

CHAPTER 19

Relations with the executive government

In any system of government conducted by elected representatives of the people, the relationship between the representative assembly holding the legislative power and the holders of the executive power is of great significance. In a parliamentary system, in which the executive is formed out of the legislative assembly, the relationship is of greater significance. In such a system the executive, the ministry, is supposed to be scrutinised and controlled by the legislature. In practice, in most systems inherited from the United Kingdom, the ministry has come to control the lower house of the legislature through control of disciplined and hierarchical parties. In this situation, as has been observed in Chapter 1, the role of a second chamber like the Senate is crucial, and its relationship with the executive must, if it can, compensate for the usual ministerial dominance of the lower house.

The Senate and the ministry

Section 1 of the Constitution provides that the Parliament consists of the monarch, the Senate and the House of Representatives. The titular head of the executive government is therefore also part of the legislature and joins in the exercise of the legislative power. The monarch's powers and functions are in effect delegated to the Governor-General (s. 2) whom the monarch appoints, usually for a term of five years, on the advice of the government; in practice the appointment is controlled by the prime minister.

Section 61 of the Constitution vests the executive power of the Commonwealth in the Governor-General representing the monarch, but in practice that power is exercised by ministers appointed by the Governor-General, who are members of the Federal Executive Council, an advisory body to the Governor-General, and who are required to be members of the Senate or the House of Representatives (ss 62 to 64). This latter requirement is the only reference in the Constitution to the practice of responsible or cabinet government, under which the ministry holds office so long as it retains the confidence of the House of Representatives. In practice this means that the prime minister is the leader of the party or coalition of parties which holds a majority in that House, and the other ministers are members of that party or coalition nominated by the prime minister or selected by the party or coalition. Through its party majority, the ministry controls the House

of Representatives.¹

The tenure of office of the ministry is therefore not directly affected by the composition or actions of the Senate, and the party forming the ministry has not normally had a majority in the Senate. Ministers individually and the ministry collectively, however, are required by the Senate to be accountable to the Senate for their policies and their conduct of the executive government. This accountability to the Senate is provided for in the procedures of the Senate, and is imposed through questioning of ministers, examination of government legislative proposals, and inquiries into government activities.

This chapter examines relations between the Senate and the executive government and the accountability of the executive generally. The scrutiny of legislation and inquiries into government activities are examined in Chapters 12 and 13 on Legislation and Chapters 16 and 17 on Committees and Witnesses.

The Governor-General and the Senate

The Governor-General as the representative of the monarch is a part of the legislature, but does not normally attend or participate in the proceedings of either House, with two exceptions. The Governor-General at the opening of each session of Parliament delivers an opening speech in the Senate chamber. The Governor-General also usually attends personally to swear in new senators, when there is no President in office. This is usually after the terms of senators have begun, but may occur on other occasions. For example, when Senator Douglas McClelland resigned as President and as a senator during the summer adjournment in February 1987, the Governor-General attended the Senate on the first sitting day to report the resignation and the appointment by the Parliament of New South Wales of a person to fill the vacancy, and to hear the affirmation of the new senator.² Apart from these occasions communications between the Governor-General and the Houses consist of formal addresses and messages, and announcements by ministers.

The principal constitutional powers and functions of the Governor-General as they directly affect the Senate include the appointment of times for the holding of sessions of Parliament and the proroguing of Parliament (s. 5), and the dissolution of both Houses simultaneously and the convening of a joint sitting (s. 57). The Governor-General may administer the oath or affirmation to senators or may commission deputies to do so (s. 42).³ The President's resignation is tendered to the Governor-General (s. 17), as are those of senators if there is no President or the President

1 Periods of minority government have been rare.

2 17/2/1987, J.1591.

3 On the election of a President the Governor-General issues a commission authorising the President to swear in new senators.

is absent from the Commonwealth (s. 19). In the event of a vacancy in the Senate when there is no President or the President is absent from the Commonwealth the Governor-General notifies the Governor of the relevant State (s. 21). When legislation has been passed by both Houses it is presented to the Governor-General for assent, and the Governor-General may also recommend amendments (s. 58).⁴ Section 128 of the Constitution provides that where the Houses cannot agree on a proposed law to alter the Constitution the Governor-General may submit the proposal to the electors.

The Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia state that “a person appointed to be Governor-General shall take the Oath or Affirmation of Allegiance and the Oath or Affirmation of Office in the Presence of the Chief Justice or another Justice of the High Court of Australia”.⁵ The oath or affirmation of allegiance is as set out in the schedule to the Constitution and the form of the oath or affirmation of office is specified in paragraph V(b) of the Letters Patent. The venue for the swearing-in of a new Governor-General is determined by the Government. Traditionally it takes place in the Senate chamber, but is not part of proceedings of the Senate.

The Senate may formally communicate with the monarch or the Governor-General by way of an address, in accordance with provisions in standing orders 171 and 172. A motion for an address requires notice.

Addresses to the monarch were formerly used for various occasions; they are now very rare.⁶ Apart from the presentation of an address-in-reply to the Governor-General’s speech at the opening of each new session of Parliament (see Chapter 7), there have been no addresses presented to the Governor-General since 1931.

Should the Senate request access to documents in the control of the Governor-General, such as correspondence between the Governor-General and the Prime Minister on a request for a dissolution, an address to the Governor-General may be employed.⁷ [\(See supplement\)](#)

Messages from the Governor-General are reported to the Senate as soon as practicable after receipt. A message may be presented by a minister at any time, but not during a debate, or so as to interrupt a senator speaking. The message may be at once taken into consideration, or ordered

4 See Chapter 12, Legislation.

5 Paragraph II(b); the current letters patent were issued on 21/8/2008.

6 Most recent addresses have concerned the deaths of members of the Royal Family: 1/9/1997, J.2371, 12/2/2002, J.54, 14/5/2002, J.312; but see 7/2/2012, J. 1986, for an address on the Queen’s Diamond Jubilee.

7 SO 165; see Chapter 18, Documents, under Addresses for documents.

to be printed, or a future day may be fixed on motion for taking it into consideration.⁸

Messages from the Governor-General are received by the Senate on the following subjects:

- Address-in-reply, and other addresses from the Senate — the Governor-General's replies.
- With respect to bills:

Returning any bill presented for assent, and enclosing any amendment which the Governor-General may recommend.

Notifying assent to bills and the proclamation of commencement of Acts.⁹

The monarch, Governor-General and governors of the states are protected by the procedures of the Senate against offence in debate. Standing order 193(2) provides that a senator shall not refer to them “disrespectfully in debate, or for the purpose of influencing the Senate in its deliberations”. It has been ruled that this order does not protect former Governors-General but may protect Governors-General designate.¹⁰

Ministers in the Senate

The Constitution vests the executive power of the Commonwealth in the Governor-General as the monarch's representative (s. 61). In practice the Governor General acts only on the advice of the government, which is formally tendered through the Executive Council, of which all ministers are members. Parliamentary secretaries (see below) are also appointed to the Council.

Ministers are appointed by the Governor-General on the advice of the Prime Minister. The Constitution requires that no minister “shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives” (s. 64). The number of ministers and the maximum amount of funds that can be appropriated to cover their salaries is prescribed, under sections 65 and 66 of the Constitution, by the *Ministers of State Act 1952* as amended.

Traditionally the Prime Minister and the Treasurer are members of the House of Representatives. When Senator John Gorton became Prime Minister consequent upon his election to the position of leader of the Liberal Party on 10 January 1968 he sought to become a member of the House

8 SO 173.

9 See Chapters 12 and 13 on Legislation.

10 SD, 19/12/1988, p. 4484; SD, 19/12/1988, p. 4496; see Chapter 10, Debate. For a resolution calling on the Governor-General to resign, or, if he does not, for the Prime Minister to advise the withdrawal of his commission, see 15/5/2003, J.1818-20.

of Representatives as soon as practicable. He resigned from the Senate on 1 February 1968 and was elected as member of the House of Representatives on 24 February 1968.

Although there are no constitutional or statutory requirements that any ministers be members of the Senate, all governments since federation have appointed senators to the ministry. In recent decades senators have usually comprised approximately one quarter to one third of the ministry.

From time to time the proposition has been advanced that there should be no ministers in the Senate, the argument being that the Senate is not the House which determines the composition of the government, the Senate's role should be one of review and the presence of ministers inhibits that role. For example, on 22 February 1979 Senator Hamer moved:

- (1) That, in the opinion of the Senate —
 - (a) Senators should no longer hold office as Ministers of State, with the exception of any Senator holding the office of Leader of the Government in the Senate, who, in order adequately to represent Government priorities to the Senate, should remain a member of the Cabinet; and
 - (b) Chairmen of the Senate's Legislative and General Purpose Standing Committees should be granted allowances, staffs and other entitlements similar to those currently granted to Ministers other than Ministers in the Cabinet. ...

This motion was debated but not resolved.¹¹ Notice of a similar motion was given by Senator Rae. It remained on the Notice Paper until 16 December 1982 but it was not moved and not debated.¹² Such a change might well strengthen the Senate's role as the house of legislation and review, as distinct from the electoral college role of the House of Representatives of determining the party composition of the government. Unless the major parties agree not to appoint ministers in the Senate, which is unlikely, the change could come about only by a constitutional amendment.

The Senate's procedures give ministers certain exclusive powers, most of which are concerned with the management of government business. The standing orders provide that ministers may:

- arrange the order of their notices of motion and orders of the day on the Notice Paper as they think fit¹³
- move a motion connected with the conduct of the business of the Senate at any time without

11 22/2/1979, J.571, SD, pp. 229-40.

12 22/3/1979, J.619; 4/12/1980, J.57.

13 SO 65.

notice¹⁴

- move that a bill be declared urgent and, if the motion is agreed to, move further motions concerning the time allocated for consideration of the bill¹⁵
- move at any time that the Senate adjourn¹⁶
- move for the adjournment of a debate after having spoken in that debate¹⁷
- move that the question be now put on more than one occasion, and after having spoken in the debate¹⁸
- present documents¹⁹
- present a message from the Governor-General at any time, but not during a debate or so as to interrupt a senator speaking.²⁰

Ministers may authorise senators who are not ministers to exercise these powers on their behalf.

Ministers may be asked questions relating to public affairs at question time.²¹ Committees examining the estimates may ask ministers for explanations concerning items of proposed expenditure.²²

A document relating to public affairs quoted by a minister may not be ordered to be laid on the table, if the minister states that the document is of a confidential nature or should more properly be obtained by address.²³

Ministers in the Senate represent one or more ministers who are members of the House of Representatives for the purposes of answering questions without notice, tabling documents and taking charge of bills. Conversely, Senate ministers are represented in the House of Representatives by a minister who is a member of that House. These representational arrangements are determined by the government.

14 SO 56; for discussion of this power see the section on the rearrangement of business in Chapter 8, Conduct of Proceedings.

15 SO 142.

16 SO 53(2).

17 SO 201(6).

18 SO 199(3).

19 SO 61 and 166.

20 SO 173.

21 SO 72.

22 SO 26.

23 SO 168(1); see Chapter 18, Documents.

Parliamentary secretaries

Some members of the Senate are appointed by the government to assist ministers in their work. They are now referred to as parliamentary secretaries. In the past, persons who performed similar functions have been known by a variety of designations, including parliamentary under-secretary and assistant minister.

Parliamentary secretaries are now appointed under an amendment made in 2000 to the Ministers of State Act 1952, which prescribes the number of ministers under section 65 of the Constitution. The statutory provision provides for them to be appointed as ministers, but without that title or status. The purpose of this paradoxical provision is to allow them to be paid salary for the office without incurring disqualification under section 44(iv.) of the Constitution, which prevents members of either House holding an office of profit under the Crown, excepting only ministers.²⁴

Before the 2000 provision, parliamentary secretaries were appointed under the Parliamentary Secretaries Act 1980, and were not paid any remuneration of office but were reimbursed for expenses.

Since 1990, when the practice of appointing parliamentary secretaries was resumed, at least one senator has always been included in their number.

The first assistant minister to be appointed in the Senate was Senator E J Russell, who held that office during 1914–16. As assistant minister, Senator Russell answered questions (without notice and upon notice), laid papers on the table, initiated and controlled the passage through the Senate of legislation, moved other motions, and generally did all those things which a minister representing another minister in the other House does in the Senate. No special resolution or changes in the standing orders were made to enable Senator Russell to discharge the functions of a minister.

The legal status of parliamentary secretaries and the extent of their powers was the subject of debate on a number of occasions in the past; for further details see the report of the Senate's Standing Committee on Constitutional and Legal Affairs on *The Constitutional Qualifications of Members of Parliament*.²⁵

A continuing order of the Senate authorises parliamentary secretaries to exercise the powers and perform the functions conferred upon ministers by the procedures of the Senate, but they may not be asked or answer questions which may be put to ministers under standing order 72(1), or represent a Senate minister in respect of that minister's responsibilities before a committee

24 For comments on the constitutional propriety of this provision, see the remarks by Senator Harradine, SD, 16/2/2000, pp. 11926–7. This arrangement, however, was, in effect, upheld by the High Court: *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

25 PP 131/1981.

examining the estimates.

The history of this order is as follows. The Parliamentary Secretaries Act 1980 did not define the powers or duties of a parliamentary secretary and thus did not settle the question of the extent to which senators appointed to such offices could exercise the powers and functions conferred upon ministers by the procedures of the Senate. In a statement to the Senate on this matter in June 1991, President Sibraa gave consideration to the question of whether secretaries could answer questions without notice on behalf of ministers and whether they could represent ministers at estimates committees.²⁶ On 3 September 1991 the Senate adopted the following sessional order:

That any Senator appointed a parliamentary secretary under the *Parliamentary Secretaries Act 1980* may exercise the powers and perform the functions conferred upon ministers by the procedures of the Senate, but may not be asked or answer questions which may be put to ministers under standing order 72(1).²⁷

During his term as Parliamentary Secretary to the Treasurer, 4 April 1990 to 24 March 1993, Senator McMullan appeared before estimates committees in place of the Treasurer and the Minister for Finance. On 6 May 1993 the Senate adopted a sessional order which contained, in addition to the provisions included in the order quoted above, a prohibition on parliamentary secretaries representing ministers before committees considering estimates.²⁸ The order was made permanent on 11 November 1998.²⁹ This prohibition was subsequently relaxed to allow parliamentary secretaries to represent ministers other than Senate ministers in relation to the latter's own responsibilities.³⁰

Ministerial accountability and censure motions

As has been noted above, governments are formed by the party or coalition of parties which can command a majority of votes in the House of Representatives, and ministers are appointed by the Governor-General on the advice of the leader of that party or coalition. The termination of a minister's appointment is likewise effected by the Governor-General on the advice of the Prime Minister. While ministers are neither appointed nor removed by the Senate, they are accountable to it, that is, they are expected to account for their actions and policies by, for example, answering questions, providing documents, and appearing before committees. In 1984 the Senate demonstrated the importance placed on accountability when it censured a minister for, among other matters,

26 SD, 18/6/1991, pp. 4778-9.

27 J.1455-6.

28 J.100.

29 J.54.

30 6/2/2001, J.3860.

“his refusal to explain his actions despite repeated questioning by the Senate”.³¹ Ministers have been censured for matters as varied as: misleading the Senate, failing to answer questions on notice within the stipulated time limit, maladministration of a department, attempting to interfere in the justice system of another country, failing to declare an interest in a matter, for “contemptuous abuse” of the Senate, and for refusing to produce documents in compliance with an order of the Senate. The Senate has insisted on ministers accepting full personal responsibility for answers given on behalf of others, and ministers have been censured on this basis.³²

Although a resolution of the Senate censuring the government or a minister can have no direct constitutional or legal consequences, as an expression of the Senate’s disapproval of the actions or policies of particular ministers, or of the government as a whole, censure resolutions may have a significant political impact and for this reason they have frequently been moved and carried in the Senate. They provide a substitute to the usual inability, because of ministerial control, of the House of Representatives to discipline a minister.

On 10 October 1996 the Senate passed a resolution calling on the Assistant Treasurer, Senator Short, and the Parliamentary Secretary to the Treasurer, Senator Gibson, to explain apparent conflicts of interest arising from their shareholdings.³³ Those two office-holders subsequently resigned. House of Representatives ministers said to be in the same situation, however, escaped unscathed, and the Prime Minister then indicated that the code of ministerial conduct would be reviewed as it was too restrictive of ministers’ private interests. This incident provided evidence of the thesis that ministers are held accountable in the Senate but not in the House of Representatives to which the ministry is supposed to be responsible.

Almost all such motions have been expressed in terms of censuring either individual ministers or the government. There have been no motions proposing want of confidence in the government and very few expressing want of confidence in particular ministers, none of which was successful. No motion of want of confidence in a minister has been proposed since 1979³⁴ and the practice now is to frame such motions in terms of censure.

Two censure motions adopted by the Senate in the early 1970s called for the resignations of those to whom they were directed. One case involved a minister,³⁵ and in the other the government was called on to resign.³⁶ The government took no action in either case. Only two of the unsuccessful

31 13/9/1984, J.1125.

32 See, for example, 25/5/1989, J.1712; 10/5/1994, J.1641.

33 J.678.

34 24/5/1979, J.733-4.

35 18/9/1974, J.195-7.

36 8/4/1974, J.93.

censure motions moved since that time have included calls for resignation.³⁷

The Senate has passed motions of censure on ministers in the House of Representatives (see the list of successful motions below). Following the adoption of a censure motion against the Prime Minister in 1992 the Senate passed a motion that the censure resolution be communicated by message to the House of Representatives.³⁸ On the day after the Senate's censure of a Senate minister in 1973 the House of Representatives, on the motion of the government and voting on party lines, passed a motion affirming confidence in that minister.³⁹

While there are no special provisions in the Senate standing orders concerning censure motions, it is the usual practice for such motions to be accorded immediate precedence or for the debate to be adjourned to a later hour the same day.⁴⁰

Censure motions are initiated either by giving notice of motion or, more commonly, a motion is moved pursuant to a contingent notice "that so much of standing orders be suspended as would prevent Senator (. . .) moving a motion to provide for the consideration of a matter, namely a motion to give precedence to a motion of censure of (. . .)". Upon the adoption of the suspension motion another motion is moved to the effect that "a motion of censure may be moved immediately and have precedence over all other business this day till determined". The censure motion is then moved.⁴¹ Censure motions have also been moved by leave.⁴²

A censure motion specifies the minister or other senator towards whom it is directed and states the reason for the censure. The following is a typical example of the form:

That the Senate censures the Minister for Resources and Energy (Senator Walsh) for his deliberate misleading of the Senate by selective tabling of documents and his refusal to explain his actions despite repeated questioning by the Senate.⁴³

If a censure motion contains a number of propositions the question may be divided.⁴⁴

Motions of censure and want of confidence may be amended. For example, on 14 August 1968,

37 25/8/1982, J.1023-4; 16/2/1988, J.476-7.

