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Rights and Obligations of a Legislature in a Federal, Bicameral System

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EXECUTIVE PRIVILEGES?

The king's missing cow dung sparks crisis in Swaziland
(A report from correspondent Anton la Guardia, Johannesburg, August 2000)

The kingdom of Swaziland has been thrown into political crisis over allegations that the speaker of parliament stole a piece of cow dung from the king's cattle enclosure.
Outraged MPs are trying to muster the two-thirds majority needed to vote Mgabhi Diamini out of office, while he says he is considering seeking asylum abroad after "intimidation" by the Prime Minister, Sibusiso Diamini.

Traditionalists believe that Mr Diamini took the manure from the royal herd to use in a traditional African ritual to strengthen his standing with King Mswati, one of the last absolute monarchs...

MPs opposed to Mr Diamini said the theft was discovered by traditional healers who had foreseen it in a vision.

He said he had 'taken a handful of manure' to use in a ritual, but had no intention of stealing it. He had his own vision, he said: 'God told me in a dream to do it to prevent something bad happening to the king. I did not do it for my own benefit.'…

Warwick Khumalo, an MP who voted against the Speaker said…the dung incident was the final straw.

'According to African tradition, you cannot touch the cow dung in the royal cattle byre because it has got special significance,' he said. There is a story doing the rounds that the Speaker wanted to use the dung to make himself more powerful and have himself appointed Prime Minister.'[i].

PUBLIC INTEREST IMMUNITY IN PERSPECTIVE

This fascinating tale indicates to the etymological scholar that the English origins of the word "manure" are not too distant from African concepts – the owner of the manor had the right to the animal droppings. It also provides an excellent insight into some of the concepts of executive privilege, if not public interest immunity. On occasion, in sitting at the Table in the place of the Clerk of the House, I think that occurrences of stealing someone's cattle dung that might otherwise be described as plagiarism!

However, it does invite some interesting precautions about placing the matter in context. Before commenting in detail on the rights and obligations of legislatures in a federal, bicameral legislature within the context of Parliamentary inquiry and executive secrecy, I propose to make some general comments about the operation of the Executive in Parliament.

I regard as naive the declarations of those of us within our parliamentary system who describe it as predicated upon never-ending conflict between the Executive and the legislature. This simplistic reduction ignores the fact that many systems deriving from Westminster regard the executive and the legislature as intertwined. In addition, there is an almost undergraduate zeal in making such a declaration when our day-to-day experience should result in our knowing better. Those closely observing the operation of the legislature (including party meetings) should be aware that often the art

of government is in choosing the least undesirable of a number of unpleasant options. In the more than thirty years that I have worked in the legislature, I have observed governments of both major political persuasions take decisions that were less than popular at the time. However, I am convinced that they believed that their decisions were made in what they saw as the best interests of Australia and its peoples. I have also seen elements of the legislature other than the executive enrich the end result.

Similarly, I think that it is simplistic to describe the actions of the House of Representatives in parliamentary business as being indistinct from the actions of the government. Those who regard the House as the rubber stamp of the executive have no idea (or choose to have no idea) of the subtle inter-relationships at play. The House, not infrequently, agrees to Opposition amendments as well as Government amendments. It is no more correct to say that decisions of the House are decisions of the Government than it is to say that decisions coming from the Senate were decisions of whatever small group provided the balance of power in a particular matter. They are not decisions of the Government/Democrats or the Opposition/Greens, for example. They are decisions of the Senate; similarly the House makes its own decisions.

Does it really matter? I believe that it definitely does matter. Those of us who work near and for the legislature have an obligation to describe the situation as it really is, and to make a full recognition of any driving, sometimes blinding, bias we possess. We need to resist the attraction of appealing to a sensationalist press, and make full recognition of the more subtle forces at play in the parliamentary environment. To do otherwise may add to the delight of the yellow press (and some of the yellow press publishes in broadsheet). However, it also adds significantly to the unfavourable public perception of the institution we serve.

