AUSTRALIAN SENATE
WITNESSES - FORMER MINISTERS AND MINISTERIAL STAFF

OPINION

The Clerk of the Senate has asked for my opinion on the question whether former Ministers who are no longer Members of either House, and members of Ministers' staff (currently or formerly on staff) have immunity from compulsory summonses to appear before a Senate committee to give evidence concerning their official actions, as Ministers (but not including evidence about Cabinet deliberations or proceedings in a House) or as staff members providing advice and personal assistance to Ministers.

2. The question is about compulsion, and thus concerns the extent of the powers of the Senate - the powers of a committee devolving from those of the Senate itself.

3. The question thus involves the general matter of the Senate's power to summons witnesses (by which I intend also to include compelling them to produce documents), and the particular matter whether former Ministers and Ministerial staff (as I shall term the class described above) have immunity from any such general power.

4. The question does not involve the quite different question whether there is some incapacity in former Ministers and Ministerial staff to give evidence and supply

documents (at least, those which are theirs legally to control) voluntarily. Nothing in this Opinion touches on that matter, except for this comment - I have seen nothing to support any such incapacity.

5. Section 49 of the *Constitution* provides as follows:-

> *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.*

6. The long title of the *Parliamentary Privileges Act 1987* is "*An Act to declare the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House, and for related purposes*".

7. Beyond any possible dispute, in 1901 the House of Commons at Westminster had powers to order witnesses to give evidence before the House or a committee: eg see the tenth edition (1893) of the treatise now known as *Erskine May on Parliamentary Practice*, Chapter XVI and esp at pp 400 and 401. Equally, there is no doubt, in 1901 select committees of the House of Commons could be given by the House power to send for persons, papers and records, witnesses being summoned by an order signed by the chairman of the committee and the sanction for disobedience being guilt of contempt of Parliament: see the tenth edition of *Erskine May* at p 384. Also, by reason of 1871 legislation, committees of the House of Commons had power, in 1901, to administer oaths to witnesses, thereby attaching to false evidence the penalties of perjury, as well as involving a serious breach of Parliamentary privilege:

see the tenth edition of *Erskine May* pp 406-407. (Later historical references, including pre-1901 material consistent with these propositions, and post-1901 material of great comparative interest, may be found in the twenty-first edition of *Erskine May* especially at pp 629 and 677, and in the twenty-second edition at pp 64, 616 and 646. References to the House of Lords are perforce of broad comparative relevance only. Otherwise, the current editions demonstrate complete consistency with the conclusions noted above and discussed below.)

8. Does sec 49 and its 1901-House-of-Commons-equivalency provision continue to apply directly? In terms, it does so only "*until*" Parliament has "*declared*" the Houses', their members' and committees' powers, privileges and immunities. If the 1987 Act did so, then the 1901-House-of-Commons equivalency no longer applies directly by reason of sec 49, as the latter part of sec 49 containing that provision would then be spent.

9. This issue was considered by the High Court of Australia in *R v Richards; Ex parte Fitzpatrick & Browne* (1955) 92 CLR 157, when the only putative such declarations were what the Court described as "*the two very minor and subsidiary matters*" constituted by the *Parliamentary Papers Act 1908* and the *Parliamentary Proceedings Broadcasting Act 1946*. The Court noted that there was then no legislation "*which purports to be a declaration of the powers, privileges and immunities either of the Senate or the House of Representatives, stating comprehensively what they desire them to be*" (at 92 CLR 167). Their Honours (all seven unanimously) regarded the argument that the latter part of sec 49 no longer had application as untenable, describing the earlier part of sec 49 as "*dealing with the whole content of their powers, privileges and immunities*" and being "*concerned with*

the totality of what the legislature thinks to provide for both Houses as powers, privileges and immunities", so that the phrase "*until declared*" introducing the latter part of sec 49 meant "*until the legislature undertakes the task of providing what shall be the powers, privileges and immunities*" (at 92 CLR 168).

