APPENDIX E

OPINION OF MR DAVID JACKSON QC

Re: SENATE SELECT COMMITTEE ON CERTAIN ASPECTS OF FOREIGN OWNERSHIP DECISIONS IN RELATION TO THE PRINT MEDIA

O P I N I O N

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Re: SENATE SELECT COMMITTEE ON CERTAIN ASPECTS
OF FOREIGN OWNERSHIP DECISIONS
IN RELATION TO THE PRINT MEDIA

OPINION

A. INTRODUCTION

1. On 9 December 1993 the Senate resolved to establish a select committee:-

> " . . . to be known as the Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media . . . to inquire into and report, on or before 28 February 1994, on the following matters:
>
> (a) the origin and basis of decisions in 1991 and 1993 to increase the permissible percentage of foreign ownership of newspapers, and, in particular:

(i) whether those decisions were influenced by considerations relating to the content of newspapers including any requirement for 'balanced' coverage; and

(ii) whether the contents of newspapers were influenced by those decisions or the prospect of those decisions; and

(iii) the procedures followed by the Foreign Investment Review Board and the extent to which any of its deliberations or recommendations were taken into account in the making of those decisions; and

(iv) whether the Prime Minister influenced or sought to influence those decisions, and, if so, the basis on which and the extent to which he did so; and

(b) the significance and effectiveness of the guidelines of the Foreign Investment Review Board; and

(c) the views expressed to Mr Conrad Black by the Leader of the Opposition, Dr Hewson MP, on foreign ownership in the print media in Australia."

2. The resolution provided for a Committee of nine senators, with the quorum being five. Subcommittees might be appointed (Term of Reference (7)) and the Committee, and any subcommittee so appointed, were to have power:-

> " . . . to send for and examine persons and documents, to move from place to place and to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives."

See Term of Reference (6).

3. Some provisions were also made by the resolution for the conduct of the business of the Committee, including (Terms of Reference (8)(a), (b) and (c)):-

> "That, without limiting its power to pass procedural or other resolutions that are not inconsistent with this paragraph or these terms of reference, the Committee observe the following procedures, namely that:
>
> Submissions and calling of witnesses
>
> (a) as a general principle, evidence be invited in the first instance in the form of written submissions and following examination of submissions, the Committee decide which witnesses are to be called for examination; and
>
> (b) subject to any contrary order in relation to a particular submission, the submission to the Committee by a person of a statement relating to the inquiry be deemed to be the giving of evidence before the Committee by that person in accordance with that statement; and
>
> Evidence
>
> (c) evidence be heard in public session except in instances where the committee or a sub-committee resolves to hear evidence in camera."

4. As I understand the position some persons called before the Committee as witnesses have declined to give evidence as to advice and views which they may have given the Commonwealth Government leading to the making of the two decisions referred to in Term of Reference (1)(a). Further, the Committee has been advised that the Treasurer has directed that officers of the Treasury and members of the Foreign Investment Review Board

are not to provide the Committee, either orally or by providing documents, certain information in relation to those decisions. (The terms of the Treasurer's direction are set out below.)

5. The officers fall into three categories, namely:-

Category 1

Mr Tony Hinton, employed under the Public Service Act 1922 and Executive Member of the Foreign Investment Review Board ("FIRB"), a non-statutory body which advises the Treasurer in relation to foreign ownership decisions.

Category 2

Mr George Pooley, formerly employed under the Public Service Act and the immediate past Executive Member of FIRB. Mr Pooley is now the Commissioner, Insurance and Superannuation Commission and is employed under the provisions of the Insurance and Superannuation Commissioner Act 1987.

Category 3

Mr Des Halsted and Mr Ken Stone are members of FIRB. To the Committee's knowledge these witnesses are paid advisers to government. They are neither public servants nor statutory office holders.

