THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
1975—Parliamentary Paper No. 215

Senate Standing Committee of Privileges

REPORT ON MATTERS REFERRED BY SENATE RESOLUTION OF 17 JULY 1975

7 OCTOBER 1975

Brought up and ordered to be printed
7 October 1975

THE COMMONWEALTH GOVERNMENT PRINTER
CANBERRA 1977

First published 1977
Reprinted 1982

MEMBERS OF THE COMMITTEE

Senator J. N. Button (Chairman)
Senator D. M. Devitt
Senator M. G. Everett, Q.C.
Senator the Hon. I. J. Greenwood, Q.C.
Senator J. A. Mulvihill
Senator J. J. Webster
Senator the Hon. R. C. Wright

Secretary: Mr A. R. Cumming Thom
The Senate

Printed by Authority by the Commonwealth Government Printer, Canberra 1982

CONTENTS

PREAMBLE

In presenting its Report to the Senate the Committee indicates that the Report was agreed to by a majority of the members (Senators Button, Devitt, Everett, and Mulvihill). The Report is accompanied by Addenda by (a) Senator Everett and (b) Senators Devitt and Mulvihill, and a Dissenting Report by Senators Greenwood, Webster, and Wright. The Dissenting Report is accompanied by Addenda by (c) Senators Greenwood, Webster, and Wright and (d) Senator Greenwood.

REPORT OF THE COMMITTEE

1. On 17 July 1975, on the motion of Senator Withers, the Senate resolved as follows:

> That the Senate take note of the Papers (being letters from three Ministers presented by the President on 16 July 1975), but the Senate resolves that:
>
> (1) The action of the Government in directing public servants called to the Bar of the Senate not to answer any questions is a massive cover-up of the Government's involvement in the attempted raising of overseas loans; and therefore the Senate renews its call for the Government to appoint a Royal Commission consisting of at least one Judge and with proper and adequate terms of reference.
>
> (2) Notwithstanding anything contained in the Standing Orders, there be referred to the Committee of Privileges:
>
> (a) the direction of the Prime Minister, the Treasurer, the Attorney-General and the Minister for Minerals and Energy that public servants claim privilege;
>
> (b) the further direction of Ministers that notwithstanding any rejection by the Senate of such claim of privilege the public servants summoned were not to answer any questions or produce any documents; and
>
> (c) the further claim of privilege made by the Solicitor-General.
>
> (3) That the Committee of Privileges report by 30 September 1975.
>
> (4) That, notwithstanding anything contained in the Standing Orders, the Privileges Committee for the purposes of its inquiry and report shall have power to send for persons, papers and records.

2. The Committee met on seven occasions to consider the reference, one meeting being held in Melbourne and six in Canberra. On 30 September the Senate granted to the Committee an extension of time to report until 7 October.

3. In its deliberations the Committee did not call for submissions or oral evidence, but decided to give consideration to any submissions received. One written submission was received from Senator Sir Magnus Cormack.

BACKGROUND TO THE REFERENCE

4. In the year 1974, as the then Treasurer, Mr Crean, said in a paper delivered on 4 November 1974, there was a significant change in the world economy, resulting in a marked reduction in the availability of international loan funds from traditional sources. In the same period the oil exporting countries enjoyed very substantial current account surpluses and consequently emerged as potential lenders on the international money market. Between September 1974 and May 1975 the Australian Government attempted to gain access to these new sources of loan funds. The methods adopted by the Government became the subject of various questions in the House of Representatives and the Senate between February and July 1975, and considerable criticism and speculation in the press.

5. During the winter adjournment the House of Representatives was recalled by the Prime Minister and, following the announcement that the House would meet on 9 July, Opposition Senators, pursuant to the Resolution of the Senate on 12 June, initiated the action necessary to have the Senate meet, also on 9 July. Lengthy debates took place in both Houses on the subject of 'Overseas Loan Negotiations' and a number of documents were tabled.

The charges and countercharges made in the course of the parliamentary debate are recorded in Hansard. For the purpose of the reference to the Commit-

tee it is sufficient to indicate the attitudes adopted by the Government and Opposition in the following extracts which have relevance to what subsequently took place:

> Until we recalled the Parliament for this matter, members of the Opposition relied on the press to create an impression of new and never-ending revelations. When the Parliament was sitting they initiated nothing, although the nature and amount of the proposed loan had been public knowledge from the second week of February when the session began. On no occasion did the Opposition move a specific motion dealing with overseas loan borrowings; not until the last day of sitting did it move for the suspension of Standing Orders.
>
> For 4 months, while the House was sitting, members of the Opposition took no opportunity to raise the matter on the adjournment or by way of an urgency motion. They refused my repeated invitations to place questions on notice.

(Senator Wriedt: Leader of the Government in the Senate. Hansard: 9 July, page 2695)

> Senator WITHERS (Western Australia—Leader of the Opposition in the Senate)—I wish to speak to the motion that the Senate take note of the statement. In the other place today and here again tonight we had an explanation provided by the Prime Minister (Mr Whitlam) which in no way satisfies the Opposition as to this whole matter. An awful lot has been said in recent months and a large degree of criticism has been levelled by the Prime Minister against the Deputy Leader of the Opposition (Mr Lynch) in another place. I deal with that matter first. If it had not been for the persistence of the Deputy Leader of the Opposition in another place most of what is now revealed would never have surfaced. But in spite of what has surfaced so far, the situation is far from satisfactory. I put to the Senate that the Government's documents show virturally nothing that is new.

(Hansard: 9 July, page 2707)

6. The foregoing paragraphs indicate the substance of what came to be known as 'the loans crisis'. For the purpose of the reference to the Committee of Privileges of the Senate the relevant chronology of events began on 9 July when the Leader of the Opposition moved the following amendment to the motion that the Senate take note of a statement made by Senator Wriedt on 'Overseas Loan Negotiations':

> That the Senate is of the opinion that the Government has failed to give to the Parliament and the Australian people a proper, full and accurate account of the activities of its Ministers, servants and agents, relating to all dealings by them both prior to and subsequent to the Executive Council Meeting of 13 December 1974, which authorised the Minister for Minerals and Energy to borrow a sum not exceeding four thousand million dollars in the currency of the United States of America for temporary purposes, and because the Government refuses to appoint a Royal Commission with proper and adequate terms of reference to investigate and report upon all aspects of the Government's overseas loan activities, the Senate resolves:
>
> (1) (a) That the following persons be called to the Bar of the Senate, by summons under the hand of the Clerk of the Senate, on Tuesday, 15 July 1975, at half past two p.m., and from day to day until the Senate otherwise orders—
>
> Sir Frederick Wheeler, C.B.E.—Secretary, the Treasury
>
> Mr J. O. Stone—Deputy Secretary (Economic), the Treasury
>
> Mr R. J. Whitelaw, O.B.E.—First Assistant Secretary, Overseas Economic Relations Division, the Treasury
>
> Mr A. R. G. Prowse—First Assistant Secretary, Revenue, Loans and Investment Division, the Treasury
>
> Mr A. P. Bailey—Assistant Secretary, Revenue, Loans and Investment Division, the Treasury
>
> Mr I. Hay—Revenue, Loans and Investment Division, the Treasury

Sir Lenox Hewitt, O.B.E.—Secretary, Department of Minerals and Energy

Mr J. T. Larkin—First Assistant Secretary, Energy Planning Division, Department of Minerals and Energy

Mr C. W. Harders, O.B.E.—Secretary, Attorney-General's Department

Mr M. H. Byers, Q.C.—Solicitor-General

Mr A. C. C. Menzies—First Assistant Secretary, Advisings Division, Attorney-General's Department

Mr D. J. Rose—Senior Assistant Secretary, Advisings Division, Attorney-General's Department

and such other person or persons as the Senate determines—

to answer questions upon these matters and to produce all documents, files or papers in their possession, custody or control relevant to these matters which have not been tabled in either House of the Parliament; and

(b) that notwithstanding anything contained in the Standing Orders, and unless otherwise ordered, the examination of such witnesses take place immediately after the presentation of Petitions and the giving of Notices each day, and provided that a motion to summon any other person or persons to the Bar of the Senate may be moved without notice prior to the commencement of the examination of witnesses each day.

(2) That, if, prior to 15 July 1975, the Government announces the intention to appoint a Royal Commission consisting of at least one Judge and with proper and adequate terms of reference agreed to by the Leader of the Opposition in the House of Representatives, the President is authorised to cancel the meeting of the Senate set for 15 July 1975 and to release all witnesses from their obligation to attend before the Senate, provided that a request or requests by an absolute majority of the whole number of Senators is received by the President for the cancellation of the meeting and such cancellation shall be notified to each Senator by telegram or letter.

For these purposes a request by the Leader of the Government in the Senate shall be deemed to be a request by every member of the Government, a request by the Leader of the Opposition shall be deemed to be a request by every member of the Opposition and a request by the Leader of the National Country Party of Australia shall be deemed to be a request by members of that Party.

Provided further that the request or requests may be made to the President by leaving the same with, or delivering the same to, the Clerk of the Senate, who shall immediately notify the President.

In the event of the President being unavailable the Clerk shall without delay notify the Deputy-President, or, should he be unavailable, any one of the Temporary Chairmen of Committees, who shall be deemed to be required by the Senate to cancel the meeting on behalf of the President, in accordance with the terms of this resolution.

The Resolution as amended was adopted by the Senate, and summonses to appear before the Bar of the Senate were issued and served on each of the persons named in paragraph 1 (a) of the Resolution.

7. The Senate met again on 15 July 1975. At the commencement of proceedings the President reported to the Senate that he had received certain letters from the Prime Minister, other Ministers and the Solicitor-General. These letters, which were read to the Senate, are as follows:

letter dated 15 July from the Prime Minister,
letter dated 15 July from the Minister for Minerals and Energy,
letter dated 15 July from the Treasurer,
letter dated 15 July from the Attorney-General,
letter dated 15 July from the Solicitor-General.

Copies of these letters are appended to this report as they are of vital relevance to the Committee's task. For the purpose of background chronology, however, it is sufficient to refer to the essential point of the letters which is contained in paragraph 2 of the Prime Minister's letter which reads as follows:

> I write to you concerning the summonses that have been served on officers of the Public Service. The Solicitor-General, as the Second Law Officer under the Law Officers Act, is writing to you directly. The Officers of the Public Service summoned will attend in accordance with the summonses. I wish to inform you, however, that each officer will be instructed by his Minister to claim privilege in respect of answers to all questions upon the matters contained in the Resolution of the Senate and in respect of the production of all documents, files and papers relevant to those matters.

In addition, the letters from each of the Ministers, other than the Prime Minister, contained the following paragraph:

> I certify that the answering of any questions upon the matters contained in the Resolution of the Senate and the production of any documents, files or papers relevant to those matters by officers of my Department would be detrimental to the proper functioning of the Public Service and its relationship to government and would be injurious to the public interest.

The letter from the Solicitor-General set out a number of considerations relating to 'Crown privilege' and indicated his conclusion as follows:

> The above considerations and much anxious thought have compelled me to conclude that I must object to answer any question relating to the Resolution that may be put to me, for should I answer any, the claim to privilege may be to that extent defeated. Natually, I shall attend the Senate in answer to the summons issued by it as one of the constitutional organs of government.

Following the tabling of the letters the Leader of the Opposition sought the adjournment of the Senate.

8. On 16 July the Senate resolved on the motion of the Leader of the Opposition:

> That the Senate notes the statements contained in the letters of the Prime Minister and the Minister for Minerals and Energy, the Treasurer, the Attorney-General and the Solicitor-General addressed to the President of the Senate and declares and resolves:
>
> (1) That the Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.
>
> (2) That subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.
>
> (3) That the fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.
>
> (4) That, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim.

9. When the sittings of the Senate resumed at 2.15 p.m. on 16 July the President indicated that he had received letters from various Ministers which he proceeded to read to the Senate. These letters and enclosures, which are appended to this report, were as follows:

(a) letter dated 16 July from the Minister for Minerals and Energy enclosing a copy of a letter bearing the same date from the Minister to Sir Lenox Hewitt;

(b) letter dated 16 July from the Treasurer enclosing a copy of a letter bearing the same date from the Treasurer to Sir Frederick Wheeler;

(c) letter dated 16 July 1975 from the Attorney-General enclosing a copy of a letter bearing the same date from the Attorney-General to Mr C. W. Harders, Secretary of the Attorney-General's Department.

The letters from each of the Ministers refer to the fact that the Minister has 'given further directions to the Secretary of my Department in relation to the matter of claiming privilege in respect of answers to questions upon the matters contained in the Resolution of the Senate of 9 July 1975 and in respect of the production of any document, file or paper relevant to those matters'. The letters (enclosed with the Ministers' letters) to Sir Lenox Hewitt, Sir Frederick Wheeler and Mr Harders each contained the following instruction:

> In case there should be any misunderstanding of the position that I have directed you to take as a witness before the Senate, I direct that, if the Senate rejects the general claim of privilege made by you, you are to decline to answer any questions addressed to you upon the matters contained in the Resolution of the Senate, and to decline to produce any documents, files or papers relevant to those matters. This direction does not, of course, prevent you from giving answers to formal questions that may be addressed to you by the Senate.

Subsequently the Senate 'noted' these letters and adopted a Resolution prescribing 'the procedure for the examination of witnesses'.

10. On the afternoon of 16 July 1975 the twelve persons named in the Senate Resolution of 9 July appeared before the Bar of the Senate in answer to the summonses which had been served upon them.

The Soliticitor-General, Mr Byers, answered a number of questions in elaboration of the views expressed in his letter of 15 July to the Senate, but declined to answer questions 'inconsistent with or opposed to the privilege claimed'. Each other witness declined to answer questions (other than formal questions) addressed to him, indicating that he did so either on the basis of instructions received from his Minister, or on the basis of a claim of privilege.

After each witness had been questioned, the President indicated that the witness was 'excused from attendance' before the Senate. No member of the Senate raised any matter by way of discussion, question or debate relating to the propriety of the claim of privilege or the refusal to answer questions.

On the morning of 17 July on the motion of Senator Withers the Senate resolved 'that the remaining witnesses be discharged', and later in the day the Resolution set out in paragraph one of this report and including the reference to the Committee of Privileges was passed by the Senate.

'PRIVILEGE' AND PARLIAMENT

11. *The powers and privileges of the Senate*

Parliamentary Privilege means the special rights or immunities attaching to Parliament, its Members, and others, necessary for the discharge of the functions of Parliament without obstruction and without fear of prosecution.
(Odgers, *Australian Senate Practice*, page 561)

Section 49 of the Constitution provides as follows:

> 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.

Section 50 of the Constitution provides that:

> Each House of the Parliament may make rules and orders with respect to—
> (i) The mode in which its powers, privileges, and immunities may be exercised and upheld:
> (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

On 1 January 1966 Standing Order 33A was incorporated in the Standing Orders of the Senate. This Standing Order reads as follows:

> A Committee of Privileges, to consist of seven Senators, shall be appointed at the commencement of each Parliament to inquire into and report upon complaints of breach of Privilege which may be referred to it by the Senate.

Standing Order 118 gives priority over other business to 'a Matter or Question directly concerning the Privileges of the Senate, or of any Committee or Member thereof . . .'

The 'powers, privileges, and immunities of the Senate' have not been 'declared by the Parliament' in accordance with section 49 of the Constitution and accordingly remain those of the House of Commons at the time of the establishment of the Commonwealth.

There is no limitation in theory on the power of the House of Commons to call for the production of documents or the giving of oral evidence by the Executive arm of Government. It is a question of practical and proper use of the power which the House enjoys. The Senate is in the same position and paragraphs 1 to 3 of the Senate Resolution of 16 July reiterate that position:

> (1) That the Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.
> (2) That, subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.
> (3) That the fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.

