THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COMMITTEE OF PRIVILEGES

PARLIAMENTARY PRIVILEGES AMENDMENT (ENFORCEMENT OF LAWFUL ORDERS) BILL 1994

(49TH REPORT)

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CHAPTER ONE

INTRODUCTION

Introduction

1.1 On 12 May 1994 the following matter was referred to the Committee of Privileges, on the motion of the Leader of the Australian Democrats, Senator Cheryl Kernot:

(1) The Senate notes that:

(a) on several recent occasions the government has failed to comply with orders and requests of the Senate and its committees for documents and information, in particular:

(i) the order of the Senate of 16 December 1993 concerning communications between ministers on woodchip export licences,

(ii) requests by the Select Committee on the Australian Loan Council for evidence, and

(iii) requests by the Select Committee on Foreign Ownership Decisions in Relation to the Print Media for documents and evidence;

(b) the government has, explicitly or implicitly, claimed executive privilege or public interest immunity in not providing the information and documents sought by the Senate and its committees;

(c) the grounds for these claims have not been established, but merely asserted by the government;

(d) the Senate has no remedy against these refusals to provide information and documents, except its power to impose penalties for contempt;

(e) the Senate probably cannot impose such penalties on a minister who is a member of another House;

(f) it would be unjust for the Senate to impose a penalty on a public servant who, in declining to provide information or documents, acts on the directions of a minister;

(g) there is no mechanism for having claims of executive privilege or public interest immunity adjudicated and determined by an impartial tribunal; and

(h) the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, introduced in the Senate by Senator Kernot on 23 March 1994, would provide for:

(i) the enforcement by the Federal Court of the lawful orders of the Senate and its committees,

particularly orders for the production of information and documents,

(ii) avoidance of any imposition of a penalty on a public servant for acting under the directions of a minister, and

(iii) the adjudication and determination by the Court of any claim of executive privilege or public interest immunity, through the examination of the disputed evidence or documents by the Court.

(2) The Senate refers to the Committee of Privileges, for inquiry and report by 23 August 1994, the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, and requires the committee to give particular attention to the effectiveness of the bill in providing a solution to the problems set out in this resolution.

(3) For the purposes of the committee's inquiry into the bill, a senator nominated by the Leader of the Australian Democrats be added to the membership of the Committee of Privileges in a non-voting capacity.

(4) The Select Committee on Foreign Ownership Decisions in Relation to the Print Media present its first report by 9 June 1994, and the committee present a final report by 22 September 1994; and during the period from 9 June to the day on which the committee presents its final report the committee be provided with, and use, the minimum resources required for giving effect to this resolution.

Senator Kernot was added to the Committee of Privileges membership under paragraph (3) of the resolution.

1.2 On 22 June, a further matter was referred to the Committee for consideration during its consideration of the Parliamentary Privileges Bill. This second matter, relating to the production of documents concerning a leasing arrangement in Casselden Place, Melbourne, is dependent on the receipt of a report of the Auditor-General and will be the subject of a further report from this Committee. In view, however, of the significance of the matters referred to it on 12 May, the Committee considered that it should report on its original terms of reference as soon as practicable after holding public hearings on the 12 May matter. These were held on 18 August, and the Committee sought and received from the Senate a four-week extension of time to report on the 12 May terms of reference, and a three-week extension from the tabling of the Auditor-General's report to produce its report on the second matter.

Background

1.3 On 23 March 1994 Senator Kernot introduced the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994. The purpose of the bill was to 'provide for the Federal Court to enforce lawful orders made by Parliament, and to allow the Court to determine claims that disclosure of information to Parliament would contravene the public interest'. Senator Kernot went on to state that:

> The catalyst for the Bill is the conflict between the Senate print media committee and the Treasurer over the committee's request for Foreign Investment Review Board documents.

The full text of the bill, the explanatory memorandum and Senator Kernot's second reading speech is at Appendix A to this report.