6. In addition the Committee intends to obtain evidence from Mr Hawke, the former Prime Minister, and Messrs Kerin and Dawkins, former Treasurers, whom I shall describe as Category 4. It may be that those gentlemen will also be "directed" or "requested" by the Treasurer not to give evidence as to advice which they received and/or decisions which they made relevant to the Select Committee's Terms of Reference. It may also be that they simply decline to give such evidence.

B. **ISSUES**

7. The issues upon which I am asked to advise are set out in the Instructions to me as follows:-

> " 1. Does the Committee have the power to compel witnesses from each of the above categories to give evidence and produce documents? If so, by what means?
>
> 2. In so far, as Treasurer Willis seeks to assert a conclusive claim that certain documents are not to be disclosed to the Committee, is it for the Government to determine the nature and extent of public interest immunity and that certain witnesses curtail their evidence to the Committee and/or not disclose certain documents?
>
> 3. Are decisions of the Senate and/or the Committee justiciable and in what circumstances and to what extent is a court able to go behind a decision of the Committee or the Senate?
>
> 4. What steps are open to the Committee to take in respect of non-co-operation with its orders?
>
> 5. Is the Treasurer in contempt of the Senate in instructing various witnesses to refrain from providing evidence to the Committee and

producing documents, or in other ways limiting their co-operation with the Committee and other orders of the Senate?

[See Standing Orders and other Orders of the Senate document (attachment 2), especially:

- Parliamentary Privilege Resolution of 25 February 1988 Resolution 6(1), 6(10) and 6(13) (pp.97-99).
- Procedural Orders and Resolutions of the Senate of Continuing Effect. Resolution 24 and 27 (pp.122-123).]"

8. An additional issue was raised by a letter of 2 March 1994 from the Committee's Secretary to the instructing solicitors. It is as follows:-

> "At a meeting on 1 March 1994, the Committee resolved that it seek . . . advice on the rights of witnesses for each of the four categories referred to in my earlier instructions. This further advice should include reference to the advice to be given by the Chair to witnesses before giving oral evidence to the Committee. In this regard, I again refer you to the Parliamentary Privileges Resolution of 25 February 1988 . . .".

C. VIEWS

9. The powers of the Senate derive relevantly from ss. 49 and 50 of the Constitution, which are as follows:-

> "49. 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.

> 50. 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."

10. The Parliament, in the exercise of the powers conferred by s.49, has enacted the Parliamentary Privileges Act 1987. Further, the Senate, in the exercise of its powers, under s.50, has made Standing Orders, and other Orders, from time to time.

11. I have referred earlier to the fact that Term of Reference (7) conferred on the Committee a power to send for and examine witnesses, a power reflecting the terms of Senate Standing Order 34(1). Standing Order 34(2) goes on to provide that the chairman of a committee:-

> " . . . shall direct the secretary attending the committee to invite or summons witnesses and request or require the production of documents in accordance with the orders of the committee."

12. Question 1. It will thus be seen, in relation to Question 1, that there is no reason why any of the persons in Categories 1 to 4 might not, by the procedure of Standing Order 34, be required to attend to give oral evidence, and to produce documents at the Select Committee's hearing. Mr Hawke, Mr Kerin and Mr Dawkins each formerly held high political office, but that does not mean that they may not be required to

appear before a committee of a House. (None of those persons, of course, is now a member of the House of Representatives, and accordingly Senate Standing Order 178 is not applicable.)

13. I would therefore answer Question 1 by saying that the Committee does have power to compel witnesses from Categories 1 to 4 to give evidence and produce documents. The means is by the procedure of Standing Order 34(2). The procedures set out in Resolution 1 of the Parliamentary Privilege Resolutions agreed to by the Senate on 25 February 1988 ("the Privilege Resolutions") should also be followed, as should the Committee's own Terms of Reference.

14. I should add one observation in relation to documents, namely that it is unlikely that some of the persons in the several categories would themselves have relevant documents.

15. Question 4. It is convenient next to discuss Question 4, an issue which may first be considered by examining the courses which are open if a witness simply refuses to answer a question properly put at a meeting of a Committee of the Senate.

