

**THE SENATE'S POWER
TO OBTAIN EVIDENCE**

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The Senate Finance and Public Administration Committee at a hearing on 3 September 2003 asked for a brief paper on the relationship between the formal power of the Senate to obtain evidence and the limitations on that power which have gained some parliamentary recognition but not legal status. A paper was prepared accordingly and published by the committee.

This is an updated version of that paper.

The Power

The Senate has a general power, not subject to any known legal limitations, to compel evidence, that is, to require the attendance of witnesses, the answering of questions and the production of documents, and to impose penalties for default.

There are two sources of this power:

- Section 49 of the Constitution confers on each House of the Parliament the powers of the United Kingdom House of Commons as at 1901. The power to compel evidence was one of the powers of the House of Commons, regularly and recently exercised before 1901, and is therefore one of the powers adhering to the Senate under this section.
- The power is inherent in the legislature of a self-governing body politic. This would not be mentioned here except for the very strong articulation of this inherent legislative power doctrine by the United States Supreme Court in respect of the Houses of Congress, notwithstanding the absence from the United States Constitution of any explicit reference to the power.¹ Those judgments are important in establishing that the power is *legislative* in character. Also, Australian courts have shown some deference to United States Supreme Court judgments, and this doctrine may become important in Australia in the future.

Section 49, however, is the undoubted source of the power. The section allows the Parliament to change its powers by legislation, but no relevant legislative change has been made to this power, except for a limitation of the penalties which may be imposed.²

There are no known limitations in law to this power. There are no authoritative court judgments establishing any such limitations.

There may be limitations in law which might be found by the courts in Australia if relevant questions were ever tested. It must be emphasised, however, that such questions have not been tested, and therefore discussion of possible legal limitations does not go far beyond speculation.

There are three possible sources of such possible legal limitations:

- In the United Kingdom there are two presumed limitations which might be held to apply in Australia under section 49.
- The United States Supreme Court has found limitations on the congressional power of inquiry arising from the United States Constitution, and these findings could be persuasive to the Australian courts because of similarities in the Australian Constitution.
- There might be other limitations arising from the Australian Constitution.

There are also well-established limitations which are observed as a matter of parliamentary practice. They correspond to some possible legal limitations.

The limitations with some parliamentary recognition and the possible legal limitations may be summarised as follows.

The monarch

In the United Kingdom it is presumed that the House of Commons could not summon the monarch, and this might transfer to Australia as an immunity of the monarch's representative, the Governor-General. There is a parliamentary practice of making "addresses" to the monarch and the representative in both jurisdictions,³ and the foundation of this practice might be taken to be a lack of power to make demands of them.

Members of other houses

In the United Kingdom it is well established that the House of Commons cannot summon members of the House of Lords.⁴ This rule in that jurisdiction probably has a great deal to do with the status of the lords as peers of the realm, and on this basis the limitation would not automatically transfer to Australia.

In the procedural rules of the Australian Houses, however, there is a well-established principle that each House does not seek to compel the members of the other House.⁵ This is based on a requirement for comity between branches of the legislature.

It is possible that the courts in Australia might find this rule to have a legal basis in the Constitution, but it is at least just as likely, on past performance, that the courts would say that it is a matter for the two Houses to resolve between themselves and not a legal question. In the Senate this rule of comity has been regarded as extending to members of state and territory legislatures, and the Senate and Senate committees have accepted and acted on advice to that effect.⁶

Legislative power

The power to compel evidence may be limited to subjects within the legislative competence of the Commonwealth.

There are old High Court judgments suggesting that the Commonwealth executive may not conduct compulsory inquiries into matters beyond the Commonwealth's legislative competence.⁷ The United States Supreme Court explicitly identified this limitation as applying to the Congress,⁸ and the American cases would probably be persuasive in Australia (but there is the difficulty that the Congress relies on inherent power and not prescription).

It would not be a significant limitation, given the ability of the Commonwealth to legislate on most subjects in one way or another, but it is observed in practice in Senate inquiries.

