

HIGH COURT OF AUSTRALIA

GORDON J

ANTHONY JAMES ALFORD & ANOR

PLAINTIFFS

AND

PARLIAMENTARY JOINT COMMITTEE ON
CORPORATIONS AND FINANCIAL SERVICES

DEFENDANT

*Alford v Parliamentary Joint Committee on Corporations and Financial
Services*

[2018] HCA 57

22 November 2018

B59/2018

ORDER

1. *The plaintiffs' summons filed 19 November 2018 is dismissed with costs.*
2. *The parties, and the intervener, the Attorney-General of the Commonwealth, should relist the matter for directions to address the future management of the plaintiffs' substantive application.*

Representation

G C Dempsey for the plaintiffs (instructed by K2 Law)

G J D del Villar for the defendant (instructed by Australian Government Solicitor)

S J Free SC with Z C Heger for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Alford v Parliamentary Joint Committee on Corporations and Financial Services

Interlocutory order – Application for stay or injunction – Where Parliamentary Joint Committee conducting inquiry – Where plaintiffs directed to appear before Committee – Where plaintiffs sought to restrain Committee's exercise of power – Whether plaintiffs established prima facie case for relief – Whether balance of convenience favoured relief.

Words and phrases – "compel", "joint committee", "parliamentary privileges".

Constitution, ss 49, 50.

Parliamentary Privileges Act 1987 (Cth), ss 3, 16.

1 GORDON J. The defendant, the Parliamentary Joint Committee on Corporations and Financial Services ("the Corporations and Financial Services Committee"), is inquiring into the operation and effectiveness of the Franchising Code of Conduct ("the Franchising Inquiry"). It is due to report by 6 December 2018. Commencing in July 2018, multiple requests were sent inviting the plaintiffs to appear before the Committee in relation to that Inquiry. Then, on 18 October 2018, each plaintiff was directed to appear before the Corporations and Financial Services Committee ("the October Directions"). The plaintiffs do not wish to appear and, by summons, sought interlocutory orders that the October Directions be "stayed" until further order.

2 The Attorney-General of the Commonwealth intervened pursuant to s 78A of the *Judiciary Act 1903* (Cth). The defendant appeared but informed the Court that it would file a submitting appearance.

Form of relief

3 By a summons filed on 19 November 2018, the plaintiffs sought interlocutory relief in the form of a "stay" of the October Directions pursuant to r 8.07.1 and further, or alternatively, r 25.11 of the *High Court Rules 2004* (Cth). The Corporations and Financial Services Committee is not a court. The hearing before the Corporations and Financial Services Committee, which the plaintiffs have been directed to attend, is not a "proceeding" within the meaning of r 25.11 of the *High Court Rules* and, of course, the plaintiffs do not seek a stay of this proceeding. Moreover, the October Directions are not in the nature of judicial orders of the kind to which a stay could properly be directed pursuant to r 8.07.1 of the *High Court Rules*. Therefore, a stay is inappropriate.

4 What the plaintiffs, in substance, sought was an injunction to restrain or control the conduct of the Corporations and Financial Services Committee or the exercise of its powers. However, the plaintiffs did not identify with precision the terms of any injunction. Instead, the argument proceeded on the basis that an order was sought to the effect that the Committee be restrained from taking any further steps in reliance on the October Directions.

Approach to application

5 The plaintiffs accepted that in order for them to obtain an interlocutory order restraining or controlling the conduct of the Corporations and Financial Services Committee, or the exercise of its powers, the plaintiffs were required to establish that there was a serious question to be tried and that the balance of convenience favoured the grant of the relief sought¹. The Attorney-General

1 See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 216-217 [8]-[10], 241 [91]; [2001] HCA 63. In relation to a stay, (Footnote continues on next page)

submitted that the plaintiffs faced a higher threshold; a requirement for "compelling grounds"² to be shown for the interlocutory injunction to be granted because, in substance, it was an injunction that restrained the administration or enforcement of an Act pending the final resolution of a challenge to its constitutional validity.

- 6 It is unnecessary to resolve that difference in approach because the plaintiffs cannot meet either threshold.