1.4 During the debate on the reference, which was supported by all non-government senators, it was pointed out by several senators that the need for consideration of the question of executive privilege or public interest immunity claimed against a House of Parliament or its committees had been demonstrated by recent incidents referred to in the terms of reference. It was also pointed out, however, that the question was long-standing, and had not satisfactorily been resolved on any occasion.

1.5 The questions that the bill was designed to resolve were:

(a) whether there should be a method of determining a claim for executive privilege against a House of the Parliament;

(b) on what basis the claim should be determined; and

(c) whether the determination of the claim should reside within either of the two institutions, that is, the Parliament or the executive, or whether recourse should be had to the third arm of governance, that is, the judiciary.

1.6 To minimise the extent to which a House of the Parliament and the courts should have overlapping jurisdiction, the bill was deliberately designed to ensure that when a minister in one House, who is immune from the contempt powers of the other, instructs a public servant who is not so immune to disobey an order of that other House, a mechanism is available to bring that minister before a court with a capacity to make orders binding on the minister concerned, rather than on a public servant caught in a conflict between the operation of two contradictory orders.

1.7 The purpose of the bill was to provide a means whereby the judiciary would determine a claim of executive privilege and the method chosen was to allow the matter to be brought before the Federal Court by means of a criminal prosecution.

Conduct of inquiry

1.8 On receipt of the first reference, the Committee determined that it should advertise in the *Weekend Australian* of 21-22 May 1994, with a deadline for submissions of 22 June 1994. In addition, the Committee notified relevant parliamentary and government authorities and a cross-section of specialists in the field, for example, law institutes, legal centres and law reform areas, of the terms of reference.

1.9 The response was extremely limited, with the Committee receiving submissions from only eight persons or institutions (see Appendix B). All the submissions received by the Committee are tabled in a separate volume together with the *Hansard* transcript of proceedings. The quality of the submissions led the Committee to invite all submitters to a public hearing conducted on 18 August 1994. All accepted the invitation, with the exception of the Law Institute of Victoria, the submission from which, nonetheless, was referred to by several witnesses at the hearing.

1.10 The Committee wishes to commend to the attention of the Senate both the submissions received and the evidence given at the hearing. Any attempt to summarise the complex concepts discussed would not do justice to the wide ranging and fruitful debate conducted during the hearings, and the Committee therefore suggests that the material should be read as one with this report.

1.11 In dealing with the subject, the Committee also had regard to the advice received by the Print Media Committee and included as appendices to that Committee's First Report, to other parliamentary reports on the subject and to the writings of scholars such as Professor Enid Campbell and Professor Paul Finn, whose work was referred to during proceedings.

CHAPTER TWO

DISCUSSION OF BILL

Powers of Parliament

2.1 While several submissions addressed the detail of the bill, the primary focus of all evidence received by the Committee was on the fundamental constitutional framework of our system of government. The common denominator of all submissions, whether they supported or opposed the bill, was that it should not be necessary. As the Leader of the Government in the Senate, Senator Gareth Evans QC, has put it:

> [T]here is no lack of certainty about the formal constitutional powers of parliament to order the production of documents, nor about the ability of a house to enforce its orders or those of its committees (Senate *Hansard*, 25 August 1994, p. 380).

2.2 The Committee was, however, aware, as was the author of the bill - and all witnesses before the Committee accepted - that the exercise of the power of one House to enforce an order against a member of another House, particularly a minister who claims executive privilege, is circumscribed by parliamentary rules. It was therefore well understood that any attempt by a House of the Parliament to impose the extreme penalties of either gaol or a fine upon a public servant who obeyed a ministerial instruction not to comply with an order of that House or a committee, while the minister concerned was immune from its contempt powers, was untenable. As Senator Kernot's second reading speech noted, the powers of a House of Parliament under these circumstances 'while extensive, are widely seen as inappropriate for use in such a situation'.

