Senate Select Committee on a Certain Maritime Matter – Obligation of former ministers (and their ministerial staff) to answer questions at an inquiry conducted by parliamentary committees

Comments provided by Professor G J Lindell on the advice given by Mr B Walker SC

1. As I indicated before, the Opinion provided by Mr B Walker SC and dated 16 May 2002 on the above matter, has not led me to alter the views I expressed in my two earlier advices, dated 22 March and 1 April 2002, respectively. I also indicated that I would provide a short written statement of my reasons for adhering to those views and those reasons are now set out below.

2. The same statement does not seek to add anything already said in relation to public interest immunity. It concentrates, instead, on what I perceive to be the main arguments advanced by learned counsel to deny the existence of a legal immunity of former members of the Australian Parliament (and their staff) from having to answer questions relating to their conduct as members when those questions are asked at an inquiry conducted by the House in which they were not members.

(i) Absence of *express* constitutional and statutory recognition of immunity

3. Mr Walker has rightly pointed to the absence of *express* constitutional or statutory provisions to support such an immunity.

4. In addition, and as was emphasised in para 22 of my advice dated 22 March 2002, it is true that there is an absence of direct judicial authority on the matter. It would be surprising if there was such authority given the exclusive control of parliamentary proceedings vested in the Houses of the Australian Parliament by virtue of s49 of the Constitution. It is only since the enactment of the *Parliamentary Privileges Act* 1987 (Cth) and, in particular ss 4,7and 9 of that Act, that such matters have become capable of coming within the scope of judicial review, even if only in a limited way: see para 34 of my advice dated 22 March 2002.

5. Until Parliament otherwise provides, the immunity is to be found in the powers privileges and immunities enjoyed the House of Commons and their members as at the establishment of the Commonwealth in 1901. Please see in that regard para 6-15 of my advice dated 22 March 2002, as regards the position of current members and paras 16-22 of the same advice, as regards *former* members.

6. The failure of the *Parliamentary Privileges Act* to mention that immunity cannot be decisive in the face of provisions which Mr Walker himself relied on to support the continued existence of the pre-existing powers of the Houses and their Committees to compel the answer to questions and the production of documents at parliamentary inquiries. The provisions of s5 of that make it abundantly clear that "[e]xcept to the extent that the same Act expressly provides otherwise" the Act does not alter "the powers, privileges and immunities of each House and of the members and committees of each House" which existed immediately before the

same Act was passed. It will be noticed that the provisions of s5 are not confined to powers but extend to *immunities* as well.

(ii) The alleged basis and rationale for the immunity recognised for *current* members and its alleged non-application to *former* members

7. Mr Walker can be taken as suggesting that the immunity enjoyed by current members is founded on "comity": at para 20. Furthermore the rationale for its existence is not in his view applicable to the position of former members (and their staff). It is convenient to deal with both of these assertions together: at paras 21-9.

8. I have already explained in the earlier advice why I believe that considerations of both law and policy combine to make the immunity operate as a legal limitation on the powers of inquiry and not just as a matter of comity. In particular the legal limitation should be seen as derived from:

   - the independent and equal nature of the powers enjoyed by both Houses of the Australian Parliament; and

   - the disorder, confusion and the potential for mutual recrimination which could result if both Houses sought to interfere with members of the other House.

9. The passages quoted from Hatsell in paras 10 and 11 in the advice dated 22 March 2002 were important for two reasons. First they showed that the powers of the House of Commons were limited in their failure to extend to members of the House of Lords. Secondly, they highlighted the potential conflict that could otherwise have arisen from arming both those Houses of the British Parliament with coercive powers to compel the answering of questions and the production of documents. In my view the same potential arises from vesting both Houses of the Australian Parliament with the same powers under s49 of the Constitution. This gives rise to the need to reconcile those equal powers by recognising the immunity in question. With respect, none of these matters is addressed in the Opinion provided by Mr Walker.

10. Neither does the Opinion address the functional need for the immunity to continue to operate after a member ceases to be a member if the immunity is to be effective: see paras 16-9 of my advice dated 22 March 2002. Nor did it address the four analogies advanced to illustrate this consideration: at para 18 of the same advice.

(iii) Other arguments and matters

(a) Elected nature of the Senate

11. In para 19 of his Opinion Mr Walker seeks to distinguish British parliamentary history and practice on the ground that the House of Lords was, unlike, the Senate, an unelected body. I fail to see the relevance of this difference. If anything, the elected nature of the House of Representatives and the fact that it is vested with

equal powers (if not even greater powers in the enactment of financial legislation) would seem to strengthen the need to limit the Senate's powers to coerce and exercise authority over current and past members of the former House.

(b) Remarks in *Egan v Willis*

12. Reliance is placed in para 27 of the same Opinion on certain remarks made by Gaudron, Gummow and Hayne JJ in *Egan v Willis* (1998) 195 CLR 424 at pp 451-3, paras 42 and 45. In those remarks their Honours indicated that they could not see anything inconsistent with the way responsible government operated in Australia for the Upper Houses of Australian legislatures to have the power to inquire into the conduct of Ministers who are not members of those Houses. So much may be conceded.

13. As Mr Walker acknowledges, that case involved a different question. It did not involve, and their Honours were not concerned with, the exercise of coercive authority by one House over the members of the other House in a bi-cameral legislature. (The Treasurer who was required to produce certain documents to the New South Wales Legislative Council in that case was a member of the Council.) It is unwise to assume that their Honours meant to suggest that an Upper House could exercise *coercive authority* over members of the other House in a bicameral parliament. For this purpose a distinction can and should be drawn between the ability to *inquire* over a matter and the *authority* that can be exercised in the course of carrying out that inquiry. Finally their Honours were careful to warn that they were not dealing with Houses of a legislature which enjoyed the same powers, privileges and immunities as those enjoyed by the British House of Commons, as is the case with the Houses of the Commonwealth Parliament by virtue of s49 of the Constitution: (1998) 195 CLR 424 at pp 446-7, paras 28-9.

(c) Ability of the House of Representatives to inquire

14. In para 16 of the Opinion a rhetorical question is asked by Mr Walker as to who could be better placed than the former Minister to explain what had happened in relation to his part in the maritime incident under investigation Doubtless the obvious answer to this question is the former Minister himself. But it by no means follows from that answer that the Senate is the appropriate House of the Parliament to require the former Minister to explain his conduct under compulsion. As I emphasised in the final para of my advice dated 1 April 2002 it remains *legally* open to the House in which he was previously a member to perform this function as the "Grand Inquest of the Nation" regardless of its willingness to do so.

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