16. It is clear, in such a case, that the witness would be in breach of Resolution 6(12)(b) of the Privilege Resolutions, which provides that:-

" (12) A witness before the Senate or a committee shall not:

(b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so."

Similarly, Resolution 6(13)(b) of the same Privilege Resolutions provides in relation to documents that:-

" A person shall not, without reasonable excuse:

(b) refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Senate or of a Committee."

17. If a witness does not answer a question to which the Committee has required an answer, the Committee may not itself deal with the witness for contempt; it must report the matter to the Senate: Resolution 1(10) of the Privilege Resolutions. [If the ground of refusal is a claim of "privilege", Procedural Order 24(4) is also relevant.] In determining whether the witness's conduct amounted to a contempt of the Senate, or a breach of its privileges, the Senate might deal with the matter itself in the first instance, or alternatively might first refer the matter to its Committee of Privileges for its report. See Standing Order 18. See too Resolution 27 of the Privilege Resolutions.

18. The ambit of Senate's power to impose sanctions in such circumstances is now regulated by the Parliamentary Privileges Act, s.7(1) of which provides that a House of the Parliament:-

> ". . . may impose on a person a penalty of imprisonment for a period of six months for an offence against that House determined by that House to have been committed by that person."

The Senate has no other power to order imprisonment for an "offence against the House" (s.7(3)), the term "offence against a House" being a reference to:-

> " a breach of the privileges or immunities, or a contempt, of a House or of the members or Committees."

See s.3(3). The Senate is also empowered to impose a fine for an offence against the House (s.7(5)) but a fine may not be imposed in addition to a penalty of imprisonment for the same offence: s.7(7).

19. In summary, in answer to Question 4, the Committee's power, in the end, is to refer a failure or refusal to answer questions or produce documents to the Senate as a whole. The Committee itself has no power to impose a sanction. The Senate, if satisfied that an "offence against the House" in terms of s.7(3) of the Parliamentary Privileges Act has been committed, may impose a penalty of imprisonment not exceeding six months <u>or</u> a fine not exceeding $5,000.00 in the case of an individual.

20. Two questions would arise before the Senate in such a case, namely:-

(a) whether an offence against the Senate had been committed;

(b) if so, whether any and what penalty should be imposed.

21. I turn next to Question 3.

22. Question 3. It is obvious, of course, that there are some aspects of decisions of the Senate or of the Committee which could be the subject of decisions by the courts. For example, if a committee, rather than the Senate, purported to impose a penalty for an offence against the House, albeit an offence constituted by refusal to answer a question before a committee, the court could declare that the penalty had not been validly imposed, because the body purporting to impose it had no power to do so. Only "a House" may impose a penalty of imprisonment or a fine: Parliamentary Privileges Act, ss. 7(1) and 7(5). A similar situation would obtain if the House imposed a penalty in excess of that provided for by the Act.

23. Further, s.9 of the Act requires that where a penalty of imprisonment is imposed the relevant resolution and warrant of commitment:-

> " . . . shall set out particulars of the matters determined by the House to constitute that offence."

Section 9 alters the previous law that the breach of privilege need only be stated in general terms: see **The Queen v. Richards, Ex parte Fitzpatrick and Browne** (1955) 92 C.L.R. 157 at 162. To my mind, a resolution or warrant not complying with s.9 could be held invalid by a court, as not providing the necessary authority for imprisonment.

24. The matters to which I have referred in paragraphs 22 and 23 are, I think, relevantly peripheral. The principal issue is the extent to which the substance of the determination:-

(a) by the Committee that the question should be answered, or document produced;

(b) by the Senate that an offence against the House had been committed;

might be reviewed by a court.

25. As to the position of the committee, I do not consider that a court would "intervene" in the affairs of a committee of the Senate. Nor do I consider that a court would take any action in relation to the deliberations of the Senate at a time prior to the final determination by the Senate that an offence against the Senate had been committed. Whether the basis of refusal to do so would be a absence of jurisdiction so to do, or that it would be premature or officious to do so, need not be now resolved. I think it is quite clear that it would be

wrong for a court to consider the propriety of the actions of the Senate or its committee before the making of a determination by the Senate that there had been an offence against that House.