38 5/11/1992, J.2966.

39 4/4/1973, J.91-2, 93-4; VP, 1973-74, pp. 104-6.

40 For an example of the latter practice see 25/8/1982, J.1023.

41 See also Chapter 8, Conduct of Proceedings, under Suspension of standing orders.

42 For example, 24/11/2011, J.1948.

43 13/9/1984, J.1125.

44 18/9/1974, J.195-7.

in response to an Opposition motion “That the Minister for Repatriation lacks the confidence of the Senate”, the Leader of the Government in the Senate moved an amendment which proposed that the words after “That” be omitted and the following be inserted: “the Senate affirms its confidence in the integrity and propriety of the Minister for Repatriation in the discharge of his Ministerial duties. The Senate rejects the charge made against him of interference in decisions of a Repatriation Tribunal. Presentation of so serious a charge unsupported by acceptable evidence is a misuse of the forms of the Senate”. The Opposition raised a point of order that the proposed amendment was a direct negative of the motion and was therefore not in order. The Acting Deputy President, Senator Wood, ruled that the amendment was in order.⁴⁵

Censure motions have been directed at private senators.⁴⁶

It would not be proper for the Senate to seek to censure a private member of the other House. The Senate declared this principle in the context of a resolution granting permission for senators to appear before the House of Representatives Privileges Committee in an inquiry into unauthorised disclosure of joint committee documents.⁴⁷ The President has declined to grant precedence to matters of privilege on the ground that the Senate may not inquire into the conduct of a member of the other House, and the same principle would apply to censure motions.⁴⁸ This principle is apparently not observed in the House of Representatives.⁴⁹ Ministers as ministers, however, may be censured, on the principle that as ministers they are accountable to the Senate although they are members of the House of Representatives.⁵⁰

Contingent notices have been given of censure motions directed at specified ministers.⁵¹ Following the censure of a minister for failing to table certain documents in compliance with an order of the Senate contingent notice was given of a motion which would allow certain penalties to be imposed on the minister, including preventing him from introducing bills.⁵² These contingent notices were not used.

45 14/8/1968, J.158.

46 31/5/1989, J.1762-3; 4/10/1989, J.2083-5; 29/3/1995, J.3182-4; 2/10/1997, J.2618; 11/3/1998, J.3359-60; 19/3/2002, J.216-7 (a parliamentary secretary acting in a non-government capacity). See Chapter 6 Senators, under Conduct of senators.

47 7/3/2001, J.4043.

48 17/5/1988, J.711; 19/9/1994, J.2151; 22/9/1994, J.2219; see also statement by Senator Chamarette, SD, 30/3/1995, pp. 2490-1.

49 VP, 30/3/1995, pp. 2011-2, 2013; 5/3/1998, pp. 2772-4.

50 See statement by President Reid, SD, 23/10/1997, pp. 7901-2. See report of the United Kingdom House of Commons Standards and Privileges Committee, HC 447 2003-04, for a contempt found against a minister (the Lord Chancellor) in the other House.

51 28/3/1985, J.140; 22/5/1985, J.291; 19/8/1986, J.1144-5; 14/9/1987, J.20; 20/12/1988, J.1351.

52 9/6/1994, J.1791.

Censure motions are not the only weapon in the Senate's armoury of accountability. They are often accompanied by inquiries by the Senate into ministerial conduct.⁵³ A Senate inquiry into a matter of concern, or merely the prospect of one, can force a government to be more accountable. For example, following the resignation of the Minister for the Environment, Sport and Territories, Mrs Kelly, over the sports grants affair on 28 February 1994, the Opposition moved to establish a Senate select committee to inquire further into the affair and matters relating to government accountability.⁵⁴ An amendment was moved to substitute for the select committee references to a series of measures designed to ensure greater accountability. A further amendment called for measures to strengthen the independence and capacity of the Auditor-General. Both sets of amendments and the main motion were negatived, the first amendment and the motion being negatived by equally divided votes. It was thought that a further motion for an inquiry would pass in the absence of some appropriate government action. The Leader of the Government in the Senate then made a ministerial statement outlining a number of measures which the government undertook to introduce, and to consider, to improve accountability mechanisms, including a replacement for the Audit Act.⁵⁵

Almost half of the censure motions proposed in the Senate since 1968 have been successful, and most of these have occurred since 1984. The following motions were adopted by the Senate.

- A motion that the Attorney-General (Senator Murphy) did not deserve the confidence of the Senate because of certain actions connected with alleged Croatian terrorism in Australia and the Australian Security Intelligence Organisation.⁵⁶
- A motion stating, *inter alia*, that "the Government's attempt to assert that Senator Gair had vacated his seat under section 44 or 45 of the Constitution on either 14 or 21 March 1974, and did not need to resign as originally intended, deserves the gravest censure and the Government should resign".⁵⁷
- A motion stating that the Minister for Foreign Affairs (Senator Willesee) was deserving of censure and ought to resign because of certain matters relating to the departure from Australia of a Russian musician, the recognition of the Soviet incorporation of the Baltic States, and foreign policy alignments. The question was, by leave, divided, and the motion as it related

53 For inquiries generally see Chapter 16, Committees; Chapter 18, Documents, under Orders for the production of documents; and below for public interest immunity.

54 Mrs Kelly resigned after an inquiry by the Auditor-General revealed that she had not kept records of \$30m in sports grants made from her office, and after Opposition allegations of misuse of the grants for electoral manipulation.

55 3/3/1994, J.1366-72.

56 4/4/1973, J.91-2; 5/4/1973, J.93-4.

57 8/4/1974, J.93.

to the Baltic States agreed to.⁵⁸

- The Minister for Resources and Energy (Senator Walsh) was censured for his deliberate misleading of the Senate by selective tabling of documents and his refusal to explain his actions despite repeated questioning by the Senate.⁵⁹
- A motion censuring the government for “(a) its attack on the Senate’s determination to exercise its Constitutional responsibilities; (b) proposing to force through a Joint Sitting legislation which it has admitted needs amendment; and (c) wasting taxpayers’ money by persisting with legislation which would abuse personal privacy beyond limits acceptable to the principle of democracy and individual rights sacred to the Australian community”.⁶⁰
- A motion expressing “profound disapproval of the unparliamentary conduct” of the Minister for Finance (Senator Walsh) during the course of the debate on the appropriation bills.⁶¹
- A motion condemning the government “for its failure to protect the privacy of Australian citizens”.⁶²
- The Minister for Resources (Senator Cook) was censured for improper alteration of the Hansard record of an answer he had given in response to a question without notice.⁶³
- The Minister representing the Minister for Defence (Senator Richardson) and the Minister for Defence were censured for their joint failure to provide an answer to a question on notice within 30 days.⁶⁴
- The government was censured for its mismanagement of an airline pilots’ dispute.⁶⁵
- The government and its whips were censured for their actions in discouraging the formation of a quorum in the Senate.⁶⁶
- The Minister for Justice (Senator Tate) was censured for failing to meet the required standards in the conduct of his office as a senior law officer of the Crown, by interfering in the administration of justice in another country.⁶⁷

58 18/9/1974, J.195-7.

59 13/9/1984, J.1125.

60 24/9/1987, J.123-4.

61 19/11/1987, J.306-7.

62 24/2/1988, J.529.

63 7/4/1989, J.1510-1.

64 25/5/1989, J.1712.

65 26/9/1989, J.2055.

66 4/10/1989, J.2083-5.

67 10/5/1990, J.54.

- Senator Richardson, in his former capacity as Minister for the Environment, was censured for his handling of the matter of payment of money under an agreement to a timber processing firm.⁶⁸
- The government was censured for “its unjustified failure to comply with the Senate’s resolution of 10 September 1991” to table a tape recording.⁶⁹
- The Minister for Transport and Communications (Senator Richardson) was censured for allegedly misleading the Senate, attempting to interfere in the justice system of the Marshall Islands, and failing to declare an interest as a minister.⁷⁰
- The Prime Minister was censured for remarks which he had made about the Senate, which were characterised as contemptuous abuse. The Senate also adopted a motion that the censure resolution be communicated by message to the House of Representatives.⁷¹
- The Leader of the Government in the Senate (Senator Evans) was censured for refusing to comply with an order of the Senate to produce a document. The minister had declined to produce the document on the grounds of confidentiality.⁷²
- The Minister representing the Minister for Administrative Services, Senator McMullan, and the Minister for Administrative Services, Mr Walker MP, were censured for not complying with an order of the Senate to provide documents. The ministers had not provided the information requested on the grounds of commercial confidentiality.⁷³ On 8 and 9 June 1994 contingent notices of motion were given which, noting that despite the censure the documents had still not been provided, allowed for the imposition of “penalties” on the Minister for Trade, Senator McMullan, including preventing him introducing bills.⁷⁴
- The Minister for Transport, Mr Brereton MP, was censured for his negligent administration of air safety.⁷⁵
- The Prime Minister, the Leader of the Government in the Senate, Senator Gareth Evans, and the Minister for Primary Industries and Energy, Senator Collins, were censured for misleading statements about the intended application of Aboriginal land funds and entering into a secret

68 4/6/1991, J.1096.

69 12/9/1991, J.1509.

70 7/5/1992, J.2298.

71 5/11/1992, J.2966; 5/11/1992, J.2967.

72 16/12/1993, J.1055.

73 10/5/1994, J.1641.

74 J.1775, 1791.

75 12/10/1994, J.2262-3.

agreement contrary to their public statements about the matter.⁷⁶

- The Minister for Communications and the Arts, Mr Lee, and his Senate representative, Senator McMullan, were censured for failure to produce a document in response to an order of the Senate.⁷⁷
- The Minister representing the Attorney-General, Senator Bolkus, was declared to be in contempt for failure to produce documents ordered by the Senate to be produced.⁷⁸
- The Leader of the Government in the Senate, Senator Gareth Evans, was censured for remarks impugning the integrity of a Western Australian royal commissioner and the counsel assisting the commission.⁷⁹
- The Minister for Aboriginal Affairs, Senator Herron, was censured for giving misleading answers in relation to funding of Aboriginal programs.⁸⁰
- The Leader of the Government in the Senate, Senator Hill, was censured for not responding properly to an order for documents relating to the Jabiluka uranium mine.⁸¹
- The Minister for Forestry and Conservation, Mr Tuckey, was censured for inflaming rather than mitigating the conflict over Western Australia's regional forest agreement.⁸²
- The Minister for Family and Community Services, Senator Newman, was censured for failing to produce a document on proposed welfare changes in response to an order of the Senate.⁸³
- The Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, was censured for failure to fulfil his ministerial responsibilities and provide leadership in indigenous affairs.⁸⁴
- The Parliamentary Secretary to Cabinet, Senator Heffernan, was censured for recklessly making unsubstantiated allegations against a justice of the High Court, and the Prime Minister was censured for not preventing Senator Heffernan's actions.⁸⁵
- The government was censured for deploying Australian troops to Iraq without United Nations authorisation and without revealing to the Australian people the commitments on which the

76 31/5/1995, J.3327-8; see also the judgment of the Federal Court and other matters referred to in the report of the Select Committee on Certain Land Fund Matters, PP 346/1995.

77 22/6/1995, J.3497-8; the document was produced on 27/6/1995, J.3545.

78 29/6/1995, J.3588-9.

79 30/8/1995, J.3738.

80 27/6/1996, J.436-7.

81 24/3/1999, J.612-13.

82 24/8/1999, J.1545-6.

83 13/10/1999, J.1845-6.

84 10/4/2000, J.2584-5.

85 19/3/2002, J.216-7.

deployment was based.⁸⁶

- The Prime Minister was censured over the Iraq war and the lack of evidence of the claimed weapons of mass destruction in Iraq.⁸⁷
- The Leader of the Government in the Senate, Senator Hill, was censured for failing to comply with an order for the production of documents relating to the pressure allegedly exerted upon the Commissioner of the Australian Federal Police, Mr Keelty, to change his statement on terrorism and the war in Iraq.⁸⁸
- The Leader of the Government in the Senate, Senator Hill, was censured for failing to take seriously his responsibility in relation to the abuse of prisoners in Iraq and to correct serious communications problems in his office and the Defence Department contrary to assurances which were given after the “children overboard” affair of 2001-02.⁸⁹
- The Minister for Immigration and Multicultural and Indigenous Affairs, Senator Vanstone, was censured for her failure to take responsibility for the manifest failures of her department in relation to detained persons.⁹⁰
- The government was censured for systematic failures in the delivery of climate change programs, including home insulation, green loans, solar rebates, renewable remote power generation and renewable energy targets.⁹¹
- In 1995, a censure motion was not proceeded with when the minister concerned apologised for her actions.⁹²

In June 2000, in passing a bill which was regarded as essential to the public interest, the Senate adopted a resolution noting the persistent failure of the Minister for Regional Services, Territories and Local Government, Senator Ian Macdonald, to answer questions relevant to the bill.⁹³

Although two of the motions listed above were not couched in terms of censure or want of confidence they had the same import as a censure motion. The motion passed on 19 November 1987 expressed “profound disapproval” of a minister’s behaviour, and the motion passed on 24 February 1988 stated that the Senate “condemns” the government. For the same reason, an unsuccessful motion proposing that Senator Greenwood had “dishonoured the office of Attorney-

86 5/2/2003, J.1447-50.

87 7/10/2003, J.2463-4.

88 30/3/2004, J.3276-7.

89 21/6/2004, J.3574-5.

90 11/5/2005, J.614-5.

91 23/2/2010, J.3179-81.

92 28/3/1995, J.3166, SD, 29/3/1995, pp. 2381-9.

93 19/6/2000, J.2802.

General”⁹⁴ is included in the list of unsuccessful censure motions.

Unsuccessful motions of censure or want of confidence have been moved on numerous occasions.⁹⁵

On several occasions unsuccessful amendments have been proposed to the address-in-reply, seeking to include an expression of censure or regret.⁹⁶

If a censure motion is moved before or during question time, questions are usually called on or resumed in accordance with the routine of business.⁹⁷ A minister may ask for questions to be placed on notice, but it is open to the Senate to order that questions continue.⁹⁸

Claims by the executive of public interest immunity

The Senate has the power to require the giving of evidence and the production of documents.⁹⁹ The executive government and ministers are frequently the subjects of the exercise of this power. On 16 July 1975 the Senate resolved:

- (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.

94 1/3/1972, J.887-8.

95 15/8/1968, J.158-9; 19/8/1969 J.544; 20/8/1969, J.546; 1/3/1972, J.887-8; 13/5/1975, J.642; 30/5/1978, J.205-6; 8/5/1979, J.690; 24/5/1979, J.733-4; 14/11/1979, J.1038-9; 21/5/1980, J.1370; 9/4/1981, J.200; 25/8/1982, J.1023-4; 7/3/1984, J.717-8; 8/3/1984, J.723; 8/5/1984, J.833-4; 16/2/1988, J.476-7; 30/5/1988, J.775-6; 2/12/1988, J.123; 7/12/1988, J.1263; 31/5/1989, J.1762-3; 5/10/1989, J.2096-7; 9/12/1991, J.1885-6; 17/12/1992, J.3422-3; 8/12/1993, J.943; 8/2/1995, J.2909, 2911; 9/10/1996, J.662-3, 667; 28/2/2011, J.601-2; 24/11/2011, J.1948.

96 See 20/5/1914, J.37; 3/6/1914, J.59-60; 20/3/1957, J.10-11; 28/3/1957, J.21-2; 25/11/1969, J.15; 29/9/2010, J.81-2.

97 Unless prevented by an order for other business to occur at a specified time; 24/11/2011, J.1948.

98 See below, under Questions to ministers; for examples: 16/2/1988, J.476-7; 9/12/1991, J.1885-6; 30, 31/8/1995, J.3738-9, 3760-1; for an unsuccessful attempt see 28/2/2011, J.602.

99 See Chapter 2, Parliamentary Privilege and Chapter 17, Witnesses.

- (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.¹⁰⁰

While the Senate undoubtedly possesses this power, it is acknowledged that there is some information held by government which ought not to be disclosed. This principle is the basis of a postulated immunity from disclosure which was formerly known as crown privilege or executive privilege and is now usually known as public interest immunity. While the Senate has not conceded that claims of public interest immunity by the executive are anything more than claims, and not established prerogatives, it has usually not sought to enforce demands for evidence or documents against a ministerial refusal to provide them but has adopted other remedies.

In 1976 the Royal Commission on Australian Government Administration observed that:

Neither House of the Commonwealth Parliament has yet formally determined whether it accepts or does not accept that its investigatory authority is legally constrained by Crown privilege. It is apparent that they are at least prepared to entertain claims, and in some situations not to insist on answers being supplied, but this does not necessarily signify acquiescence in any limitation on the legal powers of the Houses.¹⁰¹

The Senate's acknowledgment that a claim to public interest immunity may be advanced is implied in the words "subject to the determination of all just and proper claims of privilege" and "a claim of privilege based on an established ground" in paragraphs (2) and (4) of the resolution of 16 July 1975 quoted above.

The Senate's resolutions on parliamentary privilege of 25 February 1988,¹⁰² in providing that witnesses may raise objections to the giving of evidence, implicitly acknowledge the right to make claims for public interest immunity.¹⁰³

Paragraph (4) of the resolution of 16 July 1975 makes it clear that while the Senate may permit claims for public interest immunity to be advanced it reserves the right to determine whether any particular claim will be accepted.

The existence of the claimed right of public interest immunity in respect of parliamentary proceedings has not been adjudicated by the courts and is not likely to be. Several Senate committees have considered the question but have not developed agreed procedures or criteria for determining

100 16/7/1975, J.831.

101 Report of the Royal Commission on Australian Government Administration, 1976, PP 185/1976, p. 115.

102 See Chapter 2, Parliamentary Privilege and Chapter 17, Witnesses.

103 Resolution 1, paragraph (10).

whether a claim for public interest immunity should be granted. A common thread emerging from the deliberations of those committees is that the question is a political, and not a legal or procedural, one. There appears to be a consensus that the struggle between the two principles involved, the executive's claim for confidentiality and the Parliament's right to know, must be resolved politically. In practice this means that whether, in any particular case, a government will release information which it would rather keep confidential depends on its political judgment as to whether disclosure of the information will be politically more damaging than not disclosing it, the latter course perhaps involving difficulty in the Senate or public disapprobation. However, this position has been somewhat undermined by recent amendments to strengthen freedom of information legislation including by identifying factors favouring access. Testimony from the Treasury Secretary during additional estimates hearings of the Economics Legislation Committee on 24 February 2011 indicated that information refused to the Senate in accordance with "the way that our parliamentary procedures operate" had subsequently been released under FOI, highlighting the hollowness of many executive claims for confidentiality.

