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PARLIAMENTARY INQUIRIES AND GOVERNMENT WITNESSES

*Geoffrey Lindell**

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I Introduction

In the course of commenting on the use made by the House of Commons of its parliamentary privileges during the seventeenth century, Sir William Holdsworth had occasion to make the following observations:

> The privilege of freedom of speech enabled it to criticize the conduct of the government and of its agents, and to suggest changes and reforms. And there is no doubt that the growth of the committee system made this criticism very much more effective and more searching than it had ever been before. One of the charges which Charles I. made against the Commons, in his declaration of 1629. was the extension of their privileges by the establishment of standing committees. He complained that 'there are so many chairs erected to make inquiry upon all sorts of men, where complaints of all sorts are entertained'; that young lawyers sitting there decried the opinion of the judges, and maintained that the resolutions of the House were binding upon them; and, last and worst, that they have sent for and examined the attorney-general, the treasurer, chancellor, and barons of the exchequer, some of the judges, and other officials, for matters done in the course of their respective duties, for which they were in no way accountable to the House of Commons. 'Under pretence of privilege and freedom of speech, they take liberty to declare against all authority of Council and Courts at their pleasure ... Their drift was to break, by this means, through all respects and ligaments of government, and to erect an universal overswaying power to themselves, which belongs only to us and not to them'.[1]

Recent parliamentary inquiries have again brought to the fore the vexing question of the claim of executive privilege (formerly called 'Crown Privilege' and now usually referred to as 'public interest immunity') before parliamentary inquiries. The purpose of this article is to examine the legal and constitutional issues involved in the resolution of this question.

It will also deal with the power to establish parliamentary committees of inquiry and the existence of any constitutional limits on the scope of those inquiries, as well as the scope of the parliamentary power to 'send for persons, papers and records'. This will necessarily involve an examination of the rights and immunities of witnesses and, in particular, public servants who appear before Parliament and its committees. It will further entail an examination of the scope of judicial review in relation to these matters, especially in the light of the enactment of the Parliamentary Privileges Act 1987 (Cth). Although these issues can and do arise with all Australian parliaments they will be examined in this article with particular reference to the Commonwealth Parliament.

While these issues have been the subject of illuminating and comprehensive

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analysis before, especially by Professor Enid Campbell, they deserve further exploration in light of the enactment of the Parliamentary Privileges Act in 1987.[2]

II Establishment of parliamentary committees: sources of power to establish and scope of inquiries

Non-statutory committees

The power to establish Commonwealth parliamentary committees of inquiry, otherwise than by legislation, would seem to derive from ss49 and 50 of the Australian Constitution.[3] Those provisions read as follows:

> 49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.
>
> 50. Each House of the Parliament may make rules and orders with respect to
>
> (i) The mode in which its powers, privileges, and immunities may be exercised and upheld;
> (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

At the establishment of the Commonwealth in 1901, the House of Commons in the United Kingdom had the authority to act and did act as the 'Grand Inquest of the Nation'.[4] In *Howard v Gossett*[5] Coleridge J said:

> [T]he Commons are, in the word of Lord Coke, the general inquisitors of the realm ... it would be difficult to define any limits by which the subject matter of their inquiry can be bounded ... they may inquire into everything which it concerns the public weal for them to know; and they themselves ... are entrusted with determination of what falls within that category. Co-extensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, [and] to enforce it by arrest where disobedience makes that necessary ...[6]

Although the function described above may have assisted the House of Commons in the performance of its legislative functions, it seems clear that this inquisitorial function was not limited to only those cases which involved the enactment of legislation.[7]

The inquisitorial function was developed before the evolution of the British doctrine of responsible government, but it seems safe to assume that the function survived that development and has not fallen into disuse except perhaps as an incident of the power to impeach public officials.[8] It seems difficult to deny that there should be a general power to inquire into any matter that affects the public interest, read in its broadest sense. Strong and compelling notions of executive accountability to the Parliament can only reinforce that view, whether or not the kind of accountability adopted takes the form of responsible government. As will be explained later, modern developments tend to call into question the *way* the co-extensive power to punish persons who withhold information and documents for breach of parliamentary privilege is exercised, rather than the very *existence* of a parliamentary power to inquire.

It is true that before the enactment of the Parliamentary Privileges Act 1987 (Cth), the Commonwealth Parliament had enacted isolated legislative provisions which affected the powers and privileges of the Houses of the Federal Parliament. But those provisions did not displace the provisions of s49 as an exercise of the power of the Parliament to make other provisions pursuant to ss51(36) and 49 of the Constitution.[9] Even if the provisions of the 1987 Act constitute other provisions of this kind, s 5 of that Act states that the provisions of s49 of the Commonwealth Constitution continue in force except to the extent expressly provided in the same

Act. The 1987 Act does not appear to deal with the general parliamentary power to inquire, although as will be seen later it does regulate and modify in a significant way the power of the Houses of Parliament to punish for contempt, that is, for breach of parliamentary privilege.

A strong case can therefore be made to show that the inquisitorial function of the House of Commons can be exercised by the Houses of the Federal Parliament because of s49 of the Constitution. Nevertheless, there is judicial authority to support the view that s49 did not have the effect of vesting the inquisitorial function in those Houses of the Parliament, principally on the surprising and unpersuasive ground that the power of the House of Commons to act as 'grand inquest' or 'grand inquisitor' was 'a function of the House of Commons and not a power'. This was the view taken by the Northern Territory Supreme Court in *MacFarlane's* case,[10] where Forster J was required to interpret the similar provisions enacted in relation to the powers and privileges of the Northern Territory Legislative Council. According to this approach, s49 of the Constitution only operated to vest the Federal Houses of Parliament with such powers of inquiry as were necessary to enable them to carry out their legislative functions.[11] It is possible that this limitation may not be so narrow as to require the introduction of a Bill in the Parliament in order to justify the establishment of a committee of investigation.[12] But in any event, the interpretation adopted by his Honour has already been convincingly criticised by Professor Campbell with whose views on this question the present writer is in complete agreement.[13]

If then, as seems to be highly likely, the inquisitorial function is a 'power' or 'privilege' within the meaning of s49, any limitations on the matters which may be the subject of federal parliamentary inquiry will need to be derived by a process of constitutional implication or reading down the apparent width of the provisions of that section.

A more substantial limitation could be derived from the federal nature of the Australian Constitution. According to this possibility the topic of any federal parliamentary inquiry must be one that deals with a matter which is capable of being the subject of valid federal legislation, that is, relevant to the federal distribution of legislative power, for example, under ss51 and 52 of the Constitution. At a broad level of abstraction similar issues arise in relation to the scope of the Commonwealth's appropriation and executive powers.

Professor Lane[14] has drawn attention to the remarks contained in *Fitzpatrick and Browne's* case where it was said in relation to the 'very plain words of s49 itself':

> The words are incapable of a restricted meaning, unless that restricted meaning be imperatively demanded as something to be placed artificially upon them by the more general considerations which the Constitution supplies....[15]

An analogous issue in a more direct sense has of course already arisen in relation to the power of the Federal Parliament to legislate for the creation of Royal Commissions of inquiry. Existing authority suggests that at least in relation to Royal Commissions armed with coercive authority to command the attendance of witnesses and the production of documents, and despite s128 of the Constitution, the topics of inquiry must relate to matters which are capable of being the subject of valid federal legislation.[16]

This view is not without its difficulties and it has not escaped cogent criticism.[17] The main difficulty is that it is not easy to think of questions that could be put to a witness which could not have some possible bearing on Commonwealth legislative powers - a difficulty which over time has

only been made worse by the generous interpretation accorded to Federal legislative powers by the High Court, for example, the Commonwealth's corporations and external affairs powers, not to forget the power of the Federal Parliament to make grants of financial assistance under s96. The practical difficulties, when combined with the possibility that a Parliament may need to inquire into the need for an amendment to the Constitution to increase the scope of national legislative powers, point to the desirability of the Court departing from the view apparently favoured by the Privy Council in the *Royal Commissions* case.[18]

If this suggestion is accepted it would of course obviate the need to limit the literal reach of s49 of the Constitution by reference to a similar federal limitation. The absence of any such limitation may well have had the support of the former Chief Justice when he stated in *Australian Capital Television Pty Ltd v The Commonwealth*:

> Unlike the legislative powers of the Commonwealth Parliament, there are no limits to the range of matters that may be relevant to debate in the Commonwealth Parliament or its workings...[19]

The quoted remarks were made in the context of emphasising the indivisibility of freedom of communication in relation to political discussion and the public affairs of both the federal and State levels of government in Australia. This had the consequence, in his view, that the freedom of communication implied from the Federal Constitution 'extends to all matters of public affairs and political discussion, notwithstanding that a particular matter at a given time might appear to have a primary or immediate connection with Commonwealth affairs'. He pointed to a continuing relationship between the various tiers of government (for example through s96 grants of financial assistance to the States) which made it inevitable that matters of local concern have the potential to become matters of national concern. These considerations even if only by way of analogy, help to underline the practical difficulty, emphasised earlier, of giving effect to a federal limitation on the matters which may be made the subject of federal inquiries in Australia.[20]

Even if, notwithstanding the above considerations, the power to establish parliamentary committees of inquiry is federally limited, two factors would combine to lessen the practical significance of such a limitation. The first is that the limitation may not come into play unless the committee is armed with compulsory powers to require the attendance of witnesses and the production of documents. In *Lockwood v The Commonwealth*, Fullagar J suggested that if the inquiry was not vested with compulsory powers 'the Commonwealth ... [can] make an inquiry into any subject', subject to the need for a parliamentary appropriation to fund the inquiry.[21] Secondly, there remains the difficulty of establishing that a matter may never be relevant to the Commonwealth's legislative powers.

Another and associated federal limitation relates to the possible inability to inquire into matters that concern the processes and workings of State (as distinct from Territory) governments and their instrumentalities. In *Koowarta v Bjelke-Petersen*, Stephen J acknowledged that there are limitations to be implied from the federal nature of the Constitution 'which will serve to protect the structural integrity of the State components of the federal framework, State legislatures and State executives'.[22] Those limitations have revived, in a modified way, notions of inter-governmental immunity that were originally thought to have been laid to rest in the *Engineers'* case.[23] The modern doctrine has understandably been directed at limitations on the power of the Federal Parliament to make *laws* which bind State governments and their

instrumentalities. These were summarised as laws which either:

1 discriminate against the States; or

2 operate to destroy or curtail the continued existence of the States or their capacity to function as governments.[24]

These limitations on the power to make *laws* can also be used to limit the reach of other provisions contained in the Constitution which are not concerned with the power of the Federal Parliament to enact legislation, such as, for example, s117 as was demonstrated by the approach adopted by Brennan J in *Street v Queensland Bar Association*.[25] No doubt similar reasoning can and should be used to restrict the scope of s49.

Even if this view is accepted, it may not be easy to show that the mere holding of an inquiry into the affairs of a State government or its agents and officials will by itself violate the limitations mentioned above. Nevertheless, the Court might view differently any attempt to exercise the co-extensive power of the Federal Houses of Parliament to punish for contempt of Parliament the failure of State officials to answer questions or produce documents. The use of such coercive powers to further federal inquiries might well be seen as seeking to make State agencies and instrumentalities accountable and answerable to the Federal Parliament. The attempt by federal agencies to use coercive powers against a State for those purposes would, it is thought, run contrary to the well known remarks of Sir Own Dixon when he stated:

> The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities.[26]

Such a view would be easier to accept if it was held that the Commonwealth power of inquiry was federally limited by reference to the subject matter of the inquiry. But even if there is no limit on the subject of the inquiry, the general inability to compel State agencies to cooperate with the inquiry, might well be justified on the ground that the Constitution protects the way in which State governments function, that is, the *processes* of State governments rather than the *content* of their powers.[27] It might also have the effect of rendering such inquiries ineffective in a practical sense.

Leaving aside the difficult federal problems discussed above, the present writer generally favours the need to give full effect to the literal meaning of the provisions of s49 and does not support those provisions being read down. Their width is confirmed by the deliberate decision of the Framers not to limit the scope of the power of the Parliament to make its own provision in relation to its powers and privileges. They refused to limit that power by reference to the powers and privileges possessed by the British House of Commons. It was said that they should allow the clause to stand 'and trust to the good sense of the commonwealth as sufficient to guide us'.[28] In advancing this view it is not intended to suggest that the provisions of s49 can be read in disregard of provisions such as s71 of the Constitution. It is assumed, for example, that any inquiry would be established only to *inquire and report* and not to make *legally binding and final determinations of guilt or innocence*, so as to be exercising the 'judicial power of the Commonwealth'.[29]

That having been said, it is impossible to ignore the modern High Court's increasing disenchantment with British notions of constitutional law that rest upon having confidence in a parliamentary system of government and in the ability of voters to cure any abuse of power.[30] Under those notions any abuse of power is not a reason for denying its existence. This means that the potential for using

parliamentary inquiries with the sole aim of exposing the private affairs of individuals may well encourage the modern Court to depart from the unwillingness of the Court in former times to imply restrictions on the powers created by s49. It is easy to see how the reputations of individuals can be injured in a way that can leave them without any redress given the freedom of speech accorded to the proceedings of Parliament.

The possible willingness of the Court to prevent such abuse would contrast sharply with the adherence to the literal width of s49 displayed in the unanimous judgment of the High Court in *Fitzpatrick and Browne's* case,[31] but this only highlights the changes in judicial approach which began to be apparent towards the end of the last decade. Without necessarily agreeing with the new approach, it suffices to say that the Court's new found concern for the rights of individuals (and conversely its increasing distrust for the workings of government) may well result in the scope of s49 being restricted by impliedly limiting the power of inquiry in order to protect the rights of the ordinary citizen.

Beyond merely noting their possible existence, no attempt is made here to predict the nature and scope of those implied limits. The possible role of the doctrine of the separation of powers as a reason for impliedly limiting the scope of s49 will be discussed later when dealing with the effectiveness or otherwise of claims of executive privilege as grounds for refusing to comply with orders to answer questions or produce documents.

Statutory committees

Some parliamentary committees are established by Federal legislation and presumably the source of constitutional power to establish them is to be found in s51(39) of the Constitution, when read in conjunction with any other primary heads of legislative power that are relevant to the matters which may be the subject of inquiry by those committees.[32]

Similar issues would seem to arise with the constitutional power to establish statutory committees, to those that were discussed above in relation to non-statutory committees. It would be surprising if different results could be obtained by reference to whether the parliamentary committees were established by legislation or under s49 of the Constitution.

III Conduct of inquiries

A power to send for 'persons, papers and records'

It will be recalled that in the passage quoted from *Howard v Gossett*, Coleridge J indicated that the power to inquire would be ineffective without the co-extensive authority to call for the attendance of witnesses and to enforce it by arrest where disobedience makes that necessary.[33] This authority extends to the call for the production of documents and is sometimes referred to the power 'to call for persons, papers and records'.

The authority in question carried with it the exclusive power of the House of Commons to determine whether any disobedience constituted a breach of parliamentary privilege and also to impose penalties for that breach.

Questions have been raised about the basis and historical origin of this authority. There are problems with the traditional statement that the ability to punish for contempt was a privilege enjoyed by both Houses of the British parliament collectively 'as a constituent part of the High Court of Parliament' since it has been suggested that only the House of Lords can be said to have the historical status as a 'High Court'.[34] The traditional statement would therefore make it difficult to explain the acknowledged existence

and exercise of that authority by the House of Commons. It would also have obvious implications for the position in relation to the Federal Houses of Parliament notwithstanding s49 of the Constitution since it is difficult to treat either of those Houses as a 'High Court'.

The present writer agrees that it is more realistic to view the power to send for persons, papers and records as associated with the fundamental right of Parliament to information, not in any judicial capacity, but in its scrutinising role as a legislature.[35]

While the theoretical existence of this authority is rarely questioned and is fully accepted in the recognised texts on parliamentary law and practice both in the United Kingdom and Australia, the need for its formal exercise is obviated by the usual willingness of prospective witnesses to cooperate with requests to appear or produce documents. However, in more recent times there are increasing signs that willingness is becoming less forthcoming, at least in the United Kingdom. This appears to be the case both as regards ordinary and official witnesses.[36] It may also be the case in Australia as regards the increasing use being made of executive privilege as a ground for the failure of government witnesses to comply with requests for information or documents sought by the Senate.[37]

The signs have been sufficiently strong to lead a number of commentators to point to a growing gap between the theoretical existence of the authority and the reality regarding its actual exercise.[38] The gap will be the subject of further discussion below but, for the present, it is necessary to mention that, so far as non-statutory committees are concerned, the power to send for persons, papers and records is regarded as being vested in the Houses of Parliament so that an appropriate delegation of the same power is needed before the power can be exercised by a parliamentary committee.[39] It seems that doubts have been expressed as to whether joint committees are invested with the same powers, privileges and immunities as the committees of the individual Houses, apparently because s49 of the Constitution invests the two Houses and the *committees of each House* with the powers, privileges and immunities of the House of Commons at the establishment of the Commonwealth.[40] If these are well founded they could prevent both Houses of the Federal Parliament lawfully delegating the power to send for persons, papers and records to joint committees. However it has also been suggested that these doubts have now been put to rest by the enactment of the Parliamentary Privileges Act.[41] Presumably the doubts could be overcome by legislation enacted pursuant to ss49, 51(36) and 51(39). In the case of statutory committees it seems safe to assume that s51(39) is wide enough to support legislation which vests the same power in those committees, including joint committees.[42]

The need for a delegation of power in relation to non-statutory committees can be expected to have practical implications for the establishment of inquiries into the conduct of Ministers and other government officials. A House of Parliament controlled by the Executive might well wish to use that control to prevent such a committee from having the necessary coercive authority needed to conduct that inquiry.[43] The same problem would not however arise in a House that is not controlled by the Executive as is usually the case with the Australian Senate.

Consequences of failure to obey lawful orders to answer questions and interference with witnesses

It will be clear from the foregoing that the failure of a witness before a parliamentary inquiry to answer a question which a witness is obliged to answer could attract,

in the case of non-statutory committees, the penal jurisdiction of the relevant House of Parliament. That jurisdiction is exercisable by the House since it is vested in the House and not its committees. Furthermore, the exercise of the jurisdiction is now subject to the Parliamentary Privileges Act and, in the case of the Senate, certain Resolutions passed by it to govern the exercise of its parliamentary privileges. As will be seen in more detail later, s12 of that Act creates a separate statutory offence in relation to conduct which amounts to improper interference with witnesses.

In the case of some statutory committees, there are statutory provisions which create offences triable and punishable in ordinary courts of law.[44] The obligations of witnesses are qualified by reference to whether the witness acts without a 'reasonable excuse'.[45] In the case of other committees of this kind (referred to earlier as the 'hybrid' variety), all matters which relate to their powers and proceedings are, as mentioned before, determined by resolutions passed by the Houses of Parliament.[46]

Possible limitations on these powers - major areas of contention

At this stage, it is convenient to deal with a number of possible limitations on the powers discussed above, before dealing in more detail with the legal consequences of the failure of witnesses to comply with lawful orders to answer questions or produce documents. Those possible limits arise out of the following matters:

1 Executive privilege;

2 Secrecy provisions; and

3 Statutory immunities of witnesses.

1 Executive privilege - the conclusiveness of executive certificates

(a) Existing position

The theoretical position discussed above would seem to suggest that the power to send for persons, papers and records can be exercised in relation to any person, whether the person is a government official or a private citizen.[47]

It is true that a special procedure may need to be employed in order to obtain the production of a public paper which concerns the royal prerogative. The Standing Orders of both Houses of the Federal Parliament require an address to the Governor-General praying that the paper be laid before the respective House.[48] It is also the case, as indicated by Professor Campbell, that it is not entirely clear whether the production of such papers can be coerced in the same way as disobedience to an order that a paper be laid before a House of the Parliament.[49] However this is likely to be a matter of parliamentary procedure which, at most, may only require a change or suspension in the Standing Orders of the relevant House pursuant to s50 of the Constitution. Any difficulty as regards the obligation to produce such a document is likely to rest on more fundamental considerations are to be discussed below.