26. A different situation, however, would obtain once the Senate had resolved that there had been an offence against it, at least if a penalty was imposed. [A difficult question, presently academic, is whether there might be curial consideration if a finding of an offence against the Senate were made by the Senate, but no penalty was imposed.]

27. Prior to the enactment of the **Parliamentary Privileges Act** the functions of a court in relation to a finding of contempt of Parliament were as discussed by the High Court in **The Queen v. Richards, Ex parte Fitzpatrick and Browne** where Dixon C.J., speaking for the Court, said at 162:-

> " It is unnecessary to discuss at length the situation in England; it has been made clear by judicial authority. Stated shortly, it is this: it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise."

At 166, Dixon C.J. also said, in dealing with the English position:-

> " . . . it was for the courts to judge of the existence of privileges. But - consistently as they believed with that view - they also took the

> view that in the practical application of the privilege both upon all questions of fact and upon questions as to whether the facts fell within the scope of the privilege, the resolution of the House and the warrant of the Speaker were conclusive."

28. The position in relation to the Houses of the Commonwealth Parliament has changed somewhat by reason of the enactment of the **Parliamentary Privileges Act**. As I have said earlier, s.9 now requires that the "particulars of the matters determined by the House to constitute that offence" must be included in the resolution imposing the penalty and in the warrant committing the person to custody. Secondly, s.4 of the Act provides that:-

> " Conduct . . . does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions . . ."

29. The terms of s.4, which operate as a limitation on the powers of the Houses in relevant respects, mean that conduct in refusing to answer a question or produce a document cannot be an offence against a House (i.e. cannot constitute a breach of that House's privileges or immunities, or contempt of it) unless such conduct:-

(a) amounts to; or

(b) is intended to amount to; or

(c) is likely to amount to;

an interference with the free exercise of the committee's authority or functions, and an interference which is "improper".

30. It is then necessary to consider whether courts may examine whether the requirements of s.4 are satisfied and, if so, the function which the courts perform in so doing.

31. To my mind the first of those matters should be answered in the affirmative. Section 4 is part of a law of the Commonwealth made under the Constitution. Section 5 of the Commonwealth of Australia Constitution Act requires it to be applied by all courts throughout the Commonwealth.

32. The second question, however, is more difficult and there are (broadly speaking) two possible views open. One is that the court may determine whether, on the material before the relevant House, the conduct in fact satisfied the test provided for in s.4. The other is that the curial function is limited to determining whether it was open to the House so to find, whether or not the court itself would arrive at a similar view.

33. The resolution of this issue, as I have said, is difficult. I <u>incline</u> to the view that the court's function is the more limited, and I incline to that view for two reasons. The first is that s.5 provides that:-

> " Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force."

Whilst s.4 clearly does "expressly provide" for a qualification to the earlier broad power of the Houses under s.49 of the Constitution, it does not (and the Act otherwise does not) detract from the broad principle referred to in the passage quoted earlier (para.27) of **The Queen v. Richards, Ex parte Fitzpatrick and Browne**, namely that a court was entitled to decide whether the conduct in question was capable of amounting to contempt, but it was for the relevant House to decide whether it did so in fact.

34. The second reason is that s.16 of the Act, which applies Article 9 of the **Bill of Rights, 1688** to the Houses of Parliament, together with the extensive meaning given to "proceedings in Parliament" in s.16(2) and the provisions of s.16(3)(c) may well create significant difficulties in proving in a court some of the matters which it would ordinarily be necessary to prove if the larger view of the powers of a court were taken.