Summary

- 7 Given the lack of merit in the plaintiffs' substantive application for certiorari and declaratory relief and, further, given that the issues raised by the plaintiffs should generally be resolved by the Parliament, not the courts, the plaintiffs have failed to establish a *prima facie* case for relief. Whether the Corporations and Financial Services Committee has the power to make a direction requiring the attendance of a witness does not raise a serious question to be tried; and there is little, if any, probability that at a final hearing the plaintiffs would be entitled to the relief that they seek. Moreover, even if the plaintiffs had established that there was a serious question to be tried (and they have not), the balance of convenience would not favour granting the interlocutory relief that they seek.

- 8 The plaintiffs' interlocutory application should be dismissed with costs. These reasons will set out the relevant constitutional and legislative framework and the background to the application before turning to address the plaintiffs' contentions that the Corporations and Financial Services Committee does not have the power to make a direction requiring a witness to appear before the Committee for the purposes of the Franchising Inquiry.

Constitutional and legislative framework

- 9 The Corporations and Financial Services Committee was referred to in s 241(1) of the *Australian Securities Commission Act 1989* (Cth). That sub-section provided:

see *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* [No 1] (1986) 161 CLR 681 at 685; [1986] HCA 84; *Obeid v The Queen* (2016) 90 ALJR 447 at 450 [14]; 329 ALR 372 at 376; [2016] HCA 9.

- 2 See *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 155-156; [1986] HCA 58; *Davids Holding Pty Ltd v Byrnes* (1987) 71 ALR 251; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 274, 275-276; [1988] HCA 10; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 82 [66]; [2006] HCA 46.

3.

"As soon as practicable after the commencement of this Part and after the commencement of the first session of *each Parliament*, a joint committee of members of the Parliament ... shall be appointed." (emphasis added)

10 Section 241(3) provided that the appointment of members to the Committee was to be in accordance with each House's practice relating to the appointment of members of that House to serve on joint select committees of both Houses.

11 By reason of s 261 of the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act"), the Corporations and Financial Services Committee continues in existence. Section 242 of the ASIC Act provides that "[s]ubject to [that] Act, all matters relating to the Parliamentary Committee's powers and proceedings *must be determined by resolution of both Houses*" (emphasis added).

12 The Corporations and Financial Services Committee's powers and proceedings were determined by resolution of both Houses: by the House of Representatives on 1 September 2016 and by the Senate on 12 September 2016 ("the 2016 Resolutions"). Those Resolutions relevantly provide that:

"in accordance with section 242 of the *Australian Securities and Investments Commission Act 2001*, matters relating to the powers and proceedings of the [Corporations and Financial Services Committee] shall be as follows:

- (a) the committee consist of 10 members, 3 Members of the House of Representatives to be nominated by the Government Whip or Whips, 2 Members of the House of Representatives to be nominated by the Opposition Whip or Whips or by any minority group or independent Member, 2 Senators to be nominated by the Leader of the Government in the Senate, 2 Senators to be nominated by the Leader of the Opposition in the Senate and 1 Senator to be nominated by any minority group or independent Senator;

...

- (k) the committee or any subcommittee have power to:
 - (i) *call for witnesses to attend* and for documents to be produced;
 - (ii) conduct proceedings at any place it sees fit;
 - (iii) sit in public or in private;

4.

(iv) report from time to time; and

..." (emphasis added)

13 The terms of the 2016 Resolutions are important. The 2016 Resolutions identify the composition of the Corporations and Financial Services Committee and its powers. Relevantly, those powers include a power to call for witnesses to attend. It is that power – the power of the Corporations and Financial Services Committee to call for witnesses to attend – that the plaintiffs seek to challenge.

14 In addition to the 2016 Resolutions, the Senate resolved in 1988 to establish procedures to be observed by Senate committees for the protection of witnesses ("the 1988 Resolutions"). It is established practice for joint committees to follow Senate committee procedures when such procedures differ from the House³. The 1988 Resolutions relevantly state:

"In their dealings with witnesses, all committees of the Senate shall observe the following procedures:

1) A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.

...

3) A witness shall be given reasonable notice of a meeting at which the witness is to appear, and shall be supplied with a copy of the committee's order of reference, a statement of the matters expected to be dealt with during the witness's appearance, and a copy of these procedures.

4) A witness shall be given opportunity to make a submission in writing before appearing to give oral evidence.

5) Where appropriate, reasonable opportunity shall be given for a witness to raise any matters of concern to the witness relating to the witness's submission or the evidence the witness is to give before the witness appears at a meeting.

...

3 See Elder (ed), *House of Representatives Practice*, 7th ed (2018) at 648.

5.

