

RESERVATION BY SENATOR KERNOT

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While I am in agreement with the majority report, I would seek to add the following two comments by way of reservation:

The Foreign Investment Review Board

(1) The Australian Democrats principal motivation for being involved in this inquiry was the opportunity it presented to examine the operation of the Foreign Investment Review Board (FIRB).

This has been acknowledged by the other members of the Committee, for example:

... I understand Senator Kernot's principal concern (has) rested with the workings of the Foreign Investment Review Board and foreign investment policy generally.

Senator Stephen Loosley, Senate Hansard, March 16, 1994

The term of reference referring to FIRB's operation was included at the Democrats' insistence. Our concern, and my concern, about the FIRB's processes has been long-standing. It is demonstrated by this extract from my first speech to Parliament:

... The other factor in this equation is the role played by the Foreign Investment Review Board (FIRB). Currently, part time directors virtually rubber-stamp foreign investment proposals, which are very rarely blocked. Although there is a power of forfeiture of an asset, there is no investigation into acquisitions by foreign buyers to ensure compliance with the law.

I do not think that is good enough.

The 1986 change in FIRB criteria for approval of acquisitions from 'economic benefit' to 'not contrary to the national interest' is an attempt to defraud the people of Australia. 'Not contrary to the national interest' to the Treasurer simply means anything which will attract currency to Australia in the short term.

Mr Deputy President, the long term effects of such a policy are already being seen in the vertical integration of both the tourist and beef cattle

industries in Queensland. It is not in the national interest for around 85 per cent of profits from these industries to flow from Australia.

Senator Cheryl Kernot, First speech, Senate Hansard, August 22, 1990

It is also demonstrated by a **Private Senator's Bill** which I introduced into the Senate 18 months ago, on December 17, 1992. It sought to replace the Foreign Investment Review Board with an independent statutory body, a Foreign Investment Review Commission.

The text of my comments at that time and the Bill itself are attached to this reservation.

Public accountability

(2) Special attention needs to be drawn to another matter which affected the operation of the Committee and which goes to the heart of public accountability.

The Treasurer directed certain officials not to answer certain questions or produce certain documents. He did this by **asserting** that the information the Committee was requesting attracted a **public interest immunity**.

Currently where such a conflict between the Executive and the Senate occurs over the public interest of information, only penal remedies aimed at the officials concerned exist to resolve the conflict (these were last updated in the 1987 rewrite of the Parliamentary Privileges Act), or 'indirect' punitive measures such as disruption of the Government's legislative program.

Such assertions have previously adversely affected, amongst other things, parliamentary examination of the Loans (Khemlani) Affair in 1974/5; bottom-of-the-harbour tax schemes in 1981/2; and the Loans Council Inquiry of 1992/3.

The ability of a Minister to prevent information being publicly scrutinised by asserting - and not having to prove - that the release of the information is against the public interest runs counter to all tenets of proper public accountability.

On March 23, 1994, I introduced into the Senate a **Private Senator's Bill** [the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994] to remedy the "public interest impasse".

The Bill empowers the Federal Court to enforce lawful orders of a House of the Parliament or a committee for the production of documents. Failure to comply would be a punishable criminal offence.

Where an officer of the Commonwealth failed to produce documents because of a direction by a Minister, the bill would empower the Federal Court to make such orders as were necessary to obtain the documents, unless it were proved that disclosure of those documents would be substantially prejudicial to the public interest and that such prejudice was not outweighed by the public interest in ensuring that a House of Parliament or its committee could conduct inquiries freely.

The Bill would empower the Federal Court to find an offence proved against the officer but not to convict the officer or impose any penalty.

The Bill of course does not apply to information explicitly protected by current statute. The text of my bill is attached to this reservation.

I believe enactment of the Bill by Parliament would restore the proper balance between Parliament and government in relation to the Parliament's right to important information produced or held by government.

It would deal properly with the use of ministerial directions to intimidate officials who are ultimately accountable to Parliament. It would deal effectively with improper attempts by Ministers to conceal from Parliament documents for which there can be no justification that they be kept secret.

The Senate's Privileges' Committee is due to report back on the Bill in August this year. How it is then dealt with by the Parliament will be a test for all political parties' attitudes to long-term public accountability.

Extract from the WEEKLY SENATE HANSARD Database
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MATTERS OF PUBLIC INTEREST
Foreign Investment in Australia

Senator KERNOT (Queensland) (1.08 p.m.)--The issue I want to raise is that of **foreign** investment in Australia. In particular, I wish to raise the question of the level of **foreign** ownership which is allowed in our print media. There is no legislative limit on the amount of **foreign** ownership allowed in Australian print media assets. There is a reserve power vested in the Treasurer to reject any proposal concerning **foreign** investment which is judged to be contrary to the national interest, but this national interest test is so nebulous as to be virtually meaningless. There is basically a total discretion with the Executive and no parliamentary or other control on the decisions.

Recent media reports indicate that the **Foreign Investment Review Board** is currently or will soon be considering an application to allow an increase in **foreign** ownership of the Fairfax group. Mr Conrad Black is apparently attempting to increase his holdings above 15 per cent and the United States investors are also apparently seeking approval to raise their 5 per cent non-voting interest. The Australian public is completely shut out of the decision making process in this matter. As we have argued here many times, the media is a special industry. It is intrinsic to modern life in so many ways and the impact of the media on our culture and on the nature of our country is immense. Not only are our views on so many subjects and especially the rest of the world influenced by the media, but the image of Australia and Australians which is projected to the world is inexorably linked to our media, especially print media.

It is for these reasons that the Democrats support legislation which limits the level of **foreign** ownership of print media. We have such legislative control over radio and television that we may ask why newspapers and magazines should be treated differently? Mr Bryan Frith, writing in yesterday's *Australian* newspaper, made an interesting point when he said:

It must be presumed that Canadian publisher Mr Conrad Black would not seek formal approval to lift his stake in press group John Fairfax Holdings to 25 per cent unless he believed it would be forthcoming.

The office of the Prime Minister (Mr Keating) is reported as saying that no guarantees have been given. I say to him that sure, we all know about the policy making processes in the Labor Party. Prime Minister Keating decides all policy at the moment, often as a result of a bet with Senator Schacht. Who in the Labor Party is left to care that Caucus set the current limit only one year ago.

It is important to remember that it is Mr Dawkins, and only he, as Treasurer, who has the power to refuse the application. Legally Mr Keating has no status whatsoever. Mr Dawkins is on record as opposing any increase above the current arrangements. I think it begs the question what exactly has changed which would justify any alteration. Why have investors decided that now, of all times, is the appropriate time to apply for an increased holding?

Normally this period is not good for investment; there is a lot of uncertainty on the outcome of the election and hence on the commercial environment.

Surely it is inappropriate that media ownership policy is influenced by the stage of the electoral cycle. If the Treasurer wishes to stop the increase he simply has to say so publicly. I would contend that silence demonstrates a new flexibility on this issue which cannot be justified by recent events. What is needed is a whole new regime of regulation of **foreign** investment in Australia and to that end I seek leave to table for discussion purposes a draft Bill and an explanatory statement proposing to reform the current **foreign** investment review regime.

