THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

PARLIAMENTARY PRIVILEGES AMENDMENT (ENFORCEMENT OF LAWFUL ORDERS) BILL 1994 - CASSELDEN PLACE REFERENCE

(52ND REPORT)

MARCH 1995

MEMBERS OF THE COMMITTEE

Senator Baden Teague (**Chairman**) (South Australia)
Senator the Honourable Margaret Reynolds (**Deputy Chairperson**) (Queensland)
Senator Bruce Childs (New South Wales)
Senator John Coates (Tasmania)
Senator Christopher Ellison (Western Australia)
Senator Jim McKiernan (Western Australia)
Senator Bob Woods (New South Wales)
Senator Cheryl Kernot (Queensland) (for the purposes of the Committee's inquiry into the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994)

The Senate
Parliament House

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Introduction

1. On 22 June 1994, the Committee of Privileges was ordered by the Senate to consider a "particular instance of refusal by a minister to produce documents in response to an order of the Senate" as part of its consideration of the Parliamentary Privileges Amendment (Enforcement of Lawful Orders Bill) 1994, which had been referred to the Committee on 12 May 1994. The resolution also required the Committee to consider a report by the Auditor-General, which the Senate had by the same resolution ordered him to produce, in relation to leases for office space in the Casselden Place building in Melbourne.

2. On 19 October, the Acting Auditor-General, in response to the order of the Senate, transmitted a report which was tabled on 20 October. In the meantime, the Committee of Privileges had made its general report on the Privileges Bill (Report No. 49, tabled on 19 September 1994, Parliamentary Paper No. 322 of 94). The purpose of the Committee's report was to comment on the general principles of the Bill, which had been drafted and presented to the Senate as a method of overcoming the impasse which occasionally arises from a demand by the Senate or one of its committees for documents held by the executive and the executive's refusal to comply on the basis of a claim of public interest immunity or executive privilege.

3. The motion referring the Bill to the Committee had included several recent examples of ministerial refusal to produce documents. The Committee has interpreted the terms of the present reference as asking it to consider whether ministerial refusal to produce documents on the grounds that they were commercial-in-confidence constituted a further such instance.

Matters for consideration

4. The question for the Committee arose following persistent attempts by individual Senators and the Senate to receive details of Commonwealth leaseholding arrangements at Casselden Place. All were denied on commercial-in-confidence grounds, although various mechanisms were suggested to enable interested Senators to receive the information without compromising what the executive regarded as confidential rental arrangements.

5. Finally, the Senate asked the Auditor-General to investigate the matter. In order for the ANAO to pursue its inquiries it was necessary for that office to have access to the details of the rents paid by the enterprises and any other considerations received by them in respect of their tenancy arrangements; in other words, access to the information not provided to Senators in responses to their questions on notice and to the Senate's two orders for production of documents of 5 and 10 May 1994. The ANAO has access to a large amount of confidential information in the normal course of its operations, and is in a position to maintain confidentiality. This does not apply to information provided to the Senate or an individual senator.

6. The resultant report of the Acting Auditor-General has given significant details of the arrangements. It contains many details of costs, etc, in relation to a wide variety of matters on which the Senate had asked the Auditor-General to report. Only one figure in the entire report has been blacked out, at the request of the Department of Administrative Services, and this element has not been pursued further.

The question of "commercial-in-confidence"

7. In reaching its conclusions on the matter, the Committee was guided by the report of the then Senate Standing Committee on Finance and Government Operations, tabled on 3 December 1986 (Parliamentary Paper No. 432 of 1986). This report examined commercial-in-confidence aspects of a contract

entered into between the Australian Broadcasting Corporation and one of its program presenters. While that Committee's comments were directed to the question of statutory authority accountability, and while the contract in question contained an explicit non-disclosure clause and had other objectionable features, the conclusions reached by that Committee have relevance to questions of commercial-in-confidence matters arising in relation to the right of Houses of Parliament and their committees to receive information. The report included the following conclusions:

- The power in enabling legislation to enter into contracts does not imply that the Parliament or its committees will not insist on the disclosure of such details.

- As a basic matter of accountability, it is desirable that contract details not be confidential.

- When Parliament seeks information claimed to be commercially confidential, proper regard should be had for genuine personal and commercial interests (such as privacy or competitiveness) that may be affected by publication, but it is an important principle that actual remuneration for providing services to an authority should be available to the Parliament when requested.

- In particular, authorities must be prepared to account to Estimates Committees for all aspects of their financial management and administration, even when the information sought may be regarded as private or commercially confidential. This aspect of statutory authority accountability should be made clear at the time an authority enters into negotiations for any type of contract and should be made clear in the terms of contracts entered into.

8. The report declares the parliamentary principle underpinning the above

conclusions as follows:

> It remains a general principle that information cannot and should not be withheld from Parliament or its committees by an authority, unless a specific provision to that effect is contained in an authority's enabling legislation.

9. In its response to the report on 17 November 1987, the Government accepted this general principle, making the point, however, that:

> Parliament should assess the difficulties associated with making the information public and ensure that any such adverse effect is balanced against the public interest in the Parliament obtaining the information.

10. The Committee of Privileges, in its 49th report, also asserted the Parliament's right to receive information, emphasising that it is up to a House of Parliament itself to determine whether the question of production of documents should be pursued in given circumstances. However, despite the points referred to in paragraph 7, it has not yet been generally accepted that the commercial confidentiality which normally applies in the private sector should not also apply in the public sector. Further, the suggestion referred to in the last dot point of paragraph 7 has not been implemented. The Committee believes that these changes should be made before the Parliament seeks to override reasonable claims of commercial confidentiality which the suppliers of goods and services, in particular, would assume applies. This is especially relevant given the vastly increased commercialisation of the public sector since the 1986 report.

11. It is noteworthy that a suggestion made in the Privileges Committee's 49th Report was used in the present instance to overcome the difficulties experienced by the Senate in dealing with claims of executive privilege or public interest immunity. The report suggested that a method of overcoming the conflict between a House of Parliament's right to know and possibly

legitimate claims of public interest immunity would be to appoint an independent arbitrator to examine the material, taking into account public interest immunity criteria. In effect, the Acting Auditor-General was the agent of the Senate in this matter.

12. The Committee notes that Senator Kernot has proposed an alternative parliamentary mechanism to the external agency provision used to examine the Casselden Place material. A notice of motion to give effect to her proposal has been placed on the Notice Paper for debate on 2 March 1995.

Conclusions

1. That the Casselden Place matter referred to the Committee of Privileges on 22 June 1994 constituted a further instance of non-compliance with an order of the Senate which gave rise to the Committee's reference on the Parliamentary Privileges (Enforcement of Lawful Orders Bill) 1994.

2. The Committee reaffirms the comments made in its 49th Report that any claims of executive privilege or public interest immunity are ultimately for a House of Parliament to determine, but draws attention to its comments in paragraph 10 above.

3. The Committee again draws to attention the suggestion outlined at paragraph 2.15 of its 49th Report 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 be sent to an independent arbitrator to evaluate them on public interest immunity criteria.

4. That, in this instance, the use of an independent arbitrator to examine the matters of concern to the Senate, that is, the Acting Auditor-General, appears to have worked satisfactorily.

Baden Teague
Chairman