AUSTRALIAN SENATE

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5 April 2002

Senator the Hon P. Cook
Chair
Select Committee on a Certain
Maritime Incident
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cook

LETTER FROM CLERK OF THE HOUSE OF REPRESENTATIVES, DATED 3 APRIL 2002

Yesterday the committee published a letter dated 3 April 2002 from the Clerk of the House of Representatives, Mr Ian Harris.

The letter refers to issues relating to the compellability as witnesses of former ministers and members of ministerial staff which were the subjects of my letters of 19 February and 21 February 2002 to Senator Faulkner (which were made available to the committee following their release by Senator Faulkner) and my note to the committee of 22 March 2002 (which was also published by the committee yesterday).

Mr Harris' letter contains serious misrepresentations of the actions of the Senate and of my references to those actions in my notes. I must therefore respond to the letter, and ask the committee to receive and publish this response.

These misrepresentations add several more layers of confusion over the issues. I will not attempt to disentangle every one, which would take many pages, but I will refer only to the principal points.

(1) The letter continues to misrepresent the actions of the Senate in relation to ministers as ministers as distinct from its actions in relation to members of the House of Representatives who are not ministers. The fact that the Senate censured the Prime Minister on 19 March last (p. 3) does *not* indicate that "the Senate has also applied a less stringent approach". The Senate has always claimed the right to judge the conduct of ministers as ministers, and has consistently refrained from judging the conduct of members of the House of Representatives as members. Obviously the Prime Minister was censured for his conduct in a ministerial capacity. I need not say that the amendment of a bill in 1921 about the salary of the Clerk of the House of Representatives has nothing to do with this issue.

(2) Similarly, the letter persists in confusing the removability of ministers with their accountability. Censure motions of ministers by the Senate are not failed attempts to remove such ministers. The fact that ministers are not removable by the Senate (pp 6, 9) has nothing to do with the issue of accountability.

(3) The Senate's action in asking the House of Representatives to compel the appearance of a minister before the Senate Select Committee on the Australian Loan Council (p. 8) was explicitly taken because the minister was also a current member of the House. It was not a concession that ministers have some kind of immunity as ministers.

(4) It is obvious that if an office-holder has some immunity in respect of their actions as an office-holder, then that immunity in respect of those actions continues after they leave office (p. 10). Who has ever asserted anything to the contrary? The question is whether the immunity exists in the first place. There are several hints in the letter that Mr Reith might be examined on his actions taken in the course of proceedings in the House. I have distinguished that question, and the committee has not done anything remotely to suggest that it may seek to do anything of the sort.

(5) It is obvious that a decision by a committee does not establish a practice of a House (p. 11). Who has asserted that it does? The decision of a committee, however, is significant. The Senate consistently supported, and certainly did not repudiate, the actions of the Senate Select Committee on the Print Media in 1995. The significance of the occasion is that no one at the time discovered the supposed immunity of former ministers which has now been discovered. It is also obvious that Clerks do not establish practices. Who has asserted that they do?

(6) The pages of the report of the Select Committee on the Print Media referred to in the footnote (p. 11) do not give any support to the remarkable proposition that witnesses who appear under summons may be taken to have given evidence voluntarily.

(7) The reference to section 10(6) of the Public Service Act (p. 12) appears to be an attempt to revive the argument that a statutory secrecy provision (a statutory provision requiring a person to maintain the secrecy or confidentiality of information) operates to modify the powers and immunities of each House of the Parliament. The Senate and its committees have operated for over a decade on the basis that this question was settled in 1991 when the then Solicitor-General, overruling other government legal advisers, conceded that such a provision does not have that effect in the absence of some such indication in the statute. As was pointed out at the time, this proposition would mean that literally hundreds of statutory provisions would prevent parliamentary committees from gaining access to information. It is remarkable that this proposition should again be advanced.

(8) The lack of an immunity of ministerial staff is not asserted "on the basis of" the 1995 precedent (p. 13). It is asserted on the lack of any basis for the immunity. The 1995 precedent establishes that the Senate did not accept at that time that there was an absolute immunity, as distinct from other considerations such as those set out in my note of 22 March.

(9) Of course former office-holders may claim to be bound by a claim of public interest immunity made by the government (p. 16). The point is that, before the former office-holders may make such a claim, there has to be a claim by the government by which the former

office-holders may then claim to be bound. Such a claim by the government is yet to be made.

(10) The "reasonable necessity" test applying to the New South Wales Legislative Council under the judgments in the Egan case is cited as if it would have some significance in a court challenge to the powers of the federal Houses (p. 18), but as it has already been conceded in another context (pp 15-16) that the New South Wales Parliament operates on a different statutory basis, the unqualified reference to the case here is misleading.

(11) The letter conveys that great significance is attached to the word "improper" in section 4 of the Parliamentary Privileges Act (pp 17-18), but it is not stated what the significance is. This may be an attempt to rerun an argument about the significance of that word which was tried on before the Senate Privileges Committee some years ago. In the absence of an explanation, I simply give notice that it may be necessary to return to this point if that argument is raised again.

(12) It is impossible to discern what the letter is saying in many passages. For example, the meaning of the references to "unfortunate connotations" and "perception of inevitable risk or prejudice" and "the Tudor monarchy" (p. 10) is entirely obscure. And what is "this way" which Mr Harris would advise against? I do not suggest, however, that the committee seek clarification.

I have kept these points as brief as possible, and I regret the committee having to be troubled by these matters, but the listed statements in the letter should not go uncorrected.

Yours sincerely

(Harry Evans)