- 7) A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private session, and shall be invited to give reasons for any such application. If the application is not granted, the witness shall be notified of reasons for that decision.
- 8) Before giving any evidence in private session a witness shall be informed whether it is the intention of the committee to publish or present to the Senate all or part of that evidence, that it is within the power of the committee to do so, and that the Senate has the authority to order the production and publication of undisclosed evidence.

...

- 10) Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.
- 11) Where a committee has reason to believe that evidence about to be given may reflect adversely on a person, the committee shall give consideration to hearing that evidence in private session.
- 12) Where a witness gives evidence reflecting adversely on a person and the committee is not satisfied that that evidence is relevant to the committee's inquiry, the committee shall give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence.

6.

- 13) Where evidence is given which reflects adversely on a person and action of the kind referred to in paragraph (12) is not taken in respect of the evidence, the committee shall provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission and appearance before the committee.
- 14) A witness may make application to be accompanied by counsel and to consult counsel in the course of a meeting at which the witness appears. In considering such an application, a committee shall have regard to the need for the witness to be accompanied by counsel to ensure the proper protection of the witness. If an application is not granted, the witness shall be notified of reasons for that decision.
- 15) A witness accompanied by counsel shall be given reasonable opportunity to consult counsel during a meeting at which the witness appears.
- ...
- 17) Reasonable opportunity shall be afforded to witnesses to make corrections of errors of transcription in the transcript of their evidence and to put before a committee additional material supplementary to their evidence.
- ..."

It will be necessary to return to consider the 1988 Resolutions later in these reasons.

- 15 If necessary, s 49 of the *Constitution* provides an additional source of power for the Corporations and Financial Services Committee to issue the October Directions. Section 49 of the *Constitution*, headed "Privileges etc of Houses", provides:

"The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and *the committees of each House*, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth." (emphasis added)

- 16 Section 49 of the *Constitution* provides a source of coercive authority for the two Houses of the Commonwealth Parliament and the members and committees of each House to summon witnesses or require production of

documents⁴, under pain of punishment for contempt; a power that can be traced to English practices pre-dating Federation⁵.

17 Section 50 of the *Constitution*, headed "Rules and orders", is also relevant. It provides:

"Each House of the Parliament may make rules and orders with respect to:

- (i) the mode in which its powers, privileges, and immunities may be exercised and upheld;
- (ii) the order and conduct of its business and proceedings either separately or jointly with the other House."

18 Moreover, the Commonwealth Parliament has exercised the power to declare its powers, privileges and immunities in the *Parliamentary Privileges Act 1987* (Cth). Section 5 of the *Parliamentary Privileges Act* has the effect that the Act does not displace the powers, privileges and immunities of each House, or of the members and *committees of each House*, as in force before the commencement of the Act, except to the extent that the Act expressly provides otherwise. The reference to "committees of each House" is important because "committee" is relevantly defined in that Act to mean "a committee of a House *or of both Houses*, including a committee of a whole House and *a committee established by an Act*"⁶ (emphasis added). The *Parliamentary Privileges Act* therefore applies to the Corporations and Financial Services Committee.

Facts

19 Retail Food Group Limited and its related entities ("the Retail Food Group") is a retail food franchisor for, among others, Donut King, Brumby's, Gloria Jean's, Pizza Capers, Crust Pizza and Michel's Patisserie. The first plaintiff, Mr Alford, was the Managing Director and Chief Executive Officer of the Retail Food Group from 28 October 2003 until 2 June 2015, the Managing Director until 30 June 2016 and thereafter a non-executive director until 3 July

4 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 558-559; [1997] HCA 25, citing *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157; [1955] HCA 36.

5 See *Egan v Willis* (1998) 195 CLR 424 at 476 [104]; [1998] HCA 71; May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 384, 400-401.

6 *Parliamentary Privileges Act*, s 3(1)(a).

2017. The second plaintiff, Ms Atkinson, was employed as an executive by two entities within the Retail Food Group from February 2015 to May 2017.

20 On 22 March 2018, the Senate resolved to refer certain matters to the Corporations and Financial Services Committee for inquiry and report regarding the operation and effectiveness of the Franchising Code of Conduct. On 12 July 2018, the Secretary of the Corporations and Financial Services Committee sent a letter to each plaintiff inviting them to give evidence to the Committee at a public hearing on 11 September 2018.