Leave granted.

Senator KERNOT--I thank the Senate and I seek leave to have the explanatory statement incorporated in *Hansard*.

Leave granted.

The document read as follows--

This Bill concerns a matter of great importance for the longterm development and security of this country. It concerns the economic sovereignty of this nation and it concerns the standards which Australia imposes on the international investment community. This Bill is not anti-**foreign** investment, it is unashamedly pro good **foreign** investment.

The Bill proposes to fulfil a promise made by the former Treasurer, Mr Phillip Lynch, on 1 April 1976 in the House of Representatives when the **Foreign** Investment Review Board was established. He stated:

"Initially we will establish the Board by administrative action. It is proposed that it be given a statutory basis as soon as possible."

Mr President, more than 16 years later, that proposal has been ignored by all of the 5 subsequent Commonwealth Treasurers. This legislation proposes to remedy that inaction by establishing an independent statutory **Foreign** Investment Review Commission.

The Commission will take over the existing responsibilities of the Board and it will obtain enhanced powers and responsibilities. I will detail those later, however it is important to consider how an independent Commission will differ from the current arrangements.

The FIRB has close administrative arrangements with the Commonwealth Treasury. There is a branch of the Treasury, the **Foreign** Investment Branch, which provides services to the FIRB.

The Board's primary function is to assist the Government in administering **foreign** investment policy. The Board examines proposals by **foreign** interests to undertake direct investment in Australia and advises the Government on whether they satisfy the existing guidelines and hence should be approved. So, in essence, the FIRB is simply an advisory

body--the Treasurer has the final say on **foreign** investment matters.

There has been criticism that the Board is captive to the Treasury, which is under the control of the Minister. Thus even though the Board may act independently, there is always the appearance of the Board being captive to Government and hence being subject to political interference in its deliberations.

This cloud could be lifted by granting the Board statutory independence and that is one of the effects of this Bill.

A criticism which is levelled at the Board is that it is a "toothless tiger". Even in the relatively rare circumstance where the Board advises the Treasurer to impose some conditions on a **foreign** investment proposal, and the Treasurer agrees to such conditions, then there is absolutely no follow up to ensure that the conditions have actually been honoured. That is, there is no compliance function routinely undertaken by the Board.

Clearly this will weaken the value of any conditions imposed on **foreign** investment and should be remedied. A broad example concerns the development of land. There is a general condition in **foreign** investment policy that **foreign** investors cannot speculate on urban land holdings. Accordingly, acquisition of vacant real estate for development is generally allowed where the development occurs within 12 months. There are many examples in Queensland where this requirement has been breached yet no action has been taken against the investors concerned.

Clause 6 of the Bill specifically provides that one of the functions of the Commission is to ensure compliance by **foreign** investors with decisions made with respect to **foreign** investment matters. This will ensure that voluntary compliance by investors improves, and that the proper auditing of the conditions applied to investments will ensure that involuntary compliance will also be improved.

The Bill proposes to grant to the Commission both the statutory duty to consider all reviewable submissions on **foreign** investment and more importantly to make decisions in respect of those submissions.

Currently it is a matter of administrative practice that reviewable investment proposals are submitted to the FIRB. There is no statutory obligation that this occur. The Bill mandates that the investor must submit his or her proposal to the Commission.

The Bill also proposes to depoliticise the process of approval by granting deliberative powers to the Commission. The current advisory role of the Board will be replaced by a Commission with a deliberative power.

There are numerous reasons for granting a deliberative role for the Commission. Firstly, in practice the Board's advice is generally relied on and is the de facto decision maker. I believe that this reality should be reflected in the legislation.

Secondly, under the current arrangements it is impossible to find out whether the Treasurer acts on the advice of the FIRB or completely ignores that advice. This lack of transparency

means that it is impossible to discern whether decisions are made on economic grounds or on political grounds.

To overcome this problem, it is proposed that, although the Commission will be granted a deliberative power, a reserve power to override any decision of the Commission will be left with the Treasurer. That is, the final say will remain with the Minister. The Treasurer may reverse or alter any decision and attach any condition to any decision, however any such reversal or alteration of a decision must be in writing and must be published in the Gazette and tabled in both Houses of Parliament, with an explanatory statement, within 15 sitting days.

This system will enable the public to be aware of the original advice on any proposal and the changes imposed by the Treasurer and the reasons for those changes.

Schedule 1 of the Bill proposes to codify the principles which must be used by the Commission in determining applications for **foreign** investment into Australia. The first of these is the net economic benefit to Australia of the proposed investment.

This should not be a contentious matter. Surely it is reasonable that Australia says to the world--we welcome investment from outside this country as long as there is a clear economic benefit to Australia, and the investment is not against the national interest.

The Government amended the **Foreign Acquisitions and Takeovers Act 1975** during the 1980's to remove the "net economic benefit" test and replaced it with the deliberately nebulous criterion of "not contrary to the public interest".

Clearly this is ludicrous. Why shouldn't the Treasurer have the power to reject a project because it doesn't provide any economic benefits?

The Commission will also have an important power concerning public enquiries into any aspect of **foreign** investment in Australia. The Treasurer, or either House of Parliament will have the power to refer any **foreign** investment matter to the Commission for enquiry and report.

This could involve a particular investment proposal, such as the Multi-Function Polis or a general reference such as an enquiry into the level of **foreign** ownership in a particular industry. Members of the public would be entitled to make submissions and to appear before these enquiries, thereby strengthening public participation.

The Commission will also have to establish and maintain a comprehensive register of **foreign** investment in Australia. There is considerable public unease over the growing level of **foreign** ownership in the Australian economy. This unease is fostered, in part, by the refusal of successive Governments to establish a comprehensive register showing the level of **foreign** ownership in Australia. Obsession with secrecy and with impugning the motives of those who speak out about our future if we "sell the farm", are the usual responses of Government--however these concerns about our longterm economic sovereignty continue to represent legitimate community concerns.

There is now a trend at the State level to establish registers of **foreign** investment in land. Queensland led the way in this matter, Western Australia has recently followed suit and there are Bills before the Parliaments of South Australia and Tasmania on this issue.

The Commission will register all **foreign** investment, not just land, with appropriate exemptions applying so as to minimise the administrative task. This register will enable the community to know the extent of **foreign** ownership of Australian assets.

Currently the **foreign** investment policy of the Government is simply policy. There are no legislative provisions for most sectors of the economy; broadcasting is an obvious exception. This means that the control of **foreign** investment is dominated by the Executive.

This situation is defended as appropriate by some on the basis that great flexibility is needed in this area. That approach is rejected by the Democrats.

The Parliament should decide upon the appropriate regime for **foreign** investment. Parliamentary scrutiny should be needed before the rules are liberalised.

For example, in the One Nation Statement, the Government unilaterally increased the thresholds below which **foreign** investment proposals are not examined, and abolished the requirement for Australian equity participation in mining ventures.