To my mind, the executive is very much part of our parliamentary system, and it is one of the great strengths of our system that this is the situation. During the proposals directed at impeachment of President Clinton in the concluding years of the last century, comparisons between that system and one where the executive is accountable to and commands the support of the majority in the House of Representatives should lead to gratitude for the system Australians enjoy. Accountability occurs during every question time, or with questions on notice. It takes place whenever legislation is being discussed or questioned in the Chamber of the House of Representatives or its Main Committee, or is the subject of inquiry for an advisory report by one of our committees. One of the key functions of executive accountability can occur in the context of Senate committees. While these inquiries may sometimes seem to be politically driven, my observation has been that the key players usually wish to maximise the political advantage, but do not wish to proceed as far down the road media commentators and others may be trying to push them lest they destroy the key element of accountability they possess.

It should be apparent that, in talking about “Parliamentary Inquiry and Executive Secrecy” I have deliberately chosen to give expression to the “and” in its legal utterance rather than the more adversarial “versus”. Parliamentary inquiry occurs in relation to many elements of accountability I have outlined. However, for the purposes of the current discussion, I propose to limit my observations to parliamentary committees of inquiry. In particular, I would like to concentrate on the powers of the federal Houses of Parliament to compel the attendance of persons before parliamentary committees of inquiry.

CERTAIN MARITIME INCIDENT SELECT COMMITTEE – STAFF AND FORMER MEMBER WITNESSES

The compulsion powers assumed some prominence earlier this year in relation to the Senate Select Committee on a Certain Maritime Incident and its consideration of whether it might call before it a former Minister who was a former Member of the House. The committee sought my views, and in summary these were:

- There appeared to be an agreed immunity for current Members of each House from being compelled to appear before the House of which they were not a member, or its committees;

- This immunity probably extended to former Senators and Members in relation to matters for which he or she could have been accountable to the House of which they were a member; and

- The immunity may well extend to ministerial staff.

Before providing this advice, and after viewing legal advice to the contrary, I sought legal counsel. I am not legally trained, but I believe that even a legally trained Clerk could benefit from legal advice. Sometimes a strong argument is advanced that matters of this kind are not justiciable. As I will subsequently indicate, the matter itself may not be justiciable, but certain actions flowing from an attempt to enforce any compulsion may be justiciable. My belief has always been that it is improper to act without regard to proper standards simply on the basis that a matter is not justiciable, and the courts will not act on intra mural proceedings of Parliament, thus giving either House freedom to act as it thinks fit. I believe that the fact that something may be non-justiciable imposes an obligation upon a legislature not to abuse its privileged position. I think most members of Parliament would agree with this view. Certainly, the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs into the third paragraph of section 53 of the Constitution made a number of observations on the matter. The report contained the statement that 'The Parliament, like the courts, has a duty to uphold the Constitution', and chapter 5 of the report dealt at length with possible approaches stemming from possible non-justiciability[ii].

The Clerk of the Senate also received legal advice after I had advanced my initial thoughts. The Clerk sought advice from a leading member of the Sydney bar, Mr Brett Walker SC. I sought advice from the eminent academic lawyer, Professor Geoffrey Lindell and another leading member of the Sydney bar, Mr Alan Robertson, SC.

DEPARTMENTAL AND MINISTERIAL STAFF

Much of the Walker opinion, and much of the subsequent action by the Senate Select Committee, concerned the powers of a committee in relation to ministerial advisers. As I indicated, I believe that immunity may well extend to ministerial staff. I have not seen anything advanced to convince me that, under our current system, such people are answerable to any one other than the Minister they serve. Certainly, I think that if direct accountability is ever established, it could apply to the staff of Opposition Members as well. For the moment, it is sufficient to indicate that if one of the committees of the House of Representatives sought my advice as to whether ministerial or opposition staff should be compelled to attend before them, I would reply that it would not be appropriate to seek to achieve this by compulsion.

There is also an interesting consideration relating to people employed under the Public Service Act. Parliament enacted this legislation only recently – in 1999. The Act marked a move away from a regulatory, prescription-driven public service to one based on values. One of the values of the Australian Public Service (APS) is that:

The APS is openly accountable for its actions, **within the framework of ministerial responsibility**, to the Government, the Parliament, and the Australian public [*emphasis added*].