35. Once again, however, it is unnecessary to express a concluded view on these issues.

36. Question 2. In the light of the foregoing, I turn now to Question 2.

37. The question whether a committee of a House is entitled to have answered by a witness any relevant question which it insists on putting to the witness is really unresolved. One

view is that the committee is entitled to have all such questions answered, but has a discretion not to insist upon that course where it would be inappropriate to do so, as for example, where it would not be in the public interest that disclosure should occur. The other view is that the Houses of Parliament are not entitled to compel answers to all questions which they might ask, but are obliged to respect certain privileges and immunities including a "public interest immunity", somewhat analogous to that applicable in courts of law.

38. One sees the conflicts of view reflected in, for example, the Senate's own rules. Thus Resolution 6 of the Privilege Resolutions sets out in its opening words that the following parts of Resolution 6 are not to derogate from the Senate's "power to determine that particular acts constitute contempt". On the other hand, and no doubt subject to the broad qualification to which I have just referred, the Privilege Resolutions contemplate that there are circumstances where the witness's refusal to answer questions is unlikely to amount to an offence against the Senate. Thus Resolution 1(10) of the Privilege Resolutions provides that:-

> " (10) <u>Where a witness objects to answering any question put to the witness on any ground</u>, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee

> shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer to the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate." [Emphasis added]

39. The terms of Resolution 1(10) do not <u>themselves</u> suggest that the ground of objection raised before the committee <u>must</u> prevail. Indeed they suggest the opposite. Equally, however, they recognise that the objection <u>may</u> prevail if either the committee decides not to require an answer to the question, or the Senate declines to take action on the committee's report to it.

40. Secondly, Resolutions 6(12)(b) and 6(13)(c) of the Privilege Resolutions - set out above in para.16 - contain within themselves the qualification "without reasonable excuse".

41. Prior to the enactment of the Parliamentary Privileges Act the issue to which I have adverted in paragraph 37 presented itself in relatively stark form. It was an issue on which strongly divergent views might be taken, as demonstrated by the opposing views (along party lines) expressed by the

majority and minority in the Senate Standing Committee on Privileges Report on Matters Referred by Senate Resolution of 17 July 1975. The resolution of the issue, however, necessarily by the Senate itself rather than by the committee whose requirement that the question be answered gave rise to the issue, was always likely to be along party lines. The issue would arise with the government of the day, which might have a majority in both Houses (in which case the Senate would not be likely to take action to vindicate the committee) or which might have a majority in the House of Representatives only, but have "in its pocket" a number of bills rejected by the Senate and which wculd entitle it to obtain a double dissolution under s.57 of the Constitution (thus making it politically unlikely that the hostile majority in the Senate would be prepared to pay the price of a double dissolution - on a different political ground - in order to enforce the privilege of the Senate's committees). In short, the issue was for political resolution.

42. As I have said the issue, in the abstract, of the Senate's power to compel answers to questions put to witnesses by its committees was unresolved, and a matter on which strong, opposing, views were held. My own view on that abstract issue is that a House of the Parliament did have power to compel an answer to any relevant (and of course properly-framed) question but that the power would not ordinarily be exercised where there was a significant contention that the national interest would not be served by compelling the answer. I agree with the

views expressed in this regard in Campbell, **Parliamentary Privilege in Australia** (1966) at 171:-

> " Generally speaking, parliamentary committees do not regard themselves as obliged to observe the rules of evidence applied in courts of law. This means that when executive, or as it is better known, Crown privilege is claimed, a parliamentary committee may, if it chooses, reject the claim and insist that the witness testify or that the relevent documents be produced."

with the qualification which she expresses at 173:-

> " Even though in law parliamentary committees may not be bound to accept claims of Crown privilege, there may be occasions on which they ought to. Admittedly, in theory, the executive branch by convention is accountable to parliament, but, in accounting for its actions, is the administration obliged to divulge information which if disclosed might be prejudicial to national security? There is a considerable body of opinion to the effect that where parliamentary enquiry into executive action might be inimical to public safety, the House should not press for enquiry at all."

43. I have expressed the views in the preceding paragraph "in the abstract" because the issue was always inherently likely to remain academic because of the considerations to which I have adverted in paragraph 41.

