2. THE INQUIRY PROCESS

INTRODUCTION

2.1 In early June 1996 the Committee advertised its inquiry and invited persons and organisations wishing to express views on the Committee's terms of reference to make a submission. Subsequently the Committee wrote to approximately one hundred individuals or organisations and invited them to make a submission to the Committee. The Committee also sought access to the internal reports or working documents of the Victorian Casino Control Authority (VCCA) and its successor the Victorian Casino and Gaming Authority (VCGA).

2.2 The Committee received ten submissions. In response to an invitation to provide the Committee with a written submission, the Premier of Victoria asserted that:

> ... the State of Victoria is protected by its executive privilege against actions of the Commonwealth which threaten its autonomy or curtail its capacity to function effectively. Your inquiry is such an action as it threatens to breach the confidentiality of advice provided at the highest levels of the Victorian Public Service and possibly Cabinet confidentiality.
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> ... Furthermore, the State of Victoria will assert its executive privilege if the Committee attempts to obtain evidence from current or former Ministers or Public Servants, either voluntarily or by compulsion of law. Any attempt to examine current or former Ministers or Public Servants will require them to disclose information relating to the Cabinet process and high level communications within the Victorian Public Service.

2.3 Following the receipt of submissions the usual procedure is for a Senate Committee to receive further evidence at public hearings. Unfortunately the stance taken by the Victorian Government presented the Committee with limited material on which to base its public hearings and threatened to considerably restrict the scope of those hearings.

2.4 The controversy surrounding the tender process for the Victorian Casino is the subject of paragraph (d) of the Committee's terms of reference. As the Crown Casino tender process is both one of the most recent in Australia and one of the most controversial, the events surrounding the tender for that casino were also of great importance for the Committee's consideration of its other

terms of reference. The unco-operative attitude of the Victorian Government therefore represented a major impediment to the successful conclusion of the Committee's inquiry.

2.5 In addition to the issues raised by the Premier of Victoria a number of potential witnesses raised the issue of the secrecy provisions in State legislation and in memoranda of understanding and consultancy agreements. The Committee was therefore forced to give detailed consideration to the coercive powers available to it and to the extent to which they could or should be used during any public hearings.

2.6 Under its terms of appointment the Committee has a general power to call for persons and documents and the Senate has the power to compel compliance with those orders. However, the issues raised by the Victorian Premier reflect the possible existence of significant limits on the powers of the Senate in this case. The Committee therefore decided to test these issues before proceeding with any public hearings and sought advice from the Clerk and Professor Dennis Pearce on its powers.

THE SENATE'S POWER TO ESTABLISH INQUIRIES AND COMPEL THE GIVING OF EVIDENCE

2.7 The Senate's power to establish committees of inquiry derives from ss 49 and 50 of the Australian constitution. Those sections provide that:

> Privileges, &c. of Houses.
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> **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.
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> Rules and orders.
>
> **50.** Each House of the Parliament may make rules and orders with respect to-
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> (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.

2.8 At the time of the establishment of the Commonwealth in 1901, the House of Commons had extensive authority to conduct inquiries and compel the attendance of witnesses and the giving of evidence. In *Howard v Gossen*[4] Coleridge J said:

> The Commons are, in the words of Lord Coke, the general inquisitors of the realm ... it would be difficult to define any limits by which the subject matter of their inquiry can be bounded ... they may inquire into everything which it concerns the public weal for them to know; and they themselves ... are entrusted with determination of what falls within that category. Co-extensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, [and] to enforce it by arrest where disobedience makes that necessary.

2.9 It would seem from this that the Houses have very broad powers both to conduct inquiries and to compel the attendance of witnesses and the answering of questions. However, there may be both legal and practical limitations on those powers.

IMPLICIT LIMITATIONS ON THE POWERS OF THE SENATE

2.10 The Committee received advice that the extensive powers of the Federal Houses may be subject to some limitations. The Committee devoted considerable time to exploring the issue of the Senate's powers and has decided to include an extensive review of the material it considered in the remainder of this chapter.

