No. 19

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE COUNCIL

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

REPORT

ON

INQUIRY INTO SANCTIONS WHERE A MINISTER FAILS TO TABLE DOCUMENTS

Ordered to be printed 10 May 1996,
according to Resolution of the House

REPORT NO. 1 MAY 1996

Foreword by the Chair

This inquiry arose from a conflict between orders of the House calling for papers from the Executive government and the Government's assertion that the House has no authority, either statutory or inherent, to so order. The reference required the Committee to determine what sanctions should be imposed where a Minister fails to table papers in compliance with an order of the House. However, before the Committee could recommend sanctions it was necessary to examine the nature of the conflict between the House and the Government.

The Committee took evidence from Mr Bret Walker SC whose evidence supported the House's right to call for papers, and from Mr Keith Mason QC, Solicitor General and Mr Ian Knight, Crown Solicitor, both of whom maintained that the Parliament, without express statutory authority, lacked the power to enforce any order calling for papers. In addition, the Committee took evidence from the Clerk of the Australian Senate Mr Harry Evans, the Clerk of the Western Australian Legislative Council Mr Laurie Marquet, and the Treasurer, Mr Egan. Professor Enid Campbell provided the Committee with written advice concerning the House's authority both to order the tabling of papers and to impose sanctions.

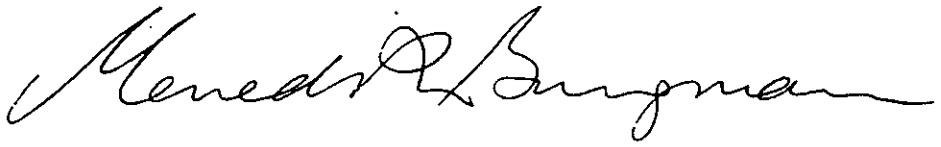
The evidence before the Committee indicated that it is quite unclear whether the Legislative Council does have the power to order the tabling of papers. Without a consensus that an order calling for papers is within the established powers and rights of the House and not *ultra vires*, the Committee was of the view that recommending sanctions would not be appropriate at this stage.

The Report makes two recommendations. Firstly, it recommends that legislation should be introduced to clarify the powers and privileges of the House, including the power to require the production of documents. Such legislation would bring the NSW Parliament into line with the other Parliaments in Australia. Secondly, it recommends that some type of mechanism should be devised to assess claims made by the Executive that documents should not be produced on public interest grounds.

Given the events in the House on Thursday 2 May 1996, whereby the Leader of the Government was suspended for the remainder of the sitting day for failing to comply with an order of the House to table papers, and the likelihood of the matter being brought before the Supreme Court of NSW, the Committee has tabled the Report early so that its findings and recommendations can be made public and therefore contribute to an informed debate between all those concerned.

As Committee Chair, I wish to acknowledge the co-operation and contributions of the Members of the Legislative Council who served on the Committee.

The Committee also wishes to thank the Clerk to the Committee and Deputy Clerk of the Legislative Council, Ms Lynn Lovelock, the Senior Project Officer, Ms Velia Mignacca, and the Secretary to the Office of the Clerk, Ms Phillipa Gately.



The Hon Dr Meredith Burgmann MLC
Chair
Standing Committee on Parliamentary Privilege and Ethics

Background to the Committee

The Committee was first established as the Standing Committee Upon Parliamentary Privilege by resolution of the Legislative Council on 9 November 1988. It was re-established under the 50th Parliament on 16 October 1991. On 24 May 1995 at the commencement of the 51st Parliament the Committee was reconstituted as the Standing Committee on Parliamentary Privilege and Ethics.

The Committee has two main roles:

(1) to consider and report on any matters relating to parliamentary privilege which may be referred to it by the House or the President; and

(2) to carry out certain functions relating to ethical standards for Members of the Legislative Council under Part 7A of the *Independent Commission Against Corruption Act 1988 (NSW)*.

Terms of Reference

The Terms of Reference for the inquiry are contained in paragraph (5) of the following resolution of the Legislative Council, passed on 13 November 1995:

That this House:

(1) (a) notes the failure of the Government to comply with an order of this House made on Thursday 18 October 1995, requiring the tabling of documents relating to the closure of certain veterinary laboratories and the Biological and Chemical Research Institute at Rydalmere by 12 noon on Tuesday 24 October 1995;

(b) notes the failure of the Treasurer as Leader of the Government to comply with a further order of this House made on Thursday 26 October 1995 for him to table the documents by 4.00 pm on that day; and

(c) notes the continued failure of the Treasurer to table the documents following the passing of a resolution on Thursday 26 October 1995 expressing this House's displeasure with the Leader of the Government for his failure to comply promptly with the earlier resolution, and calling upon him to comply with the Resolution of the House by Monday 13 November 1995;

(2) (a) notes the failure of the Government to comply with an order of this House made on Wednesday 25 October 1995 requiring the tabling of documents relating to the Government's negotiations with 20th Century Fox concerning the conversion of the Sydney Showground into a film complex; and

(b) notes the continued failure of the Treasurer as Leader of the Government to table the documents following the passing of a resolution on Thursday 26 October 1995 expressing this House's displeasure with the Leader of the Government for his failure to comply promptly with the Resolution of 25 October 1995, and calling upon him to comply with the Resolution of the House by Monday 13 November 1995;

(3) notes the failure of the Government to comply with an order of this House made on Thursday 26 October 1995 requiring the tabling of documents relating to the Government's decision to recentralise the Department of Education and the resultant closure of Regional Offices;

(4) adjudges the Treasurer guilty of a contempt of this House for his failure to comply with those orders;

(5) refers the matter to the Standing Committee on Parliamentary Privilege and Ethics for inquiry and report into what sanctions should be enforced where a Minister fails to obey an order of the House to table papers by a certain date. The Committee is to report by 15 February 1996.

(Minutes No. 22, Tuesday 13 November 1995, Entry No. 14)

Committee Membership

The Hon Dr Meredith Burgmann, MLC **Chair**	Australian Labor Party
The Hon Jenny Gardiner, MLC	National Party
The Hon Charlie Lynn, MLC	Liberal Party
The Hon John Johnson, MLC	Australian Labor Party
The Hon Richard Jones, MLC	
The Hon Andrew Manson, MLC	Australian Labor Party
The Hon Bryan Vaughan, MLC	Australian Labor Party

SECRETARIAT

Ms Lynn Lovelock	Clerk to the Committee
Ms Velia Mignacca	Project Officer

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Chapter One

1. OUTLINE OF THE INQUIRY

1.1 BACKGROUND TO INQUIRY

1.1.1 Over several weeks in October/November 1995, the Legislative Council passed a number of resolutions requiring certain documents held by the Government to be tabled in the House by certain specified times. The resolutions are reproduced in full at Appendix 1. The documents ordered to be tabled fell into three categories which may be summarised as follows:

(i) Documents relating to the closure of certain veterinary laboratories and the Biological and Chemical Research Institute at Rydalmere;[1]

(ii) Documents relevant to the Government's negotiations with Twentieth Century Fox relating to the conversion of the Sydney Showground into a film complex;[2]

(iii) Documents relating to the Government's decision to recentralise the Department of Education and the resultant closure of Regional Offices.[3]

1.1.2 Three of the six resolutions required the documents to be tabled by the Leader of the Government in the House, the Hon. Michael Egan MLC (Treasurer, Minister for Energy, Minister for State Development, Minister Assisting the Premier, and Vice-President of the Executive Council).[4] In two of the resolutions, the House expressed its displeasure with the Leader of the Government for his failure to comply with the orders of the House.[5]

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1 Resolution 18 October 1995, Minutes No. 17, Entry No. 9; 26 October 1995, Minutes No. 21, Entries No. 12 and 17.

2 Resolution 25 October 1995, Minutes No. 20, Entry No. 6; 26 October 1995, Minutes No. 21, Entry No. 20.

3 Resolution 26 October 1995, Minutes No. 21, Entries No. 14 and 17.

4 26 October 1995, Minutes No. 21, Entry No. 12; Entry No. 17; Entry No. 20.

5 26 October 1995, Minutes No. 17, Entry No. 17; Entry No. 20.

1.1.3 The documents specified in the resolutions relating to veterinary facilities and the Department of Education were not tabled as required. The orders concerning documents relating to Twentieth Century Fox were partially complied with. A schedule of documents held by the Department of State Development concerning the Government's negotiations with Fox studios was tabled by Mr Egan on 26 October 1995.[6] Certain documents referred to in the schedule were lodged with the Clerk out of session on 30 October 1995, 1 November 1995 and 10 November 1995, and were tabled in the House by the Clerk on 13 November 1995.[7]

1.1.4 In the course of debate on the motions requiring tabling of documents, the Government gave various reasons why the relevant documents should not be produced. These arguments included:

(1) that the House lacked power to order the production of documents, both under the Standing Orders and under the House's inherent common law powers;[8]

(2) that the documents were subject to public interest immunity;[9]

(3) that the documents were "commercial in confidence" documents;[10]

(4) that it was against public policy to release documents that would be defined under the *Freedom of Information Act* as internal working documents.[11]

(5) that the documents were subject to legal professional privilege.[12]

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6 Minutes No. 21 p.281; *Parliamentary Debates* 26 October 1995, p. 2410.

7 Minutes No. 22, Entry No. 9.

8 *Parliamentary Debates* 18 October 1995, p. 1882; *Parliamentary Debates* 25 October 1995 p. 2251; *Parliamentary Debates*, 26 October 1995, pp. 2381-2, 2412.

9 *Parliamentary Debates* 26 October 1995, p. 2402.

10 *Parliamentary Debates* 25 October 1995 p. 2252; 26 October 1995, p. 2409.

11 *Parliamentary Debates* 26 October 1995, p. 2402.

12 *Parliamentary Debates* 26 October 1995, p. 2409.

1.1.5 By resolution of 13 November 1995, the Legislative Council adjudged the Treasurer guilty of contempt for his failure to comply with the several orders of the House.[13] Paragraph (5) of the resolution refers the matter to this Committee -

> for inquiry and report on what sanctions should be enforced where a Minister fails to obey an order of the House to table papers by a certain date.

1.2 CONDUCT OF INQUIRY

1.2.1 The Committee conducted two public hearings in relation to the inquiry on 27 November and 19 December 1995. In addition, the Committee held five deliberative meetings. The Minutes of Proceedings are reproduced at Appendix 9 and the transcripts of evidence at Appendix 10.

1.2.2 Under the resolution which established this inquiry, the Committee was to report to the House by 15 February 1996.[14] However, at 15 February 1996, the Legislative Council stood prorogued until 16 April 1996. A new reporting date of 17 May 1996 was set by resolution of the House on 17 April 1996.

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[13] Resolution reproduced at pp. (iv)-(v) of this Report.

[14] Paragraph (5).

Chapter Two

2. POWER OF THE HOUSE TO ORDER TABLING OF PAPERS

2.1 PRELIMINARY

2.1.1 The Committee's task in this inquiry was to examine the sanctions which should be imposed where a Minister fails to obey an order of the House to table documents by a certain time. To form a proper view on this matter the Committee considered that it was necessary to gain some understanding of the nature and scope of the House's power to order the tabling of papers.

2.1.2 In examining this power the Committee did not question or reflect on the resolutions of the House calling for the tabling of papers or finding the Treasurer guilty of contempt. The Committee's purpose was solely to ascertain whether the status of the power has any bearing on the sanctions issue.

2.2 SOURCES OF THE POWER TO ORDER THE TABLING OF PAPERS

2.2.1 There is no legislation which confers on the Houses of the NSW Parliament the power to order documents to be tabled. The power to compel witnesses to attend and answer questions has been granted by the *Parliamentary Evidence Act 1901* (sections 4, 7-9, 11), but the power to order production of documents has not been addressed by statute.

2.2.2 This contrasts with the position in the other Parliaments in Australia. In some States, the power to order the tabling of papers has been specifically conferred on the Houses by legislation.[15] In the Commonwealth Parliament and in many of the States, the Houses have been granted the same powers and privileges as the House of Commons.[16] The House of Commons possesses the power to call for the

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[15] *Constitution Act 1867 (Qld)*, s.42; *Parliamentary Privileges Act 1891 (WA)*, s.4; *Parliamentary Privilege Act 1858 (Tas)*, ss.1-3. These provisions are reproduced in Appendix 6.

[16] *Constitution Act 1901 (Commonwealth)*, s.49; *Constitution Act 1975 (Vic)* s.19(1); *Constitution Act 1867 (Qld)*, s.40A; *Constitution Act 1934 (SA)*, s.38; *Parliamentary Privileges Act 1891 (WA)*, s.1. These provisions are reproduced in Appendix 6.

production of papers, although there are cases where obedience to such an order has not been insisted on.[17]

2.2.3 In the absence of legislation, the following sources for a power to order production of documents have been asserted by the NSW Legislative Council:

(i) Standing Order 18;

(ii) the inherent common law powers of the House.

Each of these possible sources will be examined in turn.

(1) Standing Order 18

2.2.4 Standing Order 18 states –

> Any papers may be ordered to be laid before the House and the Clerk shall communicate to the Premier's Department any such order.

Legal opinions referred to in the Legislative Council and submitted to the Committee on this issue indicated that Standing Order 18 is not valid as a source of the power to order the production of documents. These opinions are briefly considered below.

2.2.5 **The Solicitor General and Crown Solicitor of NSW** advised that Standing Order 18 is outside the power to make Standing Orders which is conferred on the Legislative Council by section 15(1) of the *Constitution Act 1902.*[18] This section sets out the matters with respect to which the Legislative Council (and Legislative Assembly) may make Standing Orders. The relevant part of the section is paragraph 15(1)(a), which reads:

> The Legislative Council ... shall, as there may be occasion, prepare and adopt ... Standing Rules and Orders regulating ... the orderly conduct of such Council ...

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17 *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament,* 21st ed., London, Butterworths, 1989, pp. 213-14. This issue is discussed in Appendix 6 to this Report.

18 Letter from Crown Solicitor to Mr R. Wilkins, Cabinet Office, 18 October 1995 (Appendix 3); Solicitor General's Advice to this Committee, SG 95/123, 3 May 1994 (Appendix 2). Both advices were tabled at the Committee hearing on 19 December 1995. Extracts were quoted in the Legislative Council by the Hon. Michael Egan MLC on 18 October 1995, *Parliamentary Debates* p. 1882.

In the opinion of the Crown law officers, this paragraph does not go beyond authorising standing orders which regulate the "orderly conduct" of the Houses. This relates to the orderly way in which business is conducted in the Houses. It does not authorise Standing Orders which impose obligations on third parties to provide information to the Houses.

2.2.6 On similar grounds, **Mr Bret Walker, Senior Counsel,** and **Professor Enid Campbell** advised that Standing Order 18 is not a source of power to order the production of documents, though it may be regarded as a provision which regulates the exercise of power which is inherent in the Houses of the NSW Parliament.[19]

(2) Inherent Common Law Powers

2.2.7 In the absence of any statutory basis for a power to require the tabling of documents, the only other possible basis is the inherent common law powers of the House.

(a) Nature of the inherent powers

2.2.8 The principles governing the inherent powers of the House were first laid down by the Privy Council in a series of cases in the nineteenth century.[20] These cases established that "colonial" legislatures, or legislatures which derive their authority from Imperial statute, did not inherit all of the powers and privileges of the House of Commons when the common law of England was received at the time of settlement. It was held that, in the absence of legislation, the Houses of these Parliaments have only such powers -

> as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute;

(*Kielley v Carson* (1842) 4 Moo. PC 63 at 88)

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[19] Bret Walker QC, Opinion provided to the Clerk of the Parliaments dated 10 November 1995, tabled in the Legislative Council on 13 November 1995 (Appendix 4); Professor Enid Campbell, Opinion dated 15 January 1996 submitted to the Committee on 17 January 1996, (Appendix 5), p.1.

[20] E.g. *Kielley v Carson* (1842) 4 Moo. PC 63; *Fenton v Hampton* (1858) 11 Moo. P.C. 347 *Barton v Taylor* (1886) 11 App. Cas. 197 at 203; followed in *Armstrong v Budd* (1969) 71 SR (NSW) 386.

> Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority.

(*Barton v Taylor* (1886) 11 App. Cas. 197 at 203).

2.2.9 Accordingly, the question whether the Legislative Council possesses an inherent power to order production of documents depends on whether such a power can be said to be "necessary to the existence" of the Council or to the "proper exercise of the functions it is intended to execute". While this question can only be finally determined by a court, a number of different opinions have been advanced.

(b) Opinions concerning the inherent powers

2.2.10 **The Solicitor General and Crown Solicitor of NSW** advised that, while a power to order production of documents may assist Members to undertake some of their duties, it does not satisfy the test of "necessity" which has been laid down by the courts:

> It cannot be said the production of these documents is necessary for the very existence of the House. Nor can it be said that such production is necessary for "the due and orderly exercise of its functions" or "the proper exercise of the functions which it is intended to execute". While it may be that the information contained in the documents is of interest to Members and some of it may conceivably assist them to perform some function more efficiently and effectively, that is not the test for the existence of an implied power. [21]

> That power [to call for production of documents] exists by the law and custom of British Parliament and enables each House of the British Parliament to act as a "grand inquest". But it is clearly established that such common law power was not inherited by the Houses of the NSW legislature.[22]

2.2.11 The Crown law officers point out that the Parliament has the power to enact legislation conferring the power to order production of documents, but this has not been done.[23] The power was not included in the *Parliamentary Evidence Act 1901*. A bill to confer general powers on the

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21 Letter from Crown Solicitor to Mr J. Schmidt, Cabinet Office, 26 October 1995, tabled at Committee hearing 19 December 1995, (Appendix 3), p. 2.

22 Solicitor General's Advice SG 95/123, op.cit., p. 3.

23 Solicitor General, Transcript of Evidence, 19 December 1995, pp. 5-6 (Appendix 9).

Houses of the NSW Parliament, including the power to order production of documents, failed in the Legislative Council in 1878.[24]

2.2.12 The Committee notes that two previous Committees of the NSW Parliament recommended that the Parliament legislate to define its powers and privileges. In its 1985 report *Parliamentary Privilege in New South Wales*, the Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege took the view that the powers, privileges and immunities of the Houses of the NSW Parliament are those of the House of Commons. It recommended that the *Constitution Act* be amended to place this beyond doubt (p. 20). In 1993, the Legislative Council Standing Committee Upon Parliamentary Privilege recommended that the Parliament enact legislation to define its powers and privileges, and to define its powers to deal with breach of privilege and contempt of Parliament.[25] Despite these various recommendations, no action has been taken in this regard.

2.2.13 **Mr Bret Walker SC** took a broader view of the powers which are encompassed by the common law principle of "necessity". In his view, a power to call for production of documents is necessary for the proper exercise of the functions of the House. The principal reasons for this conclusion are:

(a) The powers which are, as a matter of necessity, inherent or implied, must be determined by reference to the particular functions which the legislature is expected to discharge. Modern Parliaments in the British or Anglo-American tradition have important constitutional functions beyond the strictly legislative. One of these functions is to inquire into and investigate matters of public interest, including matters concerned with the workings of the Executive. A power over

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[24] Advice SG 95/123, op.cit. p. 4, para. 11; Solicitor General, Transcript of Evidence, p.6.

The bill in question was the *Parliamentary Powers and Privileges Bill.* In summary the Bill provided that the Houses of the NSW Parliament were to have the same powers and privileges as the House of Commons. The Bill was passed by the Legislative Council, with amendments, on 13 February 1879 (*Journals* 1878-9, Vol. 29, Part 1, p. 111), but the Legislative Assembly did not agree with some of the amendments. A Free Conference of Managers was held in an attempt to resolve the deadlock between the Houses. The order for consideration in Committee of the Managers' Report was discharged from the Paper on 20 May 1879 (*Journals* 1878-9, Vol. 29, Part 1, p. 227).

Objections to the Bill which were raised during debate in the Legislative Council centred on the fact that the powers of the House of Commons were considered to be vague and ill-defined. In addition, the Council objected to those clauses in the Bill which would have allowed the House to refer cases of breach of privilege to the Attorney General for prosecution (*The Sydney Morning Herald* report of second reading debate, 7 November 1878; *Journals*, 1878-9, Vol. 29, Part 1, pp. 151-2).

[25] *Report concerning the publication of an article appearing in the Sun Herald Newspaper containing details of in camera evidence*, October 1993, p. 20

production of documents is essential for the proper discharge of this investigative function.

(b) In determining what implied powers are "necessary", regard must be had to the conditions and requirements of the present day, not the nineteenth century conditions pertaining at the time the common law principles were established.[26]

In Mr Walker's view, the conditions of 1995 include the practice of legislative chambers such as the Legislative Council in questioning and enquiring into the administration of government, and the political expectation that the Executive is responsible to the people's elected representatives. The tools of the Legislative Council should therefore include a power to call for production of documents which demonstrate what has happened in the administration under scrutiny.[27]

(c) In *Armstrong v Budd*, the Supreme Court held that the Legislative Council possesses an implied power to expel a Member and declare his seat vacant on the ground of "conduct unworthy of a Member". In that case, it was "the integrity of those who participate therein which is essential to mutual trust and confidence amongst the members", which led the Court to uphold the inherent or implied power of expulsion.[28] In Mr Walker's view:

> If the value of integrity necessitates an expulsion power, there is much to be said for the view that the value of informed debate necessitates a power to acquire information by means such as the production of documents.[29]

2.2.14 **Professor Enid Campbell** referred the Committee to certain opinions of the United States Supreme Court concerning the investigatory powers of the Congress.[30] The Constitution of the United States does not expressly confer on the Houses of the Congress any power to conduct investigations or to require the attendance of witnesses or production of

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26 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 402 per Wallace P., referred to in Mr Walker's Opinion, op. cit., at p. 18.

27 Opinion, op. cit., pp. 18-19.

28 Sugerman J.A. at 409, quoted in Mr Walker's Opinion, op. cit., at p.9.

29 Opinion, op. cit., pp. 9-10.

30 Advice 15 January 1996, op.cit.

documents. Nevertheless, the Supreme Court has recognised that the Houses have an inherent power to conduct investigations in matters of public concern,[31] and to compel the giving or production of evidence in the course of investigations (See Appendix 5).[32]

2.2.15 **The Clerk of the Australian Senate, Mr Harry Evans,** also addressed this issue.[33] Mr Evans pointed out that the cases which established the principles regarding the limitations on the inherent powers of legislative chambers were based on the premise that the relevant legislatures were "colonial", and "subordinate" to the Imperial Parliament. However, since the passage of the *Australia Acts* in 1986, the United Kingdom no longer has any power to legislate for NSW. As the NSW Parliament is no longer in any sense "subordinate" or "colonial", Mr Evans considers that it now possesses all of the powers inherent in a legislature of a modern independent state, subject only to constitutional limitations. These powers include the power to order production of documents for the purpose of investigating matters of public concern.

2.2.16 The validity of the common law powers enunciated in *Kielley v Carson* was also called into question by the Clerk of the Western Australian Legislative Council, Mr Laurie Marquet. In his evidence he suggested that the common law is dynamic and is acted upon by the other parts of Australian law. In support of this view he referred to *Theophanous v Herald & Weekly Times* (1994) 124 ALR, 1 which states:

> "If the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former. It will not always be easy to determine whether and to what extend there is a variance but it is clear that the Constitution must prevail.

2.2.17 The basis of Mr Marquet's evidence was that whatever the legal position may have been before 1901, the constitution and powers of the NSW Legislative Council today should be decided by reference to the form of government for the State ordained by the Commonwealth and State constitutions, and that the common law as declared in *Keilley v Carson* gives way to the paramountcy of the constitution.

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[31] *Watkins v United States* 354 US 178; 1 L Ed 2d 1273 (1957), referred to by Professor Campbell at p. 1 of her advice.

[32] *Mc Grain v Dougherty* 273 US 135; 71 L Ed 580 (1927); *Jurney v McCracken*, 294 US 124; 79 L Ed 802 (1935), referred to by Professor Campbell at pp. 2 and 3 respectively.

[33] Transcript of Evidence, 19 December 1995 (Appendix 9).

2.2.18 The Committee notes that the Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege in its 1985 Report entitled *Parliamentary Privilege in New South Wales* stated that it had received legal advice that the decision of the Privy Council in *Kielley v Carson* is of arguable validity. The Report states that the Committee was of the view that the decision is not currently binding in the State of New South Wales (p. 18).

2.2.19 In the past the Legislative Council has asserted a right to call for papers on numerous occasions. President Willis, having canvased the uncertainty of the legal situation in his ruling of 2 May 1996 stated *inter alia* "...since 1856 when this parliament in its current form came into existence, there have been scores, if not hundreds, of resolutions of both Houses calling for the production of documents pursuant to the Standing Orders of the respective Houses in that behalf and in the vast majority of cases, these orders have been responded to positively".[34]

2.2.20 In the Committee's view, in the absence of clarification by a court, it is not possible to state with certainty whether the Legislative Council possesses an inherent power to order the production of documents. In the Parliaments of the Commonwealth, and the other States, there is greater certainty, as the power has been addressed in legislation.

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34 President Willis' ruling, dated 2 May 1996, Minutes of the Proceedings No. 8, Entry No. 8, p. 115. (Appendix 10)

Chapter Three

3. SANCTIONS

3.1 POWER OF LEGISLATIVE COUNCIL TO IMPOSE SANCTIONS

3.1.1 There is no legislation which expressly confers on the Houses of the NSW Parliament the power to impose sanctions in respect of persons who fail to obey orders for the tabling of documents. Whether the House may impose sanctions under its inherent or implied powers is a matter of some contention.

3.1.2 As discussed in Chapter 2, the courts have held that legislatures established by Imperial statute such as the NSW Legislative Council have limited inherent powers. Such legislatures possess only those powers which are necessary to the existence of the House and to the proper exercise of its functions. These powers must be "protective" and "self-defensive" only, and not punitive.[35]

3.1.3 Sanctions which have been upheld by the courts in conformity with these principles include:

- Suspension of a Member from the House during the continuance of the current sitting, in order to protect the House against obstruction or disturbance of its proceedings. However, an unconditional suspension for an indefinite time would be more than the necessity of self-defence requires and would amount to a punitive measure (*Barton v Taylor* (1886) 11 AC 197).

- Removal of a Member from the House for disorderly conduct, but not the infliction of a penal sentence for the offence (*Doyle v Falconer* (1886) LR 1 PC 328; *Toohey v Melville* [1892] 13 LR (NSW) 132).

- Expulsion of a Member for "conduct unworthy of a Member" and declaration of the Member's seat vacant (*Armstrong v Budd* (1969) 71 SR (NSW) 386).

3.1.4 The Committee examined a number of different opinions concerning the sanctions which the Legislative Council may impose in accordance with these principles where a Minister fails to obey an order of the House to table papers by a certain time.

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[35] *Barton v Taylor* (1886) 11 AC 197; *Doyle v Falconer* (1886) LR 1 PC 328; *Toohey v Melville* [1892] 13 LR (NSW) 132.

3.2 LEGAL OPINIONS

Solicitor General and Crown Solicitor of NSW

3.2.1 The Solicitor General and Crown Solicitor advised that the courts have held that local legislatures have no inherent right to require the production of documents from the Executive and to punish persons who refuse to cooperate.[36] A claim by the House of a right to compel the production of documents would clash with well-established common law rights.[37]

3.2.2 The Solicitor General advised that, even if the House has the power to impose sanctions, that power may not be exercised punitively. In his opinion, to suspend or expel a Minister for failing to produce documents where the documents do not form part of the relevant Minister's portfolio, or where the decision not to produce had been taken by Cabinet, would involve a punitive exercise of power.[38]

3.2.3 In the Crown law officers' view, in the absence of legislation, the only sanction which the House could impose where a Minister failed to produce documents would be to pass a resolution expressing its displeasure.[39]

Mr Bret Walker SC

3.2.4 In Mr Walker's opinion the cases commencing with *Kielley v Carson* established that there is a distinction between *punishment* for past misconduct (which is beyond the powers of the House), and *enforcement* of a power necessary for the discharge of the House's functions. While the House does not have the power to impose punitive measures such as imprisonment, Mr Walker considers that it would have the power to take steps necessary to give effect to its orders.

3.2.5 In the case of a Minister failing to obey an order of the House to table documents by a certain date, Mr Walker advised that the House could take the following steps -

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[36] Advice SG 95/123, op. cit., paragraphs 9, 10; Letter from Crown Solicitor 26 October 1995, op. cit., p.3.

[37] Advice SG 95/123, op. cit., paragraph 7; Solicitor General, Transcript of Evidence, pp. 4-5.

[38] Advice SG 95/123, op. cit., paragraph 12(1); Transcript of Evidence, p. 8.

[39] Advice SG 95/123, op. cit., paragraph 12; Transcript of Evidence p. 8.

(1) Authorise officers of the House to enter premises and take the documents

3.2.6 The House would have the power to order Black Rod to enter premises and take the relevant documents, if necessary using reasonable force.[40]

3.2.7 Mr Walker stressed that the existence of this power is very uncertain. The only precedents are from the Seventeenth Century, where the Serjeant-at-Arms (or in some cases Black Rod) was authorised to "break down doors" in order to execute warrants for arrest issued under the authority of the House.[41]

3.2.8 Mr Walker pointed out that the exercise of this power could give rise to difficulties in practice, such as a confrontation between the officers of the Parliament and law enforcement officers acting under the orders of the Executive Government.[42]

3.2.9 Nevertheless Mr Walker considers that the existence of such a power is necessary to vindicate orders of the House. Without such a power, the House would be placed in a position of "unprecedented subservience ... to the courts", which can authorise officers of the law to use force if necessary in the execution of warrants for the production of documents.[43]

(2) Suspend the Member from the service of the House

3.2.10 The House would have power to suspend the Member from the service of the House for a specified period in order to prevent the Member from taking part in proceedings which the Member had impeded by his or her disobedience.[44]

(3) Expel the Member and declare his or her seat vacant

3.2.11 If the defiance of the Member continues beyond the period of suspension, the House could expel the Member and declare his or seat vacant, by broad analogy with *Armstrong v Budd*.

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40 Transcript of Evidence, p.3.

41 See precedents cited in *Erskine May*, 3rd edn. pp. 65 - 68.

42 Transcript of Evidence, pp. 4, 18.

43 Transcript of Evidence, p. 4.

44 Opinion, op. cit., p. 21.

> That is, just as a person of impaired integrity may be expelled, so ... should a person who, regardless of his or her good faith, insists upon substituting his or her personal judgement of his or her obligations to the House for the formal judgement of the House. There is much to be said for the proposition that the Council needs to have the power to remove from itself Members who defy its own exercise of power to inform debate before it.[45]

3.2.12 Mr Walker's views regarding the power to suspend and expel are held "on balance, and with real doubt".[46] It is particularly uncertain whether the House would be justified in imposing sanctions on a Minister if the relevant documents were within the responsibility of a Minister in the Legislative Assembly.[47]

3.2.13 Mr Walker conceded that there are some occasions when it is in the public interest for Government documents to be withheld from the House.[48] However, he noted that there is no mechanism for sifting those cases from cases where the documents should in the public interest be produced. This issue is examined in Chapter 3.3.

Professor Enid Campbell

3.2.14 As discussed in Chapter 2, Professor Campbell advised the Committee that certain United States Supreme Court authorities provide support for the view that the Legislative Council has an inherent power to require the production of documents. Nevertheless, in Professor Campbell's opinion, an Australian court would not be prepared to disturb what has long been regarded as settled law, namely that Australian Houses of Parliament have no inherent power to impose penal sanctions such as imprisonment or fines.[49]

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45 Opinion, op. cit., p. 21.

46 Opinion, op. cit., p. 21.

47 Transcript of Evidence pp. 15 - 17.

48 Transcript of Evidence, p. 13.

49 Opinion, op. cit., p. 3.

3.2.15 The opinion notes that it would be open to the Council to request the attendance of the Minister at the bar of the House to explain his or her reasons for refusing to table the documents. It observes however that this course may not be considered appropriate if the Minister has already been adjudged guilty of contempt.[50]

Mr Harry Evans, Clerk of the Senate

3.2.16 Mr Evans submitted that a strong case could be made out that the Houses in NSW possess an inherent power to punish for contempt, on the basis that that is one of the inherent powers of a legislature of an independent State.[51]

3.3 CLAIMS OF PRIVILEGE AND IMMUNITY

3.3.1 In the matter which gave rise to this inquiry, the Government gave various reasons why the documents required by the House should not be tabled. These included, that the documents were subject to:

(a) legal professional privilege, and / or
(b) public interest immunity.

3.3.2 The Committee sought to examine whether Executive claims of this type restrict the scope of the powers of Houses of Parliament to require the tabling of documents and to impose sanctions where orders are not complied with.

(a) Legal professional privilege

3.3.3 In civil and criminal proceedings, confidential communications between a client and his or her legal adviser need not be given in evidence if the communications were made for the purpose of giving or obtaining legal advice, or with reference to litigation.[52]

3.3.4 Legal opinions considered by the Committee conflicted on the question whether this principle may be relied on by a Minister who is ordered to table documents in the House.

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[50] Opinion, op. cit., p. 4.

[51] Transcript, p. 28.

[52] See statement of rule in *Cross on Evidence*, Australian Ed., ed. D. Byrne and J.D. Heydon, Vol. I, Butterworths, 1986; and *Evidence Act 1995 (NSW)*, Part 3.10, Division 1.

3.3.5 Mr Bret Walker SC submitted that legal professional privilege would not be applicable in these circumstances because there is no public policy to justify its application similar to that underpinning the privilege in courts and tribunals.[53]

3.3.6 By contrast, the NSW Solicitor General advised that documents may be withheld from the House on this ground. He referred to cases where the High Court has held that the right to withhold from production on the ground of legal professional privilege is a basic common law right[54], and that the privilege applies in non-judicial proceedings.[55]

(b) Public interest immunity (also known as "Crown privilege" and "Executive privilege")

(i) In the courts

3.3.7 In judicial proceedings, the doctrine of public interest immunity requires the court to exclude otherwise relevant evidence if disclosure of the evidence would be contrary to the public interest. To determine whether evidence should be excluded, the court seeks to strike a balance between competing public interests. The public interest in the proper administration of justice (which favours disclosure), is balanced against the public interest in keeping confidential sensitive information which could damage the national or community interest.[56]

3.3.8 The mere assertion by a Minister that documents sought to be produced are subject to public interest immunity is not conclusive.[57] It is the duty of the court to determine whether the claim of public interest immunity should be upheld.

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53 Opinion, op. cit., pp. 23-24.

54 *Jacobsen v Rogers* (1995) 182 CLR 572 at 589, referred to in Advice SG 95/123, op. cit., p.5, paragraph 12(2).

55 *Jacobsen v Rogers; Baker v Campbell* (1983) 153 CLR 52 at 97, 131-2, referred to in Advice SG 95/123, op. cit., p. 5, paragraph 12(2).

56 The factors to be taken into account in this balancing exercise are set out in Section 130(5) of the *Evidence Act 1995*, and discussed in various cases e.g. in *Sankey v Whitlam and ors* 1978 142 CLR 1, at 48-49, per Stephen J.

57 *Sankey v Whitlam*; *The Commonwealth v Northern Land Council* (1993) 167 CLR 604.

3.3.9 There are certain categories of documents which are ordinarily accorded public interest immunity, such as Cabinet documents and papers concerned with policy decisions at a high level. However, even in respect of such documents, the protection from disclosure is not absolute. The court must still balance the need for secrecy against the need to produce the documents in the interests of justice.

(ii) In Parliament

3.3.10 The question whether public interest immunity overrides the powers of Houses of Parliament to require the production of documents has never been tested in the courts. Where executive claims to immunity have been made in Australian Parliaments, it appears that the question has not been pushed to a point of resolution. Either the Minister has ultimately produced the documents, or the Parliament has not insisted on its demands.

3.3.11 For example, the Australian Senate has determined by resolution that it is for the Senate to decide whether any claim of privilege or immunity from a parliamentary demand should be allowed.[58] However, where immunity from production has been claimed by the Executive, the Senate has not taken steps to enforce production other than by imposing political sanctions (e.g. public criticism; procedural measures designed to take up time in the House which would otherwise be devoted to Government legislation).[59] As is observed in *Odgers' Australian Senate Practice* -

> ... the question [whether public interest immunity applies] is a political, and not a procedural, one. There appears to be a consensus that the struggle between the two principles involved, the executive's claim for confidentiality and the Parliament's right to know, must be resolved politically. In practice this means that whether, in any particular case, a government will release information which it would rather keep confidential depends on its political judgement as to whether disclosure of the information will be politically more damaging than not disclosing it, the latter course perhaps involving difficulty in the Senate or public disapprobation.[60]

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58 *Journals of the Senate*, 16 July 1975, p. 831.

59 *Odgers' Australian Senate Practice*, 7th ed., Australian Government Publishing Service, Canberra, p. 497; Harry Evans,Transcript of Evidence, 19 December 1995, p.34.

60 *Odgers*, p. 481.

3.3.12 The resolution of public interest immunity claims by political means has averted the need for any final determination of the question whether such claims apply to parliamentary proceedings as a matter of law. However, the legal status of such claims in the parliamentary forum has been considered. Mr A.J.H. Morris QC advised a recent Senate Select Committee that the Senate's ability to investigate matters of public concern is not restricted by the doctrine of public interest immunity.[61] In Mr Morris' view, the authorities have not limited the investigative powers of the Senate or the House of Commons in this way.

