

## **Parliamentary Privilege: The Reasons of Mr Justice Cantor—An Analysis\***

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One of the immunities adhering to the houses of the Australian Parliament by virtue of section 49 of the Constitution is the immunity contained in article 9 of the Bill of Rights of 1688:

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

Hitherto it has been thought that this immunity not only prevents parliamentary proceedings or words spoken in the course thereof being the subject of civil or criminal action, but also prevents those proceedings being referred to before the courts in such a way that they are questioned in a wide sense. It has been thought that what has been said in the course of parliamentary proceedings may not be commented upon, used to draw inferences or conclusions, analysed or made the basis of cross-examination or submission. The authorities for these propositions consist of a number of cases in which the meaning of article 9 has been explored, principally *Church of Scientology of California v Johnson-Smith* (1972) 1 QB 522, *R v Secretary of State for Trade and others, ex parte Anderson Strathclyde plc*, (1983) 2 All ER 233, and *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1.

It is true that these conclusions are drawn largely from submissions made by the British Attorney-General in the first case and from *obiter dicta*, but those submissions

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and dicta were regarded as correct and authoritative. It was thought to be quite clear that the immunity contained in article 9 would prevent the cross-examination of witnesses in court proceedings on evidence given before parliamentary committees, and this conclusion was supported in debate in the Senate by the Minister Representing the Attorney-General and the Deputy Leader of the Opposition on 16 April 1985 (Hansard, pp. 1026–30).

In proceedings in the Supreme Court of New South Wales on 3 and 4 June 1985, counsel representing the President of the Senate submitted that the court should not allow cross-examination of witnesses on the basis of evidence given before Senate committees, and that, to avoid the necessity for counsel representing the President to appear to take objection to questions or submissions, the judge should, of his own motion, enforce the restriction imposed by article 9. Mr Justice Cantor declined to perform this task, and on Wednesday 5 June gave his reasons.

Mr Justice Cantor does not accept that article 9 has the effect expounded above. He holds that witnesses may be questioned as to what they said before a Senate committee, as this does not necessarily amount to a breach of article 9. In reaching this conclusion he has determined that for there to be a breach of article 9 there is ‘a need for there to be some adverse effect flowing from the cross-examination’, and that the adverse effect must be ‘upon the freedom of speech or upon debates in Parliament or upon proceedings in Parliament’. The judge has therefore set up a new test of whether reference to parliamentary proceedings is in breach of article 9, the test being whether there is an adverse effect upon freedom of speech or debates or proceedings.

The judge added that ‘I am of the view that the revelation in a Court of Law of what was said in a House of Parliament does not necessarily impeach or question what was said in Parliament’. This is not a new conclusion: it has never been the situation that the mere ‘revelation’ of proceedings in Parliament is in breach of article 9. The cases make clear that evidence of parliamentary proceedings may be admitted to establish facts material to a case, such as the fact that a certain statement was made at a certain time. This reference to ‘revelation’ of proceedings suggests that the judge thought the interpretation of article 9 advanced by counsel for the President to be far more restrictive than in truth it is, a suggestion supported by other matters discussed below.

In order to maintain his conclusion the judge has dismissed much of what was said in previous cases as *obiter*, and has gone back to the wording of article 9 to seek its true meaning. In support of his test of adverse consequences he refers to the synonyms and connotations of the word ‘impeach’. Unfortunately he has not given the same attention to the verb ‘question’, the dictionary meanings of which include ‘ask questions of, interrogate, subject to examination’ (OED). In order to reconcile his test with the cases he indicates a belief that in the cases where evidence of proceedings in Parliament was held not to be admissible there was likely to be an adverse effect upon freedom of speech or debates or proceedings. It is unfortunate that he has not attempted this reconciliation in greater detail, since it is by no means clear that, in cases such as *Scientology* and *Anderson Strathclyde*, the element of adverse effect which he requires was in fact present. An exposition of the adverse effect likely in those cases would have clarified greatly his concept of adverse effect. He also refers to ‘an adverse effect upon the institutions (sic) of Parliament’ which, as a restatement of the tests, seems to widen it.

In establishing his new test, the judge obviously felt the need to overcome a number of difficulties. One is a difficulty which he detects in the 'widest possible construction' which he says was urged by counsel for the President, that is that it would embrace 'any critical comment of discussion outside Parliament of what took place in Parliament', such as occurs in the press. Since such critical comment and discussion constantly occurs, he regards this as a fatal weakness of the wide interpretation. This question of a possible application of article 9 to public comment was raised by the judge during submissions, and in response counsel for the President suggested that the proper view was that article 9 had no application to public discussion, that the expression 'place out of Parliament' probably referred to other tribunals or bodies of the state, and that in any case since the article referred explicitly to courts the possible wider application was not a matter which should trouble the judge. Thus it was not submitted that the wide interpretation of article 9 was a potential prohibition on public discussion; this is a conclusion which the judge has drawn in spite of submissions to the contrary.

