THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

COMPELLING EVIDENCE

SENATE SELECT COMMITTEE
ON THE VICTORIAN CASINO INQUIRY

5 December 1996

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Senator the Hon Robert Ray

Senator John Woodley

Secretary

Mr Frank Nugent
The Senate
Parliament House
CANBERRA ACT 2600

DUTIES OF THE COMMITTEE

On 8 May 1996 the Senate resolved as follows:

(1) That a select committee be appointed, to be known as the Victorian Casino Inquiry Select Committee, to inquire into and report on:

(a) the adequacy of Commonwealth legislation in relation to casino licensing, in particular:

(i) the effectiveness with which the Corporations Law operates in respect of casinos, including those laws dealing with company directors, and

(ii) the need for uniform legislation to establish standards and procedures for the licensing of casinos;

(b) the adequacy of the Financial Transaction Reports Act 1988 in respect of transactions within casinos;

(c) whether the granting of any licence to any casino within Australia has affected Australia's overseas reputation; and

(d) whether a full judicial inquiry, Royal commission or other form of inquiry is required into Victoria's Crown Casino, with particular reference to:

(i) the tendering process for its licence, and

(ii) whether Australia's best interests have been adequately protected during the tendering process with particular reference to the record and reputation of the tenderers.

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1. INTRODUCTION

1.1 Casinos and controversy seem inevitably linked. Casinos are significant sources of government revenue, most transactions use cash and are not recorded, and because casinos are often associated with concern about organised crime, casinos and political sensitivity are also inevitably linked.

1.2 On 5 September 1993 the Victorian Casino Control Authority (VCCA) selected Crown Casino Limited as the preferred applicant for the Melbourne Casino Licence. The decision followed many years of controversy about whether Victoria should have a licensed casino, and the outcome of the tender process has been the source of even more intense controversy and dispute.

The Casino Industry in Australia

1.3 Licensed casinos have operated in Australia only since February 1973. The first licensed casino in Australia commenced operation in February 1973 at Hobart's Wrest Point Casino. Since then casinos have been opened in all of Australia's capital cities and in Alice Springs, Launceston, the Gold Coast, Townsville, Cairns and Christmas Island. A number of casino operators are public companies listed on the Australian Stock Exchange.

1.4 There have been two distinct phases of development - the first involving relatively modest developments in smaller centres. The second phase has seen casinos located in the heart of major Australian cities. Australia's state and territory governments have been responsible for the licensing and ongoing regulation of each of the casinos that has been established. The pattern of development of casinos in Australia has been termed "extraordinarily decentralised".[1]

> Within a broad pattern of national development, various State governments also have adopted distinctly regional responses to casinos and casino regulations, based on different moral climates, political-economic calculations and market competition. Specific regional conditions have influenced when and where to introduce casinos, the

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[1] Jan McMillen, *'When the Chips are Down: A Comparison of Australian casino Developments'*, Paper delivered at the Second National Conference of the National Association for Gambling Studies (1986), p 22.

types of casinos to be established, the choice of operators and the structures and conventions of control.[2]

1.5 However, there are some common features. The consistent approach has been to grant each casino operator an exclusive licence for a city for a period of time. Sir Laurence Street has seen other common features:

> Legalisation of casinos has proceeded in Australia within a strict regulatory framework. Rather than exercising control through ownership, Governments have preferred to exercise control by regulation, although some have seriously considered the ownership option. The result has been, broadly speaking, the development of a distinctively Australian casino system. There are some differences of approach to casino control and regulatory systems reflecting the different political and economic situations among the States, as well as the period within which each State's casino policy was developed. Yet there are many common features. Casinos are usually part of a tourist/entertainment complex, with a range of associated amenities. Governments have granted a degree of exclusivity to casinos, protecting the operator from geographic competition in return for revenue contributions which are high by international standards. Again broadly speaking, a primary objective of the Australian regulatory system is to ensure the casino industry operates honestly and free from criminal influence. Mechanisms adopted include the licensing of casino operators and staff, comprehensive regulations which control both activities at the gaming table and the movement of chips and cash, surveillance and monitoring of compliance with those regulations and imposition of sanctions should breaches occur. A key feature is the permanent on-site presence of government inspectors to supervise gambling and detect violations. This system has created what is arguably the most stringent casino control system in the world.[3]

1.6 The establishment of these casinos in Australia has often been a prolonged and sometimes controversial process. Controversy surrounding the granting of the licence for the Melbourne casino was the primary reason leading to the establishment of this Committee.

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2 id.

3 Sir Laurence Street, *Report: Inquiry into the Establishment and Operation of Legal Casinos in New South Wales*, 27 November 1991, para 2.2.3.

The Victorian Casino

1.7 In December 1990, the Victorian State Government decided to permit the operation of a casino in Victoria. The Government passed the Casino Control Act and some accompanying regulations in October 1991. On 5 September 1993 the Victorian Casino Control Authority (VCCA) selected Crown Casino Limited as the preferred applicant for the Melbourne licence.

1.8 However, the selection process has become involved in considerable controversy. Questions have been raised in the media about the adequacy of the probity investigations, the lack of confidentiality in the selection process and a range of other issues. It was both general concerns about the licensing of casinos in Australia, and these issues concerning Crown Casino in particular, which led to the Senate establishing this Committee.

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.
>
> 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.

3. CONCLUSIONS

3.1 The lack of co-operation from the Victorian Government caused the Committee considerable difficulty in conducting its inquiry. The guidelines adopted by the Committee would have substantially affected the compellability of current and former members of state parliaments, current and former senior public servants, ministerial advisers and members of statutory bodies. As a consequence of the legal issues canvassed in Chapter 2 of this Report and the Committee's adherence to the principles of comity, the Committee formed the view that it was inappropriate to proceed with the compelling of witnesses in circumstances in which different classes of witnesses would be subject to different rights.

3.2 Further, as a consequence, the Committee has not addressed the subsidiary issues contained within the terms of reference not relating to the Victorian Casino as these were considered contingent on the main purpose of the inquiry.

RECOMMENDATION

3.3 The Committee therefore recommends that a full judicial inquiry or Royal Commission into the tendering process for the Victorian Crown Casino be held enabling issues relating to probity and the confidentiality of the tendering process to be investigated.

SENATOR BRUCE CHILDS
CHAIRMAN

5 DECEMBER 1996

Dissenting report to the Senate Select Committee on the Victorian Casino Inquiry

Senator John Woodley (Australian Democrats)

The Australian Democrats recognise that there is difficulty surrounding the question of whether public servants, other government employees and Members of Parliament and Senators should be coerced into giving evidence to Senate inquiries.

We also respect the legal opinion given to the Casino Inquiry Committee which suggests that it is not possible for the Senate Committee to sub-poena such people as witnesses (although it appears that the Senate as a whole may have that ability).

However the Democrats' grave concern is that often where there are problems within State Governments, only an independent body such as the Senate can be a point of last appeal for Australian citizens.

This has been demonstrated in the reports of both Whistle-blower Inquiries.

Without strong national whistle-blower legislation, and an independent federal agency to administer such legislation, ordinary Australians will have no recourse against injustice, perpetrated on them by State Governments and their agencies.

The Democrats are also concerned at the Casino Inquiry Committee's assertion of 'comity' as a justification for closing down the inquiry.

Comity refers to the 'two way street' consequences of taking certain actions.

The majority report of the Casino Inquiry Committee states that comity is:

"...the biblical 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 possibility of retaliatory inquiries cannot be ruled out. Mutual cooperation can

be seen as the safeguard against mutual escalating interference in each other's operations."

This interpretation of 'the golden rule' raises an ethical problem which is basic. The golden rule should not be interpreted in terms of threats or retaliation or even as 'mutual cooperation' to avoid 'interference'.

The golden rule should be interpreted to mean that you ought to maintain standards of behaviour toward others that you would ethically expect them to maintain toward you.

On this basis the Democrats are concerned that it is too easy to avoid accountability when different levels of government agree not to investigate each other.

Labor and Coalition Senators sitting on this Inquiry Committee have reasons to be concerned about damaging publicity if aspects of casino administrations in Labor or Liberal states were to be thoroughly scrutinised.

The Inquiry into the Victorian Casino was charged with inquiring into "*whether Australia's best interests have been adequately protected during the tendering process with particular reference to the record and reputation of the tenders*".

Despite significant evidence to suggest that this clause in the terms of reference could have elicited serious and important submissions, this Inquiry is to be closed down.

Once again Australia is seen to be the place where deals done in highly controversial circumstances are not exposed to independent scrutiny.

Evidence given to the Australian Democrats suggest that this kind of behaviour is endemic to the casino culture and not just an aberration in an otherwise clean industry.

In relation to the Victorian Casino, the Premier of that State, Jeff Kennett, will forever remain under suspicion for manipulating the process to close down an Inquiry which could have embarrassed him politically.

While the Australian Democrats do not make that assertion, the question will always remain in the public mind: "What did the Victorian Government have to hide?"

There has also been an injustice done to public servants and Gaming Commissioners who may have been involved in the administration of the Victorian Casino.