3.3.13 The NSW Solicitor General Mr Keith Mason QC was critical of this view when giving evidence before this Committee. Mr Mason referred to various authorities which support the application of public interest immunity in parliamentary proceedings.[62]

3.3.14 The Committee concluded that, if the Legislative Council does possess a power to order the production of documents, it is not clear whether that power could be enforced where the relevant Minister claims that the documents should be withheld on public interest grounds. The House could attempt to resolve matters through the use of "political sanctions", following the practice of the Senate. Alternatively, a mechanism could be developed to enable public interest immunity claims arising in the House to be assessed.

3.3.15 The Committee considers that the current inquiry highlights the need for the development of some type of mechanism to facilitate the assessment of public interest immunity claims. Several witnesses before the Committee submitted that the introduction of such a mechanism should be considered.[63] Conflicts between the Legislative Council and the Government over the production of documents are likely to continue, as long as the Government is not in control of a majority of seats in the House. In the Committee's view, it is preferable for the public interest to be assessed in relation to each particular claim (as occurs when claims are made in the courts), rather than for absolute protection to be given to certain types of claims or to certain classes of documents.

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[61] *Report on the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994*, 49th Report, Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media, September 1994, Appendix H, Opinion of Mr A.J.H. Morris QC, 21 March 1994.

[62] Advice SG 95/123, op. cit., pp. 5-6, paragraph 12(2).

[63] Mr Walker: Transcript of Evidence, pp. 19, 20; Solicitor General, Transcript of Evidence, p. 14; Crown Solicitor, Transcript of Evidence, p. 16.

3.3.16 The Committee did not examine this matter in detail in the course of this inquiry and has come to no concluded view as to the type of mechanism which should be adopted. However, possible mechanisms include:

(1) Assessment of claims by the Supreme Court

(2) Assessment of claims by an officer designated by statute or appointed by the House (e.g. retired judge)

(3) Assessment of claims by a committee of the House

(4) Assessment of claims by the Presiding Officer

(5) Tabling of documents with restricted access (e.g. documents lodged with the Clerk in a sealed container, accessible only to Members of the House).

Chapter Four

4. CONCLUSIONS AND RECOMMENDATIONS

1.1 The evidence before the Committee indicated that it is unclear whether the Legislative Council possesses the power to impose sanctions where a Minister fails to obey an order of the House to table documents. There is no relevant legislation in this area; any powers which the Council may possess would be based on the inherent or implied powers of the House. The nature and extent of the inherent powers have been defined by the courts. However, legal opinions tabled in the Legislative Council and submitted to the Committee contained conflicting interpretations of the relevant common law principles.

1.2 The Solicitor General and Crown Solicitor advised that any sanctions which the Council sought to impose would be punitive, and therefore beyond the inherent powers as defined in the common law authorities. Other opinions supported the view that, while the House could not impose punitive sanctions, it could adopt measures to enforce its orders, such as suspending or expelling a Member in contempt of the House's authority.

1.3 The question of the House's powers to impose sanctions is further complicated by the fact that the power to make orders for the tabling of papers is itself the subject of conflicting legal opinion, as discussed in Chapter 2.

1.4 **The Committee finds that:**

1. **The powers of the Parliament to order the tabling of papers and to enforce such orders by the imposition of sanctions are uncertain and the subject of conflicting legal opinion.**

1.5 Given the uncertainty surrounding the House's powers, the Committee considers that it would not be appropriate to recommend the imposition of particular sanctions. In the event that sanctions imposed by the House were challenged in a court of law, it appears that the outcome of the court proceedings could not be predicted with any degree of certainty. A finding by a court that the Legislative Council has no inherent power to compel compliance with its orders would have serious ramifications for many areas of the House's operations, not just the House's ability to obtain documents. The Committee is of the view that it is preferable for the House to clarify its own powers by legislation, rather than for the matter to be left to the courts.

1.6 Comprehensive legislation clarifying the powers and privileges of the House would bring the NSW Parliament into line with all other Parliaments in Australia. It would enable the House to decide how persons who defy its authority should be dealt with. The legislation could take various forms, ranging from a general grant of House of Commons powers, to a conferral of certain specified powers.

1.7 **The Committee finds that:**

2. Given that the House's powers are so uncertain and ill-defined, it would not be appropriate for the Committee to recommend the imposition of particular sanctions.

1.8 **The Committee recommends that:**

3. Legislation be introduced to clarify the powers and privileges of the House, including the power to require the production of documents and to deal with persons who are in contempt of the House's authority.

1.9 The other major difficulty confronted by the Committee in the course of this inquiry was determining the effect of Executive claims that documents should not be produced on various public interest grounds. Even if the Legislative Council possesses powers to compel the production of documents, it is not clear whether those powers should be exercised in the face of such claims. The evidence received by the Committee suggested that there are three main options available to Houses of Parliament in relation to this issue -

(a) Seek to compel production of the documents notwithstanding the Executive claim, and risk a finding by a court that Executive claims prevail over the powers of the House.

(b) Impose only "political sanctions" in respect of the Minister's failure to produce the documents. Political sanctions could include public criticism, or procedural measures designed to take up time in the House which would otherwise be devoted to Government legislation.

(c) Attempt to devise a mechanism which would allow the public interest arguments for and against the tabling of documents to be assessed in an objective manner, similar to the "balancing exercise" performed by the court in judicial proceedings.

1.10 The Committee acknowledges that it may be difficult to obtain agreement between the House and the Government on a workable mechanism for assessing claims as contemplated by option (c). However, if such a mechanism can be agreed, the Committee considers that this option is to be preferred.

1.11 The Committee recommends that:

4. A mechanism be devised to facilitate the assessment of Executive claims that documents ordered to be tabled in the House should not be produced on public interest grounds.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. The powers of the Parliament to order the tabling of papers and to enforce such orders by the imposition of sanctions are uncertain and the subject of conflicting legal opinion.

2. Given that the House's powers are so uncertain and ill-defined, it would not be appropriate for the Committee to recommend the imposition of particular sanctions.

3. Legislation should be introduced to clarify the powers and privileges of the House, including the power to require the production of documents and to deal with persons who are in contempt of the House's authority.

4. A mechanism, or set of mechanisms, should be devised to facilitate the assessment of Executive claims that documents ordered to be tabled in the House should not be produced on public interest grounds.

APPENDIX 1

Resolutions of the Legislative Council ordering the tabling of papers 18, 25 and 26 October 1995

18 OCTOBER 1995

Minutes No. 17, Entry No. 9

ORDER FOR PAPERS—STANDING ORDER18—CLOSURE OF VETERINARY LABORATORIES

Motion of Mr Bull:

That, under Standing Order 18, there be laid upon the Table of this House and made public without restricted access no later than 12.00 noon, Tuesday 24 October 1995, all:

(a) documents from all Government Departments and Ministerial Offices pertaining to the closure of the veterinary laboratory at Wagga Wagga;

(b) documents from all Government Departments and Ministerial Offices pertaining to the closure of the veterinary laboratory at Armidale;

(c) documents from all Government Departments and Ministerial Offices pertaining to the closure of the Biological and Chemical Research Institute at Rydalmere; and

(d) documents relating to, and including, the Coopers and Lybrand report into the feasibility of the closure of the Biological and Chemical Research Institute at Rydalmere.

25 OCTOBER 1995

Minutes No. 20, Entry No. 6

ORDER FOR PAPERS—TWENTIETH CENTURY FOX

Motion of Mr Hannaford:

That under Standing Order 18, there be laid upon the Table of this House and made public without restricted access by 5.00 p.m. Thursday 26 October 1995, all documents relevant to the Government's negotiations with Twentieth Century Fox relating to the conversion of the Sydney Showground into a film complex, including but not limited to:

(a) all documents, correspondence, notes, advices and submissions including briefing papers in relation to the in-principle agreement with Twentieth Century Fox;

(b) all documents relating to the Sydney Showground site at Moore Park and the transfer of planning powers from South Sydney Council to the New South Wales State Government; and

(c) all documents relating to the Twentieth Century Fox involvement on the Sydney Showground site beyond the use of the site for a film studio.

26 OCTOBER 1995

Minutes No. 21, Entry No. 12

PRODUCTION OF DOCUMENTS—CLOSURE OF VETERINARY LABORATORIES

Motion of Mr Hannaford:

That this House:

(a) notes that the documents ordered by Resolution of the House on 18 October 1995 to be laid upon the Table by 12.00 noon, 24 October 1995, have not been received by the House;

(b) affirms the right of the House to call for the production of documents under Standing Order 18 and under the implied or inherent powers of the House which are necessary to its existence or to the proper exercise of its functions;

(c) affirms the powers, privileges and immunities expressly or impliedly conferred by the Imperial Parliament by the establishment of this Legislature;

(d) affirms the need to protect the high standing of Parliament and to ensure that it may discharge its duties and responsibilities with the confidence of the community which elects its Members;

(e) calls upon the Leader of the Government representing the Premier to table by 4.00 p.m., Thursday 26 October 1995 the documents referred to in the Resolution of the House of 18 October 1995, that is, all:

(i) documents from all Government Departments and Ministerial Offices pertaining to the closure of the veterinary laboratory at Wagga Wagga;

(ii) documents from all Government Departments and Ministerial Offices pertaining to the closure of the veterinary laboratory at Armidale;

(iii) documents from all Government Departments and Ministerial Offices pertaining to the closure of the Biological and Chemical Research Institute at Rydalmere; and

(iv) documents relating to, and including, the Coopers and Lybrand report into the feasibility of the closure of the Biological and Chemical Research Institute at Rydalmere.

26 OCTOBER 1995

Minutes No. 21, Entry No. 14

ORDER FOR PAPERS—DEPARTMENT OF EDUCATION

Motion of Mrs Chadwick:

1. That under Standing Order 18, there be laid upon the Table of this House and made public without restricted access by 5.00 p.m. Wednesday 1 November 1995, all documents relevant to the Government's decision to recentralise the Department of Education and the resultant closure of Regional Offices, including Wagga Wagga, Tamworth and Lismore.

2. That such documentation include:

(a) any available discussion papers, research or reports which outlined inadequacies or flaws of the existing structure which were instrumental in reaching the decision that a restructuring of the Department of Education was necessary;
(b) any options paper which details what other options were considered and why this restructuring became the preferred one;
(c) any economic analysis of each option considered;
(d) any analysis on the impact of the restructure on the administrative workload in schools;
(e) any analysis of the economic impact of this restructuring on the Department of Education;
(f) any analysis of the economic impact of the restructuring on communities where regional offices were formerly located;
(g) any analysis of the social impact of the restructuring of regional centres;
(h) any records of consultation with the then regional offices and the relevant Assistant Directors-General about the restructuring;
(i) minutes of all meetings and evidence from interviews with affected community and interest groups including but not exclusively, local government, the New South Wales Teachers Federation, the New South Wales Parents and Citizens Association and the Public Service Association; and
(j) a list of dates when these meetings or interviews occurred.

3. That should the House stand adjourned:

(a) the documents be sent to the Clerk of the Parliaments; and

(b) the documents be laid on the Table of the House by the Clerk at its next sitting.

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26 OCTOBER 1996

Minutes No. 21, Entry No. 17

PRODUCTION OF DOCUMENTS ON CLOSURE OF VETERINARY LABORATORIES—CENSURE OF LEADER OF THE GOVERNMENT

Motion of Mr Hannaford, amended by Revd Mr Nile:

That this House:

(a) notes the refusal of the Government to comply with the Resolution of the House of 18 October 1995 to table documents specified in that Resolution;

(b) notes the refusal of the Leader of the Government to comply with the direction contained in the House's Resolution of 26 October 1995 to table the documents specified in that Resolution;

(c) is of the opinion that this House is fully entitled to scrutinise and demand accountability for all aspects of executive Government behaviour;

(d) notes with great concern the Government's apparent belief that it is not accountable to the people of New South Wales through this House of the Parliament;

(e) accordingly, expresses its displeasure to the Leader of the Government for his failure to comply promptly with the House's Resolution of 26 October 1995; and

(f) calls upon the Leader of the Government to comply with the Resolution of the House by lodging the documents with the Clerk of the House before the House meets on Monday 13 November 1995.

26 OCTOBER 1996

Minutes No. 21, Entry No. 20

PRODUCTION OF DOCUMENTS ON SYDNEY SHOWGROUND AND TWENTIETH CENTURY FOX—CENSURE OF LEADER OF GOVERNMENT

Motion of Mr Hannaford, amended by Revd Mr Nile:

That this House:

(a) notes that the documents relating to the Government's negotiations with Twentieth Century Fox for conversion of the Sydney Showground, ordered by Resolution of the House of 25 October 1995 to be laid on the table by 5.00 p.m. Thursday 26 October 1995, have not been received by the House;

(b) is of the opinion that this House is fully entitled to scrutinise and demand accountability for all aspects of executive Government behaviour;

(c) notes with great concern the Government's apparent belief that it is not accountable to the people of New South Wales through this House of the Parliament;

(d) accordingly, expresses its displeasure to the Leader of the Government for his failure to comply promptly with the House's Resolution of 25 October 1995; and

(e) calls upon the Leader of the Government to lodge with the Clerk of the House before the House meets on Monday 13 November 1995, the documents referred to in the Resolution of the House of 25 October 1995, that is, all documents relevant to the Government's negotiations with Twentieth Century Fox relating to the conversion of the Sydney Showground in to a film complex, including but not limited to:

  (i) all documents, correspondence, notes, advices and submissions including briefing papers in relation to the in-principle agreement with Twentieth Century Fox;
  (ii) all documents relating to the Sydney Showground site at Moore Park and the transfer of planning powers from South Sydney Council to the New South Wales State Government; and
  (iii) all documents relating to the Twentieth Century Fox involvement on the Sydney Showground site beyond the use of the site for a film studio;

(f) requests that the Government not sign any agreement with Twentieth Century Fox relating to the conversion of the Sydney Showground until the documents have been tabled.

APPENDIX 2

Opinions of Solicitor General for NSW

NEW SOUTH WALES

SOLICITOR GENERAL

SG 94/58

Valid scope of Standing Orders requiring production of documents

Standing Order 18 of the Legislative Council provides:

> *Orders for Papers*
>
> *Any Papers may be ordered to be laid before the House and the Clerk shall communicate to the Premier's Department any such order. (1927)*

To similar effect is Standing Order 54 of the Legislative Assembly which provides:

> *Accounts, &c, ordered*
>
> *Accounts and Papers may be ordered to be laid before the House; and the Clerk shall communicate to the Premier all orders for Papers made by the House; and such Papers shall be laid on the Table by any Member of the House, being also a Member of the Government.*

I am asked whether these Standing Orders are within the power conferred by s15 of the Constitution Act 1902. That section empowers the Council and the Assembly to prepare and adopt Standing Rules and Orders regulating various matters. Section 15 provides:

Standing Rules and Orders to be laid before Governor

(1) The Legislative Council and Legislative Assembly shall, as there may be occasion, prepare and adopt respectively Standing Rules and Orders regulating:

(a) the orderly conduct of such Council and Assembly respectively; and

(b) the manner in which such Council and Assembly shall be presided over in case of the absence of the President or the Speaker; and

(c) the mode in which such Council and Assembly shall confer, correspond, and communicate with each other relative to Votes or Bills passed by, or pending in, such Council and Assembly respectively; and

(d) the manner in which Notices of Bills, Resolutions and other business intended to be submitted to such Council and Assembly respectively at any Session thereof may be published for general information; and

(e) the proper passing, entitling, and numbering of the Bills to be introduced into and passed by the said Council and Assembly; and

(f) the proper presentation of the same to the Governor for His Majesty's Assent; and

(g) any other matter that, by or under this Act, is required or permitted to be regulated by Standing Rules and Orders.

(2) Such Rules and Orders shall by such Council and Assembly respectively be laid before the Governor, and being by him approved shall become binding and of force.

It is well established that the State Houses of Parliament derive their existence solely from statutory authority, which also defines their respective powers and functions. The legality of any act of either House must therefore

be determined by reference to some express statutory authority from which its powers are derived or arise necessarily as an incident of those powers: see *Kielley v Carson* (1842) 4 Moo PC 63, 13 ER 225; *Armstrong v Budd* (1969) 71 SR(NSW) 386.

Section 15(1) of the Constitution Act sets out the matters with respect to which the Council and the Assembly may make Standing Rules and Orders. The clear implication from s15(2) is that s15(1) is the sole source of the power to make standing orders, and that such power is limited as set out in s15(1). That implication is reinforced by the principles referred to in the cases I have already cited. (Section 15 can be traced back to s35 of the New South Wales Constitution Act of 1855 and to s27 of the Australian Constitutions Act 1842.)

There is nothing in paras (a)-(g) of s15(1) which supports the two Standing Orders, especially in their application to a simple call to produce documents held by the Executive. Section 15(1)(a) does not go beyond authorising standing orders which regulate "*orderly conduct*" of the Houses. This relates to the orderly way in which business is conducted in the respective Houses, and is not a source of power to impose obligations on third parties designed merely to assist in the more effective functioning of those Houses. See *Barton v Taylor* (1886) 11 App Cas 197 at 207 and *Barnes v Purcell* [1946] St R Qd 87 at 95, 110. Whilst the Governor's approval of Rules and Orders makes them "*binding and of force*" (s15(2)), this does not make them part of the general law: *Clayton v Heffron* (1960) 105 CLR 214 at 240.

I note that a similar view about the invalidity of the two Standing Orders

has been expressed by successive Crown Solicitors: CS.60/4982, CS.63/5932, CS.90/2/743, CS.90/3/382.

Keith Mason QC
SOLICITOR GENERAL

3 May 1994

The Honourable the Attorney General

Director-General of Cabinet Office

Director General

Deputy Director General

NEW SOUTH WALES

SOLICITOR GENERAL

SG 95/123

THE POWER OF THE LEGISLATIVE COUNCIL TO REQUIRE PRODUCTION OF DOCUMENTS

1. I note that the Legislative Council has by its resolution of 13 November 1995 adjudged the Treasurer guilty of a contempt of the House. The basis for that judgment is recited in clauses (1) - (3) of the Resolution. I also note that what has been referred to this Standing Committee for inquiry and report is the matter of what sanctions should be enforced where a Minister fails to obey an order of the House to table papers by a certain date. In view of the decision already reached by the House concerning the Treasurer and the general terms of reference to the Standing Committee it is inappropriate that I should express an opinion as to the validity of the Resolution. The fact that I have been retained to represent the Treasurer in legal proceedings in the event that he were to be suspended or expelled from the House reinforces this position. What follows should therefore be read as representing my opinion as to the general powers of the House.

2. The question of enforcing sanctions where a Minister "fails to obey an order of the House to table papers" implies that the House has the authority to make a binding order of that nature. In my opinion no such power exists although it could obviously be conferred by legislation.

3. Absent legislation, two sources have been suggested as the basis of a valid order directed at a Minister who is a member of the Legislative Council directing him

or her to table papers by a certain date. The possible sources of power are:-

(a) Standing Order 18; and

(b) the implied common law powers of the House.

4. The Clerk of the Parliaments has received advice from Mr Walker SC that Standing Order 18 does not bestow powers on the House to call for documents, and that it is not supported by s15 of the Constitution Act 1902. As recorded in the Committee's Parliamentary Background Paper (para 3.2), both the Crown Solicitor and I have given advice to the present and the former Governments to the effect that Standing Order 18 and the cognate Standing Order in the Legislative Assembly are *ultra vires* the power to make Standing Orders conferred by s15 of the Constitution Act. Copy of my Advice SG 94/58 is attached.

5. As recorded in the Background Paper, Mr Walker SC and the Crown Solicitor have given differing opinions as to whether the House possesses the implied common law power enabling it to order the tabling of documents.

6. I respectfully but firmly disagree with the opinion of Mr Walker SC which argues in favour of an inherent or implied power in the present case. That opinion is based largely upon passages in English cases concerning the powers and privileges of the House of Commons. The position argued for by Mr Walker was, in my opinion, considered but rejected by the Privy Council in the nineteenth century in a series of cases starting with ***Kielley v Carson*** (1842) 4 Moo PC 63, 13 ER 225 which are reviewed in ***Armstrong v Budd*** (1969) 71 SR(NSW) 386.

7. The implied powers of a House are neither those of a House of the Imperial Parliament nor of the Supreme Court: see ***Doyle v Falconer*** (1866) LR 1 PC 328 at

339. They are only such "as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute": ***Kielley*** at 88. The cases show that this principle has been narrowly interpreted, because a claim by the House of a right to compel the attendance of a person or the production of documents must of necessity clash with well established common law rights. There is no support in principle or in the case law for distinguishing the position of a member of the House and a stranger as regards the House's right to compel attendance or production of documents.

8. Although legislation could be passed giving such power, the common law power of either House does not include the general power to send for "persons, papers and records" possessed by the Houses of Commons and Lords. That power exists by the law and custom of British parliament and enables each House of the British parliament to act as a "grand inquest". But it is clearly established that such common law power was not inherited by the individual Houses of the New South Wales legislature.

9. The Privy Council has held that the principle of necessity does not empower a House of Parliament, even when part of a Parliament vested with general legislative power, to require production of documents from the Executive and to visit a sanction upon the person who refuses to cooperate: see ***Fenton v Hampton*** (1858) 11 Moo PC 347, 14 ER 727. The common law powers are not enlarged artificially when directed at a member of the House: see ***Landers v Woodworth*** (1878) 2 SCR 158 (Supreme Court of Canada); ***Barton v Taylor*** (1886) 11 App Cas 197 (Privy Council). As the Privy Council pointed out in ***Barton***, "the rights of constituents ought not, in a question of this kind, to be left out of sight" (at 205). Cf also ***Australian Capital Television Pty Ltd v Commonwealth*** (*the Political*

Advertising Case) (1992) 177 CLR 106.

10. This conclusion is supported by ***McGuinness v Attorney General (Vic)*** (1940) 63 CLR 73 where the High Court ruled that the Crown had no common law power to compel the attendance of witnesses or the production of documents in aid of its undoubted investigatory functions. Legislation was necessary to arm Royal Commissions and bodies such as ICAC with such powers.

11. Legislatures in Australia and elsewhere have responded to the nineteenth century cases, usually by claiming the powers and privileges of the House of Commons in a Constitution (eg Commonwealth Constitution, s49) or by legislation. New South Wales is the only State that has not addressed this matter generally. Its Parliamentary Evidence Act 1901 accepts the principle of the nineteenth century cases, because it confers the power of compelling the attendance of witnesses (a power vested at common law in the House of Commons), but the Act does not extend to documents. A Bill to confer upon the New South Wales Parliament all of the privileges of the House of Commons was rejected by the Legislative Council in 1878: see debate on the Parliamentary Evidence Bill 1881, **Parliamentary Debates**, Legislative Assembly, 18 August 1881 p727.

12. For these reasons I consider that the House possesses no sanction beyond expressing its displeasure where a Minister or a stranger fails to obey an order of the House to table papers by a certain date. There are additional reasons that may apply depending upon the circumstances. I shall express the matter generally because of my stated desire not to be seen to be canvassing a judgment of the House against the Treasurer in the particular situation. Even if, contrary to my view, the House had an implied common law power as suggested by Mr Walker SC:

(1) That power could never be used punitively: see ***Armstrong v Budd***. Resort to a power of suspension or expulsion where the documents do not form part of the relevant Minister's portfolio or where the decision not to produce them had been taken by Cabinet would, in my opinion, involve a punitive exercise of any relevant power.

(2) If in a particular case all or some of the documents concerned attracted public interest immunity then the power of the House to require their production and to discipline for non production would be very doubtful. The same may apply to documents that would attract legal professional privilege or which contain commercial confidential information although the arguments are not as strong in those circumstances. As regards public interest immunity and legal professional privilege, the right to withhold from production is a basic common law right: ***Jacobsen v Rogers*** (1995) 182 CLR 572 at 589. Even if a House had an implied power to call for documents it would not follow that that power could override public interest immunity or legal professional privilege. The opinion of Mr Anthony J H Morris QC to the contrary which is attached to the Preliminary Background Paper precedes the judgment of the High Court in ***Jacobsen v Rogers*** and takes no account of passages in that case (at 589) and in ***Baker v Campbell*** (1983) 153 CLR 52 at 97, 131-2 which reject the suggestion that a right to assert public interest immunity and legal professional privilege is confined to judicial proceedings. The principle that, in the absence of statute, public interest immunity prevails against an implied parliamentary power to call for documents is recognised in the United States, even though the power of the Houses of Congress to call for papers equates that of the

House of Commons: see **Senate Select Committee on Presidential Campaign Activities v Nixon** 498 F 2d 725 (1974) (US CA, DC Cir). If it requires a very clear legislative statement to overcome public interest immunity or legal professional privilege then I cannot see the basis upon which a resolution of one House of Parliament can perform that task. Although the House of Commons and the Houses of the Australian Parliament have a general power to require production of papers, each has to date accepted that it is a valid answer to such a call that the Minister concerned certifies that it is in the public interest that the documents not be produced: see ***The Admiralty v The Aberdeen Steam Trawling Fishing Co Ltd*** (1908) 46 SLR 254 at 257 (Lord M'Laren); Enid Campbell, *"Parliamentary Inquiries and Executive Privilege"* (1986) **Legislative Studies** vol 1 p10; Great Britain, First Report from the Select Committee on Civil Procedure 1977-78 (HC 588-1 of 1978-79) Appendix C. It could be productive of a terrible injustice if a House asserted a power, beyond even that claimed by the Courts, to require production of any category of document. Presumably this would extend to documents revealing the identity of an informant, containing an individual Minister's contribution to the discussion of a current policy issue before Cabinet, disclosing commercially sensitive information relating to current negotiations, or disclosing legal advice obtained by Government in a matter such as the present one where the Government and a House appear to be taking conflicting positions.

Keith Mason QC SG

19 December 1995

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APPENDIX 3

Opinions of NSW Crown Solicitor

CROWN SOLICITOR'S OFFICE

Your ref: R Wilkins
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18 October 1995

Mr R Wilkins
Cabinet Office
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SYDNEY

By facsimile: 230 2851 (Parliament House)

Dear Mr Wilkins

RE: NOTICE OF MOTION - CLOSURE OF VETERINARY LABORATORIES
SO 18 - LEGISLATIVE COUNCIL

It has been the view of successive Crown Solicitors and it is the view of myself and the present Solicitor General that SO 18 of the Legislative Council and SO 54 of the Legislative Assembly are invalid especially to the extent they purport to authorise a simple call to produce documents held by the Executive.

That view proceeds on the basis there is nothing in paras (a)-(g) of s.15(1) of the Constitution Act 1902 (the sole source of power to make Standing Orders) which supports the making of such Standing Orders.

If such Standing Orders are to have any validity an attempt would have to be made to read them down so as to exclude a right to call for documents which:

(a) did not relate to the orderly conduct of the Houses i.e. the orderly way in which business is conducted in the Houses (s.15(1)(a)) Constitution Act 1902 is not a source of power to impose obligations on third parties designed merely to assist in the more effective functioning of the Houses); and

(b) would abrogate fundamental legal rights such as:

(i) public interest immunity;

(ii) the privilege against self-incrimination; and

(iii) legal professional privilege.

There must be a real doubt that the Standing Orders would be read down in such a way so as to preserve some valid operation for them. A Court called upon to do so would, on one view, have to "re-write" them and that a Court is reluctant to do.

Yours faithfully

I. V. Knight

I V KNIGHT
Crown Solicitor

NEW SOUTH WALES

CROWN SOLICITOR'S OFFICE

Your ref: J Schmidt
Our ref: IVK/ac

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26 October 1995

Mr J Schmidt
The Cabinet Office
New South Wales
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Macquarie Street
SYDNEY NSW 2000

Dear Sir

RE: LEGISLATIVE COUNCIL'S INHERENT POWER - PRODUCTION OF DOCUMENTS

I am asked to advise whether the Legislative Council may rely on its "inherent power" to compel the Executive to produce to it documents which are in its possession or control.

It is envisaged that a resolution may be passed by the Council calling for documents to be produced and providing for some punishment to be imposed in the event of a failure to produce.

The resolution might call for documents which were included in the subject of the notice of motion proposed to be moved by Mr Hannaford which depended upon the use of Standing Order 18. I have given advice re the validity of Standing Order 18.

Apart from Statute, the NSW Parliament only has such powers and privileges as are implied by reason of necessity: Armstrong v Budd (1969) 71 SR (NSW) 386. In that case, Herron CJ, at p.391:

> "For there exist well-recognized overriding common-law principles which enlarge Parliamentary power. As applying to this case the first primary essentials may be stated thus: in the absence of express grant the Legislative Council possesses such powers and privileges as are implied by reason of necessity; the necessity which occasions the implication of a particular power or privilege is such as is necessary to the existence of the Council or to the due and orderly exercise of its functions.
>
> These principles result from cases decided in the Privy Council, the High Court and in this Court. From these authorities derive such well-recognized rights and privileges as for example the absolute privilege of a member as to statements made by him in the House (*Gipps v McElhone*

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> and *Chenard and Co v. Joachim Arissol*), or the right of the House, through its President, to remove, suspend or expel a member for disorderly conduct in the course of the proceedings of the House."

In relation to an inherent power to expel a member of the Council, Wallace P concluded in the same case, at p.403:

> "In the result I am of the opinion that the Legislative Council has an implied power to expel a member if it adjudges him to have been guilty of conduct unworthy of a member. The nature of this power is that it is solely defensive - a power to preserve and safeguard the dignity and honour of the Council and the proper conduct and exercise of its duties. The power extends to conduct outside the Council provided the exercise of the power is solely and genuinely inspired by the said defensive objectives. The manner and the occasion of the exercise of the power are for the decision of the Council."

In Armstrong v Budd reference was made to Kielley v Carson 13 E.R. 225 in which, in relation to the House of Assembly of the Island of Newfoundland, the Privy Council held, at p.234:

> "The Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute."

In my opinion, necessity does not dictate that the Legislative Council has implied power to require the production to it of documents of the subject kind which happen to be in the possession or control of the executive (or a third party) for the purpose of informing the House of their contents. It cannot be said the production of these documents is necessary for the very existence of the House. Nor can it be said that such production is necessary for "the due and orderly exercise of its functions" or "the proper exercise of the functions which it is intended to execute". While it may be that the information contained in the documents is of interest to Members and some of it may conceivably assist them to perform some function more efficiently and effectively, that is not the test for the existence of implied power.

That subordinate Parliaments, such as the NSW Parliament, do not possess implied power to impose punishment is made clear in Armstrong v Budd. At p.393, Herron CJ, referred to the decision in Doyle v Falconer (1866) L.R.I P.C. 328 saying:

> "...the Judicial Committee denied the existence of a power in a local legislature to punish a member of the House for contempt committed in the face of the House as not being necessary to its existence and the proper exercise of its functions. As their Lordships point out, it is necessary

> to distinguish between a power to punish for contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. A power of expulsion for disorderly conduct was recognized by the Judicial Committee as contrasted with the power to inflict a penal sentence for the offence. 'The right to remove for self-security is one thing, the right to inflict punishment is another.'"

In my opinion, the Legislative Council does not possess inherent power in the present circumstances to resolve to order that documents in the possession and control of the Executive be produced to it. Nor do I consider that it has inherent power to resolve to inflict some form of punishment upon a person who fails to comply with the order.

Yours faithfully

I. V. Knight

I V KNIGHT
Crown Solicitor

APPENDIX 4

Opinion of Mr Bret Walker, Senior Counsel

Tabled and ordered to be printed.

John Evans
13/11/95

THE LEGISLATIVE COUNCIL - PRODUCTION OF DOCUMENTS

OPINION

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Telephone 230 2321

THE LEGISLATIVE COUNCIL -

PRODUCTION OF DOCUMENTS

OPINION

The Clerk of the Legislative Council has requested my advice on the powers of the Legislative Council to call for the production of documents, and related matters. The background referred to in my brief includes the proceedings in the Legislative Council surrounding and following its resolution passed on 18th October 1995 calling for the production of certain documents relating to the closure of veterinary laboratories. By a further resolution passed on 16th October 1995, the Legislative Council repeated its call for the documents. On the first occasion, Standing Order 18 was invoked, while on the second occasion the inherent or implied powers of the Legislative Council were also invoked.

2. Standing Order 18 states:-

> *Any Papers may be ordered to be laid before the House and the Clerk shall communicate to the Premier's Department any such order.*

Standing Order 19 prescribes the mode of Address to the Governor for certain Papers, which would not include the documents called for by the resolution in question.

Standing Orders 20, 21 and 22 provide for publication, the occasions for presentation or laying upon the Table, and distribution of Papers.

3. It is apparent from these Standing Orders that:-

(a) a power is assumed to order Papers to be produced;

(b) the nature of the power is related to the Legislative Council's powers and duties of supervision or enquiry into the Executive (hence communication to the Premier's Department);

(c) a distinction is observed between Papers which may relate to the ordinary administration of the State on the one hand, and Papers touching the Royal Prerogative, vice-regal correspondence and the administration of justice on the other hand; and

(d) the assumed power is directed to informing the Legislative Council, and through its records the people whom its Members represent, of the matter in such Papers.

4. In debate on 18th October 1995, the Leader of the Government in the Legislative Council, the Hon. M.R. Egan M.L.C., referred to and quoted from Opinions by the Crown Solicitor and the learned Solicitor General, to the general effect that Standing Order 18 is

invalid as beyond the power of the Legislative Council. The Crown Solicitor referred to difficulties said to arise from public interest immunity, the privilege against self-incrimination and (scil.) legal professional privilege. The learned Solicitor General distinguished the orderly conduct of the House from "*the more effective functioning*" of the Parliamentary Houses.

5. These Opinions, as quoted by the Leader of the Government, refuted the power to promulgate Standing Order 18 under section 15 of the *Constitution Act 1902*. Relevantly, paragraph 15(1)(a) of the *Constitution Act* reads:-

> *The Legislative Council ... shall, as there may be occasion, prepare and adopt ... Standing Rules and Orders regulating ... the orderly conduct of such Council ...*

(None of paragraphs 15(1)(b)-(g) could empower the making of Standing Order 18.) Sub-section 15(2) renders Standing Orders "*binding and of force*" when laid before the Governor and approved by him - as was done with Standing Order 18 in 1927. However, the imprimatur of the Governor does not give validity to a Standing Order if in law it is beyond the express power enacted by section 15 itself: see *Crick v. Harnett* (1908) 8 S.R. (N.S.W.) 451 (Privy Council) per Lord Macnaghten at 454.

6. The Legislature of New South Wales, of which the Legislative Council is a component part, has plenary power "*to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever*" (section 5 of the *Constitution*

Act) - subject to the Commonwealth Constitution, of course, and limited otherwise only by the need for "*a relevant connexion*" between the State and the circumstances on which the legislation operates, which connexion may be "*remote and general*": see *Union Steamship Co. of Australia v. King* (1988) 166 C.L.R. 1 at 9-14.

7. In this setting, the questions I am asked all concern the powers of Parliament. For the reasons which follow, I advise that the answers to the questions I am asked ultimately depend on the extent of the powers which are inherent in the existence of a House of Parliament such as the Legislative Council. In order to understand that issue, it is necessary to draw somewhat on the law concerning the (formerly Imperial) Parliament of the United Kingdom and in particular its House of Commons, as well as on the law concerning colonial legislatures last century. At the outset, significant differences between the position in New South Wales and that in the United Kingdom should be observed, as well as the evolution in representative democracy and responsible government from last century until today.

8. It is well established that the Parliamentary Houses of New South Wales do not possess by force of law all the attributes, including powers, of the House of Commons. The House of Commons possesses powers founded on at least three bases, viz. lex et consuetudo parliamenti (more or less, tradition and customary practice hardened into law), statute, and implication by reasonable necessity. The first of these was not brought to Australia as part of the common law of England, as it applied exclusively to the Lords and Commons and not to a colonial legislature: *Fenton v. Hampton* (1858) 11 Moo. P.C. 347

at 397 (Privy Council on appeal from the Supreme Court of Van Dieman's Land), *Namoi Shire Council v. Attorney-General for N.S.W.* [1980] 2 N.S.W.L.R. 639 at 643.

9. Statutory powers do not matter in this case, because, unlike other Australian legislatures, the Parliament of New South Wales has not enacted legislation granting itself, in express terms, specifically or by reference to the powers of the House of Commons, particular powers such as the power to compel the production of documents. The fact that some powers have been expressly enacted by legislation in New South Wales, such as powers in relation to the summoning of witnesses before one or other of the Houses or Committees in the *Parliamentary Evidence Act 1901*, does not indicate that Parliament has no powers other than those expressed by statute. Even the expression in legislation of some powers concerning a particular topic cannot be taken to exclude other powers on the same topic which would otherwise exist. A strong demonstration of this was the case of *Armstrong v. Budd* (1969) 71 S.R. (N.S.W.) 386, where a Full Court of the Supreme Court held that the Legislative Council possessed the power to expel a Member from the Council and declare his seat vacant, on the ground of his unfitness to be a Member. This power was held to exist despite the fact that it was not included in the enumerated grounds of vacating a seat expressly provided by section 19 of the *Constitution Act* (now see section 13A). The concession by counsel for Mr. Armstrong that the statutory grounds could not be exhaustive of the power of the Legislative Council to remove an unfit Member was regarded by the Supreme Court as entirely correct: see per Herron C.J. at 391 and Wallace P. at 403.