The Senate passed on 13 May 2009 an order setting out the process to be followed by public sector witnesses who believe that they have grounds for withholding information from Senate committees. In essence, the order requires that witnesses state recognised public interest grounds for withholding information and, at the request of a committee or any senator, refer the matter to the responsible minister, who is also required to state recognised public interest grounds for any claim to withhold the information.¹⁰⁴ The Procedure Committee reviewed the operation of the order, suggesting there was evidence of a lack of acquaintance with it during the 2009 Budget estimates hearings and indicating that further steps would be taken to bring it to the attention of departments and agencies.¹⁰⁵ A subsequent report indicated there was still a lack of understanding of the order.¹⁰⁶ On 16 November 2009, following the tabling of documents relating to the National Broadband Network and the withholding of many on various grounds of public interest immunity, the Senate referred to the Finance and Public Administration References Committee a process for determining such claims.¹⁰⁷ The committee's report did not at this time support the proposed process for third party arbitration. Subsequently, however, this mechanism received renewed support in the various agreements on parliamentary reform, entered into after the 2010 election, but is yet to be implemented.¹⁰⁸

A paper entitled *Grounds for Public Interest Immunity Claims*, listing potentially acceptable and

104 13/5/2009, J.1941-2.

105 Procedure Committee, Third report of 2009, PP No. 168/2009.

106 Procedure Committee, Fourth report of 2009, PP No. 320/2009.

107 16/11/2009, J.2709-10.

108 See Chapter 18, under Orders for production of documents for an account of orders directed to the Australian Information Commissioner (the arbiter proposed in the 2010 parliamentary reform agreements).

unacceptable grounds for claims of public interest immunity, based on cases in the Senate (many of which are set out below), was circulated to senators during the May 2005 estimates hearings, and was published by the Employment, Workplace Relations and Education Legislation Committee. The paper indicated that the following grounds had attracted some measure of acceptance in the Senate, subject to the circumstances of particular cases and without acceptance of distorted or exaggerated versions of the grounds:

- prejudice to legal proceedings
- prejudice to law enforcement investigations
- damage to commercial interests
- unreasonable invasion of privacy
- disclosure of Executive Council or cabinet deliberations
- prejudice to national security or defence
- prejudice to Australia's international relations
- prejudice to relations between the Commonwealth and the states.

The paper listed the following grounds not accepted by the Senate:

- a freedom of information request has been or could be refused
- legal professional privilege
- advice to government
- secrecy provisions in statutes
- working documents
- “confusing the public debate” and “prejudicing policy consideration”.

Public interest immunity in the courts

While the Houses of the Parliament are not obliged to follow the criteria used by the courts in cases involving claims to public interest immunity, parliamentary thinking has been influenced by changing judicial practice.

For many years the view of the courts was that a certificate from a minister or an authorised senior public servant stating that certain information should not be disclosed to a court in the public interest was accepted as conclusive. Immunity could be claimed for a document either on the ground that it contained particular information (for example, secret defence or diplomatic

material) whose disclosure would be against the public interest, or on the ground that it belonged to a specific class of documents, such as cabinet documents and advice from senior officials to ministers, which ought to be kept confidential irrespective of the contents of any one document within that class. This view was articulated in the judgment of Simon L.C. in the British case, *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624, which included the following outline of the principles which should guide ministers in considering whether to claim privilege:

In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the Minister adequate justification for objecting to production. It is not a sufficient ground that the documents are “State documents” or “official” or are marked “confidential”. It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the Department open to claims for compensation. In a word, it is not enough that the Minister of the department does not want to have the documents produced. The Minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. When these conditions are satisfied and the Minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. The present opinion is concerned only with the production of documents, but it seems to me that the same principle must also apply to the exclusion of oral evidence which, if given, would jeopardise the interest of the community.¹⁰⁹

The attitude of the courts changed in 1968 when the House of Lords held, in *Conway v Rimmer* [1968] AC 910, that the minister’s certification was not conclusive in all cases and that it was for the court to decide whether the immunity should be granted. The High Court of Australia took a similar view in *Sankey v Whitlam* (1978) 142 CLR 1, in which Stephen J. described crown privilege as involving:

two principles which are of quite general importance to our system of government and of justice. Such is the vigour and breadth of these principles that each, given its fullest extent of operation, will at its margins encounter and conflict with the other. ... These principles, stated in their broadest

109 *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624 at 642-3.

form, each reflect different aspect of the public weal. Because disclosure to the world at large of some information concerning sensitive areas of government and administration may prejudice the national interest there exists a public interest in preventing the curial process from being made the means of any such disclosure. At the same time the proper administration of justice, of prime importance in the national interest, requires that evidence necessary if justice is to be done should be freely available to those who litigate in our courts.¹¹⁰

Gibbs A.C.J. acknowledged that “it is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No Minister, or senior public servant, could effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public”. He noted, however, that the object of such protection from disclosure “is to ensure the proper working of government, and not to protect Ministers and other servants of the Crown from criticism, however intemperate or unfairly based”.¹¹¹ He concluded: “It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld”.¹¹² He further observed:

It is impossible to accept that the public interest requires that all state papers should be kept secret for ever, or until they are only of historical interest. In some cases the legitimate need for secrecy will have ceased to exist after a short time has elapsed.¹¹³

I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure forever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice.¹¹⁴

Justice Stephen observed that:

to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who might occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices.¹¹⁵

110 *Sankey v Whitlam* (1978) 142 CLR 1 at 48-9.

111 *ibid.*, at 40.

112 *ibid.*, at 38.

113 *ibid.*, at 41-2.

114 *ibid.*, at 43.

115 *ibid.*, at 56.

If the defendants did engage in criminal conduct, and the documents are excluded, a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by Ministers in the execution of their office.¹¹⁶

In 1984 the High Court ordered the production of Australian Security and Intelligence Organisation (ASIO) documents for its inspection in a criminal trial.¹¹⁷ The Court held that:

The production to the court of documents recording cabinet deliberations should only be ordered in exceptional circumstances which give rise to a significant likelihood that the public interest in the proper administration of justice outweighs the very high public interest in the confidentiality of such documents.

It is doubtful whether civil proceedings will ever warrant the production of documents recording cabinet deliberations upon a matter which remains current or controversial. In criminal proceedings exceptional circumstances may exist if withholding the documents would prevent a successful prosecution or impede the conduct of the defence.¹¹⁸

It had long been argued that one class of documents, those concerned with the policy-making process, should be absolutely protected from disclosure because without such protection public servants might not be willing to proffer advice fearlessly and candidly. In *Commonwealth v Northern Land Council* the Court made the following observations on this argument:

When immunity is claimed for Cabinet documents as a class and not in reliance upon the particular contents, it is generally upon the basis that disclosure would discourage candour on the part of public officials in their communications with those responsible for making policy decisions and would for that reason be against the public interest. The discouragement of candour on the part of public officials has been questioned as a sufficient, or even valid, basis upon which to claim immunity. On the other hand, Lord Wilberforce has expressed the view that, in recent years, this consideration has “received an excessive dose of cold water”.¹¹⁹

In *INP Consortium and others v John Fairfax Holdings Ltd* (Unreported, Federal Court of Australia, 18 July 1994) the Federal Court ordered documents for which public interest immunity had been claimed by the Foreign Investment Review Board to be made available to the legal representatives

116 *ibid.*, at 47.

117 *Alister v The Queen* (1984) 154 CLR 404. In *Commonwealth v Northern Land Council* (1993) 176 CLR 604 the High Court held that the Commonwealth should not have been ordered to produce notebooks containing records of cabinet deliberations to legal representatives of the Northern Land Council.

118 *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 605.

119 *ibid.*, at 615.

of one party to the proceedings. The judge held that the balance between the need to keep certain documents confidential in the public interest and the public interest in the due administration of justice:

can be properly accommodated by the not unusual course of ordering that the documents be kept confidential but made available on a limited basis for inspection by the applicants' legal representatives.

In *Canwest v Treasurer* (Cth) (Unreported, Federal Court of Australia, 14 July 1997) the Federal Court rejected a claim that advice to government should be immune from production, and scorned the notion that advice would not be given freely unless given in secret. This the court called "secrecy for its own sake".

The claim often loosely made that "cabinet documents" are immune from production in the courts is not supported by recent judgments. Only documents which record or reveal the deliberations of cabinet are immune.¹²⁰

It is clear that, in recent times, the courts have been less willing to accept claims that the admission into evidence or disclosure of material would be detrimental to the public interest, and have been unwilling to allow the executive government to act as judge in its own cause by determining that question. Governments have had to adjust to this approach by the courts and to accept that claims of public interest immunity may not be sustained.

The Senate and public interest immunity: early cases

In the face of executive claims of public interest immunity the Senate has not conceded its right ultimately to determine such claims. On the other hand the Senate has usually not taken steps to enforce production of documents for which the executive has claimed immunity, other than exacting a political penalty. In some cases procedural penalties have been imposed and alternative methods of obtaining the required information, such as committee hearings, have been pursued.

In 1951 the government directed certain senior military officers and public servants not to appear before a Senate select committee inquiring into defence recruitment and comprising three opposition members. One official, however, did choose to attend and gave evidence. The committee reported that it took "a very grave view of the action of the Cabinet in flouting Parliamentary authority" and that "such action by the Cabinet is an interference with the freedom of prospective witnesses, and can only be construed as calculated to defeat, hamper and obstruct the purpose of the committee".

120 *Commonwealth v Construction, Forestry, Mining and Energy Union* (2000) 98 FCR 31; *National Tertiary Education Industry Union v Commonwealth* (Unreported, Federal Court of Australia, 19 April 2001); see also *Secretary, Department of Infrastructure v Asher* [2007] 19 VR 17.

Both Houses were dissolved before debate on the report was concluded.¹²¹

On 19 November 1953 the Prime Minister wrote to the Joint Committee of Public Accounts concerning evidence relating to security issues and claims for public interest immunity. He stated, *inter alia*:

The first thing to note about this is that it is not the privilege of the witness but of the Crown. If a witness attends to give evidence on any matter in which it appears that State secrets may be concerned, he should endeavour to obtain instructions from his Minister beforehand as to the questions, if any, which he should not answer. If a question arises unexpectedly in the course of an inquiry, the witness should request a postponement of the taking of his evidence to enable him to obtain the instructions of his Minister through his Permanent Head, and doubtless this postponement would be granted. In either event, if the Minister decides to claim privilege, he should furnish the witness with a certificate to that effect. It is possible that in some instances contractors to the Commonwealth might be asked questions on confidential matters. A similar course could be followed in these cases also, except that the witness should look for his instructions to the Permanent Head of the Department responsible for the particular contract.

Where a witness, particularly a witness who is not an officer of the Commonwealth or is a comparatively junior officer, does not raise any question of privilege although the matter obviously concerns State secrets, it is, in my opinion, the duty of the Chairman of the Committee himself to stop the evidence being given until the Minister has been given an opportunity to consider whether privilege should be claimed or whether a request should be made that the evidence be heard in private. Moreover, if a witness were to supply to the Committee a certificate from the appropriate Minister to the effect that he regarded it as being injurious to the public interest to divulge information concerning particular matters, the Committee should accept the certificate and not continue further to question a witness on these matters.¹²²

On 14 September 1956 the Solicitor-General gave the following advice concerning public interest immunity in a letter to the Regulations and Ordinances Committee:

The privilege claimed is, in fact, not the privilege of the witness but that of the Crown. Nowadays, however, the claim is made by the witness himself, and supported by the submission of a sworn statement from the responsible Minister, or, if the Minister is not available, the Permanent Head. A sworn statement of this kind, to the effect that the

121 Reports of the Select Committee on National Service in the Defence Force, PP S.2 and S.3 of 1950-51.

122 For the full text of the letter see *ASP*, 6th ed., pp. 830-3.

giving of the evidence concerned would, in the opinion of the Minister, be prejudicial to the public interest, is in practice accepted as conclusive by the civil courts [but see above]; and I conceive a similar rule would, and should, apply in a Standing Committee. . . .

The Lord Chancellor made an important announcement in the House of Lords on 6 June 1956, regarding the practice proposed to be followed by the British Government in making claims of privilege. The Lord Chancellor said that the law enabled privilege to be claimed by the Crown on alternative grounds, namely:

- (a) when the production of the contents of the particular document would injure the public interest; and
- (b) when, although there might be nothing in the contents of the particular document the production of which would injure the public interest, the document fell into a class which the public interest required to be withheld from production.

The latter grounds he called “class grounds” and the reasons for claiming privilege in these cases were given in the following instructive extracts:

The reason why the law sanctions the claiming of Crown privilege on the “class” ground is the need to secure freedom and candour of communication with and within the public service, so that Government decisions can be taken on the best advice and with the fullest information. In order to secure this it is necessary that the class of documents to which privilege applies should be clearly settled, so that the person giving advice or information should know that he is doing so in confidence. Any system whereby a document falling within the class might, as a result of a later decision, be required to be produced in evidence, would destroy that confidence and undermine the whole basis of “class” privilege, because there would be no certainty at the time of writing that the document would not be disclosed.

I come now to the category of departmental and interdepartmental minutes and memoranda containing advice and comment, and recording decisions — the documents by which the administrative machine thinks and works. Here we consider that Crown privilege must be maintained. An important type of case in which documents of this kind may be relevant is where the vires or legality of a Minister’s decision is challenged and the plaintiff may seek to show that the Minister proceeded on wrong principles. In such a case, it is right that a Minister should be prepared to defend his decision, but if it became possible to challenge Government action, by reference to the opinions expressed by individual civil servants in the necessary process of discussion and advice prior to

decision, the efficiency of Government administration would be gravely prejudiced.¹²³

It is clear that the government's views prior to 1968 were heavily influenced by the approach taken by the courts to public interest immunity, particularly in the assertion that some documents should be immune from production simply by belonging to a class of documents.

The Royal Commission on Australian Government Administration (1976) noted that although the letters from the Prime Minister and the Solicitor-General cited above had not been formally endorsed by Parliament "they appear to have been used as guidelines".¹²⁴ The Royal Commission suggested that the government should:

prepare for the guidance of officials and for discussion, a statement of the principles and procedures it would wish to be followed when evidence from official witnesses is sought, and a set of instructions for the guidance of officials whose attendance before parliamentary committees might be requested or required.¹²⁵

The government's response to this suggestion is dealt with below.

In June 1969 the Senate Select Committee on the Canberra Abattoir (comprising three Labor opposition senators) was advised by the Treasurer that he had directed the Treasury that it should not respond to questions that called for an expression of opinion on government decisions in relation to the abattoir, nor provide confidential information on the issue that had not been released by the Government to the public. In its report, the committee said that it did not disagree with the first qualification.¹²⁶ However, in relation to the second restriction, the committee advised the Treasurer that it reserved its position. The committee indicated that, should any circumstance arise where a Treasury or other official witness refused information which the committee considered necessary for the purposes of its inquiry, and which did not appear to be contrary to the public interest to disclose, in either closed or open session, the committee would seek to arrange to discuss the matter with the appropriate minister. The only refusal to supply information reported by the committee concerned a report furnished to the government by an interdepartmental committee on the future of the Canberra abattoir. The Minister for Health informed the committee that the report was prepared at the request of cabinet by senior officials for the purpose of assisting ministers in the formulation of government policy. He believed that to be an area in which the confidentiality of advice should be preserved.

123 For the full text of the letter see *ASP*, 6th ed., pp. 834-44.

124 Report, PP 185/1976, p. 115.

125 *ibid.*, p. 115.

126 PP 99/1969.

In 1972 the Attorney-General, Senator Greenwood, and the Solicitor-General, Mr R.J. Ellicott, prepared a paper entitled *Parliamentary Committees: Powers Over and Protection Afforded to Witnesses* which outlined the Government's views on public interest immunity.¹²⁷ As there was no move to have the Senate endorse it, the document remained merely a statement of the executive's views on this topic. The paper included the following observations:

Because the power of Parliament to require the production of documents and the giving of evidence is, for practical purposes, unlimited, the extent to which a House requires the giving or production of executive information will necessarily rest on convention. Clearly enough, there could be no justification for Parliament requiring an unlimited disclosure of information by the executive, even in camera.

... against the background of a system which is based on party Government and the responsibility of Ministers to Parliament, we think the preferable course is to continue the practice of treating the Minister's certificate as conclusive. If a House thought that a minister was improperly exercising his power to grant a certificate it, could, of course, withdraw its confidence in him.

...

If, as we recommend, the matter remains with a Minister the decision he makes should, of course, be related to the two aspects of public interest involved, that is to say, the public interest in withholding certain information and the public interest in Parliament and its Houses being adequately informed in order to perform their legislative and advisory functions ...¹²⁸

The paper drew some support from the provision now in standing order 168(1) whereby a minister may resist a motion for the tabling of a document quoted by the minister on grounds of confidentiality. This provision, however, does not constitute a concession by the Senate to executive privilege, as it relates only to the particular circumstance of a motion moved without notice during debate in relation to a quoted document. The provision in the Senate's procedures for orders for the production of documents, standing order 164, does not allow for such a ministerial claim.¹²⁹

In 1973 a question arose as to the attendance of members of ASIO as witnesses before the Senate Select Committee on Civil Rights of Migrant Australians. The government agreed to the giving of evidence by the Director-General of ASIO but not to the committee's request that the Director-

127 PP 168/1972; tabled 26/10/1972, J.1206.

128 PP 168/1972, pp. 38, 39.

129 See also Chapter 18, Documents.

General be accompanied by other officers of ASIO. The committee was advised that, taking into account the provisions of the ASIO Act, and the previous rulings of prime ministers, the Director-General would not be accompanied by any other ASIO officer, and that the Director-General would observe the practice that questions seeking information, whether positive or negative, as to the affairs of the Organisation would not be answered. The Director-General attended the committee and gave evidence, but the committee did not pursue its request for the attendance of other officers of ASIO.

Public interest immunity was claimed by the Prime Minister, Mr Whitlam, and certain ministers in 1975 in connection with the summoning of public servants to the bar of the Senate to answer questions and produce documents relating to the government's overseas loan negotiations. Formal summonses were served on the witnesses to appear before the Senate on 15 July 1975. When the Senate met on 15 July 1975, President O'Byrne reported that he had received a letter from the Prime Minister in which he stated:

I wish to inform you, however, that each officer will be instructed by his Minister to claim privilege in respect of answers to all questions upon the matters contained in the Resolution of the Senate and in respect of the production of all documents, files and papers relevant to those matters.

The three ministers involved, the Minister for Minerals and Energy, the Treasurer, and the Attorney-General, wrote letters to the President of the Senate which stated:

In accordance with long-established principles, I have directed officers of my Department who have been summoned to appear before the Senate to claim privilege in respect of answers to all questions upon the matters contained in the Resolution of the Senate and in respect of the production of all documents, files and papers relevant to those matters.

I certify that the answering of any questions upon the matters contained in the Resolution of the Senate and the production of any documents, files or papers relevant to those matters by officers of my Department would be detrimental to the proper functioning of the Public Service and its relationship to government and would be injurious to the public interest.