They have not had the option of answering the inferences of improper behaviour which an Inquiry conducted under Parliamentary privilege would have given them.

The opportunity has been lost to question increasing government dependence on gambling revenue, (although the drift into a gambling-dominated culture in Australia demands serious investigation).

Gambling is a highly inequitable form of taxation with serious social consequences. These costs are discounted by governments who are becoming more and more reliant on gambling revenue to plug the gaps left by a shrinking tax base.

There are also serious issues interstate which remain unresolved.

For example in Queensland, these issues include the assertion of an unfair tendering process for the Treasury Casino in Brisbane.

US company Harrah's claimed in 1992 that "*It is in our view that, based upon what we know of the matter, the tendering process was not applied by the (Queensland) Government evenly among the various tenders for the (Treasury Casino) license, or consistently with the brief to applicants, including addenda, which the Government published and on which submissions were sought.*"

The company goes on to say "*...our unsatisfactory experience in connection with the Brisbane bid has resulted in a decision not to proceed with tenders for other available casino licenses in Australia, or, for that matter, any other business opportunities in Australia...*"

Many Queenslanders who raised questions about the whole process involved in the Treasury Casino will now be denied the opportunity to pursue those questions until they get satisfactory answers.

The finding of the majority report of the Senate Casino Inquiry that a full judicial inquiry, Royal Commission or other form of inquiry into the probity evaluation of the tenders is warranted is welcome.

However the chances of the Victorian Government following that recommendation are remote and the committee is well aware of that fact.

What has happened here today is that the Premier of Victoria has manipulated a Senate inquiry with the express purpose of avoiding scrutiny of a highly controversial government decision.

The Casino Inquiry Committee had other courses of action available. It could have tested the Senate as a whole to see if it would agree to compel members and employees of the Victorian Government to answer questions about the Crown Casino.

It could have held public hearings taking evidence from parties other than members and employees of the Victorian Government.

It could have used the terms of reference to inquire into the controversial circumstances of the tender process for the Brisbane Casino.

But the Committee has chosen to recommend a Royal Commission that it knows will not be held and in doing so has lessened the impact of Senate Inquiries in the future.

This is a serious consequence of the Senate Casino Committee's decision.

The majority report of this committee sets a precedent for the Senate and for other state jurisdictions who may cease even attempting to sub-poena public servants.

The effect which this development will have on the ability of ordinary citizens to seek redress when injustices are perpetrated against them remains to be seen.

But what can be seen now is that the decision to close down the Casino Inquiry is a backward step.

How can ordinary Australians have confidence that Australian politicians will be accountable?

Senator John Woodley
Australian Democrats

GOVERNMENT SENATORS' REPORT
A PRINCIPLED DECISION TO WIND UP A POLITICALLY MOTIVATED INQUIRY

The Government Senators agree with the decision of the Committee to wind up its inquiry without holding any hearings or receiving oral evidence; this recognised the primacy of principle over pragmatism. The Government Senators share the views expressed in the report as to the importance of the Senate and its committees exercising proper caution when considering the use of the Senate's powers of compulsion over witnesses. This is especially so where this involves current or former Members of State Parliaments or employees of State Governments.

The gratuitous and baseless criticisms of the Victorian Government contained in this report are disingenuous and detract from an otherwise erudite discussion of these issues.

Further, the report is seriously flawed, both as to what it contains, and in respect of the issues it omits to deal with. The recommendation made in the report for a judicial inquiry or royal Commission into what the report mistakenly describes as the "tendering process" for the Victorian casino (in fact the process was not a tender, as the report itself makes clear) is without basis in fact or logic. The report fails to consider at all some serious issues concerning the licensing of the Christmas Island casino, and the questionable involvement of several Ministers and one Parliamentary Secretary of the former Labor Government in that process.

Issues of principle concerning inquiries into State matters

The considered views of the Clerk of the Senate, and Professor Denis Pearce (attached in the appendices) are an excellent summary of not only the legal points, but also the practical position with respect to comity.

Regrettably the majority did not see fit to elevate the principles of comity above the level of pure legality. The commonsense of comity, ie. the need for courtesy between the Parliaments given the federal nature of Australia's body politic is identified by the Government Senators as the fundamental issue.

The minority is fortified in that view by the learned opinions attached to this report.

As the Clerk of the Senate stated:

> "The possibility of retaliatory inquiries cannot be ruled out. Mutual cooperation can be seen as the safeguard against mutual and escalating interference in each others operations." (Letter from the Clerk of the Senate to the Committee, 8 October 1996)

Professor Denis Pearce opined:

> "The Clerk has indicated in his advice to you and to previous committees that, as a matter of comity, the practice of the Senate is not to compel the attendance of officials of State governments before Senate Committees. The application of this approach and its wisdom is not a legal issue but one that the Committee must determine for itself. The notion of comity is inextricably linked with the ideas of Federalism and the constraints that it imposes are discussed above. To take an all or nothing approach to the requirement of attendance of a State official cuts across the primacy of the Commonwealth in the Federal system. I would have thought that there were circumstances where it could be said that the Senate was not performing its duty for all of Australia if it adopted an approach that in no circumstances would it summon a State official. However, this is a matter of policy for the Committee and the Senate to resolve." (Professor Denis Pearce submission, Page 8, para 37)

The Government Senators believe the policy of the Senate ought to be to resist the temptation of inquiring in State matters as the consequences warned of by the Clerk of the Senate could do irreparable damage to the Federal compact. To allow an exemption will create a precedent and open the way for the States to embark upon retaliatory inquiries.

All future deliberations of the Senate when determining the establishment of Senate Select Committees into matters properly in the domain of the States ought to heed the sound advice proffered by the Committee. Whilst the initial thrill of a political hunt may appear attractive the beauty is illusory when considered in the context of the potential damage to the federal compact.

As such we unreservedly embrace the good sense and the principles embodied in para 2.58, subparagraphs 1,2, and 3, which we repeat below:

> "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."

Issues not adequately dealt with in the report

The report, and the recommendation which it contains are fatally flawed. Perhaps this is not surprising, since the Select Committee was established in order to reach that recommendation, and a majority of its members determined that it should make that recommendation regardless of the lack of any evidence to justify it. Most observers will recall that the Select Committee was set up in a highly politically charged atmosphere. Regrettably, but predicatbly, that atmosphere permeates both the report and in particular its recommendation.

The issues which are not adequately dealt with in the report, and which are accordingly the subject of the discussion below, may be summarised as follows:

1. The lack of substantive evidence before the Select Committee.
2. The entitlement of the Victorian Government to respond as it did.
3. The fact that Victorian legislation provides for a mandatory further inquiry into the ongoing fitness of the casino licensee in that State at predetermined regular intervals, the first such further inquiry already being under way.
4. The failure of the Select Committee to investigate the direct political involvement of several former Federal Labor Ministers and at least one former Labor Parliamentary Secretary in the establishment and licensing of the casino on Christmas Island.
5. The politics of the establishment and conduct of the Select Committee.

Each of these issues is considered below.

Lack of evidence

It soon became apparent that those who agitated for the establishment of the Select Committee were unable to produce any evidence to support the conclusion that they hoped it would reach. There was in fact such a dearth of evidence that the Select Committee resolved to dispense entirely with public hearings. In the event, the Select Committee received no oral evidence at all. It received only 10 written submissions, most of which were completely irrelevant, and none of which contained any useful information not already publicly available.

Some who claimed to have relevant evidence inexplicably failed to produce it. One member of the Select Committee, Senator Woodley, was reported in The Age on October 1, 1996, page 5, as saying the following:

> "We have a whole raft of documentary evidence and if they (the Victorian Government) do not allow the public servants to appear we will simply present that which would not be in the (Victorian) Government's interests at all."

If indeed Senator Woodley had a "raft of documentary evidence" available to him as at 1 October 1996, it is curious that he chose not to present any of it to the Select Committee.

Several current and former Victorian Labor State Members have also claimed at various times to have evidence impugning the Victorian Casino selection process. They, or any other person who wished to present such evidence to the Select Committee, was free to do so. None did.

The Victorian Government's response

The Victorian Government took a decision to exercise its rights. The stance taken by the Victorian Government is not unusual. Indeed this was recognised by the Committee in its media release of August 22, 1996 in which the Committee unanimously stated:

> "The inquiry has raised complex issues about the extent of the Senate's powers and obligations and appropriate processes when dealing with State parliamentarians, officials and consultants.

> "These questions are not unique to this Committee's inquiry, but have been raised on a number of occasions previously." (Emphasis added)

Thus the attitude of the Victorian Government was acknowledged by all members of the Committee as not being unique and having occurred previously. It is therefore disingenuous to use the pejorative terms employed by the majority in commenting on the Victorian Government's principled stance. Indeed the Queensland Labor Government took a similar position to the Senate Select Committee on Unresolved Whistleblowers.

As such the non-government Senator's report fulfilled the implication of bias as in Senator Woodley's statement, when he said:

> "we will simply present that which would not be in the (Victorian) Government's interests at all."

The Senate will recall that the allegations against the Victorian Government have remained unsubstantiated and are vigorously denied by the Victorian Government.

