



hc/let/13647

21 May 2002

Senator the Hon John Faulkner  
Leader of the Opposition in the Senate  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Senator Faulkner

**SELECT COMMITTEE ON A CERTAIN MARITIME INCIDENT —  
FORMER MINISTERS AND MINISTERIAL STAFF**

You have asked for my comments on a proposal which you have developed to put before the Select Committee on a Certain Maritime Incident as a suggested course of action for the committee to follow in relation to former minister Mr P.K. Reith, former ministerial staff member and now departmental officer Mr Michael Scrafton and current ministerial staff Mr Ross Hampton, Mr Peter Hendy and Mr Miles Jordana, in the light of the refusal by those persons of invitations to appear before the committee to give evidence.

It appears to me that there are four alternative courses for the committee to adopt:

- to summon those persons, but not to recommend to the Senate any substantive action against them if they still refuse to give evidence
- to summon them, and to recommend that the Senate take action against them in the event of default
- not to summon them, and to report to the Senate on the basis of the other evidence the committee has obtained, with any conclusions the committee may draw about their significance to its inquiry and their roles
- not to summon them, and to provide to the Senate some independent assessment of the significance of those persons to the inquiry and of conclusions which might be drawn about their roles.

The first alternative is not tenable. It would devalue the serious step, which Senate committees seldom take, of formally summoning witnesses. Summonses should not be issued unless the committee concerned is willing to take substantive action in the event of default.

In relation to the second option, it is necessary to consider the likely train of events if the committee decides to summon those persons. A summons by the committee, judging by the attitude of the government so far, is likely to be met with refusal to comply. In that circumstance, the committee can take no further action other than to report the default to the Senate. The Senate could then issue further summonses for those persons to appear. It is also likely that those summonses would be met with non-compliance. The only remedy then available to the Senate would be to impose penalties on the defaulters. The Senate declared in a resolution in 1994, however, that it would be unfair to penalise officers for failure to comply with a Senate requirement because of instructions to such officers by a minister. If the Senate continued to adhere to this principle, a penalty would be imposed only on Mr Reith. Any penalties would probably be challenged in the courts. The government would probably indemnify the defaulters, so that the cost of the consequent court proceedings would fall entirely upon the taxpayer. The Senate would ultimately be vindicated in the court proceedings, in that, if the matter were properly argued, the courts, and certainly the High Court, would give no credence to the insupportable view that these persons have some kind of legal immunity from the requirements of parliamentary inquiries. This vindication, however, would be won at great cost to the taxpayer, with little or no burden falling on the defaulters. The evidence required by the committee would also not be obtained, unless the Senate were willing to start the whole process again by again summoning the defaulters and imposing penalties for further refusals.

This lengthy process would serve only as a distraction, probably a complete distraction, from the important issue of uncovering the truth behind the matter into which the committee has inquired.

In effect, this is not a case of reluctant witnesses, but a variation on the theme of Senate/government conflict, of the Senate seeking information and the government refusing it. This case, however, is a significant escalation of that problem. It cannot be satisfactorily resolved by the use of the power to punish contempts.

The third option amounts to the committee making the best report it can without the evidence of the persons concerned.

The method of dealing with the problem which you propose gives rise to the fourth option, and has many advantages.

- (1) The capacity to summon those persons, and the lack of any immunity on their part, would be affirmed, which is important to preserve the integrity of parliamentary inquiries. That capacity must be retained in reserve for appropriate cases.
- (2) The proposal takes full account of the difficulties of the alternative courses mentioned above.
- (3) The proposal would affirm the significant principle that the value of inquiries lies in informing the public, and that the true remedy for government malfeasance lies in the exposure of that malfeasance to the public. These are the principles upon which, in effect, Senate inquiries have always operated and continue to operate, with their compulsory powers in reserve.

- (4) The proposal would bring the committee much closer to discovering the truth behind the subject matters of its inquiry than the alternative course of seeking to impose penalties.
- (5) The proposal would achieve this result at much less cost to the taxpayer.
- (6) The services proposed to be performed for the committee by me and by the Independent Assessor are appropriate services for the Senate Department and an independent adviser to a committee to perform, and involve a more productive use of resources available to the Senate and to its committees than seeking to impose penalties.
- (7) The recommendation for an inquiry into the effect on parliamentary accountability of the current roles of ministerial advisers could result in a valuable contribution to the cause of parliamentary inquiries and accountability.

For all these reasons, I consider that the course of action outlined in your proposal is preferable to summoning the persons concerned and imposing penalties for default. The proposal puts forward a new method of dealing with a new manifestation of executive intransigence in the face of parliamentary scrutiny. I believe that there is no alternative course of action to the one you have proposed which is likely to bring the committee and the Senate closer to discovering the truth about the subject matters of its inquiry.

Yours sincerely



(Harry Evans)