Constraints on disclosure of information

2.3 The Committee also acknowledged, as did all witnesses, that there is some information held by an executive which should not be disclosed. As the Leader of the Government in the Senate pointed out in evidence, members of Parliament are aware of and guided by the types of claims of executive privilege that may be raised by a public servant through access to the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, which discusses at paragraphs 2.28-2.34 the question of public interest immunity. The scope of the immunity suggested in the guidelines, as set out in paragraph 2.32 of the document, is as follows:

> (a) material the disclosure of which could reasonably be expected to cause damage to:

(i) national security, defence, or international relations; or

(ii) relations with the States;

including disclosure of documents or information obtained in confidence from other governments;

(b) material disclosing any deliberation or decision of the Cabinet, other than a decision that has been officially published, or purely factual material the disclosure of which would not reveal a decision or deliberation not officially published;

(c) material disclosing any deliberation of or advice to the Executive Council, other than a document by which an act of the Governor-General in Council was officially published;

(d) material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government where disclosure would be contrary to the public interest; [emphasis in original]

(e) material relating to law enforcement or protection of public safety which would, or could reasonably be expected to:

(i) prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance;

(ii) disclose, or enable a person to ascertain the existence or identity of a confidential source or information, in relation to the enforcement or administration of the law;

(iii) endanger the life or physical safety of any person;

(iv) prejudice the fair trial of a person or the impartial adjudication of a particular case;

(v) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

(vi) prejudice the maintenance or enforcement of lawful methods for the protection of public safety; and

(f) material subject to legal professional privilege.

2.4 At paragraph 2.33 the document also draws attention to the following considerations which may affect a decision whether to make documents or information available:

(a) secrecy provisions of Acts: Attorney-General's Department should be consulted when occasions involving such provisions arise; and

(b) court orders or subjudice issues: where the provision of information would appear to be restricted by a court order, or where the question of possible prejudice to court proceedings could arise, the Attorney-General's Department should be consulted although decisions on the application of the subjudice rule are for the committee to determine, not witnesses.

2.5 In most cases, parliamentarians have been willing to take such matters, particularly matters of national security and individual privacy, into account when deciding whether to pursue requests for information. Furthermore, in the Senate, all committees are bound by privilege resolution 1(16) to refrain from asking public servants questions on policy, and are also required by the resolution to give public servants reasonable opportunity to refer questions to superior officers or a minister.

2.6 Conversely, it must be emphasised that only rarely is there any requirement for a request for information to be pressed, because normally committees receive admirable co-operation from ministers and officers appearing before them. So far as the Senate is concerned, most requests or orders to ministers for the production of documents are met without demur. The problem lies, however, with the exceptional cases, both in committees and in the Senate as a whole. The terms of reference of this Committee give illustrations of government refusal to produce documents and, as the evidence before the Committee shows, there have been other cases.

Determination of claims of executive privilege

2.7 In the blunt terms of one witness before the Committee, Mr Anthony Morris QC, it is all a question of trust. He noted that, in an ideal world, a government could be trusted not to make a claim inappropriately, while in the event that a claim needed to be considered because of some ambiguity or

uncertainty a House or committee of the Parliament could be trusted with such information so that a determination could properly and confidentially be made. However, as he pointed out in his submission, two concerns have led to the present difficulties:

> [T]hat wrong-doing by the government will be concealed under the pretext of invoking the "public interest", or alternatively, that the "public interest" will suffer irreparable harm, through the disclosure of documents and information which, it is hoped, will embarrass the Government (*Volume of Submissions,* pp. 54-5).

2.8 All senators have had some experience of public service and government reluctance to provide certain information on some occasions. Also, it must be accepted that persons who have given evidence or documents in good faith on a confidential basis to committees have sometimes had their trust betrayed. In addition, on some occasions committees themselves, or a House of Parliament, have released evidence given in confidence. Consequently, under Senate Privilege Resolution 1(8) all committees bound by the resolutions are required to warn witnesses that any evidence given in private session may be published by the committee itself or by the Senate.