Victorian inquiry already under way

In recommending a further inquiry, the report fails even to mention the fact that the Victorian Casino Control Authority is already conducting an inquiry into the fitness of the Victorian Casino licensee to retain that licence, as required by the Victorian *Casino Control Act 1991*. It is open to any person who might give evidence to a judicial inquiry or a Royal Commission to give that same evidence to the Authority. The Authority is an independent statutory body, the membership of which was controlled by the previous Victorian Labor Government. The *Casino Control Act* requires the Authority to conduct such inquiries at regular intervals, the first of which is now at hand. The Authority embarked upon its inquiry several months ago, and it invited and received submissions from the public as part of that process. It is expected to report soon. The report fails to offer any reason for duplicating the Authority's inquiry.

Failure to investigate the licensing of Christmas Island Casino

Unlike Victoria, the Commonwealth did not establish an independent authority to deal with the selection of a casino licensee on Christmas Island or to determine the terms and conditions of any licence. It took no step to remove that process from the political arena - indeed all of the key decisions in that process were taken by the Cabinet or at a Ministerial or Parliamentary Secretary level. The potential for corruption or abuse in such circumstances are obvious. However the Government Senators would not presume to make such a judgement given the paucity of evidence before the Committee.

The Government Senators note, however, that if the standards applied in the report for determining whether there should be an inquiry into the Victorian casino were applied equally to the known facts in relation to Christmas Island, the logical consequence must be that it should also be the subject of a judicial inquiry of Royal Commission. Only politics can explain why the report does not even canvass this possibility.

The Politics of the establishment and conduct of the Select Committee

The conduct of the Select Committee's deliberations made clear that its terms of reference were never genuine. When forcing this ill-conceived inquiry through the Senate, the Opposition and minor party Senators tried to hide behind the first three terms of reference to justify their pursuit of the fourth (which related solely to the Victorian casino). this pretence was exposed by the majority confirming in Chapter 3 of their report:

> "Further, as a consequence, the Committee has not addressed the subsidiary issues contained within the terms of reference not relating to the Victorian Casino as these were considered contingent on the main purpose of the inquiry."

It is interesting to note that the "subsidiary issues" were listed first in the terms of reference. The "main purpose of the inquiry" was purely and simply a political attack on the Victorian Government. The purported concerns over Commonwealth legislation, the Financial Transactions Reports Act 1988 and Australia's international reputation were no more than a facade, dispensable if the underlying political motive of the inquiry could not be achieved. Yet the terms of reference were framed in such a way as to pretend that they were to be the principle areas of inquiry.

Conclusion

The recommendation for an inquiry (judicial or otherwise) by non-government Senators is not based on any evidence, and the body of the report does not give any justification for such a recommendation. This inquiry foundered purely and simply because its extensive advertising failed to attract a single witness willing or able to give any relevant evidence impugning the Victorian Casino licensing process.

There should not be a judicial inquiry or a Royal Commission into the Victorian Casino. That is because:

1. There is no evidence before the Committee to justify such an inquiry.
2. The Victorian Casino Control Authority is already conducting an inquiry pursuant to its obligations under the Victorian *Casino Control Act.*

If the reasoning of the majority (in concluding that there should be an inquiry into the Victorian Casino) was to be applied equally to the Christmas Island Casino, it would lead to the inevitable conclusion that the involvement of several former Labor Federal Ministers and one former Parliamentary Secretary in the process of licensing that casino should be the subject of a similar inquiry.

Care should be taken by the Senate in future to ensure that Select Committees are established only where there are legitimate and appropriate matters for inquiry.

Judith Troeth	**Christopher Ellison**	**Eric Abetz**
(Deputy Chair)	**Senator for Western**	**Senator for Tasmania**
Senator for Victoria	**Australia**	

4 December 1996

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APPENDIX 1

Our Ref: JGK:TC
15706

30 JUL 1996

Senator Bruce Childs
Chairman
Senate Select Committee on the Victorian Casino Inquiry
Parliament House
CANBERRA ACT 2600

Dear Senator Childs

Thank you for your letter of 19 July 1996 inviting me to make a written submission to the Senate Inquiry on the Victorian Casino.

The Victorian Government does not intend to make a submission to your inquiry.

As you would be aware, 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.

All Australian Governments, including the Commonwealth, rely heavily on the confidentiality of these processes in order to carry out their functions effectively. By seeking to obtain evidence from Ministers, Ministerial Staff and Public Servants, the Senate risks impeaching the confidentiality of these processes for all Australian Governments. The importance of this privilege has been acknowledged by the Senate itself, which has declined to compel State Ministers and Public Servants to appear before its committees.

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.

I consider your letter to be only further evidence that the public is not outraged by the process that was followed regarding the awarding of the Casino licence. Refer the results of the recent State election.

.../2

The inquiry is an abuse of the role of the Senate and an obvious waste of taxpayers' money.

For these reasons, and because I am confident that the process was carried out with the utmost integrity, I will not be making a submission to your inquiry.

Yours sincerely

Jeff Kennett

APPENDIX 2

ADVICES FROM THE CLERK OF THE SENATE

1. Letter to Senator Murphy on the powers of the Senate Select Committee on Unresolved Whistleblower Cases, 6 December 1994.

2. Letter to Select Committee on the Victorian Casino Inquiry about the powers of the Committee, 22 July 1996.

3. Letter to Select Committee on the Victorian Casino Inquiry on the effect of state statutes on the powers of the Committee, 13 August 1996.

4. Letter to Senator Abetz on the powers of the Committee, 15 August 1996.

5. Letter to Senator Abetz on the powers of the Committee, 15 August 1996.

6. Letter to Senator the Hon R Kemp on the powers of the Committee, 21 August 1996.

7. Letter to Select Committee on the Victorian Casino Inquiry concerning the Committee's powers to summon state officials, 19 September 1996.

8. Letter to Select Committee on the Victorian Casino Inquiry commenting on the advice received by the Committee from Professor Dennis Pearce, 8 October 1996.

AUSTRALIAN SENATE

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600
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CLERK OF THE SENATE
lun/l/10195

6 December 1994

Senator S M Murphy
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Murphy

SELECT COMMITTEE ON UNRESOLVED WHISTLEBLOWER CASES — POWERS

Thank you for your letter of 6 December 1994 in which you seek advice on the powers of the Select Committee on Unresolved Whistleblower Cases, particularly the power to require the production of documents within the control of a state government.

The Select Committee has been given the powers, in paragraph (6) of its resolution of appointment of 1 December 1994, to require the attendance of witnesses, the giving of evidence and the production of documents. These powers are conferred on the Committee pursuant to standing order 34. The powers to require the attendance of witnesses, the giving of evidence and the production of documents are among the undoubted powers of the Senate under section 49 of the Constitution. The Senate may delegate these powers to its committees, but only the Senate may punish default as a contempt. The power to punish contempts is codified by the *Parliamentary Privileges Act 1987*.

There are no explicit limitations on these powers to require the attendance of witnesses, the giving of evidence and the production of documents. There are probably, however, two relevant implicit limitations on the powers.

First, the powers may be confined to inquiries into subjects in respect of which the Commonwealth Parliament has the power to legislate. There is judicial authority for the proposition that the Commonwealth and its agencies may not compel the giving of evidence and the production of documents except in respect of subjects within the Commonwealth's legislative competence (*Attorney-General for the Commonwealth v Colonial Sugar Refinery Co Ltd* 1913 15 CLR 182; *Lockwood v the Commonwealth* 1954 90 CLR 177 at 182-3), and, if the

matter were litigated, the High Court might well hold that this limitation applies to the inquiry powers of Senate committees.

Secondly, it could well be held that the inquiry powers of the Senate do not extend to members of state parliaments and officers of state governments. There is no authority for this proposition, and the matter has not been litigated, but the High Court could arrive at such a conclusion by reference to the federal nature of the Constitution and the doctrine that the Commonwealth may not impose a requirement inimical to the integrity of the states (something like this reasoning was used in *Melbourne Corporation v the Commonwealth* 1947 74 CLR 31; *Queensland Electricity Commission v the Commonwealth* 1985 159 CLR 152).

Whatever the legal situation, it is a parliamentary rule, and a rule of the Senate, that the inquiry powers are not exercised in respect of members of the House of Representatives (standing order 178), and as a matter of first principle the same rule extends to members of state and territory parliaments. Senate committees as a matter of practice have in the past accepted this rule, and have not endeavoured to exercise their inquiry powers in respect of members of state parliaments or officers of state governments. Such persons have given evidence before Senate committees on invitation and voluntarily. The Senate has also accepted the application of the rule to state parliaments in making requests to state houses for the attendance of their members before the Select Committee on the Australian Loan Council (*Journals of the Senate*, 5 October 1993, p. 565-6)

It is possible that, should the matter be litigated, the courts would apply the parliamentary rule as a rule of law and find that the inquiry powers of the Senate do not extend to state or territory parliaments or state or territory officers.