The question is 'what self-restraint should there be in the exercise of a theoretically unlimited power?' And 'what does the Senate do if a witness summoned fails to discharge "the obligation . . . to answer questions and produce documents"?'

The practice in the House of Commons was and remains as described in the following passage:

> The interest of the public in maintaining the confidentiality of official documents is recognised by our constitution. For example, when papers are called for by Parliament, the department is always understood to have the right to keep back documents the publication of which might be injurious to the public service, and I doubt whether it would be possible to find an instance where Parliament has insisted on the production of papers which the Minister responsible for the department has declared could not be produced without injury to the public interest.

(*Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co.* (1908) 46 S.L.R. 254 per Lord McLaren at page 257)

In Australia there has been no instance of either House of Parliament insisting on the giving of evidence or the production of documents in similar circumstances.

12. *'Crown' or 'Executive' privilege*

'Crown' or 'Executive' privilege as it is termed in the United States may theoretically be asserted in the Courts and in the Parliament.

The essential notion is that the deliberations of the Crown are confidential and that it is not in the public interest that they be disclosed, unless the Crown through its Executive Ministers so determines.

The concept of 'public interest' may be stated in a variety of ways, but is generally stated, in asserting a claim of privilege in the Parliament, that it is inimical to the interests of good government that public servants should be subject to 'Parliamentary inquisition' (see e.g. Sir Robert Menzies as quoted in the Prime Minister's letter of 15 July). This view stems from the notion that if advice is to be given freely and frankly it should be given confidentially. In the Courts the same general principle was applied when Crown privilege was claimed.

> It is well settled that, in the public interest, such documents should be written with the utmost candour and freedom of expression, that such candour and freedom of expression might be impared if such documents could be ordered to be produced in an action, and that accordingly their production would be so much to the prejudice of the public interest, that, however pertinent they might be to the issues in an action, they ought not to be produced.

(*Re Grosvenor Hotel* [1964] 3 A. E.R. 354 per Salmon L. J. at page 368)

In the 1968 case of *Conway* v. *Rimmer* ([1968] A.C. 910) the principle was asserted by Lord Reid in the following passage:

> I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet Minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity 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. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy.
>
> I do not think that it is possible to limit such documents by any definition. But there seems to me to be a wide difference between such documents and routine reports. There may be special reasons for withholding some kinds or routine document, but I think that the proper test to be applied is to ask, in the language of Lord Simon in *Duncan's case*, whether the withholding of a document because it belongs to a particular class is really 'nessary for the proper functioning of the public service'.

In *Conway* v. *Rimmer*, however, whilst reasserting the general principle referred to above, the House of Lords held that the certificate of a Minister was not always conclusive, and that, in certain circumstances, the Court was entitled to examine the documents to form its own opinion as to whether it was in the public interest that they be withheld. It is to be noted that this decision was in line with the practice in a number of countries where the concept of Crown or Executive privilege is maintained.

Prior to the decision in *Conway* v. *Rimmer* the practice of the Australian Parliament was consistent with the practice of the Courts. The principles on

which the Parliament proceeded are conveniently set out in the following summary of advice given by Sir Robert Menzies in 1953 and advice given by the Solicitor-General, Sir Kenneth Bailey, in 1956:

(i) The privilege involved is not that of the witness but that of the Crown.

(ii) If a witness attends to give evidence on any matter in which it appears that State secrets may be concerned, he should endeavour to obtain instructions from his Minister beforehand as to the questions, if any, which he should not answer.

(iii) If questions arise unexpectedly in the course of an inquiry, the witness should request postponement of the taking of his eveidence to enable him to obtain the instructions of his Minister through his Permanent Head.

(iv) If the Minister decides to claim privilege, he should furnish the committee with a certificate to that effect.

(v) Where the witness does not raise any question of privilege, although the matter is obviously one which could be the subject of privilege, the Chairman of the Committee should stop the evidence being given until the appropriate Minister has an opportunity to consider whether privilege should be claimed or whether a request should be made that the evidence be heard in private.

(vi) If a witness were to supply to the committee a certificate from the appropriate Minister to the effect that he regarded it as being injurious to the public interest to divulge information concerning particular matters, the committee should accept the certificate and not continue further to question a witness on these matters.

(vii) Should the Comittee regard the question of the line of inquiry being pursued as important for its purposes, the Chairman should arrange to discuss the matter with the appropriate Minister. The object of the discussion would be to arrange a method of making available to the committee such information as is requisite for its purposes without endangering the security of classified information.

(viii) Before deciding whether to grant a certificate, the Minister should carefully consider the matter in the light of the relevant principles.

(Greenwood and Ellicott, *Parliamentary Committees: Powers over and protection afforded to witnesses*)

Following the decision in *Conway* v. *Rimmer* the question arises whether that decision affecting the practice of the Courts should also affect the practice of the Parliament. Greenwood and Ellicott expressed the view that it should not, in the following terms:

> On this matter it is not easy to express a view which will satisfy the varying points of view on the question of the desirability of making executive information available. However, against the background of a system which is based on party Government and the responsibility of Ministers to Parliament, we think the preferable course is to continue the practice of treating the Minister's certificate as conclusive. If a House thought that a Minister was improperly exercising his power to grant a certificate it could, of course, withdraw its confidence in him.

One might add to this view the importance of the substantive difference in the nature of a Court from a House of Parliament, composed as it is of politicians of diverse political allegiances.

13. During the course of the deliberations of the Committee of Privileges a view was expressed that there was in fact no such thing as 'Crown privilege' recognised in the House of Commons in relation to disclosure of documents and the giving of evidence. Rather, it was suggested, there is a recognised practice or convention whereby the withholding of information by the Executive is respected by the House in the circumstances outlined above. This view gains some support from

May's *Parliamentary Practice* which makes no mention of 'Crown privilege' claimed in the course of parliamentary proceedings.

In Australia, the authorities on the subject consistently refer to it as 'Crown privilege' and the distinction, if it exists, may be no more than a semantic one. In either case it involves an assertion by the Executive of a claim to withhold information in the public interest. Whether such a claim is dealt with as an assertion of the Crown's privilege or as consistent with a constitutional convention is probably of minor importance.

PREVIOUS PRACTICE IN THE AUSTRALIAN PARLIAMENT

14. (a) *Powers and privileges of the Parliament*

There have been a number of references to the Committee of Privileges of the House of Representatives and the Committee of Privileges of the Senate relating to complaints of breach of privilege. These references, together with the minutes of proceedings of the Committees, are documented in Parliamentary Papers. The character of these references has varied considerably but they have included such matters as:

articles and letters in newspapers allegedly breaching parliamentary privilege,
prior publication of contents of committee reports,
commitment to prison of a member for civil debt,
misuse of a Hansard proof.

There has been no instance of a claim for 'Crown privilege' being considered by the Senate as a breach of the privileges of the Parliament, although on one occasion referred to below an opinion to this effect was expressed by a Committee.

(b) *'Crown privilege'*

In 1951 the Senate Select Committee on National Service in the Defence Force, comprising Labor Senators only, reported to the Senate that the Acting Prime Minister had directed the Chiefs of Staff of the armed services and other officers of the Commonwealth Service not to attend before the Select Committee in answer to a request to do so. The direction not to attend was based on 'public interest'. The Committee described the direction as 'an interference with the freedom of prospective witnesses' which could only be construed 'as calculated to defeat, hamper and obstruct the purpose which the Senate had in appointing the Select Committee'.

The Committee considered the direction a breach of privilege, but in the context that the claim of 'public interest' could not be made when the information was to be given to a committee sitting *in camera*. In 1953 and 1956 advice was given by Sir Robert Menzies and the Solicitor-General respectively on the question of the attitude which should be adopted by Ministers and public servants in asserting a claim of privilege. The advices given are summarised earlier in this report and a highly relevant section of the Solicitor-General's opinion is repeated in paragraph 3 of the Senate Resolution of 16 July 1975.

In November 1967 in relation to the dispute over the use of V.I.P. Aircraft the then Leader of the Opposition (Senator Murphy), gave notice of motion that (*inter alia*):

> . . . the Senate considers that the Government has failed to give any proper explanation or excuse for the untrue statements on V.I.P. aircraft and accordingly that:
> (a) the Secretary of the Department of Air be called to the Bar of the Senate, by

summons under the hand of the Clerk of the Senate, to give evidence upon the matters contained in the resolution of the Senate.

In this situation the documents which the Opposition had been seeking were tabled in the Senate and the motion was not proceeded with.

These instances are examples of situations in which the power and 'privileges of Parliament' have come into conflict with an assertion of 'Crown privilege' or executive immunity from disclosure. There has been no situation in which this conflict has come to a head and had to be resolved by the Senate.

NATURE OF THE REFERENCE TO THE COMMITTEE

16. The terms of the reference to the Committee of Privileges are set out in paragraph 2 of the Resolution of the Senate on 17 July 1975 (see paragraph 1 of this Report). The Resolution gives no guidance as to what the Senate requires the Committee to do with the matters referred, which are set out in clauses (a), (b) and (c) of paragraph 2 of the Resolution. The Committee is merely enjoined by paragraph 3 of the Resolution to report by 30 September.

The Resolution contains no complaint of breach of privilege as envisaged by Standing Order 33A. It is a reference 'at large'.

17. In the circumstances outlined earlier in this Report there is a temptation to construe the reference as an invitation to attempt a difinitive treatise on the notion of 'Crown privilege' asserted in the Parliament. In our view, such a construction would be undesirable, and, in any event, we believe it to be precluded by the specific terms of reference.

18. In the course of the Committee's deliberations it was suggested that the Committee should seek to have the reference discharged by the Senate and a further reference substituted. Such a further reference would require the Committee to examine the question of the powers asserted by the Senate and the concept of 'Crown privilege' as a question of principle, with a view to presenting a report which may be of value and guidance in the future. It was argued that this could only be done if the essential issues were abstracted from the politically emotive content of the 'loans crisis' and the Resolution of 17 July. Whilst the majority considered that the function of a Committee of Privileges would be discharged best if this approach were adopted, it was unacceptable to a minority of the Committee. The Committee accordingly decided to report on the specific matters referred.

19. Having regard to the specific terms of reference we conceive the function of the Committee of Privileges to be:
    (a) to determine whether the directions of the four Ministers on 15 July that public servants claim privilege were lawful and proper directions;
    (b) to consider whether such directions constituted a breach of the privileges of the Senate;
    (c) to consider the further directions of Ministers on 16 July that notwithstanding a rejection by the Senate of the claim of privilege the public servants summoned were not to answer any questions or produce any documents;
    (d) to consider whether such further directions of the Ministers on 16 July constituted a breach of the privileges of the Senate;
    (e) to consider the Solicitor-General's claim that he would not do anything inconsistent with the claim of privilege asserted by the Crown.

CONCLUSIONS ON THE REFERENCE

20. *The political nature of the reference*

In our opinion the Committee of Privileges was faced with an almost impossible task in trying to produce a Report which fulfilled the proper function of the Committee and, at the same time, provided something of permanent value to the Senate.

Quite apart from the misconceptions implicit in the terminology of the specific matters referred to the Committee (dealt with later in this Report), the first paragraph of the Senate Resolution of 17 July effectively precluded the members of the Committee who voted for that Resolution in the Senate from objectively assessing the merits or otherwise of the directions of the Ministers to claim privilege. The relevant portion of the first paragraph of the Resolution reads:

> The action of the Government in directing public servants called to the Bar of the Senate not to answer any questions is a massive cover-up . . .

That is a highly political allegation, about which there are, and will remain, differences of opinion in the Parliament and elsewhere. If, however, a person embraces that view of what took place, he is scarcely in a position to objectively evaluate the validity and propriety of the directions to claim privilege referred to the Committee. This comment is not intended as partisan criticism. It merely reflects a realistic appraisal of the nature of the Senate as a party political House, essentially incapable of exercising the function of an objective 'House of Review'.

THE SPECIFIC TERMS OF THE REFERENCE

21. *The directions of the Prime Minister, the Treasurer, the Attorney-General and the Minister for Minerals and Energy that public servants claim privilege*

The Senate was advised that such directions had been given to the President of the Senate in the letters dated 15 July.

It is not apparent whether the actual directions were given orally or in writing to the public servants concerned.

The essential point of the Prime Minister's letter was that the claim of privilege was asserted in the public interest, on the basis that, in accordance with the principle of Ministerial responsibility, 'officers do not decide, and are not responsible for, Government policy or Government action'.

The letters from the other Ministers each certified that 'the answering of any questions' by the public servants summoned 'would be detrimental to the proper functioning of the Public Service and its relationship to Government and would be injurious to the public interest'. There can, in my view, be no doubt that the directions given by the Ministers were valid and lawful directions. A Minister, as an Executive Officer of the Commonwealth, is entitled as a general principle to direct a public servant on any matter falling within the scope of his employment. The relationship between the Minister and the public servant is (subject to the qualifications of the Public Service Act) no different from the relationship which subsists between master and servant at common law. Only if the direction were, in itself, a direction to perform an unlawful act might it be construed as an unlawful direction. The direction to claim privilege before the Bar of the Senate was clearly not such a direction.

The propriety of the claim for privilege is a matter about which there may be continuing scepticism. But on the basis of the decided principles enunciated earlier in this Report the Ministers were clearly entitled to certify, as they did, that the undisclosed documents (if any) fell within a class of documents which were properly regarded as confidential communications. Similar considerations

apply 'in the public interest' to the claim for immunity from exposure of public servants to parliamentary interrogation. It is extremely doubtful if a court would have, in these circumstances, taken the view that it should go behind the Minister's certificate. In the parliamentary context of party government and Ministerial responsibility it would be improper to do so.

22. *Did such directions constitute a breach of the privileges of the Senate?*
May's *Parliamentary Practice* (17th edition, page 130) states:
'Any conduct which is calculated to deter prospective witnesses from giving evidence before either House of before Committees of either House is a breach of privilege'.

This statement is made as a general proposition without reference to specific circumstances in which a claim of 'Crown privilege' is asserted.

The directions of the Ministers were not that public servants should refrain from answering the summonses, but rather that they should not answer questions on the subject-matters in respect of which privilege was claimed. It is considered that a claim of Crown privilege properly asserted cannot logically constitute a breach of the privileges of a House of the Parliament. Nor can there be a breach of privilege unless the Senate so determines. The Senate did not do so.

23. *The further directions of the Ministers on 16 July that notwithstanding a rejection by the Senate of the claim of privilege the public servants summoned were not to answer any questions or produce any documents.*
It is important to consider the nature of these directions as contained in the Ministers' letters.

> In case there should be any misunderstanding of the position that I have directed you to take as a witness before the Senate, I direct that, if the Senate rejects the general claim of privilege made by you, you are to decline to answer any questions addressed to you upon the matters contained in the Resolution of the Senate and to decline to produce any documents, files or papers relevant to those matters. This direction does not, of course, prevent you from giving answers to formal questions that may be addressed to you by the Senate.

It has been suggested that this direction goes beyond a claim of 'Crown privilege' and constitutes a flagrant and 'blanket' direction to refuse to answer any questions in any circumstances.

On a proper construction of the Ministers' letters (of 15 and 16 July) it is considered that this view cannot be correct and that the correct interpretation may be summarised in the following terms:

(a) the direction of 15 July constituted 'a general claim of privilege' in respect of answers to *all* questions relating to the Resolution of the Senate;

(b) the directions of 16 July constituted an instruction that if the *general* claim of privilege relating to *all* questions were rejected by the Senate then in respect of each individual question asked ('*any* question') then the same claim of privilege was to be asserted.