2.11 There are two grounds on which the powers of the Senate may be limited because of the federal nature of the Australian Constitution. The first of these is that the power of the Commonwealth may be restricted to inquiring into matters which fall within the legislative competence of the Commonwealth. The second is that the use of the Commonwealth's powers must not be inimical to the integrity of the states.

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4 *Howard v Gossen* (1845) 10 QBD 359. Lindell 385.

LEGISLATIVE COMPETENCE OF THE COMMONWEALTH

2.12 There may be an implicit limitation on the power of the Senate to use its compulsive powers during inquiries arising from the limited legislative power of the Commonwealth. There appears to be no limit on the subject into which the Commonwealth may inquire, or into the questions which may be asked. However, the power of the Parliament to compel answers and demand the production of documents during an inquiry may be confined to inquiries into subjects in respect of which the Commonwealth Parliament has the power to legislate.

2.13 Judicial authority relating to the power of Royal Commissions to conduct inquiries suggests that the powers of the Commonwealth to ask questions during the conduct of inquiries are very wide. However, the use of compulsion is not possible if the issues to be investigated by the Royal Commission exceed the legislative competence of the Commonwealth.[5]

2.14 In the *CSR* case the Privy Council observed that:

> ... it is hardly possible for a Court to pronounce in advance as to what may and what may not turn out to be relevant to other subjects of inquiry on which the Commonwealth Parliament is undoubtedly entitled to make laws. If in order to render the powers given by the Royal Commission Acts *intra vires* it is sufficient that they should be ancillary to possible subjects of present legislative capacity, as distinguished from being incidents in actual legislation about such subjects, it is not easy to say that the questions proposed in the present case to be put, and the documents sought to be obtained, are not relevant as throwing light on possible legislation.[6]
>
> To be compelled to answer (the questions) is a serious interference with liberty. But if there exists a right in the Government of the Commonwealth to put them, so far as relevant to a merely possible exercise of its actual legislative powers, the policy of doing so is something on which their Lordships are neither at liberty nor competent to express an opinion, and it seems to them impossible to say in advance which of these questions, if they can be insisted on at all, may not turn

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5 *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644; *Lockwood v The Commonwealth* (1954) 90 CLR 177.

6 *Attorney-General (Cth) v "Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644 at 650.

out in the course of a prolonged inquiry to be relevant or even necessary for the guidance of the Legislature in the possible exercise of its powers.[7]

2.15 Having indicated a view that the power of the Commonwealth to make inquiries related to its legislative capacity should be interpreted widely the Privy Council then turned its attention to the power of the Royal Commission to compel witnesses to answer questions on other matters. It found that in this respect the Royal Commissions Acts were ultra vires.

2.16 In *Lockwood v The Commonwealth*[8] Fullagar J said that:

> I can think of no sound reason why the Commonwealth should not make an inquiry into any subject matter which it may choose. Where, however, the subject matter of the inquiry lies outside the field of Commonwealth power, the Commonwealth cannot constitutionally confer compulsive powers on any body set up to make the inquiry.[9]

2.17 In commenting upon the earlier *CSR* case he said that:

> Actually the vice, and the only vice, lay in the fact that s.1A authorised inquiry, attended by compulsive powers, into matters which were not, as well as matters which were, within the constitutional powers of the Commonwealth.[10]

2.18 In his advice to the Committee on its powers with respect to this inquiry Dennis Pearce stated;

> But in this case the scope of the inquiry is broad and is associated with the corporations power of the Commonwealth and also draws by implication on the external affairs power. It does not seem to me that a constitutional objection based on the power to conduct the inquiry could be successfully raised.[11]

2.19 The United States has a similar federal structure to Australia. The United States Supreme Court has held that the inquiry powers of the Congress are

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Attorney-General (Cth) v "Colonial Sugar Refining Co Ltd (1913) 17 CLR 644 at 651.

8 *Lockwood v The Commonwealth* (1954) 90 CLR 177.

9 *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 182.

10 *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 183.