The Solicitor-General (Mr Byers), who was among those summoned, wrote to the President claiming public interest immunity:

The Crown has claimed its privilege. As one of its Law Officers, I may not consistently

with my constitutional duty intentionally act in opposition to its claim.¹³⁰

On the following day, 16 July, the Senate responded to these claims for immunity with a resolution which affirmed that it had the power to require persons to answer questions and produce documents and that if privilege was claimed the matter was to be determined by the Senate. The text of the substantive part of the resolution is quoted above.

On 16 July, the three ministers wrote again to the President advising that they had further instructed their officers as follows:

In case there should be any misunderstanding of the position that I have directed you to take as a witness before the Senate, I direct that, if the Senate rejects the general claim of privilege made by you, you are to decline to answer any questions addressed to you upon the matters contained in the Resolution of the Senate and to decline to produce any documents, files or papers relevant to those matters.¹³¹

On 16 July the witnesses were, in turn, called before the Senate, when on ministerial direction they declined to answer questions, other than of a formal nature. The Solicitor General responded to questions relating to his reasons for declining to answer questions concerning the matters under inquiry by the Senate. The witnesses were discharged from further attendance on Thursday, 17 July 1975. The Senate then resolved, on the motion of the Leader of the Opposition (Senator Withers), to refer the matter to the Committee of Privileges.¹³²

The Privileges Committee presented its report on 7 October 1975.¹³³ The committee divided on party lines. The four government members of the committee were of the opinion that the ministerial directions were valid and lawful. In a dissenting report, the three opposition members of the committee reported that a minister's certificate of privilege for evidence, oral or documentary, sought from public servants has evidentiary value but is not conclusive; they found that the ultimate decision as to whether a question must be answered or a document produced is for the Senate and not for the executive. On 17 February 1977, Senator R.C. Wright moved that the Senate endorse the opinions expressed in certain paragraphs of the dissenting report, but the motion lapsed on prorogation.¹³⁴

As mentioned above, the report of the Royal Commission on Australian Government Administration

130 For the full text of the letters see SD, 15/7/1975, pp. 2729-30.

131 For the full text of the letter see SD, 16/7/1975, p. 2762.

132 17/7/1975, J.836-7.

133 PP 215/1975.

134 SD, 17/2/1977, p. 175-9.

recommended that the government develop a set of guidelines concerning the giving of evidence by public servants to parliamentary committees. On 28 September 1978 the government tabled a paper ‘Proposed guidelines for official witnesses appearing before Parliamentary committees’. Revised versions of the guidelines were tabled in 1984 and 1989. The guidelines list the categories of information which could form the basis of a claim of public interest immunity (many of these are similar to the exemptions under the Freedom of Information Act) and specify that such claims should be made only by ministers. The guidelines remain a statement of the executive’s views on this topic and have not been endorsed by either House.¹³⁵

On 22 November 1978 President Laucke made a statement in response to a question from Senator Tate concerning any impact the judgment of the High Court in the Case of *Sankey v Whitlam* (1978) 142 CLR 1 (see above) might have on the procedures of the Senate and its committees. The President stated that:

the questions involve matters which are ultimately for the Senate to decide in the regulation of its own proceedings. I go no further than to express the view that the Senate would no doubt take the recent High Court judgment into consideration in reaching any decisions.¹³⁶

In 1982 the Senate passed three resolutions ordering that certain documents relating to tax evasion schemes be tabled after being edited by an independent party to exclude material which might prejudice the conduct of legal proceedings against those involved in tax evasion and avoidance schemes.¹³⁷ The government maintained its position that the disclosure of the documents would be harmful to the administration of justice and stated that:

In the event that a Senate majority seeks to enforce the directions contained in the resolution of 25 November 1982, the Government intends to put the basic legal and constitutional questions in relation to the Senate’s powers before the High Court of Australia.¹³⁸

Before the matter could be resolved both Houses were dissolved on 4 February 1983 and the subsequent election resulted in a change of government. The matter was not further pursued in the next Parliament by the Senate or by the new government.

135 For texts of the guidelines, see SD, 23/8/1984, pp. 309-14; SD, 30/11/1989, pp. 3693-702. Inadequacies of the guidelines were the subject of a report of the Foreign Affairs, Defence and Trade References Committee in 2010 (PP 69/2010), an issue subsequently referred to the Privileges Committee which is examining a revised version of the guidelines: 23/6/2010, J.3687, 21/3/2011, J.700; and, see the committee’s website for a draft of the revised guidelines.

136 SD, 22/11/1978, p. 2358.

137 23/9/1982, J.1105-7; 14/10/1982, J.1125; 25/11/1982, J.1258-9.

138 SD, 15/12/1982, p. 3581.

The final report of the Joint Select Committee on Parliamentary Privilege presented in October 1984, observed that, since *Sankey v Whitlam*:

it is evident that the trend has been away from ready recognition of claims for Crown privilege and towards examining these claims closely and carefully weighing competing “public interest” considerations. It seems at least possible that an analogous evolution in thinking may develop in Parliament to help resolve cases where disputes arise between committees requesting information and Executives resisting their requests. But we cannot presume this will happen. We are faced with two options. Firstly, to allow matters to stand as they are; secondly, to propose means for the resolution of future clashes.

... But we do not think ... any procedures involving concessions to Executive authority should be adopted. Such a course would amount to a concession the Commonwealth Parliament has never made — namely, that any authority other than the Houses ought to be the ultimate judge of whether or not a document should be produced or information given.¹³⁹

The committee commented that the development of guidelines might prove helpful, but concluded that, ultimately, claims of public interest immunity can only be solved politically:

However ingenious, guidelines can only reduce the areas of contention: they can never be eliminated. This follows from the different functions, the inherent characteristics, and the differing interests of Parliament and the Executive. In the nature of things it is impossible to devise any means of eliminating contention between the two without one making major and unacceptable concessions to the other. It is theoretically possible that some third body could be appointed to adjudicate between the two. But the political reality is that neither would find this acceptable. We therefore think that the wiser course is to leave to Parliament and the Executive the resolution of clashes in this quintessentially political field.¹⁴⁰

Later cases in the Senate

In more recent cases in the Senate, governments have exhibited a tendency to abandon reasoned claims of public interest immunity based on principles advanced in court proceedings, probably because the development of the law by the courts does not support large claims of executive secrecy. Instead ministers have sought to rely on more generalised claims of confidentiality. There has been a corresponding fall in the tolerance in the Senate of such claims.

139 PP 219/1984, pp. 153,154.

140 *ibid.*, p. 154.

In 1992 the government refused to produce a document in response to an order for the production of a note on a Treasury file. The government claimed that to produce the document would be contrary to the public interest in that it might damage Australia's relationships with other countries. A letter of refusal was tabled and debated but any further action by the Senate was forestalled by the 1993 prorogation and general election.¹⁴¹

On 3 June 1992 the Senate requested the Procedure Committee to report on whether the exemption provisions of the Freedom of Information Act provide grounds for not producing documents to a House of Parliament. This followed remarks by the Leader of the Government in the Senate which appeared to suggest that the exemption provisions of the Freedom of Information Act provided grounds for refusal to provide documents to the Senate, a suggestion which the Senate by resolution repudiated.¹⁴² On 15 October 1992 the committee reported that the Act does not apply as a matter of law to the production of documents to a House, and went on to observe that:

If a minister were to regard all of the exemption provisions of the Act as providing grounds on which to claim a privilege against disclosure of information to a House, this would considerably expand the grounds of executive privilege hitherto claimed by ministers; for example, the exemption provisions include reference to cabinet documents, Executive Council documents, internal working documents and documents relating to research, none of which has been regarded in the past as documents which may be withheld from Parliament by reason only that they fall into those categories.

The committee concluded that while a minister may use the provisions of the Freedom of Information Act as a checklist of grounds for non-disclosure, this practice:

does not relieve a minister of the responsibility of carefully considering whether the minister should seek to withhold documents from a House, or from considering the question in the context of the importance of the matters under examination in the House.... Ministers will no doubt continue to take seriously their obligation to give account to the Houses of the conduct of government and to consider seriously the requests or requirements of a House for the production of documents.¹⁴³

The committee noted that during the debate on the resolution referring this matter to it for consideration, reference was made to the resolutions of the Senate in 1982 which required the production of documents to a person appointed to act as the Senate's agent to delete from the

141 9/12/1992, J.3262.

142 J.2404-5.

143 Procedure Committee, Third Report of 1992, PP 510/1992, p. 6. Major amendment of the Freedom of Information Act in 2010 to encourage disclosure has not inhibited claims of confidentiality based on increasingly generalised grounds. See testimony by Treasury secretary referred to above.

documents any material which should not be disclosed, particularly on the ground of risk of prejudice to legal proceedings (see above). The committee observed that these resolutions “may be regarded as indicating acceptance by the Senate of the principle that there are some grounds on which documents may be withheld, but there was at that time no general expression of the Senate’s view on the matter”.¹⁴⁴

In late 1992 the Senate Select Committee on the Functions, Powers and Operation of the Australian Loan Council invited the Treasurer, the Hon J S Dawkins, to give evidence to the committee. The committee reported that it was disappointed that the Treasurer “had not appeared before the committee at its hearing on 15 December 1992, and was concerned at a statement made by Prime Minister Keating on 4 November 1992 that he would ‘forbid’ the Treasurer from appearing before it”.¹⁴⁵ The committee sought advice from the Clerk of the Senate who observed that:

If there were such an instruction by the Prime Minister to the Treasurer, it could be interpreted as an exercise of executive authority or a (premature) claim of executive privilege, or public interest immunity, in relation to a parliamentary inquiry (it would be premature in the sense that the committee presumably has made no demand for the Treasurer to give evidence).¹⁴⁶

On the Clerk’s advice the committee wrote to the Prime Minister and the Treasurer asking each of them if the Prime Minister had issued any instruction to Mr Dawkins not to make a submission to, or appear before the committee, but no answer was forthcoming and the committee took no further action.

In February 1994 the Treasurer, the Hon. Ralph Willis, made a claim of public interest immunity in respect of certain classes of documents requested by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media. The Treasurer also stated that he had instructed a number of official witnesses due to give evidence not to provide the committee with certain information or documents. In response to a request from the committee, the Clerk of the Senate advised that the existence of the claimed right to public interest immunity in respect of parliamentary proceedings has not been adjudicated by the courts, and observed:

The Senate has not conceded the existence of the claimed right, but, on the contrary, has asserted that it is for the Senate itself to determine whether any claim of privilege (i.e., a claim of immunity from a parliamentary demand) should be allowed (see the resolution of the Senate of 16 July 1975, no. 24 at page 122 of the standing orders volume).

144 *ibid.*, p. 4.

145 PP 78/1993, p. 58.

146 Report, p. 91.

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

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

During the “overseas loans case”, which was the occasion of the passage of the resolution of the Senate to which I have referred, the then Solicitor-General, who is a statutory office-holder and legal adviser to the executive government, in effect informed the Senate that, while he was not subject to direction by the executive government and not bound by a claim of executive privilege, he had a duty, in his view, to have regard to such a claim and not to act in such a way as to undermine it. On that basis he declined to answer questions. The Senate took no action against him, nor against the public service officers who were directed by the Prime Minister not to answer questions, but passed the resolution to which I have referred and pursued the matter as a political contest with the ministry of the day.

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

The Clerk advised that in the first instance a person who is the subject of a parliamentary demand determines whether to have regard to or conform with an executive government direction to refuse a parliamentary demand.

If such a person decides to have regard to or conform with such a direction, it is for the committee or the House concerned to determine whether action should be taken against the person by way of proceedings for contempt or against the individual minister concerned or the ministry collectively as a political matter.

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

for contempt.

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

The committee also sought opinions from senior legal counsel concerning the constitutional aspects of public interest immunity claims, legal precedents and court practice. The advice of the Clerk and the opinions of counsel are included as appendices to the committee's first report.¹⁴⁷

In response to these developments, Senator Kernot (Leader of the Australian Democrats, Queensland), on 23 March 1994, presented a bill to amend significantly the law of parliamentary privilege. On 12 May 1994 Senator Kernot successfully moved that the bill, the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, be referred to the Committee of Privileges for examination. The preamble to the motion of referral noted that:

- (a) on several recent occasions the government has failed to comply with orders and requests of the Senate and its committees for documents and information, in particular:
 - (i) the order of the Senate of 16 December 1993 concerning communications between ministers on woodchip export licences,
 - (ii) requests by the Select Committee on the Australian Loan Council for evidence, and
 - (iii) requests by the Select Committee on Foreign Ownership Decisions in Relation to the Print Media for documents and evidence;
- (b) the government has, explicitly or implicitly, claimed executive privilege or public interest immunity in not providing the information and documents sought by the Senate and its committees;
- (c) the grounds for these claims have not been established, but merely asserted by the government;
- (d) the Senate has no remedy against these refusals to provide information and documents, except its power to impose penalties for contempt;

147 PP 114/1994.

- (e) the Senate probably cannot impose such penalties on a minister who is a member of another House;
- (f) it would be unjust for the Senate to impose a penalty on a public servant who, in declining to provide information or documents, acts on the directions of a minister;
- (g) there is no mechanism for having claims of executive privilege or public interest immunity adjudicated and determined by an impartial tribunal ... ¹⁴⁸

The bill provided that failure to comply with a lawful order of either House or a committee would be a criminal offence prosecuted in the Federal Court. If an offence were proved, the Court would make orders to ensure future compliance with the lawful order of the House or committee; in the case in question the order would be for the production of the documents. If a public servant committed an offence as a result of an instruction by a minister, the Court would make the necessary orders but not impose a penalty. It would be a defence to a prosecution that compliance with an order to give evidence or produce documents would involve substantial prejudice to the public interest not outweighed by the public interest in the free conduct of parliamentary inquiries. In order to determine whether the defence was established, the Court would examine the disputed evidence or documents in camera. By this provision the Court would be empowered to determine any government claim of executive privilege. A House would not be able to use its power to punish contempts in respect of an offence for which it had initiated a prosecution, and only the Houses would be able to commence prosecutions.

In its 49th report presented on 19 September 1994 the Privileges Committee recommended that the bill not be proceeded with, citing evidence by virtually all its witnesses that it would be unwise for the Parliament to allow the courts to adjudicate claims of executive privilege or public interest immunity in relation to a House or its committees. ¹⁴⁹ The committee considered that such claims should continue to be dealt with by the House concerned. ¹⁵⁰

The committee acknowledged, as did all witnesses, that while there is some information held by the executive which should not be disclosed, “There was general agreement among witnesses that, in the words of the Leader of the Government in the Senate, Senator Evans, a claim of executive privilege or public interest immunity was ‘ultimately one for the house of parliament to determine’”. The committee noted, however:

... that the exercise of the power of one House to enforce an order against a member of another House, particularly a minister who claims executive privilege, is circumscribed

148 J.1683-4.

149 PP 171/1994.

150 See also 52nd report of the committee, PP 21/1995.

by parliamentary rules. It was therefore well understood that any attempt by a House of the Parliament to impose the extreme penalties of either gaol or a fine upon a public servant who obeyed a ministerial instruction not to comply with an order of that House or a committee, while the minister concerned was immune from its contempt powers, was untenable. As Senator Kernot's second reading speech noted, the powers of a House of Parliament under these circumstances 'while extensive, are widely seen as inappropriate for use in such a situation'.

The committee acknowledged that "it is open to the Senate to take such action within its powers as it considers necessary to force a government to comply with an order, recognising that it would be only in extreme circumstances that such measures would be considered and even then may not universally be regarded as justifiable".

Following presentation of the committee's report, Senator Kernot gave notice of a motion to establish another mechanism for dealing with the claim of public interest immunity in relation to the documents not provided to the Select Committee on Foreign Ownership Decisions in Relation to the Print Media.¹⁵¹ The motion would have established a committee of party leaders to examine the documents in camera and determine whether the publication of the documents would be sufficiently prejudicial to the public interest as to outweigh the public interest in the free and effective conduct of Senate inquiries. A preamble to the motion referred to evidence to the Privileges Committee by the Leader of the Government in the Senate, Senator Gareth Evans, conceding that the Senate has the power to order the production of documents. This motion was not considered.

During the hearing of the Privileges Committee, the Leader of the Government in the Senate acknowledged the power of the Senate to require the production of documents and to punish defaults, and indicated that the government would think carefully before making a decision to refuse information or documents in response to a parliamentary requirement. Responses by ministers to Senate orders for the production of documents immediately subsequent to the report of the Privileges Committee indicated that ministers were perhaps not as ready to resort to claims of confidentiality or public interest immunity as they had been in the recent past. To that extent, Senator Kernot's bill and the inquiry by the Privileges Committee may have had a salutary effect.

In *Canwest v Treasurer Cth* (Unreported, Federal Court of Australia, 14 July 1997) the Federal Court rejected the argument that advice to government by the Foreign Investment Review Board should remain secret.

In its 52nd report in 1995 the Privileges Committee recommended the procedure of the appointment

151 19/9/1994, J.2160-5.

of a neutral third party to examine material claimed to be confidential and to report to the Senate on the content of such material. The committee pointed out that this, in effect, was what was done with the matter examined in that report, when the Senate asked the Auditor-General to report on material claimed by the government to be subject to commercial confidentiality.¹⁵²

The Finance and Public Administration References Committee, in a report in May 1998 on contracting out of government services, referred to the increasing resort to commercial confidentiality as a ground for withholding information, and observed that genuine commercially confidential matters are likely to be limited in scope and the onus is on the person claiming confidentiality to argue the case for it. The committee also recommended the use of an independent arbiter such as the Auditor-General to examine material on behalf of the Senate.¹⁵³

In response to an order for production of documents relating to the waterfront dispute in 1998, the government refused to produce the documents on the ground that the documents were relevant to actions pending in the Federal Court between the parties to the dispute.¹⁵⁴ Advice by the Clerk of the Senate suggested that this apparent invocation of the sub judice convention was not well founded.¹⁵⁵ In this case there appeared to be a claim of public interest immunity (although not made explicitly) loosely based on an asserted danger to legal proceedings.

In 1999-2001 there were indications that the government had abandoned a policy of restraint in making public interest immunity claims, and was resorting more readily to such claims in attempts to keep information secret.

The Leader of the Government in the Senate, Senator Hill, was censured by the Senate for not responding properly to an order for documents relating to the Jabiluka uranium mine. The minister had tabled some documents and listed others which were withheld on stated grounds, but subsequently stated that only “key documents” had been produced.¹⁵⁶

The Minister for Family and Community Services, Senator Newman, refused to produce in response to a Senate order a draft document on changes to the welfare system which she had earlier said she would release at a Press Club address. Instead she produced substitute documents, including, eventually, the stated final version of the required document. Among the grounds for refusal to produce the required document were that its disclosure would “confuse the public debate” and “prejudice policy consideration”. Advice from the Clerk of the Senate suggested that these were

152 PP 21/1995.

153 PP 52/1998, p. 71. A later committee, however, drew back from endorsing the use of an independent arbiter, see PP 6/2010.