2.9 The tension between a government decision to withhold information and the Senate's insistence on its production has not been satisfactorily resolved. The question canvassed by the Committee was whether any solution was possible, and in what forum.

2.10 There was general agreement among witnesses that, in the words of the Leader of the Government in the Senate, Senator Evans, a claim of executive privilege or public interest immunity was 'ultimately one for the house of parliament to determine' (*Evidence,* p. 19). This was regarded by witnesses who addressed the question as the desired method. A succinct summary of this view was provided to the Committee in a submission by Dr Ken Coghill, former Speaker of the Victorian Legislative Assembly:

> That the respective House of Parliament, or the two Houses in the case of a joint committee, [should] determine whether it is in the public interest that certain information should not be disclosed by the executive or that it should be disclosed on a confidential basis ... to the Parliament through a Committee (*Volume of Submissions,* p. 161).

2.11 In evidence Dr Coghill expanded his opposition to reference of such matters to the courts as follows:

> My concern is that the legislation is ultimately repugnant to the responsibilities of the parliament, and to the Senate in particular, in our system of government. To my mind the referral of such matters to a court would undermine the authority of the parliament and politicise the court's proceedings (*Evidence,* p. 97).

2.12 Concern about the undermining of parliamentary authority was a feature of evidence given by other witnesses. For example, the Hon. P.D. Connolly QC declared:

> It is my view that nothing should be done to diminish the authority of either chamber of the Commonwealth parliament. Certainly, such a course should not lightly be undertaken (*Evidence,* p. 56).

Mr Harry Evans, Clerk of the Senate, said:

> [U]ltimately, if parliament fails, the whole system is likely to fail. There is simply no substitute for an inquisitive legislature ... We have had a string of royal commissions telling us that all manner of dreadful things have gone on, that parliaments have been powerless to prevent them and have been negligent in their duties, et cetera, and that we need more safeguards, like independent commissions against corruption and all manner of things like that, to prevent these things happening.
>
> I still say that all those things will not work in the absence of a properly operating parliament (*Evidence,* p. 38).

2.13 Dr Coghill's view of the danger of politicising the courts was also espoused by several witnesses. Thus recourse to the bill referred to the Committee was not generally regarded as desirable, in that, while it may to an extent offer a theoretical solution to an impasse between a House of the Parliament and the executive, there would be real concerns about involving the courts in essentially political issues. In responding to the requirement in term of reference (2), that the committee give particular attention to the effectiveness of the bill in providing a solution to the problems set out in the resolution, therefore, the Committee considered that, while the bill provided a mechanism to do so, the disadvantages of giving a court concurrent jurisdiction in these matters outweighed the advantages. Accordingly, while noting comments made in submissions on the drafting and constitutionality of the bill, the Committee has not examined whether the bill is drafted in the best way to give effect to its purpose.

Options for determination of claims

2.14 The question then became, how best to determine claims of executive privilege or public interest immunity under the umbrella of each House of Parliament. Several options were put forward. The first was proposed by Senator Evans. He suggested that, where there has been a dispute about the production of documents 'generally speaking, the Parliament has been able to obtain the material, essentially by political means' (Evidence, p. 4). When asked about the sanctions available in the event of government refusal to produce relevant documents, he put forward the 'court of public opinion' (*Volume of Submissions,* p. 4) as the ultimate sanction. Other witnesses pointed out, however, that the electoral sanction was a blunt instrument, ineffective for the particular purpose. Mr Morris went so far as to label the argument 'nonsense', for two reasons:

> The first reason is that it cannot be expected that the electorate are going to cast their votes in any given general election on the basis of whether or not the government granted or withheld documents to a particular Senate inquiry on a particular occasion ...
>
> [S]econd ... If the government ... gets away with saying, 'We are not going to hand over these documents because the public interest requires that we do not hand over the documents,' then how is the public going to find out that that abuse has occurred?
>
> The court of public opinion is in that sense a very strange court because it only has the evidence before it that the government is prepared to release (*Evidence,* pp. 72-3).