If a Senate committee issues a subpoena requiring the attendance of witnesses, the giving of evidence or the production of documents and is met with a refusal, the committee has no power to take any further action, but can only report the matter to the Senate. It is then for the Senate to determine whether it should treat the refusal as a contempt and seek to impose any penalty. It is at the stage of the attempted imposition of a penalty that a person in receipt of a subpoena, such as a state minister, member of parliament or other office-holder, could challenge in the courts the exercise of the Senate's powers. It is possible that the attempted exercise of the inquiry powers could be challenged at an earlier stage, such as on the issue of a subpoena.

My advice to all Senate committees is that they should observe the parliamentary rule and the past practice and not seek to summon members of state or territory parliaments or state or territory officers, or to require them to give evidence or to produce documents. Such persons

should be invited to appear or submit documents if a committee desires to take evidence from them, and any invitation to state or territory officers should be directed to the relevant state or territory minister. In the event of an invitation being declined, a committee should not take the matter any further.

Please let me know if I can provide any further information or assistance in relation to this matter.

Yours sincerely

(Harry Evans)

AUSTRALIAN SENATE

CLERK OF THE SENATE

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hc/proc/10922

22 July 1996

Mr Neil Bessell
Secretary
Select Committee on the Victorian Casino Inquiry
The Senate
Parliament House
CANBERRA ACT

Dear Mr Bessell

POWERS OF THE COMMITTEE

Thank you for your letter of 22 July 1996 in which you seek advice on questions concerning the powers of the Select Committee on the Victorian Casino Inquiry.

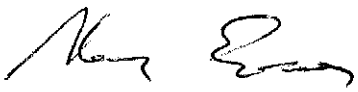
The advice dated 6 December 1994 to the Select Committee on Unresolved Whistleblower Cases, to which the first paragraph of your letter refers, still represents my advice in relation to the powers of Senate committees in respect of members of state parliaments and officers of state governments and the exercise of those powers. I would provide the same advice to the Select Committee on the Victorian Casino Inquiry. I would add only one point. The view may be taken that the Senate and its committees may compel the giving of evidence by state legislators and officials provided that the matter under inquiry is within the legislative competence of the Commonwealth Parliament. An equivalent view is apparently taken in the United States, although it appears to be based only on old precedents and not on any explicit judicial determination. Because of different constitutional provisions in the two countries, I would not draw the same conclusion in relation to the Australian situation, and I would not suggest that Senate committees act on any such assumption. In any event, regardless of the legal situation, the difficulties of enforcing compliance remain.

The second paragraph of your letter, and the material attached to it, raises the question of whether the implied limitation on the Senate's powers of inquiry in respect of state legislators and officials might be held to extend to *former* state officials and consultants on the basis that they are bound by state legislation. It is possible that, if the matter were litigated, it could be so held. The courts may have difficulty in drawing a line between current officials and former officials and consultants, and would probably have regard to any relevant state legislation, but any such determination would obviously be a very significant extension of the implied limitation, if the latter were found to exist. The only advice I can give is that the Committee should carefully consider its position before attempting to require the attendance of, or the production of documents by, former state officials and consultants to whom the relevant state legislation applies.

This question, of course, is quite distinct from the question of whether state statutory secrecy provisions *prevent* the giving of evidence by current or former state legislators or officials or consultants. There is no doubt that, if any evidence is given by such persons voluntarily, the giving of that evidence cannot constitute an offence under the state statutory provisions. In this respect, the document attached to your letter is misconceived in suggesting that witnesses should not be put in a position whereby they will breach state law in the course of giving evidence, even though they cannot be prosecuted for such a breach. The point is that words spoken and acts done in the course of parliamentary proceedings, including the giving of evidence, cannot constitute an offence, because the statutory provisions cannot apply to such proceedings.

Please let me know if I can be of any further assistance.

Yours sincerely



(Harry Evans)

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hc/proc/10942

13 August 1996

Mr James Warmenhoven
Select Committee on the Victorian
Casino Inquiry
The Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Warmenhoven

POWERS OF COMMITTEE - STATE STATUTE

Your letter of 12 August 1996 seeks advice on two points concerning the relationship between the secrecy provisions of section 151 of the Victorian *Casino Control Act 1991* and parliamentary privilege.

Subsection 151(4) could not have any effect on a Senate committee which obtained information covered by the act. The reason for this is that a state statute cannot alter the operation of parliamentary privilege at the federal level, which can be affected only by a declaration of the Commonwealth Parliament under section 49 of the Constitution. In any event, even if there existed an express or implied authorisation for information to be divulged to a Senate committee, it could not be said that the committee obtained that information pursuant to that authorisation or pursuant to the state statute.

I do not think that the expression "court" in subsection 151(5) of the state act would be held to include a Senate committee. The latter is so far removed from the normal connotations of "court" that it would be held not to be included in the expression in the absence of express provision that it is included. The extension of the meaning of the expression in the act to certain other bodies would support this conclusion; it would be concluded that, had the state Parliament intended to include a Senate committee, it would have expressly included it in that extended definition. It would also be assumed that a state Parliament would not purport to regulate access to information by a Senate committee, which would be beyond its powers.

Please let me know if I can be of any further assistance.

Yours sincerely

(Harry Evans)

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hc/proc/10944

15 August 1996

Senator Eric Abetz
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Abetz

SELECT COMMITTEE ON THE VICTORIAN CASINO INQUIRY - POWERS

Your letter of 14 August 1996 seeks advice on matters relating to the powers of the Select Committee on the Victorian Casino Inquiry.

These matters are largely covered by the advices to the committee dated 22 July 1996, to which you have access as a member of the committee, and by the advice dated 6 December 1994 to the Select Committee on Unresolved Whistleblower Cases, which was published in the report of that committee. Copies of those advices are attached.

Those advices may be summarised as follows:

- It is a parliamentary rule of the Senate that members of other houses of parliament are not summoned, and in the past this rule has been accepted as extending to all state officials, so that, by long-established convention, Senate committees do not seek to summon such office-holders, but request state parliaments or governments to direct them to attend or to make them available.

- As a matter of law, the power of the Senate to compel the attendance of witnesses, the production of documents and the giving of evidence may not extend to members of state parliaments and state officials, which is another reason for Senate committees not seeking to summon such persons.

- Where former state officials and consultants to state authorities are bound by state legislation, it could be held that the implied limitation on the power to compel evidence extends also to those persons, and Senate committees should carefully consider their position before attempting to summon such persons.

These considerations apply regardless of any assertion of executive privilege by a state government, although such an assertion could be regarded as adding weight to them.

In the light of these considerations, my advice, as was indicated to the Select Committee on Unresolved Whistleblower Cases, is that Senate committees should not seek to summon such persons or to require them to give evidence or to produce documents; that, in respect of state office-holders, requests for their evidence should be directed to the relevant state bodies; and that, in the event of a request being declined, the committees should not take the matter any further.

If the committee, as have all Senate committees in the past, accepts the tenor of this advice, in fairness to persons in the relevant categories who are invited to attend they should be advised that the committee does not intend to subpoena them.

Without knowing the terms of the Victorian government's claim to executive privilege, it is not possible for me to consider whether potential witnesses should be advised of it, but, as I have indicated, the existence of such a claim is not the decisive factor in determining whether to subpoena relevant persons.

Please let me know if I can be of any further assistance.

Yours sincerely

(Harry Evans)

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hc/proc/10947

15 August 1996

Senator Eric Abetz
The Senate
Parliament House
CANBERRA ACT 2600

Fax: 002 243709

Dear Senator Abetz

SELECT COMMITTEE ON THE VICTORIAN CASINO INQUIRY - POWERS (2)

As requested, and in clarification of the earlier advice of today's date, I confirm that Victorian police, members and employees of the Victorian Casino and Gaming Authority, members and employees of the Victorian Casino Control Authority, and persons employed by the Totalisator Agency Board while it was a state government instrumentality, are all state officials within the meaning of the earlier advice, and persons who formerly fell into those categories are former state officials within the meaning of the advice.

Please let me know if I can be of any further assistance.

Yours sincerely

(Harry Evans)

AUSTRALIAN SENATE

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hc/proc/10958

21 August 1996

Senator the Hon R. Kemp
Manager of Government Business in the Senate
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Kemp

POWERS OF SENATE COMMITTEES

You have asked for a note on the article by Geoffrey Lindell, "Parliamentary Inquiries and Government Witnesses", *Melbourne University Law Review,* 20:2, December 1995.

At pp. 387-91 of the article Mr Lindell advances arguments (though without coming to firm conclusions) against the propositions that the powers of the Commonwealth Houses and their committees to compel evidence are limited to matters within the legislative competence of the Parliament and may not be exercised in respect of state officials.

The article does not refer to any authorities other than those of which I was aware when compiling the advices which I gave to various Senate committees, and there is nothing in the article to modify those advices.

In relation to the first proposition, the article does not advert to decisions of the United States Supreme Court to the effect that the inquiry powers of the Congress are limited to its legislative competence. As Australia is a federation like the United States rather than a unitary state like the United Kingdom, the American law is likely to be persuasive. Moreover, a large part of the basis of that law is the protection of individual rights, a matter on which the High Court has recently been sensitive.