154 SD, 28/5/1998, p. 3378-9.

155 Economics Legislation Committee, estimates hearing Hansard, 2/6/1998, pp. E124-8.

156 24/3/1999, J.612-13.

novel grounds of unclear meaning. The minister was censured by the Senate.¹⁵⁷ The Senate also adopted measures to penalise the government and to gain access to the content of the required document. Question time was extended, the Community Affairs References Committee was ordered to hold a hearing on the matter, and officers of the relevant department were ordered to give evidence before the committee.¹⁵⁸ Officers duly appeared and gave evidence, although under an instruction from the minister not to answer some kinds of questions. When the committee reported, the Senate carried a resolution rejecting the minister's claim of public interest immunity and the grounds on which it was based.¹⁵⁹

The government refused to produce documents relating to higher education funding, the stated grounds being commercial confidentiality, cabinet confidentiality and possibly confidentiality of advice. An advice from the Clerk of the Senate suggested that these grounds were over-extended and confused in the claim. Questions about the matter were, however, answered at an estimates hearing.¹⁶⁰

The government also refused to produce documents relating to purchases of magnetic resonance imaging machines. The principal grounds were risk of prejudice to administrative inquiries and the confidentiality of the government's relationship with the medical profession. Advices from the Clerk of the Senate suggested that these grounds were novel and lacking in cogency. The matter was extensively explored at an estimates hearing, and the advices were released. Subsequently, a report by the Health Insurance Commission was produced, with an indication that cases had been referred to the Director of Public Prosecutions. The Senate directed a further committee hearing on the matter, at which officers were closely questioned. An Auditor-General's report was obtained. Both the Senate committee and the Auditor-General found evidence of serious administrative deficiencies. Finally, a large volume of documents was tabled.¹⁶¹

The government did not produce a draft report of the Bureau of Air Safety on an air safety trial. The order for the document was made in the context of suggestions that the report had been unduly delayed and interfered with. The government relied principally on the inappropriateness of producing a draft report. The final report was soon produced, probably prompted by the Senate's order.¹⁶²

157 13/10/1999, J.1845-6.

158 19/10/1999, J.1931-2; 21/10/1999, J.1966.

159 Report of the committee, including Clerk's advices, PP 364/1999; 22/11/1999, J.2007, 25/11/1999, J.2077.

160 20/10/1999, J.1953-4; 21/10/1999, J.1988; Employment, Workplace Relations, Small Business and Education Legislation Committee, estimates Hansard, 2/12/1999, pp. 74-5.

161 21/10/1999, J.1967; 29/11/1999, J.2123; Community Affairs Legislation Committee, estimates Hansard, 1/12/1999, pp 51-3; 15/2/2000, J.2280; 10/4/2000, J.2582-3, 2585; 10/5/2000, J.2682, 2689.

162 21/10/1999, J.1968; 22/11/1999, J.2008; 23/11/1999, J.2013.

The government's new tax system, introduced in 1999-2000, gave rise to several demands for information by the Senate and relevant committees, most of which were met. In response to an order of 29 June 2000, however, the government declined to provide details of an economic model used to predict movements in petrol prices, on the ground that it was a working document, a ground in the Freedom of Information Act but not accepted by the Senate.¹⁶³ Similarly, a refusal to produce documents relating to tax minimisation schemes was based on the protection of investigations, although the documents had apparently been offered in response to a freedom of information request upon the payment of a large fee.¹⁶⁴ In this case a recognition in the Senate's order that there might be grounds for withholding some documents led to a government claim that the grounds applied to all of the documents.

An order for documents relating to the collapse of the HIH Insurance company, which was met by a government refusal, was not pursued largely on the basis that a royal commission into the matter was appointed.¹⁶⁵

Frequent claims of commercial confidentiality in relation to government contracts led to a continuing order of the Senate for lists of contracts to the value of \$100 000 or more to be published on the Internet with statements of reasons for any confidentiality clauses or claims.¹⁶⁶ A claim by the government that the order was beyond the power of the Senate was rejected and later tacitly abandoned.¹⁶⁷

A resolution of 30 October 2003 declared that the Senate and its committees would not entertain claims of commercial confidentiality unless made by a minister and accompanied by a ministerial statement of the basis of the claim, including a statement of the commercial harm which might result from the disclosure of the information.¹⁶⁸ If a committee is satisfied that a statutory authority has such a degree of independence from ministerial direction that it would be inappropriate to have

163 27/6/2000, J.2908; 29/6/2000, J.2992.

164 4/10/2000, J.3298-9; 6/2/2001, J.3840; 5/3/2001, J.4016; 7/3/2001, J.4046.

165 23/5/2001, J.4264-5; 24/5/2001, J.4289.

166 20/6/2001, J.4358-9.

167 26/9/2001, J.4976; 27/9/2001, J.4994-5; report of the Finance and Public Administration References Committee on accountability to the Senate in relation to government contracts, PP 212/2001, and advice from the Clerk of the Senate in that report, opinion by the Australian Government Solicitor's Office and comments by the Clerk on that opinion, published by the committee; report by the Auditor-General, 18/9/2002, PP 367/2002; further report by the Finance and Public Administration References Committee, 12/12/2002, PP 610/2002; reports by Auditor-General, 5/3/2003, PP 23/2003; 11/9/2003, PP 183/2003, and subsequent reports; order amended 18/6/2003, J.1881-2; 26/6/2003, J.2011-13; 4/12/2003, J.2851.

168 30/10/2003, J.2654.

a minister make the claim, the committee may receive the claim from officers of the authority.¹⁶⁹

The collapse of Ansett Australia led to two orders for documents on 19 and 20 September 2001 relating to the government's approval of the takeover of Ansett by Air New Zealand. The government refused to produce the documents on 24 September 2001 on various grounds, including confidentiality of advice and a claim that producing the documents would distract departmental officers from the task of attempting to save Ansett, but it was indicated that the orders would be attended to later. The mover of the motions, Senator O'Brien, indicated that the matter would be pursued by way of hearings of the Rural and Regional Affairs and Transport References Committee, which was given a reference on the Ansett collapse on 19 September 2001. In accordance with an authorisation of the Senate, the committee held hearings accordingly on 27 September 2001. Departmental officers were then questioned, without the government attempting to prevent the hearing.¹⁷⁰

An order on 21 August 2002 relating to information on the financial situations of higher education institutions was met with a claim of commercial confidentiality and a statement that revealing the information would undermine confidence in the higher education sector. It was pointed out that the latter excuse is virtually an admission that the information would disclose serious difficulties which have been kept secret. The mover of the motion, Senator Carr, responded on 28 August with a notice of motion for an extensive committee inquiry into the subject. The notice was expressed to be contingent on the information not being provided before the motion was moved. Another government statement on 16 September gave some ground by indicating that the vice chancellors of various institutions would be asked for their permission to release information gathered from them. This concession did not satisfy the majority of the Senate, and the motion for the committee inquiry into the matter was passed on 18 September. The committee reported that universities had raised no objections to the disclosure of the information, and that it had obtained some of the information through its inquiry.¹⁷¹

On 12 August 2003 the Senate deferred consideration of two customs and excise tariff bills to give effect to an ethanol subsidy scheme until the government produced documents required by various Senate orders relating to the scheme. The documents were not produced and the bills were not passed.¹⁷²

169 For a ministerial claim in accordance with the resolution, see Legal and Constitutional Legislation Committee, estimates hearings 3/11/2003, additional information, vol. 2, p. 1.

170 19/9/2001, J.4875, 4879; 20/9/2001, J.4896; 24/9/2001, J.4922; 25/9/2001, J.4943; 27/9/2001, J.4996.

171 21/8/2002, J.626-7; 26/8/2002, J.652; 28/8/2002, J.688; 16/9/2002, J.723; 18/9/2002, J.760; 15/10/2003, J.2573.

172 12/8/2003, J.2089-90. These bills were subsequently brought on and passed as a result of an agreement between the government and some senators as to amendments of other legislation and the tabling of some documents: 1/4/2004, J.3324.

In February 2004 the government refused to comply with an order of 29 October 2003 for the production of statements giving details of government advertising contracts, the major ground of the refusal being that the information could be obtained by other means. The information was subsequently pursued in estimates hearings.¹⁷³

An order in March 2004 relating to the alleged pressure exerted upon the Commissioner of the Australian Federal Police, Mr Keelty, to change his statements on terrorism and the war in Iraq, was met with a refusal to produce the required documents. The Leader of the Government in the Senate, Senator Hill, was censured after lengthy debate for failing to produce the documents.¹⁷⁴

The war in Iraq in 2003-04 produced several orders for documents and two government refusals to produce relevant documents.¹⁷⁵

In 2006 the government instructed some officers not to answer questions in estimates hearings on matters which were before the commission of inquiry (the Cole commission) into the Australian Wheat Board Iraq wheat bribery affair. Some questions about the matter were answered. There was no claim of public interest immunity. Because the then government had a party majority of one in the Senate, no remedial action was taken in this matter, except that senators kept asking questions, with some success. This was one of several unsupported government refusals to provide information during that period (July 2005-2007).¹⁷⁶

The persistence of ministers and officers in declining to answer questions or produce documents, at estimates hearings without properly raising recognised public interest grounds led to a resolution of the Senate of 13 May 2009 prescribing the process to be followed by public sector witnesses who believe they have grounds for withholding information.¹⁷⁷

Observation of the resolution was not achieved at the subsequent estimates hearings, indicating a lack of understanding of the principle involved, that claims to withhold information from

173 29/10/2003, J.2641; SD, 12/2/2004, pp. 20168-9; Finance and Public Administration Legislation Committee transcript, 16/2/2004, p. 154ff; Finance and Public Administration Committee, report on annual reports 2008, PP 231/2008: this report recommended compliance with the order.

174 24/3/2004, J.3216; 30/3/2004, J.3276-7.

175 22/6/2004, J.3613; 23/6/2004, J.3658, SD, 23/6/2004, pp. 24779-80; 24/6/2004, pp. 24952-6.

176 For debates on the then government's record in responding to orders for documents, see SD, 19/11/2002, pp. 6755-7, 2/12/2002, pp. 6853-4, 26/3/2003, pp. 10227-30, 16/6/2003, pp. 11394-5, 17/6/2003, pp. 11562-3. For a senator's letter to the Leader of the Government on the matter, see letter tabled 14/5/2003, J.1803; debate on the letter: 22/6/2005, J.787. For a refusal by a minister to answer a question without stating any ground, see the reservation attached to the report of the Foreign Affairs, Defence and Trade Legislation Committee on the additional estimates 2004-05, PP 64/2005, pp. 149-50; SD, 14/3/2005, pp. 65-70.

177 13/5/2009, J.1941-2. See Claims by the executive of public interest immunity above.

Senate committees require a statement of public interest grounds that can be considered by the committee and the Senate. The resolution now forms part of chairs' opening statements at all estimates hearings.

Although governments have generally abandoned claims that documents should not be produced simply because they belong to a class of documents, this claim has continued in residual forms.

At various times governments have claimed that they should not be obliged to disclose legal fees paid or levied by the Commonwealth, on grounds of commercial confidentiality, client confidentiality or privacy. The Senate, however, has asserted its right to inquire into such fees.¹⁷⁸ The claim has not been consistently made.¹⁷⁹

Governments have also claimed that there is a long-established practice of not disclosing their advice, or of not doing so except in exceptional circumstances.¹⁸⁰ These claims are contradicted by the occasions on which advice is voluntarily disclosed when it supports a government position.¹⁸¹ The actual position was stated in a letter produced in 2008 by the Secretary of the Department of Prime Minister and Cabinet: the government discloses its legal advice when it chooses to do so.¹⁸² The inconsistency inherent in the government's position was illustrated by the release of summary legal advice relating to the Water Act 2007, a refusal to release the full advice, but publication of a statement by the Australian Government Solicitor that the full advice was consistent with the summary advice!¹⁸³ One reason sometimes advanced for not disclosing legal advice is that disclosure of the advice may prejudice the Commonwealth's position in future legal proceedings. Such a claim was made in respect of the legal advice relating to the Health Insurance Amendment (Revival of Table Items) Bill 2009 and its alleged unconstitutionality, apparently on the basis of its contravention of section 53.¹⁸⁴ As section 53 of the Constitution is not justiciable, the claim clearly had no foundation in this case as there cannot be any legal proceedings on the matter.¹⁸⁵

178 18/9/1980, J.1563.

179 For a consideration of this question, see Legal and Constitutional Legislation Committee, Report on Budget Estimates 2002-2003, PP 328/2002, pp. 3-5. For an inquiry by the Senate specifically into Commonwealth legal fees, see the report by the Legal and Constitutional Affairs Committee on fees paid by the Aboriginal Development Commission, PP 451/1991.

180 See, for example, report by the Finance and Public Administration References Committee, PP 228/2005, pp. xxii-xxiv.

181 For example, 4/9/2006, J.2553.

182 See advices attached to the report of the Legal and Constitutional Affairs Committee on additional estimates for 2007-08, PP 230/2008; report on budget estimates 2008-09, PP 309/2008. For an example of questions in a committee about the content of legal advice, and answers provided, see Environment, Communications and the Arts Committee, estimates hearing, 23/2/2009, transcript, pp. 149-53.

183 10/2/2011, J.582.

184 See Chapter 15, Delegated legislation and disallowance under Disallowance of a repealing instrument.

185 18/11/2009, J.2768; SD, pp. 8255-60.

The claim that documents could not be produced to a committee because they were not published, a vacuous claim, as committees would not be likely to seek information already published, was repudiated in a resolution passed in February 2009.¹⁸⁶

Similarly, immunity is often claimed for documents on the basis that they are cabinet documents. The cabinet confidentiality ground, however, is properly claimed only for documents which would reveal the deliberations of cabinet.¹⁸⁷ The courts have made this clear in relation to such claims in court proceedings (see above, under Public interest immunity in the courts).

In 2010, correspondence which had been “declassified” (by having the cabinet-in-confidence security marking ruled through) was tabled in the Senate in response to an order for documents relating to the problematic home insulation scheme. It was stated that the documents were being released because their contents were now largely in the public domain.¹⁸⁸

Statutory authorities and public interest immunity

As noted in the Clerk’s advice to the Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media in September 1994 (see above), it has not been settled whether the executive government may seek to make a claim of public interest immunity in respect of, or on behalf of, statutory authorities or statutory office-holders. (See supplement)

On several occasions the Senate has, by resolution, asserted the principle that, while statutory authorities may not be subject to direction or control by the executive government in their day-to-day operations, they are accountable to the Senate for their expenditure of public funds and have no discretion to withhold from the Senate information concerning their activities.¹⁸⁹

Officers of statutory authorities, therefore, so far as the Senate is concerned, are in the same position as other witnesses, and have no particular immunity in respect of giving evidence before the Senate and its committees. (See supplement)

186 4/2/2009, J.1541-2.

187 For a claim that disclosure of documents relating to the processing and resettlement of asylum seekers aboard the *Oceanic Viking* would compromise the confidentiality of cabinet, see 3/2/2010, J.3119. Questions on this matter were subsequently asked at estimates hearings, Legal and Constitutional Affairs Legislation Committee, 9/2/2010.

188 15/6/2011, J.3535.

189 9/12/1971, J.846; 23/10/1974, J.283, 18/9/1980, J.1563; 4/6/1984, J.902; 19/11/1986, J.1424; 29/5/1997, J.2042; see also report of the Standing Committee on Finance and Government Operations on *ABC Employment Contracts and their Confidentiality*, PP 432/1986, and the government’s response, SD, 17/11/1987, pp. 1840-4; Privileges Committee, 64th report, PP 40/1997, 29/5/1997, J.2042.

Remedies against executive refusal of information

As has been noted in the analysis above, the principal remedy which the Senate may seek against an executive refusal to provide information or documents in response to a requirement of the Senate or a committee is to use its power to impose a penalty of imprisonment or a fine for contempt, in accordance with the *Parliamentary Privileges Act 1987*.¹⁹⁰ As has also been noted, there are practical difficulties involved in the use of this power, particularly the probable inability of the Senate to punish a minister who is a member of the House of Representatives, and the unfairness of imposing a penalty on a public servant who acts on the directions of a minister. A penalty imposed for contempt may be contested in the courts under the *Parliamentary Privileges Act*.¹⁹¹ It is possible, but unlikely, that the courts in such a challenge could determine a claim of public interest immunity.¹⁹²

The Senate may impose a range of procedural penalties on a government for a refusal to provide information or documents, ranging from a motion to censure a minister (see above) to a refusal to pass government legislation. The Senate has, however, usually been reluctant to resort to the more drastic of these kinds of measures.

In some cases procedural penalties have been imposed and alternative methods of obtaining the required information, such as committee hearings, have been pursued.

On 12 August 2003 the Senate deferred consideration of two customs and excise tariff bills to give effect to an ethanol subsidy scheme until the government produced documents required by various Senate orders relating to the scheme. The documents were initially not produced and the bills were not passed until documents were subsequently tabled.¹⁹³

A remedy against government refusal was included in an order for documents made on 1 November 2000. It provided that, should the required documents not be produced, the responsible Senate minister would be obliged to make a statement and a debate could then take place. Documents were produced in response to the order.¹⁹⁴

On 13 May 2009 government legislation to establish the National Broadband Network was postponed until the government produced information required by an order of the Senate.¹⁹⁵ The bill was subsequently discharged from the Notice Paper but a second bill was introduced and also

190 See Chapter 2, *Parliamentary Privilege*.

191 See Chapter 2, *Parliamentary Privilege*.

192 See *Egan v Chadwick* (1999) 46 NSWLR 563.

193 12/8/2003, J.2089-90; 1/4/2004, J.3324-5.

194 1/11/2000, J.3462; 2/11/2000, J.3479; 27/11/2000, J.3586.

195 13/5/2009, J.1934; 25/6/2009, J.2194.

postponed in accordance with the same order.¹⁹⁶

A resolution passed by the Senate on 17 June 2009 set out the history of attempts by the Select Committee on Fuel and Energy, supported by orders for documents passed by the Senate, to extract from the government information on computer modelling on climate change.¹⁹⁷ A further resolution on 25 June 2009 declared the government contemptuous for failing to produce this information.¹⁹⁸ This action coincided with the postponement of the government's carbon pollution reduction scheme legislation.

As has also been noted above, the Senate may seek to impose a political penalty on a government for refusing to cooperate with a Senate inquiry. This, in effect, is what happened in relation to the overseas loans affair in 1975 and the taxation avoidance affair in 1982: the government's refusal to cooperate with inquiries was made the subject of unrelenting political attack. In both cases, the perception that the governments were concealing their own mistakes and misdeeds probably significantly contributed to their defeat at subsequent general elections. As was suggested in evidence before the Privileges Committee, however, an electoral remedy is uncertain of application, depending as it does on the relative electoral strengths of parties at the time.