With the stroke of a pen the Government decided that it will cease to examine proposals by **foreign** interests to purchase or establish businesses with a value of less than \$50 million in almost all sectors of the economy. This quite literally means that virtually every rural property in Australia could be acquired by **foreign** interests, without the FIRB even examining the acquisitions. Few, but this Labor Government, desperate for any **foreign** capital, would argue that such a scenario is in the national interest.

This Bill is still in draft form. I am tabling it to encourage community debate on the issue and I welcome feedback and suggestions for refinement and improvement.

THIS IS A DRAFT OF A BILL PROPOSED FOR INTRODUCTION IN
THE SENATE, CIRCULATED TO STIMULATE DISCUSSION ON
THE SUBJECT.

COMMENTS ARE WELCOME AND SHOULD BE ADDRESSED TO:

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D R A F T

Foreign Investment Review Commission Bill 1992

1990-91-92

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

(SENATOR KERNOT)

A BILL

FOR

An Act to establish a Foreign Investment Review Commission,
and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives
of the Commonwealth of Australia, as follows:

PART 1—PRELIMINARY

Short title

- 5 1. This Act may be cited as the *Foreign Investment Review Commission Act 1992*.

Commencement

2. This Act commences on the day on which it receives the Royal Assent.

2 *Foreign Investment Review Commission Act 1992* No. ,1992

Interpretation

3. In this Act, unless the contrary intention appears:

“Chairperson” means the Chairperson of the Commission;

“Commission” means the Foreign Investment Review Commission established by section 5; 5

“Commissioner” means the Chairperson, a Commissioner or a special Commissioner;

“Commonwealth authority” means:

- (a) a body or an authority established for a public purpose by or under a law of the Commonwealth; or 10
- (b) a body corporate:
 - (i) incorporated under a law of the Commonwealth or a State; and
 - (ii) in which the Commonwealth has a controlling interest;

“conservation” means the management of the human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations, and includes the preservation, maintenance, sustainable utilisation, restoration and enhancement of the environment; 15

“development” means the modification of the biosphere to satisfy human needs and improve the quality of life; 20

“Division”, in relation to an inquiry, means the Chairperson, Commissioners or the special Commissioners (if any) for the inquiry;

“environment” includes all aspects of the surroundings of human beings, whether affecting human beings as individuals or in social groupings;

“evidence”, in relation to an inquiry, includes a submission to an inquiry, whether oral or written; 25

“foreign interest” means a natural person not ordinarily resident in Australia, or any corporation, business or trust in which there is a substantial foreign interest, regardless of whether the corporation, business or trust is foreign controlled;

“foreign investment matter” means a proposal by a foreign interest, for investment in Australia; 30

“inhabited external Territory” means:

- (a) Norfolk Island;
- (b) the Territory of Christmas Island; or
- (c) the Territory of Cocos (Keeling) Islands; 35

"inquiry" means an inquiry initiated under section 18;

"Judge" means:

- (a) a Judge of a court created by the Parliament; or
- (b) a person who has the same designation and status as such a Judge; or
- (c) a Judge of a court of a State;

"losses" includes costs;

"referral" means a referral under section 18 of a matter to the Commission for inquiry and report;

"resource" means a biological, mineral or other material component, whether natural or not, of the environment (other than a human being) and includes a permanent or temporary combination or association of such components;

"special Commissioner" means a person appointed under paragraph 10(c) and, in relation to an inquiry, means a special Commissioner appointed for the purposes of the inquiry;

"State" includes the Australian Capital Territory and the Northern Territory;

"use" includes proposed use and, in relation to a resource, includes:

- (a) use for, or by way of, conservation or development; and
- (b) use of the resource before, during or after any processing.

Application

4. This Act extends to all external Territories.

PART 2—FOREIGN INVESTMENT REVIEW COMMISSION

Division 1—Establishment, Functions and Powers of Commission

Establishment

5. The Foreign Investment Review Commission is established.

Functions

6. The functions of the Commission are:

- (a) to hold inquiries and make reports to the Minister in respect of such matters as are referred to it;
- (b) to make decisions in respect of foreign investment matters in accordance with this Act;
- (c) to ensure compliance by foreign investors with decisions made with respect to foreign investment matters; and
- (d) to establish and maintain a foreign investment register.

4 *Foreign Investment Review Commission Act 1992* No. ,1992

Commission to be guided by policy principles

7. In the performance of its functions the Commission must be guided by the policy principles set out in Schedule 1.

Matters to be addressed in performance of Commission's functions

8. In the performance of its functions in relation to a foreign investment matter, the Commission must as far as practicable: 5

- (a) identify the subject of the investment proposal; and
- (b) identify:
 - (i) the environmental, cultural, social, industrial, economic and other effects of the investment proposal; and 10
 - (ii) the implications for those effects, including implications that are uncertain or long-term; and
- (c) assess the losses and benefits involved in the investment proposal including:
 - (i) losses and benefits of an unquantifiable nature; and
 - (ii) losses and benefits that are uncertain or long-term; and 15
- (d) give consideration to any other aspect of the matter that it considers relevant.

Powers of Commission

9. In addition to any other power conferred on it by this Act, the Commission has power to do all things necessary or convenient to be done for or in connection with the performance of its functions. 20

Division 2—Constitution of Commission

Constitution of Commission

10. The Commission consists of:

- (a) a Chairperson; and
- (b) any Commissioners appointed from time to time under this Act; and 25
- (c) any special Commissioners appointed from time to time under this Act for the purpose of inquiries.

Appointment of Commissioners

11.(1) The Commissioners, special Commissioners and the Chairperson are to be appointed by the Governor-General on the nomination of the Minister. 30

(2) Appointments under subsection (1) are to be made on a full-time basis or on a part-time basis.

Period of appointment of Chairperson

12. The Chairperson is to be appointed for such period not exceeding 5 years as is specified in the instrument of appointment and is eligible for reappointment. 35

Period of appointment of special Commissioners

13.(1) A special Commissioner is to be appointed for the inquiry or inquiries specified in the instrument of appointment.

(2) The Governor-General may by written notice to a special Commissioner appoint the Commissioner for an additional inquiry.

Selection of special Commissioners

14. Before the appointment of a special Commissioner the Minister must consult:

(a) the Chairperson; and

(b) the presiding member (however described) of the Industries Commission; about suitable appointees.

Terms and conditions of appointment

15. The Commissioners hold office on such terms and conditions in respect of matters not provided for by this Part or Part 5 as are determined by the Minister in writing.

PART 3—REFERENCE OF INVESTMENT PROPOSALS TO COMMISSION

Submission of investment proposals to Commission

16.(1) Where a foreign investor seeks to make a prescribed investment, he or she must submit an investment proposal in the prescribed form for the consideration of the Commission.

(2) The Commission must determine within the prescribed time whether the investment as proposed may proceed.

(3) The Commission may attach any conditions for the investment that it thinks fit, consistent with the principles set out in Schedule 1.