44. The enactment of s.4 of the **Parliamentary Privileges Act** means that some modification of the views referred to above is required. As I have said earlier, an offence against the Senate will not be committed by refusal to answer questions or produce documents unless the conduct amounts, is intended to

amount or is likely to amount to an "improper interference" with the free exercise by the House or committee of its functions.

45. It may be taken, I think, that failure to answer questions or produce documents when required by a Senate committee would amount to an <u>interference</u> with the performance by the committee of its authority or functions. The term "improper", however, is not defined and to my mind allows a wider range of conduct, delimited only by the concept of "improper" (in the context of s.4) to be engaged in without amounting to an offence against the relevant House.

46. I shall return to the concept of impropriety in s.4, but it is first convenient to discuss in more detail the nature of the claim to confidentiality which has been made by the Treasurer.

47. That appears from the Treasurer's letter of 10 February 1994, a copy of which is Annexure "A" to this Opinion. [I exclude the Annexure to that letter.] As is apparent from its terms, the claim made is for confidentiality of the material in Categories 1 and 2 "in the public interest". The issue to which the advice and information is directed is, in the particular case, whether an order should be made by the Treasurer prohibiting the acquisition of shares in an Australian company, the power so to prohibit being found in

ss. 18(2) and 18(4) of the Foreign Acquisitions and Takeovers Act 1975. In making any such order the Treasurer must be satisifed that the acquisition or proposed acquisition would be "contrary to the national interest": ss. 18(2)(c), 18(4)(b) and 18(5). The Treasurer's letter does not suggest that the advice or information in the particular case is itself of such a nature that in the public interest its disclosure should not occur but rather that the processes of supply of information to government, and the candour of advice given to government would suffer in the class of cases in question, if the confidentiality of the supply of information and advice were not respected.

48. It is inevitable, when considering the merits of claims of this kind, to refer to the somewhat analogous situation obtaining when claims to public interest immunity are made in litigation. By way of example, the majority and minority views in the Senate Standing Committee on Privileges Report of 7 October 1975, to which I have referred earlier (paragraph 41) both draw heavily on the position of public interest immunity in relation to litigation. One of the aspects of that concept is the "class claim", and it is convenient to discuss now whether the claims by the Treasurer would, in litigation, satisfy the tests there applicable in respect of such an immunity.

49. The leading Australian case on the nature of the immunity and the manner in which it operates is **Sankey v. Whitlam**

(1978) 142 C.L.R. 1, where the principle is discussed relevantly at 38-46, 56-64, 95-99. See too generally Cross on Evidence, Australian Edition, paras. [27001] - [27195].

50. A summary of the main aspects of the operation of the principle, insofar as it applies to courts, is contained in the judgment of Gibbs A.C.J. in that case at 38-40, where he said:-

> " The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in Conway v. Rimmer, as follows:
>
> > ' There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.'
>
> It is in all the cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in Conway v. Rimmer, 'the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it'. In such cases once the court has decided that 'to order production of the document in evidence would put the interest of the state in jeopardy', it must decline to order production.

An objection may be made to the production of a document because it would be against the public interest to disclose its contents, or because it belongs to a class of documents which in the public interest ought not to be produced, whether or not it would be harmful to disclose the contents of the particular document. In the present case no suggestion has been made that the contents of any particular documents are such that their disclosure would harm the national interest. The claim is to withhold the documents because of the class to which they belong. Speaking generally, such a claim will be upheld only if it is really necessary for the proper functioning of the public service to withhold documents of that class from production. However it has been repeatedly asserted that there are certain documents which by their nature fall in a class which ought not to be disclosed no matter what the documents individually contain: in other words that the law recognizes that there is a class of documents which in the public interest should be immune from disclosure. The class includes cabinet minutes and minutes of discussions between heads of departments (**Conway v. Rimmer; Reg. v. Lewes Justices; Ex Parte Home Secretary; Australian National Airlines Commission v. The Commonwealth**, papers brought into existence for the purpose of preparing a submission to cabinet (**Lanyon Pty Ltd v. The Commonwealth**), and indeed any documents which relate to the framing of government policy at a high level (cf. **In re Grosvenor Hotel, London [No. 2]**). According to Lord Reid, the class would extend 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': **Conway v. Rimmer**.