21 On 16 August 2018, the then Chair of the Corporations and Financial Services Committee made a further request for each plaintiff to appear, which included the following statement:

"If you are unwilling to appear on this date, I remind you that the [Corporations and Financial Services Committee] has the power to summon you to appear before it. Failure to comply with an order of the [Corporations and Financial Services Committee] and refusal to attend may be treated as a contempt of the Senate."

22 On 3 September 2018, the plaintiffs, through their solicitors, declined to give evidence to the Corporations and Financial Services Committee.

23 On 19 September 2018, the Corporations and Financial Services Committee wrote to each plaintiff requesting their attendance at a public hearing scheduled for 16 October 2018 and setting out a list of some of the matters it wished to ask them. The 1988 Resolutions were attached.

24 On 3 October 2018, the Corporations and Financial Services Committee wrote to each plaintiff asking them to provide written answers to questions on notice. On 18 October 2018, and before the plaintiffs had responded to the 3 October letter, the Secretary of the Corporations and Financial Services Committee sent a letter to each plaintiff directing them to appear before the Corporations and Financial Services Committee on 26 November 2018, referred to earlier as the October Directions. Each letter stated:

"Failure to comply with this order will be reported to the Senate for resolution under the *Parliamentary Privileges Act 1987* and related resolutions of the Senate agreed to on 25 February 1988, and may be treated by the Senate as a contempt."

The 2016 Resolutions and the 1988 Resolutions were attached to the October Directions.

25 On 19 November 2018, the plaintiffs filed an application in this Court seeking a writ of certiorari quashing the October Directions; or, in the alternative, a declaration that each of the October Directions is void. That application was

supported by an affidavit sworn by one of the plaintiffs' solicitors. A notice under s 78B of the *Judiciary Act 1903* (Cth) was also filed together with the summons seeking interlocutory relief.

26 It is against that background that the legal question sought to be agitated by the plaintiffs is to be assessed, namely whether the Corporations and Financial Services Committee has the power to make a direction requiring the attendance of each plaintiff on 26 November 2018.

Justiciable controversy?

27 Where, as here, there is an apparently validly appointed joint committee – the Corporations and Financial Services Committee – which has a power to direct a person to attend as a witness, it is difficult to identify a role for the courts in relation to that exercise of power.

28 Article 9 of the *Bill of Rights 1688*⁷ declares that "[p]roceedings in Parliament, ought not to be impeached or questioned in any Court". Pursuant to s 16(2) of the *Parliamentary Privileges Act*, for the purposes of Art 9 of the *Bill of Rights*, "proceedings in Parliament" is extended to include all words spoken and acts done in the course of or for the purposes of the transacting of the business of a House or committee, and includes the giving of evidence before a committee.

29 As is apparent, the plaintiffs' application for interlocutory relief faces an immediate hurdle. Given the terms of Art 9 of the *Bill of Rights 1688* (applying by virtue of s 49 of the *Constitution* and s 16 of the *Parliamentary Privileges Act*), acts done for the purposes of the transacting of the business of a committee may not be "questioned in any Court". That approach is reflected in the jurisprudence of this Court. In *R v Richards; Ex parte Fitzpatrick and Browne*⁸, Dixon CJ explained that "it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise". Similarly, in *Egan v Willis*⁹, Gaudron, Gummow and Hayne JJ explained that questions concerning the existence of powers and privileges of a legislative chamber may present justiciable issues when they are elements in a controversy arising in the

7 1 W & M Sess 2 c 2.

8 (1955) 92 CLR 157 at 162.

9 (1998) 195 CLR 424 at 438-439 [5].

courts under the general law¹⁰ but they should not be entertained in the abstract and apart from a justiciable controversy.

30 Thus, although the plaintiffs' contentions will be addressed, that analysis should not be construed as acceptance that all of the issues sought to be raised by the plaintiffs were justiciable. Moreover, even if the issues raised were capable of being justiciable, the plaintiffs' concerns about their attendance before the Corporations and Financial Services Committee on 26 November 2018 were ill-defined and hypothetical.

A joint committee is a committee

31 The plaintiffs contended that because the Corporations and Financial Services Committee is a joint committee, it does not fall within the meaning of "the committees of each House" in s 49 of the *Constitution*. That contention does not assist the plaintiffs.