11 Dennis Pearce "*Advice on the Calling of Witnesses*", 4 October 1996, p 4.

limited to its areas of legislative competence (*Quinn v US* 1955 349 US 155). However, this would not mean that an inquiry would have to be linked with any particular legislation (cf *Eastland v US Servicemen's Fund* 1975 421 US 491).[12]

2.20 It would appear from the above that the Senate has very broad powers to conduct inquiries, to ask questions and examine documents but its use of compulsive powers may be restricted. Both the *CSR* and *Lockwood* cases dealt with the use of compulsive powers by Royal Commissions established under Commonwealth legislation. If the matter were litigated the High Court might hold that this limitation also applies to the inquiry powers of Senate committees. However, it could also be argued that Senate committees, which are not established by legislation, have broader powers.

2.21 Even if the court were to find that the limitation applied to the inquiry powers of the Senate there would still remain the question how the limitation was applied to the Committee's terms of reference and to specific lines of inquiry being followed by the Committee. Geoffrey Lindell[13] has suggested that:

> Even if, notwithstanding the above consideration, the power to establish parliamentary committees of inquiry is federally limited, two factors would combine to lessen the practical significance of such a limitation. The first is that the limitation may not come into play unless the committee is armed with compulsory powers to require the attendance of witnesses and the production of documents. ... Secondly, there remains the difficulty of establishing that a matter may never be relevant to the Commonwealth's legislative powers.[14]

2.22 The absence of any clear judicial guidance on this matter has made it difficult for the Committee to come to any firm conclusion on the affect on its inquiry of this possible limitation. However it is possible that a court may find that the use of coercive powers in relation to inquiries directed at Para (d)(i) of the Committee's terms of reference are beyond the Committees powers.

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12 *Odgers' Australian Senate Practice*, 7th Edition, Electronic copy updated to 30-9-96, p 51.

13 Geoffrey Lindell, "*Parliamentary Inquiries and Government Witnesses*", (1995) 20 Melb Uni L Rev 383.

14 Geoffrey Lindell, "*Parliamentary Inquiries and Government Witnesses*", (1995) 20 Melb Uni L Rev 383 at 388.

INTEGRITY OF THE STATES

2.23 The Committee's attention was also drawn to a second implicit limitation. The second limitation is that the use of the Commonwealth's powers must not be inimical to the integrity of the States. This limitation arises from the need to preserve the integrity and autonomy of the States as constituent elements of the Australian Federation. However, as with the limitation based on the Commonwealth's legislative power discussed above the scope of this limitation has not been clearly defined.

> The many discussions in the High Court reveal the difficulty of identifying, particularly in the abstract, what precisely is the scope of the implied limitation on Commonwealth power. Secondly, it seems likely that some matters that might be addressed to a witness could fall within the proscription but others would not. What I think is clear is that recent discussions by the Court of the limitation indicates that it is not an all or nothing position. The limitation does not mean that no inquiries can be made of the State officials.[15]

2.24 In a recent decision the High Court identified two elements of the limitation:

> The limitation consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities (the limitation against discrimination) and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.[16]

2.25 The limitation does not act to prevent the Commonwealth from enacting legislation which overrides the decision of a state government. The enactment of such legislation was anticipated in the constitution which makes provision for an inconsistency of laws in section 109. In the *Dams* case it was held that the prerogatives of the Crown in right of the State were not immune from Commonwealth legislation, and the overriding and superseding of State legislative and executive functions was the ordinary consequence under s109 of the constitution of the operation of any valid commonwealth law in an area of

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15 Dennis Pearce, "*Advice on the Calling of Witnesses*", 4 October 1996, p 4.

16 *Re Australian Education Union; Ex parte State of Victoria* (1995) 128 ALR 609.

concurrent power.[17] In his judgment Deane J said in response to the arguments of the State Government:

> The fact that the Wilderness National Parks comprise more than 11 per cent of the land area of Tasmania provided a setting in which this submission was advanced with an effectiveness that, in my view, does not survive closer scrutiny. The declaration , in reg.2 of the Regulations under the Act, of the Wilderness National Parks as part of the natural heritage, which is the only provision which relates to the whole of the Wilderness National Parks, did not involve any operative interference at all with the legislative or executive powers of Tasmania in respect of that land. Nor, in my view, can the actual prohibitions and restrictions which the Act, Regulations and Proclamations impose in respect of more limited areas properly be seen as in any way inconsistent with the continued existence of Tasmania or its capacity to function.

