highly unlikely that a court, even if it were to give legal force to the immunity currently having parliamentary recognition, would find a new legal principle which would involve it in such difficult and essentially non-legal issues. I think it more likely that a court would follow another legal principle, that a law should not be found which gives rise to absurdities. It would be an absurdity that a Senate committee could inquire into Mr Reith's contacts with Tenix, which Professor Lindell concedes, but could not inquire into those contacts which were thought to involve his ministerial capacity in some way.

In response to the question of the legal principle on which this narrowing down of the immunity could occur and the subject matters of the immunity could be identified, Professor Lindell's only answer was that such questions are of a kind which lawyers are accustomed to consider.

All this reinforces the point I made in my last note to the committee, that a court is highly unlikely to make the leap from the immunity of a current member to the new, and, as Professor Lindell concedes, quite different supposed immunity of a former member.

As the Senate Committee of Privileges has also been following this question, I have sent a copy of this letter to that committee.

Yours sincerely

(Harry Evans)