In relation to the second proposition, if the matter were litigated the High Court would be likely to have regard to the possibility of the system of government being brought to a halt by the Commonwealth and state houses establishing inquiries into overlapping subjects and summoning large numbers of each other's officers. The same officers could be summoned by different houses to appear at the same time. An implied immunity might well be seen as necessary to preserve the system of government itself.

In any event, the undetermined legal question is less important that the matter of comity between houses of parliaments and between Commonwealth and states. It is a parliamentary rule that houses do not summon each other's members and officers. Senate committees have always accepted that, as a matter of comity between Commonwealth and states, they should not seek to summon state officials.

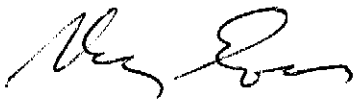
There are two errors in the article, which I have drawn to the attention of the author.

Subsection 16(4) of the Parliamentary Privileges Act does not provide for the waiver of any immunity (p. 411 of the article). It simply provides that a court shall not compel the production of parliamentary evidence taken in camera and, as part of the description of in camera evidence, describes it as evidence which has not been published by a House or a committee. In other words, evidence may be taken in camera but if it is subsequently published by a House or a committee it ceases to be in camera evidence and does not attract the special protection of subsection 16(4), but still attracts the protection of the other provisions of section 16.

Secondly, Fitzpatrick and Browne were not imprisoned for defamation of the House or its members (p 412), but for attempting, by means of a publication, to intimidate a member. Such an offence could still be punished under the Parliamentary Privileges Act.

Please let me know if I can be of any further assistance.

Yours sincerely



(Harry Evans)

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hc/lett/11011

19 September 1996

Senator Bruce Childs
Chair
Select Committee on the Victorian Casino Inquiry
Parliament House
CANBERRA ACT 2600

Dear Senator Childs

COMMITTEE POWERS - STATE OFFICIALS

Following a reference to the matter at the estimates hearing relating to the Department of the Senate on 16 September 1996, Senator Kemp asked that I expand on my advice to the committee in relation to the lack of United States authorities and precedents on the power of federal parliamentary committees to compel evidence from state officials. He also asked that I provide this supplementary advice to your committee.

The following brief summary of US material is provided accordingly.

It is clear from a line of Supreme Court judgments that the Houses of the US Congress have an inherent power to compel the giving of evidence and the production of documents and to punish defaults as contempts. The Congress has also legislated to provide for the prosecution of such contempts in the courts. It is also clear that the inquiry powers of the Houses are limited to matters within their legislative competence.

There are no judicial authorities dealing explicitly with the question of whether state office-holders may be compelled.

Finding no relevant authorities, I directed inquiries to the Clerks of the two Houses in Washington, both of whom were kind enough to provide me with very full replies.

In both Houses the view is apparently taken that the Houses and their duly authorised committees can compel evidence from state officials, provided that their inquiries are directed to matters within the legislative competence of the Congress.

The Clerk of the Senate referred me to only one precedent, a case in 1873 in which a Senate committee, inquiring into "whether there is any existing State government in Louisiana, and how and by whom it is constituted", successfully subpoenaed a state legislative official. This precedent, however, relates to the time when the southern states were still under military occupation. Such an inquiry could also be regarded as supported by the provision in article IV, section 4 of the Constitution, whereby:

> The United States shall guarantee to every State in this Union a Republican Form of Government.

This provision, which has been construed by the Supreme Court as an injunction on the political branches of the federal government, may be regarded as giving the Congress a general power of supervision over state governments which has no equivalent in Australia.

The Clerk of the House of Representatives drew my attention to a precedent in 1877, again involving the troublesome state of Louisiana, in which state officials were imprisoned for contempt for failing to produce subpoenaed documents relating to the conduct of a presidential election. Apart from the ancient character of this precedent, the period in which it occurred and the absence of any challenge to the House's action, it relates to a peculiarity of US constitutional arrangements, whereby the states control the conduct of presidential elections. It is notable that, in debate in the House, it was argued that the inquiry was an invasion of state sovereignty.

In 1962 a state official successfully appealed against conviction for contempt of Congress for failing to produce documents in response to an inquiry by a House subcommittee. The appeal was upheld on the ground that the appellant had properly responded to that part of the subcommittee's requirement which was within its powers, and that the information refused to the subcommittee related only to a matter which was outside the scope of the subcommittee's authority to investigate. The US Court of Appeals deliberately refrained from adjudicating on the contention of the appellant that the subcommittee subpoena amounted to "an unconstitutional invasion of powers reserved to the States", and strongly suggested that such matters should not be resolved by resort to the criminal process. The official concerned was not a normal state public servant, but an officer of a body established by two states under a state-to-state compact subject to congressional approval under article I, section 10 of the Constitution. This constitutional provision also has no Australian equivalent. (*Tobin v US* 1962 306 F.2d 270)

State officials constitute only about 8% of all witnesses who appear before congressional committees, and, like the vast majority of witnesses, appear by invitation. The committees appear to avoid issuing subpoenas for such officials, and the Houses appear to avoid clashes between governments such as could result from any attempt to enforce such subpoenas.

Having considered all of these matters, I think that it can be said that the question in issue has not been substantively considered in the United States, and that the situation there is not of substantial assistance in a consideration of the question in Australia.

I would have no objection to this note being provided to Professor Pearce.

Yours sincerely

(Harry Evans)

AUSTRALIAN SENATE

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hc/proc/11015

8 October 1996

Senator the Hon R. Kemp
Deputy Chair
Select Committee on Victorian Casino Inquiry
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Kemp

VICTORIAN CASINO INQUIRY COMMITTEE:
POWERS: ADVICE OF PROFESSOR PEARCE

You have asked for my comments on the advice dated 4 October 1996 to the committee by Professor Dennis Pearce concerning matters relating to the powers of the committee which were the subject of advices I provided to the committee on 22 July, 13 August and 19 September 1996.

Professor Pearce's advice and mine are in substantial agreement on significant points, and there is only one substantive point of disagreement between our advices.

His advice, of course, deals only with questions of law and not with questions of parliamentary practice and propriety; in particular, he does not advise on the matter of comity between the Houses of the Commonwealth Parliament and the Houses of state parliaments.

In relation to questions of law, Professor Pearce's advice agrees with mine on the following points:

- There is probably a legal barrier to the summoning of members of state parliaments (he considers that former members of state parliaments are also protected in so far as their activities as members are under inquiry).

- The Senate's powers of inquiry are probably limited to matters within the legislative competence of the Commonwealth Parliament.

- There is probably a limitation on those inquiry powers in relation to the states in so far as inquiries may not curtail the capacity of state governments to function.

These probable legal limitations on the Senate's powers of inquiry would provide a basis for a legal challenge to any particular inquiry, a point to which I shall return.

Professor Pearce considers that the probable limitation on inquiries where the capacity of a state to function would be curtailed is a limitation on the *inquiries which may be made* as distinct from a limitation on the ability to summon witnesses. This is the only substantial point of disagreement between our advices. He regards the limitation on inquiries which may be made as a limitation on questions which may be put to witnesses and to which answers may be demanded. There are two points which I would make in relation to this.

First, even if Professor Pearce is correct, and the limitation is a limitation on the inquiries which may be made rather than a limitation on the power to summon witnesses, 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.

Secondly, Professor Pearce's advice does not deal with orders for the production of documents which may be made by the committee, and which would be the other major mechanism by which the committee could pursue its inquiries. With orders for the production of documents it would be much more difficult to determine whether the inquiries which are thereby made give rise to the relevant legal limitation. An order for the production of documents would provide a firmer basis for a legal challenge.

In respect of the limitation on the inquiry powers in relation to the capacity of states to function it is, as Professor Pearce concedes, not possible to give a concluded opinion. I remain of the view that a court could hold that the Senate and its committees may not compel state officials, whether by means of summonses to appear, by questions put to them when they appear or by orders for the production of documents.

It is to be noted that the matters which Professor Pearce considers may fall within the limitation relating to the capacity of states to function are significant and substantive matters so far as the inquiry of the committee is concerned. The committee may well consider whether summoning state officials is a course on which it should embark, even if any summons to such a witness does not immediately trigger a legal challenge, given that any questions about the matters referred to by Professor Pearce could be expected to do so.

Professor Pearce agrees with my advice that a state statutory secrecy provision in itself does not prevent the disclosure of information to a Senate committee. He does not, however, relate the existence of such a provision to the compellability of state officers and the limitation on the inquiry power in 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.

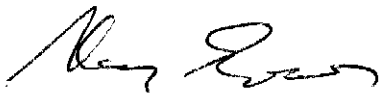
In considering the non-legal issue of comity between federal and state parliaments, Professor Pearce does not refer to what might be called the "two-way-street" aspect of comity. There is built into it an element of the Biblical golden rule of doing unto others as you would have them do unto you. If 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 presumably 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.

As has been indicated, a legal challenge may not await questions put to witnesses and answers insisted upon, but may be set off by the first issue of a subpoena. Professor Pearce's concluding paragraph needs to be considered in that light.

My view is that the possible legal difficulties analysed by Professor Pearce, combined with the consideration of comity, the difficulty of enforcement, and the invariable practice of Senate committees in the past of not seeking to summon state officials, strongly suggest that that invariable practice should be adhered to in the future.