10. Bearing in mind the long title of the 1987 Act, it must be at least arguable that the event so described by the High Court as not yet having occurred in 1955, has now occurred. On the other hand, a contrary argument would fasten on the Court's reference to comprehensiveness and totality of legislative provision as to powers, privileges and immunities. The contrary argument would proceed by remarking the self-evident incompleteness of the *Parliamentary Privileges Act* as a code of eg the Houses' powers. This is particularly so in relation to the specific question I am considering, given that there is no specific provision in the 1987 Act empowering a House or a committee of a House to summon witnesses to give evidence. However, significantly, sub-sec 14(3) of the Act explicitly assumes that a person may be "*required to attend before a House or a committee*", an assumption which presupposes an existing and continuing power in a House or a committee to impose such a requirement. The lack of comprehensiveness and totality of provision in the 1987 Act is therefore clear - because it could not seriously be argued that in the absence of a specific provision granting that power neither House nor any committee could any longer require the attendance of any person.

11. Were it not for sec 5 of the Act, it might be necessary to resolve the conflicting arguments noted in 10 above. In that event, I think there would be considerable doubt as to the ultimate outcome. This is not merely an academic or theoretical issue, because there could have been real differences between the

interpretation (including by implication) of a 1901-House-of-Commons equivalency directly imposed by the *Constitution*, in 1901, by contrast with a provision to similar effect legislatively imposed in 1987.

12. For the purposes of answering the present question, fortunately, these other issues may be deferred indefinitely. For sec 5 of the *Parliamentary Privileges Act* provides as follows:-

> *Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as under force in section 49 of the Constitution immediately before the commencement of this Act, continue in force.*

13. By this provision, Parliament has ensured that the full content of the sec 49 1901-House-of-Commons equivalency is preserved by force of statute, if no longer (in part at least) by direct force of the latter part of sec 49 itself. The temporal description in sec 5 of the Act (viz "*immediately before the commencement of this Act*") in turn incorporates the 1901-House-of-Commons equivalency, because that was the position before the 1987 Act essayed its (incomplete) declaration of the Houses', members' and committees' powers, privileges and immunities.

14. It follows that there is no doubt that, today, the Senate and its committees have the power to compel the attendance of witnesses to give evidence. The basis of this undoubted general power is the combination of the position in the House of Commons at Westminster in 1901 (set out in 7 above), sec 49 of the *Constitution* and sec 5 of the *Parliamentary Privileges Act*.

15. I have laboured the point of the source of law providing this general power because none of its components is apt to have bestowed immunities on persons such as former Ministers and Ministerial staff by silent or undetected implication, let alone by interstitial exceptions. First, in my opinion it is impossible to spell out any such immunity from the text of the *Constitution*. That paramount and fundamental law, having Parliamentary government as its elementary framework, could never be read so as to provide such a specific exception from the efficacy of well-understood parliamentary functions such as obtaining information about the operations of government - the Grand Inquest of the Nation, as it has been called. Second, it is futile to search for any such immunity in the specific terms of the other provisions of the *Parliamentary Privileges Act* - and there is no more reason to find it in the general provisions of sec 5 of that Act as there are to find it in the *Constitution*.

16. Third, this leaves the historically ascertainable position in the House of Commons at Westminster in 1901 (ie at the first instant of New Years' Day that year) as the only theoretically available foundation for the existence of such an immunity. The powers of the House of Commons noted in 7 above are described during that period including until 1901 in terms which entirely omit reference to any such immunity. That suffices to conclude the particular matter raised by the present question - there is no immunity for former Ministers and Ministerial staff from compulsory attendance to give evidence before a committee of the Senate.

17. This conclusion is strongly supported by immunities, or exceptions, or established indulgences, which are the subject of considerable reference and discussion as to the relevant powers of the House of Commons and its committees by 1901. Not all of them warrant exposition or discussion for present purposes (eg Peers

of the Realm without a seat in the House of Lords). But some of them are illuminating as to the rationale and principle they suggest for immunities from such a fundamental tool at the disposal of a House and its committees.

18. The most important immunity (which may be a slightly imprecise expression in this context) established by 1901 in relation to the House of Commons' power to summon witnesses before it or one of its committees was the refusal of the House of Lords, being the other House, to countenance any such purported compulsion directed to one of its own Members, and the concomitant self-restraint regarded by the House of Commons as imposed on it against purporting to direct any such compulsion against a Member of the other House.