The power to send for persons, papers and records when official witnesses and papers are involved, has been complicated by at least two important considerations, which cannot be regarded as merely procedural. The first is the possibility of restricting the scope of this power by reference to the notion of public interest immunity (formerly described as 'Crown Privilege' and sometimes referred to in this article as 'executive privilege', when claimed by the Executive branch of Government).[50] The second consideration relates to the probable immunity of the members of one House of the Federal

Parliament from the authority of the other House of the same Parliament.[51] The same immunity is acknowledged to exist in relation to the Houses of the British Parliament.[52] The immunity is likely to be based on the need for each House to function independently of, and without interference from, the authority of the other House. It appears to make good sense from a policy point of view, as well from an analytic perspective, since it may flow directly from the terms of s49 of the Constitution if, as seems likely, this was an immunity enjoyed by the House of Commons at the establishment of the Commonwealth.

This immunity may therefore protect a Minister who is a member of the House of Representatives from the authority of the Senate, even though, paradoxically, a public servant employed in the same Minister's Department may not enjoy the same immunity. The crucial issue is whether the same public servant should enjoy a similar immunity in respect of actions undertaken by the public servant when acting in accordance with the instructions of the Minister.

The first of the two complications foreshadowed above has the capacity to raise a spectacular clash of powers between the Legislative and Executive branches of government especially where the conflict arises from the refusal of the Executive to comply with the orders of the Senate. So far, however, there has been what virtually amounts to a history of parliamentary acquiescence in cases where the Executive branch has been determined to maintain its claim to privilege.[53] But this has occurred without either House of Parliament ever conceding the legal effectiveness of claims to executive privilege in the context of parliamentary inquiries.[54]

Furthermore, and significantly, the Commonwealth Government has not gone so far as to claim the ability to direct civil servants who give evidence to parliamentary committees 'not [to] answer questions which are or appear to be directed to the conduct of themselves or other named officials', as has apparently occurred in the United Kingdom.[55] The latter development is comparatively recent and flies in the face of traditional statements of British parliamentary law and practice. The Commonwealth's claim to the conclusiveness of its assertions that it would be contrary to the public interest for evidence to be provided to a parliamentary inquiry can be traced back to a statement made to Parliament in 1953 by the then Prime Minister, Mr RG Menzies, and later also advice provided by the then Solicitor-General, Professor KH Bailey, which was tabled in Parliament in 1956.[56] Heavy reliance was placed by them on the decision of the House of Lords in *Duncan v Cammell, Laird & Co Ltd*[57]- a case which should be regarded as the high-water mark of the doctrine of public interest immunity

As others have pointed out, the issues involved in public interest immunity which have been developed by courts in ordinary litigation are not necessarily the same as those which can arise in parliamentary proceedings.[58] In one case the courts are concerned to balance the public interest in securing justice between litigants with the need to keep secret information, the disclosure of which could damage the community at large. In the other, the Houses of Parliament are concerned with the public interest at large and whether they have an overriding interest in being informed about and by the Executive; and also whether Ministers should be allowed to be the sole judges of what the public interest requires.[59]

The wider public interest gives rise to a number of important issues. Those are whether the Houses of Parliament have an overriding interest in being informed by the Executive and whether it is safe to allow Ministers to be the sole judges of what the public interest requires not to be disclosed. It surely requires little

imagination to see how such a discretion could be used by Ministers wishing to escape public scrutiny in relation to their own conduct or that of other persons for whom they are responsible. In recent times the Matrix Churchill affair in the United Kingdom[60] and, to a lesser extent, in Australia, the attempt by the Commonwealth Treasurer to prevent the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media having access to certain documents,[61] illustrate how claims to executive privilege can be, and are, arguably abused. This recalls the rather humorous remarks quoted by Megarry:

> If anything shall seem,
> The Minister shall deem:
> His certificate of demption
> Shall confer complete exemption.[62]

It is sometimes suggested that the remedy for any abuse of the claim to executive privilege before parliamentary committees lies in the so called 'court of public opinion', that is, in allowing the matter to be the subject of political judgment by the electorate.[63] In the view of this writer, however, it is most unlikely that electors would be able to focus on issues of such a detailed character in the course of an election.

There have also been important changes to the doctrine of public interest immunity as it applies to litigation in the ordinary courts of the land since the case of *Duncan v Cammell, Laird & Co Ltd* was decided. In the first place, the trend has been away from the ready recognition of such claims towards the position where the courts in Australia (and in the United Kingdom) assert the right to examine documents for themselves, if necessary in secret, in order to determine whether a claim to non-disclosure should be upheld. In other words, the claims are not treated as conclusive.[64]

The second important change relates to the enactment of the federal freedom of information legislation. As others have pointed out it would be difficult to sustain a claim for executive privilege in relation to matters which are required to be disclosed under that legislation.[65] The Official Government Guidelines issued by the Federal Government to its employees and officers who are asked to appear before parliamentary committees (last revised in 1989) recognise that claims to executive privilege can still be made in areas which are exempt from disclosure under the freedom of information legislation. The categories of exemption make sense and should not, it is suggested, be lightly disregarded, as a matter of practice and convention.

However, even in the areas traditionally regarded as coming within the legitimate ambit of executive privilege such as, for example, defence, it is sobering to remember that the British House of Commons entertained an inquiry into the conduct of the Crimean War.[66] Moreover claims of executive privilege based on grounds relating to defence and national security were effective to prevent a House of Commons Committee from inquiring into matters which later came to light as a result of the refusal of a court to uphold the conclusiveness of claims of privilege advanced by four Ministers of the Crown in the prosecution of companies for exporting certain materials without export authority in the Matrix Churchill affair.[67]

It also needs to be borne in mind that the assertion of executive privilege sanctioned and even required by the Government Guidelines issued both in Australia and the United Kingdom has never received parliamentary approval or parliamentary acceptance in either country.[68] There is no obligation on the part of government officials to claim the exemption created by the freedom of information legislation.[69] In any event, it cannot be said that the same legislation is intended to modify or

override the power and privileges of Parliament referred to in s49.[70]

The extent, if any, to which executive privilege operates as a legal restriction on the power of the Houses of Parliament to require official witnesses to answer questions or produce documents, remains an open question. Not surprisingly, and so far as this writer is aware, the matter has never been the subject of authoritative judicial resolution.[71] Nevertheless a question can be raised as to whether the issue will continue to remain unresolved.

Presumably the control exercised by a government under the Westminster system was and will continue to operate as a brake on inquiries instituted in the lower or more popularly elected Houses of Parliament. Thus a government which enjoys the confidence of those chambers will no doubt be in a position to block any attempt to ignore or overrule the claim to privilege advanced by the same government. The one possible exception may arise in the case of minority governments. Leaving aside that possibility, this means that care needs to be exercised before reliance can be placed on the position in the United Kingdom, since even in the case of the House of Lords, the British Government would no doubt have ways of ensuring that the same body did not press its claims for information against the wishes of the government in office, especially having regard to the non-elective nature of that legislative chamber.

The same cannot be said about the position of the Senate which is of course an elective body even if arguments can be raised about whether its elective basis is as democratic as that of the House of Representatives. Moreover the likelihood of the Senate ignoring a claim to privilege advanced by the government of the day must be classed as much greater when, as is usually the case, government is unable to obtain a majority in that chamber. Presumably the only weapon a government could use to dissuade the Senate pressing its claims to information claimed to be privileged would be the threat of a double dissolution of the Parliament if the conditions for such a dissolution were satisfied or, but perhaps less effectively, a prorogation of the parliament or a dissolution of only the House of Representatives.[72]

Whatever role public interest immunity can and should play as a matter of parliamentary practice or convention, in this writer's view it should not operate to restrict the legal scope of parliamentary inquiries and the co-extensive powers needed to make those inquiries effective under s49 of the Constitution.

No doubt it would be possible to construct arguments to support the contrary view based on the doctrines of responsible government or the separation of powers so as to implicitly cut down the potential reach of the powers that can otherwise be derived from s49. According to those kinds of arguments, the provisions of s49 would need to be read subject to implied restrictions which might be seen to flow from ss61 and 64 of the Constitution when those provisions are read against the background of the British notions of responsible government.

It is accepted that those notions are concerned to emphasise the responsibility which Ministers owe to parliament or, to be more accurate, the lower or more popularly elected House of Parliament.[73] The 'responsibility' referred to here is essentially political in the sense that if a Minister or Ministers cease to enjoy the confidence of the appropriate chamber they are under a conventional duty to resign. Under traditional and, it is suggested, dated understandings of ministerial responsibility and responsible government, public servants would only be seen as emanations of the Ministers in charge of their departments and would only be 'accountable to the public through

the accountability of ministers and cabinet to parliament'.[74]

These considerations have implications which go much further than the failure to give evidence covered by a claim of privilege and might well be used to deny:

1 not only the ability of parliamentary inquiries to require the giving of evidence by public servants (since if evidence is to be given at all it should be by the person who is regarded as being solely responsible to Parliament);

2 but, and more fundamentally, the legal obligation of the Minister to give the evidence.

In other words, the responsibility is purely political in the sense that the only sanction for failing to give the evidence is that the Minister or Ministers may lose the confidence of the Parliament and may in this way ultimately be forced to resign.

There are two responses which can be advanced against this highly restrictive view. In the first place the ability of a Parliament to withdraw its confidence in Ministers would be greatly assisted by ensuring that the Parliament can ascertain all the facts and information needed to make an informed judgment on the conduct of Ministers and the government agencies for which they are responsible. Some might even argue that this should be seen as not merely desirable, but essential, in ensuring the accountability of Ministers to the Legislature. Looked at from this perspective, and leaving aside any inter-House immunity which Ministers may enjoy by reason of their membership of the other House, the power to obtain evidence from government officials would actually aid and strengthen the operation of responsible government at the very time when its success as a form of government has come under serious challenge because of the executive domination of the Parliament. This would also apply to the power of the Parliament to override claims of executive Privilege.

Secondly, the writer has had occasion to comment before on the unsuitability of using the conventional rules of responsible government as a basis for legal obligations or restrictions which are enforceable in a court of law.[75] The main difficulty is the inherent vagueness which surrounds most aspects of those rules - as is illustrated by the use of that notion to support opposing sides of the argument outlined above. There is also the loss of one of the supposed advantages of rules which are developed by practice and convention, namely, their flexibility and ability to adapt and change to meet new circumstances.

Similar considerations can, it is suggested, be used to reject limits on the power of parliamentary investigations to obtain evidence from governments which are based on the doctrine of the separation of powers. It has been said that it is one of the main general doctrines underlying the Constitution.[76] This is partly due to the design of the Constitution and, in particular, the provisions of ss1, 61 and 71. The main significance of the doctrine in the Australian context has been the separation of the legislative and executive powers, on the one hand, from the judicial powers, on the other, given the union of the legislative and executive powers that results from the adoption of a Westminster style of government.[77]

Doubtless, a rigid application of the separation of powers doctrine in relation to the legislative and executive powers of the Commonwealth would cast considerable doubt on the ability of the Parliament to legislate, whether under s49 or 51 of the Constitution, to

1 confer the 'executive power of the Commonwealth' on any body or person other than the Executive branch of the federal government; and to

2 interfere with the exercise of the same power by the same branch of the government in question.

Constitutional constraints of this kind have certainly been recognised in relation to the exercise of the judicial power of the Commonwealth. So far as the writer is aware, there has not been any judicial discussion of the second of the above two issues in relation to executive power, except for the issue of the constitutional immunity of the Commonwealth and its instrumentalities from the operation of State laws. That issue involves, however, special considerations based on the federal character of the Constitution.

There has also been very little judicial discussion of the first of those issues. It has had a bearing on the constitutional validity of Commonwealth-State cooperative arrangements. The writer and some other commentators have concluded that in the present state of the authorities, s61 of the Constitution should not be read as precluding the vesting of the executive power of the Commonwealth in State officers and also autonomous federal statutory authorities.[78] Nevertheless, doubts persist regarding the constitutional validity of 'legislation which seeks to strengthen parliamentary control over the executive branch by giving either House authority to give binding directions to executive officers concerning the manner of performance of their legal functions and duties'.[79]

Even so, arming parliamentary investigations with the power to override claims of executive privilege and the holding of such investigations generally, does not amount to *vesting* those investigations with executive power so as to attract the doubts in question. It is true that they may be seen as a form of *interference* with the exercise of the same power. However, the extent to which they are viewed in this manner may have to be offset against the role such investigations play in making more effective the parliamentary oversight of the activities of the Executive and thereby help to strengthen the operation of responsible government in Australia. There is of course no shortage of judicial authority which makes it permissible to interpret the Constitution against the background of responsible government.[80]

The view advanced above is reinforced by the newly implied constitutional freedom of political communication based upon the doctrine of representative democracy.[81] The freedom and the doctrine from which it is derived can only emphasise the importance of maximising the free flow of information necessary to enable electors to make informed decisions about their political representatives. Thus, as was said by Mason CJ, Toohey and Gaudron JJ in the *Theophanous* case:

> [t]he implied freedom of communication is not limited to communication between the electors and the elected. Because the system of representative government depends for its efficacy on the free flow of information, ideas and debate, the freedom extends to all those who participate in political discussion. By protecting the free flow of information and ideas and of debate, the Constitution better equips the elected to make decisions and the electors to make choices and thereby enhances the efficacy of representative government.[82]

Principles of this character, although formulated in a different context, are not conducive to the encouragement of government secrecy which can be achieved through the use of claims to executive privilege.

It is doubtless possible for powers of parliamentary investigation to be used to obstruct the operations of the Executive branch of government by forcing that branch to divert valuable resources needed to service onerous and burdensome demands for information made by such investigations. Presumably, Opposition parties could then use their numbers in the Senate to drive home their

party political advantage, assuming that is, that the inquiries were able to uncover embarrassing information. Although unwelcome to some, others, including the writer, might well see such a result as a vindication of the accountability principle. However, damage could well be done if the powers of inquiry were pressed too far in the sensitive areas of foreign relations and defence.

One further problem that could and has arisen, concerns the unfortunate position of public servants who are ordered to give evidence to an inquiry instituted by one House of the Parliament despite a Ministerial instruction not to give the evidence in circumstances where the relevant Minister cannot be compelled to give the same evidence because the Minister is a member of the other House, that is, as a result of House immunity. The precise legal position of public servants who find themselves inn such unenviable situations and that of their Ministers, will be discussed further below.[83]

Leaving aside that problem, it is, in the end, a matter of balancing the difficulties discussed above with the important consideration of accountability and of course the right of the public to be fully informed about the actions and conduct of its government. In these circumstances, and given the absence of judicial authority to support the operation of public interest immunity as a legal restriction on parliamentary powers of inquiry, the writer agrees with the view consistently taken by Professor Campbell under which the immunity in question does not legally limit those powers of inquiry derived from s49 of the Constitution.[84]

Not surprisingly this is also the view asserted by various Senate committees.[85] The same view was apparently shared by the Joint Select Committee on Parliamentary Privilege.[86] What is more surprising is the important recent concession made by the Leader of the Government in the Senate which recognises the power of the Senate to overrule a claim to executive privilege. When confronted by his acceptance of the power earlier when in Opposition and asked whether he still thought that 'executive privilege is for the Senate to determine', he replied:

> In the particular context that we are talking about here - a tussle about whether or not some document or some information should be revealed - the claim that an executive government may make of public interest immunity, which is the currently preferred expression, is, I acknowledge, ultimately one for the House of Parliament to determine. That follows from first principles, if you accept that is the way the Constitution works on these matters.
>
> As a technical matter, that is the case. But we are arguing, as so often is the case when it comes to constitutional matters, that the technical power might be absolute but the way in which it should be exercised in practice should be regarded as subject to all sorts of conventions and limitations.[87]

(b) Proposals for change

The foregoing discussion has concentrated on the existing legal and constitutional position. Even if the view favoured by the writer is correct, various options have been advanced as to how the issue should be handled in the future. These may be categorised under four broad heads.

1 Retain the present position without any attempt to change the law on the understanding that as the law stands at present executive certificates of what should not be disclosed will *not* be treated by the courts as conclusive if the issue should ever be resolved by them.[88]

2 Retain the present position on the same understanding as was stated in the first option, but enable the relevant House of Parliament to seek the advice of independent arbitrators, appointed on an *ad hoc* basis, in

deciding whether claims to executive privilege should be upheld in cases where this is thought appropriate.

3 Change the law to ensure that, whatever may be the correct understanding of the law as it stands at present, the Executive becomes the conclusive judge of what matters should not be disclosed, that is, treat executive certificates as conclusive, as has occurred in certain jurisdictions.[89]

4 Change the law to allow the courts to decide whether to uphold claims advanced by the Executive to privilege from disclosure by reference to whether this would be in the public interest.

The fourth option follows the solution to the problem adopted in the United States.[90] It is also one of the solutions which was advocated in the wake of the claim to executive privilege advanced in response to requests for documents and evidence made by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media. A private member's Bill was introduced into the Senate for this purpose by Senator Cheryl Kernot, the Leader of the Australian Democrats.[91] The same Bill would allow the Federal Court to resolve whether claims of public interest immunity should be upheld and would also seek to ensure that public servants could not be imprisoned for their refusal to give evidence or produce documents pursuant to a Ministerial direction to that effect.[92] This solution was, however, rejected by the Senate Committee of Privileges in the report presented to the Senate on the Bill in question.[93]

When the Senate referred the Bill to the Senate Privileges Committee for inquiry and report it noted a number of matters. In the first place it was asserted that on several recent occasions the government had failed to comply with orders and requests of the Senate and its committees for documents and information. The following three instances were cited by way of illustration:

1 the order of the Senate of 16 December 1993 concerning communications between Ministers on woodchip export licences;

2 requests by the Select Committee on the Australian Loan Council for evidence; and

3 requests by the Select Committee on Foreign Ownership Decisions in Relation to the Print Media for documents and evidence.

The Senate also stated that the government had, explicitly or implicitly, claimed executive privilege or public interest immunity in not providing the information and documents sought by the Senate and its committees. It asserted in its resolution that the grounds for these had not been established but merely asserted and that the Senate had no remedy against those refusals to provide information and documents, except its power to impose such penalties on a Minister who was a member of another House and that it would be unjust for the Senate to impose a penalty on a public servant who, in declining to provide information or documents, acted on the directions of a Minister.[94]

The latter is a telling point which may well be an important reason to explain why the Senate has not seen fit to test its power to override claim of executive privilege. A solution to this problem will need to be found if parliamentary inquiries are to function effectively without Executive obstruction and thus generally assist in the scrutiny role to be performed by the Parliament.

The rejection of the solution embodied in the private member's Bill was not based on grounds of constitutional invalidity

although questions were raised by some of the witnesses who gave evidence to that Committee as to whether the Federal Court could be empowered to rule on issues of executive privilege before parliamentary inquiries because of the separation of powers doctrine. The questions centred on whether the performance of the function proposed to be given to the Court was not judicial within the meaning of the requirement implied from the Constitution in the *Boilermakers'* case.[95] A further problem perceived with the legislation was that even if the function was capable of being characterised as judicial, the width of the discretion which it was proposed to vest in the Federal Court in the performance of that function under the legislation as drafted, was sufficient to destroy its character as judicial for the purposes of the same requirement.

Without examining the issue in any detail, the present writer is inclined to the view that the function in question is unlikely to be viewed as inherently non-judicial so as to be incapable of assignment to a court according to the approach taken by Isaacs J and approved in *R v Quinn; ex parte Consolidated Food Corporation*.[96] Rather, it is more likely that the function of ruling on claims of privilege before parliamentary committees is one that is subject 'to no *a priori* exclusive delimitation' and is therefore 'capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances'.[97] In addition, although not identical, it is sufficiently similar to the function which courts already perform when they adjudicate on claims of public interest immunity in ordinary litigation involving private citizens and the State.