(4) The relevant foreign investor must be advised of the decision of the Commission in writing as soon as a decision has been made under this section.

(5) Each submission of an investment proposal must be accompanied by the prescribed fee.

Submission of decisions to Minister

17.(1) The Commission must submit in writing to the Minister all decisions made by it pursuant to section 16.

(2) The Minister may by notice in writing together with an explanatory statement, reverse, alter or attach any condition to any decision, as he or she sees fit. Such notice must be issued within the prescribed time.

(3) Any notice and explanatory statement under subsection (2) must be published in the *Gazette* and laid before each House of the Parliament within 15 sitting days of that House after the Minister issues the notice.

PART 4—INQUIRIES*Division 1—Preliminary***Initiation of inquiry**

18.(1) The Minister may refer any matter relating to foreign investment to the Commission for inquiry and report. 5

(2) Either House of the Parliament may by resolution refer any matter relating to foreign investment to the Commission for inquiry and report.

(3) All referrals to the Commission for inquiry and report must be in writing, must include a reporting date and must be included in the Annual Report of the Commission.

Notice of inquiries 10

19. The Commission must as soon as practicable after receiving a referral of an inquiry matter, give reasonable notice in each State and inhabited external Territory, by advertisement in a newspaper circulating generally in each State or Territory, of:

- (a) the inquiry into the matter;
- (b) the subject of the inquiry; 15
- (c) when the inquiry is to begin; and
- (d) the address to which, and the date by which, written submissions to the inquiry may be sent.

Constitution of Commission for purposes of inquiry

20.(1) An inquiry must be conducted by a Division of the Commission constituted by the Chairperson and the Commissioners or special Commissioners (if any) for the inquiry. 20

(2) A Division must include at least two Commissioners unless the Minister otherwise directs.

Inquiries may be held at the same time

21. The Commission may hold more than one inquiry at the same time. 25

Delegation of Chairperson's powers

22. The Chairperson may by signed instrument delegate to a Commissioner for the purposes of an inquiry all or any of the Chairperson's powers under this Act in relation to the conduct of meetings and hearings of the Division conducting the inquiry, but those powers may only be exercised at meetings and hearings at which the Chairperson is not present. 30

Protection of Commissioners and witnesses

23.(1) A Commissioner has, in the performance of his or her duties as a Commissioner, the same protection and immunity as a Justice of the High Court.

(2) A person giving evidence to an inquiry has the same protection and is, in addition to the penalties provided by this Act, subject to the same liabilities as a witness in proceedings in the High Court.

Division 2—Conduct of Inquiries

5 General conduct of inquiries

24. Subject to this Division, in the conduct of an inquiry:

(a) the procedure is to be decided upon by the Chairperson; and

(b) the Commission:

- 10 (i) may inform itself about any matter in any way the Chairperson thinks fit;
- (ii) may receive oral or written evidence;
- (iii) may consult with such persons as the Chairperson thinks fit;
- (iv) is not bound to act in a formal manner; and
- (v) is not bound by the rules of evidence.

15 Meetings of Commissioners

25.(1) Where there is at least one special Commissioner for an inquiry, the Chairperson may convene such meetings of the Division conducting the inquiry as the Chairperson thinks necessary for the efficient conduct of the inquiry.

(2) The Chairperson may determine the places at which the meetings are to be held.

20 Hearings by Commission

26.(1) The Commission may hold such hearing or hearings as the Chairperson thinks necessary for the purposes of an inquiry.

(2) Before the Commission begins hearings for the purposes of an inquiry, the Commission must give reasonable notice in each State and inhabited external Territory, by advertisement in a newspaper circulating generally in each State or Territory, of:

- 25 (a) the hearings;
- (b) the subject of the hearings; and
- (c) the times and places at which the hearings are to be held.

30 Quorum for meetings and hearings

27.(1) Subject to subsection (2), where there is at least one special Commissioner for an inquiry, the majority of the Commissioners constituting the Division for the inquiry constitute a quorum at a meeting or hearing of the Division.

(2) A quorum of a Division for an inquiry must not be taken to be present unless the Chairperson or his or her delegate for the purposes of the inquiry is present.

35 Presiding at meetings and hearings

28.(1) The Chairperson is to preside at all meetings and hearings at which he or she is present.

(2) Where the Chairperson is not present at a meeting or hearing for the purposes of an inquiry, his or her delegate for the purposes of the inquiry is to preside at the meeting or hearing.

Procedure at hearings

29.(1) Subject to this section, a hearing is to be held in public. 5

(2) Where:

(a) a person who appears to give evidence at a hearing objects to giving evidence in public; and

(b) the Commission considers that:

(i) the evidence is of a confidential nature; and 10

(ii) the interest in maintaining confidentiality is greater than the interest in having the evidence taken in public;

the Commission may take the evidence in private.

(3) Where the Commission considers that:

(a) that evidence to be given at a hearing is of a confidential nature, even though the person who appears to give the evidence has not objected to doing so in public; and 15

(b) the interest in maintaining confidentiality is greater than the interest in having the evidence taken in public;

the Commission may take the evidence in private. 20

(4) The Commission may if it thinks fit permit or require a person who is to give evidence to the Commission to do so in writing.

(5) The Commission may take evidence on oath or affirmation at a hearing.

Written evidence and documents to be made public . 25

30. Where a person:

(a) gives written evidence to an inquiry; or

(b) gives or produces a document to the Commission in connection with an inquiry; the Commission must as soon as practicable make available to the public, in any way it thinks fit, the particulars of the evidence or the contents of the document, other than any matter where: 30

(c) the person objects to the matter being made public and the Commission considers that evidence of the matter would have been taken in private if it had been given orally at a hearing; or

(d) the Commission considers that, even though the person does not object to the matter being made public, evidence of the matter would have been taken in private if it had been given orally at a hearing. 35

Commission may prepare background papers etc.

31.(1) In the course of an inquiry, the Commission may prepare for public consideration a background paper or issues paper in relation to the inquiry. 40

(2) The Commission must as soon as practicable make copies of any background paper or issues paper available to the public.

Draft reports

5 32.(1) In the course of an inquiry the Commission must, unless the Minister otherwise directs, prepare for public consideration a draft report of the inquiry.

(2) The Commission must as soon as practicable make copies of the draft report available to the public and must provide opportunities for public comment on the draft report.

Conduct of meetings

10 33.(1) The Commission may, subject to this Division, regulate proceedings at its meetings as it considers appropriate.

(2) Without limiting subsection (1), the Chairperson may permit participation in a meeting or hearing by telephone, closed circuit television or any other means of communication.

15 (3) A Commissioner or other person who is permitted to participate in a meeting or hearing under subsection (2) is to be regarded as being present at that meeting.

Powers of Chairperson

20 34.(1) A power of the Chairperson under section 24, 25, 26 or 33 in relation to an inquiry is to be exercised as far as practicable only after consultation with the Commissioners for the inquiry.

(2) The Chairperson is to direct and control travel arrangements by Commissioners for the purpose of the performance of their duties.