One reason that is traditionally given for the protection of documents of this class is that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. Some judges now regard this reason as unconvincing, but I do not think it altogether unreal to suppose that in some matters at least communications between Ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure. For instance, not all Crown

servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned. However this consideration does not justify the grant of a complete immunity from disclosure to documents of this kind. Another reason was suggested by Lord Reid in Conway v. Rimmer:

> ' To my mind the most important reason is that such disclosure would create or fan ill-formed 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.'

Of course, the object of the protection is to ensure the proper workings of government, and not to protect Ministers and other servants of the Crown from criticism, however intemperate and unfairly based. Nevertheless, it is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No Minister, or senior public servant, could effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public. The public interest therefore requires that some protection be afforded by the law to documents of that kind. It does not follow that all such documents should be absolutely protected from disclosure, irrespective of the subject matter with which they deal."

51. Some further features which emerge from the passages in Sankey v. Whitlam to which I have referred, and which are also potentially germane for present purposes, are:-

(a) the protection from disclosure is not absolute, and does not endure for ever;

(b) it is the court, not the executive, which in the end decides whether the privilege is made out, although due weight, of course, is given to the view of the executive government;

(c) the immunity applies to the giving of oral evidence, as well as to the production of documents;

(d) because the immunity is for the public interest, it may be taken by a witness, or by the court itself;

(e) if necessary, the court will examine the documents in question with a view to determining whether the claim is made out.

52. If the correctness of the claim for public interest immunity were to arise for consideration in litigation, my own view would be that Category 1 of the material to which the Treasurer's letter refers, i.e. advice from FIRB or from the Treasury to the Government, would be regarded as falling within a class to which a claim for public interest immunity might successfully be made. Whether the claim would be sustained would depend on other factors, such as the time which had elapsed since the advice was given. The court might also well wish to examine the material itself. I think it probable, however, that the claim would be upheld. The position is more

doubtful in respect of Category 2. "Confidentiality", as Lord Cross said in **Alfred Crompton Amusement Machines Ltd** v. **Commissioners of Customs and Excise (No.2)** [1974] A.C. 405 at 433:-

> " . . . is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest."

My own view, however, is whilst some of the information in the Treasurer's Category 2 would be regarded as material attracting the immunity, the "class" comprising Category 2 is in reality a number of different "classes", and that the claim would not succeed as to all documents, the subject of it.

53. There are, of course, some obvious analogies between the concepts underlying these principles and those which would be applicable by the Senate or a committee in deciding whether to require a question to be answered or a document produced notwithstanding the making of a claim to public interest immunity.

54. In the first place, I do not think that it is the province of the executive government to decide conclusively whether questions should not be answered, or documents produced, by reason of public interest immunity. I am conscious, of course, of the fact that a House of Parliament is a political, not judicial, institution and indeed a party political body. So too, however, is the executive government. In my view the

relationship between legislature and executive in Australia merits the conclusion that the executive government's view on such an issue must bend to that of the relevant House. Of course, in deciding whether to press a question or require the production of a document, the committee should take into account the views of the executive government. They are to be respected and in many instances, one would expect them to be accepted as a matter of course. They are not, however, decisive.

55. There seems to be also no reason why such views might not be expressed strongly by the executive government, and no reason why that government should not tell its employees, former employees, advisers and former advisers, and its own former members, that it intends to claim that the questions should not be answered or the documents not produced.

56. The particular form of communication adopted by the Treasurer to the committee, to potential witnesses, or by witnesses in declining to answer questions or producing documents does not, I think, much matter. The ultimate question is whether the contentions underlying the claim should be accepted.