2.26 In the education case the High Court similarly made a distinction between the curtailment of the constitutional functions of a state government and an impairment of a particular function which a state government undertakes.[18]

2.27 The cases discussed above refer to the limitation on the passing of legislation. It could be argued that an inquiry by a Senate Committee whose findings do not have the force of law is not subject to the same limitation. However, during inquiries by administrative bodies the courts have been prepared to hold that an inquiry does affect a person such that the rules of natural justice must be followed even though no adverse consequences flow directly from the finding. The same approach could lead to a court finding that the limitation applicable to legislation also applies to inquiries directed to a possible legislative outcome.

Discrimination Limitation

2.28 If the implied limitation approach is relevant to Senate inquiries, the reference by the High Court to a prohibition against discrimination may be read as referring to a circumstance where a burden is placed on an institution of a State that is not similarly borne the Commonwealth. The Senate, for example,

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17 *Commonwealth of Australia and Another v State of Tasmania and Others* (1983) 158 CLR 1; 46 ALR 625 at 627.

18 *Re Australian Education Union; Ex parte State of Victoria* (1995) 128 ALR 609 at 629.

cannot compel a Member of the House of Representatives to attend before it or one of its committees. It can only invite Members to appear.[19]

> If the Commonwealth Parliament provides in its rules or practice that Commonwealth Members of Parliament are not compellable witnesses it would seem discriminatory if it allowed State Parliamentarians to be summoned and questioned. The view might also be taken that the examination of State members affected the constitutional capacity of the State to govern thereby attracting the second limitation on Commonwealth power noted above.[20]

2.29 This limitation would probably operate to prevent the Committee from summoning a member of a State Parliament. The issue of whether the Senate could compel the attendance of a member of a State Parliament was considered by the Select Committee on the Australian Loan Council in 1992. At that time the Clerk advised the Senate that compulsion was not possible on the grounds of comity between parliaments and also on the basis of the implied limitation in the constitution. In its interim report in March 1993 the Committee accepted the advice of the Clerk of the Senate that it could not summon as witnesses members of the House of Representatives and of the houses of state parliaments. Similar advice was accepted by the Select Committee on Unresolved Whistleblower Cases.[21]

2.30 This leaves open the question of whether state officers and former parliamentarians can be compelled to attend. In the past the Senate has summoned former members of the Commonwealth Parliament to appear before a committee[22] and employees and former employees of Commonwealth departments and agencies are compellable as witnesses.[23] There would therefore appear to be no bar, on the grounds of discrimination, to the use of coercive powers to summon officers of State Government agencies and

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19 *Odgers' Australian Senate Practice*, Seventh Edition, Electronic copy updated to 30-9-96, at 416.

20 Dennis Pearce, "*Advice on the Calling of Witnesses*", 4 October 1996, p 5.

21 *Odgers' Australian Senate Practice*, 7th Edition, Electronic copy updated to 30-9-96, p 51.

22 *Odgers' Australian Senate Practice*, 7th Edition, Electronic copy updated to 30-9-96 at 418.

23 *Odgers' Australian Senate Practice*, 7th Edition, Electronic copy updated to 30-9-96 at 418 - 419.

departments, and former members of State Parliaments to appear before the Committee.

Capacity of the States to Function as Governments

2.31 The second arm of the implied limitation test might provide protection for state officials and former members of State Parliament on the grounds that to require them to appear or to answer questions would destroy or curtail the capacity of the States to function as governments. In his advice to the Committee Professor Pearce reviewed the Committee's terms of reference before concluding that:

> However, the establishment of a casino is essentially a State commercial enterprise. I find it difficult to see how it could be said to go to the continuing functions of a State if its commercial activities were to be the subject of an inquiry by a Senate committee,[24]

2.32 Although an inquiry into the commercial operations of a casino might not go to the continuing functions of a State there may be a limitation on the ability of the Committee to ask questions which relate to the formulation of policy by the State concerning casinos.