Division 3—Reports

Report to be tabled

25 35.(1) Where the Commission receives a reference under section 18, the Commission must report on the reference within a reasonable time having regard to the size and complexity of the reference.

30 (2) The Minister must cause a copy of a report relating to an inquiry that is given to him or her to be laid before each House of the Parliament within 10 sitting days of that House after the day on which the Minister receives the report.

*Division 4—Evidence***Power to obtain information and documents****36.(1) Where the Commission:**

- (a) is conducting an inquiry or considering an investment proposal; and
 - (b) has reason to believe that a person is capable of giving information or producing documents relevant to the inquiry or investment proposal; 5
- the Chairperson may give written notice to the person:
- (c) requiring him or her to appear at a hearing to give evidence or to produce the documents specified in the notice; or
 - (d) requiring him or her to give to the Commission on or before a day specified in the notice: 10
 - (i) a statement signed by the person or, in the case of a body corporate, on behalf of the body corporate, setting out the information specified in the notice; or
 - (ii) the documents specified in the notice. 15

(2) Where documents are produced or given to the Commission under subsection (1), the Commission:

- (a) may take possession of and may make copies of or take extracts from the documents;
- (b) may retain possession of the documents for such period as is necessary for the purposes of the inquiry or consideration of the investment proposal to which the documents relate; and 20
- (c) during that period must permit them to be inspected at all reasonable times by persons who would be entitled to inspect them if they were not in the possession of the Commission. 25

Allowances to persons giving evidence

37.(1) A person who appears at a hearing because of a notice under subsection 36(1) is entitled to be paid such allowances for the person's travelling and other expenses as are prescribed.

(2) If the Chairperson considers it appropriate, a person who appears at a hearing to give evidence or produce documents (otherwise than because of a notice under subsection 36(1)) may be paid such allowances for the person's travelling and other expenses as are prescribed. 30

(3) If the Chairperson considers it appropriate, a person who gives evidence to or produces documents at an inquiry may be: 35

- (a) paid such remuneration as is prescribed for the performance of work involved in collecting and preparing the evidence or documents; or
 - (b) reimbursed such expenses or compensated for such losses as were reasonably incurred in collecting and preparing the evidence or documents; 40
- or both.

(4) Money payable under this section is to be paid by the Commonwealth.

PART 5—ADMINISTRATION

*Division 1—Office of Commissioner***Acting Chairperson**

38.(1) The Minister may appoint a person to act as the Chairperson:

- (a) during a vacancy in the office of the Chairperson (whether or not an appointment has previously been made to the office); or
- (b) during any period, or during all periods, when the Chairperson is absent from Australia or is, for any other reason, unable to perform the functions of the office of the Chairperson;

but a person appointed to act during a vacancy must not continue to act for more than 12 months.

(2) Anything done by or in relation to a person purporting to act as the Chairperson is not invalid on the ground that:

- (a) the occasion for the person's appointment had not arisen; or
- (b) there was a defect or irregularity in connection with the person's appointment; or
- (c) the person's appointment had ceased to have effect; or
- (d) the occasion for the person to act had not arisen or had ceased.

Acting special Commissioners

39.(1) The Minister may appoint a person to act as a special Commissioner for an inquiry:

- (a) in the place of a person who has ceased to be a special Commissioner for the inquiry; or
- (b) during any period, or during all periods, when a special Commissioner for the inquiry:

- (i) is absent from Australia; or
- (ii) is unable to take part in the inquiry because of a direction under subsection 41(4); or
- (iii) is for any other reason unable to perform the function of a special Commissioner for the inquiry;

but a person appointed to act under paragraph (a) must not continue to act for more than 6 months.

(2) In considering the persons suitable for appointment for an inquiry under subsection (1), the Minister must take into account the consultations under section 14 in relation to the inquiry.

(3) Anything done by or in relation to a person purporting to act as a special Commissioner is not invalid on the ground that:

- (a) the occasion for the person's appointment had not arisen; or
- (b) there was a defect or irregularity in connection with the person's appointment; or
- (c) the person's appointment had ceased to have effect; or
- (d) the occasion for the person to act had not arisen or had ceased.

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Outside employment

40.(1) A Commissioner must not:

- (a) if appointed on a full-time basis—engage in paid employment outside the duties of the office of Commissioner except with the consent of the Minister; or
- (b) if appointed on a part-time basis—engage in paid employment that conflicts with the proper performance of the Commissioner's functions. 5

(2) A reference in this section to paid employment includes a reference to the performance by a person of a service for which it could reasonably be expected that the person would receive payment.

Disclosure of interests

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41.(1) The Chairperson must give written notice to the Minister of all direct and indirect pecuniary interests that the Chairperson has or acquires in a business carried on in Australia or in a body corporate carrying on any such business.

(2) Where the Chairperson has or acquires an interest, pecuniary or otherwise, that could conflict with the proper performance of his or her functions during an inquiry: 15

- (a) he or she must, as soon as possible after the relevant facts have come to his or her knowledge, disclose the interest to the Minister;
- (b) the Minister must take such action as the Minister considers appropriate; and
- (c) the interest must be disclosed in the report of the inquiry. 20

(3) Where a Commissioner has or acquires an interest, pecuniary or otherwise, that could conflict with the proper performance of his or her functions during an inquiry he or she must, as soon as practicable after the relevant facts have come to his or her knowledge, disclose the interest to the Minister.

(4) Where the Chairperson becomes aware that a Commissioner has, in relation to an inquiry, an interest of the kind referred to in subsection (3), the Chairperson must direct the Commissioner not to take any further part in the inquiry. 25

Suspension and removal from office

42.(1) The Governor-General may suspend a Commissioner from office on the ground of misbehaviour or physical or mental incapacity. 30

(2) Where the Governor-General suspends a Commissioner from office, the Minister must cause a statement of the ground of the suspension to be laid before each House of the Parliament within 7 sitting days of the House after the suspension.

(3) Where such a statement has been laid before a House of the Parliament, that House may by resolution within 15 sitting days of that House after the day on which the statement has been laid before it, declare that the Commissioner should be restored to office. If each House so passes a resolution, the Governor-General must revoke the suspension. 35

(4) If at the expiration of 15 sitting days of a House of the Parliament after the day on which the statement has been laid before that House, that House has not passed such a resolution, the Governor-General must remove the Commissioner from office.

(5) If a Commissioner:

- 5 (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit; or
- (b) being a person holding office on a full-time basis:
- 10 (i) engages, except with the consent of the Minister, in paid employment outside the duties of his or her office; or
- (ii) is absent from duty except on leave granted by the Minister in accordance with section 46, for 14 consecutive days or for 28 days in any period of 12 months; or
- 15 (c) fails without reasonable excuse to comply with subsection 41(1), (2) or (3) or with a direction under subsection 41(4);
- the Governor-General must terminate the appointment of the Commissioner.

(6) A Commissioner must not be removed from office except as provided by this section.