The Act also provides[iii] that:

An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or a Minister's member of staff.

Many words have been written and spoken on the effect of statutory secrecy provisions. I will not repeat many aspects of the question that have been discussed elsewhere but have never been pursued to final judicial determination. However, I will mention in passing the 1985 joint opinion by the then Attorney-General and the Solicitor-General that express words are necessary in a statute before it interferes with parliamentary privilege, and issues raised in *Odgers' Australian Senate Practice* [iv] in this regard. Firstly, dealings that public servants have with Ministers or their staff go to the heart of responsible government. Governments of different persuasions have held consistently that ministerial staff are responsible to the Minister, and the Minister to the Parliament and ultimately the electors[v]. It seems to me that Parliament's enactment of a value relating to accountability within the framework of ministerial responsibility remains to be explored. Of course, ministerial responsibility remains at the core of our parliamentary system, and in relation to the Parliamentary Privileges Act[vi], express provision was made to exclude the application of a part of the Act from the operations of either House or their committees. No similar disclaiming provision has been made in respect of the Public Service Act. There are two aspects to be considered. One is whether a person employed under the Public Service Act would be prosecuted for revealing discussions with a minister or ministerial staff to a parliamentary committee. This appears to be unlikely. The second is whether a person employed under the Act, declining to provide information to a House or a committee because of his or her understanding of their obligations under the Act, might successfully resist action by a House to punish their non-disclosure. This is less certain, and would almost certainly be justiciable. Professor Lindell's article in the Melbourne University Law Review, volume 20, 1995, is also relevant in this respect. I will elaborate on this subsequently.

FORMER MEMBERS AS WITNESSES

Basis of immunity of current Members and its extension to former Members

One important point to be established is whether current Members of both federal Houses enjoy something closely akin to a legal immunity from being compelled to attend the House of which they are not a member, or one of its committees. There appears to be general agreement that they do enjoy such immunity, but there is not firm universal agreement on the basis on which this immunity rests. The Clerk of the Senate and Mr Walker appear to incline to a loose concept of 'comity', in Mr Walker's words symbolised by a number of ceremonies of the two Houses at Westminster in 1901 and Canberra in 2002. My belief, reinforced by the opinions of Professor Lindell and Mr Robertson, is that because of sections 49 and 50 of our Constitution, the federal Houses do not possess the power to compel members of the other House to appear. The legal position of the House of Commons as at 1901 stated in *Hatsell* is one of total independence, with neither House being able to claim, much less exercise, any authority over a member of the other House[vii].

Mr Robertson has indicated that this passage in *Hatsell* suggests the existence of an immunity expressed as a lack of power in the other House. The purpose of the privilege or immunity is founded in institutional independence and not simply in the need for Members freely to perform their duties day to day. This in turn suggests that it would be inimical to that purpose for a member to be subject to the power of the other House after the Member has ceased to be a Member[viii].

I understand that Professor Lindell has made available to the Australasian Study of Parliament Group the substance of his thinking in this matter. Therefore, it will be sufficient for me to summarise his argument that non-recognition of the agreed immunity extended to current members would render it incomplete and defeat the essential objective sought to be confirmed by that immunity. Professor Lindell illustrated his point with the following analogies:

- the privilege of the proceedings of both Houses does not cease operation simply because the actors have ceased to perform their roles;

- the protection extended to witnesses before committees does not cease to exist after the completion of examination of the witness;

- a judge's immunity in determining cases does not cease to operate once the judge had retired;

- certain immunities stemming from the inability of a parliament of one level of government to impose discriminatory taxes on public servants of another level of government in Australia may extend to discriminatory taxes on pensions of retired public servants[ix].