Another major difficulty, which the judge refers to at some length, is the difficulty of the judge intervening in the proceedings to prevent questions or submissions contrary to article 9. This difficulty, however, is not removed or avoided because, as the final paragraph of the judge's reasons make clear, there is still under this test the possibility of questions or submissions in breach of article 9, and it would be necessary for the judge to intervene to prevent them. Indeed, as he seems to concede, his test is likely to make a task of a judge in determining when to prevent questions or submissions more difficult. In response to this residual difficulty, he seems to contemplate that it is necessary for him to undertake a balancing role, and to determine 'whether the harm likely to be done to the administration of criminal justice in this trial would far outweigh any harm which might be done to the institutions (sic) of the Senate'. This reference to a requirement to balance conflicting interests would seem to indicate that, according to the judge's new interpretation of article 9, examination of parliamentary proceedings might be admitted even if it is in clear breach of article 9 where the interests of the court proceedings so require. The article is thus reduced from an important constitutional prohibition to a subordinate principle which may be overridden.

This balancing seems to be the method by which the judge overcomes the other remaining difficulty, that of fairness to the accused in criminal proceedings. It is clear that if cross-examination of witnesses on their previous evidence and submissions relating thereto are to be restricted, there is always some possibility of unfairness to an accused. Since the test proposed by the judge might lessen but would not remove this possibility, in that some questioning or submissions could still be objectionable, the judge seems to imply that by the process of balancing article 9 may be put aside entirely in criminal proceedings.

In deciding to allow cross-examination of witnesses on their parliamentary evidence, of necessity the judge concludes that there is no inherent adverse effect in such a process. In submissions put by counsel representing the President such inherent adverse effects were postulated. The judge has referred to only one of these, namely the possible discouragement given to future witnesses in parliamentary proceedings. This he dismisses as 'somewhat strained and artificial'. He has not, however, referred

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to the other inherent adverse effect *on the witness*, namely that an attack upon the credit or credibility of a witness by the use of his previous evidence and a comparison of past and present evidence to form a basis of a submission as to inconsistency or unreliability necessarily involves inflicting upon a witness a process which may well be damaging to the witness, and which would not have been inflicted had the witness not given evidence in the parliamentary proceedings. In other words, a witness may well be made to suffer, however slightly, for giving evidence to the Parliament, and this is precisely what article 9 is designed to prevent.

Apart from seemingly repudiating the very rationale of the immunity, the judge's new test is highly unsatisfactory. It is vague. What is meant by an adverse effect, and how is it to be recognised? It would seem to involve a court in some assessment of the impact of the giving of particular evidence upon parliamentary proceedings, an assessment which a court is ill-equipped to make. The references by the judge to the 'revelation' of matters occurring in parliamentary proceedings and to the balancing process merely add greater vagueness. It would have been safer for the judge to follow the conventional view of the effect of article 9, whatever decision he made as to the particular proceedings before him.

The course of the proceedings in the court subsequent to the judge's ruling give some indication of how the concepts contained in the ruling are to operate in practice. Witnesses were cross-examined not only on evidence which had been given before Senate committees in public session or had been published by the committees, but on evidence which had been given in camera, which had not been published by the committee concerned or by the Senate, and the publication of which without the authorisation of the Senate is forbidden by a standing order of the Senate. Normally such unauthorised publication of in camera evidence would be treated as a contempt of the Senate. Presumably, the judge regarded the use of this in camera evidence in the court proceedings as either not having an adverse effect on parliamentary proceedings or as having an adverse effect which was outweighed by the requirements of the court proceedings.

Similarly, evidence given by a witness before the committees was compared with his evidence before the court, he was questioned as to the truth of his evidence before the committees and as to whether he regarded his appearance before a committee as a serious occasion. The witness was also asked whether he was placed under pressure by a committee. Presumably the judge regarded none of these inquiries as amounting to impeaching or questioning parliamentary proceedings according to his test of adverse effect, or at least regarded any adverse effect as being outweighed by the interest in the court proceedings.

The judge also allowed the accused to be cross-examined on a statement which the accused made to one of the Senate committees. It would have been thought that the use of parliamentary evidence given by the accused against him at his trial would be the clearest possible breach of article 9, and the defence made a submission to that effect. Even this, however, does not offend according to the judge's test of adverse effect.

The judge's reasons refer only to the examination of evidence given in a parliamentary committee by a witness. There is nothing to indicate, however, that they

are intended to be confined to witnesses, and in terms they apply with equal force to members of Parliament. Thus if this reasoning is followed members may well find themselves being cross-examined in court proceedings on their speeches in Parliament, hitherto an unthinkable occurrence. In the process, proposed by the judge, of balancing the conflicting interests, members, and their houses, may be made to suffer 'adverse effects' because of their parliamentary speeches if the interests of court proceedings so require. Whether the Parliament will tolerate such a degree of judicial intrusion into its proceedings remain to be seen.