Other Australian jurisdictions

There may be a legal basis to a limitation which is observed in practice by the Senate, namely, that Senate committees should not seek to summon the officers and documents of state or territory governments. As with the rule about members of other houses, this is a matter of comity between bodies which possess similar political powers and which ought to demonstrate mutual respect for each other.

No Senate committee has ever summoned a state office-holder; the practice is to ask the responsible state minister to provide relevant state public servants to give evidence and relevant documents, and to proceed by way of invitation with all other state office-holders.

There are High Court judgments to the effect that the Commonwealth may not act in such a way as to prevent the essential functioning of the states,⁹ and these could form the basis for a legal doctrine supporting the parliamentary practice as a matter of law. A Senate committee sought the advice of the Clerk and subsequently of a distinguished professor of law, and

having received much the same message that it probably could not summon state officers, abandoned its inquiry.¹⁰

Surprisingly, perhaps, this question has not been litigated in the United States. The view of congressional advisers is that the federal Houses may summon state officers in pursuit of inquiries into matters within the legislative competence of the Congress, but the cited precedents are old and uncertain. In any event, the United States Constitution is, contrary to the usual perception, more centralised than its Australian counterpart in some respects, and Congress has powers over the states with no Australian equivalent which could support the inquiry power in this regard.¹¹

Other houses' proceedings

The various houses of parliaments generally follow the principle that one house cannot inquire into proceedings in another house.

A basis in law for this would be the immunity of parliamentary proceedings from impeachment or question in any other place, the Bill of Rights of 1689, article 9 immunity which adheres to all of the Australian parliaments, and which is interpreted as applying to each individual house.¹²

This does not affect political comment on events in other houses, but formal inquiries into other houses' proceedings are avoided. It would obviously be difficult properly to conduct bicameral relations within a jurisdiction, or federal relations between jurisdictions, in the absence of this rule, so it is a matter of comity apart from any question of law.

Unlike the other possible limitations considered here, this restriction applies regardless of whether witnesses and documents are summoned. Thus, a committee of one house does not hold an inquiry into events occurring in the course of proceedings in another house, and does not take evidence on such a matter from a member of the other house, even if the member appears and gives evidence voluntarily.

The judiciary

It is generally assumed that the Senate and its committees would not summon members of the judiciary, as a matter of mutual respect between the legislature and the judicial branch. There is, however, no basis for any legal immunity.

There is one circumstance in which judges might be summoned: in an inquiry by the Senate into whether a judge of a federal court should be removed from office by resolution of both Houses under section 72 of the Constitution.¹³

“Executive privilege”

Executive governments in Australia and comparable jurisdictions have frequently claimed that they have a right to withhold information from the legislature if the disclosure of the information would not be in the public interest. No legislature worthy of the name has conceded that there is any such right or privilege adhering to the executive government.¹⁴

Nor have courts in any of those jurisdictions found that the claim has any legal basis in relation to the *legislature*, as distinct from proceedings in the courts. Discussion of this matter has not been helped by identifying the law relating to proceedings in the courts with any practice which might apply to proceedings in the legislature or its committees. The courts have expounded the law relating to what was called “crown privilege” and which, via “executive privilege”, came to be called “public interest immunity”. Basically, the law now is that the courts will consider and determine whether any information should not be produced in legal proceedings because it would be contrary to the public interest to do so. The term “public interest immunity” has been adopted in the parliamentary sphere, partly in the hope on the part of parliamentarians that the same rule would apply there, namely, that the legislature will determine any claim of immunity by the executive government. The relevant law, however, does not apply to the legislature.

The Senate has asserted, by resolution, the principle that it is for the Senate to determine any claims by the executive government that information should not be produced.¹⁵ The executive government has not accepted this and has persisted in refusing information to the Senate. Such disputes have been regarded as matters for political resolution. The Senate has adopted various remedies in relation to government refusals of information, including declining to pass legislation until relevant information is produced.¹⁶