Immunity against a non-existent power

One common theme emerging from those arguing in favour of compellability of former Members as witnesses has been a law of compulsion. The argument, advanced by the Clerk of the Senate, is that those who assert the existence of a law have to establish its existence[x]. Mr Walker SC refers to the so-described 'undoubted' power of the Senate or its committees to compel the attendance of witnesses to give evidence. Mr Walker's description is of an 'undoubted general power'[xi]. My contention is that this is a less than fully appropriate description. It is necessary to distinguish between the compellability of witnesses in general, and compellability of members or former members of either House.

Rather than the onus being on those wishing to establish a law of immunity, it is my belief that there is an obligation on those asserting a power that makes the immunity necessary to establish that there is an all-encompassing power of compulsion. It is also necessary to advance evidence other than mere opinion to support it.

There is no express provision for the right of either House of the Parliament of the United Kingdom in 1901 to summon former Members of either House. Of course, the powers of the Australian Houses are linked to those of the United Kingdom House of Commons in 1901. The possibility of the Commons' compelling the attendance of a former Member of the House of Lords in 1901 was extremely remote. In the vast majority of instances, it was not possible to be a former Member of the House of Lords in 1901 and still be alive (retired bishops being the major exception). If the power existed, it was, of course, open to the House of Lords to compel the attendance of former Members of the House of Commons. However, Commons' powers are relevant for the powers of the Australian Houses, and if the power did exist, it appears that it was not exercised by 1901, and has not been exercised since.

Nor is the power of committees of either House as open or undoubted as Mr Walker suggests. The general statement of belief of the House of Commons in this regard is that the House has power over its Members and documents in their possession, but that this power is not automatically delegated to a committee with the power to send for persons, papers and records[xii]. Diana Woodhouse describes the following restrictions imposed by the British Parliament on its committees:

10.3 LIMITATIONS IMPOSED BY PARLIAMENT
ON THE POWER OF SELECT COMMITTEES

Terms of Reference

The powers delegated to committees are always limited in their use by the terms of reference set down by the House, either at the time of the appointment of the committee or an a later motion by the chairman. A committee attempting to exercise its powers beyond these terms would be acting *ultra vires* …

A Lack of Formal Authority

The power of select committees to send for persons, papers, and records is held to be 'unqualified', and enables select committees to order the attendance of witnesses or the production of documents. Moreover, because the refusal to obey an order issued by a committee is a contempt of Parliament, non-compliance can be raised in the House as a matter of privilege and thus takes priority over other business. **However, select committees can exercise such unqualified power only with regard to private individuals and, in very limited circumstances, the sending for papers from departments** [*emphasis added*] …

Parliamentary Privilege and Attendance before Committees

Select committees cannot order Members of either House of Parliament to appear before them. Such an order would conflict with the Privileges of Parliament…

Such considerations … raise questions about the theoretical inability of a committee to call to account a reluctant Minister who is a Peer, or indeed to call an ex-minister or ex-civil servant to give evidence. Thus, when Lord Young indicated that he would decline any invitation by the Trade and Industry Committee to give evidence on the sale of Rover to British Aerospace, for which he had been the responsible minister, the committee could take no direct action. It could not request an order from the House of Commons, as the making of such an order is a breach of the privileges of the House of Lords[xiii].

This is not to say that the position is immovably fixed. Senator Ray advised the Senate recently of the recommendation of the Transport, Local Government and the Regions Committee in the United Kingdom concerning government advisers who were also Members of the House of Lords. Senator Ray said 'The committee stated that it was inappropriate for advisers to take advantage of a convention that was established for different circumstances in order to avoid giving evidence at committees. The committee recommended that the Procedure Committee consider whether the convention should be modified to prevent members of the House of Lords who are government advisers from appearing before select committees[xiv].

My conclusion is that a committee of either House, invested with the power to send for persons, papers and records, has the power to send for any private citizen within Australia or its territories in that person's capacity as a private person, and the person would be well-advised to comply. However, when a committee seeks the attendance of a citizen in a person's ministerial or former ministerial capacity, the delegated power does not automatically apply.

UNLIMITED IMMUNITY?