- 20 (7) Where a Commissioner who is an eligible employee for the purposes of the *Superannuation Act 1976* is removed from office under subsection (4) on the ground of physical or mental incapacity, he or she is to be taken for the purposes of that Act to have been retired on the ground of invalidity on the day on which he or she was suspended from office.

- 25 (8) A Commissioner who is suspended from office under this section is not entitled to be paid any remuneration or allowances in respect of the period of suspension unless he or she is restored to office.

Division 2—Conditions of Commissioners

Part-time Chairperson taken to be full-time

43. Where:

- 30 (a) the Chairperson has been appointed on a part-time basis; and
- (b) the Minister becomes satisfied that the Chairperson will not be able to perform the functions of Chairperson during a period otherwise than on a full-time basis;
- the Minister must, in writing specifying the period, direct that for the purposes of paragraph 42(5)(b) and sections 45 and 46, the Chairperson is to be taken to have been
- 35 appointed on a full-time basis for that period.

Part-time special Commissioner taken to be full-time

44. Where:

- (a) a special Commissioner has been appointed on a part-time basis; and

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(b) the Chairperson becomes satisfied that the special Commissioner will not be able to perform the functions of special Commissioner during a period otherwise than on a full-time basis;
the Chairperson must, in writing specifying the period, direct that for the purposes of paragraph 42(5)(b) and sections 45 and 46, the special Commissioner is to be taken to have been appointed on a full-time basis for that period. 5

Remuneration and allowances

45.(1) Subject to this section, a Commissioner is to be paid such remuneration as is determined by the Remuneration Tribunal.

(2) A Commissioner is to be paid such allowances as are prescribed. 10

(3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

(4) If a person who is a Judge is appointed as a Commissioner, the person is not entitled to remuneration under this Act while receiving salary or annual allowance as a Judge.

Leave of absence 15

46.(1) Subject to arrangements under section 43 and to section 44, where a Commissioner is appointed on a full-time basis, the Minister may grant the Commissioner leave of absence on such terms and conditions as to remuneration and otherwise as the Minister determines.

(2) The Minister may in writing delegate to the Chairperson the powers under subsection (1) in relation to special Commissioners. 20

Resignation of Commissioners

47.(1) The Chairperson or a Commissioner may resign by signed instrument delivered to the Governor-General.

(2) A special Commissioner may resign as a special Commissioner for an inquiry by signed instrument delivered to the Governor-General. 25

Division 3—Staff and Consultants

Staff

48.(1) Subject to section 50, the staff of the Commission are to be persons appointed or employed under the *Public Service Act 1922*. 30

(2) The Chairperson has all the powers of or exercisable by a Secretary of a Department of the Australian Public Service under the *Public Service Act 1922*, so far as those powers relate to the branch of the Australian Public Service comprising the staff referred to in subsection (1), as if that branch were a separate Department of the Australian Public Service. 35

Arrangements relating to staff

49.(1) The Chairperson may, on behalf of the Commission, arrange with the Secretary of a Department of the Australian Public Service or with a body established for a public purpose by or under a law of the Commonwealth, for the services of officers or employees of the Department or body to be made available to the Commission.

(2) The Chairperson may, on behalf of the Commission, enter into an arrangement with the appropriate authority of a State or Territory for the services of officers or employees of the Public Service of the State or Territory, or of a body established for a public purpose by or under a law of the State or Territory, to be made available to the Commission.

Engagement of consultants

50.(1) The Chairperson may, on behalf of the Commission, engage persons having suitable qualifications and experience as consultants to the Commission.

(2) The terms and conditions of the engagement of a person under subsection (1) are such as are determined by the Chairperson.

PART 6—OFFENCES

Offences relating to administration of Act

51.(1) A person must not hinder, obstruct, molest or interfere with:

- (a) a Commissioner participating in an inquiry; or
- (b) a person acting on behalf of the Commission for the purposes of an inquiry.

Penalty: \$3,000.

(2) A person who:

- (a) refuses to employ another person;
- (b) dismisses, or threatens to dismiss, another person from the other person's employment;
- (c) prejudices, or threatens to prejudice, another person in the other person's employment; or
- (d) intimidates or coerces, imposes any pecuniary or other penalty upon, or takes any other disciplinary action in relation to, another person;

because the other person:

- (e) has given or proposes to give information or documents to the Commission or to a person acting on behalf of the Commission; or
- (f) has given or proposes to give evidence before the Commission or to a person acting on behalf of the Commission;

is guilty of an offence.

Penalty: Imprisonment for 6 months.

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Failure to comply with requirement

52.(1) A person who, after having been given notice under subsection 36 (1), without reasonable excuse:

- (a) refuses or fails to comply with the notice; or
- (b) when appearing at a hearing because of the notice refuses or fails: 5
 - (i) to take an oath or make an affirmation; or
 - (ii) to answer a question that is required by the Commissioner presiding at the hearing to be answered;

is guilty of an offence.

Penalty: \$3,000. 10

(2) A person who, after having been given notice under subsection 36(1) requiring the person to appear at a hearing, without reasonable excuse refuses or fails to attend from day to day, unless excused or released from further attendance by the Commissioner presiding at the hearing, is guilty of an offence.

Penalty: \$3,000. 15

(3) It is a reasonable excuse for the purposes of subsection (1) for a person to refuse or fail to answer a question, give information or produce a document, that the answer, the information or the production of the document might tend to incriminate the person or make the person liable to forfeiture or a penalty.

False or misleading evidence or information 20

53.(1) A person must not:

- (a) give to the Commission information or documents that the person knows to be false or misleading in a material particular; or
- (b) at a hearing, give evidence or produce a document that the person knows to be false or misleading in a material particular. 25

Penalty: Imprisonment for 6 months.

(2) Subsection (1) does not apply to a document if, at the time when the person gives it to the Commission, produces it at a hearing or gives it to the Commission, the person informs the Commission that it is false or misleading in a material particular and specifies in what respect it is to the person's knowledge false or misleading in a material particular. 30

Conduct of directors, servants and agents

54.(1) Where it is necessary to establish for the purposes of this Act or the regulations, the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:

- (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and 35
- (b) that the director, servant or agent had the state of mind.

5 (2) Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority shall be deemed, for the purposes of this Act and the regulations, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

(3) Where it is necessary to establish for the purposes of this Act or the regulations, the state of mind of a person other than a body corporate in relation to particular conduct, it is sufficient to show:

- 10 (a) that the conduct was engaged in by a servant or agent of the person within the scope of his or her actual or apparent authority; and
(b) that the servant or agent had the state of mind.

15 (4) Any conduct engaged in on behalf of a person other than a body corporate by a servant or agent of the person within the scope of his or her apparent authority shall be deemed, for the purposes of this Act and the regulations, to have been engaged in also by the first-mentioned person unless the first-mentioned person establishes that the first-mentioned person took reasonable precautions and exercised due diligence to avoid the conduct.

(5) Where:

- 20 (a) a person other than a body corporate is convicted of an offence; and
(b) the person would not have been convicted of the offence if subsections (3) and (4) had not been enacted;

the person is not liable to be punished by imprisonment for that offence.