However, if it is assigned to the courts it will have to be exercised in a judicial way. This may suggest the need to ensure that the breadth of any discretion which is entrusted to a court is circumscribed since it is accepted that the exercise of broad policy considerations is a distinguishing feature of the role played by the executive and legislative arms of government. Thus, while the concept of public interest might well be left undefined if the function of ruling on claims of privilege is vested in the Parliament or its committees, the same may not be the case of the function is given to a court of law. There may need to be 'objectively determinable criteria' to define what is meant by the public interest. if a court is to be required to determine when certain evidence should be treated as privileged from disclosure on that ground.[98] The prescription of factors to define the content of the public interest, for example, by reference to a class of evidence such as evidence involving the disclosure of matters relevant to defence or national security, should be sufficient to protect legislation of this kind from attack based on the second of the grounds relating to the separation of powers.

The private member's Bill referred to above envisaged that the Federal Court would be given the power to issue orders for the giving of evidence which was not found to be privileged by the Court and the commission of a statutory offence in the event of a failure to comply with any such orders. By relying on the courts to enforce the orders, and not the Parliament in the exercise of its power to punish for contempt, there can of course be no suggestion that a non-judicial body has been vested with the judicial power of the Commonwealth contrary to s71 of the Constitution. This avoids the need for the High Court to reconsider the correctness of *Fitzpatrick and Browne's* case,[99] which suggests that the power of the Parliament to punish for contempt of Parliament is consistent with s71 on historical grounds.[100] No doubt the provisions of s80 would also have to be observed, whatever they may require.

The Senate Privileges Committee rejected the solution embodied in the private member's Bill and recommended that it

not be proceeded with. It did not accept that the courts had a role to play in this area. The Committee considered that if an order of a House or committee of the House was not obeyed by a public servant acting on the instructions of a Minister, it was for the relevant House to take such action under its contempt powers as it considered appropriate in the circumstances.[101] This of course was based on the assumption that those powers existed.

The Committee had regard to evidence given by witnesses who appeared before it, which suggested that the issues that a court would be called on to decide were essentially political and that the Bill would undermine the authority possessed by the Houses of Parliament.[102] The submission tabled by the Government was also opposed to the Bill essentially because of the danger of courts becoming politicised. The Leader of the Government in the Senate also relied in speaking to the submission on the adequacy of the political processes for resolving conflicts between the Executive and Legislative branches of government. In his view the 'court of public opinion' would also act to cure any abuse of the claims to privilege advanced by a government unwilling to divulge information to the Parliament. It is however difficult to envisage electors being able to concentrate on issues of this kind in the course of an ordinary election. Moreover, as was pointed out by some witnesses, it would be difficult for electors to make an informed judgment when the Government itself is in a position to determine what information should be made public.[103]

Returning to the question whether the existing position should be changed by the enactment of the Bill introduced by Senator Kernot, the writer is not persuaded by the reasons advanced against its adoption. In particular, although it may be conceded that the function which a court performs in deciding on claims to privilege in ordinary litigation is not identical to the task it would be called on to perform under the Bill, the differences are not so great as to prevent a court performing that task. This would be especially so if the court was given adequate guidance on the factors which it should take into account in weighing up matters relevant to the public interest as explained above. In addition courts are already involved under our system of government in ruling on matters of a political character without this having the effect of calling into question their impartiality. It would also provide the mechanism which the Senate thought was lacking when it referred the private member's Bill for inquiry and report, namely a 'mechanism for having claims of executive privilege or public interest immunity adjudicated and determined by an impartial tribunal'.[104] The kind of solution propounded in the Bill would also resolve the thorny question concerning the liability of a public servant for refusing to provide evidence to a parliamentary committee pursuant to a Ministerial instruction.

2 Secrecy provisions

A second major area of contention regarding the scope of parliamentary inquiries concerns the operation of statutory provisions which make it an offence for public officials to divulge or make public information gained in the course of performing their statutory duties, for example, the provision of information by officials who are responsible for administering the collection and recovery of income tax.[105]

A further example of such a secrecy provision can be found in s51 of the National Crimes Authority Act 1984 (Cth) and its existence has been cited as a reason for limiting the powers of inquiry possessed by the Joint Parliamentary Standing Committee on the National Crime Authority, an important statutory body established to investigate certain criminal activities. In particular, it has been

suggested that the Committee cannot lawfully require the disclosure of information gained by the Authority in the course of its investigation of criminal activities.

A conflict arose between the Clerk of the Senate on the one hand, and the Federal Attorney-General's Department on the other, regarding whether the provisions of s51 had the effect of overriding the powers of inquiry which the Standing Committee had derived from s49 of the Constitution.[106] The conflicting legal opinions included an opinion given by Dr G Griffith QC, the Commonwealth Solicitor-General.[107] Those advices seem to accept that the basic issue at stake is one of statutory interpretation, namely, whether the Parliament when it enacts a secrecy provision can be taken as having intended to override the parliamentary powers and privileges referred to in s49 of the Constitution since it is open to the Parliament to modify or alter those powers and privileges under the same section of the Constitution, when read in conjunction with the provisions of s51(36). There is also acceptance of what seems to be a sound principle of statutory interpretation under which it may be presumed that the Parliament should not be taken as intending to override its powers and privileges unless there are express provisions to that effect or such an intention can be inferred by necessary implication. The principle enjoys some judicial support and was probably applied in *Duke of Newcastle v Morris*.[108]

The disagreement turns on the nature of the provisions which are needed to evince the contrary intention. The nature of statutory presumptions of this kind makes it almost inevitable that there will be disagreement about the kind of provisions needed to show the existence of the contrary intention. This, however, does not destroy the utility of the presumption discussed above given the importance that should attach to powers and privileges of both Houses of Parliament.

3 Statutory immunities of witnesses

The legislative power enjoyed by the Federal Parliament under ss49 and 51(39) would seem to be clearly sufficient to support the enactment of legislation to clarify or alter the existing legal position with regard to the question of executive privilege discussed above. So far as the writer is aware and despite the need for such legislation, legislation of this kind has not been passed even in relation to those statutory committees which derive their existence from legislation.

It is true that witnesses before some of those committees are given the 'same protection and privileges' as are witnesses who appear before the High Court, for example, in relation to self incrimination or legal professional privilege.[109] However, as others have pointed out, it is difficult to treat public interest immunity as an immunity which belongs to the witness.[110] Accordingly, it is suggested that similar problems arise with witnesses who appear before statutory committees in relation to claims of executive privilege as were discussed above in relation to witnesses who appear before the non-statutory committees and also those statutory committees which derive their powers and privileges from s49 of the Constitution.

The only differences would seem to be that the arguments which seek to restrict the powers to require the giving of evidence by reference to executive privilege would need to be based on restrictions implied from the relevant legislative provisions which establish and arm the committees with those powers. In addition, it may be argued that a public servant who fails to provide the evidence required by a parliamentary committee because of an instruction given by a Minister may have a 'reasonable excuse' or 'just cause' for refusing to give the evidence in question. According to this view the public servant would not commit the relevant statutory offence for acting in that way.[111]

IV Protection and immunities of witnesses

It is appropriate at this stage to consider the general question of what, if any, protection and immunities witnesses, including official witnesses, enjoy when they appear before parliamentary inquiries and investigations.

The position of witnesses before the statutory committees has already been mentioned. Apart from additional provisions which make it an offence to interfere with such witnesses, little more needs to be said, except that the statutory protection granted them seems to be generally satisfactory from a civil liberties perspective.

Much more open to criticism is the position faced by witnesses who appear before non-statutory committees and other committees which derive their powers and privileges from s49 of the Constitution. At the outset it needs to be appreciated that those witnesses are not entitled to the same immunities, rights and privileges, as are those enjoyed by witnesses who appear in ordinary judicial proceedings. The relevant law which governs their position is to be found in the law which deals with parliamentary privilege. The disparity in the position of those witnesses has attracted criticism - and one that is easy to understand especially when it is recalled that the power to try and punish for contempt has in the past been thought to rest exclusively with the Houses of Parliament, although this has been considerably modified as will be shown below as a result of the passing of the Parliamentary Privileges Act 1987 (Cth).

Debate about the need to enact a general Parliamentary Witnesses Act has dated from very early times after the Commonwealth Parliament began to function.[112] Suffice it to say no such legislation was passed at least until 1987. While witnesses did not enjoy the same rights as witnesses in ordinary judicial proceedings, they did and continue, to enjoy the protection of Article 9 of the English Bill of Rights which operates in relation to the Commonwealth Parliament by virtue of s49 of the Constitution and now also s16(1) of the Parliamentary Privileges Act. Article 9 states:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

The conduct of a regularly constituted parliamentary inquiry, whether conducted by either of the Houses of Parliament or their committees, would undoubtedly give rise to a 'proceeding in Parliament'. This is put beyond doubt by the provisions of s16(2)(a) of the Parliamentary Privileges Act. As a result, witnesses who appear before such inquiries are likely to enjoy protection from any liability in defamation in respect of any evidence given by them at those inquiries. They will also enjoy certain protection in relation to the use which may be made of the same evidence in ordinary civil or criminal judicial proceedings. As can be seen from the extensive notes which appear in the Explanatory Memorandum to the Parliamentary Privileges Act in relation to clause 16, the precise extent of that evidentiary protection had to be clarified in the light of the interpretation given to Article 9 by the New South Wales Supreme Court in cases involving the trials of the late Mr Justice Murphy and Judge Ford as well as other cases involving civil liability in defamation.[113] The scope of the protection as clarified by s16 of the above Act has not escaped criticism. It is arguable that the purpose of Article 9 in preventing proceedings in Parliament being questioned in any court was to ensure that judges could not pass on the validity of parliamentary proceedings at a time when judges were seen as servants of the Crown and did not enjoy security of tenure.[114] On the other hand it is also arguable that the privileges which derive from Article 9 may still serve

a useful and modern purpose of enabling the Parliament to obtain information and to scrutinise the activities of the Executive branch of government.

Be that as it may, it is worth noting that the immunity referred to may not be sufficient to protect the witnesses against the use of secondary evidence which was obtained as a result of the evidence given to the inquiry. Furthermore, the immunity is capable of being waived by the relevant House or committee by reason of s16(4) of the Act in question. This serves to emphasise that the immunity is seen not as belonging to the witness. Its purpose is more properly seen as a means by which the Parliament can ensure that witnesses are not deterred from giving evidence.

The protection and immunities of witnesses before parliamentary inquiries now needs to be viewed against the background of the enactment of the Act adverted to above as well as certain resolutions passed by the Senate following the wide ranging recommendations for altering the law relating to parliamentary privilege made by the Joint Select Committee on Parliamentary Privilege in the Report presented to Parliament in 1984.[115]

The Act had a two-fold purpose:

1 to provide for the principal changes in the law recommended by the Joint Select Committee referred to above; and

2 to avoid the consequences of the interpretation of freedom of speech in Parliament by judgments of certain judges of the NSW Supreme Court also mentioned in passing above.[116]

While the Act modifies the law in certain important respects to be examined below, it cannot be taken to be an exhaustive code on the subject. The provisions of s5 of the Act state that except to the extent that the Act expressly provides otherwise, the power, privileges and immunities of each House, and of the members and committees of each House, as in force under s49 of the Constitution immediately before the commencement of the Act, continue in force.

For present purposes the most important provisions are to be found in s12 and, to a lesser extent, s13. Given the crucial significance of s12 it is worth quoting its provisions in full:

> **Protection of witnesses**
>
> 12.(1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or committee, or induce another person to refrain from giving any such evidence ...
>
> (2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of -
>
> (a) the giving or proposed giving of any evidence; or
>
> (b) any evidence given or to be given,
>
> before a House or a committee ...
>
> (3) This section does not prevent the imposition of a penalty by a House in respect of an offence against a House or by a court in respect of an offence against an Act establishing a committee.

The provisions omitted from sub-ss(1) and (2) provide in each case for a penalty in the case of a natural person, a fine of $5,000 or imprisonment for six months, and in the case of a corporation, a fine of $25,000. The provisions of s13 create a further statutory offence against the unauthorised disclosure of evidence taken in secret. It will be noticed that the provisions of s12 do not displace the ability of the Houses of Parliament to punish for contempt of Parliament,

referred to in sub-s(3) as 'an offence against a House'. An important difference between the two offences lies in the fact that the statutory offence would be heard and tried by an ordinary court of law, while the other offence would, of course, be heard and tried by the relevant Houses of Parliament, that is, bodies that are not obviously judicial in character.

The Act has nevertheless made important changes to the conduct which can now constitute an offence against a House. Apart from abolishing contempts of Parliament which consist of remarks that defame the Houses of Parliament or their members,[117] what is more significant for present purposes, the provisions of s4 have significantly narrowed the content of that offence by in effect providing the need to show that the impugned conduct amounts to an *improper interference with a House, its committees or members.* Those provisions state:

Essential elements of offences

> 4. Conduct (including the use of words) does not constitute an offence unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

As will be explained below, this provision, especially when it is read in conjunction with s9 of the Act, will provide the courts with an opportunity to review the legality of any imprisonment of a person by a House of the Parliament. The difficult issue, however, will be the extent to which its inquiry into legality will reach into the kind of questions already explored in this article.

Also of importance are the Resolutions passed by the Senate on Parliamentary Privileges on 25 February 1988 which concede important procedural rights to persons who appear before Senate committees.[118] The resolutions implement a number of the recommendations made by the Joint Select Committee on Parliamentary Privilege in 1984. So far as this writer is aware a similar set of resolutions has yet to be passed by the House of Representatives.

The Senate Resolutions provide a code of procedures which must be observed in proceedings conducted by Senate committees and which also carry with them a right of appeal to the Senate if it is alleged that the terms of the Code were not observed. The Resolutions also deal with the area which has in the past attracted the most significant criticism. The area relates to the position of persons who are dealt with for contempt of Parliament before the Privileges Committee of the Senate. Such persons have, for example, been accorded the right to examine other witnesses, the right to be informed of the charges made against them and also the right to make submissions to the Senate before it makes up its collective mind.

These measures go a long way to provide basic procedural rights and safeguards to persons who are called on to appear before Senate committees. It is to be hoped that the House of Representatives will follow suit and pass a similar set of resolutions in relation to itself and its committees. But as important as these measures are it is important to remember that the Resolutions only have the status of parliamentary working rules which on the face of them may not be judicially enforceable. In other words, it is highly doubtful whether the breach of those rules would of itself provide any right of recourse to the courts. The extent to which courts can intervene in relation to the conduct of parliamentary inquiries remains the final matter to be examined in this article, an issue which it is now appropriate to consider.

V Justiciability - the uncertain scope of judicial review

So far it has been assumed in this article that the issues under discussion are justiciable in the sense that a court could ultimately be called upon to decide them in properly constituted judicial proceedings. It is now necessary to test the correctness of that assumption. It is convenient to begin by considering the general ability and willingness of courts to review the legal effectiveness of parliamentary proceedings leaving to one side, for the moment, the possibility of judicial intervention in relation to the exercise of the power of the Parliament to punish persons for contempt of Parliament.

Not surprisingly there has been a traditional reluctance on the part of the courts to entertain proceedings which challenge the validity of parliamentary proceedings except of course when it comes to reviewing the legal validity of legislation. Certainly the reluctance here referred to has not prevented the High Court reviewing the validity of legislation both generally and by reference to whether the parliamentary conditions prescribed by s57 have been followed as regards laws which were passed at a joint sitting of both Houses of Parliament. And even in that instance there is a reluctance to intervene before the process of enactment is completed.[119] While the analytical basis of the reluctance is not always made explicit, it is likely to be found in Article 9 of the English Bill of Rights, the terms of which have already been quoted.

An extreme illustration of the reluctance of courts to review the legal validity of the activities of the Houses of Parliament, not directly connected with the law relating to parliamentary privilege, can be found in *Bradlaugh v Gosset*.[120] In that case it was held that a court was powerless to interfere where a person was elected as a member of the House of Commons and was prevented from taking his seat even though it was alleged that in doing so the House was acting contrary to a particular statute. Stephens J said:

> It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly.[121]

A further illustration can be found in the refusal of the courts to impugn the validity of legislation by reference to non-compliance with the Standing Orders of a legislative chamber.[122]

The traditional reluctance was strikingly confirmed in the context of the law relating to parliamentary privilege by a unanimous High Court in 1955 in the well known *Fitzpatrick and Browne's* case referred to in several places in this article. It will be recalled that the Court refused to review the legality of the imprisonment of two persons found to be in contempt of the House of Representatives where the warrant for their imprisonment failed to specify or give particulars of the nature of the parliamentary privilege which those persons were alleged to have breached. While the decision seems quite consistent with English and pre-Federation Australian cases, what seems particularly striking, when the matter is considered in the present era, is the relative ease with which the Court brushed aside contrary arguments based on the different setting of the Australian Federal Constitution and, in particular, the existence of the doctrine of the separation of judicial powers and the general availability of judicial review. It is true that the modern cases relating to what constitutes the judicial power of the Commonwealth within the meaning of s71 of the Constitution continue to suggest that the exercise of penal powers vested in the Houses of Parliament by reason of s49 stand as one of a number of historical exceptions to the requirement that only the courts can exercise the judicial power

of the Commonwealth. Even so the suspicion remains that perhaps the issue might be decided differently if it were to arise today given the Court's new-found concern for the rights of individuals and the intrusion on their liberty which can result from the actions of a non-judicial body under the traditional view of the law relating to parliamentary privilege.[123]

The possibility remains that a modern High Court may not be minded to show the same reluctance to interfere in such matters. It is also significant to note that there have been two cases that have involved challenges to the regularity of parliamentary inquiries. In one of those cases the challenge was successful (admittedly for reasons which the writer and others have not found persuasive).[124] In the other, it is true that the challenge was dismissed but this was not because the issues sought to be raised were treated as non-justiciable, that is, in the sense that the court lacked jurisdiction to entertain the challenge or was unwilling to exercise jurisdiction by not considering the issues raised by the challenge.[125]

Be that as it may, it is possible that today a court may be required to pass judgment on the issues discussed in this article as a result of the ability of the courts to review any imprisonment of a person by a House of the Federal Parliament, by reason of ss4 and 9 of the Parliamentary Privileges Act.. These provisions may well have opened the door to some kind of judicial review and, to that extent, have thereby removed the justification for following the traditional reluctance of the courts to interfere. This possibility requires further explanation.

In order to provide that explanation it is necessary to presuppose that one of the Houses of the Federal Parliament or its committees issues an order to a government official to either produce certain documents or to give oral evidence either to the House or the committee. It is also necessary to assume that the Minister who administers the department in which the official is employed issues an instruction to claim executive privilege as the reason for not complying with the order in question. At this point the House or committee can either decline to pursue the matter any further and accept the Minister's view that it would be contrary to the public interest for the document to be produced or the evidence to be given. Alternatively it may decide to overrule the claim to privilege and persist with its original order and, in response, the Minister instructs the official to abide by the Minister's earlier instruction. Given the control which the Government is likely to exercise over the House of Representatives, the kind of situation outlined above is most likely to arise in the Senate and its committees. Nevertheless, it should not be overlooked that it could also arise in the House of Representatives if a minority Government held office.

So far, however, as was pointed out earlier in this article, the Senate has not seen fit to press its claims in the face of an intransigent government even though the Senate has never abandoned its own claim that it is not bound to accept an assertion of executive privilege. It will be recalled that this is probably due, at least in part, to the unfairness of punishing the Government official for contempt, essentially for following the instructions of a Minister of Ministers (including the Prime Minister) when the Minister or Ministers are members of the House of Representatives and thus quite probably not amenable to the penal jurisdiction of the Senate.