19. For present purposes, it is important to note the radically different relation of parliamentary history to current parliamentary practice which applied at Westminster in 1901 from that which applies in Canberra in 2002. For one thing, there was never any contest between the Senate and the House of Representatives to produce a slowly evolving and (for most of its history) undemocratic but nonetheless representative lower Chamber, such as characterizes the yoked histories of the Lords and Commons.

20. What matters for present purposes is that as a profound matter of privilege, evinced by elaborate expressions of comity - symbolized by a number of ceremonies - the two Houses at Westminster in 1901, and also at Canberra in 2002, do not claim any power to compel (as opposed to invite) the attendance of a Member of the other House. And the very point of requests or invitations is to leave it to the powers of the other House eg to sanction the conduct of one of its own Members in declining to co-operate with the invitation to attend the requesting House.

21. The most cogent explanation by way of rationale, in 1901 at Westminster and in 2002 at Canberra, of an immunity against compulsion of a Member of the other House is that it is a public duty (not a private interest) of every Member of a House to attend to his or her business in its Chamber, freed of extraneous pressures. In a system of government which integrally involves legislation by proposal, debate and voting, and which involves responsibility of the Executive to the Houses of Parliament, by questions, enquiries, debate and resolutions (involving voting), it is obvious that the attendance of Members is a matter of cardinal importance.

22. As it happens, not accidentally, Parliament has legislated to this end. By sec 9 of the *Parliamentary Privileges Act,* any supposed power to expel a Member is excluded. By sub-sec 14(1) of the Act, Members are granted immunity from compulsory attendance before a court or tribunal (which by sub-sec 3(1) expressly does not include a House or a committee of a House) on days generally related to his or her House's or committee's meetings. By sub-sec 14(2) of the Act, officers of a House have a similar immunity. The officers' immunity is instructive, showing Parliament's current intention to provide immunity for the public purpose of preventing any impediment to the business of a House or one of its committees.

23. The provisions of sub-sec 14(3) of the Act grant a more limited immunity to any "*person who is required to attend before a House or a committee*", more limited by reference to the very day of the required attendance. In my opinion, the specific provisions of sec 14, relating to Members, officers and the general class of persons required to attend, leave no room for some immanent policy by which an immunity from such a requirement as sub-sec 14(3) obviously contemplates, is to be extended to former Ministers or Ministerial staff.

24. This is because former Ministers, as that term is used in this Opinion to include their character of no longer being Members of either House, have no public business to attend the meetings of a House or a committee. There is no functional rationale for any such immunity. The same is also true, it should go without saying, of Ministerial staff, whether or not they still serve as such, are in the public service otherwise, or have become private citizens merely.

25. I have never seen it suggested that former members of the Executive government trail with them, forever until they die, a personal protective immunity from investigation by the Houses of Parliament of their official conduct, and thus an immunity specifically from compulsory attendance to give evidence in relation to such an investigation. In my opinion, merely to state such a novel suggestion is to doubt its possibility as a matter of law (or political science).

26. Who could be better placed than a former Minister to explain what happened, and to give the facts? What more important task, whether for the purposes of legislation or in the course of examining the workings of government, does a House have than finding out what happened and why at the level of the officers of the Commonwealth designated as "*the Queen's Ministers of State for the Commonwealth*" in sec 64 of the *Constitution*?

27. In my opinion, these rhetorical questions highlight an important aspect of the matter of principle which impels a negative answer to the question of an immunity from compulsory attendance to give evidence for former Ministers and Ministerial staff. The principle is the inherent function of a Parliamentary chamber to investigate governmental administration, and thus bestowing the powers made requisite by the

nature of that function. In my opinion, this follows for the reasons generally illustrated by the decision of the High Court (albeit it concerned the somewhat different question of the powers of the Legislative Council of the Parliament of New South Wales) in *Egan v Willis* (1998) 195 CLR 424. By way of selective example, the references by Gaudron, Gummow and Hayne JJ at [42] and [45] strongly support the function of an Upper House as a place where, as in the Lower House, there is a direct rôle for the House to superintend government by questioning and criticizing on behalf of the people. There is nothing in the 1855 origins of that New South Wales chamber which distinguishes this reasoning from that which in my opinion must be true of the Senate.

