

## **APPENDIX D**

### **CLERK'S ADVICE ON THE COMPULSION OF WITNESSES**



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2 February 1994

Mr R Gilbert  
Secretary  
Select Committee on Certain Aspects of  
Foreign Ownership Decisions in Relation  
to the Print Media  
Parliament House  
CANBERRA ACT 2600

Dear Mr Gilbert

#### COMPULSION OF WITNESSES

Your letter of today's date seeks advice on the power of the Committee to compel the attendance of witnesses and the giving of evidence.

I hope that the following outline will be of some assistance to the Committee.

Each House of the Parliament possesses the power to require persons to attend, to give oral evidence and to produce documents in their custody or control. Each House may delegate that power to its committees, but only the House may punish any default. This Committee has such a delegation.

Ultimately the power to compel witnesses depends on the power of each House to punish any default as a contempt. That power to punish contempts was upheld by the High Court in *R. v Richards: ex parte Fitzpatrick and Browne* 1955 92 CLR 157. The power has since been limited and codified by the *Parliamentary Privileges Act 1987*, but not so as to affect the tenor of this advice.

All persons in the jurisdiction of the Commonwealth are subject to the power to compel witnesses. The only exception to this, I believe, is that a House or its committees may not compel a member of another House of the Commonwealth Parliament, or of a state parliament. There is no court judgment which supports this conclusion; indeed, there has been no adjudication of the extent of the power, but I believe that the limitation is an implied one arising from the Constitution. This matter was the subject of an advice to the Select Committee on the Australian Loan

Council, which advice was published in the interim report of that committee in March 1993.

There is also a question of whether the powers of inquiry of the Commonwealth Houses are limited by the limitations on the Commonwealth's legislative power, but that question also has not been adjudicated.

From time to time the executive government has claimed a right to instruct its officers to refuse to appear, to give evidence, or to produce documents in response to a demand of a House or a parliamentary committee. This claimed right is subsumed in the expressions "Crown privilege", or "executive privilege", or "public interest immunity", in their claimed application to parliamentary inquiries (as distinct from the proceedings of courts). The existence of the claimed right has not been adjudicated by the courts. The Senate has not conceded the existence of the claimed right, but, on the contrary, has asserted that it is for the Senate itself to determine whether any claim of privilege (ie., a claim of immunity from a parliamentary demand) should be allowed (see the resolution of the Senate of 16 July 1975, no. 24 at page 122 of the standing orders volume).

The question of the existence of executive privilege in relation to parliamentary inquiries has not been settled. Unless it is adjudicated by the courts, which is unlikely, it will continue to be dealt with case by case as a matter of political dispute and contest between the Senate and a government.

Your letter asks whether members and former members of the Foreign Investment Review Board may be compelled to give evidence before the committee. Undoubtedly such persons, if in the jurisdiction, are subject to the parliamentary power to compel witnesses. The question implicitly raised by your letter and the correspondence attached to it is whether persons who are not officers of the executive government, but who are statutory office-holders or advisers to the executive government, are subject to direction by the executive government in relation to their response to a parliamentary demand, or may be covered, as it were, by a claim of executive privilege in relation to parliamentary inquiries.

During the "overseas loans case", which was the occasion of the passage of the resolution of the Senate to which I have referred, the then Solicitor-General, who is a statutory office-holder and legal adviser to the executive government, in effect informed the Senate that, while he was not subject to direction by the executive government and not bound by a claim of executive privilege, he had a duty, in his view, to have regard to such a claim and not to act in such a way as to undermine it. On that basis he declined to answer questions. The Senate took no action against

him, nor against the public service officers who were directed by the Prime Minister not to answer questions, but passed the resolution to which I have referred and pursued the matter as a political contest with the ministry of the day.

This question is therefore also not settled, and also has not been adjudicated by the courts.

In the first instance it is for a person who is the subject of a parliamentary demand to determine whether he or she will have regard to or conform with an executive government direction to refuse a parliamentary demand. There is at least one case of an officer disobeying such a direction on the ground of a perceived duty to cooperate with a Senate inquiry. If such a person decides to have regard to or conform with such a direction, it is for the committee or the House concerned to determine whether action should be taken against the person by way of proceedings for contempt or against the individual minister concerned or the ministry collectively as a political matter.

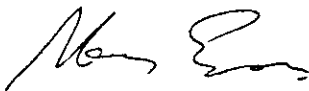
A committee met with a refusal by a person to comply with an order to attend, give evidence or produce documents cannot take any action against the person, but can only report the matter to the relevant House, which may then proceed against the person for contempt.

It is for a committee to which the power has been delegated to determine whether it should in a particular case make a formal demand (ie., issue a summons) for a witness to attend, give evidence or produce documents. In my view a Senate committee should not make a formal demand unless the committee intends, in case of refusal, to ask the Senate to enforce the demand, and has some grounds to believe that the Senate will support the demand.

Your letter refers to the possibility of legal advice on these matters. As there are virtually no relevant court judgments, it is not a matter on which legal advice as such can be given. (There are several court judgments on these subjects in the United States, but because of the different constitutional arrangements in that country, those judgments are not readily applicable to Australia.)

Please let me know if the Committee wishes to have any elaboration or clarification of this advice.

Yours sincerely



(Harry Evans)