The position of independent statutory officials who are not subject to Ministerial instructions and wish to claim public interest immunity (as distinct from executive privilege) will in a sense be simpler. Any difficulty involved with those officials is likely to result from an issue discussed earlier, namely, whether the relevant statute which establishes the office occupied by the official can be taken

to override the powers and privileges derived from s49 of the Constitution.

To return to the example involving non-statutory officials, the failure of the official to give the required evidence potentially exposes the official to punishment for contempt of Parliament under the powers enjoyed by the Senate which are derived from s49 of the Constitution. But it needs to be recalled that since the enactment of the Parliamentary Privileges Act in 1987 the impugned conduct of the official does not constitute an offence against the Senate unless that conduct amounted to 'an *improper interference* with the free exercise by (the Senate) or committee (of the Senate) of its authority or functions', with the emphasised being on the words which are italicised.[126] In addition, the provisions of s9 of the same Act now require that if the Senate imposes a penalty of imprisonment (as distinct from a fine) upon a person, the resolution of the Senate and the necessary warrant to commit the person to custody must set out particulars of the offence committed by the person. Thus the provisions of s9 state:

> **Resolutions and warrants for committal**
>
> 9. Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

This provision gives effect to one of the recommendations made by the Joint Select Committee on Parliamentary Privileges.[127] The crucial importance of the provision was helpfully explained in the Explanatory Memorandum.[128] It is true that the Act does not contain the provision recommended by the Joint Committee for the High Court to make a non-enforceable declaration concerning an imprisonment of a person by a House of the Parliament.[129] However the Act also does not prevent a person who is imprisoned by a House from seeking a review by a court of the House's action by other means, such as by application for a writ of habeas corpus. As was also indicated in the Explanatory Memorandum, any requirement for the specification of the offence in a warrant would have the effect that a court could determine whether the ground for the imprisonment of a person is sufficient in law to amount to a contempt of a House.[130] This is so because of the following remarks that were made in the unanimous judgment delivered by the High Court in the *Fitzpatrick and Browne's* case:

> [I]t is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and the manner of its exercise. The judgment of the House is expressed by its resolution and the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.[131]

The writer sees no reason to disagree with the further view expressed in the Explanatory Memorandum, namely, that when the provisions of s9 are read in conjunction with those of s4, they will have the effect that a court may review any imprisonment of a person by a House to determine whether the person's conduct was capable of constituting an offence against a House of the Parliament as defined in s4.[132]

The judicial review identified here would presumably not take place until the Senate had reached the stage of resolving that the official should be imprisoned. There is here an analogy with the usual refusal of courts to consider the validity of legislation before the processes of enactment are completed.[133] If this view is

accepted, the modification to Article 9 of the Bill of Rights (with its injunction against courts impeaching or questioning a proceeding in Parliament) made by ss4 and 9 of the Parliamentary Privileges Act only begins to take effect once the resolution is passed and the process of taking a person into custody has begun. Another limit on the judicial review created by the provisions of the Act discussed above concerns the failure of the same provisions to provide for the availability of judicial review in relation to the imposition of only a fine instead of imprisonment.

The question remains, however, even in relation to cases if imprisonment, as to how far the scope of the judicial review extends. Doubtless, to deal with two simple examples of its application, a court would intervene if:

1 the resolution of the Senate failed to provide the particulars of the privilege breached by the person who is ordered to be imprisoned; and

2 the punishment is imposed by a committee of the Senate and not the Senate itself as is required by the provisions of s7.[134]

By contrast it is far from clear that a court would or should interfere to review the correctness of the finding of facts which sustained the finding of ultimate guilt; and possibly also the legality of the establishment of the parliamentary inquiry by reference for example to the Standing Orders and other rules of an internal character.[135] In the case of the former example it is difficult to ignore the deliberate decision of the Parliament to retain for its Houses the power to try and punish for contempt of Parliament instead of transferring that jurisdiction to the ordinary courts of law, as has long occurred in the area of contested elections which are heard by Courts of Disputed Returns. The Joint Committee on Parliamentary Privileges considered the issue in some detail and concluded in favour of not transferring the jurisdiction to the ordinary courts of law although it did favour the enactment of provisions similar to those now contained in s9 of the Act. Those provisions, it is suggested, should be seen as a compromise. This however does not necessarily rule out the kind of role courts play in reviewing decisions of statutory tribunals in administrative law. Even that narrower concept of the court's role is nevertheless likely to prove difficult and controversial.

With those examples in mind, would a court called upon to review the validity of a person's imprisonment be able to incidentally decide whether the Houses of Parliament have the power to override claims made of executive privilege? As regards that question, it is thought unlikely that the mere advancement of a claim of executive privilege by a witness acting in compliance with Ministerial instructions is by itself sufficient to constitute a contempt of Parliament, at least in cases where the claim is raised for the first time.[136] Such conduct can hardly be regarded as 'improper' within the meaning of s4 of the Act. Moreover, in the case of the Senate the relevant Parliamentary Privilege Resolutions only prohibit the failure of witnesses to give evidence or produce documents when this occurs 'without reasonable excuse'.[137] Neither is the Minister's action in giving the instruction to claim privilege likely by itself to constitute contempt, for the same reason, even if the Minister is otherwise amenable to the jurisdiction of the Senate and where the claim is to be advanced in the first instance (as distinct from a repeated occurrence after the Senate has refused to accept the claim for privilege). The same view can be taken in relation to whether the Minister's instruction would contravene s12 of the Act which, it will be recalled, seems to require the act which deters a witness from giving evidence to amount to 'fraud, intimidation, force or threat, ... or by other improper means, influenc[ing] a person in respect of any

evidence to be given before a House or committee'.[138]

The position becomes decidedly more acute if the Minister's claim to privilege is overruled by the Senate and the Minister persists with the original instruction not to give evidence or produce documents. It is no doubt strongly arguable that the witness has a 'reasonable excuse' or does not act 'improperly' by complying with the Minister's instruction at that stage. The argument would be based on the basic unfairness of penalising the witness for obeying the instructions of his or her employer.[139] It might also seek to rely on the doctrines of responsible government and the separation of powers which were discussed earlier in this article, but the writer has already argued against the acceptance of those arguments.

Overall the better view, it is suggested, is to apply in this area an essential principle which the High Court had occasion to strongly reaffirm in *A v Hayden*.[140] That principle is that there is no defence in Australian law of superior orders and that the Executive does not have the capacity to dispense its servant and agents from the obligation to comply with the law. Thus Gibbs J said:

> It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.[141]

Mason J said:

> [S]uperior orders are not and never have been a defence in our law.[142]

Murphy J said:

> In Australia it is no defence to the commission of a criminal act or omission that it is done in obedience to the orders of a superior or the government.[143]

Brennan J said:

> The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of parliamentary democracy.[144]

Deane J said:

> The criminal law of this country has no place for a general defence of superior orders or Crown or executive fiat.[145]

The principle can be seen as a basic aspect of the rule of law which, as Sir Owen Dixon once had occasion to describe, is a traditional conception in accordance with which the Constitution was framed.[146] As difficult as such a situation can be for a public servant caught in the dilemma of obeying one authority only by disobeying another, and generally the inability to serve two masters, it is suggested that this will be one situation when public servants will have to exercise their own independent judgment in order to ensure compliance with their higher duty of obeying the law. Fortunately such situations should not occur very frequently.

Notwithstanding the view taken by the writer, it is perhaps unlikely that the Senate would take coercive action against a public servant in the circumstances discussed above. So far as the position of the Minister who issued the instruction is concerned, presumably such an instruction and the decision to adhere to it, would have the backing of the Government at the highest level. It has been suggested that there are certain political sanctions open to a Senate intent on requiring compliance with its authority, namely, the postponement of Bills passed by the House of Representatives, the passing of censure motions and the refusal of supply.[147]

The critical legal issue, however, is whether the Minister would have breached the newly created statutory offence in s12

of the Act which prevents interference with witnesses or prospective witnesses on account of evidence given or to be given to a House or committee. Unlike its counterpart in the law of parliamentary privileges, it does not carry any possible limitations regarding the inability of the Senate to punish members of the House of Representatives. In fact it does not involve the penal jurisdiction of either House of the Parliament. If the writer's views on the ability of the Senate to override claims of executive privilege are sound, the Minister's instruction to a government witness not to accede to the Senate's orders to give the evidence or produce a document would at the very least constitute influencing the witness in respect of any evidence to be given to the Senate contrary to s12.[148]

The question of course remains whether the Minister can be said to act 'improperly' within the meaning of s12 in giving such an instruction, especially if the term in question is read against the background of traditional understandings of ministerial responsibility. According to those understandings a public servant would only be seen as an emanation of the Minister who would normally be expected to comply and obey the Minister's wishes. As argued above, however, these understandings appear to be dated.[149]

It is also true that the Act in question does contain express provisions to indicate that it binds the Crown and that it was passed before the decision of the High Court in *Bropho v Western Australia*.[150] But, in the view of the writer, it seems difficult to deny that the very nature of the Act envisages a universal application to all persons and bodies who participate in the affairs of government so as to satisfy the new weakened principle of statutory construction that statutes are not presumed to bind the Crown.[151]

There is accordingly, a serious possibility that the Ministerial instruction discussed above would breach s12 of the Parliamentary Privileges Act - a possibility which, on balance, the writer is inclined to favour.

If this possibility is soundly based, some years ago, and before the passing of the same Act, Professor Geoffrey Sawer had occasion to remark in relation to the role of Crown privilege before parliamentary inquiries:

> Hence so far as the Houses do pay regard to judicial doctrines of privilege, it is by their own choice, not because they are bound by those doctrines as a matter of law. The reason why the Senate has invariably backed off and is likely to back off from any direct confrontation with the government and Representatives majority on these issues is primarily one of power, in both the legal and the extra-legal sense. The ministers and officials between them are in legal command of effective force; the Senate commands very little. The police are in the last resort answerable to a minister in the government of the day, not to the President of the Senate.[152]

Professor Sawer clearly had in mind the exercise of the penal jurisdiction of the Senate whereas the focus of attention above has shifted to a possible breach of what appears to be a statutory offence triable in the ordinary courts of the land. 'Effective force' in relation to the prosecution of statutory offences must in the first instance depend on who can institute the prosecution; in the second instance on who can discontinue the prosecution; and in the third instance on who will be responsible for enforcing the punishment in case of conviction. So far as the first of these matters is concerned, there seems to be no provision to reverse the usual rule that any person can commence the prosecution.[153]

In addition, and since Professor Sawer wrote those remarks, the office of Commonwealth Director of Public Prosecutions has been created, with the person occupying that office being an independent statutory official who is vested with the power to commence

prosecutions for breaches of Commonwealth law (such as the offence created by s12 of the Parliamentary Privileges Act).[154] However, this did not affect the authority of the Commonwealth Attorney-General to discontinue a prosecution.[155]

Even if a government is in a position to discontinue the prosecution and members of the police forces are amenable to government direction in the enforcement process (rather than being independent in the performance of such functions), in a democratic country with a strong tradition for observing the rule of law the notion that a Minister of the Crown has breached the law carries with it an inevitable momentum of its own.

Endnotes

1 Sir William Holdsworth, *A History of English Law* (2nd ed, 1966) vol 6, 100.

2 Enid Campbell, 'Parliament and the Executive' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (1977) 88, 90-118; Enid Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees' in John Nethercote (ed), *Parliament and Bureaucracy* (1982) 179, 204-26; Enid Campbell, 'Parliamentary Inquiries and Executive Privilege' (1986) 1 *Legislative Studies* 10, 10-29; 'Parliamentary Committees: Powers Over and Protection Afforded to Witnesses', *Commonwealth Parliamentary Paper No 168* (1982) (the joint paper prepared by the then Commonwealth Attorney-General, Senator I Greenwood and the then Solicitor-General referred to below as 'Law Officers Paper'); Gordon Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901-1988* (1989) 275-81; and generally Harry Evans (ed), *Odgers' Australian Senate Practice* (7th ed, 1995) chh 2 (especially 51-5, 56-7), 16, 17, 19 (especially 474-97); A Browning (ed), *House of Representatives Practice* (2nd ed, 1989) chh 17, 18 (especially 715-20). For significant writing on the modern position in the United Kingdom, see Diana Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice* (1994) ch 10; Patricia Leopold, 'The Power of the House of Commons to Question Private Individuals' [1992] *Public Law* 541.

3 On the establishment of Commonwealth Parliamentary Committees, see Browning, above n 2, 583-9; Evans, above n 2, 359-62.

4 The phrase quoted in the text was used by Forster J in *Attorney-General (Cth) v MacFarlane* (1971) 18 FLR 150, 156 ('*MacFarlane's* case'). Lord Coke sometimes used the alternative expression 'The Great Inquest of the Nation': Sir Edward Coke, *Institutes of the Laws of England* (1628) vol 4, 11; see also *Gossett v Howard* (1845) 10 QB 411, 450-1.

5 (1845) 10 QBD 359.

6 Ibid, 379-80.

7 *MacFarlane's* case (1971) 18 FLR 150, 157.

8 The same assumption seems to have been made in the Law Officers Paper, above n 2, 3-5 paras 12-9.

9 *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 167-8 ('*Fitzpatrick and Browne's* case').

10 (1971) 18 FLR 150, 157.

11 This view was also shared by the Commonwealth Law Officers in their joint paper: Law Officers Paper, above n 2, 7 paras 24-6. They thought, however, that because of responsible government each House was entitled to investigate executive action for the purpose of determining whether to advise, censure or withdraw confidence in the Ministers of the Crown.

12 *Aboriginal Legal Service WA Inc v Western Australia* (1992) 113 ALR 87, 97.

13 Campbell, 'Parliament and the Executive', above n 2, 92-8; see Patrick Lane, *Lane's Commentary on the Australian Constitution* (1986) 320, where Lane seems to agree with Campbell's criticism of the case referred to in the text.

14 Patrick Lane, *The Australian Federal System* (2nd ed, 1979) 479.

15 (1955) 92 CLR 157, 165 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ).

16 *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644 ('the *Royal Commissions*' case'); see also *Lockwood v The Commonwealth* (1954) 90 CLR 177; Lane, *The Australian Federal system*, above n 14, 479-82; Law Officers

Paper, above n 2, 8-9 paras 28-32 but without the authors of that paper expressing a firm view on whether in the light of subsequent developments the *Royal Commissions'* case will be followed in relation to whether reliance can be placed on s128 to support an inquiry into matters otherwise beyond legislative power.

17 Dennis Pearce, 'Inquiries by Senate Committees' (1971) 45 *Australian Law Journal* 652, 656-9; see also Law Officers Paper, above n 2.

18 (1913) 17 CLR 644.

19 (1992) 177 CLR 106, 142 (Mason CJ) ('the *Political Advertising Ban* case').

20 Id. His Honour's views in relation to the freedom of communication were subsequently adopted by a majority of the Court in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 122-3 ('the *Theophanous* case'); *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211, 232. There are parallels here with his reliance on practical difficulties as an important factor in justifying his unwillingness to give effect to legal limitations based on federalism in relation to the scope of the Commonwealth's appropriation power (s 81 Commonwealth Constitution) in *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338, 394-6 ('*Australian Assistance Plan* case').

21 (1954) 90 CLR 177, 182; see also Lane, *Lane's Commentary*, above n 13, 320; and also Lane, *The Australian Federal System*, above n 14, 479; Law Officers Paper, above n 2, 8 para 28.

22 (1982) 153 CLR 168, 216; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, 207 (Gibbs CJ), 217 (Mason J), 226 (Wilson J) ('*Queensland Electricity Commission* case').

23 *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* (1920) 28 CLR 129 ('the *Engineers'* case').

24 *Queensland Electricity Commission* case (1985) CLR 192, 217 (Mason J). This summary was quoted with approval in *Western Australia v The Commonwealth* (1995) 69 ALJR 309, 347-8 ('the *Native Title Act* case') and *Re Australian Education Union; ex parte Victoria* (1995) 69 ALJR 451, 464. In the *Native Title Act* case (1995) 69 ALJR 309, 348 the High Court left open whether the limitation could also be expressed as the Commonwealth Parliament's inability 'to impair the capacity of the States to exercise for themselves their constitutional functions; that is to say, their capacity ... to function effectually as independent units' as suggested by Dawson J in the *Queensland Electricity Commission* case (1985) 159 CLR 192, 260.

25 (1989) 168 CLR 461, 513.

26 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 82. See also the advice given by the present Clerk of the Senate, Harry Evans, in a document dated 29 January 1993, published as Appendix 5 to the *Interim Report of the Senate Select Committee on the Functions, Powers and Operation of the Australian Loan Council* (1993) 92-3; see also Browning, above n 2, 656-8; Evans, above n 2, 443-5.

27 See, eg, Brennan J in *The Commonwealth v Tasmania* ('*Tasmanian Dam* case') (1983) 158 CLR 1, 214; *Street v Queensland Bar Association* (1989) 168 CLR 461, 512-3. The inability to compel State agencies to cooperate with the inquiry is unlikely to be absolute since some federal responsibilities may be seen as overriding in character, eg defence. The implied restraint on legislative power has not been treated as absolute.

28 Reid and Forrest, above n 2, 251.

29 Lane, *The Australian Federal System*, above n 14, 476; Lane, *Lane's Commentaries*, above n 13, 320-1, where reference is made in this connection to the well known case of *Huddard Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

30 The *Engineers'* case (1920) 28 CLR 129, especially 151-2; *Attorney-General (Cth); ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 24 (Barwick CJ).

31 (1955) 92 CLR 157, especially 165, where reference was made to the 'very plain words of s49 itself' being 'incapable of a restricted meaning'.

32 See, eg, the joint committees (ie committees constituted by members of both Houses of the Federal Parliament) created by the Public Accounts Committee Act 1951 (Cth) s5 (Joint Committee of Public Accounts) and the Public Works Committee Act 1969 (Cth) s7 (Parliamentary Standing Committee on Public Works). The provisions of those Acts also set out the powers of those Committees and the rights and obligations of witnesses who appear before them. Some parliamentary committees are established by legislation

which state their terms of reference but provide that the powers and proceedings of those committees are to be determined by the resolution of both Houses, thereby drawing on the powers possessed by them under ss49 and 50 of the Constitution. For an example of such a hybrid committee see National Crime Authority Act 1984 (Cth) Part III, especially s54.

33 (1845) 10 QBD 359, 379-80; see above, text accompanying nn 5-6.

34 Woodhouse, above n 2, 178-9 who refers to Erskine May, *Treatise on the Law: Privileges, Proceedings and Usage of Parliament* (20th ed, 1983) 71 and *Kielly v Carson* (1842) 4 Moore PC 63 in support of this view.

35 Woodhouse, above n 2, 179.

36 Leopold, above n 2, 543-9; Woodhouse, above n 2, 179, 193-202.

37 See para 1(1) of the resolution of the Senate which led to the reference of the matter dealt with by the Senate Committee of Privileges in Senate Committee of Privileges, *The Forty-ninth Report of the Senate Committee of Privileges* (1994) para 1(1).

38 Leopold, above n 2; Woodhouse, above n 2, 179, 193-202; Campbell, 'Parliamentary Inquiries', above n 2, 14.

39 Evans, above n 2, 51, 397-9; Browning, above n 2, 646-7. The position is the same in relation to the Committees of the House of Commons. May, above n 34, 697; Woodhouse, above n 2, 180.

40 Browning, above n 2, 627-8; Evans, above n 2, 390-1.

41 Evans, above n 2, 390; see also Browning, above n 2, 628. Presumably this view is based on the extended definition of committees in s3(1) which includes a committee of both Houses. However, if the doubts referred to in the text are well founded, it is difficult to see how this definition can have altered the position, since s5 of the same Act merely provides for the continuance of the 'powers, privileges and immunities of each House, and of the members and committees of each House, as in force under s49 of the Constitution immediately before the commencement of this Act'. The writer is, nevertheless, inclined to the view that the doubts are not well founded since they fail to give the provisions of s49 a broad interpretation which is justified by their constitutional nature.