Mr Walker's opinion contained the following passage:

'I have never seen it suggested that former members of the Executive government trail with them, forever until they die, a personal protective immunity from investigation by the houses of Parliament of their official conduct, and thus an immunity specifically from compulsory attendance to give evidence in relation to such an investigation. In my opinion, merely to state such a novel suggestion is to doubt its possibility as a matter of law (or political science)."[xv].

Lest this statement should lead an observer to conclude that in my note to the Senate select committee I made a suggestion of this kind, I stress that I indicated to the committee that there most definitely was ***not*** an absolute immunity from accountability. I expressed my belief that accountability continued after a Member ceased to be a Member, but that the accountability was to the House of which the person had been a Member. Where a person had been a Member of both the House of Representatives and the Senate, as occurs not infrequently in the Australian federal context, I said that to my mind, accountability resides respectively in the one and the other House corresponding to conduct or behaviour for the period in which the person was a Member of that House. The inclusion of the statement in Mr Walker's opinion also led me to believe that he may not have had access to all the relevant information that would enable him to reach a sound conclusion.

PRECEDENT

Both Mr Walker[xvi] and Senator Ray[xvii] point to the compulsory attendance in 1994 of two former Treasurers and a former Prime Minister before the Senate Select Committee on the Print Media. None was still a Member of the House. There is no doubt in my mind that a bad precedent does exist. However, it represents the decision of a committee, not the whole Senate, and it is the Senate that decides Senate practice, not one of its committees or its Clerk at the time. This is supported by events surrounding the activities of the Senate Select Committee on the Australian Loan Council, which accepted advice from the Clerk of the Senate that it could not summons Members of the House of Representatives and Members of State Parliaments. The committee recommended that the **Senate** ask the various Houses to require their Members to attend and give evidence. The Senate resolved accordingly[xviii].

RELATIONS WITH STATE AND TERRITORY PARLIAMENTS

As indicated, from time to time, questions arise about the powers of the federal Houses to compel official witnesses from State or Territory jurisdictions. Again, the concept of comity is often raised. I might mention in passing that an electronic search of the debates of the Australasian Federal Conventions of the 1890's reveals that the term does not appear to have been used to refer to the relations between the proposed Senate and the House of Representatives. It was used, however, to refer to the friendly relations between nations (a meaning retained, I believe, in current usage in international law), the colonial jurisdictions and the proposed States of the intended Commonwealth. Osborn's *Concise Law Dictionary* indicates a meaning of a body of non-binding rules that states observe towards each other from courtesy or convenience; the *CCH Macquarie Dictionary of Law* describes it as consideration between different jurisdictions. The concept of comity may have some basis in the rationale for the relationship between the Commonwealth Parliament and State/Territory Parliaments. However, again I believe that there is a firm legal basis underlying the relationship, centred on the allocation of Federal powers in sections 51 and 52 of our Constitution.

This has been confirmed by a number of decisions of the High Court[xix].

PROGRESS REPORT ON WITNESSES BEFORE THE SENATE SELECT COMMITTEE ON A CERTAIN MARITIME INCIDENT

The regular update to *Odgers' Australian Senate Practice* indicates that the select committee did not accept the 'claim' as to immunity for former Members of the House, but that they disagreed about whether a former minister should be summoned[xx]. It is not easily ascertainable at this stage to discover what the committee has actually decided, but it appears that there was not merely disagreement, as the supplement suggests, but rather that the committee declined a proposal to call the former minister before it. A research paper produced by Dr Ian Holland from the Commonwealth Parliamentary Library[xxi] indicates that:

…the Committee decided not to directly confront the prospective witnesses. It instead resolved to appoint an Independent Assessor to perform the following task and report to the committee:

To assess all evidence and documents relevant to the terms of reference of the committee, obtained by the committee or by legislation committees in estimates hearings, to:

a. determine what evidence should be obtained from [former Minister Reith and his advisers], and what questions they should answer, to enable the committee to report fully on its terms of reference; and

b. formulate preliminary findings and conclusions which the committee could make in respect of the roles played by those persons with the evidence and documents so far obtained[xxii].

The research paper saw this essentially as a capitulation[xxiii].