32 First, s 49 of the *Constitution* recognises that there will be "committees of each House". There is nothing to suggest that the phrase would not extend to encompass joint committees¹¹. Second, this Court has held that that section should not be given a restricted meaning without clear reason¹². That construction is reinforced by the reference to joint and statutory committees in s 3 of the *Parliamentary Privileges Act*, which suggests that Parliament intends joint and statutory committees to be treated as "committees of each House" for the purposes of ascertaining the powers, privileges and immunities of those committees.

Section 43 of the *Constitution*

33 Section 43 of the *Constitution* provides that one member of one House of Parliament cannot sit as a member in the other House. The plaintiffs contended that this prohibition somehow operated on the power of joint committees to compel witnesses, because it was unclear how the Houses would address any contempt on the part of the plaintiffs. Section 43 does not assist the plaintiffs.

10 For example, in an application for a writ of habeas corpus, as in *R v Richards* (1955) 92 CLR 157.

11 See Lindell, "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383 at 392-393 and fn 41.

12 *R v Richards* (1955) 92 CLR 157 at 165. See also Lindell, "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383 at 393.

34 As the October Directions stated, and consistent with established practice¹³, in the event the plaintiffs failed to attend before the Corporations and Financial Services Committee on 26 November 2018, that failure would be reported to the Senate for resolution under the *Parliamentary Privileges Act* and the 1988 Resolutions and that failure might be treated by the Senate as a contempt.

Power to direct person to attend

35 As explained earlier, s 242 of the ASIC Act provides that, subject to that Act, "all matters relating to the [Corporations and Financial Services Committee's] powers and proceedings must be determined by resolution of both Houses". Both Houses have made the 2016 Resolutions, which relevantly provide, for the purposes of s 242 of the ASIC Act, that the Corporations and Financial Services Committee shall have certain powers and follow certain procedures. In particular, the 2016 Resolutions provide that the Corporations and Financial Services Committee or any sub-committee shall have the power to "call for witnesses to attend and for documents to be produced".

36 The plaintiffs' contention that those Resolutions empowering the Corporations and Financial Services Committee to "call for witnesses to attend and for documents to be produced" do not empower it to issue a direction that requires attendance is to be rejected. The phrase "call for witnesses" must be understood in its proper constitutional and historical context¹⁴.

37 As the Attorney-General submitted, parliamentary committees occupy a particular place in the constitutional system and operate according to their own rules and procedures, including procedures for handling non-compliance and contempt. The ASIC Act does not define the powers of the Corporations and Financial Services Committee; it expressly leaves those topics to the Houses of Parliament. Moreover, it must be recalled that the Corporations and Financial

13 See Elder (ed), *House of Representatives Practice*, 7th ed (2018) at 648, 678; Laing (ed), *Odgers' Australian Senate Practice*, 14th ed (2016) at 500. See also Campbell, *Parliamentary Privilege* (2003) at 152-153, 163-164.

14 See [16] above. See also May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 384; Laing (ed), *Odgers' Australian Senate Practice*, 14th ed (2016) at 499-500. See generally *Lange* (1997) 189 CLR 520 at 558-559; *Egan v Willis* (1998) 195 CLR 424 at 499 [148].

Services Committee itself does not punish for non-compliance. That is the responsibility of the Senate¹⁵.

38 The fact that the ASIC Act confers other compulsory powers on different types of administrative bodies¹⁶ says nothing about the existence or extent of the power conferred on the Corporations and Financial Services Committee by the 2016 Resolutions for the purposes of s 242 of the ASIC Act.

Transfer of functions

39 At the establishment of the Commonwealth in 1901, the House of Commons in the United Kingdom had a broad power of inquiry, or "inquisitorial function"¹⁷.

40 The plaintiffs submitted that, based on the decision of Forster J in *Attorney-General (Cth) v MacFarlane*¹⁸, the inquisitorial function had not been transferred to the Houses of Parliament by operation of s 49 of the *Constitution*, but rather, only those powers, privileges and immunities necessary for, or relevant to, the legislative function. In support of this contention, the plaintiffs cited the following dicta from *MacFarlane*¹⁹:

"If it is true to say that the House of Commons had in 1900 these two functions, legislative and inquisitorial, it seems plain to me that the only function committed by the Imperial Parliament to the Commonwealth Parliament was the legislative function and not the inquisitorial function."

41 *MacFarlane* does not assist the plaintiffs. The difficulty for the plaintiffs is twofold.