10. The only arguable statutory source of power relevant in this case is paragraph 15(1)(a) of the *Constitution Act* if it authorizes Standing Order 18, and if Standing Order 18 is seen as the source of (rather than a mere regulation of) the power of the Legislative Council to order the production of documents. In my opinion, although it might be argued that section 15 authorizes Standing Order 18 as the only source of power for the Legislative Council to order the production of documents, the better view is that the power cannot be granted to the Legislative Council by Standing Order 18 alone. My opinion rests on the scope of the phrase "*regulating ... the orderly conduct of such Council*" in paragraph 15(1)(a) of the *Constitution Act.*

11. That expression has commonly been used to empower Australian Houses of Parliament to make rules of procedure for the conduct of their business: see Enid Campbell on *Parliamentary Privilege in Australia* at 79. In *Crick v. Harnett*, as noted in 5 above, it was held that Standing Orders purportedly made pursuant to that statutory power were subject to judicial review as to their validity. Not surprisingly, there are very few authorities concerning the scope of the expression "*orderly conduct*". Most of them (e.g. *Barton v. Taylor* (1886) 11 App. Cas. 197) have been concerned to draw the line between the self-protective measures properly available to a House of Parliament and punitive measures - the former being within this statutory power to regulate by Standing Orders but the latter not. In *Fenton v. Hampton*, in the Supreme Court (whose judgement was upheld in the Privy Council), Fleming C.J. regarded the statutory power under this head as extending "*no farther than providing for and regulating the mode of conducting business*

and forms of procedure, so as to secure method and good order within the House" (at 11 Moo. P.C. 358).

12. On the other hand, it might be argued that the "*conduct*" of the Legislative Council includes the way in which it assembles information for debate and consideration, and therefore includes the production of documents to the House. It might also be argued that the epithet "*orderly*" serves to ensure that the power to make Standing Orders includes full scope for the judgement of the Legislative Council upon the proper manner of regulating its "*conduct*". An argument might then follow that a Standing Order can be made under the rubric of "*regulating ... the orderly conduct*" of the House which both empowers the House to compel the production of documents and also prescribes the way in which that may be effectuated (e.g. by communication to the Premier's Department, as in Standing Order 18). Some of the factors discussed below concerning the inherent or implied powers of the Legislative Council may support these arguments, although there is no need for any argument concerning paragraph 15(1)(a) of the *Constitution Act* to demonstrate the kind of necessity discussed in relation to inherent or implied powers.

13. In my opinion, notwithstanding the possibility of such arguments being put in a respectable fashion, they are likely to fail. The steps of literal interpretation noted in 12 above come perilously close to a reading of paragraph 15(1)(a) of the *Constitution Act* as if it meant that Standing Orders could be made granting the Legislative Council such powers as it thought from time to time would be convenient or useful for the discharge of its functions. Such ample scope for this statutory power could have been bestowed by more

apt words than the phrase "*regulating ... the orderly conduct ...*". Both "*regulating*" and "*orderly*" suggest to me that Parliament did not intend by paragraph 15(1)(a) to enable each of the Houses by Standing Order to change in a substantive way its powers, particularly in areas where civil liberties and the important constitutional relation of Parliament and the Executive are affected.

14. For these reasons, I agree with the Crown Solicitor and the learned Solicitor General, as their Opinions were quoted by the Leader of the Government, but only to a limited extent. In my opinion, it is correct to say that paragraph 15(1)(a) of the *Constitution Act* does not empower the Legislative Council, by Standing Order, to give itself a power over the production of documents which it did not otherwise have. However, it would not be correct therefore to consider Standing Order 18 invalid, any more than Standing Orders 19, 21 and 22 would be invalid. Standing Order 18 clearly regulates the way in which a power to have documents produced to the House should be exercised by and in the House. If I am correct in my advice below, then Standing Order 18 is a perfectly valid exercise of the Legislative Council's power under paragraph 15(1)(a), because it regulates the orderly conduct of the House in the exercise of one of its inherent or implied powers. It is similar in this regard to the status of Standing Order 391 of the Legislative Assembly as it was considered by the Full Court in *Armstrong v. Budd* per Wallace P. at 71 S.R. 400.

15. The Legislative Council indisputably has powers, as a matter of law, beyond and apart from those which are given to it by statute. They may be conveniently called the

inherent or implied powers, because they exist as an integral part of the Legislative Council as one of the Houses of Parliament and because they exist as necessary incidents of the constitutional function (as well as of the express powers) of a House of Parliament. The colonial legislatures, of which the Legislative Council was one, had such powers "*as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute*": *Kielley v. Carson* (1842) 4 Moo. P.C. 63 at 88. In *Barton v. Taylor*, Lord Selborne, delivering the judgement of the Privy Council on appeal from the Supreme Court of New South Wales, quoted these words and added (at 11 App. Cas. 203):-

> *Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority.*

The question whether the Legislative Council can call for documents to be produced may be tested by comparing that putative power with implied powers already established by judicial authority, and also by examining the nature of a parliament and especially modern parliaments - i.e. a representative legislature to which the Executive is responsible.

16. As noted in 9 above, the Legislative Council possesses an implied power of expulsion and vacating a seat in the case of unfit Members: *Armstrong v. Budd.* In that case, it was "*the integrity of those who participate therein which is essential to mutual trust and confidence amongst the members*" which led the Full Court to uphold the inherent or implied power of expulsion: per Sugerman J.A. at 71 S.R. 409. If the value of

integrity necessitates an expulsion power, there is much to be said for the view that the value of informed debate necessitates a power to acquire information by means such as the production of documents. In *Gipps v. McElhone* (1881) 2 N.S.W.L.R. 18, a defamation action, the argument was raised that the Legislative Assembly, not having privileges arising from lex et consuetudo parliamenti, did not have the privilege of freedom of speech within the House from such action. The argument was peremptorily dismissed: Martin C.J. described the privilege as arising "*from inherent necessity ... just as great here as in the Imperial Parliament*" (at 21), and Windeyer J. described it as "*based not on lex et consuetudo of Parliament, but upon necessity*" (at 25): and see also *Norton v. Crick* (1894) 15 N.S.W.L.R. 172 at 176. The dictum of Martin C.J. was expressly approved by the Privy Council in *Chenard & Co. v. Arissol* [1949] A.C. 127 at 134, in a context (viz. the non-representative legislature of the Seychelles Islands) demonstrating that the necessity of that privilege arose from the nature of a parliament in general.

17. The practices, powers and privileges of the United Kingdom Parliament are again relevant on the issue of inherent or implied powers, despite the necessary distinctions between the Mother of Parliaments and its adult children (as noted in 8 above). They are relevant because chambers such as the Legislative Council are Parliaments in a British sense, and an understanding of how Anglo-American legislatures function and the roles they are expected to discharge must enhance any appreciation of what powers, as a matter of reasonable necessity, are inherent or implied. At the risk of labouring elementary matters of constitutional assumptions and democratic politics, I would draw attention to

observations such as the following. Isaacs J., in the High Court in *Willis & Christie v. Perry* (1912) 13 C.L.R. 592 at 599, described the Legislative Assembly as having:-

> *... assigned to it very high constitutional functions and it is an implied part of the grant of those functions, there being a corresponding duty to perform them, that it is not to permit itself to be impeded or obstructed in discharging these functions.*

There can be no difference between the Assembly and the Council in this regard. Sir William Anson, in his 1886 work *The Law and Custom of the Constitution* (Part 1) noted that Parliament had powers other than the strictly legislative, including what he described as the "*indirect judicial power of the Houses*" - terminology which is perhaps figurative rather than literal. What the learned author had in mind is clearly apt to describe the concerns of the Legislative Council in the present case. Sir William described this power as (at 319):-

> *... the exercise of that constant criticism and the control of the executive which our system of Cabinet government puts into the hands of the legislature. By questions addressed to Ministers of the Crown, by motions for papers on matters of present interest, the members of either House can keep a check on current business and obtain explanation of its conduct, so far as is not inconsistent with the public advantage.*
>
> [emphasis added]

Erskine May (21st edition) describes the functions of the United Kingdom Parliament in their present form as including legislation and "*debate on government policy and scrutiny of government administration*" (at 7).

18. In the United Kingdom, the equivalent power to that referred to in the Legislative Council's Standing Order 18 is "*the power to call for production of papers by means of a motion for a return*", although the obligation to produce has been described as "*ill-defined*" and not "*absolute*" in light of precedents where obedience has not been insisted on: see *Erskine May* at 213-4. Anson describes the procedure as one "*for accounts or papers to be supplied to the House*" (at 221).

19. This gives rise to the question whether Standing Order 2 of the Legislative Council, which prescribes *Erskine May* for cases not specially provided for, somehow assists in determining whether the Legislative Council has the power to call for the production of documents - e.g. on the ground that *Erskine May* speaks thus of motions for returns. In my opinion, for the reasons noted in 13 and 14 above, Standing Order 2 cannot be construed in such a large and substantive way. New South Wales has chosen not to define the powers of its Parliament by reference to those of the United Kingdom Parliament (cf. section 49 of the Commonwealth Constitution).

20. The power of a legislature such as the Legislative Council, or at least its 19th century form, to require the production of documents is obviously similar to a power to compel the attendance of witnesses. In New South Wales, the latter power is contained in the *Parliamentary Evidence Act*. In the absence of such a statute, in *Fenton v. Hampton*, the Supreme Court was prepared to assume, on the ground of necessity, that there was a power of enquiry by compelling the evidence of witnesses necessary for the inquisitorial functions of that Tasmanian legislature. On that assumption, Fleming C.J. would have

limited the exercise of the power so as to permit a delinquent witness to be brought in custody for the purpose of being examined, but not so as to permit punishment rather than coercive enforcement of the witness's presence to give evidence (at 11 Moo. P.C. 366-367). (The Privy Council did not need to say whether that power inherently belonged to that legislature - at 11 Moo. P.C. 397.)

21. In the United Kingdom, some comments of present significance appear in three of the famous cases about the powers and privileges of the House of Commons. In *Burdett v. Abbot* (1811) 14 East 1at 138, Lord Ellenborough C.J. appeared to distinguish between necessity on the one hand and tradition on the other, asserting that by necessity a body such as Parliament must be "*armed with a competent authority to enforce the free and independent exercise of its own proper functions*". In *Stockdale v. Hansard* (1839) 9 Ad. & E. 1, in the Court of Queen's Bench, the following observations on the nature and functions of Parliament have some application to the present case. (Of course, the point of that decision, and the important subsequent decisions on the Parliamentary privilege against defamation actions, was quite apart from the present question.)

> *The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt.*
>
> [per Lord Denman C.J. at 115]

> *There is no doubt about the right as exercised by the two Houses of Parliament with regard to contempts or insults offered to the House, either within or without their walls; there is no doubt either as to the freedom of their members from their arrest, or of their right to summon witnesses, to require the production of papers and records, and the right of printing documents for the use of the members of the constitutent body; and as to any other thing which may appear necessary to carry on and conduct the great and important functions of their charge.*
>
> [per Littledale J. at 168-169, emphasis added]

> *The power claimed is said to be necessary to the due performance both of the legislative and inquisitorial functions of the House. In all the cases and authorities from the earliest times hitherto, the powers which have been claimed by the House of Commons for itself and its members, in relation to the rest of the community, have been either some privilege properly so called, i.e., an exemption from some duty, burden, attendance, or liability to which others are subject, or the power of sending for and examining all persons and things, and the punishing all contempts committed against their authority. Both of these powers proceed on the same ground, viz. the necessity that the House of Commons and the members thereof should in no way be obstructed in the performance of their high and important duties ...*
>
> [per Patteson J. at 209-210, emphasis added]

> *But it* [i.e. a privilege to circulate private slander] *is said to be necessary in order to obtain the requisite information for the members in any legislative or inquisitorial measure. This ground is still less tenable: the House is armed with ample powers to send for all persons who can give them information either before a committee, or the Bar of the House.*
>
> [per Patteson J. at 213]

Further comments on these matters appeared in the various judgements in the Court of Queen's Bench and in the Exchequer Chamber in *Howard v. Gosset* (1845) 10 Q.B. 359 and *Gosset v. Howard* (1845) 10 Q.B. 411.

That the Commons are, in the words of Lord Coke, the general inquisitors of the realm I fully admit: it would be difficult to define any limits by which the subject matter of their inquiry can be bounded: it is unnecessary to attempt to do so now; I would be content to state that they may inquire into every thing which it concerns the public weal for them to know; and they themselves, I think, are entrusted with the determination of what falls within that category. Coextensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest where disobedience makes that necessary ...

[per Coleridge J. at 379-380]

Equally clear is it, in my opinion, that, in the exercise of their inquisitorial functions they [i.e. the Houses of Parliament] *must have the power of enforcing the attendance of witnesses, or their authority would be nothing, and the House of Commons but the shadow of a name.*

[per Williams J. at 396]

The privilege of Parliament to prosecute all inquiries which they may deem necessary for the discharge of their high duties was also admitted without dispute, and the power, consequently, to compel the attendance of all persons whom they may require for such purposes.

[per Lord Denman C.J. at 404]

First, that House, which forms the Great Inquest of the Nation (4 Inst. p. 11), has a power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even without disobedience, we need not inquire) bring them in custody to the Bar for the purpose of examination.

[per Parke B. for the Exchequer Chamber at 450-451]

22. Some caution is required in applying the principle of reasonable necessity to the question whether the functions of the Legislative Council require a power to order the

production of documents. In my opinion, the authorities and principle support the implication of the related power to order witnesses to attend and give evidence, as the passages quoted in 21 above bear out. However, it is either the case, or has been assumed to be the case, that no Parliament, not even the House of Commons, has had the implied power to administer an oath to tell the truth and require it to be sworn by witnesses summoned before it: see e.g. Campbell *op. cit.* at 166, and Anson *op. cit.* at 316. This very point has been made in judicial consideration of implied powers, as in *Stockdale v. Hansard*, where Coleridge J. claimed (at 9 A. & E. 241) that there was "*nothing clearer than that the House has not that power, and cannot by its own resolutions acquire it*" - even although "*the power to examine witnesses upon oath would be most conducive*" to the discharge of the duty of the House of Commons as "*the grand inquest of the nation*". It may be a peculiarity of lawyers to regard the administration of an oath as necessary before information supplied to a deliberative body could be usefully supplied: and in my opinion the contrary view is very cogent, viz. that the power to administer an oath was not implied, and thus had to be granted by statute in order to exist, because Parliament (perhaps unlike some lawyers) has never regarded information as of no use if it has not been supplied under oath. For these reasons, I do not consider that the lack of an implied power to require sworn testimony casts any real doubt on the appropriateness of an implied power to order the production of documents.

23. No doubt there are important differences between Australian legislatures and the United States Congress. However, they all derive from a British concern for the legislative supremacy of Parliament, with the concomitant elevated view of that function. Although

there are important divergences between the very close emulation of the United Kingdom model in Australia and the new approach taken in the United States with respect to the responsibility of the Executive to the legislature, there are essential similarities and particularly in relation to the importance of free and informed debate. For these reasons, in my opinion a deal of support and some authority can be gained for the view I have formed that the Legislative Council does possess a power to order the production of documents from the words of Mr. Justice Story in his *Commentaries on the Constitution of the United States* (5th edition, 1891), as follows:-

> *These are all the powers and privileges which are expressly vested in each house of Congress by the Constitution. What further powers and privileges they incidentally possess has been a question much discussed, and may hereafter be open, as new cases arise, to still further discussion. It is remarkable that no power is conferred to punish for any contempts committed against either house, and yet it is obvious that unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions. For instance, how is either house to conduct its own deliberations if it may not keep out or expel intruders? If it may not require and enforce upon strangers silence and decorum in its presence? If it may not enable its own members to have free ingress, egress, and regress to its own hall of legislation? And if the power exists, by implication, to require the duty, it is wholly nugatory, unless it draws after it the incidental authority to compel obedience and to punish violations of it. It has been suggested by a learned commentator, quoting the language of Lord Bacon, that, as exceptions strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated, and hence he deduces the conclusion that, as the power to punish contempts is not among those enumerated as belonging to either house, it does not exist. Now, however wise or correct the maxim of Lord Bacon is in a general sense, as a means of interpretation it is not the sole rule. It is no more true than another maxim of a directly opposite character, that where the end is required the means are, by implication, given. Congress are required to exercise the powers of legislation and deliberation. The safety of the rights of the nation requires this; and yet, because it is not expressly said that Congress shall possess the appropriate means to accomplish this end, the means are denied and the end may be defeated. Does not this show that rules of interpretation, however correct in*

> *a general sense, must admit of many qualifications and modifications in their application to the actual business of human life and human laws? Men do not frame constitutions of government to suspend its vital interests and powers and duties upon metaphysical doubts or ingenious refinements. Such instruments must be construed reasonably and fairly, according to the scope of their purposes, and to give them effect and operation, not to cripple and destroy them. They must be construed according to the common sense applied to intruments of a like nature, and in furtherance of the fundamental objects proposed to be attained, and according to the known practice and incidents of bodies of a like nature.*

24. In considering the extent of implied powers, consideration must be given to the requirements of the time and the place of the Legislative Council in the polity of New South Wales. As Wallace P. said in *Armstrong v. Budd* (at 71 S.R. 402):-

> *When, therefore, Lord Selborne said that whatever in a reasonable sense is necessary to the existence and proper exercise of the functions of a self-governing colonial legislature has been impliedly granted, the critical question is to decide what is "reasonable" under present-day conditions and modern habits of thought to preserve the existence and proper exercise of the functions of the Legislative Council as it now exists. It would be unthinkable to "peg" Lord Selborne's remarks to the conditions in New South Wales when it had just emerged from convict days. Indeed when Keilley v. Carson was decided convicts were still being sent to western portions of Australia and had only ceased to be sent out to New South Wales one year earlier. This is not to say that the implied power as enunciated by the Privy Council can be enlarged by the passage of time, but the word "reasonable" in this context must have an ambulatory meaning to enable it to have some sense and sensibility when applied to the conditions obtaining in 1969.*

All the more, the conditions of 1995 are the foundation of considering the extent of implied powers today. In short, those conditions include the long practice of legislative chambers such as the Legislative Council in questioning and enquiring into the administration of government, more broadly than merely debating particular Bills. They

include as well the now deep-seated popular political expectation that the Executive is responsible, in some way or other, to the people's elected representatives in the legislative chambers. In my opinion, against this background, it is difficult to understand why the tools of the Legislative Council, which clearly include asking questions of members of the Government who are also Members, should not also include a power to call for the production of documents which demonstrate (usually most reliably) what has happened in the administration under scrutiny.

25. For all these reasons, I advise that the Legislative Council does have an inherent or implied power to order documents to be produced to the House, whenever the Legislative Council regards that to be appropriate for the proper discharge of an enquiry being conducted in the House (or committee as the case may be).

26. I therefore answer the questions I have been asked as follows.

1. What are the powers of the Legislative Council to call for the production of documents under Standing Order 18?

The better view is that Standing Order 18, despite its wording, does not itself bestow any power.

2. Is Standing Order 18 valid. In this regard see the opinions, quoted in debate by Mr. Egan, of the Crown Solicitor and Solicitor General.

Standing Order 18 is valid, not as a grant of power, but as a regulation of power.

3. Does the Legislative Council have power to call for the production of documents other than under Standing Order 18, that is, inherent common law powers?

Yes.

4. What are the powers of the Legislative Council to deal with a Member for contempt and to suspend a Member for failure to comply with an Order of the House requiring the Member to produce documents?

It is doubtful whether the Legislative Council has a power which is a power to deal with a Member for contempt for defiance of an order for the production of documents. First, the old cases including *Keilley v. Carson* and *Barton v. Taylor* establish that there is a line between enforcement of a power necessary for the discharge of functions and punishment for past misconduct. Second, it is obviously arguable whether dealing with a Member who has defied an order to produce documents is in truth punishment or compulsion.

In my opinion, on the basis of the principles and authorities discussed above, and in particular Mr. Justice Story's argument quoted in 23 above, the Legislative Council must have some way to compel performance of the obligation to produce documents. However, the nature of that enforcement is somewhat obscure given the need to avoid imposing

punishment. An obligation to attend to give evidence can easily be enforced by physically taking and bring the person to the House. An obligation to produce documents does not have any such straightforward means of enforcement.

On balance, and with real doubt, I advise that the Legislative Council has the power at first to suspend for a specified period a Member from the service of the House in order to prevent that Member from taking part in proceedings which that Member has impeded by his or her disobedience. Eventually, if the defiance continued beyond the period of suspension, there must be a respectable argument for a power to expel that Member and thereby vacate his or her seat, by a broad analogy with *Armstrong v. Budd*. That is, just as a person of impaired integrity may be expelled, so (it would be argued) should a person who, regardless of his or her good faith, insists upon substituting his or her personal judgement of his or her obligations to the House for the formal judgement of the House. There is much to be said for the proposition that the Legislative Council needs to have the power to remove from itself Members who defy its own exercise of power to inform debate before it.

Naturally, the propriety of such drastic action will depend entirely on the existence of such a power to expel, and that could be adjudicated in the courts of law.

It should be borne in mind that the Parliament of New South Wales has not enacted any equivalence of its Houses' privilege and power with those of the House of Commons, unlike other Australian Parliaments. It is therefore not right to proceed as if the practices

of the House of Commons and Australian Parliaments with equivalent powers and privileges provided correct precedents for New South Wales: and see Campbell *op. cit.* at 26, 109 and 120 (where, in my respectful opinion, the learned author is incorrect concerning *Keilley v. Carson*).

5. Does the Legislative Council have power to declare a Member's seat vacant for failure to comply with an Order of the House requiring the Member to produce documents?

Yes, for the reasons and with the doubts expressed in answer to 4 above.

6. Do different considerations apply where the papers are under the Ministerial responsibility of a Minister in the Legislative Council or the Legislative Assembly?

Yes.

The attitude, and in my opinion the powers, which may be taken and exercised by the Legislative Council against one of its own Members who has defied its valid exercise of power in aid of its deliberations are clearly on a different footing from the Legislative Council's relation with a Member of the Legislative Assembly. Obviously, suspension and expulsion are out of the question with respect to an M.L.A. There is also the difficult and presently obscure question of relations between the two Houses on a fundamental issue of

privilege. It may well be that a punctilious avoidance of any element of punishment will also avoid any unfortunate dispute with the Assembly.

However, and notwithstanding what I have said about implied powers, I do not regard it as likely that the Legislative Council would be held by a court of law to have an implied power to enforce an order for production of documents by committal for contempt against, say, a Minister sitting in the Legislative Assembly.

7. Are there any other matters that Counsel deems pertinent?

My only further comment is to observe that there is precedent for a distinction being observed between what might be called ordinary documents of public administration on the one hand and documents which would attract, in a court of law, so-called public immunity privilege on the other hand. In my opinion, there are difficult questions which cannot be answered in the abstract, and which appear unlikely to apply to documents concerning the closure of veterinary institutions, which will arise one day when the Legislative Council seeks particularly sensitive documents from the Executive. In one sense, of course, the inability to draw bright lines in this area reflects the beneficial tension between Parliament and the Executive.

On the other hand, in my opinion talk of legal professional privilege or the privilege against self-incrimination should be beside the point, at least for the production of documents from the Executive. There is no public policy similar to that underpinning the

former privilege in courts and tribunals, which could prevent the Legislative Council examining the legal advice upon which officers of the Executive have proceeded to do something which has attracted the attention of the House. As to the latter privilege, it seems unthinkable that a Minister would resist production of a document which may cast light on deficient administration by claiming the possibility of self-incrimination, however theoretically possible that may be in light of e.g. the common law crime of breach of public trust. It would entirely defeat the salutary function of Parliament to enquire into and criticise the administration of government if that privilege were deemed an absolute answer to an order for the production of documents.

27. I advise accordingly.

FIFTH FLOOR
ST. JAMES' HALL

10th November 1995

Bret Walker S.C.

APPENDIX 5

Advice of
Professor Enid Campbell

Legislative Council Standing Committee on Parliamentary Privilege - Inquiry into Sanctions to be Imposed where a Minister Fails to Comply with an Order of the House to Table Documents by a Certain Time

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1. By a resolution of 13 November 1995 the Legislative Council adjudged the Treasurer guilty of contempt of the House for his failure to comply with several orders of the Legislative Council to table certain documents by specified dates. It referred the matter to the Committee 'for inquiry and report into what sanctions should be enforced where a Minister fails to obey an order of the House to table papers by a certain date'.

2. The several orders in question appear not to have been made pursuant to s 5 of the Parliamentary Evidence Act 1901, but rather in reliance on Standing Order 18. One resolution, dated 26 October 1995, does, however, purport to draw on an inherent power to require production of documents. I agree with the opinion expressed by Bret Walker SC that SO 18 cannot be regarded as a source of power, though it may be regarded as a provision which regulates the exercise of a power which is inherent in the Houses of the Parliament of New South Wales.

3. Support for the proposition that the Houses have, at common law, an inherent power to require the attendance of witnesses and the production of documents for the purpose of discharging their constitutional functions is provided by some opinions of the United States Supreme Court in relation to the investigatory powers of the Houses of the United States Congress.

4. The Constitution of the United States does not expressly confer on the Houses of the Congress any power to conduct investigations and to require the attendance of witnesses or production of documents. The Supreme Court has, however, recognised that the Houses have an inherent power to compel the giving or production of evidence, albeit a limited power. In Watkins v United States, 354 US 178; 1 L Ed 2d 1273 (1957) Warren CJ, delivering the opinion of the Court, made the following observations -

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or probably needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

(354 US at 187; 1 L Ed 2d at 1284.)

The Chief Justice nevertheless emphasised that the inherent investigatory power is not unlimited and that it does not extend to inquiries into entirely private affairs. (An example

of an investigation held to be impermissible is Kilbourn v Thompson, 103 US 168; 26 L Ed 377 (1881).)

5. The question of what coercive measures could validly be taken by the Houses of the Congress in exercise of their inherent investigatory powers was considered by the Supreme Court in McGrain v Dougherty, 273 US 135; 71 L Ed 580 (1927). The circumstances which gave rise to this case were as follows. The Senate had appointed a committee to inquire into the administration of the Department of Justice during the term of the former Attorney-General, HM Dougherty. Mr Dougherty's brother, MS Dougherty, was subpoenaed to attend before the committee and to produce certain documents.[1] He failed to appear. The Senate then resolved to issue a warrant for the arrest of MS Dougherty, in order to bring him before the Senate committee to answer questions. The warrant was executed by McGrain, a deputy of the Sergeant at Arms, on the direction of the latter officer. MS Dougherty sought and obtained a writ of habeas corpus. But on appeal, the United States Supreme Court held that the inherent powers of the Senate extended to the adoption of coercive measures to compel the attendance of witnesses, at least where the witness's testimony was sought to be obtained in aid of the constitutional functions of the Senate.

6. The vital rulings of the Supreme Court in McGrain v Dougherty were these -

   (a) The powers of the Houses of the Congress are not limited to the powers expressly conferred on them by the Constitution, but extend to 'such auxiliary powers as are necessary and appropriate to make the express powers effective' (273 US at 173; 71 L Ed at 593).

   (b) '[T]he power of inquiry - with process to enforce it - is an essential and appropriate auxiliary to the legislative function' (273 US at 174; 71 L Ed at 593). That power extends to use of coercive processes to compel attendance of witnesses (273 US at 166-7; 71 L Ed at 590).

7. The Supreme Court's ruling in McGrain v Dougherty coincides with the opinion of Fleming CJ of the Supreme Court of Van Diemen's Land in Hampton v Fenton (1855) 11 Moo PC 347 at 366-7; 14 ER 727 at 734.

8. The use of coercive measures to enforce the attendance of witnesses before a House of parliament or one of its committees is not the same as the imposition of penalties for past misconduct adjudged to be in contempt of the House. In Kielley v Carson (1842) 4 Moo PC 63; 13 ER 226 the Judicial Committee of the Privy Council held that the Houses of colonial legislatures have no inherent power to punish for contempt. In Fenton v Hampton (1858) 11 Moo PC 347 at 366-7; 14 ER 727 the Judicial Committee held that the Legislative Council of Van Diemen's Land had no inherent power to order the arrest of a person who had refused to obey a summons to attend before a select committee, with a view to punish that person.

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1 A second subpoena was issued, but the direction that certain documents be produced was not repeated.

9. The United States Supreme Court has endorsed the principles enunciated in Kielley v Carson regarding the limitations on the inherent powers of legislative chambers. In Marshall v Gordon, 243 US 521; 61 L Ed 881 (1917), the Court conceded that -

> in virtue of the grant of legislative authority [to the Houses of the Congress] there would be a power implied to deal with contempt in so far as that authority was necessary to preserve and carry out the legislative authority given. (243 US at 541; 61 L Ed at 887.)

The Court went on to say, however, that the implied power to deal with contempt

> does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. (243 US at 542; 61 L Ed at 887.)

The Court noted cases in which restraints had been imposed by the Houses where witnesses had refused to produce documents or give testimony, but it considered that such restraints had not been punitive in character (243 US at 543; 61 L Ed at 888.)

10. In the later case of Jurney v MacCracken, 294 US 124; 79 L Ed 802 (1935) the United States Supreme Court held that the inherent powers of the Senate included a power to punish a witness who had failed to produce documents which a senate committee had required to be produced. The witness MacCracken had appeared before the committee but had not produced all the documents sought and he eventually destroyed them. He was cited for contempt by resolution of the Senate. When he declined to appear at the Bar of the Senate, a warrant was issued for his arrest. The Court treated the case as one of obstruction of the performance of the Senate's functions (294 US at 149-50; 79 L Ed at 807).[2]

11. None of the cases decided by the Judicial Committee of the Privy Council, with the exception of Fenton v Hampton (1858) 11 Moo PC 347; 14 ER 727, were concerned with inherent parliamentary powers to punish recalcitrant witnesses. Australian courts are no longer bound by rulings of the Judicial Committee and, in theory, it would be open to an Australian court to accept the view of the United States Supreme Court in Jurney v MacCracken as the preferable view - preferable to that taken by the Judicial Committee in Fenton v Hampton, in reliance on Kielley v Carson. But in my opinion it is unlikely that an Australian court would be prepared to disturb what has long been regarded as settled law, namely that Australian Houses of Parliament have no inherent (as distinct from a statutory) power to impose penal sanctions for contempt.

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[2] The United States Supreme Court has also recognised that legislative Houses have an inherent power to punish attempted bribery of members (Anderson v Dunn, 19 US (6 Wheaton) 204; 5 L Ed 242 (1821)) and conduct which disrupts the House's proceedings (Groilo v Leslie, 404 US 496; 30 L Ed 2d 632).

12. My conclusion is therefore that the Legislative Council has no power to order the imprisonment of the Treasurer for the conduct it has adjudged to be in contempt, or to fine him.[3] It is, I assume, open to the Legislative Council to request the attendance of the Treasurer at the Bar of the Council to explain his reasons for refusing to table the required documents, though since he has already been adjudged guilty of contempt, this course of action may not be considered appropriate.

13. I have not included in this opinion any comment on the availability of the privilege against self-incrimination, legal professional privilege or the public interest immunity in parliamentary proceedings. The availability of the public interest immunity in such proceedings is considered in E Campbell, 'Appearance of Officials as Witnesses before Parliamentary Committees' in JR Nethercote (ed), Parliament and Bureaucracy (Sydney: Hale and Iremonger, 1982) 179-226.

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15 January, 1996

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3 Punishment would, however, be authorised were the Legislative Council to proceed under the provisions of the Parliamentary Evidence Act 1901. These provisions can, I think, be construed as authorising the Houses to require witnesses to attend and also produce documents.

APPENDIX 6

Powers of Other Parliaments

POWERS OF OTHER PARLIAMENTS

This Appendix examines the powers of other comparable Parliaments to:

(i) order production of documents;
(ii) impose sanctions on Members who fail to obey orders of the House.

Part 1 deals with the powers of the House of Commons. Part 2 sets out the relevant statutory provisions which apply in other Parliaments in Australia.

1. HOUSE OF COMMONS

1.1 Power to order production of documents

According to *Erskine May*, each House has the power to call for papers by means of a motion for a return.[1] This power was frequently exercised until about the middle of the nineteenth century, but it is rarely resorted to in modern times. However, the power has continuing importance as it may be delegated to committees, enabling them to send for papers and records.

In relation to the status of the power, *Erskine May* states:

> Formerly the two Houses required the production of papers from local and other authorities not in the service of the Crown and in general such bodies may be said to be under an ill-defined obligation to produce papers to the order of either House. It cannot, however, be said that this requirement is absolute, either in the case of government departments or of public or private bodies since there are cases recorded in which obedience to an order for papers has not been insisted on.[2]

There is a general rule that papers should only be ordered on subjects which are of a public or official character.

1.2 Power to impose sanctions where a Member fails to obey an order of the House

According to *Erskine May*, the sanctions which may be imposed by the House on a Member who is found guilty of contempt, include:

- **Imprisonment / committal to the custody of the Serjeant-at-Arms**
  The most recent cases of committal occurred in 1880, when both a Member

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[1] The power to call for papers is discussed at pp. 213-4.

[2] Pages 213-4.

and a non-Member were detained by order of the House.[3]

- **Fines**
  The last occasion on which the Commons imposed a fine was in 1666; no fine has been levied in modern times.[4]

- **Reprimand or admonition by the House.**[5]

- **Suspension from service of the House.**[6]

- **Expulsion.**[7]

There are precedents where witnesses before committees of the House of Commons have been ordered to produce documents in their possession and have refused, or have destroyed the documents. The House has found the witnesses guilty of contempt and imposed the following sanctions: committal to the custody of the Serjeant at Arms (1788); being brought to the bar of the House by the Serjeant and reprimanded by the Speaker (1819); committal to Newgate Gaol (1835).[8] However, all the cases cited in *Erskine May* have involved non-Members.

2. STATUTORY PROVISIONS IN OTHER AUSTRALIAN PARLIAMENTS

The statutory provisions which confer power on other Houses of Parliament in Australia to order production of documents and/or to impose sanctions on Members who fail obey orders of the House, are as follows:

2.1 COMMONWEALTH

CONSTITUTION ACT 1901

49. 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

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3 *Erskine May*, p. 103, footnote 6.

4 *Erskine May*, p.110.

5 *Erskine May*, p. 111.

6 *Erskine May*, p. 112.

7 *Erskine May*, pp. 112 - 113.

8 The instances are referred to in *Erskine May*, p 116, footnote 6.

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.

PARLIAMENTARY PRIVILEGES ACT 1987

Essential element of offences

4. Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Powers, privileges and immunities

5. 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 in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force.

Penalties imposed by Houses

7(1) A House may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against that House determined by that House to have been committed by that person.

(2) A penalty of imprisonment imposed in accordance with this section is not affected by a prorogation of the Parliament or the dissolution or expiration of the House.

(3) A House does not have the power to order the imprisonment of a person for an offence against the House otherwise than in accordance with this section.

Houses not to expel members

8. A House does not have power to expel a member from membership of a House.

Resolutions and warrants for committal

9. Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing

the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

2.2 VICTORIA

CONSTITUTION ACT 1975

19. Privileges powers etc. of Council and Assembly

(1) The Council and the Assembly respectively and the committees and members thereof respectively shall hold enjoy and exercise such and the like privileges immunities and powers as at the 21st day of July, 1855 were held enjoyed and exercised by the House of Commons of Great Britain and Ireland and by the committees and members thereof, so far as the same are not inconsistent with any Act of the Parliament of Victoria, whether such privileges immunities or powers were so held possessed or enjoyed by custom statue or otherwise.

2.3 WESTERN AUSTRALIA

PARLIAMENTARY PRIVILEGES ACT, 1891

Privileges, powers etc., of Council and Assembly

1. The Legislative Council and Legislative Assembly of Western Australia respectively, and all the Committee and members thereof respectively, shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as, and the privileges, immunities, and powers of the said Council and Assembly, and of the Committees and members thereof, respectively, are hereby defined to be the same as are, at the time of the passing of this Act, or shall hereafter for the time being be, held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland and by the Committees and members thereof, so far as the same are not inconsistent with the said recited Act or this Act, whether such privileges, immunities, or powers are or shall be, held, possessed, or enjoyed by custom, statute or otherwise. Provided always, that with respect to the powers hereinafter more particularly defined by this Act, the provisions of the Act shall prevail.

Power to order the attendance of persons

4. Each House of Parliament of the said Colony, and any Committee of either House, duly authorised by the House to send for persons and papers, may order any person to attend before the House or before such Committee, as the case may be, and also to produce such House or Committee any paper, book, record, or other document in the possession or power of such person.

Order to attend to be notified by summons

5. Any such order to attend or to produce documents before either House shall be notified to the person required to attend or to produce documents by a summons under the hand of the President or the Speaker as the case may be, and any such order to attend or to produce documents before any such Committee shall be notified to the person required to attend or to produce documents by a summons under the hand of the Clerk of the House authorised by the Chairman of the Committee.

And in every such summons shall be stated the time and place when and where the person summoned is to attend, and the particular documents which he is required to produce.

And such summons shall be served on the person mentioned therein, either by delivering to him correct copy of such summons, or by leaving a correct copy of the same with some adult person at his usual or last known place of abode in the Colony.

And there shall be paid or tendered to the person so summoned a reasonable sum for his expenses of attendance.

Attendance of Members

6. A member of either House may be ordered by the House of which he is a member to attend before either House, or before any Committee of either House, without summons.

Objection to answer questions or produce documents to be reported to the House

7. If any person ordered to attend or produce any paper, book, record, or other document to either House, or to any Committee of either House, shall object to answer any question that may be put to him, or to produce any such paper, book, record, or other document on

the ground that the same is of a private nature and does not affect the subject of inquiry, the President, or Speaker, or Chairman of the Committee, as the case may be, shall report such refusal, with the reason thereof, to the House, who shall thereupon excuse the answering of such question, or the production of such paper, book, record, or other document, or order the answering or production thereof, as the circumstances of the case may require.