> A further limitation that could be claimed with some likelihood of success would be in relation to questions that related to the Government on high level policy issues, Cabinet decisions, etc. A State government could expect that such matters would not be inquired into by the Commonwealth Parliament. The exposure of such matters could properly be thought as being concerned with the internal services of the Government. Questions relating to them, particularly if answering the questions was compulsory, would curtail the capacity of the State to function as a Government. This limitation would be readily applicable to information sought to be elicited from officers of the State Government. It is less obvious that matters sought from the officials of statutory offices and more particularly consultants are likely to fall within this limitation.[25]

2.33 In the *Education* case the Court drew a distinction between ability of the Commonwealth to regulate the employment conditions of persons engaged at higher levels of government and other employees.

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[24] Dennis Pearce, "*Advice on the Calling of Witnesses*", 4 October 1996, p 5.

[25] Dennis Pearce, "*Advice on the Calling of Witnesses*", 4 October 1996, p 6.

> In our view, also critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group.[26]

2.34 It is possible, on this basis, that a court may draw a distinction between the ability of the Committee to use its powers with respect to other State Government officials and these senior officials, particularly where the Senate sought to compel these people to break confidentiality agreements contained in their employment contracts.

2.35 The Clerk has also indicated that the secrecy provisions contained in section 151 of the Casino Control Act 1991 (Vic) may be relevant to the limitation on the inquiry power respect of the capacity of states to function.

> The existence of such a provision may well lend support to the relevant limitation. In other words, the fact that a state parliament has enacted special provisions to restrict access to certain information may be taken into account in determining whether dealing with such information is vital to the capacity of the state to function.[27]

2.36 The experience of the United States Congress may also be relevant to the scope of the limitation.

> In the United States the view is taken that each House of the Congress and their committees may summon members and officers of state governments, provided that this is for the purposes of inquiries into matters within the legislative power of the Congress. The question has not been adjudicated, but there are precedents for the summoning of state officers and their responding. It must be noted, however, that differing constitutional provisions may reduce the persuasive value of the American law for Australian purposes; for example article 4, section 4 of the US Constitution, whereby the United States guarantees to every state a republican form of government, gives the Congress a general power of

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26 *Re Australian Education Union; Ex parte State of Victoria* (1995) 128 ALR 609 at 630.

27 Harry Evans, Letter to the Committee dated, 8 October 1996.

supervision of state governments which the Australian Parliament does not possess.[28]

2.37 The issue of the power to summon state officials most recently arose during inquiries by the Senate Select Committee on Unresolved Whistleblower Cases. The Queensland Government sought the advice of the Queensland Solicitor-General, Mr Pat Keane QC, on the legality of the inquiry and whether the Committee would have constitutional authority to require the attendance of State Ministers and public servants. The advice said that:

- the Committee would have the constitutional power to inquire into the whistleblower cases because the Committee's terms of reference have been carefully crafted to provide that the inquiry's purpose is to examine whether the cases should be taken into account in framing proposed Commonwealth whistleblower legislation for which the Commonwealth has responsibility;

- the Committee would have the power to summons state officials (including Ministers) and documents and that a state official who resisted a summons could be dealt with by the Senate for contempt;

- by convention, no Senate Committee has been prepared to summons a State public servant or Minister to give documentary or oral evidence which they have been unwilling to provide.[29]

2.38 In 1995 that Committee issued a summons to a former Inspector of the Queensland Police Force ordering him to appear and give evidence to the Committee. The issuing of the summons was not contest and the individual summoned duly appeared before the Committee.[30]

2.39 The Committee received conflicting advice on whether the limitations might operate to prevent the summoning of witness or would merely prevent them from being compelled to answer questions which go to certain matters. In his advice to the Committee Professor Dennis Pearce said that:

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28 *Odgers' Australian Senate Practice*, 7th Edition, Electronic copy updated to 30-9-96 at 52.