Other jurisdictions

Other jurisdictions have not resolved the problem of determining executive government claims of public interest immunity so as to avoid the defect of the government being the judge in its own cause.

In most jurisdictions with "Westminster" systems of government, the executive government controls the lower house and the question arises only occasionally in second chambers not under government control, so that there has been no regular solution found.

In 1998 and 1999 the New South Wales Legislative Council succeeded in extracting information from the government by suspending the Treasurer, a member of the Council, from service in the Council, its power to do so having been upheld by the Court of Appeal: *Egan v Willis* (1998) 195 CLR 424; *Egan v Chadwick* (1999) 46 NSWLR 563. Following this case the Council adopted the procedure of appointing an independent arbiter to assess any claims of public interest immunity arising from orders for documents. This procedure has worked successfully in several cases and

196 15/9/2009, J.2486; 2490-1.

197 J.2090-2.

198 J.2189.

has also been adopted by the Victorian Legislative Council.¹⁹⁹ Early in 2012, a member of the Victorian Legislative council initiated an action in the Supreme Court for a declaration that the Council had the power to order documents. This was in response to a government claim to the contrary and its repeated refusal to produce a report on a transport ticketing system.

The Houses of the United States Congress, which operate independently of the executive, have not found a satisfactory remedy, although they are usually successful in practice in extracting evidence from reluctant administrations. As noted in Chapter 2, the US Houses possess inherent powers to require the attendance of witnesses, the giving of evidence and the production of documents, and to punish contempts. They have enacted a statutory criminal offence of refusal to give evidence. They may also seek to have their requirements enforced through the courts by civil process. In serious cases of conflict between the Houses and the administration over the production of documents, administration officers are “cited” for contempt, but these matters usually end in some compromise and with documents handed over. In some cases, presidents have successfully withheld documents from the Houses. The courts, while suggesting some constitutional basis for executive privilege, and accepting jurisdiction in particular cases, have not become involved in determining specific claims of executive privilege.²⁰⁰ Contests between Congress and administration are generally left to “the ebb and flow of political power”.²⁰¹

While the public interest and the rights of individuals may be harmed by the enforced disclosure of information, it may well be considered that, in a free state, the greater danger lies in the executive government acting as the judge in its own cause, and having the capacity to conceal its activities, and, potentially, misgovernment from public scrutiny. It may also be considered that a representative House of the Parliament is the best judge of the balance of public interests.

Questions to ministers

At the time specified in the routine of business, questions without notice may be put to ministers relating to public affairs.²⁰² Provision is also made for questions on notice, that is, questions put

199 For information about the operation of these procedures, see evidence by the Clerks of those Houses to the Finance and Public Administration References Committee in its inquiry on an independent arbiter, PP 6/2010.

200 *Senate Select Committee on Presidential Campaign Activities v Nixon*, 498 F 2d 725 (DC Cir, 1974); *United States v Nixon* 418 US 683 (1974); *United States v American Telephone & Telegraph Company* 567 F 2d 121 (DC Cir, 1977); *United States v US House of Representatives* 556 F Supp. 150 (D DC, 1983); *Re Sealed Case*, 121 F 3d 729 (DC Cir, 1997); *Committee on the Judiciary, US House of Representatives v Miers* (D DC, Civ No 08-0409, 31 July 2008).

201 Archibald Cox, quoted in report of Committee of Privileges, PP 215/1975, p. 47.

202 SO 72(1).

and answered in writing.²⁰³ Although questions may also be put to the President of the Senate,²⁰⁴ they are mainly used to obtain information from the ministry, and are therefore dealt with in this chapter. Questions to chairs of committees and other senators who are not ministers were abolished in 2009.²⁰⁵

Questions without notice: question time

Question time for questions without notice occurs at 2 pm on each sitting day.

Time limits are imposed on questions and answers at question time. Standing order 72(3) provides that:

- (a) the asking of each question not exceed 1 minute and the answering of each question not exceed 4 minutes;
- (b) the asking of each supplementary question not exceed 1 minute and the answering of each supplementary question not exceed 1 minute.

These provisions are currently modified by a temporary order, first adopted in November 2008. The new procedures for question time, involve a two minute time limit on answers to primary questions, two supplementary questions allowed to the questioner, and a requirement for direct relevance in the answers.²⁰⁶ The trial was further modified on 25 November 2009 by the adoption of a 30 second time limit on the asking of supplementary questions.²⁰⁷

While standing orders give senators the right to ask questions of ministers and certain other senators there is no corresponding obligation on those questioned to give an answer. President Baker ruled on 26 August 1902 that there was “no obligation on a minister or other member to answer a question”, and in 1905 he ruled: “It is a matter of policy whether the Government will answer a question or not. There are no standing orders which can force a minister or other senator to answer a question”.²⁰⁸ Other presidents have stated that answers are “optional” or “discretionary” and that, “There is no obligation on a minister to answer: he does so merely as a

203 SO 74.

204 SO 72(2).

205 Adopted 10/3/2009, J.1657-8.

206 Procedure Committee, Third report of 2008, PP No. 500/2008; 13/11/2008, J.1206; 4/12/2008, J.1421.

207 Procedure Committee, Fourth report of 2009, PP No. 320/2009, 25/11/2009, J.2872. See also Procedure Committee, Third report of 2010, PP No. 203/2010, adopted 28/10/2010, J.246; order extended 24/11/2011, J.1936. For debate on the application of the requirement for answers to be directly relevant, see SD, 17/11/2010, pp. 1409, 1487-1501.

208 SD, 26/8/1902, p. 15311 and 20/10/1905, p. 3858.

matter of courtesy”.²⁰⁹ These rulings relate to the conduct of question time and do not preclude the Senate taking some separate action to obtain the required information.

The standing orders prescribe no limit to the duration of questions without notice. In practice, about one hour is usually occupied by questions without notice, at the expiration of which time the Leader of the Government in the Senate or the minister at the table asks senators to put any further questions on the Notice Paper. As ministers are not obliged to answer questions without notice (see above), this effectively terminates question time for that day.

Except for the period 26 September 1967 to 27 March 1973, it has been the practice for question time to be ended by a minister asking that any further questions be placed on the Notice Paper.

On 26 September 1967 the Leader of the Government in the Senate moved that further questions be placed upon the Notice Paper. The President stated that it was the practice of the Senate that a minister had the right to ask that further questions be placed on the Notice Paper, without proposing a motion. A motion, proposed by an Opposition senator, was agreed to that questions without notice be proceeded with. Ministers answered further questions, although they were not obliged to.²¹⁰

For some years after the 1967 proceedings no minister attempted to terminate question time by means of asking that further questions be placed upon the Notice Paper, and the duration of question time increased markedly, from about 45 minutes prior to 1967 to 80 minutes at the end of 1972 and 110 minutes during the early part of the 1973 session. Question time was curtailed for a brief period at the end of 1972, however. Faced with a large amount of business to be dealt with in the remaining days of the session, the government moved:

That, unless otherwise ordered, question time including questions on notice, for the remainder of the present period of sittings, shall not exceed 45 minutes.

The motion was passed on October 25 1972 and for the remaining four days of the 27th Parliament question time was limited accordingly.²¹¹

A general election was held in December 1972 and when the Senate resumed in February 1973

209 For rulings that ministers cannot be required to answer questions see SD, 26/8/1902, p. 15311; 1/6/1904, p. 1736; 20/10/1905, p. 3858; 22/5/1914, p. 1428; 16/7/1919, p. 10718; 1/10/1952, p. 2373; 2/6/1955, p. 592; 5/10/1961, p. 891; 10/9/1963, p. 372; 22/8/1973, p. 40; 19/10/1983, p. 1717; 3/11/1983, p. 2186; 6/12/1990, p. 5131.

210 The President had ruled that such a motion could not be moved without notice. This ruling, though undoubtedly correct, was dissented from by the Senate.

211 J.1193.

the practice which had been followed since 1967 (with the exception of the four days in October 1972) was briefly resumed before being replaced on 27 March 1973 by the practice which had obtained prior to 1967. President Cormack then made a statement concerning questions in which he outlined the practice which prevailed until 26 September 1967 and noted that since that time no minister had attempted to terminate question time as long as senators wished to ask questions. He stated:

Notwithstanding the September 1967 proceedings there is still no obligation upon a minister to answer questions, and if the minister in charge asks after a certain time that further questions without notice be placed on the notice paper I believe that I have no alternative but to call the next business.²¹²

The rationale for the restoration of the earlier practice was that the decision of 26 September 1967 to extend question time applied to that day only and the fact that for the next five years the government had chosen not exercise the right to terminate question time at the request of the minister at the table did not affect the validity of this practice. Consequently, on the next occasion after 1967 that the minister at the table asked that further questions be placed on the Notice Paper, the President ruled in accordance with traditional practice.

Following the President's ruling, subsequently repeated,²¹³ the Senate proceeded to the next business, but the Leader of the Opposition intended that the practice should be reviewed. On 29 March 1973 the Leader of the Opposition moved:

That, in the absence of any Standing Order on the matter, honourable Senators' right to question Ministers is limited only by the judgment of the Senate, and that Ministers who seek recognition from the Senate are obliged to answer questions with a promptness and accuracy appropriate to ministerial responsibility.

The motion was debated but not voted upon.²¹⁴

On 10 April 1973, the Leader of the Opposition gave notice that, contingent upon any minister asking, on any day of sitting during question time, that further questions without notice be placed on the Notice Paper, he might move: That questions without notice be further proceeded with. A similar notice of motion was given in the 1974 session. These notices were not used.

212 SD, 27/3/1973, p. 567.

213 SD, 17/5/1973, p. 1688.

214 29/3/1973, J.82.

President O'Byrne confirmed the restoration of the traditional practice when, on 11 July 1974,²¹⁵ he stated that after the minister in charge “asks that further questions without notice be placed on the notice paper the Chair regards itself as bound by practice to call on the next business”. The question of a minister's right to terminate question time was raised next in 1979, when President Laucke stated that the practice of question time being terminated by the Leader of the Government requesting that further questions be placed on the Notice Paper was well established and had been recognised by successive Presidents.²¹⁶

The practice was considered in 1980 by the Standing Orders Committee, which confirmed in its report to the Senate that it was a long-established practice for question time to be terminated by the Leader of the Government in the Senate asking that further questions be placed on notice.²¹⁷ The basis of the practice, the committee reported, is that it is competent for ministers to ask that any questions be placed on the Notice Paper and that ministers, in any case, are not bound to answer questions. The committee did not consider that it ought to recommend any change in the practice.

On 25 June 1992 the Opposition successfully moved a motion, for which the Opposition Leader had on the Notice Paper a special contingent notice of motion to suspend standing orders, to extend question time that day. Time was extended to enable five further questions to be put to ministers by Opposition senators.²¹⁸

On 19 October 1999 question time was extended on several days in response to a refusal by a minister to produce a document in accordance with an order of the Senate.²¹⁹

Although the government can end question time by asking that further questions be placed on notice, question time is an item in the Senate's routine of business, and, as such, cannot be dispensed with except by a decision of the Senate to alter the routine of business which explicitly or implicitly has that effect.

For the effect of censure motions on the duration of question time, see above, under Ministerial accountability and censure motions.

For the history of the time limits on questions and answers, see the *Annotated Standing Orders of the Australian Senate*, under SO 72.

215 SD, p. 81.

216 SD, 22/3/1979, p. 879.

217 PP 50/1980.

218 25/6/1992, J.2614-5.

219 19/10/1999 J.1931-2.

The chair seeks to call senators to ask questions so as to achieve an appropriate allocation of questions among parties and independent senators. By custom the chair observes an order for the allocation of questions agreed to by senators. In its second report of 1995, the Procedure Committee endorsed the principle of proportionality, that is, that the allocation of questions between the various parties, groups and independent senators should be as nearly as practicable in proportion to their numbers in the Senate.²²⁰ The allocation of questions, however, is not governed by any rule of the Senate.²²¹

The Leader of the Opposition, when seeking to ask a question, is accorded priority over all other non-government senators.²²² The call is given to senators who have not asked questions before calling any senator for a second time.²²³

Supplementary questions

Supplementary questions were introduced in the Senate on the initiative of the chair. In 1973 President Cormack decided that, within reasonable limits, he would allow supplementary questions to elucidate an answer already given.

Supplementary questions must relate to or arise from the answer. It is not in order to ask a supplementary question to another minister. A supplementary question must be directed to the minister initially answering the question and when a minister has asked that a question be put on notice a supplementary question may not be asked.²²⁴

In 1980 the Standing Orders Committee considered the question of whether senators ought to be allowed to ask supplementary questions in relation to answers which are given by ministers after the termination of question time. It was recommended that, if senators wish to ask further questions in relation to these deferred answers, they should do so either by asking leave to do so, when the answer is given, or by asking their questions in the normal way at question time on a subsequent day. The Standing Orders Committee's report was noted by the Senate.²²⁵

On 14 April 1986 President McClelland made a statement concerning the use of supplementary questions. After noting that supplementary questions began in 1973, the President stated:

220 PP 284/1995.

221 For attempts to change the allocation and specify it in an order of the Senate, see 5/3/2003, J.1539; 18/8/2011, J.1282.

222 Ruling of President Mattner, SD, 26/9/1951, p. 5.

223 SD, 24/10/1951, p. 1035; 3/5/1973, p. 1276.

224 SD, 9/10/1973, p. 1060; 13/12/1973, p. 2778; 6/3/1974, p. 51; 22/5/1979, p. 1895; 22/8/1979, p. 101; 6/5/1982, p. 1913.

225 26/2/1981, J.109.

Since that time successive Presidents have consistently ruled that supplementary questions are appropriate only for the purposes of elucidating information arising from the original question and answer. They are not appropriate for the purpose of introducing additional or new material or proposing a new question, even though such a question might be related to the subject matter of the original question.

It is my impression that recently attempts have been made to extend the scope of supplementary questions by the use of what I would call doublebarrelled questions; the second, the supplementary question, being held back for asking, virtually irrespective of the answer to the original. I do not believe that is a proper use of the supplementary question procedure which I remind senators is completely within the control of the chair.²²⁶

Supplementary questions were recognised in standing and other orders on the introduction of time limits on questions and answers in 1992 (see above). Two supplementary questions for each primary question are permitted under the temporary orders currently in operation.

Questions on notice

Questions at question time are supposed to be without notice. The Standing Orders Committee, in a 1980 report, reviewed the longestablished practice of senators giving ministers informal advice prior to question time of the subject on which they proposed to ask questions, so that ministers might obtain information on those subjects.²²⁷ The committee considered that this was an acceptable practice, particularly in a chamber where ministers represent several ministries in addition to their own, and that it leads to a more satisfactory question time. The committee noted, however, that there was a distinction between this practice of giving informal advice of the subject of a question to be asked and the giving of written notice of the precise terms of a question calling for a detailed answer as provided for in the standing order dealing with questions on notice.

A question may be submitted on notice by a senator signing and delivering it to the Clerk, fairly written, printed, or typed. Notice may be given by one senator on behalf of another.²²⁸ The Clerk is required to place notices of questions on the Notice Paper in the order in which they are received.²²⁹

Each question on notice is allocated a number and the text of the question is published in the Notice Paper. All questions which remain unanswered appear in the full online version of the Notice Paper and those that have remained unanswered for 30 or more days are noted.

226 SD, p. 1633.

227 PP 50/1980.

228 SO 74(1).

229 SO 74(2).

A reply to a question on notice is given by delivering it to the Clerk, and a copy is supplied to the senator who asked the question. The question and reply is printed in Hansard.²³⁰ A senator who has received a copy of a reply pursuant to this standing order may, by leave, immediately after questions without notice, ask the question and have the reply read in the Senate,²³¹ but this procedure is seldom used. The publication of the reply is authorised on its provision to the senator.²³²

A senator who asks a question on notice and does not receive an answer within 30 days may seek an explanation and take certain other actions.²³³

This provision, first adopted on 28 September 1988,²³⁴ on the motion of Senator Macklin, provides:

If a minister does not answer a question on notice asked by a senator within 30 days of the asking of that question, and does not, within that period, provide to the senator who asked the question an explanation satisfactory to that senator of why an answer has not yet been provided:

- (a) at the conclusion of question time on any day after that period, the senator may ask the relevant minister for such an explanation; and
- (b) the senator may, at the conclusion of the explanation, move without notice ‘That the Senate take note of the explanation’; or
- (c) in the event that the minister does not provide an explanation, the senator may, without notice, move a motion with regard to the minister’s failure to provide either an answer or an explanation.

If an explanation of the failure to answer questions within 30 days is not forthcoming when requested at the end of question time, the motion which is moved may be for any purpose, but is often a motion for an order for the answers and explanations to be tabled by a specified date. The procedure was first used by Senator Macklin on 23 November 1988 and has been frequently used since. The government has complied with orders made under this procedure to table answers by a specified date.²³⁵ On one occasion a minister was censured for the delay in answering.²³⁶

230 SO 74(3).

231 SO 74(4).

232 SO 74(3).

233 SO 74(5).

234 J.952.

235 For example, 23/11/1988, J.1144; 28/11/1990, J.485; 21/2/1991, J.785; 14/3/1991, J.875; 17/4/1991, J.951; 16/6/1992, J.2443; 11/5/1995, J.3289; 12/8/1999, J.1489-90; 26/10/2009, J.2564-5; 12/5/2011, J.921.

236 25/5/1989, J.1712.

A statement by a minister that an answer is being prepared, or that a question is under consideration, is not regarded as an explanation of failure to answer the question.²³⁷

The practice of ministers leaving the chamber immediately at the end of question time has meant that on several occasions the relevant minister has not been present to give an explanation, despite prior warning being given by the senator who asked the overdue question on notice. Despite requests from the President²³⁸ the practice continued and on 17 April 1991 the Senate passed a motion expressing its “continuing concern at the lack of courtesy by Ministers in failing to attend the Chamber and to provide adequate reasons for failure to answer questions”.²³⁹

If in response to a senator having asked for an explanation of failure to answer a question, an answer is immediately produced by a minister, it is not open to a senator to move the motions otherwise authorised by the order. The rationale of the order is to encourage ministers to answer questions, and once a question is answered the procedure in the order no longer operates in relation to the question.²⁴⁰

On 16 June 1992, a senator took the unusual step of tabling by leave answers to questions on notice of which he had received copies, and then by leave moving a motion to take note of the answers and debating them.²⁴¹

Under standing order 74(5), the procedure applies also to questions on notice lodged during estimates hearings.²⁴²

When final answers to questions on notice have not been given before the Senate adjourns, government departments and agencies furnish replies in the usual manner to the Department of the Senate which forwards them to the senators concerned. On the resumption of the next sittings, the replies are incorporated in Hansard.