Houses empowered to punish summarily for certain contempts

8. Each House of the said Parliament is hereby empowered to punish in a summary manner as for contempt by fine according to the Standing Orders of either House, and in the event of such fine not being immediately paid, by imprisonment in the custody of its own officer in such place within the Colony as the House may direct until such fine shall have been paid, or until the end of the then existing session or any portion thereof, any of the offences hereinafter enumerated whether committed by a member of the House or by any other person--

Disobedience to any order of either House or of any Committee duly authorized in that behalf to attend or to produce papers, books, records, or other documents, before the House or such Committee, unless excused by the House in manner aforesaid.

Refusing to be examined before, or to answer any lawful and relevant question put by the House or any such Committee, unless excused by the House in manner aforesaid.

The assaulting, obstructing, or insulting any member in his coming to or going from the House, or on account of his behaviour in Parliament or endeavouring to compel any member by force, insult or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before either House.

The sending to a member any threatening letter on account of his behaviour in Parliament.

The sending a challenge to fight a member.

The offering of a bribe to, or attempting to bribe a member.

The creating or joining in any disturbance in the House, or in the vicinity of the House while the same is sitting, whereby the proceedings of such House may be interrupted.

President or Speaker to issue warrant

9. For the purpose of punishing any of the contempts aforesaid, the President or Speaker, as the case may be, is hereby empowered upon the resolution in that behalf of the House to issue his warrant under his hand for the apprehension and imprisonment as aforesaid of any person adjudged by the House guilty of any such contempt, if such fine shall not have been paid aforesaid.

2.4 SOUTH AUSTRALIA

CONSTITUTION ACT 1934

Privileges of Parliament

9. The Parliament may, by any Act, define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Legislative Council and the House of Assembly, and by the members thereof respectively: Provided that no such privileges, immunities, or powers shall exceed those held, enjoyed, and exercised on the twenty-fourth day of October, 1856, by the House of Commons, or the members thereof.

2.5 QUEENSLAND

CONSTITUTION ACT 1867

40A. Powers, privileges and immunities of Legislative Assembly.

The powers, privileges and immunities to be held, enjoyed and exercised by the Legislative Assembly and the members and committees thereof shall be such as are defined by any Act or Acts so far as those powers, privileges and immunities are not inconsistent with this Act or any other Act and until so defined shall be those powers, privileges, and immunities held, enjoyed and exercised for the time being by the Commons House of Parliament of the United Kingdom and its members and committees so far as those powers, privileges and immunities are not inconsistent with this Act or any other Act, whether held, possessed or enjoyed by custom, statute or otherwise.

Powers and Privileges of Parliament

41. Power to order the attendance of persons

The Legislative Assembly of the said colony and any committee of such House duly authorised by the House to send for persons and papers may order any person to attend before the House or before such committee as the case may be and also to produce to such House or committee any paper book record or other document in the possession or power of such person.

42. Order to attend to be notified by summons

Any such order to attend or to produce documents before the Legislative Assembly shall be notified to the person required to attend or to produce documents by a summons under the hand of the Speaker and any such order to attend or to produce documents before any such Committee shall be notified to the person required to attend or to produce documents by a summons under the hand of the clerk of the House authorised by the chairman of the committee.

and in every such summons shall be stated the time and place when and where the person summoned is to attend and the particular documents which he is required to produce

and such summons shall be served on the person mentioned therein either by delivering to him a correct copy of such summons or by leaving a correct copy of the same with some adult person at his usual or last known place of abode in the colony

and there shall be paid or tendered to the person so summoned if he shall not reside within 10 kilometres of the Legislative Chambers a reasonable sum for his expenses of attendance.

43. Attendance of members

A member of the Assembly may be ordered by the Assembly to attend before the Assembly or before any committee of the Assembly without summons.

44. Objection to answer questions or produce documents to be reported to the House.

If any person ordered to attend or produce any paper book record or other document to the Assembly or to any committee of the Assembly shall object to answer any question that may be put to him or to produce any such paper book record or other document on the ground that the same is of a private nature and does not affect the subject of inquiry the Speaker or the chairman of the committee as the case may be shall report such refusal with the reason thereof to the House who shall thereupon excuse the answering of such question or the production of such paper book record or other document or order the answering or production thereof as the circumstances of the case may require.

45 Houses empowered to punish summarily for certain contempts

The Legislative Assembly is hereby empowered to punish in a summary manner as for contempt by fine according to the standing orders of the House and in the event of such fine not being immediately paid by imprisonment in the custody of its own officer in such place within the colony as the House may direct or in Her Majesty's gaol at Brisbane until such fine shall been paid or until the end of the then existing session or any portion thereof any of the offences hereinafter enumerated whether committed by a member of the House or by any other person--

Disobedience to any order of the House or of any committee duly authorised in that behalf to attend or to produce papers books records or other documents before the House or such committee unless excused by the House in manner aforesaid.

Refusing to be examined before or to answer any lawful and relevant question put by the House or any such committee unless excused by the House in manner aforesaid.

The assaulting obstructing or insulting any member in his coming to or going from the House or on account of his behaviour in Parliament or endeavouring to compel any member by force insult or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before the House.

The sending to a member any threatening letter on account of his behaviour in Parliament

The sending a challenge to fight a member.

The offering of a bribe to or attempting to bribe a member.

The creating or joining in any disturbance in the House or in the vicinity of the House while the same is sitting whereby the proceedings of the House may be interrupted

2.6 TASMANIA

PARLIAMENTARY PRIVILEGE ACT 1858

1. Each House of Parliament, and any committee of either House duly authorized by the House to send for persons and papers, is hereby empowered to order any person to attend before the House or before such committee, as the case may be, and also to produce to such House or committee any paper, book, record, or other document in the possession or power of such person; and all persons are hereby required to obey any such order.

2.(1) Any such order to attend, or to produce documents, before either House shall be notified to the person required to attend, or to produce documents, by a summons under the hand of the President or Speaker, as the case may be; and any such order to attend, or to produce documents, by a summons under the hand of the chairman of the committee; and in any such summons shall be stated the time and place when and where the person summoned is to attend; and such summons shall be served on the person mentioned therein, either personally, or by leaving the same with some person for him, at his usual or last known place of abode.

(2) A Member of either House may be ordered to attend before the House or any such committee, without summons, in the manner heretofore accustomed.

(3) Each House is hereby empowered to punish in a summary manner, as for contempt, by imprisonment in such custody and in such place as it may direct, during the then existing session or any portion thereof, any of the offences hereinafter enumerated, whether committed by a Member of the House or by any other person:-

(a) The disobedience of any order of either House, or of any committee duly authorized in that behalf, to attend, or to produce papers, books, records, or other documents before

the House or such committee;

(b) Refusing to be examined before or to answer any lawful and relevant question put by, the House or any such committee;

(c) The assaulting, menacing, obstructing, or insulting of any Member in his coming to or going from the House, or in the House, or on account of his behaviour in Parliament, or endeavouring to compel any Member by force, insult, or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before either House;

(d) The publishing or sending to a Member any insulting or threatening letter on account of his behaviour in Parliament;

(e) The sending a challenge to fight to a Member, on account of his behaviour in Parliament;

(f) The offering of a bribe to, or attempting to bribe, a Member;

(g) The creating of, or joining in, any disturbance in the House, or in the immediate vicinity of the House.

...

(5) For the purpose of punishing any of the contempts aforesaid, the President or Speaker, as the case may be, is hereby empowered, upon the resolution in that behalf of the House, to issue his warrant, under his hand, for the apprehension and imprisonment of any person adjudged by the House guilty of any such contempt.

2.7 NORTHERN TERRITORY

LEGISLATIVE ASSEMBLY (POWERS AND PRIVILEGES) ACT 1992

18. Summons to Witness

(1) On the order of the Assembly or of a committee which has been authorised by the Assembly to send for persons, papers and records, the Clerk or in the case of a committee, either the Clerk or the clerk of the committee, may issue under his or her hand a summons to a person (not being a member) to attend before the Assembly or the committee or to produce to the Assembly or the committee the papers, books, documents or articles specified in the summons.

(2) A summons under subsection (1) -

(a) may be in or to the effect of the appropriate form in Schedule 3; and

(b) shall be served personally on the person to whom it is directed.

21. Offences by Witnesses

A person who is served with a summons issued under section 18 shall not ...

(d) refuse or fail, without reasonable excuse, to produce to the Assembly or a committee the books, papers, documents or articles specified in the summons;

Penalty: In the case of a natural person, $5,000 or imprisonment for 6 months.

25. Prosecutions

(1) The Assembly may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against the Assembly determined by the Assembly to have been committed by that person.

(2) A penalty of imprisonment imposed in accordance with this section is not affected by the prorogation, dissolution or expiration of the Assembly.

(3) The Assembly does not have power to order the imprisonment of a person for an offence against the Assembly otherwise than in accordance with this section.

(4) A resolution of the Assembly ordering the imprisonment of a person in accordance with this section may provide that the Speaker is to have power, either generally or in specified circumstances, to order the discharge of the person from imprisonment and, where a resolution so provides, the Speaker has, by force of this Act, power to discharge the person accordingly.

(5) The Assembly may impose on a person a fine -

(a) not exceeding $5,000 in the case of a natural person; or

(b) not exceeding $25,000, in the case of corporation,

for an offence against the Assembly determined by the Assembly to have been committed by the person.

(6) A fine imposed under subsection (5) is a debt due and payable to the Territory and may be recovered on behalf of the Territory in a court of competent jurisdiction by any person appointed by the Assembly for that purpose.

(7) A fine shall not be imposed on a person under subsection (5) for an offence for which a penalty of imprisonment is imposed on that person.

(8) The Assembly may give such directions and authorise the issue of such warrants as are necessary or convenient for carrying this section into effect.

26. **Resolutions and Warrants for Committal**

(1) Where the Assembly imposes on a person a penalty of imprisonment for an offence against the Assembly, the resolution of the Assembly imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the Assembly to constitute that offence.

(2) A person convicted of an offence to which subsection (1) refers may apply to the Full Court of the Supreme Court for a declaration that the matters determined by the Assembly to constitute an offence, as stated in the resolution and warrant, were not capable of constituting a breach of privilege or a contempt, and the Full Court has jurisdiction to hear and determine such an application.

(3) If the Full Court makes the declaration sought by the application, the resolution referred to in subsection (1) shall forthwith have no effect, the warrant of commitment is discharged and the person, unless otherwise confined according to law, shall immediately be released from custody.

2.8 AUSTRALIAN CAPITAL TERRITORY

AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) ACT 1988

Powers, privileges and immunities of Assembly

24.(1) In this section:

"powers" includes privileges and immunities, but does not include legislative powers.

(2) Without limiting the generality of section 22, the Assembly may also make laws:

(a) declaring the powers of the Assembly and of its members and committees, but so that the powers so declared do not exceed the powers for the time being of the House of Representatives or of its members of committees; and

(b) providing for the manner in which powers so declared may be exercised or upheld.

(3) Until the Assembly makes a law with respect to its powers, the Assembly and its members and committees have the same powers as the powers for the time being of the House of Representatives and its members and committees.

(4) Nothing in this section empowers the Assembly to imprison or fine a person.

APPENDIX 7

Ruling of President Willis, 2 May 1996

PRESIDENT'S RULING ON ATTORNEY GENERAL'S POINT OF ORDER

A Point of Order has been raised by the Attorney in the context of the motion before the House moved by the Hon. The Leader of the Opposition which seeks inter alia to ajudge the Leader of the Government guilty of contempt for the failure by him as the Leader of the Government in this place to produce certain documents pursuant to the Orders of the House in this behalf. The Point of Order which is taken by the Attorney is that this House has now power constitutionally to order the production of documents and that therefore it is not competent for the House to proceed with the motion relating to contempt because to do so would compound what the Attorney alleges is an already ultra vires action by the House. The mover of the contempt motion the Hon. The Leader of the Opposition in speaking to the Point of Order contends the contrary, namely that all necessary powers are vested in this House and that the Attorney's Point of Order therefore has no substance.

Having the task of ruling on this Point of Order places me in a rather exquisitely pleasant situation. The Attorney General of New South Wales who in his own right is an imminent Queen's Counsel argues one way and the Leader of the Opposition, a former Attorney General argues to the contrary, and the decision on the issue vests in me. Whilst a lawyer I am merely a member of the lower branch of that profession who has never been an Attorney General, not even a shadow Attorney General and I am not one of Her Majesty's Counsel learned in the law. However notwithstanding my apparent inadequacy to judge as between the arguments of these two learned Counsel, the reality is that I have no hesitation in doing so because I believe the situation to be quite clear - an opinion which I trust is based not on ignorance but on experience in this Parliament and the knowledge of its history and actions in the past.

The Attorney bases his ultra vires argument on the opinion of Solicitor General Mason QC of 19 December 1995 and 3 May 1994, and I have had the opportunity of studying these opinions. As the Attorney correctly points out, they have been not only available to the current Government, but to the previous Government. The essence of Solicitor General Masons's opinion is that Standing Order 18 is ultra vires Section 15 of the Constitution Act 1902 and argues that the power to make Standing Orders is only within the specific scope of that section, and the Legislative Council has no inherent powers to demand the production of documents.

On the other hand, the Leader of the Opposition disputes the opinion of Solicitor General Mason and therefore the Attorney's Point of Order, and quoted from the opinion of Mr Brett Walker SC of 10 November 1995 on the same section and the powers of the Legislative Council to demand the production of documents. As has been stated in the debate on the Point of Order, Mr Walker holds a contrary view to that of Solicitor General Mason, namely to the effect that the Legislative Council does have inherent or implied power to require the production of documents. This conflict of emminent legal opinion of course is not uncommon in the law and whilst I have my personal view on which of the opinions of these emminent gentlemen is correct my personal view is not strictly relevant to my ruling on this Point of Order.

I would bring to the attention of Honourable Members a number of President's rulings from the past which to some extent guide me in the course that I must take on this important matter. I refer firstly to the ruling of President Hay of 11 March 1880 to the effect that

> "The House is, in regard to all questions, the judge of the last resort, but it is the duty of the President to give his opinion on such questions as may be referred to him, and on questions of order it is usual for the House to allow itself to be guided by that opinion."

Secondly there is the opinion again of President Hay of 28 August 1889 in which he said:

> "In ruling with regard to the proceedings of the House, the President must be guided by its own rules and practice, but not with a view in any way to curtail the rights of the House when it deliberately chooses to exercise them."

Another ruling of President Hay of 28 August 1889:

> "If at any time Members should think that the rules and orders and practice of Parliament to a material extent cripple their desire to be useful in any way, the Chair will be very willing to take the opinion of the House, and to bow to its decision."

And lastly again a ruling of President Hay of 29 May 1890:

> "When a question of the interpretation of the rules of the House arises, it will then be time for the President to give his opinion in regard to them."

Accordingly as I see it, it is my duty to give my opinion in the confidence that the House will be guided by that opinion. I think it fair to say these things:

Firstly that the specific powers conferred by Section 15 of the Constitution Act on this House to make Standing Orders and the same as applies to the Legislative Assembly, does not confer a specific statutory right to make Standing Orders for the production of documents. Secondly there are many decided cases to have stated that this Parliament and its constituent Houses do have certain inherent powers but to the best of my knowledge there has never been a decision of the Courts specifically on the question of whether the inherent powers include a right to make Standing Orders beyond the specifics stated in Section 15 of the Constitution. Thirdly since 1856 when this parliament in its current form came into existence, there have been scores, if not hundreds, of resolutions of both Houses calling for the production of documents pursuant to the Standing Orders of the respective Houses in that behalf and in the vast majority of cases, these Orders have been responded to positively.

I must therefore assume that in the light of these three factors that I have just mentioned, it is long and firmly established by precedent that both the Houses of this Parliament take the view that the respective Houses have inherent or implied power to call for documents. The number of precedents in this regard is so overwhelming that if one were to regard them in any Common Law context they would constitute "part of the Law of the Parliament".

As a Presiding Officer and custodian of the traditions, precedents and the rights of this Houses, it would be foolish of me and indeed contrary to what I believe to be my duty to fly in the face of this mass of historical precedent. In my opinion, the only authority in the land that is able to do that are the Courts and I must assume that until an appropriate Court of Law rules to the contrary, that the law is such that t is perfectly within the powers of the House to call for documents pursuant to that Standing Order or inherently. In this regard I am guided by the precedent of President Murray of 16 October 1862 to the effect that:

> "It is the duty of the President not to give opinions on points of law, but to declare and give his opinion when it is called for, on all matters relating to the ordinary forms and rules of proceeding in Parliament."

Accordingly, I rule that there is no Point of Order.

APPENDIX 8

List of Witnesses and Submissions

List of Witnesses and Submissions

WITNESSES

27 November 1995

- Mr Bret Walker, SC

19 December 1995

- Mr Keith Mason Q.C., Solicitor General for NSW
- Mr Ian Knight, Crown Solicitor
- Mr Harry Evans, Clerk of the Australian Senate
- Mr Laurie Marquet, Clerk of the Western Australian Legislative Council
- The Hon Michael Egan, MLC, Treasurer, Minister for Energy, Minister for State and Regional Development, Minister Assisting the Premier and Vice-President of the Executive Council

SUBMISSIONS

- Opinion by the Solicitor General for NSW, Mr Keith Mason, Q.C., entitled *The Power of the Legislative Council to Require Production of Documents*, SG 95/123, submitted 19/12/95.
- Submission by Mr Laurie Marquet, Clerk of the Western Australian Legislative Council, 19/12/95.
- Opinion by Professor Enid Campbell, dated 15 January 1996.

APPENDIX 9

Proceedings of the Committee

Proceedings of the Committee

Note:

At the time the Committee was conducting this inquiry, it was also inquiring into other matters unrelated to the subject of this inquiry. Those parts of the Minutes of the Meetings of the Committee which concern the other two matters have been deleted from the Minutes appearing below.

MEETING No. 14

Monday 27 November 1995

at Parliament House, Sydney at 9.30 am

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Miss Gardiner	Mr Lynn
Mr Johnson	Mr Manson

Apologies were received from Mr Jones, Mr Vaughan.

Minutes of the previous meetings Nos 10 and 11 and briefings Nos 12, 13 confirmed on motion of Ms Gardiner.

The Chair tabled the following correspondence:

CORRESPONDENCE SENT:

(iii) Letter to Mr Bret Walker, SC, inviting him to appear before the Committee (15 November)

(x) Letter to Mr Brett Walker, SC, containing information for the hearing dated 27 November 1995 (24 November 1995)

The Committee deliberated.

Mr Bret Walker, SC, was admitted, sworn and examined.

Evidence concluded, the witness withdrew.

The Committee deliberated.

Resolved on motion of Mr Manson: That, pursuant to the provisions of Section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and under authority of SO 252, the Committee authorises the Clerk of the Committee to publish the submission of the Senior Counsel.

The Committee adjourned at 11.26 am *sine die*.

MEETING No. 16

Tuesday 19 December 1995

at Parliament House, Sydney at 9.30 am

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Miss Gardiner	Mr Lynn
Mr Johnson	Mr Manson
Mr Jones	Mr Vaughan

Minutes of the meetings Nos 14 and 15 were confirmed, on motion of Mr Lynn.

The Chair tabled the following correspondence:

CORRESPONDENCE SENT:

(ii) Letter from the Clerk to Mr Bret Walker, SC thanking him for giving evidence and including transcript (5 December 1995)

The Committee deliberated.

The Committee determined that a hearing in relation to the Committee's inquiry into possible sanctions for failing to table documents would be held on Tuesday 30 January 1996 at 10.30 am, and a deliberative meeting would be held on Friday 2 February at 10.30 am.

Mr Manson moved: That the media be admitted at a time convenient to the Committee for the purpose of taking a photograph, under conditions as determined by the Chair.

Debate ensued.

Question put and passed.

Mr Vaughan requested that his opposition to the motion be noted.

The media and public were admitted.

Mr Keith Mason, QC, NSW Solicitor General, and Mr Ian Knight, NSW Crown Solicitor were sworn and examined.

Evidence concluded, the witnesses withdrew.

Mr Harry Evans, Clerk of the Australian Senate, was sworn and examined.

Evidence concluded, the witness withdrew.

Mr Laurie Marquet, Clerk of the Legislative Council, Western Australia, affirmed and examined.

Evidence concluded, the witness withdrew.

The Hon M. R. Egan, MLC, Treasurer, Minister for Energy, Minister for State and Regional Development, Minister Assisting the Premier, and Vice-President of the Executive Council, was sworn and examined.

Evidence concluded, the witness withdrew.

The Committee deliberated.

Resolved on motion of Mr Johnson: That, pursuant to the provisions of Section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and under authority of SO 252, the Committee authorises the Clerk of the Committee to publish the submission of the Solicitor General and the Crown Solicitor.

Resolved on motion of Mr Jones: That, pursuant to the provisions of Section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and under authority of SO 252, the Committee authorises the Clerk of the Committee to publish the submission of the Clerk of the Australian Senate, the Clerk of the Legislative Council, Western Australia and the Treasurer, Minister for Energy, Minister for State and Regional Development, Minister Assisting the Premier, and Vice-President of the Executive Council.

The Committee adjourned at 4.36 pm until Tuesday 30 January 1996 at 10.30 am.

MEETING No. 17

Monday 22 April 1996

at Parliament House, Sydney at 2.00 pm

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Mr Jones	Mr Manson
Mr Lynn	Mr Vaughan

Apologies were received from Miss Gardiner and Mr Johnson.

Minutes of meeting No 16 were confirmed, on motion of Mr Manson.

The Chair tabled the following correspondence:

CORRESPONDENCE SENT:

(i) Letters from the Clerk to the following witnesses forwarding transcripts of evidence: (2 January 1996)

Mr Keith Mason, QC, NSW Solicitor General

Mr Ian Knight, NSW Crown Solicitor

Mr Harry Evans
Clerk of the Australian Senate

Mr Laurie Marquet
Clerk of the Legislative Council, Western Australia

The Hon M. R. Egan, MLC
Treasurer, Minister for Energy, Minister for State and Regional Development, Minister Assisting the Premier, and Vice-President of the Executive Council;

(iii) Letter from the Clerk to Prof Enid Campbell, Monash University regarding the proposed Committee hearing; (3 January 1996)

(iv) Letter from the Clerk to the Acting Crown Solicitor, Mr P Anet, regarding corrections to the transcript of evidence of the Crown Solicitor; (8 January 1996)

(v) Letter to Mr Geoff Liddell, Reader in Law, Law School, University of Melbourne regarding proposed Committee hearing; (15 January 1996)

CORRESPONDENCE RECEIVED:

(v) Letter to the Clerk from Mr I V Knight, Crown Solicitor confirming his appearance before the Committee; (4 December 1995)

(vi) Letter to the Clerk from Mr Keith Mason, QC, Solicitor General for NSW to the Clerk agreeing to appear and give evidence before the Committee; (4 December 1995)

(vii) Letter to the Clerk from Mr Harry Evans, Clerk of the Senate agreeing to appear before the Committee and give evidence (5 December 1995)

(ix) Letter to the Clerk from the Acting Crown Solicitor, Mr P Anet seeking an extension of time for returning the Crown Solicitor's corrections to the transcript of evidence (3 January 1996)

(xiii) Media Press Release by the Hon Charlie Lynn, MLC concerning Mr Jones' status as a Member of the Committee (April 1996)

(xiv) Memorandum to Chair from the Hon Richard Jones, MLC concerning Mr Lynn's Media Release (28 March 1996)

The Committee deliberated.

In reference to the Media Press Release from Mr Lynn, issued April 1996, the Chair stated that the issue of membership of a party has no bearing whatsoever on the status of a Member of the Committee.

***

Resolved on motion of Mr Jones: That the Chair prepare and submit a Draft Report on the Inquiry into Sanctions where a Minister fails to table documents, for consideration by the Committee.

The Committee determined that deliberative meetings would be held at the following times:

Friday 3 May 1996	10.00 am - 1.00 pm
Monday 6 May 1996	10.00 am - 12.30 pm
Tuesday 7 May 1996	10.00 am - 12.30 pm
Friday 17 May 1996	2.00 pm

The Committee adjourned at 3.35 pm until Friday 3 May 1996 at 10.00 am.

MEETING No. 18

Friday 3 May 1996

at Parliament House, Sydney at 10.00 am

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Miss Gardiner	Mr Lynn
Mr Johnson	Mr Manson
Mr Jones	

Apologies were received from Mr Vaughan.

Minutes of meeting No. 17 were confirmed, on motion of Mr Manson.

The Chair tabled the following correspondence:

CORRESPONDENCE:

(ii) Letter to Chair from The Honourable Justice Michael Kirby A.C., C.M.G., Special Representative of the United Nations Secretary-General for Human Rights in Cambodia requesting a copy in due course of the Committee's Report concerning the powers of the House to impose sanctions on a Member. (29 December 1995)

The Committee deliberated.

The Committee considered the Draft Report on the Inquiry into Sanctions where a Minister fails to table documents.

Section 1 read and agreed to without amendment.

Section 2 read and agreed to.

Section 2.2 read.

Resolved, on motion of Miss Gardiner: That the following paragraph be inserted after paragraph 2.2.10:

2.2.11 The Committee notes that two previous Committees of the NSW Parliament recommended that the Parliament legislate to define its powers and privileges. In its 1985 report *Parliamentary Privilege in New South Wales*, the Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege took

the view that the powers, privileges and immunities of the Houses of the NSW Parliament are those of the House of Commons. It recommended that the *Constitution Act* be amended to place this beyond doubt (p. 20). In 1993, the Legislative Council Standing Committee Upon Parliamentary Privilege recommended that the Parliament enact legislation to define its powers and privileges, and to define its powers to deal with breach of privilege and contempt of Parliament[25]. Despite these various recommendations, no action has been taken in this regard.

25 *Report concerning the publication of an article appearing in the Sun Herald Newspaper containing details of in camera evidence*, October 1993, p. 20

Resolved, on motion of Miss Gardiner: That the following paragraph be inserted after paragraph 2.2.13:

2.2.14 The validity of the common law powers enunciated in *Kielley v Carson* was also called into question by the Clerk of the Western Australian Legislative Council, Mr Laurie Marquet. In his evidence he suggested that the common law is dynamic and is acted upon by the other parts of Australian law. In support of this view he referred to the *Theophanous v Herald & Weekly Times* (1994) 124 ALR, 1 which states:

"If the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former. It will not always be easy to determine whether and to what extend there is a variance but it is clear that the Constitution must prevail.

2.2.15 The basis of Mr Marquet's evidence was that whatever the legal position may have been before 1901, the constitution and powers of the NSW Legislative Council today should be decided by reference to the form of government for the State ordained by the Commonwealth and State constitutions, and that the common law as declared in *Keilley v Carson* gives way to the paramountcy of the constitution.

2.2.16 The Committee notes that the Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege in its 1985 Report entitled *Parliamentary Privilege in New South Wales* stated that it had received legal advice that the decision of the Privy Council in *Kielley v Carson* is of arguable validity. The Report states that the Committee was of the view that the decision is not currently binding in the State of New South Wales (p. 18).

2.2.17 In the past the Legislative Council has asserted a right to call for papers on numerous occasions. As President Willis stated in his ruling of 2 May 1996 "...since 1856 when this parliament in its current form came into existence, there have been scores, if not hundreds, of resolutions of both Houses calling for the production of documents pursuant to the Standing Orders of the respective Houses

in that behalf and in the vast majority of cases, these orders have been responded to positively"

Section 2, as amended, agreed to.

Section 3.1 read and agreed to.

Section 3.2 read, amended and agreed to.

Section 4 read, and agreed to.

Summary of conclusions and recommendations read, amended and agreed to.

The Committee deliberated.

The Committee adjourned at 12.30 pm until Monday 6 May 1996 at 10.00 am.

MEETING No. 19

Monday 6 May 1996

at Parliament House, Sydney at 10.00 am

MEMBERS PRESENT

Dr Burgmann (in the Chair)

Miss Gardiner	Mr Lynn
Mr Johnson	Mr Manson
Mr Jones	Mr Vaughan

Minutes of meeting No. 18 were confirmed, on motion of Mr Jones.

The Committee deliberated.

Resolved on motion of Mr Jones: That the Report on the Inquiry into Sanctions where a Minister fails to table documents, as amended, be adopted.

Resolved on motion of Mr Lynn: That the Report be signed by the Chair and presented to the Clerk in accordance with the resolution establishing the Committee.

Resolved on motion of Mr Jones: That 300 copies of the Report be printed, on recycled paper if possible, after tabling.

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The Committee continued deliberations.

The Committee adjourned at 12.00 pm until Tuesday 7 May 1996 at 10.00 am.

APPENDIX 10

Evidence taken before the Standing Committee on Parliamentary Privilege and Ethics

REPORT OF PROCEEDINGS BEFORE

LEGISLATIVE COUNCIL STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

At Sydney on Monday 27 November 1995

The Committee met at 10.00 am

PRESENT

The Hon. Dr Meredith Burgmann (Chairman)
The Hon. Jennifer Gardiner
The Hon. J.R. Johnson
The Hon. C. Lynn
The Hon. A.B. Manson

Transcript prepared by Birkner Reporting Pty Ltd

BRET WILLIAM WALKER, barrister, 5th floor, St James Hall 169 Phillip STREET, sworn and examined:

CHAIRMAN: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Mr WALKER: Yes.

CHAIRMAN: Are you conversant with the terms of reference of this inquiry?

Mr WALKER: Yes.

CHAIRMAN: Do you have a written submission?

Mr WALKER: No.

CHAIRMAN: Do you wish to briefly elaborate or make a short statement before we start questions?

Mr WALKER: Simply to refer that instead of a written submission I have given the Clerk of the Parliaments an opinion which I understand members will know something about.

CHAIRMAN: What powers does the Legislative Council have to order production of documents?

Mr WALKER: In my opinion each House of Parliament has an inherent power to order the production of, at least, certain classes of documents. The issues which, in my view, make the question a bit difficult to answer by a simple yes are, first, whether there are any classes of documents which are simply beyond the power absolutely and, second, how you would enforce a valid order for the production of certain documents if the person or persons in whose custody those documents were, refused to produce them.

But the short answer to your question is that the extent of the powers would appear to be as broad as is necessary for each House to fulfil its function and the function of the Council is such that it will be no less than the power of any legislative house on a British model, and because that includes inquiring into matters of public import or at least those matters to be considered of public import by the House, the class of documents would appear to be limited only by the scope of matters of public interest, which would appear to be virtually limitless.

Nice questions might arise if the House became interested in what were on any view completely private matters, but it is very difficult actually to construct a definition of matters which are completely private once they have engaged the interest of a House of Parliament. Almost the interest of a House of Parliament is enough to make something a matter of public importance. As to the other qualification, whether there are any documents which are completely beyond the power so that the order may be defied as not being valid, that raises questions of the relations of the House to the Executive, and in my opinion there can be no

single document of any kind by description in advance which would be beyond the power to compel production.

Those difficulties will fall to be considered, it seems to me, in questions of privilege which are a matter for the House. So far as concerns enforcement, I have already advised in the written opinion to the Clerk that I think that is a difficult matter. It is sufficiently obscure that if you were to seek to enforce the production of documents as you used to be entitled before the Act under which I am giving evidence was enacted, namely send out the Black Rod or the Sergeant-at-arms to haul someone before the House and to, by analogy, break down doors and rifle through filing cabinets to find the document you are after, then you would be on extremely traditional ground in claiming a power to do so sufficient to resist criminal charges brought against your officers for trespass, assault, theft or whatever.

But you would have to call in a precedence from a pretty stormy time from Parliament, that is the 17th century, and in particular the middle of the 17th century, precedence which has, on the one hand, the advantage of being sufficiently old to be very respectable if age gives precedence respectability, but to come from a era which is so strange in so many ways that I doubt very much whether they would carry very much weight at the end of the day. It seems to me that the question of the actual power to enforce without which the right to call would appear to be hollow will also be judged on the basis of so-called necessity.

I had some difficulty, as those who read my opinion would have seen, with seeing how you detect the limits of necessity because on one very simple view, which I prefer, if you have a power it is necessary to be able to enforce compliance with an order given under it because otherwise the power is a mockery. From that, of course, it would follow that you could send the Black Rod or the Sergeant-at-Arms or whoever you authorised, out to break down doors and rifle through filing cabinets in exactly the same strong-arm fashion as the police are entitled or, indeed, obliged to do under a warrant issued by a court. It seems to me that that comparison strongly supports the existence of that quite extraordinary and drastic power with which none of us are familiar in ordinary life because it would be probably an unprecedented subservience by Parliament to the courts of law for Parliament to consider itself not to have the same self-protective and self-effectuating mechanisms as a court does.

Courts can plainly authorise officers of the law to go and arrest people, haul them before the courts and to break down doors if necessary in the execution of a warrant to produce something, but suffice to say those powers are used very exceptionally, and in particular, search warrants as you well know have been litigated for many years and will continue to be litigated because the power that they exert is very jealously resisted by most people who have material they do not wish to have produced.

So, I am afraid my answer is very long because, in conclusion, it seems to me that you have a conflict between the theory which supports the very broad power plus, as a matter of necessity, all the means necessary to enforce it but in practice there would be, it seems to me, some very piquant confrontations between the police force and perhaps the Black Rod or the Sergeant-at-Arms at an office premise where you wished your officers to enter and take documents.

If you add the possibility to those documents the documents of Executive Government who, of course, would appear to be in more or less absolute day-to-day control of the forces of law and order, then the confrontation would be such that it is most undesirable to leave it on the basis of inherent powers or implied powers.

CHAIRMAN: You made the comment about unprecedented subservience of the Parliament to the legal system. Can you elaborate on that?

Mr WALKER: Yes. Theorists of constitutions have, for I suppose now about 400 or 500 years, played around as you would all be extremely familiar with different metaphors for how we organise the organs of State. Whether you talk about arms or limbs of government, at the moment we live in a society that thinks of there being three of them. Whether that is a correct division may be debatable, but certainly that is the most commonly accepted view.

As you know, that leads to theories like the strict American version of the separation of the different arms of government, the British view which mixes them to a degree and the Australian view which also mixes them to some degree but not quite so greatly. One of the tenets of that idea of separation of powers is that each is, as it were, supreme in its own area, and that each has to defer to a defined amount to the others but only to a defined amount.

It is very familiar that the judiciary has power over both the other arms, that is the Legislative and the Executive and we can leave the Executive out for the moment, but it would be unprecedented for Parliament to concede any more than an extremely limited power for the courts to rule upon what Parliament has done. For example, one need only think of the authorities which I have cited in my opinion. They are living demonstrations that from time to time the courts, within their own orbit of dominance, actually rule upon the validity of what Parliament did. The expulsion of Mr Armstrong from the Council, the forcible throwing out from the Chamber of Mr Crick or was it Mr Taylor?

CHAIRMAN: Mr Crick.

Mr WALKER: Those are matters where the Council, Parliament, would never have the slightest problem with the courts ruling on, what is after all, the lawfulness of its actions on the basis that everyone is subject to the law and it happens that the judiciary exists in order to pronounce and apply the law. But, it seems to me, having recognised the function which in that area and that area alone has, as it were, the court everything the last say, you would never say that therefore the court is somehow a greater being or greater entity which must have more ample powers.

It seems to me that unless you say something like that, you could not possibly accord to Parliament less ample powers as justified by necessity than you would accord to a court. Courts have power, for example, to punish for contempt in the face of the court. It would follow, from the essential function of Parliament compared to the essential function of a court, that you must have at least as great a power to punish for contempt in its face, for example. It seems to me that, although the powers of a court to compel evidence are all now regulated by statute, the power of a court, function of a court which is seen to require those powers

cannot be any greater than the power of Parliament to inquire and legislate on matters of public importance which would also bring in its train that necessity.

So, the purpose of my comment was to highlight that the notion that this Parliament would be without a power to compel production of documents when documents notoriously nowadays record matters of State which are matters of public importance, it seems to me to place Parliament in quite an inferior position as a fact finding organ, one of the three limbs of our organisation of the State, below courts which, as I say in my opinion, would be unprecedented.

CHAIRMAN: The House of Commons possesses a power to call for production of papers by means of a motion for a return, but it is commented here, however, obedience has not been insisted on. Really, that is what you have been saying, that our Parliament has the power to call for the documents and if necessary to break down doors and rifle through cabinets but you are not in the slightest bit surprised that the House of Commons has never done that?

Mr WALKER: No I am not, because I would confidently expect that for every silk who would tell you there is the power, as I am, you would find at least one who would genuinely have a different opinion. Maybe I exaggerate there. Maybe it would not divide 50/50. Life is never that neat, but it is undoubtedly an open question as to whether you can send your officers out into the street and into premises, particularly the premises of Executive Government which seem to me to be the real litmus test of the power, and to lay hands on people who are seeking to protect their documents without thereby committing assault and to go into people's private premises without thereby committing trespass. They are such large and enormous intrusions on what are ordinary freedom to be let alone that they have always been scrutinised with great care.

You will recall I mentioned some of the famous 19th century parliamentary privilege cases in the opinion. They, it seems to me, are useful for one thing as well. They show how carefully and how critically the judges, who are the ultimate arbiters on this point, will scrutinise the claim of a particular expedition on the part of Parliament to have been within power. There are a number of cases where all the rhetoric of the court is in favour of Parliament's importance and power, but there has been a failure, if you like, of the paperwork to bring it within power.

That is a simple example of the fact that you could confidently expect that anything that was actually done by way of practical strong-arm enforcement of the right to compel the production of documents would be subjected to pretty savage litigious scrutiny which is no doubt why, in the past, where compromise or practical solutions have presented themselves as alternatives to going to court, discretion has always been the better part of valour.

The Hon. J.R. JOHNSON: Do I take it that, given your answer and the oft time use by various committees of the Parliament, they are so frightened of the turmoil and the damage to itself that great way out of the Parliament should consult the dignity of its own House rather than reach a conclusion?