29 Queensland Cabinet Submission.

30 Senate Select Committee on Unresolved Whistleblower Cases, *Hansard*, 5 May 1995, p 577-579.

> The summons may be irresistible because at that stage of proceedings it is not known what questions will be asked. However, it is when a question is asked that it is thought should not be responded to that the issue of the power of the Committee arises.[31]

2.40 The Clerk of the Senate considers that the issue of a subpoena to a relevant witness could be sufficient to found a legal challenge to the exercise of inquiry powers, and a court could determine the legal issues on the basis of such a challenge.[32]

2.41 In conclusion Pearce has said that:

> I conclude that the implied limitation on Commonwealth legislative power does not act as a bar to the calling and questioning of former members of the Victorian Parliament or the various categories of State agency persons referred to above provided that the questions asked do not fall within the description of matters likely to curtail the capacity of the State to function as a government.[33]

2.42 This limitation would also extend to the use of committee's coercive powers to demand the production of documents.[34]

EXECUTIVE PRIVILEGE AND SECRECY PROVISIONS

2.43 In his letter to the Committee the Premier of Victoria stated that the State of Victoria would assert its executive privilege if the Committee attempts to obtain evidence from current or former ministers or public servants. Claims of executive privilege or public interest immunity have a long history which is outlined extensively in Odgers' Australian Senate Practice[35]. The Senate has long maintained its right to determine what information or documents should be disclosed to it when claims of public interest immunity are made. The advice that the Committee has received from both Professor Dennis Pearce and the Clerk indicates that the powers of the Senate under s 49 of the Constitution

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31 Dennis Pearce, "*Advice on the Calling of Witnesses*", 4 October 1996, p 1.

32 Harry Evans, Letter to Senator Kemp, 8 October 1996.

33 Dennis Pearce, "*Advice on the Calling of Witnesses*", 4 October 1996, p 5.

34 Harry Evans, Letter to Senator Kemp, 8 October 1996.

35 *Odgers' Australian Senate Practice*, 7th Edition, Electronic copy updated to 30-9-96 at pp 452-468.

override any claim to executive privilege or public interest immunity. This is in accordance with earlier resolutions of the Senate:

> **26.** (1) That the Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.
>
> (2) That, subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.
>
> (3) That the fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.
>
> (4) That, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim.[36]

2.44 The Committee also sought advice on the issue of whether secrecy provisions contained in section 151 of the Casino Control Act 1991 (Vic), memoranda of understanding, and agreements as to undertakings of confidentiality prevent the giving of evidence by current or former state legislators, officials or consultants. The Clerk was of the opinion that they do not. His opinion is supported by the views of Professor Pearce.[37] This matter is extensively discussed in Odgers' Australian Senate Practice.[38]

SUMMARY OF POSSIBLE LEGAL RESTRICTIONS ON USING THE COERCIVE POWERS OF SENATE COMMITTEES

2.45 The legal restrictions on the use of the Committee's coercive powers could be summarised as follows.

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36 *Journals of the Senate*, 16 July 1975, 831; *Standing Orders and other orders of the Senate*, p 120.

37 Dennis Pearce, "*Advice on the Calling of Witnesses*", 4 October 1996, pp 6-7.

38 *Odgers' Australian Senate Practice*, Seventh Edition, Electronic copy updated to 30-9-96 at pp 43-47.

1. *Where coercive powers are being used the Senate Committees may be limited to inquiring into those subjects which are within the legislative competence of the Commonwealth.*

2. *As the Senate does not compel the attendance of members of the other chamber of the Federal Parliament it would be discriminatory for it to compel the attendance of current members of State Parliaments.*

3. *The exposure of matters such as advice to the government on high level policy issues and cabinet decisions could properly be thought of being concerned with the internal services of the government. Questions relating to these matters, particularly if answering the questions was compulsory, might be found to curtail the capacity of the State to function as a government.*

2.46 The Committee's conclusions about how these restrictions relate to the current inquiry may be summarised as follows.