PENALTY

In coming to this position of what he saw as essentially a capitulation, Dr Holland indicated that the committee confirmed the previously expressed view that 'it would be unjust for the Senate to impose a penalty on an officer who declines to provide evidence on the direction of a minister'[xxiv]. However, this conclusion appears to relate to ministerial staff, not a former minister.

In my note of 3 April 2002 to the select committee, I raised the question of action that might be taken should a former Member of Parliament decline to respond to an invitation or summons to appear before a committee or a House of which he or she had not been a Member, or having appeared, was deemed not to have answered a question without reasonable excuse. The House of Representatives does not yet have resolutions to govern proceedings in such matters; the Senate does. However, it should be kept in mind that such resolutions merely operate with the status of standing orders.

The *Parliamentary Privileges Act 1987*(Commonwealth) [xxv] provides at section 4 the essential element of offences. To constitute an offence against a House, conduct - including the use of words - must amount, or be intended or likely to amount, to an improper interference with the free exercise by a House or a committee of its authority or functions, or with the free performance by a member of the member's duties as a member. Section 7 applies to penalties for an offence against a House, and includes provision for imprisonment or fines. The section also provides that, where a fine is imposed, it may be recovered in a court of competent jurisdiction.
Where a period of imprisonment was the penalty imposed for an offence against a House, the decision would probably be justiciable[xxvi]. Where a fine is imposed, and action is taken in a court of competent jurisdiction to recover the sum, the decision could well be justiciable.

Professor John McMillan has included the matter of penalties in discussing a number of unresolved questions in *Egan* v. *Willis and Cahill*[xxvii] and *Egan* v. *Chadwick and others*[xxviii]. Professor McMillan indicates that the action taken by the NSW Legislative Council – one day suspension of the Minister – fell within the test of 'reasonable necessity'. However, he raises the question as to whether a longer suspension or punitive action such as expulsion [not available in the Commonwealth sphere] would have met the test. Professor McMillan also raises the prospect of one House passing a resolution in direct contradiction of the other House[xxix]. It should also be remembered that the action taken in respect of Mr Willis was by one House in respect of one of its own Members – not in respect of a Member or former Member of the other House.

FATE OF THE PARLIAMENTARY PRIVILEGES ACT

It has been suggested that one reason why the Senate Select Committee did not proceed down the path to compulsion was apprehension as to the fate of the Commonwealth's Parliamentary Privileges Act should it come under judicial scrutiny. One such suggestion came from an article in the *Sydney Morning Herald* by John Nethercote. Mr Nethercote wrote:

The real, unstated and unstatable reason for not pressing summonses on ex-ministers and their staff has nothing to do with spending taxpayers' money, which is not invariably a top-priority consideration in Parliament House.

It has everything to do with keeping the Parliamentary Privileges Act away from judicial scrutiny, especially that of the High Court at a time when it is probably better informed than usually about

parliamentary privilege. The consequence is that grave accountability weaknesses will not only persist but will be further entrenched [xxx].

Certainly, there have been expressions of dissatisfaction about a number of matters under the Act, including assertions of its impingement on the separation of powers in its application as to the use of evidence in a court concerning 'proceedings in Parliament'. In *Laurance* v. *Katter*[xxxi], the Court of Appeal of the Supreme Court of Queensland held that Mr Laurance was not prevented from relying on statements made in the House in an action for defamation. (The decision was appealed to the High Court, but the case was settled before it was decided[xxxii]). Also, the House of Representatives has modified the way in which it deals with certain actions outside the House that would have been considered contempts before the operation of the Privileges Act lest the action might be justiciable.

BREACH OF THE PRIVILEGE OF THE HOUSE OF REPRESENTATIVES

There appears to be no doubt that a former Member of one House of the Commonwealth Parliament could be compelled, as a private citizen, to appear before a House of which he or she was not a member or one of its committees. This would have application as it would for any private citizen. However, should an attempt be made to compel a former Member of the House to attend before a House or one of its committees of which he or she was not a member in relation to matters that arose when he or she was a Member and for which he or she could have been accountable to the House, my firm advice to the Speaker would be that there would be strong grounds for the House to consider that action of this kind was an infringement of its privileges.