On the basis of this construction the directions of 16 July were in no different position from the directions of 15 July and the same considerations apply.

24. *Did the further directions of the Ministers on 16 July constitute a breach of the privileges of the Senate?*
For reasons which were stated in the previous paragraph the answer to this question is the same as the answer given in paragraph 22.

25. *The claim of privilege made by the Solicitor-General*

This is the most puzzling of the specific terms of reference given to the Committee, because the Solicitor-General made no claim of privilege to the Senate.

The position asserted by Mr Byers, the Solicitor-General, is set out in his letter to the President of the Senate on 15 July, and again in the following passage of evidence recorded in Hansard of 16 July at page 2781:

> Senator WITHERS—As I understand your letter, you claim that because of your position as Solicitor-General you are entitled to claim privilege. Is that correct?
> Mr Byers—It is the Crown's privilege. It seems to me as Solicitor-General that I cannot do anything inconsistent with the privilege which the Crown asserts.
> Senator WITHERS—Has the Crown asserted privilege?
> Mr Byers—Yes.

and again at page 2782 of Hansard:

> It is because the Crown has made the claim in constitutional terms. I, as the Crown's second law officer, as it would seem to me, cannot do anything which is intentionally inconsistent with the privilege which the Crown asserts.

This is not a claim of Crown privilege. It is a claim which arises from the Solicitor-General's conception of his obligation as the Second Law Officer of the Crown in the situation where the Crown has claimed privilege. It is a claim entitled to the respect of the Senate and the Committee of Privileges and ancillary to the matters of 'Crown privilege' referred to above.

26. *Waiver of the right to claim 'Crown privilege'*

It has been suggested that by tabling various documents, including minutes of the Executive Council, the Ministers waived the right to claim 'Crown privilege' and that the Ministers' directions were accordingly improper. Even assuming that there were other relevant documents in existence, such a proposition would appear to be incorrect.

It is the Executive which claims the privilege and the immunity. It is the Executive which determines in respect of what matters the privilege is claimed on the grounds of public interest and it must as a corollary be for the Executive to determine in respect of what matters privilege is not claimed.

27. *The calling of members of the Public Service before the Bar of the Senate*

The proper functioning of government demands some degree of co-operation and consensus. If the integrity and efficiency of the public service are to be maintained there can be no justification in pursuing the theoretical powers of a House of the Parliament to the point where that integrity and efficiency of the public service, and its relationship with government, are threatened.

In a system of Ministerial responsibility and party government we have difficulty in conceiving of a situation in which the course adopted by the Senate on 9 July 1975 should again be followed. Insofar as Labor Senators have expressed views in the past which appear inconsistent with this view, we specifically dissent from their conclusions on this matter.

28. *The proceedings of the Senate on 9, 15 and 16 July 1975*

(a) The Resolution of the Senate of 9 July 1975 to summon public servants before the Bar of the Senate was described by the Leader of the Opposition in the Senate as 'a great adventure'. In fact the Senate embarked on a journey into uncharted waters without any apparent sense of direction.

In its Resolution of 16 July the Senate expressed in paragraphs 1, 2 and 3 of that Resolution a concept of the privileges of the Senate and the obligations of witnesses which we believe to be accepted by all members of the Committee.

In paragraph 4 of the Resolution, however, the Senate purported to set down the procedures which would be followed in the following terms:

> (4) That upon a claim of privilege based on an established ground being made to any question or to the production of any documents the Senate shall consider and determine each such claim.

The claim of privilege was asserted. The directions to claim privilege as a 'general claim' and in answer to *any* question were given to and followed by the witnesses. The Senate did not *consider* or *determine* any of the claims made.

The claims or assertions of Crown Privilege were simply not discussed.

It is apparent that the claims were not considered or determined because the consequences of such consideration and determination were too horrifying to contemplate. The Senate Opposition was faced with diminishing options. A 'consideration' and 'determination' of the assertions of Crown privilege could only have led to two possible alternative conclusions:

(i) the claims or assertions of 'privilege' were justified and proper and in the public interest, or

(ii) the claims or assertions of 'privilege' were unjustified and contrary to the public interest.

The first conclusion would have by implication involved a repudiation of the Resolution of 9 July.

The second conclusion would have involved the Senate in the possibility of punishing the witnesses for breaches of the privileges of the Senate.

Neither conclusion was politically acceptable to the Senate Opposition, and, faced with the consequences of the Resolution of 9 July, the Senate referred the matter to the Committee of Privileges on 17 July.

(b) The Resolution of 17 July is a reference of matters totally inconsistent with the apparent understanding of the Senate's role contained in the Senate Resolution of 16 July. The latter Resolution 'noted' the statements of the Ministers, and proceeded on the assumption that claims of privilege would be made by the witnesses, and that these claims would be adjudicated on by the Senate. The Senate abandoned this stated intention and proceeded with a reference to the Committee which in general, and in its specific terms, was misconceived for the reasons enunciated above.

(c) The Committee of Privileges was invited to report to the Senate in circumstances which are inconsistent with the role of that Committee as envisaged by Standing Order 33A and without the benefit of any complaint. The possibility of an objective assessment of the proper exercise of the Senate's powers was precluded. The circumstances make apposite the following extract from a statement of Professor Pitt Cobbett, submitted to a Joint Select Committee on Privilege in 1908:

> (a) A political assembly has never been, and never will be, capable of exercising judicial functions with that calmness and impartiality which are essential to their proper discharge.
> (b) Trial by an interested tribunal must always be foreign to British ideas of justice.

(Odgers, *Australian Senate Practice*, page 563)

(Signed)
J. N. BUTTON
Chairman

7 October 1975

APPENDIX

Letters, dated 15 July, to the President of the Senate from:

The Prime Minister
The Minister for Minerals and Energy
The Treasurer
The Attorney-General
The Solicitor-General

(see paragraph 7 of Report)

Letters, dated 16 July, to the President of the Senate from:

The Minister for Minerals and Energy, enclosing a copy of a letter bearing the same date from the Minister to Sir Lenox Hewitt
The Treasurer, enclosing a copy of a letter bearing the same date from the Treasurer to Sir Frederick Wheeler
The Attorney-General, enclosing a copy of a letter bearing the same date from the Attorney-General to Mr C. W. Harders.

(see paragraph 9 of Report)

PRIME MINISTER

CANBERRA

15 July 1975

My dear President,

I refer to the summonses which have been served on certain officers of the Australian Public Service and on the Solicitor-General to attend before the Senate on Tuesday 15 July 1975 and from day to day thereafter to answer questions, and to produce relevant documents, files or papers in their possession or control, upon the matters contained in the Resolution of the Senate of 9 July 1975. The Resolution, a copy of which was attached to each summons, is directed to the activities of Ministers and servants and agents of the Government, relating to dealings by them prior to and subsequent to the Executive Council meeting of 13 December 1974 authorising the Minister for Minerals and Energy to borrow a sum not exceeding four thousand million dollars in the currency of the United States of America for temporary purposes.

I write to you concerning the summonses that have been served on officers of the Public Service. The Solicitor-General, as the Second Law Officer under the Law Officers Act, is writing to you directly. The officers of the Public Service summoned will attend in accordance with the summonses. I wish to inform you, however, that each officer will be instructed by his Minister to claim privilege in respect of answers to all questions upon the matters contained in the Resolution of the Senate and in respect of the production of all documents, files and papers relevant to those matters.

The inquiry is plainly an inquiry into the Government policy and decisions of Government. The principle of Ministerial responsibility is, and must remain, the keystone of our Parliamentary system. In keeping with that principle, officers do not decide, and are not responsible for, Government policy or for Government action.

What I have just said reflects a time-honoured constitutional principle of the greatest importance. It is a principle that has been frequently stated and has been endorsed by, among others, Sir Robert Menzies who has written '. . . it would be curious and alarming if an anti-Government Senate could undermine the objectivity and non-political integrity of the Public Service by exposing its senior and most responsible officers to a Parliamentary inquisition from which they had a right to be immune and compelling their entry into a field of political debate'.

In the Government's view, the real intention of the non-Government parties in the Senate is to seek to avoid the normal and proper procedures of the Parliament.

The House of Representatives was specially convened on 9 July 1975 to debate the whole subject of overseas borrowings. There had previously been a debate in the Senate on 12 June on an Opposition urgency motion. Answers have been provided to 69 questions without notice on the general subject of overseas borrowings, 37 in the Senate and 32 in the House of Representatives, between 31 October 1974 and 12 June 1975. Of the 7 questions placed on notice, 6 have been answered already.

In the course of the proceedings in the House of Representatives on 9 July, the Leader of the Opposition tabled a series of 44 questions and all will be answered. He requested the tabling of certain documents and a response to this request will be given when the House of Representatives reconvenes on 19 August, although I add in that context that, in respect of the four Executive Council Minutes, the information sought has already been provided in answer to Senator Wright's Question No. 646 (Senate Hansard 9 July, pages 2723-4).

It is clear that the non-Government parties in the Senate have by no means fully tested this matter through the normal and proper Parliamentary procedures available

to them—in debate, in questions and, if necessary, in urgency motions or even no confidence motions. The House of Representatives was recalled so that the normal and proper Parliamentary procedures could apply. What the Opposition proposes is a procedure essentially foreign and contrary to established Parliamentary principles and practice.

I make plain the Government's view that what the Senate is seeking to do is to obtain through officers of the Public Service information and documents which should be sought from Ministers by the normal and proper procedures of the Parliament. In taking this course, the fundamental character of Ministerial responsibility is challenged. It is the Government—not the Public Service—that will answer in the Parliament any request, any challenge put to it. It is the Government—not the Public Service—that is responsible to the people. This is in accord with the principles on which our democracy is based. If these principles are successfully challenged, Government would become unworkable.

I am sending a copy of this letter to each of the Ministers concerned.

Yours sincerely,

(Signed)
E. G. WHITLAM

Senator the Hon. Justin O'Byrne
President of the Senate
Parliament House
CANBERRA, A.C.T. 2600

MINISTER FOR MINERALS AND ENERGY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

15 July 1975

Dear Mr President,

I have received from the Prime Minister a copy of his letter to you dated 15 July 1975 concerning the summonses issued and served pursuant to the Resolution of the Senate of 9 July 1975. I have sent a copy of that letter to the Secretary of my Department and have asked him to send a copy to each officer of the Department who has been summoned.

In accordance with long-established principles, I have directed officers of my Department who have been summoned to appear before the Senate to claim privilege in respect of answers to all questions upon the matters contained in the Resolution of the Senate and in respect of the production of all documents, files and papers relevant to those matters.

I certify that the answering of any questions upon the matters contained in the Resolution of the Senate and the production of any documents, files or papers relevant to those matters by officers of my Department would be detrimental to the proper functioning of the Public Service and its relationship to government and would be injurious to the public interest.

Yours sincerely,
(Signed)
R. F. X. CONNOR

Senator the Hon. J. O'Byrne
President of the Senate
Parliament House
CANBERRA, A.C.T.

TREASURER

PARLIAMENT HOUSE
CANBERRA 2600

15 July 1975

Senator the Hon. Justin O'Byrne
President of the Senate
The Senate
Parliament House
CANBERRA, A.C.T. 2600

Dear Mr President

I have received from the Prime Minister a copy of his letter to you dated 15 July 1975 concerning the summonses issued and served pursuant to the Resolution of the Senate of 9 July 1975. I have sent a copy of that letter to the Secretary of my Department and have asked him to send a copy to each officer of the Department who has been summoned.

In accordance with long-established principles, I have directed officers of my Department who have been summoned to appear before the Senate to claim privilege in respect of answers to all questions upon the matters contained in the Resolution of the Senate and in respect of the production of all documents, files and papers relevant to those matters.

I certify that the answering of any questions upon the matters contained in the Resolution of the Senate and the production of any documents, files or papers relevant to those matters by officers of my Department would be detrimental to the proper functioning of the Public Service and its relationship to government and would be injurious to the public interest.

Yours sincerely,
(Signed)
BILL HAYDEN

ATTORNEY GENERAL
CANBERRA

15 July 1975

Dear Mr President,

I have received from the Prime Minister a copy of his letter to you dated 15 July 1975 concerning the summonses issued and served pursuant to the Resolution of the Senate of 9 July 1975. I have sent a copy of that letter to the Secretary of my Department and have asked him to send a copy to each officer of the Department who has been summoned.

In accordance with long-established principles, I have directed officers of my Department who have been summoned to appear before the Senate to claim privilege in respect of answers to all questions upon the matters contained in the Resolution of the Senate and in respect of the production of all documents, files and papers relevant to those matters.

I certify that the answering of any questions upon the matters contained in the Resolution of the Senate and the production of any documents, files or papers relevant to those matters by officers of my Department would be detrimental to the proper functioning of the Public Service and its relationship to government and would be injurious to the public interest.

Yours sincerely,
(Signed)
KEP ENDERBY

Senator the Hon. Justin O'Byrne
President of the Senate
Parliament House
CANBERRA, A.C.T. 2600

SOLICITOR-GENERAL OR AUSTRALIA
CANBERRA, A.C.T.

15 July 1975

Dear Mr President,

May I refer to the summons and its attached Resolution which I received last Thursday, 10th inst. That Resolution recites the Senate's opinion 'that the Government has failed to give to the Parliament and the Australian people a proper, full and accurate account of the activities of its Ministers, servants and agents, relating to all dealings by them both prior to and subsequent to the Executive Council Meeting of 13 December 1974, which authorised the Minister for Minerals and Energy to borrow a sum not exceeding four thousand million dollars in the currency of the United States of America for temporary purposes' and states that the Senate resolves that a number of named persons of whom I am one be called to the Bar of the Senate 'to answer questions upon these matters'. The matters are the activities and dealings previously recited both prior to and subsequent to the Executive Council meeting of 13 December 1974.

It is apparent, therefore, that whatever opinions I may have expressed in order that ultimately members of the Federal Executive Council might advise the Crown fall within its terms. The Act (the *Law Officers Act* 1964-1968) under which I was appointed provides that the Solicitor-General of the Commonwealth 'shall be the second Law Officer of the Commonwealth' and is to be appointed by the Governor-General. That is, the Solicitor-General is the second Law Officer of the Crown. The point of my mentioning this is but to indicate that I stand in a constitutional relationship to the Crown in which under the Constitution the Executive power of the Commonwealth alone is vested.

It is a well-recognised constitutional principle that the deliberations of the Crown are secret. To quote Sir Owen Dixon: 'The counsels of the Crown are secret and an inquiry into the grounds upon which the advice tendered proceeds may not be made for the purpose of invalidating the act formally done in the name of the Crown by the Governor-General in Council'. The passage I have quoted may be found in his judgment in *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1 at 179. The principle is reflected in the oath taken by members of the Federal Executive Council which presumably in this respect derives from that taken by a Privy Counsellor. This latter oath is set out in full in *Anson's Law and Custom of the Constitution* (1935), 4th ed., vol. II, Part I, p.153. The relevant part of each is, of course, the obligation of secrecy.

In addition the right of the Crown or what is legally the same thing, the Executive, to claim privilege is clear enough. The accepted practice as mentioned in paragraphs 127 (as to the House of Commons) and 136 (as to the Courts) in Parliamentary Paper 1972 No. 168, *Parliamentary Committees: Powers over and protection afforded to witnesses* by Senator the Honourable I. J. Greenwood, Q.C., and Mr R. J. Ellicott, Q.C., is that this privilege extends to opinions of the Law Officers. The principle applies whether they be written or oral. The Crown has claimed its privilege. As one of its Law Officers, I may not consistently with my constitutional duty intentionally act in opposition to its claim.