One of the consequences of a prorogation of the Parliament is that all business on the Notice Paper lapses on the day before the next sitting. Thus, questions submitted before the prorogation and not answered before the next sitting need to be resubmitted in order to appear on the Notice Paper in the next session. The Department of the Senate writes to senators whose questions had not been answered, inquiring whether they wish to renew the questions when the Senate resumes.

237 Rulings and statement by President Reid, SD, 28/5/1998, pp. 3377-8.

238 See SD, 21/2/1991, p. 1034.

239 17/4/1991, J.951-2.

240 SD, 2/12/1992, pp. 4044-8; 8/12/1992, pp. 4391-4; 2/12/1992, J.3190; 8/12/1992, J.3252; ruling of President Calvert, SD, 16/10/2003, p. 16629.

241 SD, 16/6/1992, pp. 3661-2, 3664-6.

242 See Chapter 16, Committees, under Estimates committees.

Ministerial departments are advised to answer questions outstanding at prorogation. If the Senate were to meet after a prorogation (see below) a Notice Paper would be issued containing the business before the Senate at the prorogation.

Questions on notice submitted after the prorogation and for which answers have not been received before the Senate sits again appear on the first Notice Paper of the new session with the annotation that notice was given on the first sitting day. For such questions the 30 days, within which ministers must provide an answer or explain why none has been given, is deemed to begin with the first day of the new session.

Rules for questions and answers

The basic requirements of questions and answers were stated by President Laucke to be:

- questions must relate to matters for which a minister is responsible
- questions and answers should be brief
- requests for statistical information should be placed on the Notice Paper and should not be sought on the floor of the chamber on any occasion
- quoting should be avoided, except to the degree necessary to make a question clear
- replies should be confined to giving information, and no debate should be entered into.²⁴³

The following rules for questions are contained in standing order 73:

Questions shall not contain:

- (a) statements of fact or names of persons unless they are strictly necessary to render the question intelligible and can be authenticated;
- (b) arguments;
- (c) inferences;
- (d) imputations;
- (e) epithets;
- (f) ironical expressions; or
- (g) hypothetical matter.

243 SD, 21/10/1976, p. 1370.

Questions shall not ask:

- (h) for an expression of opinion;
- (i) for a statement of the Government's policy; or
- (j) for legal opinion.

Questions shall not refer to:

- (k) debates in the current session; or
- (l) proceedings in committee not reported to the Senate.

Questions shall not anticipate discussion upon an order of the day or other matter which appears on the Notice Paper.

The President may direct that the language of a question be changed if it is not in conformity with the standing orders.

These rules apply also to answers. For example, if a question may not ask for a legal opinion, it follows that an answer may not give one.

The rule concerning anticipation is not interpreted narrowly because, if it were, it could block questions on a wide variety of subjects. The practice is to allow questions seeking information regarding matters on the Notice Paper but which do not necessarily amount to anticipating discussion.²⁴⁴

The rule that questions shall not refer to proceedings in committee which have not been reported to the Senate strictly refers to proceedings in committee of the whole, although the same principle has been applied to other committees. The prohibition, however, is not interpreted narrowly because, if it were, the rule might block questions on a wide variety of subjects under consideration by committees. The working rule is that senators should not be restricted from asking questions on subjects which may be under examination by a committee, provided that they do not refer to nonpublic committee proceedings which have not been reported to the Senate.²⁴⁵ President Laucke stated:

The rules have never been so interpreted as to prevent from being answered a question

244 Statements by President Reid, SD, 24/6/1999, p. 6307; 20/6/2002, p. 2312; by President Calvert, SD, 17/10/2006, p. 36.

245 Rulings of President Laucke, SD, 26/8/1976, p. 354; of Deputy President West, 22/9/1999, p. 8654; of President Calvert, SD, 17/10/2006, p. 36.

about a particular area which may or may not have a direct bearing on an inquiry currently proceeding. Otherwise no questions could be asked in the Senate. An interpretation which is not too rigid has to be made in a situation like this.²⁴⁶

The conduct of members of either House should not be reflected on in a question.²⁴⁷

It is within the discretion of the President to direct that long and involved questions be placed on the Notice Paper.²⁴⁸ See also the section on Questions involving orders for returns, below.

In applying the rule that a question shall not ask for a statement of government policy, in most cases the chair leaves it to the minister to say whether a question involves a statement of government policy. However, it has been ruled that it is in order for a question:

- to seek an explanation of government policy;²⁴⁹
- to ask a minister about the effects of a proposal on the minister's portfolio;²⁵⁰
- to ask about the government's intentions and the reasons for those intentions;²⁵¹
- to seek clarification of a statement made by a minister.²⁵²

A question which invites a minister to comment on the policies or actions of non-government parties is out of order unless the question seeks an expression of the government's intentions in some matter of ministerial responsibility.²⁵³

On 16 February 1956, a senator asked a question without notice in which he made reference to the President of Indonesia and to the government of that country. President McMullin held that the remarks of the senator were not in order, and he ruled that, in the future, such questions must be expressed in terms of appropriate dignity and courtesy.²⁵⁴ This ruling was consistent with the practice in the British House of Commons. On 19 March 1974 President Cormack disallowed a question without notice on the ground that questions may not be asked, or terms used in debate,

246 SD, 26/8/1976, p. 354.

247 Rulings of President McMullin, SD, 12/11/1968, p. 1865; 25/8/1970, p. 154.

248 Rulings of President O'Byrne, SD, 11/6/1975, p. 2488; of President Laucke, 22/3/1979, p. 876.

249 SD, 5/12/1989, p. 3879.

250 SD, 4/10/1984, p. 1206.

251 SD, 30/3/1987, p. 1438.

252 18/2/1991, J.755; SD, 18/2/1991, p. 690.

253 Rulings of President Sibraa, SD, 17/2/1987, p. 73; 30/3/1987, p. 1438; 17/5/1990, p. 554; 26/11/1991, p. 3296; of President Reid, SD, 9/9/1996, p. 3018; of President Calvert, SD, 10/9/2003, p. 14834; 1/3/2004, pp. 20291-2; 26/3/2007, pp. 34-5.

254 SD, p. 23.

which reflect on a head of state of a friendly country.²⁵⁵ These rulings have no basis in the standing orders, have not been applied since that time, and do not reflect current practice.

The attachment of the names of persons to circumstances in questions, when only the circumstances need be mentioned, is not in accordance with the standing order.²⁵⁶

The President may direct that the language of a question be changed if it is not in conformity with the standing orders.²⁵⁷

With respect to questions on notice, the practice is as outlined to the Senate by President Givens on 25 September 1918: before questions are permitted to be placed upon the Notice Paper, they are examined by officers of the Senate, and anything which, in their opinion, is doubtful is referred to the President for decision.²⁵⁸ The President may direct the Clerk to alter any question so as to conform with the standing orders. If a question contains material which does not conform to the standing orders current practice is for an officer of the Senate to discuss the matter with the senator who submitted it. The problem is usually resolved at this point by the rephrasing or withdrawal of the question.

A question which does not comply with the rules may not be placed on the Notice Paper.²⁵⁹ On 10 April 1918, President Givens disallowed a proposed question upon notice by Senator McDougall because it contained statements and assertions and, in the opinion of the President, was not asked solely for the purpose of eliciting information. The President refused to allow the question to go on the Notice Paper. Soon after the meeting of the Senate, Senator McDougall moved dissent from the ruling of the President. The motion was negatived. During the debate, President Givens held that it was the duty of the President to protect the privileges of senators by preventing the asking of improper questions.²⁶⁰

On 11 May 1950 President Brown ruled that “it is not permissible to quote from newspapers, books or periodicals when asking questions”.²⁶¹ During the debate on an unsuccessful motion of dissent from this ruling the President stated: “At the moment it is competent for an honourable senator to ask a question based upon a newspaper article, but not to read an extract from the

255 SD, 19/3/1974, p. 361.

256 Statement by President Calvert, SD, 21/8/2002, p. 3467.

257 SO 73(3).

258 SD, p. 6300.

259 SD, 1/8/1917, p. 625; 10/4/1918, p. 3694; 26/6/1919, p. 10093; 16/7/1919, p. 10718.

260 SD, 10/4/1918, p. 3694-5.

261 SD, 11/5/1950, p. 2419.

newspaper”.²⁶² On 15 May 1969 President McMullin re-affirmed that questions may be based on newspaper reports, but that quotations are not in order.²⁶³ In 1971 President Cormack ruled:

I remind the Senate that it has been ruled on many occasions that, while questions may be based on newspaper or other reports, quotations are not in order. The purpose of questions is to obtain information. Questions should be brief so that as many as possible may be asked within the time allotted. I therefore reaffirm that Senators must frame their questions in such a way as not to contain quotations.²⁶⁴

In practice the chair exercises a discretion and may allow a senator to make a quotation to the extent necessary to make the question clear.

Senators may amend their questions on the Notice Paper to clarify their terms.²⁶⁵

Questions with or without notice are permissible only for the purpose of obtaining information, and answers are subject to the same limitation, that is, they are limited to supplying the information asked for by the questions.²⁶⁶ Questions would not only be in conformity with the standing orders, but would be more effective and telling, if they were confined to properly framed questions, and did not contain statements, assertions, allegations, insinuations and other extraneous material.²⁶⁷ In answering a question, a senator must not debate it.²⁶⁸ Thus an answer should be confined to giving the information asked for, and should not contain any argument or comments. An answer must also be relevant to the question. On 22 August 1973 President Cormack ruled that in answering a question:

the Minister should confine himself to points contained in the question with such explanation only as will render the answer intelligible. In all cases the answer must be relevant to the question.²⁶⁹

However, should the Senate seek a full statement of a case, latitude is allowed to a minister in answering a question; but if it is desired to debate the matter, this should be done only on a

262 p. 2587.

263 SD, p. 1270.

264 SD, 26/10/1971, p. 1444; see also SD, 27/10/1971, p. 1472; 25/11/1971, p. 21067; 28/9/1972, p. 1310.

265 Ruling of President Givens, SD, 28/9/1922, p. 2788.

266 Rulings of President Givens, SD, 17/5/1916, p. 7920; and of President Cormack, 1/3/1973, p. 90.

267 Statement by President Calvert, SD, 6/12/2004, pp. 36-7.

268 SO 73(4).

269 SD, p. 40.

specific motion.²⁷⁰

In relation to relevance, the Procedure Committee in 1994 observed as follows:

It is clear that, in answering a question, a minister must be relevant to the question. It is for the President to make a judgment whether an answer is relevant to a question. If the answer is not relevant, the President requires the minister to be relevant.²⁷¹

Questions may be put to a minister relating to the public affairs with which the minister is officially connected, to proceedings pending in Parliament, or to any matter of administration for which the minister is responsible in a personal or representative capacity.²⁷² This is an overriding rule: that a question must seek information, or press for action within a minister's responsibility. The chair will disallow any question where it is clear that it is not within a minister's responsibility. On 18 March 1976, President Laucke ruled that questions must relate to matters within ministerial responsibility. He allowed a question to be put to a minister on the understanding that the minister might reply only in so far as he considered it his responsibility in any area covered by the question.²⁷³ There are occasions, however, when it is difficult for the chair to decide whether a matter comes within ministerial responsibility; in such cases, according to President Young, "It is the right and responsibility of ministers in this chamber to decide who will answer questions and in whose area of responsibility a particular question lies".²⁷⁴ It has been ruled that if no minister rises to answer a question it should be placed on the Notice Paper.²⁷⁵

While questions may be asked about ministers' conduct as ministers, questions relating only to the affairs of ministers' spouses or relatives are not in order.²⁷⁶

A minister may reply to a question relating to matters for which the minister is officially responsible in a personal or representative capacity²⁷⁷ and replies must be confined to those areas of responsibility.²⁷⁸ As has been noted, ministers must accept full personal responsibility for answers given on behalf

270 Ruling of President Gould, SD, 10/12/1908, pp. 2985-6.

271 Second Report of 1994, PP 223/1994, p. 3; see also statement by President Beahan, SD, 23/10/1995, pp. 2249-50.

272 Ruling of President Sibraa, SD, 30/8/1988, pp. 466-7.

273 SD, 18/3/1976, p. 621.

274 SD, 12/11/1981, p. 2081.

275 SD, 2/12/1965, pp. 1979-80.

276 Statement by President Calvert, SD, 4/12/2002, p. 7154.

277 Ruling of President McClelland, SD, 19/2/1986, p. 603.

278 Rulings of Deputy President Hamer, SD, 3/10/1984, p. 1110; of President McClelland, 17/2/1986, p. 409; and of President Sibraa, 17/5/1990, p. 554.

of others, and ministers have been censured by the Senate on this basis.²⁷⁹ It has been ruled that it is not in order for a minister “to comment on how a State public servant administers the affairs of a State department”.²⁸⁰ President Sibraa ruled that if the Chair cannot detect any Commonwealth responsibility in an answer it is out of order.²⁸¹

It is not the responsibility of the chair to tell ministers how they should respond to questions: “That is purely a matter for Ministers, provided their answers are within the standing orders”.²⁸² It is in order for a minister to answer part of a question without notice and ask that the remainder be placed on the Notice Paper.²⁸³ During question time on 18 March 1980, a senator moved that so much of the standing orders be suspended as would prevent a minister from giving the Senate a complete answer to a question. President Laucke ruled²⁸⁴ the motion not in order as at question time it was the prerogative of the minister to determine the manner in which he replied to a question. Later, and after question time had been concluded, a motion was proposed that so much of the standing orders be suspended as would prevent the moving of a motion that the minister request the Prime Minister for real and complete answers to certain questions; the motion was negatived.

It is also not for the chair to determine whether an answer is correct.²⁸⁵ Challenges to the accuracy of an answer should not take the form of a point of order.²⁸⁶

Questions may not be directed to, or answered by, a parliamentary secretary in that capacity.²⁸⁷

Declaration of interest

Neither the questioner nor a minister answering a question is required to declare an interest. Following a challenge to a minister to declare his interest in a matter on which he was providing an answer to a question without notice, President Sibraa ruled that senators do not need to declare an interest.²⁸⁸

279 25/5/1989, J.1712; 10/5/1994, J.1641.

280 SD, 23/10/1986, p. 1812.

281 SD, 3/10/1989, p. 1590-1.

282 Ruling of President McClelland, SD, 11/9/1985, p. 449.

283 Ruling of President McMullin, SD, 15/10/1953, p. 559.

284 SD, 18/3/1980, p. 715.

285 SD, 27/9/1988, p. 758; 4/12/1991, p. 4111; 11/12/1991, p. 4615.

286 SD, 2/12/1991, p. 3742.

287 Order first adopted 3/9/1991, J.1455-6.

288 SD, 28/5/1992, pp. 2900-3; for declarations of interests in debate, see Chapter 10, Debate.

Sub judice matters

For an analysis of the principles which apply to questions concerning sub judice matters, see Chapter 10, Debate, under Sub judice convention.

Questions concerning statutory authorities

As has been noted, one of the fundamental rules of questions is that a minister may be asked only about matters for which the minister is officially responsible. As statutory authorities frequently operate with considerable autonomy, the question arises of the extent to which a minister can be expected to answer questions of detail concerning their activities, especially in relation to those authorities operating commercially.²⁸⁹ No ruling has been given from the chair, nor pronouncement of policy made by government, regarding questions relating to statutory authorities. It is now the practice for questions about such bodies to be directed to the relevant minister or the minister representing the relevant minister. The information sought is usually supplied.

For declarations by the Senate concerning accountability of statutory bodies, see above, under Statutory authorities and public interest immunity.

Questions concerning security matters

It has been the policy of successive governments that questions seeking information concerning the activities of the ASIO or the Australian Secret Intelligence Service (ASIS) will not be answered. On 15 July 1975, in reply to a question on notice, the minister representing the Attorney-General stated that it is not the practice to give information relating to ASIO operations.²⁹⁰ In the debate on the Supply Bill (No. 1) 197677, a minister stated that it was the practice of governments not to answer questions on the appropriation of funds for ASIO.²⁹¹ Officers of ASIO, however, now appear at estimates hearings and answer questions.

Questions involving orders for returns

It has been ruled that detailed information requiring considerable preparation should be sought by motion for a return under standing order 164, rather than by question upon notice.²⁹² The rationale for these rulings is that because an order for a return must be approved by the Senate this procedure enables the Senate to consider whether the cost of preparing the information is justified.

289 SD, 28/8/1968, p. 367; 30/3/1971, p. 604.

290 SD, 15/7/1975, p. 2733.

291 SD, 4/6/1976, pp. 2423.

292 SD, 7/7/1905, p. 140; 1/8/1930, p. 5109; 19/3/1931, p. 373; 15/5/1931, p. 1975; 28/7/1931, p. 4408.

See also the material on unanswered questions on notice, above, and Chapter 18, Documents, under Orders for the production of documents.

Additional responses to questions without notice

It is established practice for ministers at the end of question time to make additional responses to questions without notice. They then provide orally, or by incorporation in Hansard, information which they were unable to provide at the time the question was asked. Supplementary questions are not permitted in relation to such answers.²⁹³

Motions to take note of answers

A motion may be moved without notice or leave at the conclusion of question time to take note of answers.²⁹⁴ A motion may relate to one or more of any answers given that day and a senator may speak for not more than five minutes on it. The total time for debate on all such motions on any day must not exceed 30 minutes, not including any time taken in raising and determining any points of order during the debate.²⁹⁵ Motions to take note of answers provide the Senate with an opportunity to debate answers which are regarded as unsatisfactory or which raise issues requiring debate.

A relevant amendment may be moved to a motion to take note of an answer, but an amendment to take note of a different answer is not a relevant amendment.²⁹⁶

The history of this procedure is as follows. During 1992 the Opposition began to make increasing use of the device of moving by leave after question time motions to take note of answers given by ministers. On 14 September 1992 an attempt was made by the government to limit the time spent on motions to take note of answers to questions, by making the granting of leave for moving such motions conditional on the senator seeking the leave speaking for only two minutes. This condition was refused, and leave to move a motion was refused, but this resulted in a motion to suspend standing orders, on which senators can speak for five minutes with a total time limit of 30 minutes. After one such suspension motion was disposed of, leave was granted to move three further motions to take note of answers.