Yours sincerely



(Harry Evans)

VICTORIAN CASINO INQUIRY SELECT COMMITTEE

APPENDIX 3

ADVICE ON CALLING OF WITNESSES

Introduction

1 On 8 May 1996 the Senate resolved to appoint a select committee, to be known as the Victorian Casino Inquiry Select Committee. The Committee is to inquire into and report on matters relating to the establishment of the Crown Casino in Victoria. The Committee's Terms of Reference are set out in Attachment 1. It is to be noted that paras (a) and (b) of those Terms of Reference refer to the adequacy of the Federal Corporations Law and the Financial Transactions Reports Act 1988 insofar as they relate to casino licensing and para (c) refers to matters pertaining to Australia's overseas reputation. While para (d) might be thought to be concerned with a State related matter, the issue of Australia's best interests is directed to be a subject matter of inquiry. The Committee is empowered, among other things, to send for and examine persons and documents.

2 I have been asked to advise whether the Committee's power to send for and examine persons and documents may be exercised in relation to:

(i) current members of a State parliament;
(ii) former members of a State parliament;
(iii) current public servants and officials of a State;
(iv) former public servants and officials of a State;
(v) current office holders of a State statutory authority;
(vi) former office holders of a State statutory authority;
(vii) current advisers or consultants engaged by a State government or a State statutory authority;
(viii) former advisers or consultants engaged by a State government or a State statutory authority.

3 A preliminary point of importance is that there is a distinction between summoning a person to appear before a Committee and asking questions of that person. 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. For the purposes of this analysis I have taken it that the Committee is seeking advice on not only the right to call witnesses but more importantly the right to ask and receive answers to questions. I appreciate that it has been indicated that certain persons will not respond to a summons to appear but this is posited on anticipated questions rather than on the mere fact of attendance.

Short advice

4 My short advice is:

(i) current members of a State Parliament (which would include ministers) may not be summoned to appear before the Committee nor may they be required to answer any questions put by the Committee. They may appear voluntarily before the Committee.

(ii) former members of a State Parliament (again including former ministers) may be summoned to appear before the Committee. They may not be asked questions the answers to which could be described as curtailing the capacity of the State to function. Nor may they be asked to respond to questions if to do so could be thought to impinge on the freedom of speech that they enjoyed as a member of parliament.

(iii) current public servants and officials of a State may legally be required to appear before the Committee. Officials who appear may be asked any questions provided that the answers would not curtail the capacity of the State to function. Current public servants may feel constrained to refuse to answer questions on the ground of public interest immunity and it may be thought unfair to penalise a public servant who is complying with the direction of his or her minister. However, legally this is not a ground for refusing to answer a question that is otherwise relevant to the Committee's inquiry.

(iv) former public servants may be required to appear before the Committee. The same limitation in respect of curtailing State functions applies in relation to answers to questions that they might be expected to provide. Public interest immunity should not constrain their response.

(v) current office holders of a State statutory authority: same as for (iii) but with less weight to be given to public interest immunity issues depending upon the degree of independence of the authority.

(vi) former office holders of a State statutory authority: as for (iv).

(vii) curent advisers or consultants: as for (iv) unless the person is an adviser to a minister or other high level officer of the government such as to attract the constraints applicable to (iii).

(viii) former advisers or consultants: as for (iv).

5 In relation to all or some of the categories of persons listed, the Senate or the Committee may take the view that, as a matter of comity based on the Federal nature of our system of government, it is inappropriate that the person be called as a witness before a Commonwealth parliamentary committee. This is a policy not a legal decision.

Relevant legislation

6 Section 49 of the Constitution is the fundamental provision of relevance to this advice. It reads:

> 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 the Parliament of the United Kingdom, and of its members and committees at the establishment of the Commonwealth.

7 The Parliamentary Privileges Act 1987 has made provision for some aspects of the exercise of the powers given by s 49. However, s 5 of that Act states that, except to the extent that the Act expressly provides, the powers privileges and immunities as in force under s 49 immediately before the commencement of the Act are to continue in force. The provisions of the Parliamentary Privileges Act that appear to be of most relevance in the present context are ss 4, 7 and 16. Section 4 provides relevantly that conduct does not constitute an offence unless it amounts to an improper interference with the exercise by a committee of its authority or functions. Section 7 sets out the penalties that can be imposed by the Senate for an offence against the Senate. Section 16 provides among other things that Article 9 of the Bill of Rights applies to the giving of evidence before a parliamentary committee. Article 9 provides "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of the Parliament".

8 Section 109 of the Constitution provides:

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

9 Section 151 of the Casino Control Act 1991 (Vic) is set out at Attachment 2. Subsection (1) is the most important provision for present purposes. It provides:

> "(1) Subject to subsection (3), a person must not directly or indirectly, except in the performance of duties or exercise of powers under this Act, make a record of, or divulge to any person, any information with respect to the affairs of another person or with respect to the establishment or development of a casino acquired by the first-mentioned person in the performance of those duties or exercise of those powers."

In summary, the section then goes on specifically to prohibit disclosure to a court except with the permission of the Minister. "Court" is defined to include any tribunal, authority or person having power to require the production of documents or the answering of questions. The section permits disclosure to such persons as the Minister directs if it is necessary in the public interest.

10 While technically not legislation, regard must also be paid to the Resolutions of the Senate agreed to on 25 February 1988 relating to matters constituting contempts of the Senate (hereafter "Contempt Resolutions").

Assistance from other sources

11 It would be reasonable to expect that the question of the power of a central parliament in a Federation to call State officers before it would have arisen in other countries. However, the Clerk has advised that he has not been able to find much useful information to assist the Committee on this point. In a letter to the Committee dated 19 September 1996 he does indicate that inquiries of the United States Congress elicited the response that a duly authorised committee can compel evidence from State officials. This certainly seems to be assumed to be the position in the case of *Tobin v United States* (1962) 306 F 2d 270 although, as noted by the Clerk, the officer involved there was not a standard officer of a State. I have not been able to find any further precedents.

12 There is valuable discussion of the matters with which this advice is concerned in the publications set out in Attachment 3. Reference to these is made by author's name in this advice.

Power of committee to require attendance and question witnesses: general comments

13 The resolution establishing the Committee empowers the Committee to send for and examine persons. Resolution (12) of the Contempt Resolutions provides that a witness shall not, without reasonable excuse, refuse to answer any relevant question put to the witness. Resolution (13) provides that a person shall not, without reasonable excuse, refuse or fail to attend before a committee of the Senate when ordered to do so or refuse to produce documents in accordance with an order of a committee. The Committee may therefore summon a person falling in any one of the categories listed above. The person must appear before the Committee unless he or she has a reasonable excuse not to do so. A failure to appear may be reported by the Committee to the Senate which can then take such action in relation to the matter as it thinks appropriate. The Committee itself cannot compel a person to appear before it. Likewise the Committee may ask a witness any question relevant to its terms of reference. If the witness fails to answer the Committee may report that failure to the Senate. The issue that falls for consideration is what might constitute a reasonable excuse for failure to attend or to answer a question in the circumstances of the Committee's inquiry.

Committee acting beyond Constitutional power.

14 Judicial authority relating to the power of Royal Commissions to compel the attendance of witnesses has suggested that compulsion is not possible if the issues to be investigated exceed the legislative competence of the Commonwealth: see *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644; *Lockwood v The Commonwealth* (1954) 90 CLR 177. Whether these decisions would be followed in relation to Senate Committee inquiries is not relevant in the present context as the inquiry here clearly relates to the scope of Commonwealth legislation. There may possibly be limits on the questions that a witness may be obliged to answer. United States authorities suggest that questions must be pertinent to the inquiry and this can lead to issues of constitutional power:

see Dennis Pearce "Inquiries by Senate Committees" (1971) 45 ALJ 652. 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.

Integrity or autonomy of a State

15 It has been suggested that an implied limitation on the legislative power of the Commonwealth arising from the need to preserve the integrity and autonomy of the States as constituent elements of the Australian Federation may limit the power of the Committee to require the attendance of witnesses falling within the categories above. The Clerk has properly raised this matter in his advices to the Committee. See also Lindell at 388-391. It is not an issue on which it is possible to give a concluded opinion. 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 discussion 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 State officials.

16 The existence and effect of an implied limitation was considered by the Court recently in *Re Australian Education Union; Ex parte State of Victoria* (1995) 128 ALR 609. The case concerned the power of the Australian Industrial Relations Commission to make awards relating to State employees. The Court acknowledged the difficulty of stating a principle of general application and noted the need to look at the question in relation to the facts of each particular case. It said

> 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.

Further analysis by the Court of earlier authorities relating to the second of these propositions revealed a distinction between the curtailment of the constitutional functions of a State government (which is not permissible) and an impairment of a function which a State government undertakes (which may be curtailed): see, in particular, the discussion at p 627 of the *Dams* case and at p 630 of the *Melbourne Corporation* case.