In other jurisdictions a similar situation prevails. The houses of the United States Congress have not conceded that there is any such thing as executive privilege in relation to the legislature. The US Houses possess inherent powers to require the attendance of witnesses, the giving of evidence and the production of documents, and to punish contempts. They have enacted a statutory criminal offence of refusal to give evidence. They may also seek to have their requirements enforced through the courts by civil process. In serious cases of conflict between the Houses and the administration over the production of documents, administration officers are “cited” for contempt, but these matters usually end in some compromise and with documents handed over. In some cases, presidents have successfully withheld documents from the Houses. The courts, while suggesting some constitutional basis for executive privilege, and accepting jurisdiction in particular cases, have not become involved in determining specific claims of executive privilege.¹⁷

The recognised immunities of other houses’ proceedings and of their members may have the effect of shielding the activities and the ministers of governments, in so far as those activities

occur in the course of parliamentary proceedings or are carried on by members of another house, respectively. It is not possible to extrapolate from this that government activities as such, or ministers as such, have any kind of immunity. Nor can one extrapolate from the non-existent immunity of government activities or ministers an immunity possessed by *former* ministers. There is therefore no basis for the suggestion, made in the context of the Select Committee on a Certain Maritime Incident, that former ministers of the House of Representatives may not be summoned by a Senate committee. The immunities having parliamentary recognition, of proceedings and serving members, simply do not add together to make an immunity of former ministers. Even if a court were to find a legal basis for those recognised immunities, it would be highly unlikely to make the leap to a new, unrecognised one, and in doing so impose a new limitation on parliamentary processes and a new escape route for governments to avoid accountability. In any event, former House of Representatives ministers have appeared under summons before a Senate committee.¹⁸

From time to time the claim has been made that it is not appropriate for the personal staff and advisers of ministers to appear before parliamentary committees, or it is not appropriate for them to be summoned, depending on which of two versions of the claim is made. This notion has particular appeal to ministers. The suggestion is frequently elevated into a supposed “convention”, but that would mean that it must be a frequently-breached convention. Presumably the rationale of the alleged convention is that personal staff and advisers are not action-takers or decision-makers in the system of government, but merely extensions of their ministers, who are entirely responsible for what occurs in their offices. This rationale has been punctured by numerous examples of ministerial staff taking actions and making decisions, and by ministers declining to accept responsibility for the actions and decisions of their personal staff. It was usually stated to be a matter of appropriateness, not law: ministerial staff, it was said, should not be called, even though the power to do so is there. In the context of the Select Committee on a Certain Maritime Incident, however, it was suggested that they have some kind of immunity arising from the supposed immunity of their ministers.¹⁹

There is no basis for any such immunity, either in parliamentary practice or in law. Ministerial staff have appeared before Senate committees to explain their roles and actions, voluntarily several times and once under summons (the latter occasion accompanied by the usual protestations that it would not set a precedent, etc., which only serve to demonstrate that the power is there).²⁰

There has never been any question of ministerial staff having any immunity in the United Kingdom.²¹ In the United States various administrations have claimed that it is not appropriate for presidential staff and advisers to give evidence to congressional committees, but many such persons have appeared, both voluntarily and under summons.²²

As a matter of practice, Senate committees do not normally summon Commonwealth public servants, but ask the relevant ministers to send the relevant officers. There is no doubt, however, that the Senate and its committees may summon public servants. From time to time Senate committees have issued subpoenas to public servants in particular circumstances. On several occasions the Senate has directed that particular officers appear in particular inquiries.²³

The claimed “executive privilege” is often seen as a matter of content of information: particular categories of information, such as cabinet documents or departmental advice, should not be summoned. Neither in law nor in parliamentary practice is there any substantive basis for such an immunity of particular information from legislative inquiries.

In this connection it is necessary to caution against being misled by certain court judgments in the state of New South Wales. The Court of Appeal in that state examined the power of the Legislative Council to require the production of government documents and to impose a penalty on a minister for non-compliance. While upholding that power, the court delineated at least one limitation arising from the constitutional position of the cabinet and the special status of its deliberations.²⁴ The powers of the New South Wales Houses, however, rest on a common law doctrine that they are such as are necessary for the Houses to perform their legislative functions. This doctrine was originally expounded in the context of, and still has as a substratum, the status of those Houses as creations of the British Parliament, in some sense subordinate legislatures. The law as explicated in those cases cannot readily be ascribed to those jurisdictions where the houses possess House of Commons powers by prescription. In particular, it cannot be assumed that the apparent immunity from production on the order of a house of documents recording cabinet deliberations applies in the other Australian jurisdictions. Nor is there any support for it in the comparable overseas jurisdictions.