The above considerations and much anxious thought have compelled me to conclude that I must object to answer any question relating to the Resolution that may be put to me, for should I answer any, the claim to privilege may be to that extent

defeated. Naturally, I shall attend the Senate in answer to the summons issued by it as one of the constitutional organs of government.

I have taken the liberty of writing this letter to you, Mr President, in the hope that you will inform the Senate of it and in the wish that it may receive prior notice of the position I have felt impelled to adopt.

Yours sincerely,
(Signed)
M. H. BYERS
Solicitor-General of Australia

The Hon. Justin O'Byrne
President of the Senate
Parliament House
CANBERRA

MINISTER FOR MINERALS AND ENERGY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

16 July 1975

Dear Mr President,

I refer to my letter to you dated 15 July 1975 concerning the summonses issued and served pursuant to the Resolution of the Senate of 9 July 1975.

Having regard to the course that proceedings in the Senate have taken yesterday and today, I have given further directions to the Secretary of my Department in relation to the matter of claiming privilege in respect of answers to questions upon the matters contained in the Resolution of the Senate of 9 July 1975 and in respect of the production of any document, file or paper relevant to those matters. Those directions are included in a letter that I addressed to the Secretary today. A copy of that letter is enclosed for your information and for the information of the Senate. I draw your attention to the fact that the directions in that letter are to be conveyed by the Secretary to Mr J. T. Larkin of my Department who has been summoned as a witness before the Senate and that he is to be informed of my intention that those directions apply to him in the same way as they apply to the Secretary.

Yours sincerely,
(Signed)
R. F. X. CONNOR

Senator the Hon. J. O'Bryne
President of the Senate
Parliament House
CANBERRA, A.C.T.

MINISTER FOR MINERALS AND ENERGY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

16 July 1975

Dear Sir Lenox,

I am writing to you today to expand upon my letter to you dated 15 July 1975 in relation to the summonses issued by the Senate and served upon you and Mr J. T. Larkin of my Department.

In case there should be any misunderstanding of the position that I have directed you to take as a witness before the Senate, I direct that, if the Senate rejects the general claim of privilege made by you, you are to decline to answer any questions addressed to you upon the matters contained in the Resolution of the Senate and to decline to produce any documents, files or papers relevant to those matters. This direction does not, of course, prevent you from giving answers to formal questions that may be addressed to you by the Senate.

I shall be glad if you will arrange for a copy of this letter to be handed to Mr Larkin. I ask you to convey to Mr Larkin the direction that I have addressed to you in the second paragraph of this letter, and to inform him that it is my intention that that direction should apply to him in the same way as it applies to you.

Yours sincerely,
(Signed)
R. F. X. CONNOR

Sir Lenox Hewitt, O.B.E.
Secretary
Department of Minerals and Energy
CANBERRA, A.C.T. 2600

TREASURER

PARLIAMENT HOUSE
CANBERRA 2600

16 July 1975

Senator the Hon. Justin O'Byrne
President of the Senate
The Senate
Parliament House
CANBERRA, A.C.T. 2600

Dear Mr President,

I refer to my letter to you dated 15 July 1975 concerning the summonses issued and served pursuant to the Resolution of the Senate of 9 July 1975.

Having regard to the course that proceedings in the Senate have taken yesterday and today, I have given further directions to the Secretary of my Department in relation to the matter of claiming privilege in respect of answers to questions upon the matters contained in the Resolution of the Senate of 9 July 1975 and in respect of the production of any document, file or paper relevant to those matters. Those directions are included in a letter that I addressed to the Secretary today. A copy of that letter is enclosed for your information and for the information of the Senate. I draw your attention to the fact that the directions in that letter are to be conveyed by the Secretary to the other officers of my Department who have been summoned as witnesses before the Senate and that they are to be informed of my intention that those directions apply to them in the same way as they apply to the Secretary.

Yours sincerely,
(Signed)
BILL HAYDEN

TREASURER

PARLIAMENT HOUSE
CANBERRA 2600

16 July 1975

Sir Frederick Wheeler, C.B.E.
Secretary
The Treasury
PARKES, A.C.T. 2600

Dear Sir Frederick,

I am writing to you to expand upon my letter to you dated 15 July 1975 in relation to the summonses issued by the Senate and served upon you and other officers of my Department.

In case there should be any misunderstanding of the position that I have directed you to take as a witness before the Senate, I direct that, if the Senate rejects the general claim of privilege made by you, you are to decline to answer any questions addressed to you upon the matters contained in the Resolution of the Senate and to decline to produce any documents, files or papers relevant to those matters. This direction, does not, of course, prevent you from giving answers to formal questions that may be addressed to you by the Senate.

I shall be glad if you will arrange for a copy of this letter to be handed to Messrs Stone, Prowse, Whitelaw, Bailey and Hay. I ask you to convey to Messrs Stone, Prowse, Whitelaw, Bailey and Hay the direction that I have addressed to you in the second paragraph of this letter and to inform them that it is my intention that that direction should apply to them in the same way as it applies to you.

Yours sincerely,
(Signed)
BILL HAYDEN

ATTORNEY GENERAL OF AUSTRALIA
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

16 July 1975

Dear Mr President,

I refer to my letter to you dated 15 July 1975 concerning the summonses issued and served pursuant to the Resolution of the Senate of 9 July 1975.

Having regard to the course that proceedings in the Senate have taken yesterday and today, I have given further directions to the Secretary of my Department in relation to the matter of claiming privilege in respect of answers to questions upon the matters contained in the Resolution of the Senate of 9 July 1975 and in respect of the production of any document, file or paper relevant to those matters. Those directions are included in a letter that I addressed to the Secretary today. A copy of that letter is enclosed for your information and for the information of the Senate. I draw your attention to the fact that the directions in that letter are to be conveyed by the Secretary to the other officers of my Department who have been summoned as witnesses before the Senate and that they are to be informed of my intention that those directions apply to them in the same way as they apply to the Secretary.

Yours sincerely,
(Signed)
KEP ENDERBY
Attorney-General of Australia

Senator the Hon. Justin O'Byrne
President of the Senate
Parliament House
CANBERRA, A.C.T. 2600

ATTORNEY GENERAL OF AUSTRALIA
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

16 July 1975

Dear Mr Harders,

I am writing to you today to expand upon my letter to you dated 15 July 1975 in relation to the summonses issued by the Senate and served upon you and other officers of my Department.

In case there should be any misunderstanding of the position that I have directed you to take as a witness before the Senate, I direct that, if the Senate rejects the general claim of privilege made by you, you are to decline to answer any questions addressed to you upon the matters contained in the Resolution of the Senate and to decline to produce any documents, files or papers relevant to those matters. This direction does not, of course, prevent you from giving answers to formal questions that may be addressed to you by the Senate.

I shall be glad if you will arrange for a copy of this letter to handed to Mr A. C. C. Menzies and Mr D. J. Rose. I ask you to convey to Mr Menzies and Mr Rose the direction that I have addressed to you in the second paragraph of this letter and to inform them that it is my intention that that direction should apply to them in the same way as it applies to you.

Yours sincerely,
(Signed)
KEP ENDERBY

Mr C. W. Harders, O.B.E.
Secretary
Attorney-General's Department
CANBERRA A.C.T. 2600

ADDENDUM BY SENATOR EVERETT

I concur in the report prepared by the Chairman of the Committee. I agree with his analysis of the functions of the Committee in the light of what I regard as the proper interpretation of its terms of reference. I also agree with his conclusions and the reasons he has expressed for reaching them.

However, I desire to add some comments in order to emphasise what I regard as the mistaken basis of the reference.

If the resolution of the Senate constituting the reference was really intended to generate an exposition by the Committee of the general principles relating to Crown privilege with respect to the exercise by the Senate of its constitutional powers, it would be difficult to conceive of any less appropriate approach than the resolution of 17 July 1975. Nor have I been able to find any precedent remotely resembling it.

The terms of the resolution begin with an inflammatory assertion that the Government had been guilty of a 'massive cover-up' in relation to the overseas loans issue. The anti-Government majority in the Senate, having reached this clear-cut view, proceeded, within the terms of the same resolution, to refer to the Committee of Privileges the very matter in which it had condemned the Government in such forthright terms. It chose as the vehicle for the further consideration of the matter a Committee of the Senate which included three Opposition Senators who, by their speeches in the Senate and their support of the first part of the resolution, had clearly indicated their views as politicians. The resolution was therefore hardly calculated to enhance the stature of the Committee of Privileges. It was also calculated to give the public the impression that the exercise was merely a final, clumsy attempt by anti-Government Senate forces to extricate themselves from a position into which they had blundered by an excess of party political zeal.

The Hansard record of the proceedings in the Senate to which the Chairman has referred in his report shows a confusion of attitude by anti-Government Senators.

On 16 July 1975, on the motion of the Leader of the Opposition, the Senate resolved, *inter alia*, in relation to the projected appearance before it of a number of public servants and the Solicitor-General:

> ...
>
> (4) That upon a claim of privelege based on an established ground being made to any question or to the production of any documents the Senate *shall* consider and determine each such claim.

Despite this resolution, no member of the Senate chose to attempt to initiate any 'consideration' or 'determination' of the claim of privilege on behalf of the Crown which was made by all the witnesses who were members of the Public Service and, for different reasons which he expressed, by the Solicitor-General. *The Senate acquiesced in the claims.* Its bona fides in subsequently proceeding to make the reference to the Committee of Privileges in the terms in which it chose to do so could therefore be open to question.

Because this view of the reference seemed to me clearly arguable, an attempt was made during the Committee's deliberations to initiate a reconstruction of the reference, in the hope that a reference could be made to the Committee which would permit a consideration of the question of Crown privilege in relation to the Senate without the political overtones which the existing reference bears. Regrettably that suggestion was not acceptable to the Opposition members of the Committee and therefore was not pursued.

I consider that, in the light of the history of the Senate's consideration of the whole overseas loans issue, and having regard to the terms of the resolution, especially the first paragraph, which is the basis of the Committee's power to investigate and report, it would be improper for any deeper expression of the general principles to be enun-

ciated than the Chairman in his report has chosen to undertake. I repeat that I agree with his views.

I am unable to escape the conclusions that a majority of the members of the Senate, anxious to exercise their powers in a political situation which they had begun by relishing, found themselves in a situation which became increasingly unpalatable and politically unrewarding. They sought to salvage some political credibility by forcing this inappropriate reference through the Senate. This might be an acceptable exercise in party politics, but in my opinion it is an improper resort to the time-honoured procedure of invoking the serious consideration and judgment of a Committee of Privileges.

ADDENDUM BY SENATORS DEVITT AND MULVIHILL

We have read the Report prepared by the Chairman of the Committee and agree with the conclusions which he has reached in relation to the reference to the Committee.

We would like to emphasise the view that the Committee could not perform its function properly and provide an adequate report to the Senate in the circumstances in which this reference was made to the Committee.

We also think it worthwhile to draw a distinction between the circumstances in which Crown privilege might be claimed by witnesses in the Senate Chamber and circumstances which might come before a Committee of the Senate. In the latter situation there has been little difficulty in the past in having the matter resolved *in camera* or by consultation with the Minister concerned. In the Senate Chamber, it is a completely different situation. For example, the Minister is present in the Senate Chamber and answerable to the Senate. In our experience a Minister has never been called before a Committee, though it is common for public servants to do so.

Index to Dissenting Report of Senators Greenwood, Webster and Wright

DISSENTING REPORT OF SENATORS GREENWOOD, WEBSTER AND WRIGHT

PART A

A. 1 During the financial year 1974–75 Australian Government finances were in crisis. The Government found it necessary in the half-year June to December 1974 to introduce two Supplementary Budgets. In December Mr Crean was displaced by Dr J. Cairns as Treasurer. The budget shortfall mounted alarmingly, and the year finished with an unprecedented deficit in Consolidated Revenue of 2.5 thousand million dollars—about five times the budget figure. Inflation through the year was recorded at 16.7%.

A. 2 The Minister for Minerals and Energy, Mr Connor, has stated the circumstances of the proposal for overseas borrowing in the House of Representatives (9.7.75) p. 3611. He said Australia still imports $700 million worth of crude oil yearly. He said this would be escalated. A projected increase of up to 35% could raise Australia's pay-outs to $1 thousand million annually. 'In this situation, which I forecast in April 1973, it was no less than my duty to present to the Prime Minister, and my senior colleagues, a plan for *direct overseas borrowing* of $A3 thousand million—equal to *$US $4 thousand million*—to deal with this menace' he said.

A. 3 In the Senate on 12 June 1975 Senator the Hon. J. McClelland tabled an Executive Council Minute. It recorded a decision on 13 December to authorise the Minister for Minerals and Energy to borrow *US$4 thousand million* for what was called *'temporary purposes'*. The Minute was as follows:

> WHEAREAS the Commonwealth of Australia (hereinafter called 'Australia') proposes to borrow a sum not exceeding Four thousand million dollars in the currency of the United States of America *(US $4 000 000 000)* for *temporary purposes;*

NOW IT IS RECOMMENDED for the approval of His Excellancy the Governor-General, acting with the advice of the Federal Executive Council, that, in pursuance of section 61 of the Constitution:

(a) the Minister for Minerals and Energy be authorised *to borrow for temporary purposes* a sum in the currency of the United of America not exceeding the equivalent of Four thousand million dollars and to determine on behalf of Australia the terms and conditions of the borrowing;

(b) the Minister for Minerals and Energy, or any other person authorised by him in writing for the purpose, be authorised for and on behalf of Australia to approve, enter into and *sign any necessary documents* for the purpose of making the said borrowing, including a Promissory Note;

(c) the Minister for Minerals and Energy, or any other person authorised by him in writing for the purpose, be authorised, for and on behalf of Australia, *to issue and deliver any such Promissory Note;* and

(d) the Minister for Minerals and Energy, and such other person or persons as he appoints in writing, be authorised for and on behalf of Australia to take *any other action* and execute any other documents required or permitted to be taken or executed for the purpose of making the said borrowing.

E. G. Whitlam, Q.C., M.P.
J. F. Cairns, M.P.
L. Murphy, Q.C.
R. F. X. Connor, M.P. Minister for Minerals and Energy.

R = House of Reps Hansard S = Senate Hansard

The explanatory memorandum which was attached to the Minute was also tabled at the same time (R 3595).

> The Australian Government needs immediate access to substantial sums of non-equity capital from abroad for temporary purposes, amongst other things to deal with exigencies arising out of the current world situation and the international energy crisis, to strengthen Australia's external financial position, to provide immediate protection for Australia in regard to supplies of minerals and energy and to deal with current and immediately foreseeable unemployment in Australia.

A. 4 But Mr Connor said that he presented a full list of urgent energy items, not only to his co-signatories of the Executive Council Minute, but also in the presence of the Secretary of the Treasury and the Governor of the Reserve Bank. He said that the Secretary of the Treasury had consistently opposed the project 'and strongly objected' to inclusion of the Treasurer's name on the Minute (R 3611).

The list referred to was subsequently tabled. The following is a copy:

	$A million
(1) Pipeline, Cooper Basin—Palm Valley	220
(2) Pipeline, Palm Valley—Dampier	400
(3) Pipeline, Dampier—Perth	350
(4) Submarine Pipeline, Dampier—North Rankin	225
(5) Petrochemical Plant, Dampier (Govt share)	750
(6) 3 Uranium Mining and Milling Plants	225
(7) Cooper Basin—Refinancing of field recovery	200
(8) Cooper Basin—Liquids line to Redcliffs	40
(9) Railway Electrification	150
(10) Coal Hydrogenation	200
(11) Coal Exporting Harbours—Upgrading	200
	2960
	= US$ 3900m.