42 See, eg, Public Accounts Committee Act 1951 (Cth) s13; Public Works Committee Act 1969 (Cth) s21.

43 Woodhouse, above n 2, 189-92.

44 See, eg, Public Accounts Committee Act 1951 (Cth) ss15-19, 21; Public Works Committee Act 1969 (Cth) ss28-33.

45 Public Accounts Committee Act 1951 (Cth) s15 and s17 which refers to a witness acting without 'just cause'; Public Works Act 1969 (Cth) ss28, 30.

46 See the reference to 'hybrid committee', above n 32.

47 Browning, above n 2, 646-9; Evans, above n 2, 47-8, 51-2, 398-9.

48 Browning, above n 2, 560, 656; Evans, above n 2, 457-8; Campbell, 'Parliament and the Executive', above n 2, 99. A similar position prevails in the case of the British House of Commons: Woodhouse, above n 2, 187-8.

49 Campbell, above n 2, 99.

50 For a general discussion of the subject in relation to the workings of Parliament see Browning, above n 2, 578-82, 653-6; Evans, above n 2, 30, 454-5, 480-97; Reid and Forrest, above n 2, 275-81.

51 Evans, above n 2, 43-5, 51-2, 62, 398 and see also Browning, above n 2, 41-2, 658-60, 729. The immunity would not prevent the voluntary appearance of members of one House before the committees of the other House. It may perhaps be possible for one House to coerce its own members into appearing before the committees of the other House.

52 Woodhouse, above n 2, 181-2.

53 Reid and Forrest, above n 2, 278; Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 207-9.

54 Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 207; Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 10; Evans, above n 2, 30-1, 480-1, 493; Reid and Forrest, above n 2, 276; Joint Select Committee on Parliamentary Privilege (Commonwealth), *Exposure Report, Parliamentary paper 87* (1984) 154 para 9.13 ('*Exposure Report*'); Senate Procedure Committee, *Third Report of 1992, Parliamentary Paper 510* (1992) 3.

55 Woodhouse, above n 2, 209; Peter Hennessy, *Whitehall* (1989) 334-7. The instruction was announced by the then British Prime Minister, The Rt Hon Mrs M Thatcher, during the Westlands Affair.

56 Campbell, 'Parliament and the Executive', above n 2, 100-3; Evans, above n 2, 484-6. See also Law Officers Paper, above n 2, 33-40 paras 121-51 in which the then Commonwealth Attorney-General and the Solicitor-General supported the operation of executive privilege before parliamentary committees of inquiry and the conclusiveness of executive certificates, but only as a matter convention and not as a strict legal limitation on the powers of those committees to require evidence to be given or documents to be produced. The Attorney-General in question subsequently changed his mind after he ceased to occupy that office, when he indicated his preference for the view that '[t]he conclusiveness of the Minister's certificate is for the Senate to determine': Browning, above n 2, 580.

57 [1942] AC 624.

58 See, eg, Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 12; Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 209-10; Campbell, 'Parliament and the Executive', above n 2, 103-4; see also Law Officers Paper, above n 2, 40 para 151.

59 Campbell, 'Parliament and the Executive', above n 2, 103-4.

60 A Bradley, 'Justice, Good Government and Public Interest Immunity' [1992] *Public Law* 514; Ian Leigh, 'Matrix Churchill, Supergun and the Scott Inquiry' [1993] *Public Law* 630; Adam Tomkins, 'Public Interest Immunity After Matrix Churchill' [1993] *Public Law* 650.

61 Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media, *Percentage Players: The 1991 and 1993 Fairfax Ownership Decisions, Commonwealth Parliamentary Paper 114* (1994) 19-32 (majority), 17-21 (minority) and Appendices D, E, F, H and K (*'The Print Media Inquiry Report'*). It appears that in a case decided by the Federal Court Sheppard J rejected the Federal Government's claim for public interest immunity in relation to a number of the documents that had been sought by the Senate inquiry. The case involved litigation between groups who were unsuccessful in obtaining the takeover of the Fairfax newspapers and the Fairfax receivers: Richard Gilbert, 'Documentary Tug o' War in Federal Court' (1994) 13(21) *The House Magazine* 7, 5-9.

62 R Megarry, *Miscellany-at-Law* (1955) 361.

63 Commonwealth Government Submission to the Senate Standing Committee of Privileges in relation to its reference on the Parliamentary Privileges (Enforcement of Lawful Orders) Bill 1994 (Cth) (September 1994) Submission No 10, especially paras 7-9. The phrase 'court of public opinion' was used by the Leader of the Government in the Senate, Senator Gareth Evans, during his appearance before the Senate Standing Committee for the purpose of elaborating the Government's Submission: Commonwealth, *Hansard*, Senate Standing Committee of Privileges, 18 August 1994, 12, 14.

64 Joint Select Committee on Parliamentary Privilege, above n 54, 153 para 9.12; *Sankey v Whitlam* (1978) 142 CLR 1; *The Commonwealth v Northern Land Council* (1993) 176 CLR 604. The beginning of this trend can be traced to *Conway v Rimmer* [1968] AC 910.

65 Freedom of Information Act 1982 (Cth). See Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 12. But the Senate does not treat the exemptions provisions in the freedom of information legislation as binding, as distinct from persuasive, grounds for not producing documents to that House of Parliament: Report of Senate Procedure Committee, above n 54, 1-6.

66 Enid Campbell, *Parliamentary Privilege in Australia* (1966) 173-4.

67 See the articles cited above n 60.

68 For the position in Australia see Browning, above n 2, 648; Evans, above n 2, 490; Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 199-200; Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 11 (text accompanying n 14; Reid and Forrest, above n 2, 280. For the position in the United Kingdom, see Woodhouse, above n 2, 193-200 (generally) and 194 ('no Parliamentary status whatsoever') and also 196 where the British Guidelines are disparagingly referred to as the "Osmotherely Rules'.

69 Margaret Allars, *Introduction to Australian Administrative Law* (1990) 153 para 4.62; see also Freedom of Information Act 1982 (Cth) s14.

70 For the reasons stated below, it is thought that express provisions were needed to show that such an intention was present: see below n105 and accompanying text.

71 Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 14; Campbell, 'Parliament and the Executive', above n 2, 100.

72 British legal and constitutional history suggests that the Commonwealth Parliament can only lawfully function during a 'session' of the Parliament within the meaning of that term in s5 of the Constitution. For reasons which are not elaborated here, the writer favours the view that both prorogation and a dissolution of the House of Representatives have the strict legal effect of terminating a session of the Parliament. Prorogation and dissolution are the traditional prerogative instruments by which the Executive could control the functioning of the Parliament. The Senate has conceded the legal inability of itself or its committees to function during prorogation or the dissolution of the House of Representatives, despite legal advice to the contrary given by the Federal Government's Law Officers: Evans, above n 2, 178-9, 400, 514-22; cf Browning, above n 2, 259-60, 264-9, 617-18. The writer agrees with the view taken by the Law Officers as a correct statement of the present state of the law. This is not to deny, however, that there is a need to re-examine the appropriateness of the existing position, especially given the importance of ensuring greater accountability of the Executive to the Parliament.

73 Submission presented by G McCarry to the Senate Standing Committee of Privileges referred to above n 63, 25 as elaborated in evidence before the same Committee: Commonwealth, *Hansard*, Senate Standing Committee of Privileges, 18 August 1995, 45

74 H Collins, 'What shall we do with the Westminster Model?' in R Smith and P Weller (eds), *Public Service Inquiries in Australia* (1978) 366 quoted in the submission presented by Mr Ken Coghill, a former member and Speaker in the Victorian Parliament, to the Senate Standing Committee referred to above n 63, Submission No 8, 156. Coghill described the traditional view quoted in the text as being 'widely regarded both as a false description of how the system of government actually works and unrealistic in practical terms': at 156; see also Campbell, 'Parliament and the Executive', above n 2, 109-10.

75 Geoffrey Lindell, 'Responsible Government' in Paul Finn (ed), *Essays on Law and Government, Volume 1: Principles and Values* (1995) 75, 80-9 especially 80 (including n 17) and 84-7.

76 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 69-70 (Deane and Toohey JJ) ('*Nationwide News* case').

77 *Attorney-General (Cth) v The Queen; ex parte The Boilermakers' Society of Australia* (1957) 95 CLR 529, 545-6 ('the *Boilermakers'* case'); *The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 389-90 (Windeyer J) ('*Tasmanian Breweries* case'); *Nationwide News* case (1992) 177 CLR 1, 70 (Deane and Toohey JJ); George Winterton, *Parliament, The Executive and The Governor General* (1983) 53, 61, 64, 85; Leslie Zines, *The High Court and the Constitution* (3rd ed, 1992) 142-3.

78 Geoffrey Lindell, Book Review, (1983) 6 *University of New South Wales Law Journal* 261, 263-4 (including n 7) which refers to the same view held by Winterton in the book reviewed; Zines, *The High Court and the Constitution*, above n 77, 230-2, where reference is made to others who have expressed a different view. See now also *Horta v The Commonwealth* (1994) 181 CLR 183.

79 Zines, *The High Court and the Constitution*, above n 77, 230-2, where reference is made to Campbell as the author of the doubts expressed in the text. The doubts have implications for whether the Parliament could require the Executive Government of the Commonwealth to obtain parliamentary approval before entering into contracts and treaties.

80 See, eg, the *Engineers'* case (1920) 28 CLR 129, 147; *Nationwide News* case (1992) 177 CLR 1, 70 (Deane and Toohey JJ).

81 *Nationwide News* case (1992) 177 CLR 1; *Political Advertising Ban* case (1992) 177 CLR 106; *Theophanous* case (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

82 (1994) 182 CLR 104, 122.

83 Below in the text under Part V of this Article, especially text accompanying nn 125-55.

84 Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 15; see also Campbell, 'Appearance of Officials as

Witnesses before Parliamentary Committees', above n 2, 222, 226; cf Campbell, 'Parliament and the Executive', above n 2, 112-13.

85 Evans, above n 2, 484-96.

86 *Exposure Report*, above n 54, 153-5 paras 9.11-9.15.

87 In evidence given before the Senate Committee cited in n 63 above when elaborating the Government's Submission to the same Committee: Commonwealth, *Hansard*, Senate Standing Committee of Privileges, 18 August 1994, 19.

88 As recommended by the Joint Select Committee on Parliamentary Privilege in *Exposure Report*, above n 54, 153-4 paras 9.11-9.15. Its efficacy depends on the courts resolving the question in this way.

89 For example, as in Papua New Guinea and the Northern Territory: Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 15 nn 54-5 and accompanying text. This solution was also preferred in the Law Officers Paper, above n 2, para 36-7.

90 See Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 223-4; Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 16 text accompanying nn 60-5; Law Officers Paper, above n 2, para 36-7.

91 Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 (Cth) introduced on 23 March 1994. The Bill, along with the supporting Explanatory Memorandum and Senator Kernot's second reading speech, appear as Appendix A to the Senate Committee of Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994; 49th Report* (September, 1994).

92 Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill cl 2 which would have the effect of inserting a new s11A in the Parliamentary Privileges Act 1987 (Cth).

93 Above n 91, 12-13 para 2.22.

94 Ibid 1, para 1.1.

95 *Attorney-General (Cth) v R* (1957) 95 CLR 429 (PC); [1957] AC 288.

96 (1977) 138 CLR 1, 8-9 (Jacobs J) with whose judgment Gibbs, Stephen and Mason JJ expressed agreement.

97 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 178-9. See also 175 (Isaacs J).

98 *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 400 (Windeyer J) and 376 (Kitto J), where reference is made to the 'application of any ascertainable criterion' and see also Zines, *The High Court and the Constitution*, above n 77, 170-4. The matter discussed in the text was raised by Anthony Morris QC in his submission made to the Senate Standing Committee of Privileges referred to above n 63, Submission No 6 (4 July 1994) 57-71 paras 3.01-3.15. Campbell had earlier warned against the conferral of jurisdiction by the use of provisions expressed in 'open-textured terms': Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 16-17.

99 (1955) 92 CLR 157.

100 See Zines, *The High Court and the Constitution*, above n 77, 178-9 and compare the cases referred to below n 121.

101 Senate Committee of Privileges, above n 91, 12-13, para 2.22.

102 Ibid 9, paras 2.12-2.13.

103 Ibid 10, para 2.14.

104 Ibid 1, para 1.1(1)(g).

105 Income Tax Assessment Act 1936 (Cth) s16.

106 It will be recalled that the same Committee enjoys such powers as are conferred on it by resolution of both Houses of the Federal Parliament: above n 32.

107 Evans, above n 2, 43-7.

108 (1870) LR 4 LRHL 661, 677, 680.

109 Public Works Committee Act 1969 (Cth) s25; Public Accounts Committee Act 1951 (Cth) s19(1).

110 Campbell, 'Parliament and the Executive', above n 2, 100-1.

111 Public Accounts Committee Act 1951 (Cth) ss15, 17; Public Works Committee Act 1969 (Cth) ss28, 30; Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 222; Campbell, 'Parliamentary Inquiries and Executive Privilege', above n 2, 14 (text accompanying nn 47-8).

112 Reid and Forrest, above n 2, 257-69.

113 Explanatory Memorandum to the Parliamentary Privileges Bill 1987, 9-15; see also Evans, above n 2, 32-42.

114 Sir Clarrie Harders, 'Parliamentary Privilege - Parliament versus the Courts: Cross Examination of Witnesses' (1993) 67 *Australian Law Journal* 109, 112-16, especially 113-14.

115 *Exposure Report*, above n 54.

116 Explanatory Memorandum, above n 113, 1.

117 The offences for which Fitzpatrick and Browne were imprisoned.

118 For an extensive and helpful discussion of the nature and origin of those resolutions, as well as the provisions of the Parliamentary Privileges Act, see Harry Evans, 'Parliamentary Privilege: Changes to the Law at Federal Level' (1988) 11 *University of New South Wales Law Journal* 31, 44-7 (as regards the Resolutions); see also Evans, above n 2, 573-89 (text of Resolutions) and 52, 62-6, 434, 435, 440, 449.

119 Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 180, 184-6.

120 (1884) 12 ABD 271.

121 Ibid, 280-1. The Act involved was the Parliamentary Oaths Act (1866) 29 Vic. c19.

122 *Victoria v The Commonwealth* ('the *Petroleum and Minerals Authority* case') (1975) 134 CLR 81, 164 (Gibbs J); *Namoi Shire Council v Attorney-General (NSW)* [1980] 2 NSWLR 639.

123 It is interesting to note that the Irish Supreme Court came to a contrary conclusion in relation to similar but not identical provisions of the Irish Constitution (Article 38) in *In re Haughey* [1971] Irish Reports 217. In addition, the European Court of Human Rights found that the law of Malta breached Article 6 of the European Convention of Human Rights in vesting the power to punish persons for contempt of Parliament in a non-judicial body, at least when those persons were not members of parliament: *Demicoli v Malta* (1991) 14 EHRR 47. The law of parliamentary privileges in Malta followed the British model. This gives rise to the possibility that the future exercise of the same jurisdiction in Australia may be contrary to Article 14 of the International Covenant on Civil and Political Rights with the consequence that a complaint could be taken to the United Nations Human Rights Committee under the First Optional Protocol to the Covenant: Anne Twomey, 'Parliamentary Privilege: Who wants to take this to Geneva?' (1995) 1 *Constitutional Centenary Foundation (Vic) Newsletter* 7.

124 *MacFarlane's* case (1971) 18 FLR 150, see above, text accompanying n 10.

125 *Aboriginal Legal Service WA Inc v Western Australia* (1993) 113 ALR 87.

126 Section 4.

127 Recommendations 23 paras (a), (b): *Exposure Report*, above n 54, 121 para 7.78 and generally 118-21 paras 7.71-7.76.

128 Explanatory Memorandum, above n 113, 6.

129 Apparently, because the advice was received that a legislative provision to that effect would be invalid, since it was thought that it would amount to requiring or empowering the High Court to give an advisory opinion: ibid. The Joint Committee's recommendation can be found in *Exposure Report*, above n 54, Recommendation 23 paras (c)-(c), 121 para 7.78 and see generally 119-21 paras 7.74-7.77.

130 Explanatory Memorandum, above n 113, 6.

131 (1955) 92 CLR 157, 162 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ). See also *Exposure Report*, above n 54, 118-21 paras 7.71-7.77, especially para 7.73, where reference is made to previous judicial authority to support the High Court view quoted in the text, in particular the remarks of Lord Ellenborough in *Burdett v Abbott* (1811) 14 East 150. In the view of the writer, it is unlikely that the provisions of s9 would be treated as breaching the implied doctrine which prevents courts being vested with non-judicial functions, especially if courts were able to review the legality of specific warrants of imprisonment which alleged a breach of parliamentary privilege. This view can be justified by reference to historical considerations which help to inform the concept of judicial power: Zines, *The High Court and the Constitution*, above n 77, 178-9. In any event, there seems to be a sufficient analogy with the kind of judicial review normally encountered in administrative law.

132 Explanatory Memorandum, above n 113, 6. This view was also adopted in two of the legal opinions received by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media's first report. *The Print Media Inquiry Report*, above n 61. See the advice given by Mr Jackson QC, dated 8 March 1994, Appendix E paras 29-31, Appendices 41-2, and Mr Morris QC, dated 21 March 1994, Appendix H, Appendices 114-7.

133 See, eg, *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203; *Cormack v Cope* (1974) 131 CLR 432. The same approach seems to be adopted in relation to subordinate legislation: *Queensland v The Commonwealth* (1988) 62 ALJR 143.

134 The examples were given by D Jackson QC in paras 22-3 of the Opinion referred to, above n 132, Appendices 38-9.

135 Both Mr Jackson QC and Mr Morris QC were inclined to the view that the courts would be unlikely to determine the first of these issues and, more implicitly, the second of these issues as well: above n 132. Appendices 38-40 paras 24-5, 42-3 paras 32-5, 115-16.

136 The same view as taken in para 62 of the advice given by Mr Jackson QC: above n 32, Appendices 58.

137 Senate Resolutions on Parliamentary Privilege, 25 February 1988, Resolutions 6(12)(b) and 6(13)(b) in Evans, above n 2, 586.

138 The same view was taken in paras 59-63 of the advice given by Mr Jackson QC, above n 132, Appendices 56-8.

139 As was suggested in relation to the position of witnesses who appear before statutory committees: above n 111.

140 (1984) 156 CLR 532.

141 Ibid. 540.

142 Ibid, 550.

143 Ibid, 662.

144 Ibid, 580.

145 Ibid, 593; see also *Bropho v Western Australia* (1990) 171 CLR 1, 21, 26-7 ('*Bropho's* case'); *Jacobsen v Rogers* (1995) 69 ALJR 131.

146 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193. Not surprisingly, the same concept underlies the case of *M v Home Office* [1994] 1 AC 377 where the House of Lords decided that a Minister of the Crown could be guilty of contempt of court. A valuable collection of the judicial authorities which accept the correctness of the principles discussed in the text can be found in the submission presented by Greg McCarry to the Senate Standing Committee referred to, above n 63, Submission No 1, 26, 27. Of course none of the authorities mentioned in McCarry dealt with the law of parliamentary privilege, although s12 of the Parliamentary Privilege Act creates a separate offence.

147 Evans, above n 2, 497; see also Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 226.

148 Paras 60-1 of the advice given by Mr Jackson QC, above n 132, Appendices 56-7.

149 See text accompanying nn 73-4.

150 (1990) 171 CLR 1, 23 (Mason CJ, Deane, Dawson, Toohey, Gaudron, and McHugh JJ), cf 28-9 (Brennan J) for the significance of the date of the enactment of the Act referred to in the text; see further *Jacobsen v Rogers* (1995) 69 ALJR 131, 135 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

151 As a result of *Bropho's* case it is not necessary to show that the intention of the legislature to bind the Crown is manifest from the terms of the statute or that its purpose would be wholly frustrated if the Crown was not bound by the statute: *Bropho's* case (1990) 171 CLR 1, 21-3. See also the remarks regarding the effect of a failure of a legislature to indicate by express provisions or by necessary implication that the provisions of Criminal Code or general criminal statute were applicable to servants of the Crown acting in the course of their duties: *Bropho's* case (1990) 171 CLR 1, 21 and also 26-7. In addition see, in relation to the application of provisions concerned with the investigation and prosecution of criminal offences to servants of the Crown, *Jacobsen v Rogers* (1995) 69 ALJR 131, 135 (Mason CJ, Deane Dawson, Toohey and Gaudron JJ).