Imposing penalties

It would be easy for the Senate to impose penalties on private persons for non-compliance with Senate inquiries. Such persons, however, usually readily cooperate with inquiries, without the need for subpoenas. It is executive governments which are most likely to refuse information to the Senate and its committees. It is executive governments which usually seek to conceal information from the legislature and the public. It is executive governments, with their vast resources, which can most readily resist the requirements of the legislature.

The Senate declared by resolution in 1994 that it would not impose penalties on public servants who resist Senate inquiries on the instructions of a minister.²⁵ While this self-denying ordinance limited the scope for any coercive action, it placed the responsibility for executive concealment where it ought to be, on the political arm of the executive, the ministry.

Coercing ministers has been seen as a matter for political action rather than the imposition of the limited penalties which could be imposed on them personally. This was implicit in the Senate's resolution. It is also a matter of political will.

Third party assessment

One method of resolving disputes between the Senate and the executive government about the production of government information is to have a neutral third party assess the disputed information and determine any question of non-disclosure for public interest reasons. The Senate Privileges Committee recommended this procedure, and it has been used by the Senate in some cases. The Auditor-General has been asked to make reports on matters involving government expenditure.²⁶

This process, however, depends on the executive cooperating by agreeing to the third party, to the production of the information to be examined, and to the consequent assessment of the information. If the ministry refuses to cooperate, this may be taken as a further sign that it has much to hide, but the dispute remains unresolved.

Self-imposed limitations

Any limitations on the Senate's inquiry powers, therefore, are essentially self-imposed.

If the Senate were to seek to impose penalties on a minister, this could lead to a court case in which the postulated legal limitations on the inquiry power might be tested. As has been suggested, however, the courts might well find the existence of any such limitations to be a political question incapable of judicial resolution. As in the United States,²⁷ the courts may well prefer to stay out of disputes between the legislature and the executive.

If legislative and political remedies are resorted to in such cases, there can be no question of judicial intervention. Any restraint in the use of such remedies is completely self-imposed.

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NOTES

- 1 Most notably in *McGrain v Daugherty* 1927 273 US 135 at 174-5. An examination of the authorities on this point is contained in a judgment of a US District Court in *Committee on the Judiciary, US House of Representatives v Miers* 2008 (not reported).
- 2 *Parliamentary Privileges Act 1987*, s.7. The act also provides greater scope than the previous law for the courts to review any imposition of penalties, but this does not make any more likely the discovery of any legal limitations on the inquiry power.
- 3 For the “humble Address” for documents, see *Erskine May’s Parliamentary Practice*, 23rd ed., 2004, pp 711-12. Senate Standing Orders 165, 171 and 172 provide for addresses.
- 4 A restatement of this rule occurred in United Kingdom House of Commons, Fourth Report of the Transport, Local Government and the Regions Committee, House of Commons Paper No. 655, 2001-2.
- 5 Senate Standing Orders 178, 179.
- 6 Senate Select Committee on the Australian Loan Council, interim report, March 1993, Parliamentary Paper 78/1993; see *Odgers’ Australian Senate Practice*, 12th ed, 2008, p. 60.
- 7 *Attorney-General for the Commonwealth v Colonial Sugar Refinery Co Ltd* 1912 15 CLR 182, 1913 17 CLR 644; *Lockwood v the Commonwealth* 1954 90 CLR 177 at 182-3.
- 8 The limitations applying to congressional inquiries were summarised as preventing inquiries into private affairs unrelated to a valid legislative purpose, or in areas in which Congress is forbidden to legislate, or for purposes properly belonging to law enforcement, or in violation of individual rights guaranteed by the Constitution: *Quinn v US* 1955 349 US 155 at 160-1. But an inquiry does not need to refer to specific legislation: *Eastland v US Servicemen’s Fund* 1975 421 US 491.
- 9 *Melbourne Corporation v the Commonwealth* 1947 74 CLR 31; *Queensland Electricity Commission v the Commonwealth* 1985 159 CLR 152; *Re Australian Education Union, Ex parte State of Victoria* 1995 128 ALR 609; *Austin v Commonwealth* 2003 195 ALR 321.
- 10 Senate Select Committee on the Victorian Casino Inquiry, Report, *Compelling Evidence*, December 1996, Parliamentary Paper 359/1996, pp 24, 41-67; see *Odgers*, 12th ed, 2008, p. 60.
- 11 The precedents were referred to in advices printed in the report mentioned in note 10. The Supreme Court of the Province of Prince Edward Island, in Canada, held that officers of a federal government agency had no immunity from a summons issued by a committee of the Legislative Assembly of the province in the course of an inquiry into a matter within the legislative power of the province. This decision was not appealed and the officers subsequently appeared before the committee. (*Attorney General (Canada) v MacPhee*, 2003 PESCTD O6)
- 12 See *Odgers*, 12th ed, 2008, p. 49, for the related question of whether Commonwealth legislation could override state parliamentary privilege.
- 13 See *Odgers*, 12th ed, 2008, pp 519-20.