1. *Current members of the Victorian Parliament could not be summoned to appear before the Committee.*

2. *The Committee may not be able to use its coercive powers in relation to matters which are not within the legislative competence of the Commonwealth. Inquiries directed at Para (d)(i) of the Committee's terms of reference may fall into this category.*

3. *The nature of this inquiry could not be said to impair to the continuing functioning of a State. However, the Committee probably can not use its coercive powers to compel the answering of questions relating to the preparation and presentation of advice to the Victorian Government, or into its cabinet processes.*

ENFORCEMENT OF THE COMMITTEE'S ORDERS

2.47 If a witness refuses to appear before the Committee the Committee itself has no power to take further action, but can only report the matter to the Senate. The Senate may then compel the appearance of the witness or impose a penalty. As Pearce has pointed out this creates some practical difficulties for the Committee.

2.48 The major weakness in regard to the summoning of witnesses by a committee is the inability of the Committee itself to compel attendance. If the Senate is not sitting when a committee encounters difficulty in obtaining the

attendance of a witness, either the whole Senate would have to be recalled to deal with the matter, or the Committee will have to forgo examination of the witness until the Senate resumes. Obviously, this could lead to delays in the completion of the inquiry or prevent the Committee from carrying out its inquiry as thoroughly as it should.[39]

2.49 Similar difficulties exist if a witness refuses to answer a question. According to the Privilege resolutions agreed to by the Senate on 25 February 1988:

> (10) Where a witness objects to answering any question put to the witness on any ground, 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 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.

2.50 The process outlined in this resolution places the Committee in the difficult position of being unable to enforce its own decisions. While the Committee might determine that a question should be answered neither the Committee nor the witness can have any certainty that the decision of the Committee will be supported by the Senate.

2.51 Where an objection to answering a question is based on a claim of public interest immunity there may be an additional complication. The advice received by the Committee indicates that it is up to the Senate to determine whether a claim of public interest immunity should be allowed. However, in his opinion Dennis Pearce went on to observe that:

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[39] Dennis Pearce, "*Inquiries by Senate Committees*" (1971) 45 ALJ 652 at 653.

> It should be added for the sake of completeness that it seems probable that it will only be if the Senate (and not the Committee) determines that the claim of privilege cannot be sustained and the witness still declines to respond that a contempt will have occurred. Resolution (12) of the contempt resolutions provides that a witness shall not "without reasonable excuse" decline to answer a question. It would seem to be a reasonable excuse, at least when the question is first put, that the witness has been directed to refuse to answer on the ground of public interest. If this is persisted with after the matter has been considered by the Senate the position would seem to be different."[40]

2.52 If this view is correct it would mean that when a claim of executive privilege was made by a witness, and persisted in despite a decision by the Committee to press the issue, the matter would have to be referred to the Senate for the claim to be adjudicated upon and the question again put to the witness before any contempt could be said to have occurred. The matter would then have to return to the Senate a second time for any penalty to be determined. This process would obviously impede the timely conduct of Committee inquiries.

2.53 The Committee considers that these difficulties are a major impediment to the effective use of its coercive powers and to the timely conduct of inquiries which entail extensive use of those powers.

COMITY

2.54 In addition to the possible legal restrictions considered above the Committee must also consider the non-legal issue of comity which the Clerk raised with the Committee in his advice. The need for courtesy between Parliaments, shown by the respect by one Parliament for the laws, practices and institutions of another, arises from the federal nature of the Australian Government. The notion of comity stems from the same general principles as the implied restrictions discussed above and gains force from the possible disruption to normal government that constant and unnecessary interference by one Parliament in the affairs of another would create. The Clerk put the matter in these terms:

> In considering the non-legal issue of comity between federal and state parliaments, Professor Pearce does not refer to what might be called the

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40 Dennis Pearce, "*Advice on the Calling of Witnesses*", 4 October 1996, p 8.