152 Geoffrey Sawer, *Federation Under Strain* (1977) 183. Those comments were made in the wake of the so-called 'Loans Affair' under which a number of high ranking civil servants claimed Crown Privilege when they were summoned to appear before the Senate: see Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees', above n 2, 211-16.

153 Crimes Act 1914 (Cth) s13. As to what is required to show the intention of the legislature to reverse this rule, see *Brebner v Bruce* (1950) 82 CLR 161.

154 Director of Public Prosecutions Act 1983 (Cth) ss5, 6(1)(c) and (d).

155 Judiciary Act 1903 (Cth) s71 and see also the Director of Public Prosecutions Act s10(1)(d) which authorises the Commonwealth Attorney-General to give the Director directions in relation to the prosecution of particular cases.

RESPONSE TO INITIAL COMMENTARY ON THE *BETTER DECISIONS* REPORT

*Nigel Waters**

Text of an address to AIAL seminar, The Structure of the Commonwealth Merits Review Tribunal System, Canberra, 16 November 1995.

The purpose of this article is to explain the ways in which the Administrative Review Council ('the Council') considered, in its recent report entitled *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39) ('the report'), some of the issues that appear to have attracted most initial interest.

Judgment of current tribunal performance

Some of the early commentators on the report have seen the proposals for structural change as a vote of no-confidence in the specialist tribunals, expressed most bluntly as a prescription for an Administrative Appeals Tribunal ('AAT') takeover of those tribunals. On the other hand, there has been criticism of some recommendations as threatening the high standards and credibility of the AAT itself.

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The Council saw its conclusions and recommendations in the report as representing a fresh start - as a means of incorporating the best features of all the current tribunals. It is recognised in the report that the AAT and the specialist tribunals have particular strengths and limitations, arising either from their statutory structure and processes or from the ways in which they have chosen to perform and manage their review functions. The AAT, whilst it has made significant innovations in recent years, remains in some ways too formal and legalistic, and could benefit from exposure to some of the procedural approaches pioneered in the specialist tribunals. Equally, the specialist tribunals can perhaps draw from the AAT's positive experience to date of alternative dispute resolution techniques and, at the same time, usefully adopt a more legalistic and adversarial approach in appropriate cases (a minority of their caseloads).

The emphasis throughout the report is on flexibility - on allowing tribunals to identify and apply the most appropriate process for each individual review case. The Council expects, and trusts, tribunal management to be able to approach that task without allowing an inappropriate cultural role or approach to predominate. The specialist tribunals - and the various specialist Divisions and the General Division of the proposed Administrative Review Tribunal (ART) - would continue to emphasise informality and short time frames.

The second-tier Review Panels of the proposed ART would place more emphasis on establishing suitably authoritative decision-making panels, and

on giving particularly careful and comprehensive treatment to the more significant cases that should form their staple diet.

Loss of informality and speed

One potential disadvantage of the Council's proposals - of which the Council was aware - is the risk that the present system of speedy and informal review of most income support decisions by the Social Security Appeals Tribunal ('SSAT') could be threatened by the proposed structural changes. Both the proposed merger of the SSAT with the new ART and the proposed removal of the as-of-right appeal to a second tier of review are seen as contributing to this risk. It has been suggested, for example, that the perceived need to restructure the system of review for veterans' compensation decisions - on the basis that the Veterans Review Board is not (for reasons outside its control) functioning as an effective tier of review - has led the Council to propose changes to the SSAT-AAT relationship. It is suggested that this relationship, with which there is no complaint, is to be altered purely for the sake of administrative neatness.

The Council recognised the general satisfaction with the two-tier system of external review in the social security area, but felt that it involved unnecessary duplication of review proceedings for the more than 1,000 cases that proceed to the AAT each year. The Council considered that it would be possible to retain the informality and speed of the SSAT (whether it remains separate or becomes a specialist Division of the ART) whilst at the same time limiting the right of further review to cases which fall within the three grounds set out in Chapter 8 of the report.

The most commonly cited reason for needing to retain the as-of-right second tier of review is that, if that right is removed, agencies are likely to insist on being represented at first-tier hearings. It should be noted that the Department of Social Security stated in its submission to the Council that it would not automatically seek to appear in first-tier and second-tier tribunal hearings, and that the Department of Immigration and Ethnic Affairs does not routinely participate through an appearance in Immigration Review Tribunal or Refugee Review Tribunal proceedings, despite the fact that those hearings are the final ones on the merits of individual cases. Furthermore, in the report, the Council emphasised the discretion of tribunals - subject always to the rules of procedural fairness - to manage review proceedings as they see fit, and at the same time exhorted agencies to avoid appearing in hearings in routine cases (for broader reasons going to access to tribunals).

As well as being confident that the pressures for greater formality can be resisted, the Council also defends the principle of consistency between jurisdictions in relation to tiers of review. This is more than just a seeking of administrative neatness - it is difficult to justify as-of-right access to a second-tier of review in one jurisdiction but not in another on either equity or efficiency grounds. As the Council states in paragraph 8.92 of the report, if the *only* reason for a second tier of external review 'as-of-right' is to give another opportunity to make a 'preferable' decision, then why not a third or further opportunity?

Independence

There is apparent concern in some quarters that the net result of the Council's recommendations would be to reduce the independence of tribunals from government. This is the reverse of the Council's intention. The only proposal that could perhaps be seen as directly reducing independence is the Council's preference for fixed-term renewable appointments over tenured or fixed-term non-renewable appointments (the last option being one that it had previously

espoused). This concern is perhaps associated with the emphasis in the report on external review as a part of the executive arm of government rather than the judiciary, and on concerns about performance, productivity and efficiency issues.

These emphases do no more than dispel unhelpful misconceptions about the true nature and role of external review tribunals. A clear acceptance of the propositions that review tribunals form part of the administrative decision-making machinery and that they must be accountable for their use of the resources provided to them clears the way for attention to be focussed on the factors that can and do influence the actual and perceived independence of tribunals. These factors include the administrative, staffing and financial links between tribunals and departments, the transparency of the process for selection and appointment of members and the quality of tribunal decisions. The mechanisms whereby agencies respond to tribunal decisions also affects the credibility of tribunals, particularly in the eyes of people who use them regularly. In these areas, the Council's recommendations are designed both to bolster actual independence and to reduce the potential for perceptions of interference in their operations.

Tenured appointment to retirement age can act as a guarantee against threats to independence. However, tenure is not a substitute for independence of character in the individual member. To appoint all 500-plus tribunal members on tenure would not be possible or desirable - it would represent too great a financial liability and too great a restriction on the flexibility needed to maintain a membership with the skills and experience to operate effectively in a constantly changing environment (in which members have to 'step into the shoes' of decision makers in assessing facts and exercising discretions, as well as be aware of the relevant law). One suggested alternative - to appoint only some senior members on tenure (as in the past) - would entrench a two-class membership which the Council considered undesirable.

The Council was aware that renewable appointments create the possibility of members being influenced (including in undesirable ways): however, the Council diverged from its previous position on the basis that, on balance, tribunals should not arbitrarily have to lose the experience of the best of their members if those members are prepared to stay for another term. In addition, the Council considered that the risk of undue influence upon tribunals and their members could be addressed in other ways.

The Council is confident that the other measures it recommends, particularly the overhaul of the process for the selection and appointment of members, will lead to a substantial net increase in the actual and perceived independence of tribunals. At the same time, because the credibility of tribunals in the eyes of their users and potential users is essential to their ability to provide effective external review, the Council will remain vigilant in relation to these sensitive issues.

Qualifications for membership

It has been suggested that the checklist of core skills and attributes in Chapter 4 of the report is an unrealistic 'wish list' and that it undervalues legal qualifications. The Council had no desire to denigrate the valuable contribution that lawyers have made over the years to the establishment and maintenance of high standards of external merits review. However, it deliberately tried to distinguish between a range of necessary legal knowledge and skills on the one hand and the possession of formal legal qualifications on the other. It also tried to emphasise the importance of other skills, such as communication skills, which traditional legal education may give but

does not guarantee. The Council fully expects that qualified lawyers will continue to make up a substantial proportion of tribunal membership, but they will have been appointed, like all other members, on a merit-based assessment of their competence against publicly-stated functional criteria, rather than because a legal qualification is assumed to automatically bring with it the same package of skills, experience and competencies.

The Council makes it clear in Recommendation 31 that more work needs to be done in developing core skills and experience criteria to be used in the selection and performance appraisal of members. The precise criteria used and their relative weight may well vary between different tribunals or divisions. The list in paragraph 4.12 of the report is intended as a starting point for this further work. If the list sounds demanding, that is deliberate - tribunal decision making is a high-level function, with major consequences for individuals and businesses. Members are well remunerated and, in exchange, it is reasonable to expect the highest standards of competence and sensitivity.

Cross-membership

It has been suggested that the Council's proposal for cross-membership between divisions of the new ART is inappropriate and would dilute the quality of tribunal decision-making. The Council considered but disagreed with such suggestions, noting that there are numerous instances of successful cross-membership, not only between Commonwealth tribunals, but also between Commonwealth and State tribunals. This cross-membership brings great benefits in terms of exposure to different experience and perspectives. The Council would expect a member to be appointed to more than one Division only where the member clearly met any Division-specific selection criteria and where the relevant Division Heads were satisfied that the member could successfully combine the different duties.

The Council was concerned to avoid any perception of some members being 'second class', and this is one reason why it envisages Review Panels being drawn from the ranks of the more experienced members of the ART Divisions, and that those members would continue to serve on first-tier panels in addition to performing Review Panel duties.

Effect of costs powers

In Recommendation 21 the Council proposes that tribunals should be able to make costs awards in specific circumstances. Some commentators have seen this as a recipe for greater formality and legalism, with 'parties' being overcautious and more likely to resort to legal advice and representation. As already stated above, this criticism undervalues the ability of tribunals to manage cases so as to resist any such tendency. It also overlooks the Council's intention, spelt out in paragraph 3.161, that the costs power should not be used to penalise unrepresented applicants: rather, it would be designed to serve primarily as a sanction against the infrequent cases of time wasting or other abuse of process by agencies or representatives.

Relationship between recommendations

The report makes it clear that the recommendations in Chapters 3-7 of the report can and should be implemented whether or not the structural changes proposed in Chapter 8 are also accepted. Many of the earlier recommendations are already in the process of adoption by one or more of the review tribunals, and those recommendations can continue to be implemented without waiting for the process of further consideration and consultation which the major structural changes warrant. The Minister, in launching the report in September, accepted this phased approach to

consideration and implementation of the report's proposals.

What is perhaps less clear from the report is that the proposals in Chapter 8 for limitations on the rights of review, with new grounds for discretionary 'second-tier' review, could be separated from the proposed new tribunal structure involving the ART. This has been pointed out by at least one commentator.

While the Council feels that the maximum benefit of all the Chapter 8 changes would flow from their implementation as part of a package, it agrees that there is no reason why the changes to appeal rights could not be introduced within the existing tribunal structure featuring the AAT and the separate specialist tribunals.

PRIVATE SECTOR RELEASE OF INFORMATION: FOI ACT EXTENSION OR ANOTHER AVENUE?

*Mick Batskos**

Text of an address to AIAL seminar, Melbourne, 3 July 1995.

Introduction

On 8 July 1994 the Acting Attorney-General provided terms of reference to the Australian Law Reform Commission ('ALRC') to conduct an inquiry jointly with the Administrative Review Council ('ARC') into the Freedom of Information Act 1982 (Cth) ('FOI Act'). Among the numerous matters to be reported upon was whether the FOI Act should be amended by extending its ambit to cover private sector bodies.

An issues paper[1] was prepared in September 1994 and circulated for general comment. After considering numerous submissions and conducting a series of public meetings, the ALRC/ARC review produced a discussion paper[2] in May 1995 seeking further comments and submissions by 14 July 1995.

In this paper, I propose to cover briefly:

(a) arguments against extending the FOI Act into the private sector;

(b) arguments in favour of such an extension;

(c) the current views of the ALRC/ARC review.

Arguments against

The main argument raised against the extension of the FOI Act into the private sector is that the democratic objectives of the FOI Act are not relevant to the private sector. It is argued that private sector bodies do not exercise the executive power of government. Further, they do not have a duty to act in the interests of the whole community. Rather, they have a duty to act in the best interests of their organisations. They are not accountable to the public but to their owners or shareholders.

To extend the FOI Act to the private sector would, so the argument goes, stifle or create sluggish decision-making. This would slow private sector decision-making and corporate activity resulting in loss of investment and greater unemployment.

A further argument is that current accountability mechanisms are adequate. That is, the existing regulatory mechanisms in the Trade Practices Act 1974 (Cth), the Corporations Law and other legislation is sufficient. Market forces and the ability of consumers to make the choice to not deal with particular bodies are enough to ensure appropriate behaviour by those bodies.

To the extent that the current mechanisms are thought to be inadequate, the private sector should be left to its own devices and the introduction of self-regulation. Self-regulation on an industry-by-industry basis would be better than extending the FOI Act. Self-regulation would be

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achieved through voluntary codes of conduct and, possibly, industry Ombudsmen.

It is also argued that the administration costs which would be incurred by extending the FOI Act to the private sector would be so exorbitant as to adversely affect employment and even the international competitiveness of private sector bodies.

Arguments for

Some people argue that the benefits of openness and accountability are themselves a sufficient reason for extension of the FOI Act into the private sector. My own view is that it is difficult to see the relevance in the private sector of *all* of the democratic objectives of the FOI Act. But that is not to say there should not be access to some types of information in the private sector. This is dealt with in more detail later.

It is argued that the ability of consumers to go elsewhere in the market place is not a satisfactory regulatory mechanism. As a regulator of the private sector, consumer choice is blunted by the fact that consumers do not have access to sufficient private sector information to determine whether individual firms and corporations are acting within ethical and legal parameters

As part of the justification of an extension of the FOI Act into the private sector, it is argued that some private sector bodies can affect the national economy and also the living and working standards of millions of people. This may, however, only justify a partial extension based on the nature of the information contained in particular private sector industries or certain documents. For example public safety or environmental information could be justified as being accessible but not, say, commercially sensitive financial information.

To contradict the argument promoting self-regulation rather than extending the FOI Act, it is argued that self-regulation is inadequate. It is open to abuse and, given its voluntary nature, does not lend itself to uniform provision of information across the broad spectrum of private sector bodies. Extending the FOI Act would remove that potential for abuse and lack of uniformity.

In relation to costs, it is argued that although there would be some administrative costs associated with the extension of the FOI Act, these costs are unlikely to be exorbitant. The same fearful argument as to cost was raised when the FOI Act was first introduced into the public sector. Experience has shown that apart from a handful of major government agencies who deal with largely routine requests for information, few agencies have suffered high administration costs.

Personal information

The Discussion Paper makes it clear that one of the main arguments in favour of extending the FOI Act into the private sector is that, just as individuals have a right to obtain access to their own personal information held by public sector bodies, they should have the same right (based on privacy considerations) to have access to such information held by private sector bodies. This separate treatment of personal information as being in a unique position is not new.

In 1983 the ALRC noted that if individuals were given access to personal records, they should be able to have access to such records from both the public and private sectors, as there is no valid basis for differentiating between public and private record keepers.[3] Many other commentators have agreed (as reflected by the following two passages):

> However, we submit that there are no compelling reasons of principle for making a distinction between the public and private sectors when it comes to

> access to personal information. Nor, for that matter could it be said that there are real practical reasons in the way the two sectors deal with individuals which justify the distinction.[4]
>
> The current disparity between the information access rights of nominally 'public' and 'private' consumers is clearly resulting in inequities. 'Private' consumers will have no right of access to personal or other information held by the body which supplies an essential service to them, even though the 'public' competitor of that body may be subject to FOI. This is not [an] acceptable result in policy terms, as the fundamental nature of the service provided by bodies such as utilities ... is such that consumers require access to information not only about themselves, but also about policy initiatives which may affect the cost of accessibility of the service.[5]

As was submitted by the Administrative Law Section of the Law Institute of Victoria to the ALRC/ARC inquiry, there must be consistency of access between competing bodies whether they are in the public or private sectors. There does not appear to be any rational explanation or justification as to why, for example, documents can be obtained from Telstra but not from Optus and why documents can be obtained from Medicare Private but not HBA. The same applies in a number of other areas; private and public hospitals; private and public schools and universities; prisons (when privatised).

That argument appears to be even more valid when it is considered that on an increasing basis private sector bodies are taking over the activities formerly performed by the government and its agencies. In those circumstances, individuals have little control on how the vast amount of personal information available to private sector bodies about individuals can be used in making decisions affecting those individuals. This is particularly so given the technology available to store and process that information. Private sector bodies do have influence over key areas of people's lives (banking, telecommunications, medical services). In these circumstances, individuals arguably have a right to know what information is held about them and how it is used to make decisions about them.

ALRC/ARC recommendations

FOI

The ALRC/ARC review agrees that the democratic objectives of the FOI Act have little relevance to private sector bodies. Private sector bodies are not accountable to the public in the same way as public sector bodies and the FOI Act should not be extended to them on a general basis.[6]

The review does, however, recognise that private sector bodies should be held accountable to the public where existing private sector reporting and disclosure requirements are deficient. It proposes that, if, in a particular area of the private sector, there is a need for greater disclosure of information, the relevant legislation should be amended or new legislation introduced to require greater disclosure by that industry to the relevant regulatory agency. It considers further that if there is information that ought to be disclosed upon request directly to a member of the public, 'right to know' legislation specific to that industry or situation should be introduced rather than extending the FOI Act. This view reflects the current position in many overseas countries which was considered by the ALRC/ARC review.

In the area of outsourcing, where a government function is outsourced to a private sector body, the ALRC/ARC review proposes that FOI rights should be extended at the time of outsourcing. Where the outsourcing is permanent or continuing and provided for in legislation, that legislation could provide for the extension of FOI rights. This has already occurred in the employment area. Under the Employment Services (Consequential Amendments) Act 1994 (Cth), private

sector case managers contracted to manage long term unemployment are expressly made subject to the FOI Act. Where the outsourcing occurs on an individual contract or case-by-case basis, the extension of FOI rights should be included in the terms of the contract. This would, in my view, need to be reflected in legislation acknowledging that FOI rights (including rights of review) can be imposed by agreement.

Privacy

Although the ALRC/ARC review believes the FOI Act should not generally be extended to the private sector, it does believe that there is a need to protect individuals' privacy in the private sector as well as the public sector.[7] The method suggested to achieve this is by extending the Privacy Act 1984 (Cth) ('Privacy Act') to the private sector, to government business enterprise ('GBEs') and to any parts of the public sector not currently covered. This would be done by relying on the external affairs power in the Constitution and the fact that Australia is a signatory to the International Covenant on Civil and Political Rights, and, as an OECD member, is bound by the OECD Guidelines for the protection of privacy and transborder flows of personal data.

The Privacy Act contains eleven information privacy principles ('IPPs') prescribing standards for the collection, storage and security of data, access to personal records, use of personal information and disclosure of personal information to third parties by the public sector. The ALRC/ARC review proposes that private sector bodies should be required to comply with all eleven IPPs (although it does seek comment on whether only some of the IPPs should apply).[8]

The ALRC/ARC review suggests that the mechanics of the extension of the Privacy Act should be as follows:

- The Privacy Act should apply immediately, but enforcement would be limited. The Act would only be enforceable in a particular industry if and when the Privacy Commission issues a code for that industry (if thought desirable). The aim would be to give the industry bodies an opportunity to self-regulate if they wish.