2.15 An option which attracted considerable discussion also derived from a suggestion made by Senator Evans as shadow Attorney-General in 1982. His proposal then was that, in the event of a conflict between a claim of executive privilege and the assertion by a House of Parliament of its right to have access to information, relevant documents should be sent to an independent arbitrator (in the particular instance giving rise to his proposal he suggested a retired judge of the Victorian Supreme Court) to evaluate them on public interest immunity criteria. Witnesses' response to this suggestion ranged from his own guarded support to unbridled enthusiasm, subject to the overriding view that 'the ultimate determination of these matters remains one for the parliament' (*Evidence,* p. 13).

Sanctions for enforcement of orders

2.16 The question remains, however, as to what sanction would be open to a House of Parliament if an executive refused to submit documents to a judicial arbitrator. In the words of the Clerk of the Senate:

> Unless the person appointed to adjudicate ... had some powers to enforce their determination, such a mechanism could not be much of an improvement on what you have now (*Evidence,* p. 32).

2.17 Thus the Committee of Privileges came to the final matter for consideration: the responsibilities of a House of Parliament when met with a refusal by executive government to comply with an order of that House or a committee. The view that it was for a House of Parliament - and the Senate in particular - to enforce its orders through existing powers was put most forcefully in the Law Institute of Victoria submission:

> The procedure set out by the Bill substantially weakens the Senate's existing substantive powers and makes them more difficult to use as a matter of practice. That will in turn make it more difficult for Senate Committees to enquire into matters which the government does not want publicly known. That they can enquire into such matters is precisely the justification for their existence. Instead of codifying and limiting its existing powers, the Senate should simply resolve to use them where appropriate (*Volume of Submissions,* p. 163).

2.18 Similarly, Mr Connolly asserted:

> ... I have to say to the committee ... that the answer to the problem is of course in its hands. It is understandable that you do not want to do it ...

but that:

> It may be that the political question is not as insoluble as is sometimes thought (*Evidence,* p. 60).

2.19 That the powers of the Senate are considerable is indisputable. As the Clerk put it:

> Technically, the Senate ... is in a very strong position, theoretically, to force a government to disgorge information that

> it is refusing to produce ... There is a spectrum of things ... one end of the spectrum is pass a censure motion and the other end of the spectrum is refuse to deal with any government legislation until the documents are produced ... (*Evidence,* pp. 30-1).

2.20 In response to a question from Senator Teague, he acknowledged that a significant power of the Senate, 'at the drastic end of the spectrum' (*ibid.,* p. 31), was its capacity to find contempt and give a particular penalty to a person found guilty of contempt. He cautioned, however, that:

> The Senate has enormous powers to force a government to disgorge information but there are great political constraints on the use of those powers (*ibid.,* p. 31).

Dr Coghill was less concerned about the political constraints, suggesting that:

> [I]f responsible government is to be ultimately effective, in the end either House must have the capacity to search for and seize the information (*Evidence,* p. 98).

In short, witnesses declare that the power of a House of Parliament exists; it is up to a House to use it.

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

Conclusion and recommendation

2.22 The Committee of Privileges, having considered the Parliamentary Privilege Amendment (Enforcement of Lawful Orders) Bill 1994:

(a) does not accept the concept that jurisdiction in respect of the determination of claims of executive privilege or public interest immunity against a House of Parliament or its committees should be conferred on the courts;

(b) accordingly, **recommends** that the Bill be not proceeded with; and

(c) considers that, if an order of a House or committee is not complied with by a public servant acting on the instructions of a minister, it is for the relevant House to take such action under its contempt powers as it considers appropriate in the circumstances.

Margaret Reynolds
Chairperson

APPENDIX A

1993-94

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

Presented and read a first time

(SENATOR KERNOT)

A BILL

FOR

An Act to amend the *Parliamentary Privileges Act 1987* to provide for enforcement through legal process, as an alternative to the penal powers of the Houses of the Parliament, of lawful orders of the Houses and their committees

The Parliament of Australia enacts:

Short title etc.