Of them, the Prime Minister (R 3599) said 'These are the great, the challenging uses to which we were contemplating putting the funds'. He referred to the projects (R 3598) as 'projects of immense scope and great consequence . . . These projects involve immense sums of money'.

The above is relevant to the legality of the borrowing, because under the Financial Agreement Act, provided for in section 105A of the Constitution, it is not lawful for the Australian Government to borrow moneys, without Loan Council approval, except for (a) defence loans approved by the Australian Parliament and (b) loans for temporary purposes. The proposal for this borrowing had not been made to the Loan Council; nor had its approval been sought.

At the time of the proposed borrowing, the total accumulated debt of the Australian Government for overseas loans for Commonwealth purposes, for the whole of this century, amounted to 1013 million dollars: about one-quarter of the amount of the proposed loan.

No public statement of the proposed loan was made. To questions in Parliament some brief information was given. The loan was not achieved.

A. 5 The then Treasurer (Dr Cairns) engaged in efforts to raise a loan overseas through a Mr Harris. He gave Mr Harris a letter reading as follows: (R 3594)

SECRET

TREASURER
Parliament House
Canberra 2600

7 March 1975

Alco International Pty Ltd
6 Southam Court,
BULLEEN, Vic. 3105

Attention: Mr George Harris

Dear Sir,

The Australian Government is interested in exploring available loan funds from overseas. In the event of a successful negotiation which may be introduced or arranged by you, and provided the interest rate for a term loan does not exceed 8% per annum in total, we would be prepared to pay a once only brokerage fee of 2½% deducted at the source to you and/or your nominees. We would need to be satisfied about the sources of the funds and the size of the loan would have to be appropriate to our needs.

Yours sincerely,
(Signed) J. F. CAIRNS

SECRET

On 4 June (R 3294 & 3594) Dr Cairns as Treasurer answered the following questions:

MR LYNCH—I ask the Treasurer: Did he, in a letter dated on or about 5 March, offer a commission of 2½ per cent on any loan money arranged by the recipient of the letter or his company?

Dr J. F. CAIRNS—The answer is no. At no stage did I offer a commission of 2½% or any other amount or give any authority whatever to any person to do anything other than make inquiries.

Mr Malcolm Fraser—No brokerage fee?

Dr J. F. CAIRNS—No brokerage fee. Would the honourable member like to ask more questions?

A. 6 The day after the House of Representatives adjourned for the winter recess, on 6 June, the Prime Minister reconstructed his Ministry—Dr Cairns, the Treasurer, was demoted from Treasurer to Minister for the Environment; Hon. W. Hayden was appointed Treasurer.

A. 7 Strong public controversy developed over these major loan negotiations and incidental matters.

The Government suffered defeat in the by-election in Bass after the resignation of the Minister for Defence. The majority for the opposition candidate was a record.

A. 8 On July 2, the Prime Minister recommended to the Governor-General termination of the Treasurer's commission on the ground of his false answer to the question in Parliament set out above and because his private secretary, his son Mr Phillip Cairns, had entered into negotiations out of which he could possibly profit by use of his office.

The Prime Minister was to say of this in Parliament on July 9 (R 3557) 'This dismissal of a Deputy Leader from the Ministry, particularly one held in the regard—the affection—of his Party . . . is a tragedy for all the Party, not least its Leader'.

A. 9 Under Labor Party rules it was necessary for the Caucus of that Party—i.e. all the Labor Members of Parliament—to meet to elect to the Ministry a replacement for the Minister for Defence. This meeting was called for July 14. While this meeting was pending, on 5 July the Prime Minister announced that the House of Representatives would be recalled from its winter recess to discuss the overseas loans controversy.

A.10 The Senate, in which the Government has not a majority, had debated the loans issue as a matter of urgency on 12 June; and in anticipation of unusual developments, resolved to adjourn for the winter recess subject to the right of the Opposition to require the President to recall Senators. When the Prime Minister announced the reconvening of the House of Representatives, the Opposition required the Senate to be recalled. Both Houses assembled in Parliament on 9 July.

A.11 On that day in the House of Representatives the proceedings were confined to the loans issue. The Prime Minister and other Ministers tabled papers as to negotiations for loan raisings, both by the Minister for Minerals and Energy and the ex-Treasurer, Dr Cairns. The Ministers concerned made statements on the matter. The Opposition claimed that the documents tabled were selected and incomplete, and the Opposition continued to demand the appointment of a Royal Commission presided over by a Judge to investigate the whole issue. The Prime Minister opened the debate by saying 'This House has been recalled so that once and for all the people of Australia may hear and judge any allegations of impropriety, illegality, malpractice or malfeasance against the Government or any Minister . . . This is the tribunal in which the Opposition as much as the Government will be judged—in the highest court by the jury of the people. We are all on trial now'. (R 3556) The Leader of the Opposition, the Hon. Malcolm Fraser, stated the Prime Minister 'said that once and for all it will be decided today in this Parliament. Unfortunately that will not be so, because we have only selected documents . . . The Prime Minister said he does not want a royal commission because a royal commission can only get at the facts. That is just what we want . . . and this Parliament and the people are entitled to the facts of this sorry and sordid afffair'.

A.12 The Senate resolved on that day that it was 'of the opinion that the Government has failed to give the Parliament and the Australian people a proper, full and accurate account of the activities of its Ministers, servants and agents relating to all dealings by them both prior to and subsequent to the Executive Council meeting of 13 December 1974 which authorised the Minister for Minerals and Energy to borrow a sum not exceeding 4000 million dollars in the currency of the U.S.A. for temporary purposes; and, because the Government refuses to appoint a Royal Commission with proper and adequate terms of reference to investigate and report upon all aspects of the Government's overseas loan activities, the Senate resolves:

(1) (a) That the following persons be called to the Bar of the Senate, by summons under the hand of the Clerk of the Senate, on Tuesday, 15 July 1975, at half past two p.m., and from day to day until the Senate otherwise orders—

Sir Frederick Wheeler, C.B.E.—Secretary, the Treasury
Mr J. O. Stone—Deputy Secretary (Economic), the Treasury
Mr R. J. Whitelaw, O.B.E.—First Assistant Secretary, Overseas Economic Relations Division, the Treasury

Mr A. R. G. Prowse—First Assistant Secretary, Revenue, Loans and Investment Division, the Treasury
Mr A. P. Bailey—Assistant Secretary, Revenue, Loans and Investment Division, the Treasury
Mr I. Hay—Revenue, Loans and Investment Division, the Treasury
Sir Lenox Hewitt, O.B.E.—Secretary, Department of Minerals and Energy
Mr J. T. Larkin—First Assistant Secretary, Energy Planning Division, Department of Minerals and Energy
Mr C. W. Harders, O.B.E.—Secretary, Attorney-General's Department
Mr M. H. Byers, Q.C.—Solicitor-General
Mr A. C. C. Menzies—First Assistant Secretary, Advisings Division, Attorney-General's Department
Mr D. J. Rose—Senior Assistant Secretary, Advisings Division, Attorney-General's Department

and such other person or persons as the Senate determines—to answer questions upon *these matters* and to produce all documents, files or papers in their possession, custody or control relevant to *these matters* which have not been tabled in either House of the Parliament.

The Senate adjourned until 15 July.

A.13 On 15 July the President announced that he had received certain documents from the Prime Minister and other Ministers, and from the Solicitor-General (S 2728). The Prime Minister's letter, dated 15 July, addressed to the President, stated that the public servants would attend but 'that each officer will be *instructed* by his Minister to claim *privilege* in respect of answers to *all* questions upon the matters contained in the resolution of the Senate and in respect of the production of *all* documents, files and papers relevant to those matters'. The letter went on to argue:

(a) that the principle of ministerial responsibility was a keystone of our Parliamentary system; and in keeping with that principle officers do not decide and are not responsible for Government policy or actions;
(b) that the real intention of the Senate was to avoid normal and proper procedures of the Parliament;
(c) that answers had been given in the Senate to 37 questions without notice and in the House of Representatives to 32 questions;
(d) 'I make it plain the Government's view is that what the Senate is seeking to do is to obtain through officers of the Public Service information and documents which should be sought from Ministers by the normal and proper procedures of the Parliament. In taking this course, the fundamental character of Ministerial responsibility is challenged. It is the Government—not the Public Service—that will answer in the Parliament any request, any challenge put to it. It is the Government—not the Public Service—that is responsible to the people. This is in accord with the principles on which our democracy is based. If these principles are successfully challenged, Government would become unworkable.'

The President also read to the Senate letters from each of the Minister for Minerals and Energy, the Treasurer and the Attorney-General dated on the same day. The letters were to the effect that the Minister had sent to the Secretary of his Department a copy of the Prime Minister's letter, and added:

> In accordance with long-established principles, I have directed officers of my Department who have been summoned to appear before the Senate to claim privilege in respect of answers to *all* questions upon the matters contained in the

Resolution of the Senate and in respect of the production of *all* documents, files and papers relevant to those matters.

I certify that the answering of any questions upon the matters contained in the Resolution of the Senate and the production of any documents, files or papers relevant to those matters by officers of my Department would be *detrimental to the proper functioning of the Public Service and its relationship to government, and would be injurious to the public interest.*

A.14 The Senate adjourned until the next day, and, on 16 July agreed to a motion moved by the Leader of the Opposition in the Senate (Senator R. G. Withers) as follows:

That the Senate notes the statements contained in the letters of the Prime Minister, and of the Minister for Minerals and Energy, the Treasurer, the Attorney-General and the Solicitor-General addressed to the President of the Senate, and declares and resolves:

(1) That the Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by section 49 of the Constitution and *has the power to summon persons to answer questions* and *produce documents files and papers.*

(2) That, *subject* to the determination of all just and proper claims of privilege which may be made by persons summoned, *it is the obligation* of all such persons to answer questions and produce documents.

(3) That the fact that a person summoned is *an officer of the Public Service*, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.

(4) That, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim.

The Senate adjourned for lunch.

Upon resumption, after lunch, (S 2762) the President announced that he had received from each of the Ministers concerned, the Minister for Minerals and Energy, the Treasurer and the Attorney-General, a letter advising the President that 'having regard to the course that proceedings in the Senate have taken yesterday and today' the Minister had given a letter to the Secretary of his Department in which the Secretary was asked to arrange that a copy of the letter be handed to the officers summoned from his Department and convey to them 'the direction that I have addressed to you in the second paragraph of this letter, and to inform them that it is my intention that the direction should apply to them in the same way as it applies to you'. In the Minister's letter to the Head of the Department he wrote, 'In case there should be any misunderstanding of the position that I have directed you to take as a witness before the Senate, I direct that, *if the Senate rejects the general claim of privilege made by you*, you are to decline to answer any questions addressed to you upon the matters contained in the Resolution of the Senate and to decline to produce any documents, files or papers relevant to those matters. This direction does not, of course, prevent you from giving answers to formal questions that may be addressed to you by the Senate'.

The Senate proceeded to the examination of the witnesses, after adopting the following Resolution:

(1-9) . . .

(10) A witness who is a departmental officer may be asked to state facts, and explain any aspect of Government policy relevant to the inquiry and how it

was arrived at, but may object to giving answers to questions which require him to express a personal opinion.

(11) . . .

(12) A witness asked a question, or asked to produce documents, which in his opinion could be contrary to the public interest to answer or produce shall have an opportunity to consult with his Minister on the matter . . .

(13) The foregoing rules shall in no way restrict the mode in which the Senate may exercise and uphold its powers, privileges and immunities.

Each of the witnesses, acting as they said, under the directions of the Ministerial letters, declined to answer *any* questions. So, the Senate, on 16 July, discharged the witnesses from further attendance.

A.15 On 17 July the Senate, without itself determining the questions of privilege, carried the following Resolution:

(1) The action of the Government in directing public servants called to the Bar of the Senate not to answer questions is a massive cover-up of the Government's involvement in the attempted raising of overseas loans; and therefore the Senate renews its call for the Government to appoint a Royal Commission consisting of at least one Judge and with proper and adequate terms of reference.

(2) Notwithstanding anything contained in the Standing Orders, there be referred to the Committee of Privileges:

(a) the direction of the Prime Minister, the Treasurer, the Attorney-General and the Minister for Minerals and Energy that public servants claim privilege;

(b) the further direction of Ministers that notwithstanding any rejection by the Senate of such claim of privilege the public servants summoned were not to answer any questions or produce any documents; and

(c) the further claim of privilege made by the Solicitor-General.

(3) That the Committee of Privileges report by 30 September 1975.

(4) That, notwithstanding anything contained in the Standing Orders, the Privileges Committee for the purposes of its inquiry and report shall have power to send for persons, papers and records—

So referring those questions of privilege to the Committee for report.

A.16 Although some information had been given by Ministers and some documents tabled, clearly many questions, both as to the financial wisdom and the legality of the Ministers' actions in the negotiations, remained to be answered. These questions concerned *(inter alia)*:

(a) What was the original authority (if any) of Mr Connor to initiate negotiations with Mr Khemlani (the proposed lender or lender's go-between).

(b) The effect on the public credit of Australia.

(c) The size of the loan proposed, US$4000 million, described by Mr Connor as 'peanuts' (R 3611).

(d) The purposes of the loan were described as 'temporary purposes'. They were specified in the explanatory memorandum attached to the Executive Council Minute of 13 December (see paragraph 4 above).

(e) These purposes do not correspond with the list of projects which Mr Connor said he had presented to the Executive Council and which are set out above (see paragraph 4 above). These projects involve an enormous program of capital public works which no sensible person would consider could be completed within 10 years.

(f) The documents tabled in the House on 9 July (R 3613) included a Treasury statement in respect of 'all unsolicited offers of overseas funds'. 'The follow-

ing rigorous set of conditions must be satisfied *before* substantive negotiations may be undertaken . . .
(v) offer must satisfy *Loan Council*'

(g) The documents tabled in the House on 9 July, (presumably) drafted by Departmental officers, upon a visit by Mr Khemlani to Canberra on 7 December (R 3614), included:

(i) The very first letter from Sir Lenox Hewitt to Mr Khemlani, 12 November, referred to the loan as 'repayable at the end of *20 years*' (R 3613). Dr Cairns in his statement 5 June (R 3563) said: 'We decided it was wise to investigate possibilities . . . to arrange suitable *long-term* loans'.

(ii) On 1 December Mr Kehmlani wrote a letter jointly to Mr Connor and Mr Cameron 'At the moment the loan is to become available from 6 December 1974 . . . I shall be able to arrange matters in a way so that completion shall be 15 December 1974'.

(iii) Memorandum of advice (R 3615) 8 December referring to 'interest cumulative for *20 years*', 'over 20-year period' and the loan 'could be expressed as a loan of $A 13.385 million at 7.95% drawn down as to $A3036 million forthwith, and the balance over *20 years*, at *the end of which* the total is repayable in full' p. 3615. The reference to the *20 year term of the loan* is repeated on R 3623 and twice on R 3624.

(iv) Draft acceptance (R 3615) given to Mr Khemlani on 16 December reading in part 'The Australian Government accepts the offer made to it of loan of four thousand million US dollars (US$4 000 000 000) . . . secured by . . . a promissory note . . . interest compounded . . . *over twenty (20) years . . .*'
(R 3615 R 3618).

(v) The draft acceptance (R 3615, 3616) contained a penalty condition that if the Australian Government did not accept the deposit of 3.82 thousand million US dollars into the Federal Reserve Bank of New York within 6 days of a certificate of availability it, i.e. Australian Government, would 'assume and account' 300 000 US dollars for the 'expenses' caused by the blocking of the funds as well as daily interest . . .

(vi) The draft Promissory Note referred to (R 3616) contained *a certificate by the Australian Government* 'that all acts, conditions and things precedent . . . to constitute *this promissory note the valid obligation* of the Commonwealth of Australia in accordance with its terms have been done . . . *in compliance with the applicable laws of Australia*' (R 3616, 3619).