I would hope that any former Member of either House in a position of this kind would have recourse to the sentiments I have expressed. I would also hope that any former member convinced by my arguments might feel an obligation or a duty not to participate in any action that might have the result of a diminution of the privileges of the Senate or the House of Representatives. Should an attempt be made to impose a penalty, I would expect that a former Member would be able to advance an argument that resistance to an attempt of compulsion in no way constituted an improper interference with the legislature – to the contrary, it could be viewed as a most proper performance of duty. If doubts as to the application of aspects of the law of parliamentary privilege were to be cleared up on the way, it would be to the benefit of all.

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[i] Melbourne Age 28 August 2000. I am indebted to Mr W Yates, former Member for the Division of Holt in the House of Representatives, for drawing my attention to this quotation.
[ii] *The Third Paragraph of Section 53 of the Constitution*, Report of the House of Representatives Standing Committee of Legal and Constitutional Affairs, November 1995, p55 and pp56-62.
[iii] Subsection 10(3).
[iv] Odgers' Australian Senate Practice, 10th edition, pp 48 – 51.
[v] HR Hansard, 3/3/02, p939.
[vi] Act No. 21 of 1987.
[vii] Hatsell, *Precedents of Proceedings in the House of Commons* (1818), Vol.3, p67.
[viii] Opinion of Mr A Robertson SC 26 June 2002, paragraph 9.
[ix] Opinion of Professor G J Lindell, 22 march 2002, paragraphs 18 and 19.
[x] See, for example, the advice of the Clerk of the Senate to the Chair of the Senate Select Committee on a Certain Maritime Incident, 26 August 2002.
[xi] Opinion of Mr Brett Walker SC 16 May 2002 paragraph 14.
[xii] For example, see transcript of 33rd Speakers' and Presiding Officers' Conference, Brisbane, 2 July 2002, page 27.
[xiii] *Ministers and Parliament: Accountability in Theory and Practice*, Clarendon Press, Oxford, 1994, pp 180-2.
[xiv] Senate *Hansard*, 25 September 2002, p 4624.
[xv] Op. cit. paragraph 25.
[xvi] Op. cit. paragraph 35.
[xvii] Loc. cit.
[xviii] *Odgers' Australian Senate Practice*, 10th edition, p56.
[xix] *Commonwealth Attorney-General* v. *CSR Ltd* 1912 15 CLR 182, *Lockwood* v. *Commonwealth* , 1954, 90 CLR 177. *See also* Senator Ray's comments, loc. cit.
[xx] Odgers Australian Senate Practice, Tenth edition, Supplement, Updates to 30 June 2002, p.12
[xxi] Accountability of Ministerial Staff? Research Paper No. 19 2001-02,Ian Holland, Politics and Administration Group of the Department of the Parliamentary Library, 18 June 2002 (http://www.aph.gov.au/library/pubs/rp/2002-02rp19.htm.

[xxiii] Ibid, page 23, citing resolution of 22 May 2002 of the Senate Select Committee on a Certain Maritime Incident, *Former Minister and Ministerial Staff*, paragraph 4.
[xxiii] Ibid.
[xxiv] Ibid, citing resolution of 22 May 2002 of the Senate Select Committee on a Certain Maritime Incident , *Former Minister and Ministerial Staff*, subparagraph 3(a).
[xxv] Act No. 21 of 1987.
[xxvi] *House of Representatives Practice*, 4th edition (2001), p.719.
[xxvii] 1998 158 ALR 527.
[xxviii] 1999 46 NSWLR 563.
[xxix] J McMillan, *Parliament and Administrative Law*, in *Parliament: The Vision in Hindsight*, G Lindell and R Bennett (eds) Federation Press, 2002, p 374.
[xxx] *What servants are for*, *Sydney Morning Herald* 27 June 2002, http://www.smh.com.au, p.8.
[xxxi] 1996,QCA 471
[xxxii] Laurance v. Katter, B69/1996 (26 June 1997).