1.(1) This Act may be cited as the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Act 1994*.

(2) In this Act, **"Principal Act"** means the *Parliamentary Privileges Act 1987*[1].

2. After section 11 of the Principal Act of the following section is inserted:

9405121—1,350/8.4.1994—(51/94) Cat. No. 94 4343 4

Orders of Houses and committees

"11A.(1) In this section, 'the Court' means the Federal Court of Australia.

"(2) The Court has jurisdiction, exclusive of the jurisdiction of all other courts except the High Court, with respect to matters arising under this section.

"(3) The jurisdiction of the Court under this section may be exercised by a single Judge, who may refer a question of law for the opinion of a Full Court, and may, on the Judge's own initiative or on the application of a party, refer a matter to a Full Court to be heard and determined.

"(4) A person shall not, without reasonable excuse, fail to comply with a lawful order of a House or a committee.

Penalty: (a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

"(5) When an offence against subsection (4) is proved the Court shall make such orders as are necessary to prevent a continuation or recurrence of the offence and to ensure compliance with the lawful order of the House or committee in respect of which the offence was committed.

"(6) If an offence against subsection (4) is committed by an officer or employee of the Commonwealth because of a direction by a minister, on proof of the offence the Court shall find the offence proved and make orders in accordance with subsection (5), but shall not convict the officer or employee of the offence, and shall not impose any penalty for the offence.

"(7) It is a defence to a prosecution for an offence against subsection (4) in relation to an order of a House or a committee that requires the giving of evidence or the disclosure of a document if the defendant proves that:

(a) the giving of the evidence or the disclosure of the document would be substantially prejudicial to the public interest; and

(b) the prejudice to the public interest would not be outweighed by the public interest in ensuring that a House and its committees can conduct inquiries freely.

"(8) In deciding whether a defence under subsection (7) has been established, the Court shall hear the evidence or examine the document in camera.

"(9) A person shall not disclose evidence heard or a document examined under subsection (8) except in accordance with an order of the Court.

Penalty: (a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

"(10) Subsection (9) does not prevent the giving of evidence or the presentation of a document to a House or a committee.

"(11) A penalty shall not be imposed under section 7 for an offence in respect of which a prosecution under subsection (4) has been commenced.

"(12) A prosecution for an offence against subsection (4) shall be commenced and conducted only by a person so authorised by resolution of:

(a) the Senate, for an offence in respect of an order of the Senate or of a committee of the Senate; or

(b) the House of Representatives, for an offence in respect of an order of that House or of a committee of that House; or

(c) each House, for an offence in respect of an order of each House or of a committee of both Houses.".

NOTE

1. Act No. 21, 1987, as amended. For previous amendments, see No. 9, 1988.

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1994

SENATE

PARLIAMENTARY PRIVILEGES AMENDMENT (ENFORCEMENT OF LAWFUL ORDERS) BILL 1994

EXPLANATORY MEMORANDUM

The purpose of this bill is to provide for the enforcement by the courts through normal legal processes of the lawful orders of the Houses of the Parliament and their committees.

The refusal of certain witnesses to provide documents in accordance with the requirements of the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media has drawn attention to the situation that there is no way of enforcing such requirements of the Houses or their committees except through the power of each House to punish contempts, and that the courts probably cannot and would not review an exercise of that power until a penalty is imposed.

Those incidents also drew attention to the absence of any ready means whereby a claim of executive privilege, or public interest immunity, that is, a claim that disclosure of certain information would not be in the public interest, can be adjudicated by the courts.