28. As noted in the second parenthesis in my statement of the question for this Opinion, at the head of this document, there is no call at present to consider any limitations on the power of the Senate (and thus of its committees) or any immunity granted to particular personages, by reason of the evidence or likely evidence in question concerning what may conveniently be called Cabinet secrets. It is clear that the decision in *Egan v Chadwick* (1999) 46 NSWLR 563 constitutes authoritative support by the New South Wales Court of Appeal, by analogy, for either a lack of power or a corresponding immunity against the production of secret Cabinet documents by order of the House, and in my opinion this would undoubtedly cover as well the issue of compulsory evidence about Cabinet secrets. Because this Opinion need not address the issue, I will say nothing more about it, except that it should not be assumed that in my opinion there is anything like an absolute immunity of the kind which, I concede, may reasonably be gathered from those judicial reasons.

29. For all the reasons given above, in my opinion the question in relation to the so-called former Ministers has only one correct answer: viz they have no immunity from compulsory attendance to give evidence to a Senate committee, because they are no longer Members of either House. So long as no intention appears, or better still all intention is disavowed, of questioning the now private citizen about his or her Cabinet secrets, or conduct in the House of Representatives (being the other House), there is no right in a former Minister who is no longer a Member of the other House to resist an order given under the undoubted power of the Senate. Resistance is, in my opinion, clearly a serious contempt, and punishable as such.

30. Does any circumstance arise in law or practice which could possibly justify less subjection to an order of the Senate of Ministerial staff than of former Ministers? Given their difference of character so far as their offices are concerned, it would be bewildering if it were so. In my opinion, so far as questioning about their conduct or their observations of other conduct, as advisers to Ministers, are concerned, no question of Departmental responsibility arises of a kind which might otherwise have required attention to the wisdom or propriety of a Senate committee interrogating them. It follows that, so long as nothing involving extended breach of Cabinet confidentiality is invited or required, Ministerial staff, whatever place they hold in or out of the public sector at the time they are ordered to appear, must comply with that order to appear and give evidence before a Senate committee.

31. I am asked to assume that no claim of public interest immunity has been raised by the Government in relation to any evidence which former Ministers may give, and so I have not further considered that question. I should not be taken as regarding such a claim as simply analogous to a claim made in similar terms to a court of law. In my

opinion, in general terms, the difference of function and thus of necessary power between a House of Parliament and a court of law is very considerable.

32. I am also asked to assume that the Government has claimed a right to instruct members of Ministerial staff not to appear before Senate committees. I note, so that the point may not be mistaken, that this position is quite different from one which is protective of Cabinet secrets or of the confidential discourse between the Commonwealth (ie the Crown) and its law officers. In relation to Ministerial staff, and assuming that no Cabinet secrets or high matters of legal advice are involved, there is even less reason in principle to consider a right to prevent persons attending to give evidence to a Senate committee in the case of Ministerial advisers than in the case of an ordinary Departmental officer for whom there are public service disciplinary procedures as well as a responsible Minister. In particular as to factual enquiries, as opposed to occasions for a personal apologia, Ministerial advisers have no constitutional, statutory or principled claim to be less susceptible to the demands of the Senate than any other person.

33. I note the experience drawn to my attention in the United Kingdom and in the United States of America by the Clerk, of which I am also otherwise aware. In my opinion, that experience corroborates (for what that is worth) the following aspects of the question I have been asked to address. First, the Executive claims a right to withhold evidence about its own conduct from a chamber of the legislature. Second, no such chamber has conceded that right. Third, there are precedent examples of persons in the relevant position attending to give evidence to such a chamber. There is no support for the position I have been asked to assume about the Government in this material.

34. I therefore advise that former Ministers and Ministerial staff have no immunity from compulsory attendance to give evidence and produce documents to a Senate committee.

35. I have not referred to precedents in the Senate, in this regard, in order that my Opinion examine the matter from first principle. However, like the Clerk, in his tenth edition of *Odgers' Australian Senate Practice* (at p 443), I observe that precedent is squarely against any such immunity.

FIFTH FLOOR,

ST JAMES' HALL.

16th May 2002 Bret Walker