57. In determining whether such claims should be accepted there may well be circumstances where a sub-committee of a Senate committee, by agreement with the executive, could be made aware of the nature of the evidence or documents, with a view to determining whether the executive government's claim should be

acceded to, but this is only likely to occur where there are political considerations leading to that result.

58. In short, in answer to Question 2, I consider that an executive government does not have the right to determine conclusively whether questions should or should not be answered before a Senate Committee, or documents produced to it.

59. **Question 5.** **The Parliamentary Privileges Act**, by s.12 provides that:-

> " (1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence."

Penalties are provided for by s.12(1). Section 12(3) recognises that a House may itself impose a penalty for such conduct. The terms of s.12(1) are the same as those of Resolution 6(10) of the Privilege Resolutions.

60. As is apparent from the terms of s.12(1), the provision contemplates that the means adopted must be "improper". I do not think that the conduct of an appropriate Minister, in taking the steps necessary to ensure that a claim to public interest immunity in respect of the disclosure of particular matters to a committee of the Senate - such conduct including "requiring" or "directing" all persons who might give evidence or produce

documents upon the subject matter not to do so at that point – can be regarded as, of itself, "improper". I am assuming, of course, that the claim is honestly made. (That does not necessarily exclude political purposes also being involved.) In particular, if it has been the policy of the Ministry to make claims of this kind over a long period of time, as the discussion in the Administrative Appeals Tribunal in **re Lordsvale Finance Ltd and Department of Treasury (No.2)** (1986) 12 A.L.D. 32 seems to suggest, it would be difficult to support the notion that the making of the claim and the taking of the steps necessary to ensure its efficacy was itself "improper" in terms of s.12(1). Those steps would appear to be necessary to bring the issue before the only parliamentary body which could resolve it, namely the Senate as a whole.

61. A different situation might well arise if the Senate as a whole resolved that the claim to immunity should be rejected. In such a case the giving of directions not to answer the question or not to produce the documents in my view would then be "improper". That involves, of course, the assumption that the Senate <u>does</u> have the power to require any relevant question to be answered or relevant document to produced to it. That would be an issue to be resolved in the end by a court and I do not think that the relevant Minister at that point could say that the conduct was not improper because all the Minister had been seeking to do was to obtain a ruling of the court on the issue.

62. In relation to the terms of s.4 of the Act, similar considerations, in my view, would arise. I do not think that it is an "improper" interference with the free exercise by a committee of its function for a witness to claim public immunity privilege in relation to answering questions or producing documents, provided that the witness indicates a preparedness to answer the question if the Senate determines that it should be answered or the documents produced. (It is possible that there are circumstances where that conduct would be regarded as "improper", but they would be circumstances of rarity, and probably urgency.)

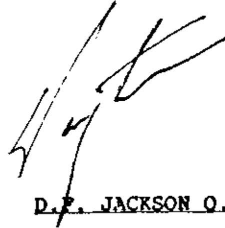
63. It may be noted that the views expressed above reflect a notion referred to earlier, namely that the enactment of ss. 4 and 12 of the **Parliamentary Privileges Act** has effected some reduction in the powers of the Houses.

64. **Additional Question.** This question has been largely dealt with in answers to earlier questions. Broadly speaking, I think witnesses are "entitled" to seek to rely on public interest immunity and to take steps in reliance upon that which will lead to the issue being resolved by the Senate. A different situation, as I have noted earlier, would obtain if a witness refused to answer a question or produce documents once the Senate as a whole had determined that the witness should do so.

65. In relation to the general conduct of the matter, and in particular in relation to the advice to be given by the Chair to witnesses before they give oral evidence, the terms of Resolution 1 of the Privilege Resolutions appear a satisfactory and fair way of dealing with the matter.

66. If it is intended to pursue the answers to particular questions or the production of particular documents with any witness, it is essential that the question or requirement be put directly and clearly to the witness.

With Compliments



D.F. JACKSON Q.C.

8 March 1994