(h) A very serious question arises whether the description of the purposes of the loan as 'for temporary purposes' was a *false* description *deceitfully* adopted to *disguise the illegality of the transaction.* 'Temporary purposes' as an express description of this 4 thousand million dollar loan is repeated no less than four times in the documents set out on R 3617 and 3618. The promissory note contained a certificate of legality. In reply to a question in Parliament on May 20 on when would the Government seek approval of the Loan Council, the Prime Minister replied 'if and when the loan is made' (R 3599). That statement wears a mixed colouring when it is quite clear that the only intention in emphasising 'temporary purposes' was to describe the trans-

action as one which was within the exception exempting it from the requirement of Loan Council approval.

This aspect of the matter was the subject of comment by Mr R. J. Ellicott, Q.C., speaking as Member for Wentworth in the House on 9 July. Mr Ellicott had been Solicitor-General of Australia before 1972. He said (R3644-5) 'What utter and complete nonsense it is to say "for temporary purposes"!' . . . 'We now know who gave the legal advice that the loan in fact sought could be dressed up as a loan for temporary purposes . . . The former Attorney-General advised orally—

"In the exceptional circumstances I have outlined the borrowing could probably be regarded as a borrowing for temporary purposes within the meaning of the Financial Agreement" (per Prime Minister R 3598).

. . . That is not the sort of advice that honest men would seek on an occasion like this with this extraordinary loan in their minds. It is not the sort of advice that honest men would seek if they were going off to the Governnor-General to tell him that this loan was a loan for temporary purposes. I have given this matter the most careful thought but I cannot believe that *any honest man* could advise the Governor-General to approve of that minute if he knew that the borrowings were for 20 years and were to meet the long-term energy purposes of the Government. I do not believe an honest man could do it. I believe it was *an illegal and unconstitutional act*'.

On this aspect Senator Greenwood said in the Senate on July 16 (S 2751) 'I have made the claim publicly, and outside the privilege of the Parliament, that what has been disclosed so far prime facie represents *criminality*. There has been an attempt by unlawful means to subvert the Constitution, to bypass Parliament and to raise, so that one might govern without Parliament, 4 000m $US'. Most lawyers know what Halsbury's *Laws of England* says as to the meaning of conspiracy. It says 'If two or more persons agree together to do something contrary to law . . . or to use unlawful means in the carrying out of an object not otherwise lawful, the persons who so agree commit the crime of conspiracy'. The Leader of the Opposition, the Hon. Malcolm Fraser, had advanced the charge that 'He (the Minister for Minerals and Energy) appears to have been the leading member of an illegal conspiracy to evade the Constitution' (R 3609). He tabled a professional opinion of Counsel, Mr William Deane, Q.C., which stated: 'It is clear that if the proposed borrowings had not been borrowings for "temporary purposes" (that is to say for temporary purposes in truth and in fact) they would have been in breach of the Financial Agreement *and illegal*'. Counsel said that the facts were not stated in his instructions to enable him to determine whether in fact the borrowings were for temporary purposes, but such expression meant a loan to supply funds for 'a passing or transient need'—and the question could be determined by the application of ordinary common sense' (R 3605-6).

The Prime Minister had said (R 3598) 'There were no requirements under the Financial Agreement for consultation with the State Premiers for a borrowing of this kind for temporary purposes. It is of course usual and proper for loans to be sought overseas in advance of Loan Council approval. The terms and conditions of a proposed overseas borrowing are usually referred for approval to the other members of the Loan Council—the States—only when there is a firm proposition to put to them'.

It could not possibly be suggested that the very serious allegations of illegality were adequately answered by a statement of this sort.

(i) Other questions arose as to the application of sections 55 and 57 of the Audit Act, which read:

'55.—(1) A separate account shall be kept, in the Treasury, of all moneys which shall be raised by way of loan upon the public credit of the Commonwealth, and which shall have been placed to the credit of the Commonwealth Public Account.

(2) Such account shall be called "The Loan Fund", and shall be kept under such *separate heads* as are specified in the several Loan *Acts* under the authority whereof the moneys were raised.'

'57.—(1) It shall not be lawful for the Treasurer to expend any moneys standing to the credit of the Loan Fund, except under the authority of *an Act*.

(2) Such Act shall show the nature of the proposed work or other object of the proposed expenditure, and the amount of the proposed expenditure in each case, and the total amount proposed to be expended for such work or object.'

(j) The proposal was to 'domicile such funds in the United States invested in approved securities in the name of the Reserve Bank of Australia' (R 3611). 'The moneys would have been drawn down as the respective parts of the energy crisis program were implemented on a "crash" and in some cases a "turnkey" operation', said Mr Connor (R 3611).

The Petroleum and Minerals Authority Bill provided for a Government Authority to be set up as a corporation to acquire mining interests and conduct mineral exploration and mining. The Bill was defeated in the Senate; after its passage through a joint sitting of the two Houses, after a double dissolution, it was declared invalid by the High Court. The Minister then claimed that his ingenuity had foreseen the possibility of the invalidity of the Bill; but for this reason, he had incorporated a company in the A.C.T. with two of his senior officers the sole shareholders. It was claimed that this company would have authority to acquire mining interests and conduct mining operations. Questions still remain unanswered as to whether its capital was to come from the proposed loans.

(k) Many questions remained unanswered in respect of what we will call the Cairns–Harris negotiations. They apparently began on 17 December 1974 (R 3565, 3569). Although the Treasurer is recorded as having accepted his Department's advice that all inquiries for loans should automatically be referred first to senior officers of the Treasury (R 3569) (R 3574), the Treasury's concern was aroused by knowledge of the two letters, both dated 15 April 1975, from Dr Cairns to Mr Harris.

Treasurer
Parliament House
Canberra 2600

15 April 1975

TO WHOM IT MAY CONCERN

Recently I have been concerned that persons in Europe and elsewhere claim to represent the Australian Government in negotiating loans. No such authority exists.

The Australian Government is interested in borrowing on favourable conditions and should any person be able to assist us we would be glad to hear from him. I am providing Mr George Harris, holder of Australian Passport

No. G740206, and whose signature appears in the margin, with this letter so *that he may make inquiries for me.*
If it is felt necessary to confirm the authenticity of this letter, then with the consent of Mr Harris, this may be done by contact with Sir John Bunting, Australian High Commissioner, London, or the Australian Ambassador to Switzerland in Berne, or direct with me by telex AA 62632, Parliament House, Canberra, Australia.
In the event that he recommends that any funds are available and I am satisfied with the authenticity of such availability and the terms and condition for lending are acceptable to me and the funds are in amounts sufficient for our needs, I would be pleased to take the matter up.

J. F. Cairns
Deputy Prime Minister and Treasurer

Mr G. H. Harris
6 Southam Crt
BULLEEN, Vic. 3105

15 April 1975

Dear Mr Harris,

In the event that the Australian Government or its representatives or nominees successfully negotiates the borrowing of overseas funds, introduced or arranged by you *an appropriate commission would be paid to you or your nominees.*
Yours faithfully,

J. F. Cairns
Deputy Prime Minister and Treasurer

The Secretary to the Treasury decided to take advice on the legal question of whether these letters involved the Government in an agency relationship. It was said—in order to protect 'confidentiality'—the Secretary submitted letters of the same substance, but different in wording, to the Crown Solicitor for advice without the consent and sanction of Dr Cairns.

During a visit to the Middle East, from 12 to 31 March, Dr Cairns made inquiries for loans.

On 3 April it appears knowledge came back from London to the Treasury of a letter written by Dr Cairns to Harris, apparently containing an undertaking to pay 2½% commission (R 3569).

Apparently, on April 23 the Prime Minister, writing to Dr Cairns, said 'Sir Lenox gave me an oral report of the status last night of your own October initiatives through Mr Michael Murphy, which you had referred to his Minister yesterday. The Merchant Bank he invoked has reported an offer of US$3 724 000 000 which they believe may be consummated this week'.

In late May Dr Cairns visited Paris for the purpose of attending a meeting of O.E.C.D.

On 28 May Sir Frederick Wheeler, the Secretary of the Treasury, received the Crown Solicitor's advice to the effect that the above letters constituted an agency relationship 'for the purpose of making inquiries into and recommendations on the availability of moneys for borrowing' (R 3565). This was reported to the Prime Minister on the same day together with a letter from Mr

McKay, Secretary for the Department of Overseas Trade, recording that the Australian Trade Commissioner in Milan had reported 'Apparently a loan of $A 500 million is being sought for Australia. Promissory Notes to this effect, giving the terms as a *20-year* compound loan resulting in total repayment of $A 2 486 million, and with the signature of Mr Connor on them, have been lodged with the small German bank Wurttembergische in Ulme' (R 3566). After urgent communications between the Treasury and the Treasurer then in Paris, Dr Cairns suddenly returned to Australia on 1 June. On 4 June, Dr Cairns answered the question in Parliament (referred to paragraph 5 above R 3594) denying that he had given any letter offering 2½% commission or any brokerage fee.

There is a reference in the documents tabled (R 3589) to the 'brokerage fee of 2½%' being 'at least double that usually required of a borrower of Australia's standing'.

Following complaints and charges by Dr Cairns that copies of letters had been removed from his private files the Solicitor-General was requested to conduct an inquiry into this and other matters relating to the right of the Secretary of the Treasury to take advice from the Crown Solicitor without the consent of his Minister. The report of Mr Byers, Q.C., Solicitor-General, is of interest (R 3582-9) chiefly because his discussion of the subject of ministerial responsibility seems to posit the Minister as the exclusive channel of communication from his department much in the same way as the interpretation of the subject is expressed in the Prime Minister's letter to the President of the Senate, 15 July (S 2729).

It is obvious that in respect of Dr Cairns' loan raisings many questions remained unanswered.

Dr Cairns was demoted from the Treasury to Ministry for Environment and then dismissed from the Ministry.

PART B

We have considered the directions of the Minister referred to in paragraphs 2 (a) and (b) of the Senate Resolution, and *we would report as follows*:

B. 1 Clearly the directions of the Ministers were the basis upon which all public servant witnesses declined to give answers.

B. 2 The grounds upon which such directions were given were set out in the Ministers' letters sufficiently summarised above. Moreover it is apparent that irrespective of whether the Senate had proceeded to consider and determine each claim of privilege (as the Senate had resolved on 16 July it was proposing to do) the public servants regarded themselves as directed not to answer questions. As has been set out above, the direction not to answer questions and to produce documents was made on the assumption that the Senate may reject the claim of privilege. The clear effect of the directions of the Ministers was to require public servants to refuse to answer questions. It was equally clear that the public servants acknowledged their acceptance of those directions. The Ministers intended their directions to prevail even if their claim for privilege did not prevail.

B. 3 The Senate has already decided (S 2741, 2761) that the fact that a person summoned is an officer of the Public Service or that a question relates to his departmental duties or that a file is a departmental one does not, of itself, excuse of preclude an officer from answering the question or from producing a file or part of a file. In so deciding the Senate acted in accordance with the opinion of a former Solicitor-General, Sir Kenneth Bailey (Odgers, *Australian Senate Practice*, 4th edn, p.492) and the present Solicitor-General, Mr Byers, Q.C. (S 2788).

B. 4 Executive or Crown privilege as a ground justifying the withholding of evidence, oral or documentary, from tribunals has a twofold aspect, vis-à-vis (a) the Courts, (b) Parliament. The Courts sit to hear trials of definite issues, criminal or civil. They are concerned with the administration of justice which of course demands production of all possible relevant evidence. But the issue is narrower than the scope of Parliament's interest.

The Parliament requires evidence for its information on the whole range of matters within its legislative power and for the purpose of its supervision of administration.

B. 5 For the purposes of the *Courts*, the subject of Executive or Crown privilege has had an interesting history. It reached its high water mark in *Duncan* v. *Rammell, Laird & Co. Ltd* [1942] A.C. 624, an action for damages by relatives of deceased seamen drowned when a submarine failed to surface through what was alleged as negligent design. The Secretary of the Navy filed an affidavit claiming Crown privilege for documents showing the design of submarine construction. The House of Lords held that the Courts must treat the Minister's claim as conclusive, and that the Courts could not investigate the ground of privilege for themselves. The Court, however, said: 'The Minister . . . ought not to take the responsibility of withholding production, except in cases where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service'.

But the development of this rule caused disquiet to the Courts, which detected an increasing growth of the occasions when Ministers put forward claims to Crown privilege—not only in war time, relating to defence secrets, but in peace time, as to all sorts of questions of administration (with the enormous

numerical growth of public servants and departments) under the comparatively recent heading of 'Proper functioning of the public service'.

In *Conway* v. *Rimmer* [1968] A.C. 910 the House of Lords reconsidered the question, this time in relation to a claim by the Minister in an action by a junior police officer claiming damages from his superior for malicious prosecution. Crown privilege was claimed for five reports which had been made concerning the plaintiff's conduct. The House of Lords overruled the decision in *Duncan's case* in so far as it held that the Minister's certificate was conclusive.

It was held that the Courts have a duty to consider the justification claimed by a Minister and, if appropriate, to inspect the documents themselves. The Minister's claim was examinable, and not conclusive. The ultimate decision as to whether the documents should be produced or withheld was for the Court.

In so holding, the House restored to full authority the decision of the Privy Council in *Robinson* v. *State of South Australia* [No.2] [1931] A.C. 704 where a South Australian wheat farmer sued the Wheat Board for negligent storage of his wheat. The Government, the defendant to the action, sought to withhold certain reports of inspections by officers of the Board on the ground of privilege. The Privy Council rejected the claim; and remitted the question for decision by the South Australian Supreme Court after examination of the documents by the Court. Lord Blanborough said such a privilege was 'a narrow one, most sparingly to be exercised'. He also said 'Its foundation is that the information cannot be disclosed, without injury to the public interests, and not that the documents are confidential or official, which *alone* is *no reason for their non-production*'.

In the meantime between 1931 and 1968 it should be recorded that *Robinson's Case* had been followed, and *Duncan's Case* not followed, in Scotland, Australia, Canada, India and New Zealand and in other jurisdictions, in a uniform stream of judicial authority which maintained the rule that the Minister's statement of privilege was not conclusive.

Conway v. *Rimmer* brought the rule for Great Britain into line with *Robinson* and all the Commonwealth countries. The claim for privilege had to be justified to the satisfaction of the Court. Although in special areas the Minister's view was very important, the Minister's claim was not conclusive against the Courts.

Wigmore on Evidence p. 2379 sums up his comments on the subject. 'A Court which abdicates its inherent function of determining the facts, upon which the admissibility of evidence depends, will furnish to bureaucratic officials too ample opportunity for abusing the privilege. The lawful limits of the privilege are extensible beyond any control of its applicability, if it is left to the determination of every official whose interest it may be to shield a wrong doing under privilege.'

B. 6 But the foregoing concerns disclosure *to the Court* for purposes of cases in the Court deciding criminal or civil issues. It is obvious that the Crown privilege to withhold evidence from a Court falls to be decided by considerations quite different from those which would justify withholding documents or evidence from a *House of Parliament*, i.e. the *Senate* or one of its Committees. The power of Parliament to inquire into any matter relevant to its legislative duties is ancient and unquestioned.