The bill would amend the *Parliamentary Privileges Act 1987* by inserting a new section 11A to provide:

- it would be an offence, prosecuted in the Federal Court, to fail to comply with a lawful order of a House or a committee (such as an order that a witness attend a hearing, that evidence be given or documents be produced) (proposed subsections 11A(1) to (4))
- when an offence is proved the Court would make orders to prevent the continuation or recurrence of the offence and to ensure compliance with the parliamentary order (for example, orders that evidence be given or that a document be produced to a House or a committee) (proposed subsection (5))
- if an offence is committed by a public servant because of a direction by a minister, the offence would be found proved but the conviction not recorded against the public servant nor a penalty imposed (proposed subsection (6))
- if in a prosecution a claim of executive privilege or public interest immunity is made, that is, that evidence should not be given or a document produced because this would be contrary to the public

interest, the Court would determine for itself whether that claim is sustained, and for that purpose would hear the evidence or examine the document in camera; this conforms with the law relating to claims of public interest immunity in court proceedings (proposed subsections (7) and (8)).

Proposed subsections (9) and (10) would ensure that evidence given and documents examined by the Court in camera would not be disclosed except by order of the Court, unless they are given or presented to a House or committee.

Proposed subsection (11) would prevent a House imposing a penalty for an offence which is the subject of proceedings before a court.

Proposed subsection (12) would ensure that a prosecution could not be commenced or carried on except at the direction of the relevant House.

The Parliamentary Privileges Act already provides that certain actions which are also contempts of Parliament, namely interference with witnesses and unauthorised disclosure of in camera evidence, may be prosecuted in the courts as criminal offences (sections 12 and 13 of the Act).

As with those provisions, the proposed provisions of the bill would not affect the existing power of the Houses to deal with contempts of Parliament (section 5 of the Act).

The bill would, however, provide a means whereby an impartial court could enforce lawful orders of the Houses and their committees and determine any claim of executive privilege or public interest immunity.

Only *lawful* orders would be so enforced, and the Court would determine their lawfulness in accordance with the existing law.

The bill would place the Australian Parliament in much the same position as the Congress of the United States of America, which retains its inherent right to punish contempts but which has legislated to allow the courts to impose penalties for non–cooperation with congressional inquiries and to enforce subpoenas.

Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994

Second reading

Senator Kernot

23 March 1994

This Bill provides for the Federal Court to enforce lawful orders made by Parliament, and to allow the Court to determine claims that disclosure of information to Parliament would contravene the public interest.

The catalyst for the Bill is the conflict between the Senate print media committee and the Treasurer over the committee's request for Foreign Investment Review Board documents.

But I have not put this legislation forward just to solve an immediate problem. That Parliament lacks a satisfactory mechanism to enforce its own orders has been obvious for years, particularly where it is the government which refuses to comply. There has been no satisfactory way of resolving Government claims that disclosure of information is not in the public interest.

When the Coalition tried to obtain evidence about the Whitlam Government's attempt to raise loans through Tirath Khemlani and others, it failed. When Labor tried to obtain documents revealing the Fraser Government's failure to tackle bottom-of-the-harbour tax avoidance, it also failed.

The Bill is drafted to allow Parliament to ask the courts to enforce any lawful order made against any person or organisation. But the principal aim is to deal with disputes which arise when Parliament orders a government to disclose information, and the government refuses.

This is not to suggest that Parliament is powerless in the face of non-compliance of this kind. It is just that its powers, while extensive, are widely seen as inappropriate for use in such a situation.

As we know, section 7 of the *Parliamentary Privileges Act 1987* gives each House the power to impose a fine or prison sentence for an offence against it. This is Parliament's sanction of last resort, but it is clearly undesirable when a public servant is caught between two orders -- Parliament's order to divulge information, and a minister's instruction not to.

In the case now before the Senate print media committee, the House of Representatives would no doubt protect the Treasurer from any action taken against him by the Senate. This would leave the Senate with the option of taking action against the public servant at the helm of the Foreign Investment Review Board, who is

acting on the Treasurer's instructions. That is clearly unsatisfactory.

