APPENDIX I

CLERK'S ADVICE ON SUB-JUDICE

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Senator R Alston
Chair
Select Committee on Certain Aspects of
Foreign Ownership Decisions in Relation
to the Print Media
Parliament House
CANBERRA ACT 2600

Dear Senator Alston

Thank you for your letter of today's date in which you seek advice on a submission from solicitors representing Mr Mark Burrows to the effect that the sub judice principle should be applied to forgo the taking of evidence by the Committee from Mr Burrows.

The sub judice convention

The sub judice convention is a restriction on debate or inquiry which the Senate imposes upon itself, whereby debate or inquiry is avoided which could involve a substantial danger of prejudice to proceedings before a court, unless the Senate considers that there is an overriding requirement for the Senate to discuss or inquire into a matter of public interest.

The convention is not contained in the standing orders, but is interpreted and applied by the chair and by the Senate according to circumstances.

The concept of prejudice to legal proceedings involves an hypothesis that a debate or inquiry on a matter before a court could influence the court and cause it to make a decision other than on the evidence and submissions before the court. A danger of prejudice would not arise from mere reference to such a matter, but from a canvassing of the issues before the court or a prejudgment of those issues.

This concept of prejudice was well explained in the context of contempt of court by the Federal Court in a case before it in 1989, in which the court restrained a state commission of inquiry from conducting a public inquiry into matters before the court in a civil action. Justice Spender explained:

> It seems to me that there are really two aspects of the question of contempt in the context of a public prejudgment. The first concerns whether the prejudgment will be likely to hinder the Court in reaching a correct conclusion. Publicity which might taint the impartiality of the jurors or which might inhibit witnesses from giving evidence are of this kind; that is to say, they have a tendency to affect whether the right result was achieved. Because jurors are less resistant than judges in resisting improper influences, considerations of this kind are of much the greater concern when there is a jury. This factor, as well as the concern of courts when a person is in jeopardy of a criminal conviction, explains the concentration of attention on the effect of public prejudgment on criminal proceedings.

The justice referred to an additional reason for restraining public prejudgment of a case:

> The second aspect of contempt in the context of public prejudgment relates not so much to whether the process is likely to be poisoned, but to the judgment itself. The first, as I said, affects whether the result obtained might not be the right result. Yet, if the effect of a public prejudgment is to undermine public confidence in that judgment, even though it does not affect the process by which that judgment is reached, that equally is a contempt. It seems to me that a public prejudgment of a central issue in the Federal Court proceedings would work a usurpation of the function of the Federal Court and lower the respect and authority to which its determination is entitled. (*Sharpe v Goodhew* 1989 90 ALR 221 at 240-1)

The first paragraph is a succinct statement of the rationale of the sub judice principle, a rationale it shares with contempt of court. The second paragraph is a statement of an additional dimension of contempt of court which has not been regarded as part of the rationale of the parliamentary sub judice convention.

As the court suggested, the danger of prejudice to court proceedings is much greater where a jury is involved in the proceedings, because judges are unlikely to be influenced in the formation of their judgments by public or parliamentary debate or inquiry. There may also be a case for apprehending a greater danger of prejudice if

a matter is before a magistrate. There is also the possibility of witnesses being influenced.

In recent decades the interpretation of the sub judice convention in the Senate has changed. In earlier years there was a tendency to restrain debate on any matter which was before a court. In the 1960s and 1970s, however, there was a change in emphasis and a greater focus on the question of whether there was a danger of prejudice to proceedings.

In 1969 President McMullin ruled:

> "As a general rule the Chair will not allow references to matters which are awaiting or under adjudication in the courts if such reference may prejudice proceedings. But it does not necessarily follow that just because a matter is before a court every aspect of it must be sub judice and beyond the limits of permissible debate in Parliament. That would be too restrictive of the rights of Parliament". (Senate Debates, 20 May 1969, p. 1368)

In 1972 President Cormack stated that he had reviewed the sub judice principle, which he thought had been too restrictive in the past, and indicated the approach the Chair would take:

> "The prime question I must ask myself is, I think: Is parliamentary debate likely to give rise to any real and substantial danger of prejudice to proceedings before the court?" (Senate Debates, 19 September 1972, pp. 907-8)

An exposition of the sub judice convention was provided by the then Minister for Justice, Senator Tate, in debate in the Senate on 30 May 1989 in which a senator sought to discuss matters relating to the 1978 Sydney Hilton Hotel bombing when a criminal prosecution was pending. (A person had been arrested and charged with criminal offences in relation to the bombing.) Senator Tate said:

> Mr President, you are faced with a very difficult situation, as indeed is the Senate. In all questions of sub judice you have to balance the absolute privilege of this place with the absolute privilege of the courts. It is a contest between the two. I think in this particular instance, the question of the Hilton bombing, the subsequent court actions and, indeed, the public inquiry, the pardon, the compensation, and the events surrounding the allegations are matters of very genuine public interest of a greater scope than attends normal trials to do with the killing of persons in our community. Unless this chamber were

> convinced that what Senator Dunn is speaking about could cause real prejudice to the trial in the sense of either creating an atmosphere where a jury would be unable to deal fairly with the evidence put before it, or would somehow perhaps affect a future witness in the giving of evidence, whether for the prosecution or the defence, and unless we thought that the matters Senator Dunn was trying to speak about were likely to cause real prejudice to the outcome of that committal proceeding or trial, I think, on balance, given the nature of the matters surrounding this whole incident over many years, that the public interest probably would allow her to continue.