> For the scope of this power we turn to its source. A random sampling of parliamentary records stretching from 1621 to 1742 disclosed that the inquiry power had its inception as a prelude to impeachment, and before long covered the entire spectrum of executive conduct; inquiries into corruption, the conduct

> of war, the basis for legislation, disbursement of appropriations, conduct of foreign relations, and execution of the laws. Legislative oversight of administration was exercised across the board. No member of the executive branch has ever advanced a pre-1787 precedent in English history for an executive refusal to turn over information to the legislature. I found a solitary instance of a refusal by a Solicitor of the Treasury; he was promptly thrown into the Tower. In 1701, Charles Davenant stated that 'no one has ever questioned the legislative authority "to enquire into, and correct the Errors and Abuses committed" ' by those who exercised executive power. That was confirmed 130 years later by the great English constitutional historian, Henry Hallam. In a word, there is no historical basis for the proposition that there was an 'inherent' executive power to withhold information from the legislature. The evidence is to the contrary.

per Raoul Berger (an American author) (1974) 22 *U.C.L.A. Review* at p. 17.

The author referred to 'James Wilson's tribute to the House of Commons, the Grand Inquest of the Nation, which has checked the progress of arbitrary power . . . The Proudest ministers of the Proudest Monarchs . . . have appeared at the Bar of the House to give an account of their conduct', *ibid.* p. 20.

It is this power of the Senate to hold public officers and Ministers responsible and accountable for their administration which is at the heart of responsible government, referred to by Mr Whitlam in his letter of 15 July. It is satisfying to note Mr Whitlam's assertion 'The Principle of Ministerial responsibility is and must remain the keystone of our Parliamentary system'. Indeed it is: but the Prime Minister's interpretation of its meaning as set out in his letter is a superficial distortion. Indeed, Ministerial responsibility involves the Minister in *a duty* to answer questions and allegations in Parliament. But one would search in vain for any suggestion in the authorities that therefore public officers are immune from answering questions by Parliament or parliamentary committees.

The distinction between *Court* and *parliamentary* privilege has been discussed by Professor Archibald Cox, Williston Professor, Harvard University (and Watergate special prosecutor, May to October 1973) *P.A. Law Review*, Vol. 122, 1974, p. 1383—with, naturally, application to the U.S. Constitution. At p. 1425 the author says 'I find marked differences between the questions raised by a claim of executive privilege during a *judicial* proceeding and those presented by an executive refusal of a *congressional demand*'. He discusses the difficulty of formulating any rule prescribing the occasions when withholding of evidence by the Executive from a demand of the Senate would be appropriate. He accepts the view that the Courts should not have jurisdiction to adjudicate in such matters. He would be content 'to leave questions of executive privilege vis-à-vis Congress to the ebb and flow of political power' (p. 1432). He pointed out that Congress has powerful political weapons (p. 1432). The threat to withhold appropriations is referred to. He adds 'President Nixon paid an enormous political price for withholding information relevant to alleged misconduct in the Executive Branch . . . President Nixon's experience will surely lead his successors to be much more forthcoming . . .'

It is apparent that the significance of this observation is not fully realised in all quarters. But it was probably, in a measure, responsible for the voluntary personal appearance of President Ford before the Congressional Committee inquiring into the circumstances of his decision to pardon his predecessor Nixon in late 1974. The President not only refrained from withholding documents, but himself voluntarily appeared to give evidence personally.

Cox at p. 1412 adds a very significant observation. 'Where a prosecution in-

volves crime in the conduct of high government office . . . the public has more than usual interest in the full and fair investigation of the issue. Public confidence in the integrity of the very processes of government can be secured only by proof that there is capability *to discover* and punish wrongdoing even at the highest levels of the Executive branch. Confidence in evenhanded administration of criminal justice requires proof that the law is enforced against the highest officials in the same manner as against the lowliest citizen.'

Two American authors, Dorsen & Shattuck, writing in *Ohio State Law Journal* (1974) vol. 35, p. 1, discuss the subject of executive privilege in many aspects which, so far as relevant, are summarised by the following quotation from p. 11.

> In the remainder of this article we shall first express our reasons for concluding that the assertion of a *discretionary executive privilege by the President is without basis in historical or judicial precedent.* We shall also discuss the *extent* to which a president may claim *confidentiality.* Two of the three principal categories of privilege—foreign and military affairs, and investigatory files, and litigation materials—while raising issues about the propriety and scope of executive secrecy, can be explained and defined wholly apart from a constitutional privilege. A third category—*internal advice within the executive branch*—raises more difficult problems. While there may be a necessity for executive secrecy in this area, it is based on the same limited constitutional premise that justifies secrecy among members of Congress and judges as well as executive officials: each branch of government has an implied power to *protect its legitimate decision-making processes* from scrutiny by other branches. We shall see that this does not mean the Executive (or the other branches) can keep secret its *actual decisions* or the *facts underlying them,* as distinguished from 'advice', *nor can it shield criminal wrongdoing by its officials or employees,*

nor, we would add, by Ministers.

The authors put forward a set of 'workable and coherent rules' for adoption, to govern the privilege which should protect advice within the Executive.

> 2.a The advice privilege may be claimed on behalf of a witness summoned by a congressional committee only at the personal direction of the President.
>
> b This privilege may be asserted only with respect to recommendations, advice, and suggestions passed on to members of the excutive branch for consideration in the formulation of policy.
>
> c A witness may not decline to answer questions about policy *decisions* that he personally *made* or *personally implemented.* Whatever the title of an individual, and whether or not he is called an 'adviser', he should be *accountable* for actions *that he took* in the name of the government and *decisions that he made leading* to action on the parts of others.
>
> d A witness may not decline to answer questions about *factual information that he acquired while acting in an official capacity.*
>
> e Executive privilege cannot be claimed as to material relating to a President's role *as leader of his political party,* as distinguished from his position as head of the executive branch of the government.
>
> f If the President or some other official *has already made statements about the matter* under inquiry by the Congress, the privilege is *waived* as to that subject. The potential net effect of selectively withholding information is to *mislead* the public as well as the legislative branch.

Those rules are of course suggested within the system of Presidential government and the differences from responsible government must be kept in mind.

B. 7 In the case of *U.S.* v. *Nixon,* President of the U.S., 1974 U.S. 1, there was a confluence of the two streams of privilege (a) court (b) congressional. The con-

test between the Executive on the one hand, and the Courts and Congress on the other, came to crisis—and confidentiality of the advice of Executive aides was at the centre of it. In July 1973 the Senate Select Committee on Presidential Campaign Activities directed a subpoena to the President—requiring production of sound tapes of certain conversations between the President and his former top aides purportedly about the Watergate case. Also, the Special Prosecutor issued a subpoena for the tapes 'as material and important evidence' in forthcoming criminal proceedings in the Courts.

In relation to court proceedings the Supreme Court held that the issue was justiciable, and held that in the absence of a claim of need to protect military, diplomatic or sensitive national security secrets, the confidentiality of the President's communications is not significantly diminished by producing material for a criminal trial under protected *in camera* inspection; and the President's claim for privilege on ground of a generalised interest in confidentiality must yield to the exigencies of a criminal trial, and the tapes should be produced.

The Supreme Court was faced with the President's 'steadfast assertion of privilege against disclosure of the material', p. 12. He demanded as to 'confidential conversations between a President and his close advisers that it would be inconsistent with the public interest to produce', p. 18. His counsel claimed an absolute privilege of confidentiality for all Presidential communications, p. 18. The Court held that it was not for the President to decide the question of privilege; that decision was essentially the function of the Court.

The decision was based upon grounds applicable to the British and Australian parliamentary system, and did not depend upon any special provisions of the American Constitution. The decision was too indulgent to, and not too restrictive of, the claims of confidentiality according to the cogent arguments of Raoul Berger (1974) 22 *U.C.L.A. Law Review*, p. 4.

This Court decision was reached on 24 July. The House Judiciary Committee voted impeachment articles on 31 July and 1 August. The President published the tapes on 5 August, and announced his resignation on 9 August.

B.8 The foregoing shows that there exists in the reference to this Committee *a basic question of parliamentary-executive relations*. The core of the question is the fundamental relationship which exists, or should exist, between the parliamentary and executive arms of government—a matter which is so fundamental to Parliament, and so steeped in the history of the Westminster style of parliamentary democracy, that it should not be overlooked.

The proposition that the ultimate power should rest—and does rest—with the people's representatives 'in Parliament assembled' is one which needs no detailed support or justification in this report. Suffice it to assert, in the words of Coke, that the power of the Parliament—

> is so transcendant and absolute, as it cannot be confined either for causes or persons within any bounds

—in Australia within the areas of legislative authority allotted to the national Parliament by the Constitution. The application of the general principle to the particular matters of seeking information and requiring answers to questions is expressed in a Commons resolution as follows:

> The refusal of a witness before a select committee to answer any question which may be put to him is a contempt of this House, and an infraction of the undoubted right of this House to conduct any inquiry which may be necessary in the public interest.

There may be some who would suggest that such a power is appropriate to a Lower House, but not to an Upper House, (on the presumably comfortable assumption that a Lower House—or 'House of Government', to use a more fashionable but basically anti-parliamentary term—would never assert itself to the extent of denying the government its wishes). Such a suggestion clearly has no place in the Australian Commonwealth Parliament, in relation to which the Constitution makes it indisputably plain (in section 49) that *each* House of this Parliament has the powers, privileges and immunities of the British House of Commons as at 1901 (unless and until otherwise declared by the Parliament itself).

This assertion of power leads to the next basic issue—one which again goes to the core of the present matter—and that is the perennial problem, inherent in the possession of power, as to the exercise of power. The closer power comes to the absolute, the more difficult is the decision as to the proper exercise of it. Parliament's power—or, in this case, the power of each House of the Parliament—is paramount, but its exercise must be a matter of particular discretion. That this is so is evidenced by the 'working relationships' which have been developed over centuries of parliamentary experience, and it perhaps is proper to treat what has been described as Crown privilege as a working relationship between the legislative and executive arms of government, similar to the view of Archibald Cox as set out above. To give the Crown (the Executive) a right to withhold such information as the Crown itself decides restores the Crown to a position of paramountcy in this respect to Parliament—an issue which was surely resolved in much earlier days of parliamentary history. To accept a proposition that the Crown has a right to refuse to give information is, of itself, a denial of the right of Parliament to perform its function.

This principle is not inconsistent with the acceptance by the Parliament of a view that it may be proper for the Crown to seek to be excused from answering certain questions or producing certain documents—in other words that the Parliament should be asked to forbear from requiring production of certain evidence—and to grant to the Crown an exemption from the otherwise immutable rule that questions must be answered and information (in documented or other form) must be produced. In stating this view it should be noted that it is in conflict with any view that the Crown has a *right* to refuse to provide information—that the Crown is in an automatically privileged position which it can *assert*. If one accepts the concept of the paramountcy of Parliament one must reject the concept of any such Executive right.

The question assumes a great importance in relation to the future of the Parliament (and its Committees), and in essence leads to the Senate making a choice between the retention of the hard-won powers of Parliament and the growth (perhaps, in history, the re-growth) of the power of the Crown.

B. 9 The two important aspects presented by the claim of Crown privilege made by the Australian Ministers against the Senate are:

(a) the claim that the Minister's statement or certificate is conclusive and unexaminable;

(b) the claim that the privilege applied 'to *all* questions upon the matters contained in the Resolution of the Senate and in respect of the production of *all* documents, files and papers relevant to those matters'.

The matters of inquiry referred to in the Senate Resolution are described as 'activities of its Ministers, servants and agents, relating to all dealings between them both prior to and subsequent to the Executive Council meeting of 13

December 1974 which authorised the Minister for Minerals and Energy to borrow a sum not exceeding 4000 million dollars in the currency of the U.S. for temporary purposes . . .' and 'all aspects of the Government's overseas loan activities'.

B.10 We take the view that the Minister's certificate is not conclusive: that it is entitled to consideration; but that it is for the Senate to decide whether the witness should or should not be required to produce any documents or give any answer. We would take it as a rule of practice, uniformly established, that production of certain classes of documents containing State secrets such as Cabinet discussion, defence matters, or diplomatic exchanges would almost automatically not be required. But even in this area the circumstances may be special. Investigation into the blunders of the Crimean War, the Dardanelles campaign, or some aspects of the Singapore surrender might be more in the national interest, even during war, than a continuance of crass incompetence and error. So too Executive Council minutes would not ordinarily be required; but, as in this case, where one minute was tabled by a Minister voluntarily (i.e. the minute of 13 December tabled by Senator J. McClelland on 12 June) the whole of the documentation of that minute, and the circumstances which in the opinion of the Senate might justify or condemn it as an act of Government, must be open to scrutiny and within scope of the Senate's power to examine.

But the contest in the Senate focuses attention chiefly upon grounds for privilege based upon the confidentiality belonging to the public service.

The Australian Ministers did not limit their veto to this class. The implication of the Prime Minister, and the reference in the Ministers' letters, indicate that the 'privilege' intended to be invoked was one pertaining to the confidential advisings of the public service—and therefore injurious to the proper functioning of the public service and its relationship with Government.

It would be in accordance with proper parliamentary practice to forbear to require evidence of such advisings, if particularised, in ordinary circumstances. But certainly no Minister has the authority by certificate or otherwise to forbid or veto such evidence generally, either in relation to a particular matter or at large. If circumstances were exceptional, e.g. where a Minister blamed his departmental Head for erroneous advice, justice would demand that the Senate give audience to the evidence of the public servant. Also in the case where the transaction amounted to a grave illegality, e.g. a conspiracy to contravene the Financial Agreement on the pretext that a loan was for temporary purposes, surely those who protested or remained uncommitted are entitled to be heard in exculpation—and the country is entitled to the evidence of all witnesses—and the very Ministers accused cannot veto the evidence on the ground of confidentiality.

If the counsels of the Crown are converted, in fact, into an unlawful conspiracy, the whole transaction should be investigated, and if a judicial investigation is refused by the Government of the day, the last resort is a House of the Parliament which is determined to uncover the Government's illegality.

Clearly no ministerial certificate is conclusive. Whether evidence should be produced is for the Senate to decide.

B.11 The second aspect of the Australian Ministers' claim is that it vetoed *all* answers and *all* documents.

The veto was not limited to any specified documents or questions or to any defined classes of documents or questions. No court and no parliament has ever countenanced such a claim. If it is based upon the view that public servants as a

class are privileged it is clearly wrong. The Senate has so ruled (S 2741, 2761 para. 3 above). The Senate has stated the clear rule that the mere fact that the witness is a public servant does not *per se* give rise to privilege.

It is surely a misconception for the Prime Minister and his Ministers to take the view that the doctrine of Ministerial responsibility restricts the Senate's authority to seek answers as to documents and facts only from Ministers.

Public servants appear before almost every parliamentary committee to give 'factual material objective evidence'. They do so as a matter of course. True, after all the facts are discovered, the Minister must accept the responsibility of answering any 'challenge in the Parliament' or 'before the people'.

Professor Enid Campbell's statement, at pp. 179-80 in her work on Parliamentary privilege in Australia, is relevant both to the position in the Courts and to parliamentary committees:

> Public interest is an extremely vague criterion and, if too widely interpreted by the Government, could be used to forestall any legislative probe at all into departmental affairs. The Court of Appeal in England recently held that when Crown privilege is claimed for documents, production of which is sought by a party to litigation, it is not sufficient for the responsible Minister to certify simply that the documents in question belong to a class which it is necessary in the public interest for the proper functioning of the public service to withhold from production.
>
> The Minister, it was held, must describe the *nature of the class of documents in question* so that the court could be satisfied that there was good reason for refusing production. If the documents related to secret defence plans, that would be sufficient cause for sustaining the claim of privilege, since disclosure could be prejudicial to national security. Commonplace communications passing between civil servants were an entirely different matter, and the consensus of opinion was that they should not be privileged from disclosure. 'There is a natural temptation', Lord Denning observed, 'for people in executive positions to regard the interests of the department as paramount. They do not realise that in many cases there is a greater interest to be considered—and that is the interest of justice iteself'.
>
> This comment applies with equal force to the production of evidence *before parliamentary committees* appointed to review administrative action. The administration is supposed to be accountable to and controlled by parliament, and the public has an interest in seeing that the executive organs of government act properly at all times. When, therefore, parliamentary committees do call for information from departmental officers, such information ought not to be withheld unless the Minister in charge certifies *with particularity* the category into which the information falls and thereby makes it clear that disclosure would be prejudicial to national security or, possibly, good diplomatic relations.