Mr WALKER: Yes. I think that represents one of those traditional and probably quite often sensible ways out of the kind of tension which we have necessarily set up, because we all have adopted and we more or less practice this division of powers and, it seems to me, the one that really matters is the division of powers between the Legislature and the Executive. That seems to me where these powers really become acute and where they present the most obvious conflict of public interest values.

The notion that the House would not push conflict to a point of ultimate resolution one way or the other, which would eventually probably be by the judiciary, is one which has a great deal to recommend it historically and practically. However, like many compromises, it lacks all systematic explanation as a matter of principle. That does not mean it is not appropriate. It may be extremely practical and politic to proceed in that fashion, not least because it keeps the tension of uncertainty between the Executive and the Legislature, which may be an extremely valuable tension to have, rather than, for example, to have everything resolved one way or the other.

It does not necessarily follow that it would be resolved in favour of the Legislature, for example, and were it to be resolved by judicial fiat in favour of the Executive, then that would no longer be any tension when a Legislative Chamber wished to obtain a document. It would simply be a request without any force of law behind it.

CHAIRMAN: Obviously when we are looking at trying to get documents, the question is how far can one go to get the documents, but it may well be difficult for the Black Rod to work out which documents he wants, and then comes the whole issue of punishment. The other question I want to ask is what principles are applied by the courts when a claim is made that documents should not be produced on grounds such as legal professional privilege or that documents are commercial in confidence documents?

Mr WALKER: I hope I will be exhaustive in this answer. There are --
CHAIRMAN: Or Executive privilege of course.

Mr WALKER: There are about four useful categories, privilege against self-incrimination, legal professional privilege, confidentiality, which is not a privilege at all, and the privilege not to produce on what is now called matters of State under section 130 of the Evidence Act 1995, which has very considerably changed the way in which we both talk and think about this area.

Taking them in order briefly, on privilege against self-incrimination, that is a common law privilege which is therefore liable to be abrogated by particular statutes and in a lot of statutes is abrogated. Thus, for example, in the Independent Commission Against Corruption you can be and people frequently are forced to give sworn evidence which incriminates them. As a trade off, no doubt in the public interest, Parliament to my knowledge has practically always enacted simultaneously with abrogation of privilege, what is caused called a use immunity, whereby that transcript and the occurrence in the hearing, for example, at ICAC cannot be used against the person who gave the evidence who had pleaded the privilege and had it overruled except, of course, for perjury before ICAC.

So, that is one model. That is the common law privilege which is obviously an important one. It is applied as an absolute. There is no judicial discretion involved once the court is satisfied that the answer could give rise to a chain of inquiry, not an outright admission, which might lead to self-incrimination, then there is an absolute privilege except in those places where statute has abrogated it. That is the first one.

The second one is legal professional privilege which has recently been held by the High Court, in terms rather similar to the High Court's statements about the privilege against self-incrimination, to be an absolute common law protection which is not to be left to the discretion of individual judges and individual cases. It is a rule of law. It also is subject to being overruled by legislation and in some, but not quite some many cases, has the form of privilege it is. Both of those are applied in court more or less mechanistically. Once the facts emerge which are relatively obvious - cases on the borderline are fairly rare - which attract the privilege, that is the end of it. The only issue thereafter is whether somebody has waived their privilege by having disclosed the material or otherwise used it in such a way as to have the court hold that the privilege has been waived by the person claiming it.

The third category, confidentiality, is often talked about most vociferously by people who claim the benefit of the confidentiality as if it were a privilege or as if it were a value on par with privilege. It emphatically is not a privilege, and in court every day, I can guarantee as I speak that confidential material is being given in evidence in open court and probably without protection. Thus, for example, all medical records are clearly confidential. People's financial records are confidential. People's banking records are confidential, and the documents in those three categories are almost certainly being given in court in evidence across the road as we speak.

Confidentiality, in other words, is a claim to protection from public disclosure which the courts will respect in great or lesser degree depending on what the court is doing and the sensitivity of the particular document. Some, nobody ever bothers to complain about. Somebody's tax returns is tendered in a personal injury case where wages loss is being claimed.

CHAIRMAN: By the other side?

Mr WALKER: Yes, been subpoenaed. It proves that, for example, rather than earning $100 a week they were declaring to the Commissioner that they earned $1,000 a week which would have a devastating effect on their claim, or vice versa. In my experience nobody bothers to go in to elaborate arguments and protective devices about confidentiality for that.

On the other hand, personal medical records, particularly of those who are not parties to the litigation, are commonly protected so far as the court can do so either by restricting access if they are subpoenaed documents or in courts which have the power to do so by making an order for non-disclosure of evidence or non-publication of evidence. Not all courts have that last power.

So, confidentiality is debated quite often in courts. It will depend upon the issue and

the sensitivity of the document as to whether anything is done to recognise the confidentiality, but the basic principle is that the interest of the administration of justice in having all the evidence will always or practically always be self-evidently more important than private confidentiality.

There are some cases, for example, if you were suing to protect a trade secret, it would be ludicrous if you had to prove your trade secret in a public court, and so cases which are very obvious where it would defeat the whole purpose of justice to publish, the very common ones where there is confidentiality and sometimes even the rarity of hearings in camera, but it is certainly not a privilege.

Every now and again beginners, legal practitioners blithely tell a registrar or master or judge where documents are being produced that they resist production on the grounds that they are confidential. It is one of those traditional times for educating them on the difference between confidentiality and privilege.

CHAIRMAN: Under the Freedom of Information Act certain documents are exempt from being produced. I think one such group of documents are those which attract Executive privilege. Would documents exempt under the Freedom of Information Act be exempt from being required by the House to be produced?

Mr WALKER: I do not know. I think that is the most difficult issue in the whole area. I have a slight preference for the view that they are not exempt from being produced, but the problem with my view is that I will find it very difficult to answer your next question, which is, well what happens and who makes the ultimate decisions.

The problem with the other view, which is once a claim of that kind is made that is the end of the House's powers, are somewhat similar. First of all who decides it and on what grounds.

CHAIRMAN: We do.

Mr WALKER: I must say I agree. That is why I prefer my view that, at the end of the day, you cannot have a system where you can go round in a circle between Executive, judicial and Legislative arms and there will always be an ultimate answer when the music stops. Some issues will always have to be left to people accepting that there will be a decision, not necessarily by the judiciary. It seems to me that a decision by the Legislative arm ultimately on that question can be defended.

But I answered I do not know to your question because there are no authorities which satisfactorily even hint how to solve this. I can briefly say what principles I think should govern and the kind of argument that I think would be most persuasive, at least to me, as to the result. There is not a lot to be learned from what happens in courts or under the Freedom of Information Act for these reasons: in court the balance is between the administration of justice which is normally between private individual and private individual, sometimes between State and the private individual, and the legislative function.

It seems to me that is a completely different balance from the more far ranging responsibility of a House of Parliament to debate matters of public interest and to assemble whatever material it thinks is suitable. Courts proceed upon far more narrow and prescriptive lines as to the rules of evidence and what is and is not available. Parliament, it seems to me, could never or should never be so restricted. The analogy with the Freedom of Information Act is not very useful because that is a regime which got rid of most balances all together. It simply said, by statute documents hitherto secret or confidential are going to be made available unless they belong to certain exceptional classes.

That was a reversal of hundreds of years of an attitude of secrecy about public papers. There is no analogy between that and courts because there is no administration of justice as the overriding value. It is simply the public right to know. But the Parliament which enacts the Freedom of Information Act seems to me a very odd Parliament indeed if it does not at least vindicate at least equivalent access to documents for itself, and I would have thought by definition somewhat greater access for this reason: while it may be appropriate for a private member of the public, if that expression makes sense, to be denied access, for example, to documents about government contracts which would, of course, include much that is commercial in confidence, it does not seem to me that there is any parallel between that and a House of Parliament.

The Parliament is the body to whom the Ombudsman and the Auditor-General reports, elected by the people and given the function of legislating as well as inquiring into matters. It seems to me that it is the obvious final repository of information and debate on those matters. The alternative, I regret to say, would be that we judicialise actions of the Executive almost completely by, in effect, awaiting an occasion when someone can mount a court case.

There is something which is justiciable or a private individual has been affected or some law can be invoked which gives members of the public standing to sue in a court of law, and then it seems to me, to my mind, the almost absurd spectacle is presented of the Executive answering to the judiciary and Parliament merely being a spectator and at the end of the day and perhaps considering some legislation in retrospect to make sure things do not happen again.

That would appear to me to be a denial of one of the main functions of Parliament, and for those reasons that all the arguments of policy which turn on the function of the body favour my view, which is that you can compel the production of documents which would clearly fall within an exempt category under the Freedom of Information Act. It would be again odd as a balance of power between you and the courts or a comparison of power between you and the courts because under section 130 of the Evidence Act, the courts are not bound absolutely to forbid production and disclosure of documents relating to matters of State.

There is a list of matters set out in section 130, all of which are balancing factors, for them the administration of justice and the public interest in keeping certain things secret which show they can in certain cases force those documents to be produced, and they can include Cabinet documents and in cases of criminal justice where somebody's defence may depend upon a document, they can even include documents relating to international security. So that

it would be again, I think, an odd comparison for Parliament to conduct of its itself with the courts to deny that it has that power to balance matters.

Documents which fall within what might be called an automatic category of immunity because they deal with matters of State will cover an enormous range. As most of us know, some Cabinet documents are very sensitive and will remain so for a long time. Other Cabinet documents are essentially ephemeral and could be disclosed without telling the public anything the public did not already know. But they all belong to the one category, Cabinet documents, when it comes to somebody making a claim in an affidavit.

It seems to me that just as a court can balance as to whether production is necessary in the interests of a particular case, so Parliament ought to be able to balance it for the purposes of particular debate. A court decides things according to rules, principles and discretions, this is an area of discretion bound by the only obligation to give reasons, a Parliament decides it by debate and vote. The difference does not seem to me to be significant.

CHAIRMAN: Are you saying by that that you cannot conceive of documents that a Parliament could not ask to be produced?

Mr WALKER: Yes, I say there are documents which, as a citizen, I hope Parliament would not ask to be produced but that is a hope in the abstract, but none which a priori, it could not ask to be produced. I think the parallel with the courts is absolutely perfect. The courts would now, even at common law, *Sankey* v *Whitlam* and *McAllister* v *The Queen*, so the loans affair and the Ananda Marga criminal trials, there is no suggestion in any of those judgments that there are particular documents which can be described in advance of their existence, let alone their production being sought which could never be ordered to be produced by a court for evidence. It again depends upon the case.

We can all now talk about classes of documents which are so obviously important and sensitive that, for example, their open debate in Parliament and their open tender in court would defeat the whole public purpose for which those documents were being created. But it is very difficult to describe them in such a way that would could feel happy, it seems to me as a citizen in a representative democracy with simply saying to the Executive, well as soon as you bring something within that category I do not want to know any more about it.

There will be no discretion exercise, no weighing of the emergency of the public debate against the sensitivity of the public document, no consideration of safeguards guards which can be imposed. That all strikes me as self-defeating. Courts do not have to do it. Parliament, in other words, has left courts with a much broader discretion. Why should Parliament not claim at least the same ability to adapt its demands to the exigencies of the particular occasion.

CHAIRMAN: Can I get on to the next issue then which is punishment? What powers does the Legislative Council have to deal with a member for contempt, and what sanctions can be imposed upon a member of the Legislative Council for failure to comply with an order of the House requiring a member to produce documents?

Mr WALKER: This is an area where there are distinctions which have to be made according to the law, the differences between which are very difficult to see. According to the authorities, this Parliament cannot punish, except to the extent that it is empowered by legislation to do so, or except to the extent that the power to punish contempt is described as punitive. In my opinion it is playing with words to say it is not punishment. However, the old cases make it quite clear that, unless there is a case of contempt, for example a stranger bursting in and throwing a stink bomb would be the most obvious example during proceedings, unless there is a case of very obvious self-protective measures then at the moment in the absence of a statute in my opinion the Legislative Council cannot set out to punish someone for not producing a document or not coming to give evidence.

You have got to leave it to the court under the Parliamentary Evidence Act to punish somebody for not coming. It seems to me the same is true with documents. All you can do is seek to enforce, and that is why I gave the earlier evidence I did about going out and getting the documents. I do not think you have any power to punish.

However, the powers I have advised in my opinion you do have would feel, I suspect, awfully like punishment to those against whom they are exercised because they would include suspension until somebody had knuckled under and accepted the will of the House, as it were, or until the end of the debate which has been affected by the defiance to produce or expulsion if, in effect, a member has said, "Well, I don't care what the majority of the House says, I think my opinion stands against the will of the House and I am going to take my place in the House and proceed accordingly".

I could imagine a House of Parliament reaching a stage where it says, "I don't care how pure your motives are, that is an attitude of defiance in respect to the House that cannot be tolerated". Apart from those cases it seems to me you have no powers that can properly be called punishment. I am totally at a loss, however, to explain why the person who is suspended or expelled would not feel, and according to ordinary English, justifiably punished.

It is a difference which, I regret to say lawyers are quite familiar talking about although it can be very hard to explain how the distinction operates at the margins. For example, with professional people, doctors and lawyers and the like, we very easily fall in to the cliche that the court or the tribunal is not there to punish the practitioner but there to protect the public. I can assure you, practitioners who are struck off feel very punished, so the difference seems to me to be more a matter of important language to tell the body that they can only go as far as necessary to vindicate its power and no further.

I think it is simplistic to say you cannot punish and leave it at that. A better way of putting it is, the only things you can do, however punitive they appear, are those which are necessary to achieve vindication of the House's power.

CHAIRMAN: But which does encompass suspension?

Mr WALKER: And expulsion. Interestingly, suspension may be harder for a House to justify than expulsion on a very simple ground. When somebody is expelled, there will be

a new member elected. When somebody is suspended, the persons represented by that person are no longer represented in the House during the suspension, so in many ways suspension is denial of democratic representation, expulsion is not. After all, the expelled person could presumably be re-elected.

CHAIRMAN: But you would not see someone being expelled stopping them standing for re-election?

Mr WALKER: Not unless legislation prevented it. It may well be that, upon them taking their new seat, they continue the attitude and they would be re-expelled. That is probably the kind of extreme example that lawyers like to test a proposition but will not arise in reality.

The Hon. J.R. JOHNSON: Yes, it could arise in reality because you cannot replace yourself.

CHAIRMAN: That is right, in the House you cannot replace yourself. Would your advice be different if the member ordered to produce the documents was a Government Minister in the Legislative Council but the documents were within the responsibility of the Minister in the Legislative Assembly?

Mr WALKER: In principle, no, but in practice the facts of the case might make it fundamentally different within the judgment of the House for this reason: I assume that, and I am sorry if I am wrong factually, the Executive arrangements are such that however much the responsible Minister in the other House may wish to oblige his or her colleague in the upper House by not embarrassing him or her, at the end of the day all the Executive arrangements and the legal rights and powers and obligations with respect to the documents reside and reside only with the Minister. If that is the case, of course, it would be extremely hard lines on the member of the upper House merely, as it were, representing the Minister in the lower House to be punished for not doing something which he or she is not empowered to do.

If I am wrong and that is not the factual position, then no doubt they can be treated as he equivalents but if I am right and the member of the upper House speaking for, as it were, a portfolio in fact held by a Minister in the lower House, has absolutely no Executive right or power over those documents, then it would strike me as harsh, perhaps beyond power for someone to be held to have defied an order. You cannot defy and order which you can not comply with it seems to me.

CHAIRMAN: You do not know what the situation is about a representative of a--

Mr WALKER: I am sorry, I do not. It seems very simple and I apologise. I thought about this and looked at it before I came up, but it is one of those things which I suspect may be so obvious that is not found in many places. It is as simple as this, there is only one Minister sworn in for each portfolio and I think that is the end of it. There is one Minister and all ministerial discretion and power resides in that one Minister.

CHAIRMAN: So the convention whereby a Minister represents that Minister in the upper House is merely a convention and gives them no particular jurisdiction?

Mr WALKER: That is my belief but I do not hold that opinion as firmly as some of the other opinions I have expressed. I have not researched that to my satisfaction. I have researched it, but not found a proper answer. It seems on me that the convention simply operates on the basis of some kind of comity among the Cabinet, because there does not seem to be any warrant in law for seeing any relation between those people outside what they do on the floors of the Houses. They do not have any Executive relation at all, it seems to me.

The Hon. Jennifer GARDINER: Can I follow up on that last point with respect to individual ministerial responsibility. The Minister that we are inquiring into is in fact Vice-President of the Executive Council, termed as being the Leader of the Government in the Legislative Council. Does that make any difference that he is the Vice-President of the Executive Council, and therefore represents the Government?

Mr WALKER: It would not make a difference, I think, to any of the answers I have given, but it does increase very considerably the tension between Executive and Legislature which is at the heart of the problem, because I again assume, I believe it to be the case, all members of the Executive Council I take it still swear an oath of secrecy and because they do and because it is a real oath, it seems to me you have a classic recipe for a stand off between someone who says, like Sir Maurice Byers when he was Solicitor General before the House of Representatives, "I am bound by an obligation" and defied the House or the Senate.

So here, it would appear to me, a member of the Executive Council could put a very attractive argument that, regardless of the will of the House to which he or she could profess unending respect, of course, there is a specific oath which specifically covers the secrecy of the material in question. I must say it seems to me that is a highly unsatisfactory state of affairs because it is a tension which is too crude to be particularly useful.

That is a classic reason, that tension between the Executive Council secrecy oath and an obligation to honour the House by compliance with its requirements why this ought to be covered by legislation and not left to highly unsatisfactory stand offs in which there is always the spectre of the judiciary deciding it.

The Hon. A.B. MANSON: Going back to the first question that was asked, Mr Walker, what powers does the legislative council have to order the production of a document, I think you mentioned something about 17th century precedence being rough justice in those days. Did you then go on to say that if these were tested in the courts today they would not stand up?

Mr WALKER: I do not know how they would go in the courts today. The attitude the courts would now have, for example, to the Legislative Council by resolution calling upon, for example, the police force to aid Black Rod, I am sure that would be very different from a resolution of the House of Parliament calling for all mayors of every borough in England to a Black Rod, not least because there is a wholly different approach to controlling the

lawfulness of police officers' actions the like, such as we require proper warrants, et cetera, and it seems to me such a drastic position to contemplate that predicting what a court would do is more than usually uncertain. It is always uncertain, I am afraid, but it is very uncertain.

My own preference is, I think the principle argument is that at least Parliament's officers can lawfully execute the will of Parliament. My own view is that Parliament cannot enlist by resolution of the House the coercive powers of the police force. I believe those days have long gone. I believe that can only be done ultimately under statutory authority and appropriate Executive delegation.

CHAIRMAN: Who would you envisage supporting the Black Rod?

Mr WALKER: His or her staff. I don't mean the rod, I mean his or her members of staff. I should say whether or not people would recognise Black Rod or understand a statement to the effect that I am Black Rod is very dubious and really highlights how very much at the margins we are. "Knock knock who is there, I am Black Rod, I am here to get these documents". I suspect there would be a rather awful mixture of ridiculousness and abortion.

CHAIRMAN: Can I try summing up what you have said, which is there are a lot of untested areas that at the moment you think it is a fairly healthy tension between the rights of the Parliament, the rights of the Executive, the non-interference of the courts, that the secrecy oath of the Executive Council complicates the issue further.

Mr WALKER: Yes.

CHAIRMAN: That the practicality of obtaining the documents is something that the House itself has to think about.

Mr WALKER: Yes.

CHAIRMAN: And the whole area of punishment is also fraught or sanctions fraught with difficulty.

Mr WALKER: I agree with all of that. I would only add one. As I understand at the moment I think your standing orders effectively make public tabled papers. I may be wrong. I think it is standing order 21 or thereabouts. It seems to me a practice, whether it is simply adopted by the House or by a standing order approved by the Governor or, as I would strongly prefer, legislation which puts these powers with relation to documents on as clear a footing as the powers with respect to witnesses now are, however you do it, it seems to me it would be, first, terrible if Parliament could not debate matters of public importance according to Parliament's decision - that is not a court's decision, it is for Parliament to decide - whether it is of public importance, even if it relates to what I will call the inner most secrets of the Executive.

I must say as a citizen I strongly take the view especially if it relates to the inner most

secrets of the Executive. On the other hand, it would be terrible if the workings of the Executive where secrecy is justified - and there are workings where secrecy is justified or absolutely necessary - were to be at the mercy of a hostile majority in a House which, of course, quite properly can be used for partisan purposes - that is what politics is - it seems to me the resolution is that the House must have a mechanism properly enforceable and of practical reassurance to people who produce documents to it for some documents to be kept confidential.

Now that runs into an extraordinarily powerful problem, a conflict of values, and that is whether anything in Parliament should be kept secret from the people. I do not think that is easily answered. On balance, no doubt because I am a lawyer, I would prefer in exceptional cases you have that power rather than you not have the power but I would obviously prefer that the power is virtually never exercised.

CHAIRMAN: But you believe it probably should be legislated exactly what documents can be --

Mr WALKER: Yes. My reasoning is this: the Executive Government continues in office in our system, which we choose to call responsible government in this aspect of it, because it enjoys the support in certain kinds of votes of one or other of the houses, depending upon what is going on, but we will call it the lower House on a matter of confidence, for example. Votes of confidence are obviously therefore of surpassing importance.

If any debate is to be well informed it ought to be and if it is thought that there have been extremely serious matters deleterious to the public interest in the eyes of the majority of the House occurring in the inner most circles of Executive Government, it would be a defeat in my view of parliamentary right to hire and fire the Executive were Parliament not able to debate that.

As a citizen, and deplorable as I would normally find secret sessions of Parliament, I would far prefer Parliament to have that power to go in camera to get documents which are incredibly sensitive to debate whether or not there ought to be that ultimate exercise of power by the House over Executive Government than to not have that power on the basis that it would be a nice power to have but because it has to be done publicly that would defeat the purpose of the secrecy of State, therefore you cannot have the documents there are you can not have the informed debate.

It seems to me that in the conflict of those values of publicity of proceeding against power over the Executive as a citizen I would prefer you had the power over the Executive even if it meant occasionally giving up publicity. Now, one way to make that resolution less obnoxious is, of course, by-law to require that a House which has resolved to get something which is very secret and let it be assumed either by law or standing orders that is stipulated to be done only on a super majority or only after a certain amount of notice or whatever.

Once the House has done that it seems to me there ought to be, as it were, a period of grace within which there can be secret or must be secret debate and criminally punishable to

reveal anything about that document but grandfathered very early, a fortnight or whatever, so that there must be disclosure unless certain circumstances occur. A system like that may enable what is otherwise a real stand off between the two arms of government, Legislative and Executive, to be resolved. My basic thesis is, it must be resolved in favour of the Legislature.

CHAIRMAN: There are obviously documents that should not be produced in public, a list of police informers at the royal commission, and your suggestion is if the Legislature believes for some reason it needs to have that document to prove that Joe Bloggs is not on it or something, you would prefer a secret sitting of the Parliament to decide that rather than there being a view that the document had total exemption?

Mr WALKER: Yes, because it seems to me the real problem is that otherwise the parliamentary - I keep calling it Legislature. That is because Parliament's main role is legislation. But the parliamentary scrutiny role would be defeated if, as it were, a ministerial certificate or a ministerial statement concludes the issue, "You cannot have this because it is too secret".

CHAIRMAN: You have really allowed for no Executive privilege at all?

Mr WALKER: No, I would hope that under any practice the claims of so-called Executive privilege, matters of State, ought to be very favourably viewed by the House. My thesis is they ought to get exactly the same kind of tender consideration as they get in court, and the point about what court does is that great respect is given to the Executive saying, "this is a matter of State" but the court reserves a power ultimately to strike a balance in favour of production. It seems to me that Parliament ought to have at least that much power. I think there is a sound argument where it should have more power but at least that much power.

The Hon. J.R. JOHNSON: Do I take it what you are in effect saying is Parliament at times must consider a higher duty?

Mr WALKER: Yes, exactly. In other words, the value of efficient Executive Government can never, as a matter of political science, be placed higher than the value of a democratic Parliament.

CHAIRMAN: The Clerk has pointed out to me that we have situations where documents are tabled but not made public.

Mr WALKER: Good. I was not aware of that. I must say I rather hoped that was the case.

The Hon. J.R. JOHNSON: We did it recently, tabled documents but with restricted access?

Mr WALKER: That seems to me to be an extremely salutary power which, so long as one bears in mind the very desirable value that proceedings in Parliament be public and publicly available, ought to be resorted to rather than the intolerable alternative of not being

informed about a matter because you cannot be informed in secret. I would stress I am really talking about extreme cases. One would hope that things being done secretly would remain very, very rare in Parliament.

CHAIRMAN: Thank you very much, Mr Walker. It has been very useful and we now have a lot to think about.

(The witness withdrew)

(The Committee adjourned at 11.15 a.m.)

REPORT OF PROCEEDINGS BEFORE

LEGISLATIVE COUNCIL STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

At Sydney on Tuesday, 19 December 1995

The Committee met at 10.00 a.m.

PRESENT

The Hon. Dr Meredith Burgmann (Chairman)

The Hon. Jennifer Gardiner
The Hon. J. R. Johnson
The Hon. R. S. L. Jones
The Hon. C. J. S. Lynn
The Hon. A. B. Manson
The Hon. B. H. Vaughan

KEITH MASON, Solicitor General for New South Wales, Goodsell Building, Chifley Square, Sydney, and

IAN VICTOR KNIGHT, Crown Solicitor for New South Wales, Goodsell Building, Chifley Square, Sydney, sworn and examined:

CHAIRMAN: Mr Mason, in what capacity are you appearing before the Committee?

Mr MASON: As Solicitor General, having been summoned.

CHAIRMAN: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Mr MASON: Yes.

CHAIRMAN: Are you conversant with the terms of reference of this inquiry?

Mr MASON: Yes.

CHAIRMAN: Do you have a written submission?

Mr MASON: Yes.

CHAIRMAN: Do you wish that submission to be included as part of your sworn evidence?

Mr MASON: Yes.

CHAIRMAN: If you should consider at any stage during your evidence that, in the public interest, certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee will consider your request in conformity with Standing Order 250.

Mr Knight, in what capacity are you appearing before the Committee?

Mr KNIGHT: Primarily as Crown Solicitor, and also in respect of two pieces of advice which I gave which are relevant to this inquiry.

CHAIRMAN: Did you receive a summons issued under my hand in accordance with the Parliamentary Evidence Act 1901?

Mr KNIGHT: I did.

CHAIRMAN: Are you conversant with the terms of reference of this inquiry

Mr KNIGHT: I am.

CHAIRMAN: Do you have a written submission?

Mr KNIGHT: I do not. I would like to bring forward the two written advices that I gave.

CHAIRMAN: Do you want those included as part of your sworn evidence?

Mr KNIGHT: If I may. Just for the information of the Committee, I do have instructions from my client to volunteer the two legal opinions. The first opinion is dated 18 October 1995 and relates to the validity of Standing Order 18. The second opinion is dated 26 October and relates to the inherent power of the Legislative Council to call for the production of documents.

CHAIRMAN: If you should consider at any stage during your evidence that, in the public interest, certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee will consider your request in conformity with Standing Order 250.

Do either of you wish to make brief statements or, in the case of Mr Mason, elaborate upon a written submission before we proceed to questions?

Mr MASON: As you know, the Crown Solicitor and I have given advice about our opinion as to Standing Order 18 and its validity. Mr Knight has given advice which has just been tabled as to the implied power of the Parliament. I have done an advice addressing that last matter as well which I am now about to table. It responds to Mr Walker's advice and sets out my opinion that in the absence of legislation neither House of the Parliament has a power to require the production of documents or to compel the giving of testimony, and that in that respect the powers of the Houses of Parliament in this State are different from those of the Imperial Parliament and indeed different from any other Parliament of Australia because legislation has not been passed in this State that goes beyond the giving of evidence.

So may I produce copies of that advice. If the Committee wishes, I will read it or speak to it, as you wish. There is attached to it a copy of advice given by me to the Attorney General of the previous Government on 3 May 1994, setting out my opinion as to the validity of Standing Order 18.

CHAIRMAN: We would like to hear you talk to it. Could you briefly elaborate on those two opinions.

Mr MASON: Certainly. In paragraph 1 I note the resolution of the Legislative

Council adjudging the Treasurer guilty of contempt of the House, and the basis for that judgment is recited in clauses (1) to (3) of the resolution. I also note that what has been referred to the standing committee for inquiry and report is the matter of what sanctions should be enforced where a Minister fails to obey an order of the House to table papers by a certain date.

In view of the decision already reached by the House concerning the Treasurer and the general terms of reference to the standing committee, it is, I suggest, inappropriate that I should express an opinion as to the validity of the November resolution. The fact that I have been retained to represent the Treasurer in legal proceedings in the event that he were to be suspended or expelled from the House reinforces this position. What follows should therefore be read as representing my opinion as to the general powers of the House.

The question of enforcing sanctions where a Minister fails to obey an order of the House to table papers implies that the House has authority to make a binding order of that nature. In my opinion, no such power exists, although it could obviously be conferred by legislation. Absent legislation, there have been two sources suggested as the basis of a valid order directed at a Minister who is a member of the Council directing him or her to table papers by a certain date. The possible sources of power are Standing Order 18 and the implied common law powers of the House.

The Clerk of the Parliaments has received advice from Mr Walker SC that Standing Order 18 does not bestow powers on the House to call for documents, and that it is not supported by section 15 of the Constitution Act. As recorded in the Committee's parliamentary background paper, both the Crown Solicitor and I have given advice to the present and the former governments to the effect that Standing Order 18 and the cognate standing order in the Assembly are ultra vires the power to make standing orders conferred by section 15 of the Constitution Act. My advice, as I indicate, is reference SG 94/58, is attached to the paper.

As recorded in the background paper, Mr Walker and the Crown Solicitor have, however, given differing opinions as to whether the House possesses the implied common law power enabling it to order the tabling of documents. I respectfully but firmly disagree with the opinion of Mr Walker which argues in favour of an inherent or implied power in the present case. That opinion is based largely upon passages in English cases concerning the powers and privileges of the House of Commons. The position argued for by Mr Walker was, in my opinion, considered but rejected by the Privy Council in the nineteenth century in a series of cases starting with *Kielley v Carson* which are reviewed in *Armstrong v Budd.*

The implied powers of a House are neither those of a House of the Imperial Parliament nor of the Supreme Court. They are only such "as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute". The cases show that this principle has been narrowly interpreted, because

a claim by the House of a right to compel the attendance of a person or the production of documents must of necessity clash with well established common law rights. There is no support in principle or in the case law for distinguishing the position of a member of the House and a stranger as regards the House's right to compel attendance or production of documents.

I wish to reinforce that last-mentioned part. What we are really debating here, in my opinion, is whether in the absence of legislation either House could require any person - be that person a member of the public, or a public official, or a Minister - to attend or to produce documents of whatever nature. The principles we are debating, if they are good against the Treasurer, would be good in the lower House against any member of that House or good against a member of the public, and regardless of the nature of the documents concerned.

The Hon. J. R. JOHNSON: Or the other House?

Mr MASON: Or against a member of the other House.

CHAIRMAN: Could a member of the upper House be brought before the lower House?

Mr MASON: I have not considered that. It may not necessarily follow. But, certainly, the power could exist - as argued by Mr Walker - presumably in the teeth of a resolution of the other House requiring the documents not to be produced. That is as far as it must go, if it is said to be implied in the proper functioning of one House.

CHAIRMAN: This is because of the absence of legislation in New South Wales?

Mr MASON: Yes.

CHAIRMAN: Whereas that is not a problem in other States?

Mr MASON: Every other State and the Commonwealth has, either by section 49 of the Commonwealth Constitution or by legislation that is passed, enacted that the privileges of the House of Commons are the privileges of each House of the Parliament. A bill to make such provision was passed in the Assembly in the 1870s but was rejected by the Legislative Council. The debates relating to that rejection are referred to in paragraph 11 of the document that I tabled.

The nineteenth century cases make it plain that the customary power of the English Houses of Parliament to act as a "grand inquest" - which is the expression which is used - did not devolve upon any colonial Parliament. In order to redress that, as I say, express power was given in some cases in the constitution, such as the Victorian Constitution; general power was given in other constitutions, by the general power to make laws for peace, welfare and good government; but it is undoubted that

the power exists to pass laws giving those privileges to the Parliaments. The only law that has been passed in this State is the Act which brings me here, the Parliamentary Evidence Act. That was enacted first in 1881, and during the debates which led to the passing of that Act it was pointed out, with some irony, that that Act only addressed the giving of evidence and not the production of documents, but that that was the position that had been reached because the Legislative Council had rejected a more general bill some years previously.

CHAIRMAN: But section 10 also continues to say that it does not affect any law relating to privilege in the Parliament, that we did not have a law.

Mr MASON: You have the common law, and the common law was held by the nineteenth century cases not to allow a summons to issue requiring production of documents simply because they were thought by Parliament to be necessary either as a general inquest power or in aid of legislation. The Parliament, just like the Crown, has the right to ask anyone to produce documents but, like the Crown, does not have the right to compel production in the absence of legislation. The reasons for that are really two-fold.

Documents are the property of the person from whom they are demanded, so necessarily there is a right to intrude upon that person's right to property; but, also, the right to require production and to require attendance sooner or later ends in a person being arrested for non-production or non-attendance. The ultimate power to arrest necessarily is a serious intrusion upon personal liberty, which is studiously protected by the common law, and will yield only to legislation. Legislation requires the concurrence of two Houses and the assent of the Monarch or the Governor, as the case may be.

I return to the text, paragraph 8. Although legislation could be passed giving such power, the common law power of either House does not include the general power to send for "persons, papers and records" possessed by the House of Commons and the House of Lords. That power exists by the law and custom of British Parliament and enables each House of the British Parliament to act as a "grand inquest". But it is, in my opinion, clearly established that such common law power was not inherited by the individual Houses of the New South Wales legislature, nor by any colonial legislature.

The Privy Council has held that the principle of necessity does not empower a House of Parliament, even when part of a Parliament vested with general legislative power, to require production of documents from the Executive and to visit a sanction upon the person who refuses to cooperate. The leading case I cite is *Fenton v Hampton*, where a summons went to, I think, the Comptroller of Prisons in Van Diemen's Land, as it then was. There was a matter of public controversy. The Parliament there required this person to attend with documents. He ignored the request. An arrest warrant issued. He challenged the arrest warrant, and his challenge

was successful, both in the Supreme Court of Tasmania and the Privy Council.

CHAIRMAN: Was it upheld in the Privy Council on the ground that there had been no legislation, or on the ground that there was not that power in the Parliament?

Mr MASON: On the ground that while that power existed in an English House of Parliament it did not impliedly vest in a colonial House of Parliament. That case did not address the question of legislation, but later cases in the nineteenth century said: the answer is simple, pass an Act of Parliament. I refer also to cases which, in my opinion, establish that the same principle applies when the power is, as it were, directed at a member of the House. Clearly, the House has power to discipline a member who obstructs the face of the House; in other words, if there is disorderly conduct directed at the Presiding Officer, then it is established that a member may be suspended form the service of the House, although it appears only for such time as is necessary, as it were, to bring the member to heel. Indeed, the cases suggest that it may be limited to the term of the sitting of the Parliament. But that is directed at disorder in the House, and the cases, in my opinion, make it plain that events that occur outside the hearing or presence of the House cannot be made the subject of the contempt power, even when directed at a member of the House.

CHAIRMAN: So the contempt power is purely for the good order of the House?

Mr MASON: Yes, the common law contempt power. That follows, I would suggest - and the cases support me, I believe, in this - for two reasons. The prime reason is that there is no distinction in principle between the position of a person who is a member and the position of a stranger. My primary point of disagreement with Mr Walker's opinion is that he does not squarely address the consequences of his opinion, which must be in logic that the powers he asserts exist against a Minister must exist against a member of the public, and that therefore he is arguing for a common law power, absent statute, ultimately to arrest a member of the public for not obeying a summons to attend a Committee of the House or a single House. Such an intrusion upon the liberty of the subject is such that the common law would not, in my opinion, countenance it.

All of what I have said so far is speaking in terms of generality. I have not yet got to the additional problem of a summons that requires production of documents that would attract public interest immunity. But there is an additional reason which, in my view, supports the equation of the position of a member of a House with that of a member of the public. It is the fact that the constituents in - the case of this House, the whole of New South Wales - are entitled to the services of the member; and that if the House could expel or suspend an individual member without clear authority at common law or statute, it would enable the majority to remove a minority representative. The principles of representative democracy that the High Court has reaffirmed, for example, in the political advertising case emphasised that it is not just a matter of the rights of the Parliament; it is a matter of the rights of the constituents

for whom the members of Parliament are representatives.

In paragraph 10 I express the opinion that the conclusion is also supported by, in the Australian context, by a series of cases, leading one being *McGuinness v Attorney General*, which addressed the powers of the Crown to require the giving of evidence or the production of documents. It has been well established that the Crown, like anybody else, has the right to ask questions, but it is equally well established that it does have the right to compel answers or compel production of documents. To give that power, legislation has had to be passed in aid of royal commissions, ICACs and the like. And the necessity, if one wanted to argue it, for getting information which some would want to say a House of Parliament has, is in principle, I would suggest, no different to the necessity that the Crown might have for getting information if there were a royal commission. And yet, in one case, as with the other, the liberty of the individual has prevailed over the public necessity, and the requirement has been that only legislation can abrogate the right of privacy, the right just to say no thanks.