(6) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to:

- 25 (a) the knowledge, intention, opinion, belief or purpose of the person; and
(b) the person's reasons for the intention, opinion, belief or purpose.

(7) A reference in this section to a director of a body corporate includes a reference to a constituent member of a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory.

30 (8) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

PART 7—MISCELLANEOUS

Relationship of this Act to other laws

35 55. The provisions of this Act are in addition to, and not in derogation of nor in substitution for, the requirements of the *Environment Protection (Impact of Proposals) Act 1974* or any other law of the Commonwealth.

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Annual report

56.(1) The Chairperson must not, later than 31 December in each year, prepare and give to the Minister a report on the Commission's activities including the financial statements of the Commission, during the period of 12 months that ended on the preceding 30 June.

5

(2) A report is to contain comments on issues arising from inquiries conducted by the Commission and must contain information concerning the foreign investment register.

(3) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the Minister received the report.

10

Regulations

57.(1) The Governor-General may make regulations not inconsistent with this Act prescribing all matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

15

(2) In prescribing a fee in accordance with subsection 16(5), the regulations must not prescribe a fee that exceeds the reasonable expenses of the Commission in dealing with the investment proposal.

Foreign Investment Review Commission Act 1992

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SCHEDULE 1

Section 7

Policy principles for determining applications for reviewable foreign investment proposals.

In determining whether an investment proposal should proceed, the Commission must have regard to:

- 5 . the net economic benefits to Australia of the proposed investment;
- . the sustainable development and growth of Australian industries that are efficient in their use of resources, self-reliant, enterprising, innovative and internationally competitive;
- 10 . the maximisation of Australian participation in the development and exploitation of Australian natural resources and in Australian industries generally;
- . the maximisation of employment and harmonious industrial relations in Australia;
- . national and local environmental and cultural policies;
- . the concentration of foreign ownership within an industry;
- 15 . the interests of consumers and the community in general; and
- . the national interest.

1994

SENATE

**PARLIAMENTARY PRIVILEGES AMENDMENT
(ENFORCEMENT OF LAWFUL ORDERS) BILL 1994**

EXPLANATORY MEMORANDUM

The purpose of this bill is to provide for the enforcement by the courts through normal legal processes of the lawful orders of the Houses of the Parliament and their committees.

The refusal of certain witnesses to provide documents in accordance with the requirements of the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media has drawn attention to the situation that there is no way of enforcing such requirements of the Houses or their committees except through the power of each House to punish contempts, and that the courts probably cannot and would not review an exercise of that power until a penalty is imposed.

Those incidents also drew attention to the absence of any ready means whereby a claim of executive privilege, or public interest immunity, that is, a claim that disclosure of certain information would not be in the public interest, can be adjudicated by the courts.

The bill would amend the *Parliamentary Privileges Act 1987* by inserting a new section 11A to provide:

- it would be an offence, prosecuted in the Federal Court, to fail to comply with a lawful order of a House or a committee (such as an order that a witness attend a hearing, that evidence be given or documents be produced) (proposed subsections 11A(1) to (4))
- when an offence is proved the Court would make orders to prevent the continuation or recurrence of the offence and to ensure compliance with the parliamentary order (for example, orders that evidence be given or that a document be produced to a House or a committee) (proposed subsection (5))
- if an offence is committed by a public servant because of a direction by a minister, the offence would be found proved but the conviction not recorded against the public servant nor a penalty imposed (proposed subsection (6))
- if in a prosecution a claim of executive privilege or public interest immunity is made, that is, that evidence should not be given or a document produced because this would be contrary to the public

interest, the Court would determine for itself whether that claim is sustained, and for that purpose would hear the evidence or examine the document in camera; this conforms with the law relating to claims of public interest immunity in court proceedings (proposed subsections (7) and (8)).

Proposed subsections (9) and (10) would ensure that evidence given and documents examined by the Court in camera would not be disclosed except by order of the Court, unless they are given or presented to a House or committee.

Proposed subsection (11) would prevent a House imposing a penalty for an offence which is the subject of proceedings before a court.

Proposed subsection (12) would ensure that a prosecution could not be commenced or carried on except at the direction of the relevant House.

The Parliamentary Privileges Act already provides that certain actions which are also contempts of Parliament, namely interference with witnesses and unauthorised disclosure of in camera evidence, may be prosecuted in the courts as criminal offences (sections 12 and 13 of the Act).

As with those provisions, the proposed provisions of the bill would not affect the existing power of the Houses to deal with contempts of Parliament (section 5 of the Act).

The bill would, however, provide a means whereby an impartial court could enforce lawful orders of the Houses and their committees and determine any claim of executive privilege or public interest immunity.

Only *lawful* orders would be so enforced, and the Court would determine their lawfulness in accordance with the existing law.

The bill would place the Australian Parliament in much the same position as the Congress of the United States of America, which retains its inherent right to punish contempts but which has legislated to allow the courts to impose penalties for non-cooperation with congressional inquiries and to enforce subpoenas.

1993-94

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

Presented and read a first time

(SENATOR KERNOT)

A BILL

FOR

**An Act to amend the *Parliamentary Privileges Act 1987* to
provide for enforcement through legal process,
as an alternative to the penal powers of the
Houses of the Parliament, of lawful orders of the
Houses and their committees**

The Parliament of Australia enacts:

Short title etc.

1.(1) This Act may be cited as the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Act 1994*.

5 **(2)** In this Act, "**Principal Act**" means the *Parliamentary Privileges Act 1987*.

2. After section 11 of the Principal Act of the following section is inserted:

2 *Parliamentary Privileges Amendment (Enforcement
of Lawful Orders) No. , 1994*

Orders of Houses and committees

“11A.(1) In this section, ‘the Court’ means the Federal Court of Australia.

“(2) The Court has jurisdiction, exclusive of the jurisdiction of all other courts except the High Court, with respect to matters arising under this section. 5

“(3) The jurisdiction of the Court under this section may be exercised by a single Judge, who may refer a question of law for the opinion of a Full Court, and may, on the Judge’s own initiative or on the application of a party, refer a matter to a Full Court to be heard and determined. 10

“(4) A person shall not, without reasonable excuse, fail to comply with a lawful order of a House or a committee.

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or
(b) in the case of a corporation, \$25,000. 15

“(5) When an offence against subsection (4) is proved the Court shall make such orders as are necessary to prevent a continuation or recurrence of the offence and to ensure compliance with the lawful order of the House or committee in respect of which the offence was committed.