B.12 It is of course within the Federal Parliament's constitutional powers to pass laws with respect to 'borrowing money on the public credit of the Commonwealth'—section 51 (iv). And under section 105A of the Constitution every agreement between the Commonwealth and States for '(f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States' shall be '(5) . . . binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State'. The Senate's constitutional power to inquire into the foregoing matters is based on the strongest grounds.

B.13 But there is something further which should not be left out of consideration. Public servants in this country are bound by the Public Service Act and Regula-

tions to secrecy. This of course would not justify a refusal to give evidence or produce documents before a Parliamentary inquiry (see Odgers).

But in 1973 the regulation providing that public servants should not 'publicly comment on any administrative action or the administration of any department' was repealed. It would be a travesty of principle to suggest that they would be restrained from disclosing their secrets to Parliament and at liberty to discuss them in public. It is suggested by the Ministers that if public servants' consultations and reports are disclosed, the public service will be inhibited from candour in confidential advice. That suggestion will be more attractive to timorous souls; but high ranking public servants, holding some of the highest offices in government, and discharging courageously, independent responsibilities both in advice to Ministers and administration in face of a critical public, will consider such tender solicitude for sensitivity a reproach. Their independence is established under the Public Service Act so long as they do their lawful duty. The Parliament, as well as the Ministers, should be able to rely upon performance of duty—and not the least the duty of giving evidence. The integrity of the Service is not dependent upon Ministers' claims to protect them against any affront to their sensitivity by being exposed to an opportunity to give evidence—when it may be the Ministers' real purpose is to protect themselves; but it is damaged when the same Ministers use the Parliament—in this instance the Prime Minister (R 3595)—to expose the public service to generalised insinuations of 'leaks from the disaffected or the disloyal' and (R 3597) 'leaking of documents'. This is a case where the Ministers hide behind immunity claimed for the public servants, and cast indirect slurs and insinuations against the same public service so immunised.

The observations of Professor Wade in *Administrative Law* (2nd edn) 1967, p. 285 (written in the year before *Conway* v. *Rimmer*) are pertinent:

> Privilege was frequently claimed under the doctrine of [Duncan's] case on the ground that documents belonged to a class which the public interest required to be withheld from production. This practice was particularly injurious since it enabled privilege to be claimed not because the particular documents were themselves secret but merely because it was thought that all documents of that kind should be confidential. A favourite argument—and one to which courts of law have given approval—was that official reports of many kinds would not be made fearlessly and candidly if there was any possibility that they might later be made public. Once this unsound argument gained currency, free rein was given to the tendency to secrecy which is inherent in the public service. It is not surprising that the Crown, having been given a blank cheque, yielded to the temptation to overdraw.

B.14 Finally, as to the Solicitor-General's position:

Mr Byers, Q.C., had written a letter to the President, dated 15 July (S 2730), referring to his 'constitutional relationship to the Crown' and stating:

> The Crown has claimed its privilege. As one of its Law Officers, I may not consistently with my constitutional duty intentionally act in opposition to its claim.
> The above considerations, and much anxious thought, have compelled me to conclude that I must object to answer *any* question relating to the Resolution that may be put to me.

The Solicitor-General affirmed that he had not been directed to claim privilege. 'I am not amenable to ministerial direction', he said (S 2781). To the question (S 2784), 'Has anybody on behalf of the Crown required you to adopt the privilege of the Crown, or is this a unilateral act on your part?' he replied, 'No one, in my view, could, and no one has'.

The office is one in status next to the Attorney-General and by tradition requires a jealous maintenance of the laws. It is sufficient to mention two matters:

(a) The Harris–Cairns negotiations. In this case Mr Byers had carried out an inquiry as to departmental conduct in relation to the loan authority of the Treasurer, involving judgment on the integrity and competence of the Secretary to the Treasury, the Crown Solicitor, and several senior officers of the public service. He reported to the Prime Minister. The documents were tabled (R 3557). On this matter there was possibly a misunderstanding. The Senate's Resolution referred to 'all aspects of the Government's overseas loan activities' (S 2710). Mr Byers' letter submits an objection to answer *'any* question relating to the Resolution'. Yet in evidence (S 2788) he said 'I have never claimed . . . privilege in relation to the report I gave'. No claim of privilege in respect of the Harris–Cairns matter ought ever to have been made.

(b) Mr R. J. Ellicott, Q.C., Senator I. J. Greenwood, Q.C., and Mr William Deane, Q.C., gave to Parliament as their opinion that the agreement of four Ministers on 13 December to authorise the borrowing of 4 thousand million dollars, described as being for temporary purposes, if in fact the borrowing was not for temporary purposes, was illegal. It therefore follows that the Ministers' concerted action probably amounts to criminal conspiracy.

The Prime Minister in Parliament (R 3597) referred to 'the assistance of the Government's legal advisers' and (R 3598) he said 'The operation of the Financial Agreement was, of course, considered. The former Attorney-General (then Senator L. K. Murphy, Q.C.) advised, orally, that in the exceptional circumstances I have outlined, the borrowing could probably be regarded as a borrowing for temporary purposes within the meaning of the Financial Agreement'. At R 3600 he also stated 'Legal advice was obtained from the Government's legal advisers before the Minister for Minerals and Energy was given authority by the Executive Council to proceed with the negotiations for the loan'. Although he stated the oral advice of Senator Murphy, he was silent as to the advice of 'Government legal advisers'. Would they include the Solicitor-General or the Crown Solicitor or Mr Rose? At page R 3597 he makes the most guarded, and very probably partly true statement, 'Before making their recommendation to the Governor-General, the Ministers had the advice of the first and *second* law officers of the Crown. It was proper for the Governor-General to act on the advice of *his Ministers'*. Mr Byers was the second law officer of the Crown. Did his advice agree with Senator Murphy's advice (orally) that in the exceptional circumstances the borrowing could be probably regarded as for temporary purposes—in relation to a list of projects of *capital works* listed as costing *US$3980 million,* and documented with promissory notes and other documents expressly providing for repayment in *20 years?* Why did the Prime Minister state the advice of Senator Murphy—superficial and tentative though it was—and maintain silence as to the opinion of the second law officer?

The Prime Minister having stated one opinion and concealed the other, or others, the case was completely within the proposition:

> The potential net effect of selectively withholding information is to mislead the public as well as the legislative branch.

(Dorsen and Shattuck, 'Executive Privilege' *Ohio State Law Journal* (1974) vol. 35, p. 31). The Solicitor-General took a heavy responsibility when he decided to share the shadow of the Ministers, and claim privilege from answering *any* question, which is the claim he made, referred to in paragraph 2(c) of the Resolution of reference. From the Solicitor-General, at least, the Senate was entitled to expect that it would receive an explanation of the legal aspects of the proposed borrowing and an opinion upon the grave allegations of illegality referred to in paragraph B.14 (b). Yet when questioned 'whether as you sit there you are aware of any allegations of illegality that have been made arising out of these loan transactions' his answer was, 'I cannot think of any' (S 2789). The allegations of Mr Fraser, based upon the opinion of Mr Deane, Q.C., and the allegations of Mr Ellicott, Q.C.—the predecessor of Mr Byers, Q.C.—had been made in Parliament a full week before!!

In his letter of 15 July stating his intention to 'object to answer *any* question relating to the Resolution which may be put to me', the Solicitor-General quoted the *Law Officers Act* 1964–1968 as providing for his appointment and that he 'shall be the second Law Officer of the Commonwealth'. He stated that his appointment was by the Governor-General, adding 'that is, the Solicitor-General is the second law officer of the Crown'. The distinction between the expression in the Act 'second Law Officer of the *Commonwealth*' and Mr Byers' expression, 'second law officer of the *Crown*', he unfortunately failed to explain. It is, we suggest, most important. As second law officer of the Commonwealth surely he has a duty not merely to advise the Executive on proper occasions but also a duty—and maybe a higher duty—to advise the Senate on proper occasions. The Senate is a vital part of the constitutional government of 'the Commonwealth'.

The Solicitor-General in his letter cited the well-known quotation from Dixon J. (as he then was):

> The counsels of the Crown are secret and an inquiry into the grounds upon which advice tendered proceeds may not be made for the purpose of invalidating the act formally done in the name of the Crown by the Governor-General in Council.

His Honour was considering the provision in the Communist Party Dissolution Act enabling the Governor-General to declare a person a Communist. His statement illustrated the difficulty of a person 'declared' in securing evidence upon which to invalidate a Governor-General's declaration. But there is nothing in His Honour's statement which precludes a Solicitor-General, albeit one who has advised the Ministers for the purpose of a Governor-General's authorisation to borrow US$4000 million on the public credit of Australia on 13 December, from discussing with and advising the Senate upon the matters which are relevant to the validity of that action—on 16 July.

The ambiguous suppression by the Prime Minister of the advice of the second law officer of the Crown in our opinion should have been considered by the Solicitor-General as compelling him to state fully the truth.

We are of the opinion that the Solicitor-General's claim to object to answer any question because Ministers claimed privilege was:

(a) too wide;
(b) not based upon any acknowledged ground for privilege;
(c) untenable in view of the public statements made by Ministers partly disclosing advice and thereby waiving any privilege for parts not disclosed.

There is another well-known passage in the judgment of Dixon J. in the *Australian Communist Party* v. *The Commonwealth* which might have been more apt in relation to this case:

> History, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding executive power. Forms of government may need protection from changes likely to arise from within the institutions to be protected.

B.15 *In summary*, therefore, we report our opinion:

1 That a Minister's certificate of privilege for evidence, oral or documentary, sought from public servants had evidentiary value but is not conclusive.
2 That a Minister's certificate as to *all* documents and *all* questions relating to the matter of overseas loan activities of the Government was clearly unsupportable—and was not acceptable as a claim of privilege unless restricted to particular documents or particular questions or a particular class of documents or questions.
3 That the directions of the Australian Ministers to claim privilege in respect of investigations by the Senate were misconceived. Such a claim is a claim for a Senate not to require an answer or a document in appropriate cases.
4 That in practice the Senate would ordinarily refrain from requiring answers to questions as to confidential advisings by public servants.
5 That there is no practice, nor is it the law, that the simple fact that a witness is a public servant or a file a departmental file gives any privilege. The question is whether a question invades the confidentiality basic to the proper performance by the public service of its duty—and if the detriment to the public interest of disclosure by the public servant outweighs the public interest of revealing the facts to the legislature, the legislature ordinarily will not require the question to be answered or a file to be produced.
6 The ultimate decision as to whether a question must be answered or a document produced is for the Senate and not for the Executive.
7 That the Solicitor-General—not claiming any privilege on professional ground or self-incrimination—was wrong in claiming that he should join a claim for privilege to the Ministers' claim of privilege, simply because such a claim was made and he was an officer appointed by an Executive. He erred in not discharging his higher duty to give evidence before a House of Parliament when lawfully required—subject to all proper privilege in respect of any particular question or class of questions—e.g. questions which impaired the confidentiality on which his relationship with an Executive was based.
8 We do not consider it appropriate that we recommend what action should be taken by the Senate in this case. The Committee has not summoned or heard any of the witnesses concerned. The matter therefore is reserved for the judgment of the Senate.

(I. J. GREENWOOD)

(J. J. WEBSTER)

(R. C. WRIGHT)

ADDENDUM BY SENATORS GREENWOOD, WEBSTER AND WRIGHT

We express our regret that the Privileges Committee has not had a fair opportunity to consider the questions raised by the Senate's reference with the sense of detachment and objectivity which their proper consideration requires. The Privileges Committee became a minor Senate forum with a majority of the Committee denying what the majority of the Senate had affirmed. Consequently, vital questions have not been considered by the Committee.

We register our strong protest that the majority of the Committee, by its conduct, predetermined what the report of the Committee should be.

When the Committee met on the evening of 29 September to consider draft reports there was available a draft report of the Chairman and memoranda prepared by other members of the Committee. The Secretary had formally circulated (at about 5.30 p.m.) the following documents:

Draft Report by the Chairman;
Addendum by Senator Everett;
Addendum by Senators Mulvihill and Devitt;
Draft by Senator Wright;
Draft by Senator Webster.

Prior to the circulation of the documents, Senators Wright, Webster and Greenwood had not seen any reports prepared by other Senators.

However, Senator Everett's Addendum commenced, 'I concur in the report prepared by the Chairman of the Committee. I agree with his analysis of the functions of the Committee in the light of what I regard as the proper interpretation of its terms of reference. I also agree with his conclusions and the reasons he has expressed for reaching them'. Senators Mulvihill and Devitt commenced their Addendum by saying, 'We have read the Report prepared by the Chairman of the Committee and agree with the conclusions which he has reached in relation to the reference to the Committee'.

The Senators who had not been privy to the Chairman's draft report prior to the circulation of the drafts mentioned above claimed that opportunity should be given for Committee consideration and debate by all members of the Committee. Protests were overborne and, as the minutes revealed, the deadlock situation in the Committee was ultimately resolved by the agreement that there would be a majority report, together with such other Addenda as were submitted in due time to the Secretary.

The foregoing account is stated because the initial work of the Committee was directed towards endeavouring, if possible, to find common ground on which the Committee could formulate a Report.

The power to call witnesses before the Senate and before its Committees ought to be unquestioned.

The extent to which the Executive of the day may nullify the exercise of that power by directing witnesses to claim privilege or not to answer questions is a matter which must concern an Opposition party irrespective of its political colour. Even if the ultimate result must have reflected to some extent party differences, the area of common ground should have been attempted to be explored.

We regret that Government Senators on the Committee were not prepared to make that attempt.

ADDENDUM BY SENATOR GREENWOOD

When Attorney-General, I had considered, in conjunction with the then Solicitor-General (Mr R. J. Ellicott, Q.C.), the definition of the point where executive information should be made available if requested by a House or its Committee. We had said *(Parliamentary Committees: Powers over and protection afforded to witnesses):*

> It is not easy to express a view which will satisfy the varying points of view on the question of the desirability of making executive information available. However, against the background of a system which is based on party Government and the responsibility of Ministers to Parliament, we think the preferable course is to continue the practice of treating the Minister's certificate as conclusive. If a House thought that a Minister was improperly exercising his power to grant a certificate it could, of course, withdraw its confidence in him.

The conclusiveness of the Minister's certificate is for the Senate to determine. There may be, as we have indicated, occasions when the desire of the Minister to withhold information from the Senate or its Committee must yield to the Senate's decision to obtain the information. It is an inadequate remedy for the Senate to withdraw confidence in a Minister, who may possibly be in the other Chamber, if the effect of withdrawing confidence is simply to have the record of the withdrawal noted in the Senate's Journals and still not to have secured the information being sought. The effect to be given to a certificate is for the Senate to consider responsibly having regard to the competing claims for confidentiality and for knowledge.

To the extent that this approach conflicts with the approach contained in the earlier paper I prefer the view expressed herein. The blanket character of the Ministers' certificates and directions, addressed to the Senate on 15 and 16 July, render the earlier view an inadequate statement of the possible eventualities which may require resolution. It also does not expressly take account of the inappropriateness of conceding the conclusiveness of a certificate where the claim of privilege is, on its face, too widely stated.