Legislatures in Australia and elsewhere have responded to the nineteenth century cases, usually by claiming the powers and privileges of the House of Commons in a Constitution - see section 49 of the Commonwealth Constitution - or by legislation. New South Wales is the only State that has not addressed this matter generally. Its Parliamentary Evidence Act 1901 accepts the principle of the nineteenth century cases - and therefore it reinforces, I suggest, the view I am putting - because it confers the power of compelling the attendance of witnesses. One could argue: Why would it have done that if the power existed, as it contended by those of a different view to my own. But that act does not extend to documents. A bill to confer upon the New South Wales Parliament, and each of its Houses obviously, all of the privileges of the House of Commons was rejected by the Legislative Council in 1878.

For these reasons I consider that the House possesses no sanction beyond expressing its displeasure where a Minister or a stranger fails to obey an order of the House to table papers by a certain date. There are additional reasons that may apply depending upon the circumstances. I shall express the matter generally because of my stated desire not to be seen to be canvassing a judgment of the House against the Treasurer in the particular situation. Even if, contrary to my view, the House had an implied common law power as suggested by Mr Walker, that power could never be used punitively. *Armstrong v Budd* establishes this. Resort to a power of suspension or expulsion where the documents do not form part of the relevant Minister's portfolio or where the decision not to produce them had been taken by Cabinet would, in my opinion, involve a punitive exercise of any relevant power. It is one thing to put pressure upon a person who has it within his or her capacity to answer a summons; it is quite another thing to punish a person for non-production of documents out of that person's control.

CHAIRMAN: Do you see that as a crucial point, or are you just adding it as an extra problem?

Mr MASON: I am adding it as an extra problem, and I am speaking generally. A second general qualification, even on an implied power that I would suggest and submit would be well established concerns the immunity that would be attracted by particular documents. Thus far I have been addressing just a general command to produce documents that do not attract any particular considerations based upon their nature. If in a particular case all or some of the documents concerned attracted public interest immunity then the power of the House to require their production and to discipline for non-production would be very doubtful.

CHAIRMAN: Basically, you do not believe in public interest immunity?

Mr MASON: I do. I do not understand.

Mr KNIGHT: This is on the assumption that there is a power to call for documents. Mr Mason is now looking at what defences may be available to such a call for documents.

Mr MASON: For particular classes of documents. I am saying even if there were a general power, it does not follow that it applies to documents whose nature would attract public interest immunity. I give some examples. As I understand the view that is contrary to mine, it is that any House can require any person to produce any document and, in absence of production, apply sanctions against a third party, presumably the power of arrest against a member but also the sanction of expulsion or suspension. I am now addressing a more particular response to that argument; namely, what if the particular documents that are withdrawn are of a nature that may, for example, reveal the identity of an informant, or what if they revealed the contribution of an individual Minister to the formation of Cabinet policy in a current matter, or which revealed instructions to Parliamentary Counsel with respect to the preparation of legislation to be introduced on the budget papers prior to their introduction, or related to legal advice?

Let it be assumed that there were litigation, in effect, between the Executive and a House as to the respective powers one over the other. Would the power of the House extend to requiring the government to produce the legal advice it had received relevant to its stance taken in that legislation? Mr Knight and I are giving evidence here clearly under the summons of the House; but, equally, we have instructions to waive any legal professional privilege, if it exists - and we contend it does - that would affect some of the evidence as to advice that had been given previously to government. Clearly, that privilege has been waived because, as I understand it, the Treasurer disclosed it in the House during some prior debate.

Let it be assumed that the identity of an informant or the disclosure of some information that is clearly not in the public interest to be disclosed is at issue. I was thinking of the situation that occurred late last year or earlier this year where there was some controversy about revealing the identity of some person who had a conviction

many many years ago. Let it be assumed there was some law that gave privilege against revealing that information generally. Is it to be said that a House, or the House by its majority, could require production to itself and into the public domain of such information; or, in a federal context, matters relating to defence secrets, for example.

My researches indicate that the matter has never been pressed; that both in the Federal Parliament and in the British Parliament, where the Houses have the full power which in my opinion this House does not have, a ministerial certificate saying "I do not produce these documents because in my opinion it is in the public interest that they not be produced" has always been respected. I am not saying that that establishes the point, but I am saying that the House has never pressed the matter in the teeth of a ministerial certificate.

CHAIRMAN: When I asked Mr Walker a question along the lines, "What about a list of police informants", his view was that the House still had the absolute right to know but that perhaps a secret sitting of the House was a way around it - which, of course, I found the secret sitting of the House a contradiction in terms.

Mr MASON: The courts acknowledge that there are categories of information, public interest immunity and legal professional privilege, which not even they can compel to be divulged. They have mechanisms for sorting out proper and improper claims of public interest immunity. If the Committee were interested, I could give evidence as to the mechanism that occurs in the courts with respect to the claims of public interest immunity and the machinery adopted by the government for vetting such claims, but whilst the courts assert the right to be judge of the existence and application of public interest immunity, the courts recognise that where a proper claim has been made they will respect that claim and not require production.

The view that is advanced by Mr Morris QC in the background paper that has been presented, as I read it, suggests that the public interest immunity and presumably also legal professional privilege are not a basis for objecting to the production of documents. I firmly disagree with that opinion. Even if the Parliament has the power - and in my view it does not - that power would not extend to requiring production of those documents. There would be no necessity which, in the eye of the law, would justify the revelation of the identity of an informant when that person could, for example, be killed. The situations have occurred where informants have been killed because their identity has been revealed.

The Morris opinion says, well, it is one thing to have public interest immunity arising in a court situation, but it is an entirely different thing to have it arising in a parliamentary inquiry situation. I respectfully suggest that he has taken no account of passages in the two cases to which I have referred, one of which he is certainly justified in overlooking because it was decided after his opinion was given. The High Court case of *Jacobsen v Rogers* established that public interest immunity privilege is not confined to judicial proceedings; that it is a fundamental common law immunity

that prevails against judicial proceedings and public inquiries and, I would contend, whatever implied powers a Parliament might otherwise have.

There is American authority that supports the same position which is referred to in the paragraph on page 6. Also, as I point out there, my researches indicate that a House of Parliament, even one with greater powers than this House, has never pressed its position in the teeth of a ministerial certificate. Of course, in most cases in the past the problem of confrontation would have occurred in the lower House. There, the House has the right to express its lack of confidence in the government, and thereby trigger off a change of government. Now, that of course gives it mighty power, but also gives it mighty restraint. I only mention that in order to indicate as it were the historical context in which some of these disputes have arisen in the past.

Members of the Committee, I think that is all I want to say about what my opinion is on the legal issue.

CHAIRMAN: On that point: what you are actually saying is that, as our House has expressed the view that a member is in contempt for not producing a document, in the lower House that would be solved in a political fashion by maybe the falling of a government.

Mr MASON: Yes.

CHAIRMAN: But we have a situation in the upper House where the House itself has expressed a view, and nothing is happening, except this Committee.

Mr KNIGHT: The Executive is not moving to enforce production or to sanction against the Minister?

CHAIRMAN: Nothing has happened politically to solve the problem, which you are suggesting would inevitably happen in the lower House, like the fall of a government.

Mr MASON: Yes.

CHAIRMAN: So you do not know whether a motion finding a member in contempt has occurred in an upper House before?

Mr MASON: Not a contempt occurring, as it were, outside of the House. I am sure there would be cases where a member of an upper House has been rowdy. In fact, I think there are some examples where members have been suspended for short periods of time for being rowdy or insulting. The nineteenth century cases draw the distinction between the power to punish but also the power to discipline for things occurring in the presence of the House that amount to disorder, and the power to send out for papers or require the attendance of persons.

Whilst, as I say, every other Parliament has that power, the Imperial Parliament by long usage and other Parliaments by constitutions or legislation, it is my opinion that this Parliament has only got the power it has taken by the Parliamentary Evidence Act, which is a power to require the attendance of persons to give evidence; and even that power, in my opinion - and I believe it is the same with the Crown Solicitor - is limited by the power to ask lawful questions. And lawful questions would exclude questions that entrench upon public interest immunity or legal professional privilege.

I have done some notes, and I can actually distribute them, on what appear to me to be the options that the Parliament or this House in particular has if it were to accept the view that I have put forward. It seems to me logical that there are three things it can do, and I have set them out. Would it be helpful if I distribute those now?

CHAIRMAN: Yes, please. We do need to address the whole question of sanctions.

Mr MASON: Yes.

CHAIRMAN: But you have basically said that you do not think the House has a right to punitive sanction, only sanction to enable it to keep order in the House, type of thing?

Mr MASON: Yes. It seems to me that logically there are three options. If the power does not exist now to sanction a member of the public or to visit with suspension or expulsion a member of the House who fails to bow to the will of the majority to produce documents, there seem to me to be three options.

The first option is to do nothing until a crisis occurs which leads to the matter being resolved by the court. Presumably, if the House were to move to suspend or expel one of its members, then that member would have standing to bring proceedings that would test the very proposition that we are here debating, and there would be a winner or a loser; the House would have all its powers confirmed, or it would be held that it had none of the powers, or something in between.

The second option is for the Legislative Council and the Government to negotiate some procedure for the sifting of proper and improper claims for non-production of documents. Of course, I am assuming that one of the issues that the House is concerned with and that this Committee is concerned with is mechanism for dealing with claims of public interest immunity. I am aware that there have been situations where the House has said, in effect, "We want all your documents" and equally where the Government has said, "We are not going to give you any documents", but in between there are categories of cases where a claim has been made of public interest immunity, legal professional privilege or commercial in confidence. There may be occasions, I assume, where the House would in principle accept that it should not require production of those documents but it would want to find some

mechanism for testing whether that claim is properly made or not.

CHAIRMAN: Mr Walker's view was that there was no such thing as commercial in confidence documents.

Mr MASON: I am not sure of the point.

CHAIRMAN: His view was that, even in a court, the argument that documents were commercial in confidence documents would not stand up.

Mr MASON: It would not stand in the face of a subpoena. But, if we are talking about an implied power of a House of Parliament, then that is not the same as the power of a court to issue a subpoena.

Mr KNIGHT: He would be saying that there is no privilege. But, from time to time, he might obtain an order preventing publication of commercial in confidence documents. But some commercial in confidence documents could ultimately be the basis of a public interest immunity claim. It would depend upon the particular documents.

CHAIRMAN: That would be tested in the court proceedings?

Mr KNIGHT: Yes.

Mr MASON: Yes. An example would be information provided by prospective tenderers, as occurs from time to time. Government tenderers put in information which they clearly do not want to be shown to their competitors. They might feel sensitive about information on the costing of the product they are seeking to sell to the government. This is where the disappointed tenderer has challenged the government decision to award to tender, and then has subpoenaed its competitor's documents and said, "I now want to look through all the information that the government assessed in order to award the tender to the other party."

The mere fact that it is commercial in confidence would give it no answer to a subpoena. But it could be the basis of a claim of public interest immunity. And, from time to time, that claim has been made and upheld, the argument being that it is in the public interest that as many people as possible tender so that the public gets the cheapest price for the product. It is in the public interest that tenderers reveal all so that there can be a full assessment of the competing information that is provided, and that the only way to protect that public interest in the free flow of information to government is to prevent the disappointed tenderer getting access, even though it may have some claim that it wants access to it for the purpose of litigation. That is just an example of public interest immunity arising with respect to documents which are commercially sensitive. I am not saying that every commercially sensitive document is in that category.

The second option would be some negotiated procedure whereby, without testing the ultimate limits of the powers, the Legislative Council and the Government negotiated a procedure for sifting proper and improper claims for non-production of documents. When I deal with item 3, I address some of the techniques of such a procedure that are worthy of consideration.

The third option would be legislation, which of course will require the concurrence of the government through its control of the lower House and of the Legislative Council, which both would confer the powers which are lacking at the moment, in my opinion, but also engraft appropriate protections and qualifications having regard to public interest immunity. There is something of an anomaly in that a member of this House can make an application under FOI legislation and get access to governmental documents, up to a limit. It might be arguable that that power should be available, as it were, on some sort of a fast-track if it were required by the House; but, equally, that power is a qualified one, and, depending upon the judgment of the government and the Council, there may be a need for greater access than is given by FOI legislation.

There certainly is a need, in my opinion, for some mechanism to address the claims of public interest immunity that clearly will arise, and perhaps arise increasingly now that Houses are demanding information of government, and now that even a lower House may not be fully representative of the government in its majority numbers. What the legislation would do would be to confer the power to determine whether a claim of privilege or immunity had been properly made upon a Committee of the House - and I am not speaking for the Government, and I am not saying whether the Government would be content with this, but, theoretically, it is a mechanism - or upon a statutory officer, or upon the Supreme Court.

The House has given up one of its traditional functions by giving the Supreme Court jurisdiction as the Court of Disputed Returns, so it would not be any great exception in principle if that power were given to the Supreme Court. That is the way the Americans have gone with respect to dealing with disputes about whether or not privilege has been properly claimed. If you did that, it would be desirable to state the criteria for whether public interest immunity can be properly claimed, and there are precedents, for example, in the new Evidence Act.

Whether the criteria for public interest are the same for withholding from a court as they are for withhold from a House of Parliament, I leave to others to judge. It may be that it is just not possible to enact in a satisfactory way what those criteria are.

Another suggestion would be that there be a power for a conclusive ministerial certificate, at least in some areas. Legislation ought, I suggest, to provide for protection of the documents pending resolution of the claim. It would be most iniquitous if the claim were destroyed in its very making; and the courts certainly do

not do that.

If the power were to be given to someone other than the House, it would be advisable, I would suggest, that both the House and the Minister should, by resolution, state their respective interest in claiming or withholding the documents. So it is not left to speculation. The House could say, "We want this information in aid of a proposed bill," or "We want it because we are inquiring into alleged corruption X", or whatever. The Minister could state what his or her reasons for assessing the public interest could be.

The other matter that might be addressed would be if the jurisdiction were to be given to the court, would you want the court to do any more than to rule whether the claim was properly made? Would you want the court to then be able to enforce the call, or would it then return to Parliament, so that the Parliament could say, "The court has ruled that the claim is properly made, or improperly, what about it, Minister, where are the documents?" Or, "What about it, member of the public, where are the documents?" An option would then be for it to be given back to Parliament to exercise what contempt powers it has or might be given by legislation.

If the Committee were interested, I could tell the Committee what is normally done with claims of public interest immunity. But that would be all that I would wish to say.

CHAIRMAN: We might return to public interest immunity later. Mr Knight, do you have anything to add?

Mr KNIGHT: Madam Chair, I would just say that since preparing the two written advices that I did I have had the chance to look at this in greater detail. I am firmly of the view that the advice I gave in relation to inherent power is correct, in my view. I adopt all that the Solicitor General has said in his comments. We would both say that this House has no inherent power to order the production of documents. We contrast that with the Imperial situation, and we say that House has by usage and the law of Parliament a power to compel the attendance of people and for the production of documents and things, and to punish if they are not produced.

Those who say that this House has inherent power must argue that it is by necessity. We would reject that view - that necessity dictates a power of such great consequence and which would affect the common law rights. One consequence of that argument is that any body which makes laws presumably has the power to call for persons and documents. Does it mean that a local government council, when it wishes to make by-laws, has the power to call for persons to come and to give evidence? And, if they do not come and produce, can they be compelled in some way to come and produce? When the rector of St John's College makes by-laws, does he have the power to compel people to come and provide evidence, and perhaps invoke some sanctions if they do not?

That is one matter - and I do not rely on it heavily. But it is one consequence of this view. It seems to me that the opinion by Brett Walker does not, with respect, analyse the consequences of the view that he adopts. I get the impression from reading the advice that he comes to the conclusion that there is a power to give an order. He becomes a bit concerned at what the consequences may be then, and he expresses some doubts about the sanctions which are then available, because at that stage you are talking about people entering homes, perhaps forcibly dragging someone to the council, entering premises and seizing documents, and imposing sanctions. So it is a very serious matter that we are talking about.

It seems to me that, on the basis of the Brett Walker opinion, this Committee should be very reluctant to form a confident view that some sanction is available in the subject circumstances. It is obviously a very difficult area.

It also occurs to me that the dilemma arises because the Legislative Council, on one view, wishes to look at particular documents; the Executive, on the other hand, says, "We are here to administer and to manage, and we make this particular decision." In effect, it is a stand-off. The Legislative Council perhaps takes the view that it is its function to go beyond just legislating to being able to inquire into various matters and in fact to hold the Executive accountable. The Executive, on the other hand, says, "Well, we are here to manage and to administer. There are certain things that we believe should not be disclosed." So, at the end of the day, it may be that there is no solution possible short of a resolution by a court. But it is certainly worthy to explore mechanisms whereby at least some documents which at the moment may not be produced could in the future be produced. It may be that we are all being very optimistic at the end of the day that there would be a mechanism whereby all documents would always be produced, because of the different roles that the Executive has as compared to the Council. I guess they are the only comments that I would make generally.

CHAIRMAN: Mr Walker's scenario certainly encompassed the vision of the bashing down of the door and the seizing of the documents. We even got down to discussing whose job this would be. I think his view seemed to be that it should be that of the Usher of the Black Rod. What you are saying is that it should never get to that; that it should be tested by a court before it reaches that stage.

Mr KNIGHT: I guess I am saying that, firstly, that is so draconian a result that it makes me reflect that the power is not there in the first place; and, secondly, the point that you make, Madam Chair.

CHAIRMAN: What we have is a situation where the House has found the Treasurer guilty of contempt. That is part of the motion. What we seem to be getting is evidence saying that he is not actually guilty of a contempt, but that we as a Committee cannot rejudge him; that we have to decide on a punishment, even though much of our evidence now is that the is not guilty of a contempt, because there is no

legislation and therefore no power to demand the production of documents.

Mr KNIGHT: As the Solicitor General has said, it is really not for us now to question a decision by the Council, but I think this Committee could take into account the various views at least in recommending sanctions. Presumably, you would recommend a much lighter sanction where there as a very real and lively debate about the issue of power. So, in that sense, I guess you can look at it when forming your views about sanctions.

Mr MASON: It is not clear to me - although it is a matter for the Committee - that the fifth paragraph of the resolution does ask this Committee to address the question of sanctions against the Treasurer. As I read it, it asks this Committee to look to the future about a problem in the future. I will not presume to give advice on that to the Committee.

CHAIRMAN: I think you are right. It says "where a Minister fails to obey an order". If we deliberate we could decide that in that particular case there was no right to demand documents anyway.

Mr KNIGHT: In answering that general question you could say that the sanctions should be minimal bearing in mind the doubt as to the power to order Ministers generally to produce documents.

CHAIRMAN: Are there any questions from members of the Committee.

The Hon. J. R. JOHNSON: Just a comment. The House of Commons, when presented with certain inquiries to undertake, has oft times reached the conclusion that the House would be better to refer to its own dignity and take account of its own dignity, rather than pursuing a matter that seems eventual. Being a practical politician and knowing the numbers there, I do not think a proposition of that sort would have a great deal of acceptances. It might enrage the natives.

CHAIRMAN: Mr Mason, you seem to be implying that in a conflict between the Executive and the Legislature that a court might be the appropriate body to decide which papers, for instance, attracted public interest immunity and which did not.

Mr MASON: I do not think I am going that far. I am saying that if one of these conflicts got to the stage of a member being expelled or suspended, a court would, in my opinion, have the jurisdiction to then resolve the issue. I am not inviting that. I am just saying that at that point of time, and not before, there would be power in the court then to determine the question.

CHAIRMAN: I thought you were saying here that legislation would give jurisdiction to resolve claims to the Supreme Court.

Mr MASON: I am saying one of the options for dealing with the present uncertainty would be to pass a law saying that it could be each House takes all of the privileges of the House of Commons, but qualifying it in some respect by saying "but not so as to call for documents that would attract public interest immunity"; and, in the case of a dispute as to whether a claim of public interest immunity has been properly made, the Supreme Court has jurisdiction to determine that dispute. I am just putting that forward as an option.

CHAIRMAN: Mr Walker's view was that that would have one of the three in the separation of powers deciding a conflict between the other two, and he felt that was not advisable.

Mr MASON: But that will happen if the House moved to suspend or expel. It happens indirectly where there are conflicts between the power of the Executive and the Parliament where legislation is challenged. I am not saying it is a good thing, but it is not an uncommon thing or not an unheard of thing.

CHAIRMAN: If there was a power to impose a sanction, do you believe it would be the House itself that should decide that sanction?

Mr MASON: It is one thing for the court to rule where the public interest lies in production; it is another thing for the court to impose a sanction on a Minister for what may well be a defiance in a political context between the Executive and the Parliament. I am inclined to the view that it would be better that whatever the status quo be maintained, unless some legislation can be prepared which will change that. But the upper House will have its political sanctions that it could impose upon a recalcitrant government.

CHAIRMAN: But it could only be up to the House itself to vote to sanction a member?

Mr MASON: I am not saying the sanction should necessarily be directed at a member. Again, it is a matter for the House, but there may be something of an iniquity in picking on a particular member for something that is really a dispute between the House and the Executive as a whole. It does raise the question: If the House can pick on one member, why can't it pick on another member? Why couldn't it pick on a member for some extraneous political reason? That may be just a political answer to a legal problem, but it does argue for limitation or restraint upon the exercise of whatever power the House has to direct a sanction at an individual member.

The Hon. JENNIFER GARDINER: In this case Mr Egan has a link with the Executive, being Vice President of the Executive Council. Does that make any difference?

Mr MASON: He is the link that the House has focused upon. The standing order

speaks about the call for documents going to the Premier. As I understand the present controversy, some of the documents are of his ministry and some are of another ministry. As to whether or not there was a Cabinet decision to resist production of the documents, I would perhaps leave to him to say if it is relevant to the inquiry. But he still is the link that the Council has chosen to, as it were, to apply the pressure upon. If the power exists, it exists; if it does not, it does not. It may support the argument that the power is being used punitively rather than defensively if it says: having regard to what the government has done, we suspend you Mr X.

Mr KNIGHT: Madam Chair, I think your question was whether the court should or might be given the power to impose the very sanction.

CHAIRMAN: Or to decide whether the sanction should occur.

Mr KNIGHT: I would imagine a court would be very reluctant to do that. A court would confine itself to saying whether a sanction was lawful or not. I would not think it would trammel on the right of the House to decide what it considers is the appropriate sanction, with its knowledge of the circumstances. I would not imagine the House would wish to concede that role.

CHAIRMAN: I do not think it would.

Mr MASON: The law could say - and again I am only putting this as a hypothetical possibility - that the court will decide whether a claim of privilege has been properly made, and if it has not been properly made and the Minister or the government refused to produce the documents, then a particular sanction could be imposed. I am saying that if legislation were so enacted, obviously it would apply according to its terms.

CHAIRMAN: One of the things this inquiry could usefully do is try to look at criteria for documents. You have included in your options criteria to the FOI Act. I know the Evidence Act deletes us anyway, but we obviously need to sit down and work out a new piece of legislation regarding what documents can be properly demanded by the House. Have you thought about how that could be gone about? It seems to me that a really useful thing we could do is say: Look, this is going to keep coming up unless we can say these documents can be demanded and these cannot.

Mr MASON: The courts have resisted any definitive exposition of what is the public interest. They have said very much that it cannot be put in terms of classes of documents; it is more a question of the particular documents in the particular context. Even Cabinet documents can become a matter of ancient history, so that there could be no legitimate reason then for withholding historical research - for example, the inner workings of Cabinet.

CHAIRMAN: After 30 years.

Mr MASON: Yes. So I think it would be very difficult. Certainly, it could be expressed in general terms having regard to categories such as national security, operations between governments, protection of human life - the sort of thing that is done in the Evidence Act 1995. What the courts engage in is a balancing exercise. They say: What is the need in a particular case for the access to the documents? If it is a civil case, it is so much. If it is the liberty of the subject in a criminal case, it has to be a higher test to withhold the documents. On the other hand, what is the claim that is being raised by the government as to why the documents should be withheld from production to the court? The court says: Give us information about that; how real is it; how current is the need; and we will do the best we can to weight the two.

CHAIRMAN: But they have battled with those sorts of problems in the Evidence Act. So it is in fact possible to produce legislation which could at least make clearer what documents ought to be covered.

Mr MASON: Yes. The real question is: Who decides? Obviously, the government might want to say, "In categories A, B and C a ministerial certificate will block an inquiry." I leave it for others to decide whether that is appropriate or not. But you have ministerial certificates which could be conclusive. As to other areas, you could decide who bears the onus of persuasion. You could decide what are the sorts of things that are to be taken into account. But, at the end of the day, you have really got to decide who decides when there is a dispute. Is it to be the courts? Is it to be the Parliament? Is it to be a Committee of the Parliament? Is it to be some statutory officer?

Mr KNIGHT: You are looking for a mechanism on the threshold question of: What category of documents should ordinarily be able to be produced to the Council?

CHAIRMAN: Yes.

Mr KNIGHT: That mechanism we had thoughts about. You go down the track of a group of parliamentarians, eminent persons perhaps, former Premiers, to try to reach agreement on a list of categories of documents that can be produced to either of the two Houses, and then you have to have a mechanism for resolving any dispute on particular occasions.

CHAIRMAN: Do you think the Parliament should have a greater right than those conferred under the FOI legislation to get documents?

Mr KNIGHT: I think there must be a good argument for that. But how much greater a right, I am not sure.

The Hon. R. S. L. JONES: The Parliament can confer upon itself the powers, privileges and immunities and decide for itself, can it not?

Mr KNIGHT: Certainly.

The Hon. R. S. L. JONES: So it is up to the Parliament to decide what it wants, essentially - both Houses, not just one House.

CHAIRMAN: They cannot at the moment because there is no legislation.

The Hon. R. S. L. JONES: We have no powers at the moment, it is argued.

Mr KNIGHT: The government may well be receptive to an argument that each House should perhaps have more rights than an individual citizen to obtain documents, and it may be that some agreement could be reached on defining those categories of documents and how disputes might be resolved. But that is a matter of policy for government.

CHAIRMAN: Would you see any such legislation having to be the same for both Houses, or could you see an argument for their being different criteria for different Houses?

Mr MASON: I am inclined to think it should be the same. I think minority government is a possibility in the lower House now, given our current political scene. It is a bit hard to see the difference.

CHAIRMAN: A motion like that referred to this Committee could not really have gone through the lower House without some political solution having occurred.

Mr MASON: I do not know. What about in the previous Parliament?

CHAIRMAN: Would not finding the Treasurer guilty of contempt in the lower House, if it created a situation where the next step was a motion of no confidence, be the subject of some political resolution?

Mr MASON: It could have been elevated into a motion of no confidence, yes.

Mr KNIGHT: Or just in the Minister personally; then the next step might have been no confidence in the government.

CHAIRMAN: But, on the whole, you are saying that any legislation should probably be the same for both Houses?

Mr MASON: We are not just talking about getting documents from the government. The powers we are talking about are available - if they are available, according to Mr Walker - or not available against Opposition members as well. The power that was used against Mr Egan in the upper House could be used against Mr Collins in the lower House, if the numbers are there and if the power is there.

The Hon. J. R. JOHNSON: Do you see any advantage in documents required to be produced being subject to restricted access?

Mr MASON: Clearly, you need to have some mechanism to ensure that the confidentiality is not destroyed in the making of the claim, so you need to keep them under wraps while the genuineness of the claim is being determined. Whether one could be sure that confidences would be kept once documents were produced to a Committee of a House which had on it members from each party is a matter I just raise as a question. Politics being what it is, there will always be reasons for suppressing or releasing documents. Whether the House can set up a mechanism that can ensure that confidence is respected in a proper case, I leave to the House.

Mr KNIGHT: The problem is that as I understand it the House does not just want access; it presumably wants to be able to do something with the information subsequently. So just securing confidentiality probably will not be a final solution. Those members of the House who actually have access are then placed in a perhaps invidious position; they may learn things that they cannot use, or they may be placed in a difficult situation with their colleagues for a variety of reasons. So I think there are problems with that sort of solution of a small group of parliamentarians having access for limited purposes.

Mr MASON: You run into problems under article 9 of the Bill of Rights in that the freedom of speech of the members would perhaps be inhibited if they had access to information which someone would say they could not use. Everything can be controlled by legislation, but there are problems in the principle and in the practicalities in giving the power to decide to a Committee of the House.

The Hon. A. B. MANSON: Mr Mason, a couple of minutes ago you made comments about powers being used against a Minister in the upper House that could be used against a Minister or a member in the lower House. Were you actually talking about retrospective sanctions? How far could this go back?

Mr MASON: If the power to call for documents resides in each House, presumably it resides in the House by resolution to call from a member of the public or from one of its numbers; and if the power to expel or suspend for disobedience to that order resides in one House it resides in the other. So, ultimately, we are talking about a power vested in the majority of either House to coerce a minority in either House.

The Hon. A. B. MANSON: And this could go back for a number of years and affect anyone who is a member of either House?

Mr MASON: The Walker view would seem to say that if the House wants to inquire into something it can send out for the papers; and, if it does not get them, presumably, have a member of the public arrested or with respect to one of its own

members have the papers seized and/or the member suspended or expelled.

CHAIRMAN: Mr Mason and Mr Knight, thank you very much for the enormous amount of very useful information you have provided. It is very different from what we got from Mr Walker, and I find it very stimulating. Thank you very much for your attendance.

(The witnesses withdrew)

HARRY EVANS, Clerk of the Senate, Parliament House Canberra, affirmed and examined:

CHAIRMAN: Mr Evans, in what capacity are you appearing before the Committee?

Mr EVANS: As Clerk of the Senate, at the invitation of the Committee.

CHAIRMAN: Are you conversant with the terms of reference of this inquiry?

Mr EVANS: Yes.

CHAIRMAN: Do you have a written submission?

Mr EVANS: No, but there are some documents that I want to make available to the Committee.

CHAIRMAN: Do you want those to be included as part of your sworn evidence?

Mr EVANS: I am happy for them to be treated in any way that the Committee wishes to treat them. One document that I will give the Committee now is a list of orders for the production of documents made by the Senate during the current Parliament, that is, 1993-94-95.

The Hon. R. S. L. JONES: How many were complied with?

Mr EVANS: There were 53 made, and one could say that all but four were complied with.

CHAIRMAN: If you should consider at any stage during your evidence that, in the public interest, certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee will consider your request in conformity with Standing Order 250. Do you wish to briefly elaborate on your submission or make a short statement?

Mr EVANS: Perhaps I could make a short statement and then follow up the question from Mr Jones. So far as the Senate is concerned, the situation has been arrived at whereby the government acknowledges that the Senate has the power to order the production of documents and that Ministers will produce documents unless they claim that there is some particular ground for not producing the documents.

The Hon. J. R. JOHNSON: Where does it derive that power?

Mr EVANS: I think the view is that it is not so much a power as a claim for

immunity. The Senate has asserted by resolution that if there is a claim for immunity it will consider the claim and determine the claim. The government position is that Ministers will produce documents unless they have some particular ground that they will claim for not producing them - a particular ground such as that they may prejudice the rights of litigants in legal proceedings, prejudice the commercial interests of corporations, and so on. It is generally accepted that this is not a legal question but a matter to be determined politically in the broadest possible sense.

I think the government acknowledges that if the Senate insists on the production of documents and the government insists on not producing them on those grounds - in other words, that the Senate has considered the claimed grounds and rejected them - that the Senate could inflict a great deal of political damage on the government if it wishes to do so. The question really is whether the Senate should, in any particular case, accept the claimed ground for not producing the document.

Just to follow up on the question earlier. The list which I have given you shows that in the current Parliament, 1993-94-95 inclusive, the Senate has made 53 orders for production of documents. Those include three orders that followed up on earlier orders. There were six which were not fully complied with. One related to correspondence between Ministers about wood chip licences. The Ministers were censured on that occasion and no further action was taken. One related to leases of premises by Commonwealth bodies. The Ministers were censured, and then the matter was referred to the Auditor General. The Auditor General investigated the matter and presented a special report to the Senate on the matter, and that was the subject of considerable debate.

One related to the sale of the Australian National Line. In that case the Minister's explanation for not wanting to produce the documents was accepted; although there was no formal acceptance by the Senate by way of resolution, in effect the Minister's explanation was accepted. In one case it related to documents relating to a committee, and the documents were virtually provided to the committee. In one case the document was not produced on time, and the Minister was censured, but the document was subsequently produced. The last case related to the legal costs of Dr Lawrence, and some of the documents required were not produced. The end result of that matter was that the appropriation bill containing the item for the costs of Dr Lawrence was amended to reduce the amount of money and to impose restrictions on it, and the bill was amended as it went through the Senate.

So those were the six orders which you could say out of the 53 were not complied with; and, as you can see, in effect two of those were complied with eventually.

CHAIRMAN: Was there discussion in the Parliament or in other appropriate bodies of what sanction would be applied if the documents were not produced?

Mr EVANS: There has always been some discussion, including some debate, about what sanctions might be imposed on a government or a Minister who absolutely refuses to produce documents, assuming that the claim for immunity is made, and then the Senate does not accept the claim. But, although other sorts of remedies have been talked about from time to time, basically I think the view is that the Senate seeks to impose a political penalty on the government or the Minister in that circumstance, and that can range from a censure motion - and the penalty of a censure motion is that it spends a great deal of time in the Senate which otherwise would be spent on government legislation - to deliberately declining to deal with government legislation or legislation of a particular Minister.

But, as I say, generally speaking the view is taken that the Senate will exact a political penalty, and the penalty which the government will pay will be adverse political criticism and having to spend time in the Senate which otherwise would be devoted to government legislation. I think Ministers take the view generally that they will produce the documents, even if they are reluctant to produce them, because they do not want more trouble in the Senate if they can avoid it, and they will not make claims of immunity unless they think they have some good ground.

The Hon. J. R. JOHNSON: If there is a persistence in disregarding that request on the part of the Minister after the Senate has made a request and the Senate does not wish to impose a "political settlement", where do you go?

Mr EVANS: I do not think any legislature has solved this problem, if it is a problem. Really, the political penalty is the only feasible penalty. I suppose you could call it a political-cum-procedural penalty in so far as you could deprive a Minister who is in the House of the Minister's procedural rights and delay that particular Minister's legislation, or delay government legislation generally. But I think every legislature is in the same position; really, the political penalty is the only feasible one.

CHAIRMAN: Our House has found the Treasurer guilty of contempt. Is that what is normally found in the Senate? Does the Senate find the Minister guilty of contempt for refusing to supply the document?

Mr EVANS: Yes, and censures the Minister for that, although, as I have pointed out, the number of cases of that are few compared with the total number of orders.

CHAIRMAN: From what you are saying, nothing flows from that. The punishment is that the Minister has been found guilty of a contempt.

Mr EVANS: As I said, formally that is the punishment in itself. The real punishment is spending time which otherwise would be spent on government legislation on debating that matter, which is a very real disincentive for governments to resist orders for the production of documents. We have one Minister who is the manager of government business in the Senate who is concerned with getting government

legislation dealt with, and he is every anxious to avoid anything which will take up his time. So it is a real political sanction.

CHAIRMAN: Has anyone ever suggested in debate that members be suspended or expelled?

Mr EVANS: The Federal Houses now do not have the power to expel members. They deprived themselves of that power by legislation back in 1987. But there have been suggestions of particular Ministers being suspended, of particular procedural penalties being imposed on Ministers, such as not allowing them to introduce bills and so on, but that sort of action has not been taken.

CHAIRMAN: Has the Senate ever struggled with the difficult issue of what papers should properly be able to be demanded? Has anyone ever tried to frame legislation on what papers can be demanded and what papers cannot?

Mr EVANS: It has been approached on the basis not of categorising the particular kinds of documents but on what grounds there might be for not disclosing those documents. In other words, as with the courts, the view is taken that no document, simply because it belongs to a class of documents or is a particular kind of document, is necessarily immune. You have to have one of those particular grounds for not producing the document. So any and all documents can be covered by an order. The question is: Are there any of those particular grounds for not producing a document, whatever its nature may be.

The Hon. JENNIFER GARDINER: Is that done on a case-by-case basis, or is there any general framework?

Mr EVANS: I think it is true to say it is done on a case-by-case basis. Governments know that if they want to raise a claim of immunity, they have to link it to this particular group of documents or document; that they have to say it is not because of this document or because it belongs to a class of documents but because the disclosure of it would have these particular effects.

CHAIRMAN: Are there any questions from Committee members?

The Hon. R. S. L. JONES: You are aware of the different powers in this Parliament compared to other Parliaments, are you?

Mr EVANS: Yes.

The Hon. R. S. L. JONES: What is your view of the powers that we do or do not have to compel the production of documents?

Mr EVANS: I think you can make out a very strong case that the Houses in New

South Wales possess an inherent power to summon witnesses, to require the production of documents and to punish contempts, on the basis that that is the inherent power of a legislature. You have that line of cases, starting with *Kielley v Carson*, about the powers of the New South Wales Houses, but that case and its successor cases are all based on the premise of the New South Wales Legislature being a subordinate or local legislature. Throughout those judgments the expression is used "a subordinate legislature", "a local legislature". The concept there was that it was a legislature subordinate to the Imperial Parliament, as it was then called, and therefore it did not possess all powers of a legislature.

But that technical legal situation has now clearly gone. The Australia Acts abolished that situation. Therefore, I think you could make out a very strong case that, as a legislature, and no longer in any sense a subordinate or local legislature, the New South Wales Houses possess the inherent powers of a legislature to require the attendance of witnesses, the production of documents and punish contempts.

The Hon. R. S. L. JONES: Has it the powers of the House of Commons?