On the following day, 15 September 1992, the Manager of Government Business moved a special motion to limit debate on motions to take note of answers to two minutes per speaker and a total

293 See ruling of Deputy President West, 21/10/1999, J.1985.

294 SO 72(4).

295 See statements by President Beahan, SD, 1/3/1994, p. 1163; SD, 7/6/1995, p. 925.

296 Ruling of Deputy President West, SD, 24/3/1998, pp. 1152-3.

of 30 minutes.²⁹⁷ This motion was agreed to, with an amendment to extend the speaking time to four minutes, on 16 September 1992.²⁹⁸ This motion was expressed to operate for the remainder of the week. It appeared to have had the effect of increasing the number of motions to take note of answers, three such motions being moved on 16 September and five on 17 September. These procedures were agreed to again for the two sitting weeks in October and the first two sitting weeks of November.²⁹⁹ On 24 November 1992 the procedures, together with those concerning time limits to questions and answers at question time (see above) were renewed as sessional orders, and in February 1997 incorporated into the standing orders.³⁰⁰

Effect of prorogation and of the dissolution of the House of Representatives on the Senate

Each House of the Parliament is empowered by the Constitution (sections 49, 50) to regulate its own proceedings, including the times at which it meets during a session of Parliament. While the annual program of sittings is normally decided in consultation with the other House, each may independently determine the pattern of its meetings during a session, which commences, as noted in Chapter 7, with the opening of Parliament by the Governor-General. The days on which a House meets, the times of meeting on a sitting day, including any suspensions, and the time and duration of adjournments during a session are matters to be determined by that House alone.

The commencement and termination of sessions of Parliament, however, are matters determined not by the Houses themselves but by the executive branch of government. Parliament as a collective entity, consisting of the monarch, the Senate and the House of Representatives, comes into being when the Governor-General, under section 5 of the Constitution, appoints the time for a session to begin. Except when a session of Parliament ends as a result of the expiration of the three-year term of the House of Representatives, sessions are terminated by the Governor-General on the advice of the government. The following actions by the Governor-General under the Constitution bring a session to an end: the dissolution of the House of Representatives (s. 5), the simultaneous dissolution of both Houses (s. 57), or the prorogation of the Parliament (s. 5). The period between the end of a session of Parliament and its next meeting at the commencement of the subsequent session is termed a “recess”.

This power of prorogation is inherited from the unwritten British constitution, and is closely associated with the monarchy. The monarch determines when the Parliament meets and may terminate its meeting by prorogation, which puts it out of session until summoned again, and

297 J.2760-1.

298 J.2775-7.

299 J.2817-9; J.2931.

300 24/11/1992, J.3076.

quashes all legislative business pending before it. The historical rationale behind the power is that Parliament is only an advisory council to the monarch and meets only when the monarch requires advice. Much used by Stuart kings to dispense with rebellious parliaments, the power is now normally exercised on the advice of the prime minister. As with other royal powers it is generally accepted that there are circumstances in which advice could be refused. For example, if a prime minister were to lose a party majority in the lower house and were to advise a prorogation simply as a means of avoiding a no-confidence motion and of clinging to power, the sovereign would be entitled to decline to act on the advice. Leaving aside such circumstances, prorogation provides the executive government, the ministry, with a handy weapon to use against troublesome upper houses.³⁰¹ A government can normally use its compliant party majority in the lower house to adjourn that house, but where such a majority is lacking in the second chamber prorogation may be the only means of avoiding embarrassing parliamentary debate or inquiry. It is, however, something of a two-edged sword so far as governments are concerned, as it terminates all pending government legislation, which must then be revived when the Parliament is called to meet again. The potential for misuse of the power adds significance to the question whether prorogation prevents the Senate meeting.

In its first decades the Parliament was invariably prorogued before a dissolution of the House of Representatives, and it was the usual practice for a Parliament to be prorogued one or more times during its term, thus dividing it into two or more sessions. The Parliament was prorogued before the dissolution of the House in 1925 but the practice was then discontinued until 1993. During the period 1928-1990 proclamations dissolving the House of Representatives included a phrase purporting to discharge senators from attendance. This phrase had no constitutional basis and arose from a misunderstanding of the procedures and previous proclamations.³⁰² In 1990 the Clerk of the Senate drew this fact to the attention of the Official Secretary to the Governor-General. Papers relating to this matter, including an opinion by the Solicitor-General, were tabled in the Senate on 14 August 1991. On the next occasion on which the House was dissolved, 8 February 1993, the Governor-General first prorogued the Parliament by proclamation, and on the same day issued another proclamation dissolving the House of Representatives. The practice of proroguing the Parliament before dissolving the House was also followed in 1996, but the dissolution proclamation did not contain the paragraph discharging senators from attendance. In 1998 the prorogation and the dissolution were combined in one proclamation, and the proclamations of 2001, 2004 and 2010 followed this form. In 2007 separate instruments were signed, with the prorogation and the dissolution on different days.

301 The NSW Parliament was prorogued in December 2010, ostensibly to prevent an inquiry by a Legislative Council committee into the privatisation of electricity. The inquiry proceeded; strongly criticised for its actions, the government lost office in the subsequent election.

302 The confusion of the wording of the proclamations is more fully set out in 'The discharge of senators from attendance on the Senate upon a dissolution of the House of Representatives', by J. Vander Wyk, Clerk Assistant of the Senate, in *Papers on Parliament*, No. 2, Department of the Senate, July 1988.

Questions arise as to whether the Senate or its committees may meet after a prorogation or a dissolution of the House of Representatives and before the Parliament is summoned to meet again. As will be seen, these questions have been only partly resolved.

The principal argument advanced against the Senate continuing to meet or exercise any of its powers after a prorogation or a dissolution of the House of Representatives is based on the concept that the Parliament is an organic whole which in some sense exists prior to its constituent parts. This view would have some validity if the Parliament was elected as a whole and then divided itself into two chambers (as was the case until 1991 in the Icelandic parliament). In such a case the dissolution of the Parliament would necessarily entail that its subordinate parts cease to exist. Under the Australian Constitution, however, the three parts of the Parliament are constituted independently of each other by separate parts of the Constitution and a Parliament is formed from these basic constituents on the initiation of the Governor-General under section 5. In so far as prorogation prevents the Parliament as whole from operating it has the effect of temporarily suspending those powers and functions of the Parliament that require the coordinate actions of its constituent parts. A dissolution of the House of Representatives means that, for a period of time, one of the components of the Parliament ceases to exist and thus the Parliament cannot perform those functions for which all three parts are required, principally the enactment of legislation. There is no constitutional provision or doctrine, however, which would prevent the Senate from meeting for non-legislative purposes. Similarly, should an election for half the Senate be held when the House of Representatives is still in session there is no reason why the House could not meet. In the absence of one of the Houses, or of the Governor-General, the remaining parts of the Parliament may continue to exercise those powers and perform those functions which do not require the coordinate action of the other parts. [\(See supplement\)](#)

In support of this view, it is to be noted that it has been held that the Governor-General may exercise legislative powers after a prorogation. On 1 December 1910 the Governor-General assented to bills which had been passed prior to a prorogation on 29 November 1910. In opinion No. 3 of 1952, dated 23 May 1952, the Solicitor-General took the view that the royal assent may be given after prorogation. In an opinion dated 9 October 1984 (see below) the Solicitor-General stated:

I do incline to the view that the Constitution does not require that the Royal assent to Bills passed by both Houses be declared and given before the Parliament is prorogued, or the House of Representatives dissolved. Certainly this is not specifically required by section 58. Moreover, section 60, which provides for a proposed law reserved pursuant to section 58 for the Queen's pleasure, clearly embraces the situation that the Queen's assent may be furnished after the end of the session at which the proposed law is passed. The requirement that the Queen's assent be made known within two years is inconsistent with any inference that assent may be given only during a session of the Parliament. The decision of the New Zealand Court of Appeal in *Simpson v Attorney-General* (1955)

N.Z.L.R. 271, 283, also is confirmatory of this view of the Crown function. It was held that section 56 of the *New Zealand Constitution Act 1852* (which, together with section 59, is in analogous terms to sections 58 and 60 of our Constitution) enabled the Governor-General to assent to a Bill after the House of Representatives was dissolved; and there was no requirement for the House of Representatives to be in session at the time of the Royal assent.

Among the powers which the Senate may exercise and the functions which it may perform during recess or following a dissolution of the House are those of debating public affairs, inquiring (principally through its committees) into matters of concern, the presentation, publication and consideration of documents, and the disallowance of statutory instruments. In the absence of a House of Representatives to receive any bills initiated and passed by the Senate, the Senate could originate legislation for subsequent consideration and could consider and vote on legislation already passed by the House of Representatives.

An important argument in support of the Senate's powers in relation to meeting during recess and following a dissolution of the House of Representatives is that concerning the continuing nature of the Senate. The six-year terms of senators and the retirement of half the Senate every three years means that the Senate is a continuing body except on those occasions when it is dissolved simultaneously with the House of Representatives under section 57 of the Constitution. The continuing nature of the Senate is reflected in the standing orders and other orders of continuing effect.

Senate standing committees are appointed at the commencement of each Parliament and continue in existence until the eve of the opening of a new Parliament.

The Senate has not asserted its right to meet after a prorogation, but has regularly authorised its committees to do so and they have met accordingly. The Senate has asserted that it and its committees may meet after a dissolution of the House of Representatives.

(a) *prorogation*

As mentioned in Chapter 7, the generally accepted view is that a prorogation, as well as terminating a session, prevents the Houses of Parliament meeting until they are summoned to meet by the Governor-General under section 5 of the Constitution, or they meet in accordance with the proclamation of prorogation. According to this view, orders and resolutions which are not of continuing effect cease to have force and all business on the Notice Paper lapses and must be recommenced in the new session. Standing order 136 provides that bills which have lapsed as result of a prorogation may be revived in the following session provided that a periodical election

for the Senate or general election for either House has not taken place between the two sessions.³⁰³

While the Senate has not met at any time during which the House of Representatives was dissolved nor in the recess following a prorogation, Senate committees have often done so. The standing orders empower most standing committees of the Senate to meet during recess and some of the relevant provisions refer explicitly to the period of a dissolution of the House of Representatives. It is usual for Senate select committees to be given power to meet during recess and following dissolution of the House.

The Senate has asserted since 1901 the right to empower committees to meet during the recess which follows a prorogation. On 6 June 1901³⁰⁴ the standing orders of the South Australian House of Assembly were adopted by the Senate on a temporary basis until it had drafted its own. These standing orders contained no specific mention of this matter but it appears to have been the practice for sessional committees of the Assembly that “deal with matters which require attention during the Recess” to be “appointed to act during the Recess”.³⁰⁵ Accordingly, on 6 June 1901 the Senate resolved to appoint a Library and a House Committee with the “power to act in the recess”.³⁰⁶ The Senate’s own standing orders, adopted in 1903, provided the Library, Standing Orders and House Committees with “power to act during Recess”. The standing orders continued to grant these committees, and certain others, power to act during recess. Upon its establishment in 1932 the Standing Committee on Regulations and Ordinances was also given this power.

The power of the Senate to authorise committees to meet during recess may be regarded as deriving from section 49 of the Constitution, which provides that the powers, privileges and immunities each House, its members and committees shall, until Parliament declares otherwise, be those of the House of Commons in 1901. In an opinion dated 9 October 1984 and tabled in the Senate on 19 October, the Solicitor-General concluded that the “House of Commons in 1901 was empowered to authorise its committees to sit during a period of its prorogation”. This and related opinions are further considered below. Procedural matters concerning committees fall within the scope of section 50(ii), which empowers each House to make rules and orders with respect to “The order and conduct of its business and proceedings either separately or jointly with the other House”. Opinion is divided as to whether this section also empowers the Senate to authorise committees to sit during recess. See, for example, the opinion by Professor Colin Howard, dated March 1973, and that of the Solicitor-General, dated 9 October 1984, referred to below.

In 1957 the Joint Committee on Constitutional Review, at the request of the Senate, was given

303 See Chapter 12, Legislation, Revival of bills.

304 J.25.

305 E.G. Blackmore, *Manual of the Practice, Procedure, and Usage of the House of Assembly of the Province of South Australia*, Adelaide, 1885, p. 88.

306 J.26.

power to sit during recess. The Leader of the House of Representatives, Mr Harold Holt, stated that the government had decided that:

... henceforth we shall have a session of the Parliament annually, and it being the desire, I think, of all members of the Parliament that committees such as the Constitutional Review Committee, which has a valuable public service to perform, should continue to function in any period of recess between the prorogation of one session of the Parliament and the formal opening of another, there is sound practical sense in the suggestion that these committees be enabled to continue during any such recess.

The minister observed that while committees of the House of Commons ceased to exist following prorogation, the situation in Australia required a different approach:

Although we follow quite regularly the rulings and practices of the House of Commons where they appear to accord with the needs of our situation in Australia, each Parliament, of course, has its own way to make and its own problems to resolve. ... We live in a practical and swiftly moving world, and although the prorogation may legally bring to an end a session of the Parliament, it is assumed that if we are to have a session annually the Parliament will go on and resume in a new session shortly after the New Year according to the kind of program that I outlined last week.³⁰⁷

The House's accession to the Senate's request that the joint committee be granted power to meet during recess was in accordance with the spirit of the standing orders of the House of Representatives which provide certain standing committees of that House with such power.

The seven legislative and general purpose standing committees appointed by the Senate for the first time on 11 June 1970 were empowered by resolution "to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament".³⁰⁸ By then there was no doubt about the ability of the Senate to make such a provision. Senate committees have since then regularly met during prorogations, for private meetings and public hearings.

(b) dissolution of the House

As has already been noted, Senate standing committees are empowered to meet during recess, and this includes the period of a dissolution of the House of Representatives. The empowering provisions for some committees explicitly refer to the period of a dissolution of the House. This form of words was first adopted in 1973 in respect of the legislative and general purpose standing

307 HRD, 28/3/1957, pp. 339-40.

308 11/6/1970, J.187.

committees, to make it clear that “recess” includes a period of dissolution of the House. This positive assertion by the Senate of the right to have its committees meet during the period of a dissolution of the House reflected a need for the newly-expanded committee system of the Senate to continue to function in an election period.

In the 1970s the standing committees frequently held meetings, including public hearings, after the dissolution of the House of Representatives.

On 19 October 1984 Senator Tate, the Chairman of the Senate Select Committee on Allegations Concerning a Judge, tabled papers relating to the power of the Senate or its committees to meet after a dissolution of the House of Representatives or a prorogation of the Parliament, and the publication of a committee report when the Senate is not sitting. The circumstances were that the dissolution of the House of Representatives was scheduled for 26 October 1984 and the committee’s report was not expected to be completed by that date. The papers tabled on 19 October 1984 were:

In the matter of the Power of the Senate or its Committees to sit after Dissolution or Prorogation — Opinion by the Solicitor-General, Dr G. Griffith, dated 9 October 1984.

The Power of the Senate or its Committees to meet after a Dissolution of the House of Representatives or a Prorogation of the Parliament, and the publication of a Committee Report when the Senate is not sitting — Paper by the Clerk-Assistant (Committees), Mr Harry Evans.³⁰⁹

Attached to the documents was a brief summary of the opinions, which read:

SUMMARY OF PAPERS

1. Opinion dated 9 October 1984 of the Solicitor-General:

This opinion concludes that —

- (a) the Senate may not meet after a prorogation, which has the effect of terminating a session and preventing Parliament, as an organic whole, from functioning;
- (b) the Senate likewise may not meet after a dissolution of the House of Representatives, which also has the effect of preventing the Parliament from functioning;

but concludes that —

309 J.1270.

- (c) the Senate has the power to authorise its committees to meet after a prorogation or dissolution of the House of Representatives, because this is one of the powers of the House of Commons adhering to the Senate by virtue of section 49 of the Constitution.

2. Paper dated 18 October 1984 by Mr Harry Evans, the Clerk-Assistant (Committees):

This paper concludes that —

- (a) it is wrong to equate a dissolution of the House of Representatives with a prorogation, and the Senate and its committees may meet after a such dissolution;
- (b) in any case, the Senate and its committees may meet after a prorogation;
- (c) it is not tenable to maintain that the Senate committees may meet during a period during which it is claimed that the Senate may not meet: if Senate committees may meet after prorogation, the Senate also may meet; and
- (d) the Senate may authorise, in advance of their receipt, the publication with absolute privilege of reports of its committees, because —
 - (i) this is in accordance with the Parliamentary Papers Act; and
 - (ii) the power to authorise the publication of any document with absolute privilege is one of the powers of the House of Commons adhering to the Senate by virtue of section 49 of the Constitution.

Each of these documents supported the conclusion that the publication of the report of the Select Committee on Allegations Concerning a Judge in accordance with the resolution appointing the committee would be absolutely privileged. The report was subsequently published and there was no challenge of any sort to its absolutely privileged nature.

Following the tabling of the papers, Senator Georges requested the tabling by the President of any further opinions received on this matter, either by the President or by any other committee of the Senate. In response to the request, the President (Senator Douglas McClelland) tabled the following papers:³¹⁰

Senate and its Committees: — Powers to meet after prorogation or dissolution —

Letter from the Attorney-General (Senator Greenwood) to the President of the Senate (Senator Cormack), dated 24 October 1972. Opinion concludes that Senate committees cannot lawfully continue to meet and transact business during the period from a

310 22/10/1984, J.1275.

dissolution of the House of Representatives to the re-assembly of Parliament in the next session. Also clear, in the Attorney's view, that the Senate itself cannot sit during that period.

Opinion by Mr R.J. Ellicott, when Commonwealth Solicitor-General. Opinion concludes that, on dissolution by proclamation of the House of Representatives, neither the Senate nor its committees have power to meet until Parliament is called together following the general election.

Opinion by Professor Colin Howard, University of Melbourne, dated March 1973. General conclusion that the Senate and its committees may sit and function during the period from a dissolution of the House of Representatives to the meeting of Parliament in the next session and during periods of prorogation of Parliament.

Opinion by Professor G Sawyer, Australian National University, dated approximately 1969. Opinion contends that once the House of Representatives is dissolved under section 5 of the Constitution, the "Parliament" ceases to exist and so does the possibility of the Senate continuing to function as an independent and separate entity until a "Parliament" is again in session pursuant to the appointment of a time by the Governor-General under section 5.

On the next sitting day, 22 October 1984, the Deputy Leader of the Opposition in the Senate (Senator Durack) moved:

That the Senate declares that where the Senate, or a committee of the Senate which is empowered to do so, meets following a dissolution of the House of Representatives and prior to the next meeting of that House, the powers, privileges and immunities of the Senate, of its members and of its committees, as provided by section 49 of the Constitution, are in force in respect of such meeting and all proceedings thereof.³¹¹

The motion was agreed to after debate, and without division.³¹² The Attorney-General (Senator Gareth Evans) argued that there were very strong legal doubts whether the Senate can in fact meet after a dissolution of the House of Representatives and continue, while so meeting, to enjoy the powers, privileges and protections normally available to it.

The Senate did not meet following the dissolution of the House of Representatives on 26 October 1984 but between that time and the opening of the next session of Parliament on 21 February

311 22/10/1984, J.1276.

312 SD, 22/10/1984, p. 2129-36.

1985, there were private meetings and public hearings of several Senate committees.

Since that time the Senate has not met after a dissolution of the House, but Senate committees have regularly done so for the purposes of private meetings and public hearings.