The President ruled:

> I will allow Senator Dunn to continue but I would advise her that she cannot question the merit or otherwise of likely evidence that could be used in the prosecution case, because it is obvious that this would prejudice any case that came before a jury. (Senate Debates, 30 May 1989, pp. 3062-5)

On a subsequent occasion, the same senator was asked to reframe her remarks when committal proceedings relating to the matter were in progress before a magistrate (Senate Debates, 27 September 1989, pp. 1472-3).

This treatment of this matter illustrates the three important principles of the sub judice convention:

- there should be an assessment of whether there is a real danger of prejudice in the sense explained by Senator Tate
- the danger of prejudice must be weighed against the public interest in the matters under discussion
- the danger of prejudice is greater when a matter is actually before a magistrate or a jury.

It would be an undue restriction on the freedom of the Senate to debate or inquire into matters of public interest if debate were to be restrained simply on the basis that matters may come before a court in the future. Thus the fact that writs have been issued, which does not necessarily mean that proceedings will ensue, does not give cause for the sub judice convention to be invoked (ruling of President Sibraa, Senate Debates, 10 May 1988, p. 2224).

The submission for Mr Burrows refers to the ruling of the President of the Senate in the case of the Westpac documents. The basis of that ruling was that disclosure of the documents could be prejudicial to legal proceedings, in that it could terminate proceedings whereby Westpac was seeking the suppression of the documents on the basis of legal professional privilege. President Sibraa indicated that, having weighed the contrary factors of prejudice to the legal proceedings and the right of the Senate to debate a matter of public interest, he had determined that disclosure of the documents in proceedings of the Senate should not be permitted. The President stated:

> The very subject matter of the case immediately before the courts, and in respect of which the sub judice claim is made, is the question as to whether the documents involved should be suppressed: to disclose the documents now would ipso facto abort that case. No clearer example of real and present danger to current legal proceedings could be imagined: indeed, it is not merely a matter of the present proceedings being prejudiced, but rather a particular litigant's rights being denied absolutely (Senate Debates, 12 February 1991, p. 356).

Thus the prejudice which was to be apprehended by disclosure of the documents in proceedings in the Senate was of an unusual character: such disclosure could render the court proceedings undertaken by Westpac ineffectual, in that the court would be unlikely to order the suppression of documents which had been tabled in the Senate and thereby made public.

That case is therefore not an instructive precedent in relation to the situation referred to in the submission.

Application to the present case

In determining whether the sub judice principle should be applied to restrain the Committee, therefore, the Committee should form a judgment as to whether hearing evidence from Mr Burrows would pose a substantial danger of prejudice to the legal proceedings referred to in the submission, and whether that danger of prejudice to the proceedings is outweighed by the public interest in the Committee pursuing its inquiry in relation to Mr Burrows.

The Senate's direction that an inquiry be undertaken is an indication of the Senate's belief that there is a significant public interest in the inquiry being held.

The submission states:

> The prejudice that would be suffered by our clients if called to give evidence to the Committee would be that they would be subjected to questioning on factual matters relevant to issues in the proceedings without the benefit of direct representation by Counsel. If the Senate Select Committee were to pursue its investigations into the conduct of our clients concerning the post-receivership reconstruction of Fairfax, it would be effectively setting itself up as an alternative forum to the court. We believe this would interfere with the course of justice.

This paragraph is not helpful to the Committee in seeking to establish whether there is a danger of prejudice to the proceedings. The subjection of witnesses to questioning on matters relevant to issues in legal proceedings, with or without representation by counsel, and the making of findings by the Committee on matters which are before the court, do not of themselves cause prejudice to the court proceedings.

Under the law of parliamentary privilege as elaborated by section 16 of the *Parliamentary Privileges Act 1987*, any evidence given before the Committee and any report by the Committee could not be admitted in evidence in the legal proceedings to support either party in those proceedings.

As has already been noted, prejudgment of issues likely to be determined by a court is not in itself a foundation of the sub judice principle.

As has been indicated, the principle is invoked only if there is a danger of prejudice to proceedings in the sense that the court may be prevented from making a correct finding because jurors or witnesses are influenced by the Committee's proceedings.

In order to assess whether there is any such danger of prejudice to the proceedings, the Committee needs to know:

- whether the matters before the court will be tried by a jury
- whether there are witnesses or potential witnesses who may be influenced by a hearing of evidence by the Committee
- whether the particular questions actually in issue in the legal proceedings are likely to be canvassed in any hearing of the Committee.

As has also been noted, the remote possibility of the justices of the court being influenced by the Committee's inquiry is not a factor in the assessment of any danger of prejudice.

It is presumed that the hearing of the Committee would not be contemporaneous with the court hearing and therefore would not disrupt the court hearing by occupying the parties or witnesses. It is also presumed that the Committee would not interfere with the court hearing by withholding original documents.

If the Committee were to come to the conclusion that there is a danger of prejudice to the court proceedings, the Committee has the option of avoiding that danger entirely by hearing evidence in camera and not publishing or reporting the evidence so heard until after the court hearing has taken place.

Please let me know if I can provide any elaboration or clarification of this advice.

Yours sincerely

(Harry Evans)