Mr EVANS: The powers inherent in a legislature of an independent State. For support of that reasoning, one could go to the American law. There is nothing in the United States Constitution about the powers to summon witnesses and require the production of documents, or punish contempts, but the courts there have found that those powers do adhere to the Houses of Congress because they are inherent powers of a legislature. You can apply that same reasoning to the New South Wales Houses now that they are not in any sense a subordinate or local legislature and say that those powers adhere to the New South Wales Houses as Houses of the legislature of an independent State. Now, whether you could persuade a judge of one of your courts to accept that sort of reasoning, I am not too sure. But I think that is a valid reasoning.

The Hon. R. S. L. JONES: Section 49 does not cover the New South Wales Parliament, does it? It only covers the Federal Parliament.

Mr EVANS: That is correct. It relates to the powers of the Federal Parliament.

The Hon. R. S. L. JONES: So are we assuming that it does cover New South Wales?

Mr EVANS: No. I am not assuming that at all. Section 49 has nothing to do with the New South Wales Houses. What I am saying is that, because the New South Wales Houses are now, at least since the Australia Acts, Houses of a legislature of an independent State they have the inherent powers of a fully independent legislature.

The Hon. R. S. L. JONES: Which do not need to be derived from legislation?

Mr EVANS: No. As I say, whether you could persuade a common law judge in

this State to accept that reasoning, I do not know. But I think that is the correct reasoning. You would be in a much stronger position if you had it in the State Constitution, or if you had it in legislation, but I think that what I have put to you is correct reasoning. I think the reasoning based on *Kielley v Carson* and its successors is defective because those cases were all based on the premise of a subordinate or local legislature, as they called it.

The Hon. J. R. JOHNSON: But the law has not changed in relation to New South Wales since Kielley v Carson, has it?

Mr EVANS: What I maintain is that the law relating to the constitutional position of New South Wales and its Parliament has changed with the Australia Acts because those Acts made it clear that the United Kingdom Parliament no longer has any power to legislate for this State, that it is a completely independent State, that the Legislature of this State is no longer in any sense a subordinate legislature of a local kind. The over-arching power of the Imperial Parliament, as it was called, has gone and that therefore has changed the constitutional situation in New South Wales, and therefore the sort of reasoning which I have put forward should apply.

The Hon. J. R. JOHNSON: In all respects?

Mr EVANS: The inherent powers of the legislature would be subject to constitutional limitations. So that if a matter is not within the legislative power of the New South Wales Houses, then they would not have the power to compel witnesses in the course of an inquiry into such a matter. So there would be constitutional limitations, but there would not be the sort of limitations that are raised in *Kielley v Carson* and those old cases.

CHAIRMAN: Does the Senate have power to impose sanctions on its members, other than for the maintaining of good order in the House?

Mr EVANS: Yes. The Senate has the power, under section 49, which is the acknowledged source of its power, to punish contempts by fine or imprisonment either of its own members or of other people, and that was legislated and virtually codified in the 1987 Parliamentary Privileges Act.

CHAIRMAN: Did it have that power before the section 49 provision was made law?

Mr EVANS: Before section 49?

CHAIRMAN: Yes, before that legislation.

Mr EVANS: It certainly had the power before that legislation, yes. The legislation merely codified it. The power was certainly there - and this is universally

acknowledged under section 49 - before that legislation. In effect, the legislation limited the power.

CHAIRMAN: But a Parliament such us ours which has no legislation about its privileges, you are saying, does not inherit an implicit right?

Mr EVANS: I am saying that the sort of reasoning that I have expounded does apply to the New South Wales Houses now because those powers are inherent in the legislature of an independent State. The reasoning of those old cases is superseded because they were all based on the premise that the New South Wales Legislature is a subordinate or local legislature, which it is not now.

Mr MANSON: When were the Australia Acts introduced?

Mr EVANS: In 1986.

The Hon. A. B. MANSON: Has the Senate ever used its power to fine or imprison a Senator?

Mr EVANS: No. It has required people judged guilty of a contempt to attend, but has not ever actually imprisoned or fined anybody. It has found people guilty of contempt on several occasions, but it has not imposed any penalty - mainly because the persons concerned have acknowledged that they have done wrong and have apologised and made redress in one form or another.

The Hon. J. R. JOHNSON: At no time has any action been taken against a member of the Senate?

Mr EVANS: Certainly, there has been no penalty for contempt. The normal penalty of suspension for disorder, of course, has been imposed on members, but there has been no penalty for contempt as such.

CHAIRMAN: One of our witnesses, Mr Walker, was of the view that the Parliament's right to know was paramount. In fact, he could not envisage documents that the Parliament did not have the right to see. What is your view on that?

Mr EVANS: I think that is the view of the Senate, in effect. The Senate passed a resolution back in 1975 during the overseas loans matter, as it was called, and in that resolution it asserted that it can demand the production of any kinds of documents; that if a claim of immunity is raised, the Senate will consider and determine that claim; but, ultimately, the Senate has the power to require the production of any and all documents.

CHAIRMAN: How can the Senate determine the claim without seeing the documents?

Mr EVANS: That in itself is an interesting question. You can determine the claim simply on the expounding of the claim by a Minister. In other words, you can say: Well, we have considered what the Minister has put to us, and we do not believe that the claim for immunity is sustained. You can ask the Minister to support the claim by one means or another. In the matter of the tax avoidance schemes, the bottom of the harbour schemes in 1982, the government claimed that the production of the documents required would prejudice criminal prosecutions against various people, and the government produced supporting documentation to support that claim - the claim of its own advisers who had looked at the documents and said, "Yes, if you publish these documents they will be prejudicial to criminal prosecutions against various defendants." So, by those sorts of means, the House can exercise a judgment on whether the claim is sustained or not.

The Hon. B. S. VAUGHAN: When you have the situation in the Senate where there is a dispute similar to the one that we had with our Treasurer a short time ago, leaving aside putting a Senator out for a short time, to what extent do you think those of parties called upon to vote are more apprehensive of the response of the media than the dignity of the House?

Mr EVANS: The public response generally - and I suppose the public response comes through the media -----

The Hon. B. S. VAUGHAN: Exactly.

Mr EVANS: But the public response generally I think is an important factor in the whole thing. I think governments are very much influenced by not wanting to be seen to be covering something up. Their instinct is to give up documents because they do not want the adverse publicity of being accused of being engaged in a cover-up. I think that is an important factor, and must always be an important factor.

The Hon. B. S. VAUGHAN: In the instance that I have been putting to you, I must say that I was quite sure - and I am on the Labor side - that there was a covering up. The newspapers, however, did not support that view. In fact, I do not think they even commented on it. Bearing in mind that I don't think the public gives a damn about most things that happen in a parliamentary forum, unless they are convinced by the *Telegraph* or the *Sydney Morning Herald* that they should give a damn, it is apprehensiveness about that that induces legislators not to take the step which is clearly called for.

Mr EVANS: Well, if you are in that situation of the public not caring you are in a very difficult situation indeed. I think ultimately, in this as in all things, the House of the Parliament relies very much on public support. And in this sort of contest I think what you would hope would be the normal situation would be that the public would react adversely to governments keeping things secret, and you would hope that the press would react adversely to things being kept secret also. If you do not have that

reaction, then you are in a very, very difficult situation. You are suggesting that you do not have that reaction because the press choose not to prompt that reaction. That is even more serious.

The Hon. B. S. VAUGHAN: Undoubtedly. For example, this Committee is being lampooned because the Chairman, another member of the Committee and the Clerk intend leaving the country on a fact finding mission - which goes on all the time - and it seems to me that if it were not for the fulminations of the press, particularly that low-class tabloid the Telegraph, the public would probably have some interest in the representatives of this Committee going abroad.

Mr EVANS: I think, if that is the situation you are in, it is a very serious and unhealthy situation.

The Hon. B. S. VAUGHAN: I agree.

Mr EVANS: What you do about it, I am not quite sure. I suppose the answer is that the public has to be persuaded that there is an important issue here. But how you do that through the blockade of the press, I don't know.

The Hon. B. S. VAUGHAN: That is a very good phrase.

Mr EVANS: I am afraid I cannot give you an answer to that. I think in a democratic society you would normally hope that the public will be suspicious of governments keeping things secret and that the public will react adversely to that, and that that will be a discipline on governments not to claim immunity for documents unless they think they are good grounds for doing so.

CHAIRMAN: Do you think that the Legislative Council's role as a House of review imposes particular duties in the area of, say, looking at documents?

Mr EVANS: Yes, I believe so. I think a House of that sort has a duty to inquire into matters of public concern, to inquire into the conduct of the administration and the conduct of government generally, and to require openness in the conduct of government generally, unless there are established to the satisfaction of the Council grounds for not disclosing particular documents.

CHAIRMAN: If a similar situation occurred in the lower House in the Federal jurisdiction where a Minister was found guilty of contempt for not producing a document, it would normally be resolved by some sort of political means, of say a no confidence motion or maybe even a change of government, is that right?

Mr EVANS: The difficulty is that when a government has a secure majority in the House of Representatives, that automatically means that Ministers will be supported.

CHAIRMAN: Which is the question I am asking. If in fact a motion of contempt was passed in the lower House, that would create a political crisis.

Mr EVANS: Yes, that would be an indication that a government had lost the support on that particular issue anyway of the House, although I have to say that the view which has become entrenched in Australia that governments have to be supported on every question in the lower House otherwise it is a question of confidence, is not followed elsewhere; and the defeat of a government on a question such as you mentioned need not necessarily be a question of confidence and need not necessarily lead to the overthrow of the government.

Governments in the House of Commons are defeated on particular questions, and they do not resign or go to an election. They don't regard it as a question of confidence; they just take it as a matter on which they do not have the support of the House and they accept defeat. In Australia, governments tend to treat every question in the lower House as a question of confidence, and that is a means by which the lower House is kept in subordination. In practical terms, in the House of Representatives you do not get an order for production of documents passed because governments will not permit it to be passed, so you never get to first base with these sorts of questions.

The Hon. B. S. VAUGHAN: Because of the numbers?

Mr EVANS: Yes, because the government party regards it as its role to support Ministers in all things, unlike their counterparts overseas, and therefore you just do not get the question arising.

CHAIRMAN: When you get claims of Executive privilege, legal professional privilege and commercial-in-confidence privilege, how has the Senate dealt with those claims? Presumably there are ways in which to deal with them.

Mr EVANS: The way that the matter is conceptualised now is in the phrase public interest immunity. That is the generic term applying to all claims for immunity from the production of documents, and that term has superseded terms such as Crown privilege and Executive privilege. It is a good phrase because it indicates that the claim is basically that the public interest would be harmed by the disclosure of the documents. Within that generic expression, the particular claims may be that disclosure of documents would prejudice the rights or litigants in legal proceedings, would damage the commercial interests of corporations, and so on. They are all subsumed in this over-arching phrase public interest immunity.

CHAIRMAN: But if the Minister stands up and says, "This will damage the interests of the litigant in a court case" how do they test that? Or do they just accept it?

Mr EVANS: They do not necessarily accept it. I am speaking with very few

cases in mind of course, but they either say, "Well, we accept that that could be the case and therefore we won't press the order," or they say, "Well, we don't see how that can possibly be. Please justify it. Give us a bit more information to justify it," or they attempt to overcome the particular problem in some way. One of the ways that is normally thought of it is, "Well, how about giving us an edited version of the document with the names of individuals taken out?" That has been done in some cases. Ministers have come back and said, "Well, here is the document, but I have blacked out the names of particular individuals because it could be damaging to them to reveal this information." So they attempt to get around the problem by means of that sort.

CHAIRMAN: What you are really saying is that the whole issue has never been brought to a head in the Senate.

Mr EVANS: It has never been taken to the stage of the Senate trying to impose some really drastic sanction on a government for not producing documents in response to an order.

CHAIRMAN: So no-one has been suspended?

Mr EVANS: No particular individual has been punished. The kind of drastic action that could be taken, such as deferring all government legislation or refusing passage of the appropriate bills, and so on, has not been taken in relation to these sorts of cases. In the two great cases in the Senate - in the loans affair in 1975 and the bottom of the harbour matter in 1982 - in effect the penalty imposed on the government was a relentless political attack maintained day after day and week after week, and the whole thing was superseded by elections at which the governments were defeated and in which those relentless political attacks played a part. But the Senate has not got to the stage of imposing some penalty on a government or on a particular Minister to try to enforce the production of the documents.

The Hon. R. S. L. JONES: The Solicitor General for New South Wales said that the opinion of Mr Walker SC that we have inherent or implied powers is based largely upon passages in English cases concerning the powers and privileges of the House of Commons, which he then says were rejected by the Privy Council in the nineteenth century in a serious of cases starting with *Kielley v Carson* in 1842, which were reviewed in *Armstrong v Budd* in 1969. You are saying that those powers are not dependent on the House of the Imperial Parliament but are inherent in the fact that we are a Parliament of an independent State. Can you elaborate upon where those powers actually come from? Are they inherent automatically, or are they based on anything?

Mr EVANS: They are powers which a legislature needs to perform its job as a legislature, and this is how the American cases are framed, and they are really the only authorities I can cite to you. There is nothing in the United States constitution about this at all, but the American courts approached it on the basis that these are powers which a legislature must have to properly perform its job as a legislature. There is a

case back in 1927 called *McGrain v Daugherty* in which the Supreme Court went through the reasoning. It said in order to do its job a legislature has to have information; you cannot legislate in the absence of information; in order to do its job it must have the information. In practical terms, you very often cannot get the information unless there is power to compel the giving of the information. Mere requests are often unavailing and you will not get all the information. Therefore the legislature must have the power to require people to produce documents, and it must have some means of enforcing those orders; and therefore the power to punish contempt flows from the legislative power. So that is the sort of reasoning that they have gone through. I think that reasoning validly applies - and when I say "validly" I am using the word in the vernacular sense and not in the legal sense - to a legislature of an independent State; that, in order to perform the functions of a legislature it must have those powers.

CHAIRMAN: Would you agree that when the Executive performs an act it does so only under the authority of an Act of Parliament?

Mr EVANS: Generally speaking, yes. There is the whole area of what used to be called prerogative powers and what are now called inherent Executive powers; in other words, the Executive can do some things simply by virtue of being the Executive. But, certainly, in the Federal sphere, the Executive relies on some particular statute in order to exercise particular powers and perform particular functions.

CHAIRMAN: Does it follow that the powers of the Executive are subject to the Constitution Act and the Parliament making laws?

Mr EVANS: Yes, certainly. I think that is accepted. There may be an area in which there are inherent powers which the legislature cannot take away, but it is a very small area, if it does exist, and generally speaking the legislature can regulate the exercise of the Executive power by legislation, which is what it does all the time of course.

The Hon. JENNIFER GARDINER: Following up on your point about the United States of America *McGrain v Daugherty* case: has that basically settled the matter? Does the Congress virtually have unfettered access to documents if it asks for them?

Mr EVANS: The existence of power is settled. The limitations on the power are never entirely settled, because they are subject to constitutional limitations, which of course are always being explored by the courts as cases arise from time to time. So you cannot absolutely predict in any particular case what will be the outcome. But the existence of the power is certainly settled.

There is a matter going on at this very time in which a Senate Committee wants all documents relating to the whitewater matter, as it is called, and the President is

saying that some of the documents relate to his consultations with his legal advisers and therefore they are subject to legal professional privilege, and he is reluctant to give them up. And negotiations and subpoenas and going to court are being talked about again, as they frequently are. But, certainly, the power is recognised.

The Hon. JENNIFER GARDINER: With respect to the Senate not having fined or imprisoned any person found to be in contempt but a number of them having apologised, did the Senate actually ask them to apologise, or how did the apology arise?

Mr EVANS: Not the Senate as such. These are cases involving individuals other than Ministers or the government collectively. In a couple of cases they have involved government agencies. Generally speaking, they have realised that they have committed a breach in the course of an inquiry by the Senate Privileges Committee and they have offered apologies and redress before the matter has got to the Senate. The Senate Committee has been able to report that they have offered apologies and redress before it has got to the Senate, and therefore it has been dealt with on that basis.

The Hon. JENNIFER GARDINER: So no Minister has actually apologised?

Mr EVANS: No Minister has been involved in a contempt case as such in that way, although some government agencies have.

CHAIRMAN: You do not have to answer this if you do not want to, but Keith Mason has put to us some options for a way out of this problem. Have you thought about what we can do in terms of either working out a way of deciding which documents can probably be asked for, how to resolve a dispute between a Minister and the House, or what to do about the fact that we have not got the power to demand the documents anyway because we do not have the legislature?

Mr EVANS: Just on that point, I would argue that you do have the power. But, leaving that point aside, one option is to have either a committee or particular members of the committee inspect the documents on a confidential basis. Now, that is usually not acceptable to Ministers; they usually do not accept that because they say that involves disclosing the documents at least to members of the committee.

Another option is to have the documents inspected by some independent person - and you could only do this with the agreement of the government and the Council, in effect - who would then determine whether the disclosure of the documents would be harmful to the public interest, as claimed by the Minister; or that independent person could edit the documents to avoid or minimise the damage to the public interest that would be caused by the disclosure of the documents. The Senate attempted to go down that road with the bottom of the harbour affair in 1982 by passing resolutions requiring the documents to be produced to an independent person for those purposes. But the government at that time would not accept that solution. The government had

alternative solutions for editing and sanitising the documents, as it was called at the time, but we did not get to any of that sort of solution because it was all superseded by the double dissolution in 1983. But they are options which have been canvassed from time to time. In practical terms, they do not work unless they are agreed to by the two parties in dispute, in effect, because if they are not you are no further advanced.

The other possibility is to devise some means whereby it can be got before a court. I suppose if you were to suspend the Minister concerned from the House or seek to impose some other penalty on a Minister, that would get it into the court and it would then be before the court for determination.

CHAIRMAN: Do you think it is desirable that courts should be called on to determine a dispute between a Parliament and the Executive?

Mr EVANS: No, I don't think so. I think you can turn it into a legal question or quasi legal question for determination by judges, but ultimately it has to be a political question, in the broadest sense, determined by political means. All legislatures have arrived at this conclusion. We were talking about the United States, of course, where the Houses of Congress are in a much more powerful position in relation to the Executive than Houses in parliamentary systems, and they have certainly gone further down the road of turning these sorts of questions into legal questions and seeking to have them resolved by judges. But even there, ultimately it is a matter of political contest.

In the 1975 report of the Senate Privileges Committee, which reported on the claim of the government in the loans affair of that year, they quoted a statement by Archbald Cox, the Watergate special prosecutor, who said that ultimately these are matters of political contest which must be resolved by the ebb and flow of political power. I think that remains ultimately the situation, however you seek to deal with these questions.

The Hon. B. S. VAUGHAN: It all boils down to numbers, too. If you have the numbers, something is not a contempt of Parliament; if you have not, it is.

Mr EVANS: Well, that is right. These questions in practical terms only arise where you have Houses of legislatures which are independent of the control of the Executive Government of the day; in other words, they only arise when you have bodies like the Senate or bodies like the Legislative Council which are not under the party-controlled government of the day and therefore act independently.

The Hon. B. S. VAUGHAN: If I could address this comment to my colleague Mr Johnson. Under the *Armstrong v Budd* decision, if the upper House was constituted then as it is today, Armstrong would not have been expelled: that is, a Green, a couple of Democrats and two Call to Australia.

The Hon. J. R. JOHNSON: I doubt it.

The Hon. B. S. VAUGHAN: You would not get the Democrats and the Greens expelling Armstrong because of a divorce, I would not think.

The Hon. J. R. JOHNSON: It was not a case of a divorce only. It was the proposition allegedly advanced that the comment was made, "Well, can we bribe the judge?" I think even our cross-bench compatriots would see that that was something worthy of the greatest of sanctions. Anyway, there was no vote on it. If there had been, it would have been unanimous, except for the two participants, I suppose.

The Hon. B. S. VAUGHAN: It was never seriously canvassed whether the suggestion of bribing the judge was a serious suggestion or not - or not canvassed as it would be in a court of law.

CHAIRMAN: I think we will keep the discussions for the luncheon adjournment. If there are no further questions, I thank you, Mr Evans, for presenting another interesting aspect to our inquiry.

(The witness withdrew)

LAURENCE BERNHARD MARQUET, Clerk of the Parliaments and Clerk of the Legislative Council, Western Australia, Parliament House, Perth, affirmed and examined:

CHAIRMAN: In what capacity are you appearing before the Committee?

Mr MARQUET: As the Clerk.

CHAIRMAN: Are you conversant with the terms of reference of this inquiry?

Mr MARQUET: I am.

CHAIRMAN: Do you have a written submission?

Mr MARQUET: In the form of notes, but I can provide a written submission subsequent to this hearing, if the Committee so requires.

CHAIRMAN: In the nature of a precis or something of that nature?

Mr MARQUET: I am prepared to put the paper that I have prepared in front of the Committee after I have cleaned it up a bit.

CHAIRMAN: If you should consider at any stage during your evidence that, in the public interest, certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee will consider your request in conformity with Standing Order 250.

Mr MARQUET: That will not be necessary.

CHAIRMAN: Do you wish to make a short statement or elaborate on your submission?

Mr MARQUET: If I may, I think it would be useful under the circumstances if I set out to the Committee precisely where I am coming from on this matter. May I proceed?

CHAIRMAN: Yes, please do.

Mr MARQUET: I think there are primarily two matters that this Committee needs to consider. The first is the constitutional issue that goes to the powers of the Legislative Council of New South Wales. The second question, obviously, is the extent to which the Committee can punish a member, including a Minister, for non-compliance with orders made by the House to produce documents. If I may deal with the constitution issue first.

The law officers of the Crown - that is, the Solicitor General and other officers with the Crown Law Office - have attacked the validity of Standing Order 18 purportedly made under the authority of section 15(1)(a) of the Constitution Act 1902 of New South Wales. That sections empowers each House to prescribe the procedures to be observed in the transaction of its business.

I point out to the Committee that section 15 is similar in its terms to section 34 of the Western Australian Constitution Act 1889. For the information of members, I will read the section:

> " The Legislative Council and the Legislative Assembly, in their First Session and from time to time afterwards as there shall be occasion, shall each adopt Standing Rules and Orders, joint as well as otherwise, for the regulation and orderly conduct of their proceedings ....."

I note there that those same words appear in section 15:

> " ..... and the desptach of business and for the manner in which the said Council and Assembly shall be presided over in the absence of the President or the Speaker ..... "

And there, of course, we are getting onto the various paragraphs of section 15:

> "..... and for the mode in which the said Council and Assembly shall confer, correspond and communicate with each other and for the passing and intituling and numbering of Bills and for the presentation of same to the Governor for Her Majesty's consent. "

The only point I would add is, of course, that in 1987 section 34 of our Constitution Act was amended to remove the necessity for the Governor to assent to those standing orders and rules as of 1987. Once the House resolves that there shall be a standing order, that is it, and there is no requirement for the Governor's assent. The argument that was put forward at the time to remove the requirement for the Governor's assent, which still applies under section 15, is that the Crown should not be in a position, acting on the advice of the Executive Council, to refuse its agreement to a rule or order made by the House for the conduct of its own business. So section 34 in fact has, if you like, the same genesis as section 15 of the New South Wales provision.

Although the majority of rules made by each Western Australian House are procedural, equally there are others that do have substantive effect. For example, our standing order 153(c) in the Legislative Council, which relates to motions for disallowance of subordinate legislation, provides that if the question for the disallowance of the subordinate legislation has not been resolved upon a prorogation

of Parliament, the question is deemed to have been passed in the affirmative, and the regulation is disallowed.

That in fact is a standing order that has substantive legal effect. In other words, the Houses says, "If we are not around at the time that prorogation occurs, and the question is still before the House, we will deem to have resolved the question by answering it in the affirmative, and the regulation is disallowed." Of course, that has a very salutary effect on the government in terms of ensuring that the matters are dealt with with some dispatch prior to prorogation.

What I am trying to illustrate here is that sometimes there can be substantive effect or legislative effect to the standing orders. What I think the law officers are saying is that the rules of procedure contemplated by section 15 are incapable of having that substantive legal effect, and that accordingly they would argue: (a) the procedural rules have no effect outside the Chamber; (b) that they are directory ranter than mandatory - and that is evidence by the ability of the House to suspend their operation without notice - and if you want to have a look at discussion of directory versus mandatory have a look at *Clayton v Heffernan*, which is a High Court decision of 1960; and (c) those procedural rules cannot affect legal or equitable rights, that are public or private, that are held, possessed and enjoyed by any person. I think this is probably where we start to part company with the law officers.

In support of their argument, the law officers rely on the legislative history and supposed intent of the current section 15 and they seek to limit its scope by reference to judicial opinion about the inherent powers of colonial legislatures. The logical conclusion to the law officers' argument is that, even were it to be conceded that the House may order one of its members to produce documents as part of the orderly conduct of business, that member's failure to produce cannot be a breach of privilege or a contempt if the production would breach (c), that is, that you would affect legal or equitable rights held, possessed and enjoyed by any person by producing. And therefore immediately there is a defence, in the law officers' view, of legal impossibility. "I would like to produce the documents, but I cannot because the law precludes my producing these documents." Presumably, the argument is stronger when the order is made against a Minister of the Crown and it relates to documents arising from an act of the government.

I think, probably, in light of the law officers' advice, the question that really has to be answered is this: Whether the Legislative Council of New South Wales has power, by its own resolution, to oblige the production of any document whether or not, under different circumstances or in a different forum, production could be refused on grounds of privilege or immunity. I really think that that is what this issue really boils down to. Necessarily, what I have to say today is confined to orders for production made against a member of the House, and I include Ministers of the Crown obviously when I talk about members of the House.

The starting off point is this. The New South Wales Parliament has enacted a statutory declaration of the powers, privileges, rights and immunities of the two Houses that are similar in scope and effect to the Constitution Acts of the other States or to the Commonwealth's 1987 Parliamentary Privileges Act, which you will be familiar with. However, Houses that rely on, or import, the powers, privileges and immunities of the House of Commons for themselves are still subject to the doctrine expressed by Lord Denman CJ in *Stockdale v Hansard*. I quote the Chief Justice's statement made in 1840:

> " The supremacy of Parliament, the foundation on which the claim is made to rest ---

And that claim was that the House of Commons was the sole judge of the existence and proper exercise of its privileges and that it was not possible for a court of law to gainsay that declaration; parliamentary law is a body of law that is not cognisable by the ordinary courts. So Lord Denman is saying that the foundation on which that claim is made to rest:

> " ----- appears to me completely to overturn it, because the House of Commons is not the Parliament, but only a co-ordinate and component part of the Parliament .... the resolution of any one of them ---"

That is, the Lords or the Commons:

> " --- cannot alter the law, or place anyone beyond its control. The proposition (Commons' claim) is therefore wholly untenable, and abhorrent to the first principles of the Constitution of England. "

For the information of the Committee, I think the basis of the doctrine espoused in *Stockdale v Hansard* can be reduced as follows:

> the House of Commons, as a component or constituent of Parliament cannot have powers greater than that of the whole unless Parliament confers such powers by Act; they cannot be assumed by the Commons by simple resolution;
>
> the limitation will be upheld by the courts because the "law and custom of Parliament" is not a separate body of law whose existence is unknown to, and whose form cannot be defined by, the ordinary courts; and ultimately
>
> it is for the courts to declare the existence in law of a privilege claimed by the Commons; but, having admitted that the claimed privilege exists, the courts will not interfere with the occasion or the manner of the exercise by the Commons of an admitted privilege.

I have to say that as recently as 1992 the Full Court of Western Australia, in the case of *Aboriginal Legal Service v Western Australia & Marquet*, upheld that view. That was a case where the Legislative Council of Western Australia in fact ordered the production of documents by the Aboriginal Legal Service, and the Aboriginal Legal Service objected to the validity of the order on the ground that because the Service was funded by the Commonwealth it was not amenable to the jurisdiction of the House, and the Full Court said: That's a load of garbage; you are amenable to the resolution of the House. And the court went into some detail as to why and to what extent the Aboriginal Legal Service was amenable to the jurisdiction of the House.

If at any stage members want to interrupt me and ask questions as I go through this statement, I will be very happy to explain as I go along.

Relevantly, there can be no suggestion that the Legislative Council of New South Wales may arrogate to itself powers or immunities unknown to the general law. It necessarily follows that if the power to compel production exists, it must be ascertainable as one of the powers that vest in the House as it is presently constituted.

For the law officers, the common law powers enunciated in *Kielley v Carson* are definitive. I understand that this morning the learned Solicitor General has reiterated that. That opinion, with respect, may be doubted. The common law is dynamic: it acts on, and is acted on, by the other parts of Australian law. It is acted on mainly by parliamentary enactment and the paramountcy of the Commonwealth Constitution. If I may in that regard cite a short passage from the High Court in the case of *Theophanous v Herald & Weekly Times*, which you will find in (1994) 124 Australian Law Reports, at page 1. The quote is this:

> " If the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former. It will not be always be easy to determine whether and to what extent there is a variance, but it is clear that the Constitution must prevail. "

In *Stephens v West Australian Newspapers Pty Ltd*, which can be found in (1994) 124 ALR 80, it was said that the freedom of political expression implied in the Commonwealth Constitution because of its mandating representative and responsible government for the Commonwealth, was also implied by similar reasoning in the State Constitution(s). I would like to cite another extract from Theophanous' case in this regard because I think it sets the scene for the way in which the High Court has approached this issue, which I think is germane to what the Legislative Council is concerned with at the moment. This is a quote from Mr Justice Brennan, as he then was:

> " The nation of Australia, its integrated system of law, this Court and its jurisdiction owe their existence ultimately to the Constitution. It is the chief of the organic laws of the Commonwealth. Read together

with the Commonwealth of Australia Constitution Act, the Statute of Westminster Adoption Act 1942 (Commonwealth) and the Australia Act 1986 (Commonwealth), ---"

And, I would add, the United Kingdom statute as well:

" --- the text of the Constitution prevails over all other laws. "

I ask the Committee to bear this in mind:

" All laws of the Commonwealth and of Commonwealth Territories depend on the Constitution and all State laws are subjected to the Constitution by Covering clause 5 which gives to the Constitution an operation 'binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State'. "

This is probably the seminal aspect of where my thesis, I hope, leads the Committee. In the present case, which is what we are concerned with, it is the foundation of the implied freedom that is important, not the operation or ambit of the freedom itself. That foundation is the nature of Australian government - that is, representative and responsible - and the implications that flow from what appears to be a *grundnorm* that is being developed.

Might I say that a grundnorm is a civilian or Roman law concept, but it does have relevance in international law, and it certainly has relevance in an australian context, where we are dealing with a rigid constitution. A grundnorm, in fact, is a principle of constitutional government that is essentially beyond the power of the legislature itself to change by its own enactment, it being intrinsic to the whole idea of the type of government that the constitution establishes.

It is submitted that whatever the legal position may have been before 1901, the constitution and powers of the New South Wales Legislative Council today will be decided by reference to the form of government for the State ordained by the Commonwealth and State constitutions. Second, the common law declared in Kielley gives way to the paramountcy of the constitution - as I have already cited - or, put another way, that common law that has been developed between 1833 and 1995 must reflect existing constitutional arrangements.

I must also say, of course, that what was espoused in *Kielley v Carson* by the Privy Council in relation to the Canadian provincial legislature is not necessarily something that has to be imported en bloc to the Australian context. One of the aspects of the common law is that, whilst it may be common, it certainly takes notice of regional differences and variations. So that I would say, even on a common law basis, Kielley is not necessarily definitive as far as New South Wales law is concerned.

I also quote the High Court again, where it says in the Theophanous case:

" ..... where a representative democracy is constitutionally entranced, ---"

And the representative democracy in Australia is constitutionally entrenched both at State and Federal level:

" --- it carries with it those legal incidents which are essential to the effective maintenance of that form of government ....."

This obviously begs the question as to what the essential legal incidents might be that the High Court has held. Obviously, the freedom of political expression answers the description: it imbues the whole notion of representative government. It is also possible to discern in the opinions a belief that those things that are essential to the maintenance of representative government are means, rather than ends; representative government is not an end so much as that which facilitates the exercise of popular sovereignty.

If I could digress. It is quite clear that in the 1980s and 1990s the High Court of Australia determined that, by and large, the relationship between the Commonwealth and the States has been determined, starting with the engineers case in 1920 and working through; the constitutional balance between the Commonwealth and the States has been largely determined. In other words, the High Court has dealt with the polities that constitute the Commonwealth. What the High Court is now interested in, obviously, is how the sovereignty of the people is manifested in the constitution and manifested in the way that the people can effect representative and responsible government mandated by the constitution. In other words, the High Court has turned its attentions to the rights of the individual person as part of the political sovereign, if you like, the people.

I said earlier that the law officers had appeared to concentrate on the legislative function of the House to the exclusion of others. I think that is true. The law officers keep returning to the fact that the Parliament of New South Wales has chosen not to enact legislation declaring its powers, privileges, rights and immunities. What I think that ignores, of course, are the other functions that any Parliament in Australia has to performance. Amongst them is that responsible government requires that Ministers, and the government collectively, must answer for their or its administration to Parliament, because it is through Parliament, and the resultant publication, that the electorate comes to be informed about the performance of both the government and the Parliament itself.

It is not an answer to say that such things as freedom of information and media publicity provide the necessary information about government activity. The constitutional discharge of the duty to account is to, and through, Parliament. The

Western Australian Aboriginal Legal Service case to which I have already referred is a very good example of where the Full Court has held that the duty to account - in this case by an association incorporated under the law of this State, and in receipt of Commonwealth funds - nevertheless still has to account to the legislature of Western Australia.

Admittedly, the Full Court of Western Australia was dealing with what I would term a Commons House; we have given ourselves the powers, privileges, etc., of the House of Commons but there is no reason to suppose, I would submit, that in the light of the Australian Capital Territory TV cases, the Nationwide News case, the Theophanous case and the Stephens case and the other two or three cases that hang off those decisions, the New South Wales Legislative Council cannot do the same.

So, ultimately, if that is accepted, a number of things flow. The first is that the Supreme Court of New South Wales, or ultimately the High Court, will decide the nature and extent of the Legislative Council's powers. That is consistent with the Stockdale doctrine; in other words, it is for the courts to determine the existence of the power but, having determined that, the courts will not interfere with the occasion of the exercise of that power by the House.

The proceedings in the exercise of that power - obviously, once it is admitted it existed - are protected from article 9 of the Bill of Rights which New South Wales incorporated into its law in 1969. The Bill of Rights also enables the House to proceed against recalcitrant members. If there is to be freedom of speech, the House must necessarily have power, to exclusion of the courts, to call members to account for abuse of their freedom or misuse of their freedom.

What I am saying is that we have moved on. Whilst *Kielley v Carson* might have been appropriate - and I would deny that anyway - and accepting that *Kielley v Carson* may well have been sufficient for a so-called colonial legislature, and notwithstanding *Armstrong v Budd*, which I think was a case decided on very narrow grounds by the New South Wales Supreme Court, the fact of Federation and the fact that both the Federal and the State constitutions mutually support each other in the establishment of a system of government which we call representative and responsible, mean that it must necessarily flow from that that to avoid a government becoming irresponsible both Houses must have some power of coercion.

I think that the cases cited by the Solicitor General in support of the very narrow view that he takes have to be revisited in the light of what the High Court has said about the nature of Australian government, because I think if there is to be any progression or any success in this matter at all it has to be on the basis that the power to coerce is not being used solely for the purpose of muscle flexing; it is being used for a purpose. If that purpose can be shown to fall within what the High Court has determined as the essential ingredients of representative and responsible government, then I believe that under the common law of Australia, as derived from and supported

by the Constitution, the Legislative Council is perfectly entitled to proceed against any member, including a Minister, for failure to produce.

I have nothing to add to the opinion expressed by Mr Walker so far as his explanation of Executive privilege and the like. What I would like to point out to the Committee is that first you need to get over the constitutional hurdle which I think I have identified today. The question of legal professional privilege falls to the ground once that you concede that the House has the power to call the government to account. Then, as with Commons type jurisdictions, such as my own, the claim to legal professional privilege, or any other form of privilege, falls to the ground.

I will illustrate that. In 1992 a solicitor appearing for a witness before one of the Legislative Council's standing committees claimed legal professional privilege. The committee sought my advice, and I said, "What is legal professional privilege? Legal professional privilege has no standing before a parliamentary committee or indeed the House itself. All privileges give way to the paramount right of the House to be informed and to take action as and when required." It is all very well to talk about the legislative function of the Legislative Council and the Legislative Assembly, but the basic rule of law is that power follows function. In other words, powers do not exist in a vacuum.

CHAIRMAN: What about the concept of public interest immunity as opposed to legal professional privilege?

Mr MARQUET: The leading case in public interest immunity and Executive privilege is *Stankey v Whitlam*, which is a decision of the High Court. The very real difference between public interest immunity and parliamentary privilege is that in the case of a claim to Executive privilege the court will make the determination, not the Executive government. In other words, the court will demand to see the documents on which the Crown makes its claim to immunity -----

CHAIRMAN: You mean once it is in court proceedings?

Mr MARQUET: That is right.

CHAIRMAN: But not in a situation like this?

Mr MARQUET: With respect, I cannot see how the Crown can make a claim to Executive privilege before the House if you were to have any notion of responsible government. The whole basis of responsible government is that the Crown, collectively and individually, is responsible to the Parliament for its acts and omissions. If you do not have that, you do not have responsible government. It is very dangerous, in my opinion, to try to import notions of the separation of powers, particularly at Australian State level, into our constitutions. There is certainly a separation of powers at the Federal level between the judicial power and the Executive power and legislative

power, but of course there cannot be any separation between the Executive and the legislature when you have got responsible government. The whole idea of responsible government is that not only is the Crown represented in the Parliament but it also obtains its Ministers through Parliament. Indeed, the opinion has been expressed that the Cabinet is no more than a parliamentary committee. I believe -----

CHAIRMAN: So you do not accept a view about public interest immunity at all?