- The Privacy Commissioner should be able to issue codes that set out how the IPPs are to be satisfied in a particular industry. He or she should consult with the industry when developing a code.

- The Privacy Commissioner should determine which industries need a code and when, but the Attorney-General should be able to direct the Privacy Commissioner to issue a code for a particular industry.

- The codes issued by the Privacy Commissioner should be disallowable instruments.

The ALRC/ARC suggest that if that model is adopted, the private medical and health industry should be addressed first and that the Attorney-General should direct the Privacy Commissioner to give that industry the highest priority as far as the development of a code is concerned.

The ALRC/ARC review proposes that the FOI Act, the Privacy Act and the Archives Act (Cth) should be combined into a single Act. Although the single Act would generally be applicable to government information, the single Act would also provide for rights of access to personal information and of amendment (subject to the issue of codes) in the private sector.

Endnotes

1 ALRC/ARC, Issues Paper No 12, *Freedom of Information* (1994).

2 ALRC/ARC, Discussion Paper No 59, *Freedom of Information* (1995) ('Discussion Paper').

3 ALRC, Report No 22, *Privacy* (1983), Vol 2, 103.

4 M Campbell and J Eyers, 'Freedom of Information - Where to Now?', Info One, 1st National Conference on Freedom of Information, Adelaide, 1993, 5.

5 T Moe and J Lye, 'Prospects for Review of FOI: Can the Commonwealth Regain the Initiative?' Fourth Annual AIAL Forum, Brisbane, 8 July 1994, p 8. See also M Batskos, 'State-owned enterprises - does administrative law apply?' (1994) 68 LIJ 830, 840-1.

6 Discussion Paper, 120-1.

7 Discussion Paper, 124.

8 Discussion paper, 125

NEGLIGENCE IN THE EXERCISE OF STATUTORY FUNCTIONS : MENGEL'S CASE AND THE BASIC RULE

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Paper presented to a seminar, Public Torts, Private Liability: the Impact of the High Court's Decision in Mengel, Melbourne, 1 November 1995.

Introduction

We have met here tonight to discuss the effect of the recent decision of the High Court in *Northern Territory v Mengel*[1] under the title *Public Torts / Private Liability*? As one American writer has said:[2]

> A system of administrative law is not adequate merely because it furnishes individual citizens adversely affected by administrative action with the right to judicial review. ... A system of administrative law that fails to provide the citizen with an action in damages to make him whole ... is actually but a skeletonized system.

On the other hand how does this sit with the idea that '[i]nvalidity is not the test of fault and should not be the test of liability'?[3]

Let us focus on the particular statement about negligence in the joint judgment in *Mengel* which has excited attention. I shall first put that statement into the context of what I call 'the basic rule' about tort liability of public authorities. Next I will show how that basic rule was important in the joint judgment under all the heads of liability raised in *Mengel*, and in so doing point out the essentially different focus of Brennan J's judgment. Finally I will assess the impact of *Mengel* in the context of previous decisions and comment upon the scope of Crown liability in Victoria.

The controversy about Mengel

Attention has been focused in particular upon the statement in the joint judgment led by Mason CJ[4] in *Mengel*. It was said:[5]

> Governments and public officers are liable for their negligent acts in accordance with the same general principles that apply to private individuals and, thus, there may be many circumstances, perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power. And if the circumstances give rise to a duty of care of that kind, they will usually give rise to a duty on the part of the officer or employee concerned to ascertain the limits of his or her power.

The question that this statement raises is whether it is intended to impose liability in negligence for ultra vires acts as such?

That statement refers very clearly to what I call the basic rule which applies to determine the tort liability of public authorities, namely that liability is determined by the same principles and under the same headings which apply to private individuals. So for example in negligence, a plaintiff must establish that a duty of care owed by the defendant was breached causing damage to the plaintiff.

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This rule is consistent with a Diceyan approach which denies 'special' treatment to public authorities when their tort liability is in issue.[6] Although the tort liability of public authorities arises at the intersection of tort and administrative law, the basic rule emphasises private law tort principles and operates to marginalise public law ideas.

The basic rule is recognised in the formula of the legislation which applies to the Crown in tort proceedings at the Commonwealth level and in most States[7] that 'the rights of the parties ... shall as nearly as possible be the same ... as in proceedings ... between subjects'. It is significant that in *Mengel*, the joint judgment expressly recognised that the basic rule was embodied in s.64 of the Judiciary Act 1903 (Cth), which contains that formula. One issue that concerns us in Victoria, which I will touch upon and which Ron Beazley will develop is how that basic rule stands with s23 (1)(b) of the Crown Proceedings Act 1958 (Vic) which contains the 'as nearly as possible formula' but provides that the Crown's liability is only vicarious.

You may ask why I assume so blithely that tort liability arises at the intersection of public (administrative) law and private (tort) law, and what do I mean by 'public authorities'? Questions about the tort liability of public authorities arise at the intersection of public and private law because public authorities can be described as bodies which exercise public (usually statutory), functions the very nature of which requires them to be exercised in the public interest.[8] As Lord Wilberforce pointed out in *Anns v Merton London Borough Council*[9], public powers have to be exercised in accordance with statutory purposes or goals. Similarly Mason J in *Council of the Shire of Sutherland v Heyman* said:[10]

> ...[S]tatutory powers are not in general mere powers which the authority has an option to exercise or not according to its unfettered choice. They are powers conferred for the purpose of attaining the statutory objects ...

Furthermore, acknowledging that there is an intersection between public and private law in this context is consistent with the way the courts have adjusted the basic tort rule. Although the basic rule means that in tort actions the courts have refrained from developing special approaches or directly examining the exercise of statutory or public powers as in administrative law, in practice the courts recognise the special position of public authorities *indirectly*. This has been done by adjusting the basic rule by the use of three particular distinctions: the misfeasance-nonfeasance,[11] duty-discretion[12] and policy-operational distinctions. These distinctions indirectly recognise a distinction between public and private law. Mason J in *Heyman* for example rejected the direct relevance of public law principles but he did acknowledge that negligence principles needed to be modified when applied to a 'public authority ... entrusted by statute with functions to be performed in the public interest or for public purposes.'[13] He said that the need for adjustment raised the following issues:[14]

> In what circumstances, if at all, does a public authority come under a common law duty in relation to the performance or non-performance of its statutory functions? ... To what extent are these questions affected by the circumstance that a public authority exercises policy-making and discretionary functions?

In *Heyman* itself which, like *Anns*, concerned the effect of a failure to inspect foundations, the High Court other than Brennan J accepted the relevance of the policy-operational distinction which had been applied by Lord Wilberforce in *Anns*, and three members of the court[15] applied a reliance concept as an aspect of the proximity question. In particular, Mason J distinguished general and specific reliance. Although it is difficult to extract a ratio from *Heyman*,[16] it is a fact that the Australian courts have applied the policy-

operational distinction and the reliance idea in later cases which have concerned the exercise of statutory functions. These adjustments, in particular the policy-operational and reliance ideas, are ways of determining how the intersection between tort and public law operates. In effect they determine the justiciability of issues in a way which mirrors the public law.

So does the statement in the joint judgment in *Mengel* engage in 'double-talk' when it spoke (clearly) about the basic rule and in the same breath (possibly) about liability in negligence for an ultra vires exercise of power? And how does it sit with the trend of the very many cases where the courts have basically said that if a negligence claim raises issues which are more appropriately reviewable under the public law, the parties should be left to that remedy?[17]

Moreover how does this statement reconcile with the rejection by a majority of the High Court in *Heyman* (the last major decision in this area) of the analysis of Lord Wilberforce in *Anns*? In that case Lord Wilberforce had suggested that a local government authority had a duty enforceable in negligence to consider the extent of its statutory powers to inspect and to ensure that inspections were carried out.

The effect of the statement in the joint judgment in *Mengel* also has to be measured against the views of Brennan J (as he then was) expressed in a separate judgment, particularly as he is now Chief Justice of the High Court. In *Mengel* Brennan J applied different reasoning to the negligence issue and repeated the view that he has expressed on previous occasions that in a negligence action involving statutory powers the extent of those powers is only relevant as a defence.

I argue that the view expressed in the joint judgment in *Mengel* does not suggest that an ultra vires exercise of power is as such evidence of negligence. However, it does place more emphasis on the relevance of statutory powers than the *Heyman* reasoning suggested and is a welcome progression of that reasoning. It represents a slightly expansive view of negligence liability in contrast to the more restrictive Brennan view (as it will be called). If time were to permit I would extend that argument by showing that the objectives of tort and administrative law are more compatible than is generally assumed and that the Brennan view is an over-protective one.

Mengel's case in context: the basic rule and the negligence claim

Mengel involved a claim for damages for economic loss resulting from the unlawful imposition of movement restrictions by two inspectors of the Northern Territory Department of Primary Industry and Fisheries ('the Department') on the plaintiffs' cattle wrongly suspected of carrying the brucellosis disease. The Brucellosis and Tuberculosis Eradication Campaign ('BTEC') was administered by the Department under the Stock Diseases Act 1954 (NT). The Department argued that the basis for the movement restrictions was a notice gazetted by the Chief Inspector in August 1988 under s27 of the Act which provided for the classification of properties where 'herds [are] subject to an eradication programme approved for the purposes of [the] campaign'. Asche CJ at first instance found that the inspectors had acted without legal authority in the gazettal under s27 as the evidence did not establish that the plaintiffs' property was 'subject to an eradication programme'. However, he also found that they acted in good faith[18] if somewhat zealously[19] in the belief that the BTEC justified their actions. The evidence showed that a manual of procedures was available for the inspectors, but no evidence was led as to whether they were required to satisfy themselves that an eradication

programme was in existence before they acted. The evidence suggested that the inspectors assumed that as they were acting on instructions from Regional Veterinary Officers of the Department, they were justified in acting. The inspectors stressed in their evidence that they were 'hands on' people with an aversion to 'paper work'. The evidence concentrated upon the inspectors' actions, their motives and understanding of their powers, as they were named as defendants, together with the Department. The Department admitted that it was vicariously liable for the acts of the inspectors. In the High Court it was accepted that the inspectors were acting outside the scope of their authority (that is, s27 of the Act) as the property was not subject to an eradication programme and that there was no other authority for their acts.

The Department's tests on the plaintiffs' cattle eventually showed no evidence of the disease. Indeed the evidence showed that the inspectors had not expected the results to be otherwise but had acted because of their commitment to BTEC.

The plaintiffs sought damages for negligent misrepresentation, misfeasance in a public office, negligence under the *Beaudesert* principle[20] and for unlawful interference with property rights and conversion. At first instance, Asche CJ in the Supreme Court of the Northern Territory found for the plaintiffs on the authority of the *Beaudesert* principle and rejected the claims on all the other bases. He assessed the plaintiffs' damages at $305,371 plus interest. On appeal, the Court of Appeal confirmed Asche CJ's decision with respect to negligence, conversion, misfeasance and the *Beaudesert* principle.[21] There was no substantive discussion of the negligence claim in the Court of Appeal. However that Court found that the plaintiffs were entitled to succeed on the basis of unlawful interference with their property rights, relying upon the judgment of Dixon J in *James v Commonwealth*.[22] In addition, Angel J (with whom Thomas J agreed) found that the plaintiffs were entitled to succeed on 'a broader constitutional principle of the rule of law'.[23] The Court of Appeal increased the damages award to $425,125 plus interest.

In the High Court the defendants argued that *Beaudesert* was wrongly decided and that there were no causes of the additional kind identified by the Court of Appeal. The plaintiffs for their part argued that they were entitled to succeed on the misfeasance action if the inspectors either knew or ought to have known that they were acting without authority. It was further asserted that if the inspectors ought to have known that they were acting without authority the plaintiffs were entitled to succeed in negligence.[24] The High Court unanimously allowed the defendants' appeal and rejected the plaintiffs' cross-appeal. All the judges agreed that the *Beaudesert* principle was no longer good law[25] and rejected the claims in misfeasance and negligence. It was also decided that the plaintiffs were not entitled to succeed on the alternative grounds accepted by the Court of Appeal.

The High Court recognised the tort of misfeasance but rejected the assertion that the action in misfeasance was made out where there was constructive knowledge. In tortious terms the issue whether a person 'ought' to know certain facts amounts to arguing that there was negligence and the High Court was right to reject the assertion. It was agreed however that the state of mind which constitutes abuse of power for the purpose of that tort was satisfied by reckless indifference as to the limits of authority.[26] On the facts the state of mind was not established. The High Court decision certainly confirms the availability of the tort where a malicious or knowing 'abuse of office' can be established.[27] This is sometimes called 'targeted malice' to emphasise the intentional character of the tort. However as these elements are

notoriously difficult to establish, the availability of the tort is generally raised in the context of preliminary issues,[28] and liability has been found in only a handful of cases.[29] Thus in my view this aspect of the decision has a cautionary effect but is unlikely to open up liability to a great extent.

One other tort mentioned in the joint judgment although not pleaded by the plaintiff was the action for breach of statutory duty. This tort, although well-established, is, like the misfeasance tort, also very limited in scope. Basically it depends upon first establishing an intention to confer a right to bring a private right of action. It is most likely to succeed where the claim is for personal injury arising from safety legislation specifically directed at the protection of the plaintiff. The courts have made it clear that they will not allow the tort to be used to expand the scope of negligence.[30] For that reason this paper concentrates upon negligence and the effect of the basic rule that liability is governed by the same principles and under the same headings as those which apply to private individuals.

The reasoning of the joint judgment under all heads of liability illustrates the impact of the basic rule. The justification for overruling the *Beaudesert* decision was that it was inconsistent with the modern trend to impose liability for only intentional or negligent infliction of harm in the law of torts. The decision under the misfeasance tort was directed by similar concerns.

The rejection of liability under *James v Commonwealth*[31] and of liability based upon the constitutional principle of the rule of law represents an affirmation of the basic rule. It is significant that it has been argued that such a principle should exist on the basis that tort issues concerning public authorities cannot always be satisfactorily solved by reference to private law principles alone.[32] The suggested principle is one of liability of *governments* for the acts of their officers, possibly as a result of the *de facto* officer principle which was established by *James v Commonwealth* (and accepted in the joint judgment in the High Court in *Mengel*).[33] However, it was said in the joint judgment that there was no support for the *James v Commonwealth* cause of action. Further '[s]o far as individual government employees are concerned, it would extend personal liability beyond misfeasance in public office or, even, in negligence and, in effect, impose liability for an error of judgment.'[34]

In the Court of Appeal, Angel J (Thomas J agreeing) had decided that the legality and actionability of the defendants' actions lay outside the realm of private torts. He said that the liability of the defendants properly rested on the place of individual liberty of action within society under the constitutional principle of the rule of law.[35] The response in the joint judgment was to refer to the basic rule.[36]

The reasoning of Brennan J on the misfeasance tort differed in one substantial respect from that of the joint judgment, which stressed the basic rule and the need to recognise only tort liability for intentional or negligent conduct. Brennan J by contrast recognised the 'special' nature of the misfeasance tort but suggested that liability was conditioned upon proof of an invalid exercise of power. His reasoning on the negligence issue also differed from that of the joint judgment.

The question of negligence was raised in the High Court in relation to the knowledge of the inspectors about the eradication programme. It was argued that constructive knowledge was sufficient for both the misfeasance claim and in negligence. The view expressed in the joint judgment was that it was not open to the Mengels to make a case for negligence on the basis that the inspectors should have known that their actions were unauthorised. The 'critical information', their Honours said, was the

existence of an approved programme and they thought that in the absence of conclusive evidence or a finding on that fact, the claim could not proceed.[37] Deane J disagreed: he thought that a positive finding was implicit in Asche CJ's judgment. His Honour invited the plaintiffs to reformulate their case as an action in negligence, although he had some doubts about establishing causation.[38] Brennan J seemed to agree with the view in the joint judgment that negligence could not be made out on the facts.[39]

At first instance the claim in negligence was pleaded on two bases. First it was alleged that there was negligence in the way that the inspectors had placed restrictions upon the plaintiffs without first ensuring that the cattle tested positively or that there was a real possibility that they would. The second claim was for negligent misrepresentation.

The second claim in negligence raised at first instance was based on the fault or 'misrepresentation' of the inspectors in not ensuring that the plaintiffs' property was subject to an eradication programme prior to imposing movement restrictions. It was thus based on the same facts as were raised in the High Court on the negligence issue. Asche CJ at first instance appeared to dismiss the second claim on the basis that it was a challenge to the exercise of a statutory discretion (or a policy function).[40] He also thought that the claim was excluded on broad policy considerations.[41] Although the High Court did not comment directly upon this reasoning, on its face it appears to be inconsistent with the thrust of the view expressed in the joint judgment that liability could arise in some circumstances for negligent failure to ascertain the limits of statutory powers. It is possible as is explained below that Brennan J would have agreed with Asche CJ about the policy implications of this claim.

Asche CJ analysed the first claim as involving two allegations, namely a duty of care to ensure that there was no reasonable possibility of brucellosis being present in the herd before taking any steps to prevent its movement, and secondly to act promptly in obtaining and acting upon the results. He tested the first allegation by the converse hypothesis: if the defendants had allowed free movement of the herd and if the evidence had subsequently shown the herd was infected, then negligence would have been established. Therefore it followed in his view that they were not negligent in acting with extra caution. In fact this allegation raised the issue whether the inspectors were negligent in exercising their judgment to impose movement restrictions. It amounted to alleging that the defendants were over-cautious and that in the circumstances they should have foreseen the economic loss that the plaintiffs would incur. In effect, it amounted to an attack on the 'policy' decision of the inspectors - although this language and analysis was not applied by Asche CJ. The only 'fault' of the inspectors was in relation to their judgment (which Asche CJ had said was made in 'good faith') that the BTEC scheme should be implemented.

Asche CJ examined all the evidence about the tests carefully and concluded that there was no 'operational' negligence (although he did not use that term) or delay in handling or returning the results.

The facts and evidence as discussed above suggested that any fault lay with the procedures laid down by the Department. The basis of the High Court's discussion of the negligence issue was the Department's 'fault' in failing to ensure that an eradication programme was in issue, or that the inspectors ensured that such a programme was in issue. The fact that a majority of the High Court was prepared to countenance a claim in negligence on that basis, subject to adequate evidence, is significant. It is consistent with the statement set out

above that liability can arise where there is a failure to observe the limits of powers.

Brennan J's judgment is an important one in the light of his status as Chief Justice of the High Court. In discussing the misfeasance tort, he made a special effort to distinguish it from negligence. In particular he distinguished between the question of whether a power is available, which he said was the relevant issue in misfeasance, and the negligent exercise of a power. He was concerned to keep negligence issues out of misfeasance and stressed as he did in *Heyman* the need to find a positive duty to act in a negligence action.

He said about the misfeasance tort that 'the legal balance between the officer's duty to ascertain the functions of the office ... and the freedom of the individual from unauthorised interference with interests which the law protects' is not to be 'undermined'[42] by a different standard, namely liability in negligence. At that point he cited the Privy Council decision in *Rowling v Takaro Properties Ltd*[43] and contrasted the decision in the New Zealand Court of Appeal in that case. In particular he referred to the judgment of Cooke P in the Court of Appeal which supported the idea expressed in the joint judgment that negligence liability could arise from a failure to observe the limits of powers. The Privy Council decision which is discussed below supports the view that if a claim is justiciable in public law, it is unlikely to give rise to an action in negligence. It is consistent with the idea that 'invalidity is not the test of fault'. However Brennan J emphasised that the loss was economic loss and in that context he appeared to cite the Privy Council decision in *Takaro* with approval. So it seems that Brennan J neither approved nor expressly disapproved the joint judgment view that liability in negligence could arise where there was a failure to observe the limits of power. But he did appear to approve the policy behind the decision in *Takaro* which is consistent with the idea that it is difficult to establish negligence where there is a failure to observe the limits of powers and the loss can be characterised as economic loss. It can be anticipated that Brennan CJ will be very cautious about finding a positive duty on the part of a public authority to know and observe the limits of its authority.