“(6) If an offence against subsection (4) is committed by an officer or employee of the Commonwealth because of a direction by a minister, on proof of the offence the Court shall find the offence proved and make orders in accordance with subsection (5), but shall not convict the officer or employee of the offence, and shall not impose any penalty for the offence. 20

“(7) It is a defence to a prosecution for an offence against subsection (4) in relation to an order of a House or a committee that requires the giving of evidence or the disclosure of a document if the defendant proves that: 25

- (a) the giving of the evidence or the disclosure of the document would be substantially prejudicial to the public interest; and
- (b) the prejudice to the public interest would not be outweighed by the public interest in ensuring that a House and its committees can conduct inquiries freely. 30

“(8) In deciding whether a defence under subsection (7) has been established, the Court shall hear the evidence or examine the document in camera. 35

“(9) A person shall not disclose evidence heard or a document examined under subsection (8) except in accordance with an order of the Court.

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

*Parliamentary Privileges Amendment (Enforcement of
Lawful Orders) No. , 1994* 3

(b) in the case of a corporation, \$25,000.

“(10) Subsection (9) does not prevent the giving of evidence or the presentation of a document to a House or a committee.

5 “(11) A penalty shall not be imposed under section 7 for an offence in respect of which a prosecution under subsection (4) has been commenced.

“(12) A prosecution for an offence against subsection (4) shall be commenced and conducted only by a person so authorised by resolution of:

- 10 (a) the Senate, for an offence in respect of an order of the Senate or of a committee of the Senate; or
- (b) the House of Representatives, for an offence in respect of an order of that House or of a committee of that House; or
- (c) each House, for an offence in respect of an order of each House or of a committee of both Houses.”.

NOTE

1. Act No. 21, 1987, as amended. For previous amendments, see No. 9, 1988.

Parliamentary Privileges Amendment (Enforcement of
Lawful Orders) Bill 1994

Second reading

Senator Kernot

23 March 1994

This Bill provides for the Federal Court to enforce lawful orders made by Parliament, and to allow the Court to determine claims that disclosure of information to Parliament would contravene the public interest.

The catalyst for the Bill is the conflict between the Senate print media committee and the Treasurer over the committee's request for Foreign Investment Review Board documents.

But I have not put this legislation forward just to solve an immediate problem. That Parliament lacks a satisfactory mechanism to enforce its own orders has been obvious for years, particularly where it is the government which refuses to comply. There has been no satisfactory way of resolving Government claims that disclosure of information is not in the public interest.

When the Coalition tried to obtain evidence about the Whitlam Government's attempt to raise loans through Tirath Khemlani and others, it failed. When Labor tried to obtain documents revealing the Fraser Government's failure to tackle bottom-of-the-harbour tax avoidance, it also failed.

The Bill is drafted to allow Parliament to ask the courts to enforce any lawful order made against any person or organisation. But the principal aim is to deal with disputes which arise when Parliament orders a government to disclose information, and the government refuses.

This is not to suggest that Parliament is powerless in the face of non-compliance of this kind. It is just that its powers, while extensive, are widely seen as inappropriate for use in such a situation.

As we know, section 7 of the *Parliamentary Privileges Act 1987* gives each House the power to impose a fine or prison sentence for an offence against it. This is Parliament's sanction of last resort, but it is clearly undesirable when a public servant is caught between two orders -- Parliament's order to divulge information, and a minister's instruction not to.

In the case now before the Senate print media committee, the House of Representatives would no doubt protect the Treasurer from any action taken against him by the Senate. This would leave the Senate with the option of taking action against the public servant at the helm of the Foreign Investment Review Board, who is

acting on the Treasurer's instructions. That is clearly unsatisfactory.

In fact, I believe there is a general view in the community that it is the role of the courts, and not the Parliament, to impose prison sentences or fines. Although there is a school of thought that the courts have no role in determining disputes of a political nature, to leave matters as they are would continue the decades-long uncertainty over the relative powers of Parliament. It is time this matter was resolved, and the only realistic way of doing so is by resort to the courts.

The Senate also has the option of taking political action to get its way. That could include filibustering, or even blocking key bills in protest. But again, I do not believe it is appropriate for Parliament to engage in obstruction to enforce accountability. This is a more civilised alternative which will avoid further erosion of Parliament's standing, and we should use it.

The Bill inserts a new section 11A into the *Parliamentary Privileges Act*.

The new section makes it an offence not to comply with a lawful order of a House or committee and requires the courts to make orders to remedy the offence.

For example, failure to comply with a lawful order to produce documents would be an offence, and the courts would order that the documents be produced.

If an offence is proved, the standard penalties in the Act apply unless the offence has been committed by a public servant acting under a minister's instructions. In that case, the public servant is not convicted of an offence, and no penalty is imposed.

There may be cases where someone other than a minister (perhaps a departmental secretary or company executive) instructs an employee not to comply with an order of Parliament. It could be argued that the employee should be protected from prosecution in those cases.

However in such a case, the secretary or executive would lack the protection of parliamentary privilege – unlike the minister – and would then be open to enforcement action instead of the employee. I have therefore decided to limit the protection of this provision to public servants acting under a minister's instructions.

It has been suggested to me that there should be no penalty for non-compliance with an order of Parliament, and that penalties should only be imposed for contempt of court, in the event that a court orders compliance but the defendant still refuses.

My concern about this proposal is that it makes non-compliance with an order of Parliament cost-free. Anyone could refuse a committee's request for information in the secure knowledge that the relevant House would have to take them to court to get it, and that they would be immune from any penalty.

Furthermore, the courts' power to order compliance provides scope for leniency in imposing penalties, for example by suspending a fine or prison term.

The Bill explicitly recognises that a defence against Parliament's order to produce

documents or give evidence is that disclosure would be contrary to the public interest. In considering such a claim, the court must hear the evidence or view the document *in camera*. Disclosure of those proceedings would be an offence unless subsequently ordered by the court, but Parliament would be free to hear the same evidence or receive the documents.

The effect of this provision is to require executive claims of public interest immunity to be determined by the courts. The Bill makes it clear that determining such a claim is a balancing act, which requires any prejudice to the public interest which disclosure might cause to be weighed against the public interest in the free conduct of inquiries by Parliament.

In recognition of the significance of the matters at stake, a case under this legislation would be heard in the Federal Court, with any appeal going to the High Court.

And the Bill prevents Parliament from having a bet each way. Once a prosecution has been commenced, Parliament would be prevented from imposing its own penalties using section 7 of the Act.

Finally, a prosecution under this Bill can only be made by a person authorised by a resolution of the House whose order -- or whose committee's order -- has not been complied with.

This Bill is a constructive attempt to break a deadlock which has existed for far too long. It is a step towards more open government, but one which allows government claims of public interest immunity to be heard and determined impartially.

The Government has given no clear indication of its position on this Bill. I would point out to them that failure to support it would look distinctly hypocritical, given the vehement attacks on me for leaving open the use of the penalty provisions of the Act to obtain Foreign Investment Review Board documents from the Board's Executive Member.

The Bill provides an alternative process which would allow the Federal Court to resolve the dispute without any threat of a penalty against any public servant. It depoliticises the competing claims of the committee and the Treasurer as to whether disclosure is in the public interest. If it doesn't become law, then we will be thrown back on the inappropriate provisions of the *Parliamentary Privileges Act*.

This Bill is a fair and reasonable alternative, and I commend it to the Senate.