> "two-way-street" aspect of comity. There is built into it an element of the Biblical golden rule of doing unto others as you would have them do unto you. If the Senate can summon state officials to appear in the course of an inquiry into matters within the legislative competence of the Commonwealth, a state House can summon Commonwealth officers to appear in the course of an inquiry into matters within the legislative competence of the state. The Senate and its committees need to consider this aspect of the matter. Is the Commonwealth, represented in this instance by the Senate, ready to allow state houses to summon Commonwealth officers? The possibility of retaliatory inquiries cannot be ruled out. Mutual cooperation can be seen as the safeguard against mutual and escalating interference in each other's operations.[41]

2.55 The Committee agrees that the general principle of comity between the Parliaments is an important factor in the efficient operation of our Federal system. In normal circumstances the Senate should respect the independence of both the House of Representatives and the various State Parliaments. However, the Committee considers that the Senate also has a duty to use its inquiry powers to investigate matters of importance to the people of Australia. Where matters of public concern are raised in the Senate which may ordinarily be considered to be within the normal province of a state government, but which are not, for whatever reason, being adequately examined by the State Parliament or an investigatory body with appropriate powers, the Senate must consider where the balance between these two principles lies.

2.56 The question of whether the Senate should become involved in inquiring into the activities of a state government was considered by the Senate. During its debate on the resolution to establish this Committee Senator Spindler put the view that where a state government fails to act on a matter of such importance the Senate should become involved. Nevertheless a detailed discussion of comity between the Parliaments was not undertaken in the debate.

> It is very clear that this matter needs to be looked at. We would have preferred Premier Kennett to have run his own investigation. When I say his own, I mean an independent judicial inquiry to get to the bottom of these allegations which hang like a cloud over Victoria. Since he has refused to do so, it is important that the Senate accept the responsibility to hold government accountable in Australia.[42]

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41 Harry Evans, letter to the Committee dated 8 October 1996.

42 Senator Spindler, *Hansard*, 8 May 1996, p 481.

2.57 In this case the Senate, after lengthy debate, decided that the matters raised in the Senate were of such public importance that an examination of the tendering process for the Victorian Casino and the impact of that process on Australia's interests was warranted. Having been charged with the responsibility of conducting this inquiry the Committee does not consider that it should re-open the broader question of comity in terms of the decision to conduct this inquiry.

2.58 However, the issue of comity also goes to the use of its coercive powers by the Committee during its inquiry. The Committee was given no direct guidance by the Senate on this issue and has therefore had to weigh up the public benefits of using its powers in this case against the undesirability of interfering with the independence of the Victorian Parliament and Government. In doing so the Committee first considered the general principles which it felt should be applied to Committee inquiries. The Committee is of the view that, in general and independently of any consideration of the legal position, the following guidelines should be followed by Senate committees:

1. Current and former members of State Parliaments should not be summoned or required to answer questions on matters which relate to their activities as members of Parliament or Ministers.

2. Current and former senior public servants, ministerial advisers and members of statutory bodies should not be summoned or required to answer questions on matters which relate to their activities as advisers to State ministers or Cabinet on policy issues.

3. The production of documents which were prepared for the purpose of informing, advising or decision making by State Ministers or State Cabinets should not be demanded.

2.59 The Committee was greatly disappointed by the Victorian Government's refusal to co-operate with its inquiry and carefully weighed the importance of the issues it was pursuing against the principle of comity. The Committee concluded that, important though the issues were, they were not of sufficient importance in this case to override the general guidelines it has set out above and establish a new precedent.

2.60 At the time that the inquiry was established it had already become apparent that the Victorian Government might not co-operate with the inquiry. It would have been of considerable assistance to the Committee if the Senate had at that stage given the Committee some guidance on the extent to which it

considered that it was appropriate for the Committee to use its power to summon witnesses. This is particularly important as it is the Senate itself which must take action where any contempt is committed. In the absence of such guidance the Committee has had to reach its own conclusion on this matter.

EFFECT ON THE COMMITTEE'S INQUIRY

2.61 The lack of co-operation from the Victorian Government caused the Committee considerable difficulty in conducting its inquiry. The Committee considers that it requires evidence from high level Victorian officials in order to properly explore the issues relating to the tender process for the Victorian Casino. To this end the Committee spent considerable time seeking advice on the use of its coercive powers to obtain evidence before proceeding with its program of public hearings.

2.62 After considering all of the advice and evidence available to it, and bearing in mind the reporting date set by the Senate, it has concluded that it is not possible for the Committee to thoroughly explore those issues through the process of public hearings. The Committee has therefore decided not to proceed with public hearings.