Discussion

The reasoning on the negligence issue was brief and raises more questions than it is possible to answer in this paper. Does the joint judgment reasoning suggest a return to the controversial reasoning in *Anns*? My view is that a principle which encourages public officials to actively and positively use their powers is desirable. Further, a principle which enables the courts to *directly* scrutinise statutory powers in tort actions, to recognise that in this context there is an intersection between tort and public law, is to be welcomed.

The Brennan view represents a 'zone of immunity' attitude and a protective approach to the tort liability of public authorities which is arguably incompatible with modern notions about the nature and exercise of public powers. But as His Honour's judgment reminds us, policy considerations play a strong factor in this context.

Policy considerations

The policy considerations against liability were articulated by the Privy Council in *Takaro* (and were possibly approved by Brennan J in *Mengel*). *Takaro* involved a claim for financial loss against a Minister arising from an administrative decision not to approve an investment by a foreign national and which led to the plaintiff incurring substantial financial loss. In judicial review proceedings the decision was held to be invalid as the Minister was influenced by irrelevant considerations. The allegations of negligence included the

taking into account of the irrelevant considerations and the failure of the Minister to take reasonable care to ascertain the extent of his powers. In deciding that no tort liability arose the Privy Council set out the considerations against liability on the facts of that case. The first was to point out the availability of judicial review as a remedy. The only effect of the decision, said the Privy Council, was delay. They warned that negligence actions would have the consequence of delay and expense to the public (the 'floodgates' argument). Secondly, said the Privy Council, an error of law or misconstruction of a statute will only rarely amount to negligence. The third consideration was the danger of 'overkill': the danger of inducing over-caution in civil servants and imposing a 'substantial and unnecessary financial burden on the community'. Fourthly, said the Privy Council, it was difficult to say that the Minister had a duty to seek legal advice. It was pointed out that in exercising his statutory discretion the Minister is essentially acting as a guardian of the public interest.

On the basis upon which *Mengel* was argued in the High Court there was arguably little room for the application of these policy considerations. The claim as argued in the High Court arose out of an operational fault in the Department's system; the Department had admitted its vicarious responsibility; the claim was not in any event for an extraordinary amount. It seemed an ideal case for imposing liability without making too extravagant a claim on the public purse. So the fact that the majority of the High Court in principle approved a broader approach has to be tempered with the realisation that only Deane J was prepared to acknowledge that a claim in negligence might succeed - and he had doubts about the causation issue. The implication is that the 'overkill' policy consideration may well have been a factor in this case. Therefore *Mengel* is equivocal in indicating an approach to policy considerations.

It is arguable that the issue of evidence about the existence of the eradication programme aside, *Mengel* would have been decided in favour of the plaintiffs applying a reliance approach to proximity and \ or the policy-operational distinction.

Reliance

In *Heyman*, three members of the High Court of Australia (Mason, Brennan and Deane JJ) applied a reliance test as part of the process of determining whether a duty of care existed. Mason J in *Heyman* distinguished specific and general reliance.[44] He thought that reliance in either sense could lead to a proximate relationship. According to Mason J, specific reliance is encouraged by some conduct on the part of the defendant (and the plaintiff generally incurs detriment as a result), whereas general reliance depends upon an expectation arising from a general relationship of reliance or dependence in situations where a public authority has assumed a responsibility. He said that general reliance 'is in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their protection'.[45] The basis of the plaintiff's reasonable reliance in the case of general reliance is, in the words of Mason J[46] a 'general dependence on the authority's performance of its functions with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of the plaintiff.' He suggested that the following were situations where general reliance might arise: air traffic control, safety inspection of aircraft, fire-fighting.[47]

Burchett J in the recent decision in *Alec Finlayson Pty Ltd v Armidale City Council*[48] adopted and applied the general reliance principle. In particular Burchett J referred to the council's position of

'dominating advantage' on the facts of this case which involved the rezoning and granting of development applications for land which the council (but not the plaintiff) knew to be contaminated. Also of importance was the fact that the council had a statutory duty to consider whether land was suitable when considering development applications.[49] Burchett J decided that the council's action in granting the development application created a hazard - that is it had taken an active part in the creation of the situation which led to the plaintiff's economic loss.

The cases suggest that reliance is an element in establishing proximity in the following situations:

(i) Where the defendant has given an assurance or undertaking express or implied that it will exercise its powers to protect the plaintiff's interests and it is reasonable for the plaintiff to rely upon it.[50]

(ii) Where there is evidence that the defendant had a regular practice in relation to the exercise of powers upon which the plaintiff relied.[51]

(iii) Where statutory conditions for the exercise of power are satisfied and it is reasonable for the plaintiff to expect that the power will be exercised.[52]

(iv) Where the public authority's activity contains a high risk or is unusually complex and the plaintiff cannot be expected to or is unable to take steps for his or her protection.[53]

The general reliance idea was not discussed in either court in *Mengel*.[54] The existence of the BTEC scheme arguably gave rise to an expectation that the Department would exercise its powers with care in the interest of the public. The negligence claim based on the presence of an eradication scheme could have been analysed in terms of general reliance.

The policy-operational distinction

The overriding consideration in determining the liability of public authorities in tort is justiciability. The policy-operational dichotomy is directed to the justiciability of the issue. Justiciability enables courts to determine what matters 'can' and 'should' be the subject of a tort claim. The 'can' issue goes to whether there are 'judicially manageable' standards which the court can apply. In judicial review cases a court will sometimes for example say that it 'cannot' determine whether a broad discretion or a decision with a high level of policy content has been exercised improperly. Similarly, Lord Wilberforce in *Anns* implied that the more discretionary the activity, the less justiciable it would be. The 'ought' issue is one of wider justiciability. For example, on judicial review, the courts will exercise their discretion not to grant a remedy if to do so would interfere with a decision of executive government or a policy decision made at a high level. In the tort context non-justiciability is often equated with any decision which contains an element of discretion. This suggests that justiciability is a limiting concept used to protect a public authority from liability rather than one which defines the circumstances in which an authority can and should be liable.

The modern version of the dichotomy was described by Mason J in *Heyman* when he suggested[55] that a public authority is under no duty of care with respect to financial, economic, social and budgetary allocations but that it might owe a duty of care in relation to administrative directions, expert advice, technical standards, or general standards of reasonableness. This test indicates those matters which the courts 'cannot' adjudicate because of the lack of judicially manageable standards.

'Policy' function characterisations have been made where a high element of discretion has been involved. These are

examples of non-justiciable discretions under both the 'can' and 'ought' criteria. In *Sasin v Commonwealth*[56] it was said that a decision to approve the design of a seat belt reel in an aircraft was a discretionary (policy) decision. In *Commonwealth v Eland*[57] it was decided that the failure of the Commonwealth to enact legislation to control alcoholism amongst the Australian Aboriginal population was a failure to perform a function at the policy-making level. In *Alec Finlayson Pty Ltd*[58] it was said that the decision to rezone the land was a policy one, but that the granting of the application was an operational decision.

Operational decisions are those which the courts feel can and ought to be subject to a claim in tort; where the 'polycentric' elements or multi-faceted aspects of the claim are minimal and the claim is therefore justiciable.[59] In a number of recent cases failures to implement policy decisions have been characterised as operational decisions. In *Glasheen v Waverley Municipal Council*[60] the plaintiff was hit by a hard board whilst swimming in a flagged area where such boards were not permitted. At the time that the plaintiff was injured there was only one of two beach inspectors on duty as the other had taken a lunch break. The decision to employ only two inspectors was described as a policy decision but it was held that the claim arose from an operational matter (the presence of one inspector) as the council had undertaken responsibility for the safety of swimmers by employing the inspectors.[61] In other words there was a failure to clarify the policy or to implement it properly

In *Mengel* the policy-operational distinction was implicit in Asche CJ's reasoning but the judgments in the High Court did not advert to it. A majority of the High Court approved, as stated above, the idea that public authorities could be liable in negligence for failure to ascertain and observe the limits of their authority. It is possible that the fault in *Mengel* was an operational fault.

Despite the equivocal indications of *Mengel* as a policy decision, the statement in the joint judgment suggests that the High Court is developing a new principled approach to the issue of negligence liability in the exercise of statutory powers. The High Court has made it clear that ordinary tort principles apply to public and local authorities exercising statutory powers and that this involves a duty to ensure that they act within powers. It should serve as a note of caution to public authorities to ensure that they and their employees know and observe the limits of their authority.

In the decade ahead we are likely to see an increasing divergence between the Brennan view and that of the other members of the High Court. That divergence will exacerbate that which already exists between the Australian and English approaches to this area of tort liability. The Brennan view aligns more closely with the restrictive approach of the English courts whereas the rest of the High Court falls somewhere between that of the expansive Canadian and New Zealand approaches and that of the English courts. This divergence is undesirable in principle and points to the urgent need to reassess the approach to liability this context.

Another divergence to which *Mengel* points is that between the position of the executive government (the 'Crown') under the Crown Proceedings Act 1958 (Vic) the other public authorities and governments.

The vicarious liability of the Crown

The Crown Proceedings Act 1958 (Vic) is now unique within Australia as liability is limited to vicarious liability and direct liability is excluded.[62] The idea that the Crown can only be vicariously liable (an imputed liability) rather than directly

(personally) liable reflects the maxim that the 'King can do no wrong'. This is arguably incompatible with the basic rule expressed by the High Court in *Mengel* as large chunks of direct liability cannot be pleaded against the Crown. It excludes the well-recognised examples of direct liability which apply to the Crown as an occupier or employer.[63] It excludes for example the 'general reliance' concept put forward by Mason J in *Heyman* and liability for 'system' faults[64] such as there appeared to be on the facts of *Mengel*. Also excluded is liability under the 'non-delegable' duty concept which depends on the idea that some duties are personal and too important to be delegated.[65] It sits uneasily with the statement in the joint judgment in *Mengel* which requires *governments* to ensure that their officers and employees know and observe the limits of their power and thus places primary responsibility on the Crown.

Sometimes it is difficult for a plaintiff to establish a relationship of vicarious liability, for example where the plaintiff is unable to establish the liability of a Crown servant or agent[66] or where liability is imposed by statute directly upon the employee.[67] Conversely if a statute protects an employee from liability difficult questions sometimes arise as to the Crown's liability.[68] Two doctrines have developed in this context to exclude vicarious liability on the basis that no vicarious relationship exists: the 'independent discretionary function' principle[69] which excludes the Crown's liability where powers are conferred directly upon an employee, and the immunity of 'superior servants' (heads of departments) for the torts of their 'inferiors' who are considered to be direct servants of the Crown.[70] The issue that arises is how these ideas fit with the view that there are 'considerations of social policy favouring the grant of immunity to Crown servants but not to the Crown ...'?[71]

The position of the Crown in Victoria therefore needs careful consideration to bring it into line with other States. Either the restriction to vicarious liability should be removed or the circumstances in which the Crown is to be vicariously liable should be clarified to recognise the basic rule.[72]

Conclusion

I have approached tonight's discussion from the perspective of reconciling tort principles with administrative law ideas. Others are simultaneously looking at administrative law ideas to see how they can accommodate tort liability. For example there has been some attention to the development of a remedy for administrative wrong - doing. In my opinion this is piecemeal and too narrow in its approach.[73] The attraction of the joint judgment in *Mengel* is that it faces squarely the intersection between tort and administrative law. The Brennan view by contrast tries to conceal it within the tort route by turning a vague principle of statutory interpretation (the defence) on its head and applying rhetoric such as 'negligence cannot be authorised in advance'. The *Mengel* statement encourages the courts to confront the intersection between tort and administrative law directly and to develop justiciability criteria to determine issues of tort liability.

Endnotes

1 *Northern Territory v Mengel* (1995) 69 ALJR 527 ('*Mengel*').

2 B Schwartz, *An Introduction to American Administrative Law*, (2nd ed 1962), 218.

3 KC Davis, *An Administrative Law Treatise*, 1958, at 487.

4 The others who joined in the judgment were Dawson, Toohey, Gaudron and McHugh JJ. Brennan and Deane JJ handed down separate judgments.

5 (1995) 69 ALJR 527, 544.

6 The tort of misfeasance in a public office which was recognised in *Mengel* is a possible exception. But see S Kneebone 'Misfeasance in a Public Office after *Mengel's* Case : A Special Tort No More?' (1995) 3 *The Tort Law Review* (forthcoming). Other exceptions are the defence of statutory authority in nuisance and judicial immunity.

7 Eg Crown Proceedings Act 1992 (ACT); Crown Proceedings Act 1993 (NT); Crown Proceedings Act 1992 (SA); Crown Proceedings Act 1993 (Tas) - s5 (1) of each Act. This legislation purposely adopts the wording of s64 of the Judiciary Act. See also Crown Proceedings Act 1980 (Qld) s9 (2); Crown Proceedings Act 1988 (NSW) s5 (2); Crown Suits Act 1947 -1954 (WA) s5 (1).

8 Thus the term 'public authority' includes government, local government and privatised bodies in relation to their statutory or public functions.

9 [1978] AC 728 ('*Anns*').

10 (1985) 157 CLR 424, 457-458 ('*Heyman*').

11 *East Suffolk Rivers Catchment Board* v *Kent* [1941] AC 74 (House of Lords)

12 *Sheppard* v *Glossop Corporation* [1921] 3 KB 132.

13 (1985) 157 CLR 424, 456.

14 Ibid, 456-457.

15 Mason, Brennan and Deane JJ.

16 See *Northern Territory v Deutscher Klub (Darwin) Incorporated* (1994) Aust Torts Reports 81-275 per Priestley JA.

17 Eg, *Jones* v *Department of Employment* [1988] 1 All ER 1025; *Dunlop* v *Woollahra Municipal Council* [1982] AC 158.

18 (1993) Aust Torts Reports 81-261, 62,762, and 62,789.

19 Ibid, 62,790.

20 In *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, 156 it was held that 'independently of trespass, negligence or nuisance but by an action upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other'.

21 (1994) Aust Torts Reports 81-267.

22 (1939) 62 CLR 339.

23 (1994) Aust Torts Reports 81-267, 61,183.

24 This point was raised by a notice of contention under Order 6(5) of the High Court Rules.

25 Although Brennan J and Deane J in separate judgments thought that the *Beaudersert* principle was supported by the case law, they agreed that it should no longer be followed.

26 Brennan J disagreed with the majority to the extent that they suggested that foreseeability was relevant. See S Kneebone (1995) 3 *Tort Law Journal* (forthcoming).

27 This is a different concept to ultra vires as the whole court recognised.

28 Eg striking out actions.

29 Eg *Farrington* v *Thomson and Bridgland* [1959] VR 286.

30 *Heyman*, 457 per Mason J; 434 & 436 per Gibbs CJ. In Canada the tort no longer has a separate existence.

31 Above, n 22.

32 C L Pannam 'Tortious Liability for Acts Performed under an Unconstitutional Statute' (1966) 5 Melb Uni LR 113.

33 (1995) 69 ALJR 527, 529, fn 1.

34 Ibid, 543.

35 (1994) Aust Torts Reports 81-267, 61,183.

36 (1995) 69 ALJR 527, 543-544.

37 Ibid, 541. Further as the plaintiffs had not raised the point in the Court of Appeal (see n 24 above) they could not proceed with it in the High Court.

38 (1995) 69 ALJR 527, 556.

39 Ibid, 548.

40 (1993) Aust Torts Reports 81-261, 62,810-62,811.

41 Ibid, 62,811-62,812, applying the passage from *Rowling v Takaro Properties* [1988] 1 All ER 163 which is discussed in the text below.

42 (1995) 69 ALJR 527, 548.

43 [1988] 1 All ER 163 (PC) on appeal from the New Zealand Court of Appeal [1986] 1 NZLR 23 ('*Takaro*'). At first instance Quilliam J found that a duty of care was owed but that breach had not been established. The Court of Appeal unanimously held that the Minister was negligent.

44 (1985) 157 CLR 424, 462.

45 Ibid, 464.

46 Id.

47 Ibid , 462-3, citing USA authorities.

48 (1994) 123 ALR 155; Aust Torts Reports 81-282. See the discussion of this case by Noel Hemmings QC in (1995) 1 LCLJ 30 - 34.

49 Environmental Planning and Assessment Act 1979 (NSW) s90(1)(g).

50 Eg *Parramatta City Council* v *Lutz* (1988) 12 NSWLR 293.

51 *Heyman* (1985) 157 CLR 424 per Brennan J at 486; eg *Brown* v *Heathcote County Council* [1986] 1 NZLR 76: cf *Coshott* v *Woollahra Municipal Council* (1988) 14 NSWLR 675.

52 *Lonhro* v *Tebbit* [1992] 4 All ER 280.

53 Eg *Parramatta City Council* v *Lutz* (1988) 12 NSWLR 293; *Alec Finlayson Pty Ltd* v *Armidale City Council* (1994) 123 ALR 155; Aust Torts Reports 81-282

54 Asche CJ did however discuss reliance in relation to the misrepresentation claim - see (1993) Aust Torts Reports 81-261, 62,810-62,811. But this is specific reliance.

55 (1985) 157 CLR 424, 469.

56 (1983) 52 ALR 299.

57 (1993) 27 ALD 516 (Supreme Court of NSW: Studdert J).

58 Above, n 48.

59 See *Swanson* v *R.* (1991) 80 DLR (4th) 741, 750 - operational decision without 'polycentric' aspects.

60 (1990) Aust Torts Reports 81-015 (Sharpe J, Supreme Court of New South Wales)

61 Sharpe J accepted the reasoning of Gibbs CJ in *Heyman*, and questioned the validity of the policy. See (1990) Aust. Torts Reports 81-015, 67,717. See also *Nagle* v *Rottnest Island Authority* (1989) Aust. Torts Reports 80-298 (Nicholson J) (operational decision not to warn of danger at recreational site). Note: the High Court did not comment upon this reasoning.

62 Paragraph 23 (1)(b).

63 Cf *Crown Proceedings Act* 1947 (UK) s2 (1); *Crown Proceedings Act* 1950 (NZ) s6 (1). These statutes also include the direct liability of the Crown for breach of statutory duty.

64 Eg *State of Western Australia* v *Watson* [1990] WAR 248.

65 Eg *Commonwealth* v *Introvigne* (1982) 150 CLR 258. Cf *State of Victoria* v *Bryar* (1970) 44 ALJR 174. Note that in *Burnie Port Authority* v *General Jones Pty Ltd* (1994) 68 ALJR 331, 346 this concept was said to be based upon the central element of control.

66 Eg *Quinn* v *Hill* [1957] VR 439.

67 *Darling Island Stevedoring & Lighterage Co Ltd* v *Long* (1956) 97 CLR 37.

68 *Cowell* v *Corrective Services Commission of NSW* (1988) 13 NSWLR 714 (governor's protection could not be claimed by the Commission).

69 *Enever* v *R* (1906) 3 CLR 969. See S Kneebone 'The Independent Discretionary Function Principle and Public Officers' (1990) 16 Mon LR 184.

70 See *Bainbridge* v *Postmaster-General* [1906] 1 KB 178; *Cowell* v *Corrective Services Commission of NSW* (1988), above n 68.

71 Ibid, 739 per Clarke JA.

72 Cf Law Reform (Vicarious Liability) Act 1983 (NSW). Note also that in the context of torts of police officers many jurisdictions provide that the State cannot avoid vicarious liability or that it is to be directly liable. See *Ceken* v *Haines* (1990) 21 NSWLR 296.

73 Cf CL Roots, 'Damages for Wrongful Administrative Action: A Future Remedy Needed Now' (1995) 2 AJAL 129.

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