Mr MARQUET: Public interest immunity is where the Crown asserts is paramount rights against those of an individual citizen who litigates. The Crown cannot argue public interest immunity in a parliamentary context, because -----

CHAIRMAN: What about a list of police informers?

Mr MARQUET: What about them?

CHAIRMAN: What about information which, if made public, can endanger life?

Mr MARQUET: With respect, I think it is the House that has to gauge that decision. In other words, if the House is prepared to take the risk that publication of a list may endanger life, the House takes that risk. But that does not absolve the government of the responsibility to produce. The House then takes the responsibility as to what flows to an individual as a result of its insistence on disclosure. But it is not a defence for the Crown to say: Because there may be a potential danger to an individual, therefore we will not produce. That is putting the cart before the horse.

CHAIRMAN: What sanction can be applied? For instance, in Western Australia what sanctions can you apply for the non-production of documents?

Mr MARQUET: There are a range of sanctions, running from censure or reprimand to expulsion.

CHAIRMAN: Can the Western Australia House expel for non-production of documents?

Mr MARQUET: Absolutely. And, indeed, has threatened to do so. The previous government has disclosed highly sensitive information under threat that if the government did not so disclose the responsible Minister, in this case the Leader of the House, would be expelled. And the House was quite prepared to expel each successive Leader of the House until it got the information, and it made that abundantly clear.

CHAIRMAN: Is this the upper House or the lower House?

Mr MARQUET: Upper House.

The Hon. A. B. MANSON: Have any members been expelled?

Mr MARQUET: No. The government capitulated and produced.

CHAIRMAN: Has that always happened?

Mr MARQUET: Yes. We have never had a case where a Minister has been expelled for failure to produce because they have never failed to produce.

CHAIRMAN: How is the upper House elected?

Mr MARQUET: Proportional representation, across six regions.

CHAIRMAN: Are the regions one vote one value?

Mr MARQUET: No. There is a case in the High Court at the moment about that.

CHAIRMAN: So you have the situation where a non-democratically elected House was presumably attacking the -----

Mr MARQUET: Hold on! I can't enter into that. I am faced with the electoral system as it stands. My view on whether it is democratic or anti-democratic is irrelevant. I take the House as I find it.

CHAIRMAN: But it was a House that at the time was hostile to the government in the lower House?

Mr MARQUET: Put it this way: The Opposition had a majority in the upper House; it was not necessarily hostile, but it had a majority.

The Hon. R. S. L. JONES: Then the power to expel was not in legislation but was by virtue of the inherent powers of the House. Is that right?

Mr MARQUET: Yes, that is correct.

CHAIRMAN: Are not those powers enacted by legislation in Western Australia?

Mr MARQUET: No.

The Hon. R. S. L. JONES: No. It took upon itself that it had inherent powers and it was going to use those inherent powers.

Mr MARQUET: Yes.

The Hon. R. S. L. JONES: Those powers were not expressed in legislation or even by the constitution?

Mr MARQUET: By operation of the section 1 of the Parliamentary Privileges Act we have the powers, privileges, rights and immunities of the House of Commons; and, obviously, one of the privileges of the House of Commons or powers of the House of Commons is to expel.

The Hon. R. S. L. JONES: But we do not have that in legislation in this State. Are we not therefore limited?

Mr MARQUET: No. With respect, I think that is where this whole discussion falls down. If you were talking pre-1901 about the Parliament of New South Wales, maybe I would tend to agree with you - that you have those powers which act as a defence, that is, they act as a shield, but that you cannot use them where you have not got powers that you can use as a sword. What I am saying is that with Federation, the grant of the Commonwealth Constitution, the flow-on effect of the Commonwealth Constitution into the State constitutions was necessary by section 106 of the Commonwealth Constitution.

This is a case, I think, where the words in section 106 "subject to this Constitution", that is the Federal Constitution, the constitutions of the States continue as they are at the establishment of the Commonwealth, subject to manner and form" are important because those words "subject to this Constitution" were not inserted in section 106 simply for the point of kite-flying. What was intended was that the State constitutions at no stage would be able to depart from the principles espoused in the Federal Constitution.

If, as the High Court has held in a number of recent cases, the genesis of Australian government is representative and responsible, and that obtains both at Commonwealth and State level, certain things flow from that. You cannot logically argue that you can have an omnipotent Executive government that is irresponsible, or not responsible, simply because the powers of a particular State Parliament or the powers of a particular component of that State Parliament have been left behind in 1833. I think that is totally untenable. As I cite in my submission, the High Court has said very clearly that the common law must give way to the constitution where the constitution appears to conflict with the common law. I would prefer to put it another way. The common law simply reflects constitutional development.

No-one is saying the same view of this matter would be held in 1901 as it is now. The High Court is not concerned with that. What the High Court is concerned about is the preservation of the principles of Australian government. Now, if necessary or desirable, if that means importing into the constitution, both at Commonwealth and State level, certain powers in the House of Parliament intended to facilitate the expression of representative and responsible government, then Australian common law,

under the constitution, will recognise that. It is highly dangerous, in my opinion, to freeze the powers of this House as at 1833 because some law lord had a bad case of gout the night before and decided that Newfoundland Legislative Assembly ought not have powers equating those of the House of Commons. I think those days are well and truly gone.

The Australia Acts do nothing more in this context, I would suggest, than simply indicate that Australia is now, as the Australia Acts themselves recite, a sovereign independent nation. As a sovereign independent nation, the Australian common law is quite capable of developing - and does develop - independently of the English common law. And the Australian common law will develop within the framework of the constitution, both at State and Federal level.

In my submission, you have got to look at what we do in Australia now. What powers are desirable or necessary to be held by a House of an Australian Parliament? Let us get away from this notion of legislature. Parliaments are there for a number of reasons. In fact you could read *Stockdale v Hansard*, the 1840 case I cited, and no more, and you would have the answer to this conundrum now. *Stockdale v Hansard* was very prescient in fact. I cannot turn up the reference in that case at the moment, but what Lord Denman was actually saying was that as far as the various functions of the House of Commons is concerned those powers and privileges appertain to the performance of those functions, equally as much as the legislative function. The legislative function is simply one of five functions that any House performs.

We should not lose sight of the fact that participating in the legislative process is but one of those functions. As I say again, power follows function. You cannot have power operating in a vacuum. Power has to facilitate something. Power facilitates the exercise of a function. It is properly the function of the Legislative Council of New South Wales, in my opinion, to call the government to account and, if necessary, to coerce the government.

The Hon. R. S. L. JONES: And expel if necessary?

Mr MARQUET: I think that is a separate issue. If the Minister remained recalcitrant, then obviously the House would have to consider the range of sanctions that are available to it. And one of those indeed could be expulsion. Certainly, it would be unlawful to suspend a member for an indefinite period. What the courts have held is that suspension of a member for an indefinite period is tantamount to expulsion, but in fact is a greater punishment because it puts the member in a position of uncertainty which is fair enough in some respects but what it does is disenfranchise the member's electors. Expulsion does not disenfranchise; suspension does.

CHAIRMAN: Are there any other questions.

The Hon. JENNIFER GARDINER: Can we summarise the situation by saying

that you think the New South Wales Legislative Council, notwithstanding the lack of legislated privileges, has the power to demand of the Executive Government the production of documents under the pain of fairly serious sanctions, including expulsion if the Minister is recalcitrant?

Mr MARQUET: Yes. The question of legal professional privilege and Executive privilege in that context are at best ancillary but probably do not need to be considered at all. Once you admit the existence of the power of the House to demand the production of documents that relate to the administration of the State, and you admit the power of the House to coerce, if necessary by expulsion, then other things flow as a result of that. Legal professional privilege in my view is a furphy in this context.

CHAIRMAN: At one stage you talked about the Supreme Court of New South Wales determining the nature and extent of Legislative Council powers. Is that only when an appeal situation has occurred?

Mr MARQUET: No. What you could do in this case, if the Legislative Council were so minded, is to do precisely what the House of Commons did to the Privy Council in 1958, and that is that you state a case for the opinion of the Supreme Court. In other words, the Legislative Council, by resolution, says: Dear Supreme Court, we are faced with these problems; we would like you to answer the following questions.

CHAIRMAN: Do you think it is proper for one arm of the separation of powers to decide a dispute between the other two arms?

Mr MARQUET: For one thing, there is no separation of powers doctrine in force. The separation of powers doctrine does not exist. There is simply a competition of function. There is no separation of powers, particularly at State level. The only separation of powers I would admit is between the judicial power of the Commonwealth and the Executive and legislative arms of the Commonwealth. That is as far as it goes. And, for example, as long as you have the Chief Justice acting as the deputy of the government, it is very difficult to argue that there is a separation of powers. But that is said just to illustrate the proposition.

What you are saying is that, in terms of the *Stockdale v Hansard* - and that is agreed on all sides now as being the law - it is for the courts to determine whether or not the claimed power or privilege of the House exists as a matter of law.

CHAIRMAN: Which court?

Mr MARQUET: The Supreme Court, and ultimately the High Court of Australia. It is up to the courts to determine whether the claimed power or privilege of the House exists as a matter of law: that is, is it recognised by the general law or not? The argument you are putting forward is the one that was dismissed by *Stockdale v Hansard*, which said: The House of Commons can declare, by its own resolution,

what the law of Parliament is; and the courts have no authority to interfere with that declaration. So, therefore, if we declare you guilty of a contempt because you dug a hole in a member's garden - and that is the situation, and *Stockdale v Hansard* gives instances of where people have been found to be in breach of privilege for stupid things - but if we decide that, then that is the law. What the court said was: That's garbage!

CHAIRMAN: But are you not saying that when you say that the House has the right to decide whatever documents it wants, and it is for the House to decide whether -----

Mr MARQUET: No. If you admit that the House has the power to order the production of documents, or if the court admits that the House has the power to order the production of documents, what the court will not do is interfere with the determination of the House as to when it is appropriate for the House to exercise that power. In other words, I cannot trot along to the Supreme Court and say: Excuse me, the Legislative Council has asked me to produce these documents and I think that's wrong. The Supreme Court will say: We admit that the Legislative Council has the power to order the production of documents. Go away!

It is a different matter if the Supreme Court says: We do not think the Legislative Council has the power to order production of documents; that is ultra vires. The Legislative Council does not have that power. We strike that down. The order is a nullity. So, what I am saying is -----

CHAIRMAN: You are saying the House has the power unless it does not?

Mr MARQUET: I am sorry?

CHAIRMAN: Really, you are saying the House has the power unless it does not?

Mr MARQUET: That is right, and it is up to the High Court ultimately to determine whether it has or not.

The Hon. J. R. JOHNSON: You have just stated that it could finish up in the Supreme Court in New South Wales by taking a stated case to the Supreme Court of New South Wales and then ultimately to the High Court. But the High Court has already determined that it will not give advisings.

Mr MARQUET: It would not give an advisory opinion in this case. The Supreme Court ----

The Hon. J. R. JOHNSON: But you have just said that that is where it would finish up.

Mr MARQUET: That is right, but not in that context. What the House would

have to do is insist on production and then take the necessary coercive measures to enforce it, and then the High Court would become involved. What I am saying is that the Legislative Council is in a position at the moment, by its own resolution, to seek a declaratory judgment from the Supreme Court of New South Wales because the Supreme Court of New South Wales will give declaratory judgments. The High Court will also give declaratory judgements, but it will not give an advisory opinion. In other words, it will not given an opinion on a hypothesis. But you have not got an hypothesis in this situation. What you are asking the Supreme Court to do is answer certain questions put to it as to the existence or otherwise in law of the powers of the Legislative Council. That is a positive question - as to the existing law.

The Hon. R. S. L. JONES: I ask a question about section 49. So section 49 does apply to New South Wales?

Mr MARQUET: The Commonwealth Constitution?

The Hon. R. S. L. JONES: Yes.

Mr MARQUET: No. It only applies to the Commonwealth Houses.

The Hon. R. S. L. JONES: So those powers we assume then by right of our function as a legislature?

Mr MARQUET: Yes. What you have got to do is go back to the ACT TV cases, Nationwide News, Theophanous and Stephens and the other two or three cases that have been decided by the High Court and look at what the High Court is saying about the nature of Australian government. Australian government is representative and responsible. If Australian government at State and Federal level is representative and responsible, a number of things flow from that, one of which is responsibility.

If you accept that we have representative and responsible government, you then cannot turn round and say: Ah, yes, but the government can decide the nature of the responsibility and the extent of that responsibility. That is a contradiction in terms. Responsible government or representative government is not an end in itself; it simply facilitates the exercise of popular sovereignty. That is the ultimate point that you have to come back to.

The Hon. R. S. L. JONES: The government can restrict its own powers by passing legislation though.

Mr MARQUET: A very different matter. The government is not restricting its powers in that situation; it is Parliament that is restricting the powers of the government.

The Hon. R. S. L. JONES: So, if there is no legislation, we fall back to the

High Court?

Mr MARQUET: You fall back on the common law and indeed you fall back on the constitution.

The Hon. R. S. L. JONES: But, if both Houses of Parliament pass legislation, we can restrict that power.

Mr MARQUET: In all this, I must say that the question that is going to be asked is: Why did not New South Wales take the opportunity to legislate in the same way that the other States did to give themselves the powers of the House of Commons in the meantime, until they had sorted out what they were going to do.

CHAIRMAN: If there are no further questions, I thank you very much, Mr Marquet.

(The witness withdrew)

MICHAEL RUEBEN EGAN, Treasurer, Minister for Energy, Minister for State Development, Minister Assisting the Premier, and Vice-President of the Executive Council, and member of the Legislative Council, Parliament House, Sydney, sworn and examined:

CHAIRMAN: In what capacity are you appearing before the Committee?

The Hon. M. R. EGAN: I suppose I could pick any one of those six capacities. In whatever capacity you wish me to attend, but essentially as a Minister of the Crown.

CHAIRMAN: Are you conversant with the terms of reference of the inquiry?

The Hon. M. R. EGAN: I am.

CHAIRMAN: Do you have a written submission?

The Hon. M. R. EGAN: No, I do not.

CHAIRMAN: If you should consider at any stage during your evidence that, in the public interest, certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee will consider your request in conformity with Standing Order 250. Do you wish to make a statement?

The Hon. M. R. EGAN: No.

CHAIRMAN: So that we will go straight into what we are inquiring into, which is the problem of what to do with respect to the production of documents and, second, what to do with someone who has been found to be in contempt of the House. Do you think that the Legislative Council's role as a House of review gives it different obligations in the matter of production of documents than say the role of a lower House?

The Hon. M. R. EGAN: It may well in that I heard the previous witness, towards the end of his evidence, talking about the concept of responsible government. My understanding of that concept is that although we talk about the responsibility of the Executive Government to Parliament, in fact it is the responsibility of the Executive Government to the lower House. It is the lower House that makes or breaks governments.

I have not really considered whether that means that the two Houses of Parliament have a different role in the scrutiny of the actions of the Executive Government. The Legislative Council, as you point out, or any upper House, traditionally has been regarded as a House of review, although in Canberra the Senate

is regarded also as a State's House. I have never really considered whether that means that the two Chambers have a different role in relation to scrutinising the Executive Government. It does pose an interesting question.

CHAIRMAN: Many of our witnesses have made the point that New South Wales is the one State in Australia that has not legislated for its powers and privileges, rights and immunities. In your view, does this mean that the power to require production of documents and the power to punish for contempt for not producing documents is limited in New South Wales?

The Hon. M. R. EGAN: I would preface my answer by saying that I do not regard myself as either a expert in constitutional law or for that matter in constitution theory, but my understanding is that although the other States and the Commonwealth have in fact, by legislation or by the Commonwealth Constitution, taken on the powers and privileges of the House of Commons, the practice in the other State Parliaments, and certainly in the Commonwealth Parliament, in relation to demands for tabling of documents is I would have thought no different from New South Wales. In fact, the practice is more restrictive than the recent assertion by the Legislative Council.

CHAIRMAN: The Committee has heard today that in the Senate the solution is mostly a political one, rather than a quasi legal one; but we have also heard that in Western Australia it seems to be a very punitive response in that jailings have been threatened if documents have not been produced. So there obviously is a big difference.

The Hon. M. R. EGAN: It could be that the eastern part of the nation is more civilised than the wild west. I don't know.

CHAIRMAN: One of the issues we are grappling with is how Executive privilege can be defined, who is to define it, and how it can be even debated when the sensitivity of some of the documents is such that even to debate them means that they are no longer confidential. Do you have thoughts about how the whole issue of production of documents can be dealt with in a way that will reduce these conflicts in the future?

The Hon. M. R. EGAN: I did, both in the House some time ago and also by letter to members, suggest that the conflict between the Legislative Council and the Executive Government about whether there was an untrammelled right presiding in the Council to demand documents should be resolved rather than left uncertain. My preference, I think, would be for legislation to define the rights of both Houses of Parliament to seek the tabling of documents; for that legislation to lay out the principles; for some sort of external review to exist in cases where there is a dispute; and for recommendations to be made to the Parliament following that review.

CHAIRMAN: Would you see the legislation as applying similarly to both Houses?

The Hon. M. R. EGAN: I would see no reason why it should not. Ideally, it should.

CHAIRMAN: Would you see it being along the lines of, say, the Evidence Act - but obviously different from the Evidence Act because you would have to leave out section 10, or whatever it is?

The Hon. M. R. EGAN: It would be along the lines of the Freedom of Information Act, I would imagine.

CHAIRMAN: You do not accept that the Parliament should have greater power to demand a document than an ordinary citizen?

The Hon. M. R. EGAN: I would have thought the grounds for exemption for documents under freedom of information would be fairly akin to what should be grounds for exemption from a demand by a House of Parliament to table documents.

CHAIRMAN: When you talk about an external review process, are you meaning a court or a group of people, or what do you mean?

The Hon. M. R. EGAN: I suppose, ultimately, given the right set of circumstances, there is the possibility that a court could get involved. But I would not necessarily see a court as being the ideal way to resolve a dispute. What I would have in mind is that there would be, perhaps, a committee established of eminent persons who would, in cases where there was a dispute between Executive Government and a House of Parliament, determine whether documents legitimately fell within a ground of exemption. In other words, it would not just be the word of the Executive Government that a particular document was commercially confidential or whatever.

CHAIRMAN: It would go to a group of people, presumably elected or appointed by the House itself?

The Hon. M. R. EGAN: That is a possibility, yes.

CHAIRMAN: One of our witnesses, Mr Walker, suggested that the way round sensitivity or perhaps danger for individuals that would arise out of the publication of sensitive documents was secret sessions of Parliament. Do you favour this option?

The Hon. M. R. EGAN: No, I do not. I would not entrust partisan political politicians with that sort of responsibility, no.

CHAIRMAN: So you would see this external group as somehow not having partisan political views?

The Hon. M. R. EGAN: Yes.

CHAIRMAN: Do you believe that the House has the right to impose a punitive sanction other than to ensure order at the time?

The Hon. M. R. EGAN: No, I do not. I think, for very practical reasons, the House should be able to suspend a member for disorderly conduct, in the same way that a referee on a sporting field can send someone off whose conduct does not allow the game to be played. But I think, for anything other than disorderly conduct, a power to suspend a member or particularly expel a member would be a very dangerous power indeed, and would be abused.

CHAIRMAN: Members have been expelled in the past for making reckless and wanton speeches, for instance.

The Hon. M. R. EGAN: Yes.

CHAIRMAN: So you would oppose that?

The Hon. M. R. EGAN: Absolutely. I opposed the expulsion of Mr Armstrong when I was a teenager. I thought it was outrageous.

CHAIRMAN: In fact, one of our lower House members, Mrs Chikarovski, suggested that members be expelled for telling lies during election campaigns. Do you believe that the House is the only institution with the right to sanction a member of Parliament?

The Hon. M. R. EGAN: I do not think any House of Parliament should have a right to punish anyone for contempt of the Parliament. I have always believed that should be a function given to the courts. I thought the punishment meted out by the House of Representatives in the Brown-Fitzpatrick case was outrageous, and of course it was motivated by malice on the part of Mr Menzies and Dr Evatt. I think that is a very unsafe power to give.

CHAIRMAN: So you believe that the third arm of government, the judiciary, should have the right to decide the sanction for a contempt of Parliament?

The Hon. M. R. EGAN: I think the Parliament, by legislation, should give the determination of a punishment to someone other than itself.

CHAIRMAN: That seems to go against the general view of most of our witnesses, certainly in respect of a code of conduct, that the Parliament have its destiny in its own hands. You are opposed to that view?

The Hon. M. R. EGAN: I think there is the danger that Parliament can simply punish people for partisan political reasons. To suspend a member, and more particularly to expel a member, is really a punishment against the electorate that elected

that member. I mean, it would be a very simple thing for a House of Parliament to suspend or expel a member because they House needed the extra vote.

CHAIRMAN: You do not see it as a problem that a court can be called on to determine a dispute between the legislature and the Executive Government?

The Hon. M. R. EGAN: I am not a lawyer, but the courts in some circumstances have that power now. The courts intervened in the Armstrong case.

CHAIRMAN: But was that not because one of the parties took the matter to the Court of Appeal?

The Hon. M. R. EGAN: That is right.

The Hon. J. R. JOHNSON: Treasurer, as a Minister your oath of office places on you obligations not to divulge in any form certain things that you may acquire by virtue of that office. Is that correct?

The Hon. M. R. EGAN: I do not think it extends that far. It certainly covers deliberations of the Cabinet and the Executive Council.

CHAIRMAN: Does being a member of the Executive Council give you greater obligations on secrecy?

The Hon. M. R. EGAN: The Executive Government has responsibilities, and one of those is to protect the orderly processes of government. Another is to protect the confidentiality of information given to it in confidence, whether it be commercially confidential or sometimes involving matters of personal confidentiality. The Executive Government certainly has a different responsibility from the Parliament, and to some extent they are in conflict.

CHAIRMAN: You take an extra oath, do you not, as a member of the Executive Council?

The Hon. M. R. EGAN: You do.

CHAIRMAN: I know one of our witnesses felt that that put a different obligation on you than there would be if you had not been a member of the Executive Council.

The Hon. M. R. EGAN: Members of Parliament who are not members of the Executive Council have not taken that oath.

CHAIRMAN: But it was about secrecy, was it not?

The Hon. M. R. EGAN: Yes. But I am not sure it extends quite as far as Mr

Johnson's question intimated.

CHAIRMAN: It was Mr Walker's view that it made out a different case.

The Hon. M. R. EGAN: I certainly take the view that a House of Parliament cannot instruct Ministers of the Crown as to how they should perform their duties. It is a different thing in the lower House, where one would think that if the lower House were to do that and a Minister resisted, it would be a question of whether the Minister still had the confidence of the House. But, having said that, I do not think even the lower House would have the right to instruct a member of the Executive Government as to how that member conducted his or her functions or duties, and certainly it would not apply with the upper House.

CHAIRMAN: Realistically, you are only looking at a case in the upper House, aren't you, where a Minister can be found guilty of contempt and there is not some political solution occurring from that, through either a motion of no confidence or a change of government perhaps?

The Hon. M. R. EGAN: There is always a political solution.

CHAIRMAN: That is certainly what Harry Evans was saying about the Senate: it continually ended up with a political solution to these conflicts.

The Hon. M. R. EGAN: Yes.

The Hon. R. S. L. JONES: Several witnesses have said that we have inherent powers which are not restricted by our lack of legislation, that other States have legislated their powers, but that our powers have not been tested yet. One witness suggested that we should seek a declaratory judgment in the Supreme Court. What is your view of our inherent powers as compared to our legislative powers?

The Hon. M. R. EGAN: Again I am not a constitutional law expert. As a Minister of the Crown, I rely on the advice of the Crown law officers, and their advice to me and to the government is that there are no such powers.

The Hon. R. S. L. JONES: Common law powers?

The Hon. M. R. EGAN: Yes.

The Hon. R. S. L. JONES: There seems to be a substantial conflict there between the Solicitor General, the Crown Solicitor and other witnesses we have had before us. Three witnesses have said that we have those inherent powers as part of the needs as a legislature. So you do not share that view?

The Hon. M. R. EGAN: I would not agree with that. I think there are enormous

dangers in a House of Parliament having unfettered powers to effectively run riot.

The Hon. R. S. L. JONES: One witness said that Cabinet essentially is a committee of Parliament. Do you agree with that?

The Hon. M. R. EGAN: No, absolutely not.

The Hon. JENNIFER GARDINER: Mr Egan, you said that your preference would be for legislation to resolve some uncertainty. Are you in a position to indicate whether or not that is the view of the government, or is that your personal view?

The Hon. M. R. EGAN: It is certainly my personal view and, whilst the matter has not been to Cabinet, I have had informal discussions with members of the government and I believe it is the view of the government.

The Hon. JENNIFER GARDINER: With respect to members of Parliament, you said that you would not entrust members of Parliament with making decisions about confidential documents and so on.

The Hon. M. R. EGAN: I think I said that more specifically in relation to members of Parliament being entrusted with documents in confidence. I would think that given the fact that most of these calls for tabling of documents are in relation to a matter of current political controversy, and knowing the capacity of members of Parliament to leak information, would anyone be confident that material would be kept confidential?

The Hon. JENNIFER GARDINER: I think it is interesting that in a previous Parliament we had the question of the Port Macquarie Hospital and the Joint Select Committee on the Sydney Water Board tender documents, and those documents were entrusted to members of Parliament. Does that not indicate that perhaps members of Parliament could be so entrusted, if some particular committee had some particular brief on a certain portfolio, and that it might be appropriate?

The Hon. M. R. EGAN: I am tempted to say that my side of politics might be more trustworthy than those on other sides of politics, but there would be no point in saying that. It could be that there was nothing in those documents that was tantalising.

The Hon. C. J. S. LYNN: Mr Egan, you mentioned before that it was dangerous for the Parliament to have the power to suspend or expel because that action would deny the electorate of representation. If that principle is dear, what should happen to a member who voluntarily abandons his electorate?

The Hon. M. R. EGAN: I am not sure that it is pertinent to the point I was making.

CHAIRMAN: It is not.

The Hon. C. J. S. LYNN: We have a recent case where the electorate that I live in has just been abandoned by a Minister who has moved to the north shore, and that electorate is now not being represented.

CHAIRMAN: Can I suggest that this is a question more appropriate for our code of ethics inquiry. This is an inquiry with specific terms of reference.

The Hon. C. J. S. LYNN: It was just that you made the point about an electorate being represented as being very important.

The Hon. M. R. EGAN: You are not suggesting that all of your own colleagues who reside out of their electorates should resign?

The Hon. C. J. S. LYNN: At least move in there.

The Hon. M. R. EGAN: I don't think you would find too many of your own colleagues meeting those requirements.

The Hon. C. J. S. LYNN: It is not a problem, because I can pick up the tab of representing him. I was just wondering.

CHAIRMAN: I suggest that you raise that matter in our code of ethics inquiry.

The Hon. A. B. MANSON: Following on from the previous questions asked by Miss Gardiner, I think you answered that you preferred a change in legislation to require production of sensitive documents, and that this could be done by an eminent group of people.

The Hon. M. R. EGAN: No, I see the eminent group of people being the adjudicators when there was a dispute between the Executive Government and a House of Parliament about whether documents fell within a category attracting exemption.

The Hon. A. B. MANSON: Have you considered the Legislative Council and the government negotiating a procedure or a system for producing these documents?

The Hon. M. R. EGAN: I have. In fact, I am not sure if I wrote to all members of the upper House but some time ago I certainly wrote to the Opposition and crossbenchers suggesting a course of action.

CHAIRMAN: Could the Committee have a copy of that letter to assist us in our later deliberations?

The Hon. M. R. EGAN: Certainly.

CHAIRMAN: So what you are suggesting is that there be two pieces of legislation. You think we should legislate for our rights and privileges and not rely on there being inherent rights derived from the House of Commons?

The Hon. M. R. EGAN: I have not specifically thought about that, but that has some appeal.

CHAIRMAN: The other bit of legislation that you are suggesting is in respect of some way to deal with what obviously will be ongoing conflicts about production of documents.

The Hon. M. R. EGAN: Yes.

CHAIRMAN: And that that legislation should probably be the same for both Houses and that it should consider some sort of external review system to resolve conflict.

The Hon. M. R. EGAN: Yes.

CHAIRMAN: But it would also be along the lines of the freedom of information legislation in terms of what documents would be subject to it.

The Hon. M. R. EGAN: Well, it is a sort of model. It applies to everyone, rather than a House of Parliament. It is a way in which people can demand to see documents and for that demand to be either acceded to or refused.

CHAIRMAN: You are obviously saying that the claims of the Executive override the claims of the Parliament.

The Hon. M. R. EGAN: No, I am not.

CHAIRMAN: We have had a number of witnesses who said that the Parliament has the right to demand any document it wants to see. And when I put to them that that might be dangerous, they said it is up to the House itself to decide whether or not a document should be confidential. Brett Walker has that view, and so does Laurie Marquet, and to some extent Harry Evans agreed, because he believes the solution is political whereas the other two basically believed it is the right of the people of Australia that their Parliament be able to demand those documents. What is your reason for stating the Executive should be able to override the House?

The Hon. M. R. EGAN: If I can give some examples of the types of documents that could be demanded if the Parliament had an unfettered right to demand the tabling of a document. First of all would be documents disclosing the identity of informants. Let us say that a House of Parliament demanded that information. Under an unfettered right, it could do so. I do not think that would be in the public interest.

Another example is the identify of a person employed in the public sector whose past private affairs have been the subject of some public discussion. I had the case recently involving my press secretary. There was a story about him that appeared in one of the Sunday papers, and within hours we had the Leader of the Opposition in the lower House saying that he would use Parliament to uncover the identity of that person. I do not regard the Parliament or a House of Parliament having power to disclose that sort of information to be in the public interest.

Another relates to security details, for example. If security arrangements have been put in place for a visiting dignitary, it could well be that that visiting dignitary was not the flavour of the month with a particular House of Parliament, and it might demand to know all of the security arrangements.

As to information protected by legal professional privilege, should a House of Parliament have the right to see any legal advice that, say, I have been furnished with for the purpose of coming along here today? I would have thought that was not in the public interest. What if the Parliament wanted information prior to the presentation of the budget about various matters being considered -----

CHAIRMAN: The price of alcohol in the bar downstairs.

The Hon. M. R. EGAN: Whatever. I do not think that would be in the public interest. I certainly do not think it is in the public interest for matters concerning ongoing commercial negotiations to be demanded by and revealed to the Parliament.

The Hon. JENNIFER GARDINER: Is not the Parliament the place to decide what the public interest is?

The Hon. M. R. EGAN: On the advice that I have received and the government has received - and we are talking here about a House of Parliament - I do not believe a House of Parliament has any legal right to make that decision. I suppose it is a matter of opinion whether it should have it. I do not believe that anyone would believe - I certainly do not believe - that we should have Houses of Parliament with untrammelled powers. There should be some checks and balances.

The Hon. JENNIFER GARDINER: The elections by the people are checks and balances.

The Hon. M. R. EGAN: Take the case of the upper House, for example. Let us say that the upper House were now to make some decision. You are saying that it could make any decision because at the next elections the people will be able to cast judgment. The fact of the matter is that people will only be able to cast judgment on half of the members of the upper House.

CHAIRMAN: If a member is suspended, say for not producing documents, in

your view should he or she have the right of appeal to another court?

The Hon. M. R. EGAN: My advice from the Crown law officers is that the power to suspend a member or Minister for failure to produce documents simply does not exist. My advice is also that if the House purported to do that, then the member would have standing to take the matter to the courts to have it determined by the courts.

CHAIRMAN: This might be a leading question, but it seems that our House has adjudged the Treasurer guilty of a contempt of the House for failure to comply with orders to produce documents. We have also had a fair bit of evidence that says that the House does not have the right to be supplied with documents.

The Hon. M. R. EGAN: That was the argument I put to the House.

The Hon. R. S. L. JONES: And we have had the opposite view, too.

CHAIRMAN: Yes. We have had a number of witnesses who believe that the right of the House is absolute. This may well be another leading question, and you do not have to answer it. Section 5 of the resolution referred the matter to the Committee for a report into what sanctions should be enforced where a Minister fails to obey an order of the House to table papers by a certain date. Do you see that as a general question?

The Hon. M. R. EGAN: I can only answer that question by saying that, as I understand it, the House has no power to demand the tabling of documents. Therefore, I would imagine it does not have the power to exact a punishment for failure to comply with the House's resolution. But I think you are asking me whether the House should have that power.

CHAIRMAN: I think that reference talks about future orders. I think it is saying: In future, what do you think should happen to a Minister who fails to table papers?

The Hon. M. R. EGAN: I think that could only be resolved by legislation, so that there was a clear obligation set out in the legislation, with clear sanctions in the legislation. But, again, I do not think it should be the prerogative of a House of Parliament to impose the sanctions. I do not think a House of Parliament can determine its own composition.

CHAIRMAN: You really do think that would then have to go to an external jurisdiction - a court of some sort?

The Hon. M. R. EGAN: Absolutely.

CHAIRMAN: Have you thought about which court it would be?

The Hon. M. R. EGAN: No.

CHAIRMAN: It is very interesting. It is the first time I have heard this one.

The Hon. M. R. EGAN: I think it was an argument put by a lot of people round the Brown-Fitzpatrick time.

CHAIRMAN: Would the Court of Appeal or the Supreme Court be the appropriate body?

The Hon. M. R. EGAN: Given that it was depriving a member of Parliament of the right either to sit in the House at all or sit in the House for a certain time, it would have to be a very similar court.

The Hon. R. S. L. JONES: Were you provided a list of 50 orders for the production of documents from the Australian Senate made from 18 August 1993, all but three of which were granted? The ones that were granted included documents for the lease of premises owned by the Australian Labor Party to the National Audit Office ----

The Hon. M. R. EGAN: Are these documents that were provided?

The Hon. R. S. L. JONES: Yes. They also included legal advice relating to the powers of Parliament or parliamentary committees to order the production of documents?

The Hon. M. R. EGAN: Yes.

The Hon. R. S. L. JONES: Documents provided to the Federal Court in relation to an independent newspaper claim against the Fairfax group.

The Hon. M. R. EGAN: Yes.

The Hon. R. S. L. JONES: Documents relating to the Australian National Line.

The Hon. M. R. EGAN: Yes.

The Hon. R. S. L. JONES: Legal opinion and related material relating to a review of the National Media Liaison Service by the Auditor-General, and reports relating to an accident on the *Griffin Venture* oil tanker. Amongst those you will notice that there are some documents that one might consider to be subject to commercial confidentiality and legal professional privilege. Is it your view that the Legislative Council does not have an intrinsic right to order the production of documents? And, therefore, why would this conflict so much with the Senate, when it has ordered production of those documents and they have been provided in 94 percent of cases?

The Hon. M. R. EGAN: Again, I am not a legal or constitutional expert, but the powers of the Senate and the powers of the House of Representatives I would have thought were established by the Australian Constitution, and that there is evidence given to this Committee that there is no such power conferred on the New South Wales Parliament. In any event, there is also the question, in relation to the Senate and the House of Representatives, as to whether the House of Parliament can persist with a call for the production of documents when the Executive Government claims some public interest immunity.

The Hon. R. S. L. JONES: Several witnesses, including the Clerk of the Senate, Harry Evans, and Laurie Marquet, the Clerk of the Legislative Council of Western Australia, have told the Committee that New South Wales does in fact have those powers even though we have not legislated for them; that we have them as inherent powers.

The Hon. M. R. EGAN: The Crown law officers do not agree with them.

The Hon. R. S. L. JONES: So that may have to be tested in the Supreme Court at some point.

The Hon. M. R. EGAN: It could well be.

The Hon. R. S. L. JONES: That might be the end result, might it not?

The Hon. M. R. EGAN: It could well be. And that would mean that either the Crown law officers' advice would be upheld, in which case the Houses of Parliament would have no rights on the tabling of documents at all, or the court would uphold that they do. Also, it might also uphold that that was subject to public interest immunity. I would have thought that it would be better for that to be sorted out by legislation of this Parliament rather than by the courts. The Parliament could end up with no powers at all.

The Hon. R. S. L. JONES: So is it your government's intention, so far as you know, to introduce legislation?

The Hon. M. R. EGAN: I think we will wait and see how things unfold here first. I mean, I did write to you and your crossbench colleagues and the Opposition proposing that we should seek a means of resolving the issue. I had a letter of rejection from the Leader of the Opposition and the Deputy Leader of the Opposition, and I am still awaiting your response.

CHAIRMAN: Would you agree that when the Executive performs an act it does so only under the authority of an Act of Parliament?

The Hon. M. R. EGAN: No. But, then, that is really not a question that is

within my competence to answer. But I would have thought things like the royal prerogative, for example, clearly come outside of that.

CHAIRMAN: Are the powers of the Executive subject to the Constitution Act and the Parliament?

The Hon. M. R. EGAN: They are certainly governed by the Constitution, yes. And they are subject to the Parliament to the extent that the government, to stay in office and to get supply, depends on support in the lower House.

CHAIRMAN: Do you see no power to the Executive arising out of the upper House at all except to pass supply?

The Hon. M. R. EGAN: No, absolutely not. The upper House can be absolutely, unanimously hostile to the government of the day, and the government of the day will survive if it retains majority in the lower House or retains the confidence of the lower House, and it will even get supply if it retains the confidence alone of the lower House, because our Constitution does not enable the upper House to amend appropriation for the ordinary annual services of government.

CHAIRMAN: If there are no further questions, I thank you very much, Mr Egan. Once again it has been a very interesting contribution.

(The witness withdrew)