In fact, I believe there is a general view in the community that it is the role of the courts, and not the Parliament, to impose prison sentences or fines. Although there is a school of thought that the courts have no role in determining disputes of a political nature, to leave matters as they are would continue the decades-long uncertainty over the relative powers of Parliament. It is time this matter was resolved, and the only realistic way of doing so is by resort to the courts.

The Senate also has the option of taking political action to get its way. That could include filibustering, or even blocking key bills in protest. But again, I do not believe it is appropriate for Parliament to engage in obstruction to enforce accountability. This is a more civilised alternative which will avoid further erosion of Parliament's standing, and we should use it.

The Bill inserts a new section 11A into the *Parliamentary Privileges Act*.

The new section makes it an offence not to comply with a lawful order of a House or committee and requires the courts to make orders to remedy the offence.

For example, failure to comply with a lawful order to produce documents would be an offence, and the courts would order that the documents be produced.

If an offence is proved, the standard penalties in the Act apply unless the offence has been committed by a public servant acting under a minister's instructions. In that case, the public servant is not convicted of an offence, and no penalty is imposed.

There may be cases where someone other than a minister (perhaps a departmental secretary or company executive) instructs an employee not to comply with an order of Parliament. It could be argued that the employee should be protected from prosecution in those cases.

However in such a case, the secretary or executive would lack the protection of parliamentary privilege -- unlike the minister -- and would then be open to enforcement action instead of the employee. I have therefore decided to limit the protection of this provision to public servants acting under a minister's instructions.

It has been suggested to me that there should be no penalty for non-compliance with an order of Parliament, and that penalties should only be imposed for contempt of court, in the event that a court orders compliance but the defendant still refuses.

My concern about this proposal is that it makes non-compliance with an order of Parliament cost-free. Anyone could refuse a committee's request for information in the secure knowledge that the relevant House would have to take them to court to get it, and that they would be immune from any penalty.

Furthermore, the courts' power to order compliance provides scope for leniency in imposing penalties, for example by suspending a fine or prison term.

The Bill explicitly recognises that a defence against Parliament's order to produce

documents or give evidence is that disclosure would be contrary to the public interest. In considering such a claim, the court must hear the evidence or view the document *in camera*. Disclosure of those proceedings would be an offence unless subsequently ordered by the court, but Parliament would be free to hear the same evidence or receive the documents.

The effect of this provision is to require executive claims of public interest immunity to be determined by the courts. The Bill makes it clear that determining such a claim is a balancing act, which requires any prejudice to the public interest which disclosure might cause to be weighed against the public interest in the free conduct of inquiries by Parliament.

In recognition of the significance of the matters at stake, a case under this legislation would be heard in the Federal Court, with any appeal going to the High Court.

And the Bill prevents Parliament from having a bet each way. Once a prosecution has been commenced, Parliament would be prevented from imposing its own penalties using section 7 of the Act.

Finally, a prosecution under this Bill can only be made by a person authorised by a resolution of the House whose order -- or whose committee's order -- has not been complied with.

This Bill is a constructive attempt to break a deadlock which has existed for far too long. It is a step towards more open government, but one which allows government claims of public interest immunity to be heard and determined impartially.

The Government has given no clear indication of its position on this Bill. I would point out to them that failure to support it would look distinctly hypocritical, given the vehement attacks on me for leaving open the use of the penalty provisions of the Act to obtain Foreign Investment Review Board documents from the Board's Executive Member.

The Bill provides an alternative process which would allow the Federal Court to resolve the dispute without any threat of a penalty against any public servant. It depoliticises the competing claims of the committee and the Treasurer as to whether disclosure is in the public interest. If it doesn't become law, then we will be thrown back on the inappropriate provisions of the *Parliamentary Privileges Act*.

This Bill is a fair and reasonable alternative, and I commend it to the Senate.

APPENDIX B

WITNESSES AND SUBMISSIONS

* *Page numbers refer to the volume of submissions which accompanies the transcript of evidence.*

** *Not represented at hearing.*