17 The discussion is relevant in the present context in a number of ways. First, the limitation discussed in the cases is concerned with the making of legislation. Here we are concerned with an inquiry by a Senate Committee. It could be argued that the fact that the Committee is only concerned with the investigation of a matter and that no result impinging on a State will directly follow from its findings means that it is not subject to the constraints referred to by the High Court. They were directed to legislation that does affect a State. This is a factor that cannot be disregarded. However, in the admittedly somewhat different context of 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 will flow automatically from the outcome of the inquiry. The same thinking could persuade a court to find that the limitation applicable to legislation applies also to inquiries directed to possible legislative outcomes by a legislative body. However, the fact that the Committee will only be asking questions is likely to lead to a greater liberality of action than would be the case if a law were imposed upon a State.

18 Assuming that 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 by the like Commonwealth institution. The Senate cannot compel a Member of the House of Representatives to atttend before it or one of its committees. It can only invite Members to appear (Odgers p 443). The issue whether the Senate could compel the attendance of a member of a State parliament to appear arose in 1992. 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. I express no opinion here on the comity issue but I consider that the Clerk was on strong legal ground in suggesting that the implied limitation approach made the summoning power doubtful.

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. If a member of a State parliament could be made to account for his or her actions before the Commonwealth Parliament, this would act as a substantial limitation on the member's freedom of speech and carriage of parliamentary duties. As such it might be thought to offend s 106 of the Constitution as well as the implied limitation. This conclusion is supported by the Report of the Constitutional and Legal Affairs Committee "Commonwealth Law Making Power and the Privilege of Freedom of Speech" (1985).

20 In contrast with the approach relating to current members, the Senate has summoned former members of the Commonwealth Parliament to appear before a committee (Odgers p 445). This being so, at least insofar as the implied limitation approach is based on discrimination, it would not seem to prevent the attendance of a former member of a State parliament being required. The position would seem to be the same also in relation to the other categories of persons referred to above. Employees and former employees of Commonwealth agencies are compellable as witnesses before Senate Committees (Odgers pp 449,450).

21 Can former parliamentarians and State officers past or present decline to attend on the basis of the second arm of the implied limitation test - that to require them to do so would destroy or curtail the capacity of the States to function as governments? It will depend upon the issues raised with them.

22 The terms of reference of the Committee are directed to three broad topics: Commonwealth legislation relating to casino licensing; international implications of such licensing; and the tendering processes relating to the Crown Casino. Only the last of these is directly related to the activities of a State government although I appreciate that questions relating to the first two could require the revelation of information relating to State procedures and perhaps policies. 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 functioning of a State if its commercial activities were to be the subject of inquiry by a Senate committee, allowing for the fact that the Senate has ample facility available to it to protect confidential commercial information.

23 The High Court in the *Australian Education* case at p 629 expressed attraction to a distinction drawn by counsel between internal and external services of government. The former it was argued were protected by the implied limitation but the latter were not. Falling within the internal services description were policy formulation, reporting to the parliament, the collection and administration of government revenue and the provision of services to parliament and to the judiciary. Many matters relating to government tendering practices generally and to the Crown Casino in particular would not fall within this description of internal services.

24 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. That limitation is directed to constitutional functions and does not extend generally to the commercial activities of the government. Much Commonwealth legislation limits the activities of a State butis not on that account invalid, eg the Trade Practices Act. However, there are special features relating to the establishment of a casino that make it necessary to look carefully at the issues that may be raised with witnesses.

25 Questions to former members would be subject to the same constraints as are applicable to existing members insofar as they relate to the period when the person was a member of the Parliament. A person cannot for the same reasons as are set out above in relation to current members be called to account for activities that occurred while the person was a member. Actions that have occurred after the member has left the Parliament are a different thing and the following remarks then apply. This would be so even though the former member may be an officer or consultant to the government.

26 The submission to the Committee from the Victorian Casino and Gaming Authority raises pertinent issues in relation to the information that may be sought from the other categories of persons referred to above. Mention is made of probity checks of individuals and companies that it is suggested must be kept secret to protect the sources of the information. It seems to me that the capacity to carry out this sort of activity whether it be in regard to casino licence applicants or crime generally is an activity that could be regarded by a court as crucial to a State's functions and therefore could not be pursued by a Senate committee.

27 I am less certain about the confidentiality undertakings referred to in the Authority's submission. It may be that the ability to give such an undertaking and maintain the secrecy of the information disclosed could be seen as important to the maintenance of a State but the argument would have to be made more cogently than is put in the submission. The Senate would need to be persuaded that its mechanisms were inadequate to preserve the confidentiality of the information and that its disclosure would be such as to result in long term damage to the State such as to be characterised as affecting its continuance. This is no easy test to meet.

28 A further limitation that could be claimed with some likelihood of success would be in relation to questions that related to advice 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 officials of statutory offices and more particularly consultants are likely to fall within this limitation. All will depend upon the nature of the issue being pursued but simply because it relates to a matter in which the State government has an interest does not mean that investigation of it will be prevented by the implied limitation test.

29 I do not see that the mere calling before the Committee of the various categories of persons referred to above, other than existing members of parliament, can be limited by the Federalism limitation in the Constitution. Nor do I see that limitation preventing the asking of questions relating to the Committee's terms of reference and an answer being required by the Senate except in the circumstances that I have indicated. If persons before the Committee are troubled by the possible effect of an answer to a question, that will provide a reasonable excuse for them not to answer and the issue will then need to be refered to the Senate for consideration of the matter. At that time further advice might be sought. A blanket refusal to attend or to answer questions cannot in my view be sustained by reference to the constitutional limitation. (I am fortified in this conclusion by the summary of the opinion of the Queensland Solicitor-General relating to the powers of the Senate Whistleblower Committee which you have provided to me. Mr Pat Keane QC advised the Queensland government that the Committee had the legal power to summon State officials and documents.)

Secrecy Provision

30 Section 151 of the Victorian Casino Control Act 1991 can be seen to impose a wide ranging limitation on the disclosure of information relating to the establishment of a casino. Even disclosure to courts is excluded without ministerial consent. Significantly, disclosure to the Victorian Parliament or a committee of the Parliament is not mentioned. It may be that this was because it was thought unnecessary to include such a requirement in that either the secrecy

provision itself or executive privilege would preclude disclosure of information to the Parliament. This was a view that was held until recently in relation to the provision of information to the Senate where a Commonwealth Act contained a secrecy provision. However, it is no longer the view of the Government Law Officers.

31 In an opinion dated 12 August 1991 and included in the Explanatory Memorandum to the Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991, the Solicitor-General opined that a general secrecy provision cannot override the operation of s 49 of the Constitution. While a provision may exclude revelation of information to the Parliament or a committee, this needs to be specific. The Solicitor-General notes the possibility of such an intention to exclude disclosure being implied but makes it apparent that such an implication will be difficult to draw. He cites the detailed regulation of disclosure provided by section 16 of the Income Tax Assessment Act 1936 as an example of a provision that does *not* manifest the requisite intent to limit the effect of s 49 of the Constitution despite its clear intention to cover the field of disclosure of information gained by taxation officers. Section 151 of the Casino Control Act is a wide ranging but generally expressed confidentiality provision of the kind to which the Solicitor-General was referring. It makes no direct reference to the non-disclosure of information to the Parliament of Victoria and there is nothing that could lead to an implication that it was intended to have that effect.

32 In the light of the Solicitor-General's opinion, which seems to me to be correct, it is difficult to see how it can be claimed that a provision of a Victorian Act that does not itself exclude revelation of information to the Victorian Parliament could limit the Commonwealth Parliament's right of access to that information. It is not necessary under this head to consider whether an attempt by the Victorian Parliament to limit access would be invalidated by s 109 of the Constitution as the issue does not arise. However, a strong argument could be made out that s 49 of the Constitution overrides a State provision that purports to limit access by the Commonwealth Parliament to information.

Executive Privilege or Public Interest Immunity

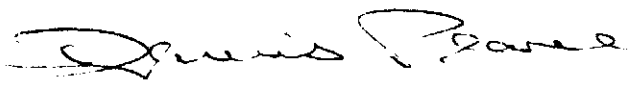
33 Commonwealth governments have, over the years, asserted that they may refuse to produce documents to the Senate or its committees and that their officers may decline to answer questions on the basis of a right that has been variously called Crown privilege, Executive privilege and public interest immunity. Under this doctrine, a minister is entitled to determine whether information pertaining to governmental affairs should be disclosed to the Parliament. The same doctrine has been asserted in relation to judicial proceedings. At one time the courts accepted that a ministerial certificate denying access to government documents was conclusive. That view has changed since the decision of the High Court in *Sankey v Whitlam* (1978) 142 CLR 1 and the courts have assumed the role of arbiter of the issue whether it is in the public interest that information be excluded from consideration in court proceedings. The ability of the executive to point to the judicial precedent as the basis for its right to refuse the parliament access to information has thus been removed. However, this has not resulted in any different attitude being taken by the executive to the parliament being given access to information.