- 14 This matter is discussed at some length in *Odgers*, 12th ed, 2008, pp 468-90.
- 15 *Odgers*, 12th ed, 2008, p. 468.
- 16 *Odgers*, 12th ed, 2008, pp 488-9.
- 17 *Senate Select Committee v Nixon* 1974 498 F 2d 725; *US v Nixon* 1974 418 US 683; *US v AT&T* 1977 567 F 2d 121; *US v House of Representatives* 1983 556 F Supp. 150; *In re Sealed Case* 1997 121 F 3d 729; *Committee on the Judiciary, US House of Representatives v Miers* 2008 (not reported).
- 18 The claim was made by the Clerk of the House of Representatives in support of ex-minister Peter Reith's unwillingness to appear before the Senate Select Committee on a Certain Maritime Incident. Contrary advices were provided by the Clerk of the Senate and Mr Bret Walker, SC (counsel for the New South Wales Legislative Council in the cases referred to in note 24). Subsequently, equivocal support was given to Mr Reith's position by Professor G. Lindell and a Mr A. Robertson, SC. The various advices were published by that committee. (Report of the committee, 23/10/2002, PP 498/2002; SD, 23/10/2002, pp 5756-7). The claim was not accepted by any member of the committee or by the Senate. Former Prime Minister Hawke and former Treasurer Kerin appeared under summons before the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media in 1994, having earlier declined invitations to appear.
- 19 See the material referred to in note 18.
- 20 See *Odgers*, 12th ed, 2008, p. 430.
- 21 This is also made clear in the report referred to in note 4.
- 22 H. Relyea & T. Tatelman, *Presidential Advisers' Testimony before Congressional Committees: an overview*, CRS Report for Congress, 10 April 2007. The District Court judgment in *Committee on the Judiciary, US House of Representatives v Mier*, 2008 (not reported) included a finding that such persons have no immunity.
- 23 See the precedents listed in *Odgers*, 12th ed, 2008, p. 425.
- 24 *Egan v Willis and Cahill*, 1996 40 NSWLR 650, 1998 158 ALR 527; *Egan v Chadwick and others*, 1999 46 NSWLR 563.
- 25 *Odgers*, 12th ed, 2008, pp 481-2.
- 26 *Odgers*, 12th ed, 2008, p. 483.
- 27 In, for example, *US v House of Representatives* 1983 556 F Supp. 150. Dismissing a suit brought by the administration to declare lawful its resistance to a House demand for documents, the court urged the parties to reach a political compromise (which they eventually did, victory going to the House), while conceding that a criminal contempt prosecution might force the court's hand. In *Committee on the Judiciary, US House of Representatives v Miers* 2008 (not reported) the District Court upheld the lawfulness of the committee's subpoenas, but declined to adjudicate on specific claims of immunity from producing particular information. There is no provision for a prosecution in Australia. The imposition of a penalty for contempt here might force a court's hand, but an Australian court would also have ample scope to remove itself from a legislative/executive conflict.