34 The saga of the conflict between the Senate and successive Commonwealth governments over the disclusure of government information is fully described in Odgers at pp 484 - 497. The legal basis for the executive's claim of immunity has been discussed in detail by Professor Enid Campbell and Geoffrey Lindell. Both conclude that s 49 of the Constitution overrrides the immunity claimed. The Senate has likewise expressed the view that it lies in its power to determine the issue. I agree with these conclusions and do not think it would be of value in the present context to rehearse the arguments that have been cogently put in the publications referred to. But if the immunity exists, what is its scope?

35 The first point to note is that the immunity attaches to the information not to the person who is being asked to divulge it. Accordingly it is for the Victorian government to assert that information should not be disclosed if it is of that view. When such a claim is made in judicial proceedings it is the court which resolves whether the claim is justified. If it takes the view that the information is not privileged from disclosure, it can compel a witness to give the information on pain of being

Conclusion

39 A conclusive answer could only be obtained to many of the matters discussed above if a court were to rule on them. The reality is that, whatever view is taken by the Committee of the legal position, the issue will not be tested unless the Senate takes the step of finding a witness guilty of contempt for failing to disclose information or a witness is prosecuted by the Victorian government for releasing information.



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4 October 1996

dealt with for contempt of court. The position is somewhat different in the Senate and it is because of this that the problems have arisen in the past. Where a government has wished to decline to make information available on the basis of public interest immunity, it has indicated this to the Senate either directly or by instructing its officers not to reveal the information sought. Theoretically it is then left to the witness who possesses the information to determine whether to adhere to that direction. It is more than probable that a public service official will adhere to such a direction. However, some of the other categories of witness referred to above are not answerable to a minister, eg former office holders, consultants and perhaps current office holders of statutory authorities. If the Senate were to conclude that the information sought should not be protected from disclosure in the public interest, these witnesses could reveal information without the possibility of consequences that may be visited upon current public servants. In the light of my conclusion that the secrecy provision of the Casino Control Act is not infringed by revealing information to a Senate committee, they could reveal information which the Victorian government considered immune from disclosure without fear of breaching the law. It might however be necessary for the Senate to be prepared to take appropriate action to protect them if a prosecution is nonetheless launched under the Casino Control Act.

36 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.

Comity

37 The Clerk has indicated in his advice to you and to previous committees that, as a matter of comity, the practice of the Senate is not to compel the attendance of officials of State governments before Senate Committees. The application of this approach and its wisdom is not a legal issue but one that the Committee must determine for itself. The notion of comity is inextricably linked with the ideas of Federalism and the constraints that it imposes that are discussed above. To take an all or nothing approach to the requirement of attendance of a State official cuts across the primacy of the Commonwealth in the Federal system. I would have thought that there were circumstances where it could be said that the Senate was not performing its duty for all of Australia if it adopted an approach that in no circumstances would it summon a State official. However, this is a matter of policy for the Committee and the Senate to resolve.

Enforceability of orders

38 Section 7 of the Parliamentary Privileges Act 1987 empowers the Senate to impose a penalty upon a person who commits an offence against the Senate of up to 6 months imprisonment or a fine of $5000. A fundamental issue that the Senate would have to face if it sought to enforce its directions to attend and/or to answer questions by use of its powers to punish for contempt would be how to enforce its orders if a witness either declined to appear or refused to answer questions. The Senate does not have its own police force. While it would turn to the executive arm of government for assistance, it is open to question in this case whether that assistance would be forthcoming. This is obviously a matter of political judgment but I raise it in the context of the legal powers of the Senate. The Clerk's staff may be called upon to act on behalf of the Senate but the Senate cannot itself compel assistance from others. However, the power to recover a fine may be able to be carried though without executive assistance. Subsection 7(6) provides for such a penalty to be recovered as a debt due to the Commonwealth by action in a court brought by a person appointed by the Senate. Being a civil action, it would seem that the executive's discretion whether or not to prosecute would not be able to be exercised. However, it would appear that taking action to recover the fine would lead to the court having to examine the validity of the conduct of the Senate in imposing the fine. This would expose for judicial pronouncement many of the matters dealt with in this advice: cf Lindell, p 417ff in relation to challenging an order of imprisonment.

ATTACHMENT 1

RESOLUTION ESTABLISHING SELECT COMMITTEE

(1) That a select committee be appointed, to be known as the Victorian Casino Inquiry Select Committee, to inquire into and report on:

(a) the adequacy of Commonwealth legislation in relation to casino licensing, in particular:

(i) the effectiveness with which the Corporations Law operates in respect of casinos, including those laws dealing with company directors, and

(ii) the need for uniform legislation to establish standards and procedures for the licensing of casinos:

(b) the adequacy of the *Financial Transactions Reports Act 1988* in respect of transactions within casinos:

(c) whether the granting of any licence to any casino within Australia has affected Australia's overseas reputation: and

(d) whether a full judicial inquiry, Royal Commission or other form of inquiry is required into Victoria's Crown Casino, with particular reference to:

(i) the tendering process for its licence, and

(ii) whether Australia's best interests have been adequately protected during the tendering process with particular reference to the record and reputation of the tenderers.

(2) That the committee consist of seven senators, as follows:

(a) three nominated by the Leader of the Government in the Senate;

(b) three nominated by the Leader of the Opposition in the Senate; and

(c) one nominated by the Leader of the Australian Democrats.

(3) That the committee may proceed to the despatch of business notwithstanding that all members have not been duly nominated and appointed and notwithstanding any vacancy.

(4) That the chair of the committee be elected by and from the members of the committee.

(5) That the deputy chair of the committee be elected by and from the members of the committee immediately after the election of the chair.

(6) That the deputy chair act as chair when there is no chair or the chair is not present at a meeting.

(7) That, in the event of the votes on any question before the committee being equally divided, the chair, or deputy chair when acting as chair, have casting vote.

(8) That a quorum of the committee be four members.

(9) That the committee and any subcommittee have power to send for and examine persons and documents, to move from place to place, to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives, and have leave to report from time to time its proceedings and the evidence taken and such interim recommendations as it may deem fit.

(10) That the committee have power to appoint subcommittees consisting of three or more of its members, and to refer to any such subcommittee any of the matters which the committee is empowered to consider, and that the quorum of a subcommittee be a majority of the senators appointed to the subcommittee.

(11) That the committee be provided with all necessary staff, facilities and resources and be empowered to appoint persons with specialist knowledge for the purposes of the committee with the approval of the President.

(12) That the committee be empowered to print from day to day such documents and evidence as may be ordered by it, and a daily *Hansard* be published of such proceedings as take place in public.

(13) That the committee report to the Senate on or before the last day of sitting in December 1996.

(5) If—

(*a*) the Minister certifies that it is necessary in the public interest that specified information should be divulged to a court; or

(*b*) a person to whom information relates has expressly authorised it to be divulged to a court—

a person may be required—

(*c*) to produce in the court any document containing the information; or

(*d*) to divulge the information to the court.

(6) In this section—

"court" includes any tribunal, authority or person having power to require the production of documents or the answering of questions;

"produce" includes permit access to.

ATTACHMENT 2

CASINO CONTROL ACT 1991, SECTION 151

151. *Secrecy*

(1) Subject to sub-section (3), a person must not directly or indirectly, except in the performance of duties or exercise of powers under this Act, make a record of, or divulge to any person, any information with respect to the affairs of another person or with respect to the establishment or development of a casino acquired by the first-mentioned person in the performance of those duties or exercise of those powers.

Penalty: 50 penalty units

(2) Subject to sub-section (5), a person is not, except for the purposes of this Act, required—

(*a*) to produce in a court a document that has come into his or her possession or under his or her control; or

(*b*) to divulge to a court any information that has come to his or her notice—

in the performance of duties or exercise of powers under this Act.

(3) A person may—

(*a*) divulge specified information to such persons as the Minister directs if the Minister certifies that it is necessary in the public interest that the information should be so divulged; or

(*b*) divulge information to a prescribed authority or prescribed person; or

(*c*) divulge information to a person who is expressly or impliedly authorised by the person to whom the information relates to obtain it.

(4) An authority or person to whom information is divulged under sub-section (3), and a person or employee under the control of that authority or person, is subject, in respect of that information, to the same rights, privileges, obligations and liabilities under this section as if that authority, person or employee were a person performing duties under this Act and had acquired the information in the performance of those duties.

ATTACHMENT 3

Odgers' Australian Senate Practice 7th ed.

Enid Campbell, "Parliament and the Executive", Commentaries on the Australian Constitution, ed Leslie Zines, 1977, Butterworths.

Enid Campbell, "Appearance of Officials as Witnesses before Parliamentary Committees", Parliament & Bureaucracy, ed J R Nethercote, 1982, Hale & Ironmonger.

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

APPENDIX 4

REFERENCES

Enid Campbell, "Parliament and the Executive", Commentaries on the Australian Constitution, ed Leslie Zines, 1977, Butterworths, .

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APPENDIX 5

CASES

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

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

Howard v Gossen (1845) 10 QBD 359.

Lockwood v The Commonwealth (1954) 90 CLR 177.

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

The Lord Mayor, Councillors and Citizens of the City of Melbourne v The Commonwealth and Another (1947) 74 CLR 31.

Sankey v Whitlam (1978) 142 CLR 1.