15 See Elder (ed), *House of Representatives Practice*, 7th ed (2018) at 648, 678; Laing (ed), *Odgers' Australian Senate Practice*, 14th ed (2016) at 500. See also Campbell, *Parliamentary Privilege* (2003) at 152-153, 163-164.

16 See, eg, ASIC Act, Pt 3, Div 6 and Pt 10, Div 3.

17 See Lindell, "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383 at 385 and the authorities cited therein. See also Australia, *Powers Over and Protection Afforded to Witnesses before Parliamentary Committees*, Paper No 168, (1972) at 3-6 [12]-[22].

18 (1971) 18 FLR 150 at 156. See also Australia, *Powers Over and Protection Afforded to Witnesses before Parliamentary Committees*, Paper No 168, (1972).

19 (1971) 18 FLR 150 at 157.

42 First, in *MacFarlane*, the challenge was to a resolution of the Legislative Council of the Northern Territory, which had established a committee, known as the Committee for the Investigation of Administrative Actions. The resolution was held to be invalid. In that case, it was conceded by the plaintiff challenging the appointment that the Legislative Council had power to set up committees of itself to make inquiries if done in aid of its proper legislative functions²⁰. Forster J acknowledged that once such a committee was constituted, the Legislative Council had power to define the committee's powers, privileges and immunities and, importantly, "in particular, the committee may be given power to summon witnesses to give evidence and produce documents"²¹. That latter power to summon witnesses was not suggested to be part of or confined to the "inquisitorial function".

43 Second, Forster J suggested that in that context – where the legislative function had been transferred – inquiries might be restricted to those necessary to aid that legislative function²². Even if the Commonwealth Parliament were limited to conducting inquiries *in aid of its legislative function* (an issue which does not need to be addressed), the plaintiffs do not contend, and there is nothing to suggest, that the Corporations and Financial Services Committee is acting other than in accordance with or in aid of proper legislative functions. It is not necessary to consider this question further.

Separation of powers

44 The plaintiffs further contended that there were constitutional principles, derived from the separation of powers, that constrained the conferral on a parliamentary committee of a power to inquire, including the summoning of witnesses. That contention does not assist the plaintiffs.

45 The Corporations and Financial Services Committee is tasked with inquiring and reporting, not making legally binding or final determinations of guilt or innocence. The October Directions, issued as part of the Franchising Inquiry, do not represent an exercise of the judicial power of the

20 *MacFarlane* (1971) 18 FLR 150 at 157.

21 *MacFarlane* (1971) 18 FLR 150 at 157-158.

22 See *MacFarlane* (1971) 18 FLR 150 at 157-158. See also Australia, *Powers Over and Protection Afforded to Witnesses before Parliamentary Committees*, Paper No 168, (1972) at 6-8 [23], [27]-[28]. cf Lindell, "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383 at 386.

Commonwealth²³. Indeed, s 49 of the *Constitution* has been held to "provide[] the source of coercive authority for each chamber of the Parliament to summon witnesses, or to require the production of documents, under pain of punishment for contempt"²⁴ and described as an "unequivocal preservation ... of the ancient powers, privileges and immunities of the Houses of the Parliament"²⁵.

46 The plaintiffs' further contention that this Court should construe the principle of separation of powers as operating to strip the Parliament of important aspects of its power to inquire also does not assist them. A legislative body cannot legislate effectively without information about the conditions which the legislation is intended to affect or change²⁶.

47 If the plaintiffs' attack is directed to the possibility of contempt powers being exercised against the plaintiffs, this Court has upheld the validity of Parliament's contempt power and rejected an argument that the separation of powers required a restrictive or secondary meaning to be given to s 49 of the *Constitution*²⁷.

Legality

48 Next, the plaintiffs contended that the principle of legality requires para (k)(i) of the 2016 Resolutions to be "read down" to avoid it constituting a coercive power to examine citizens, who the plaintiffs' counsel referred to as "strangers". That contention does not assist the plaintiffs for a number of reasons.

49 As seen earlier, ss 49 and 50 of the *Constitution* expressly provide for the Parliament to control and declare its powers, privileges and immunities,

23 See Lindell, "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383 at 390.

24 *Lange* (1997) 189 CLR 520 at 558-559.

25 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 622 [142]; [2007] HCA 29.

26 See *Egan v Willis* (1998) 195 CLR 424 at 499-500 [148]-[149], citing *McGrain v Daugherty* (1927) 273 US 135 at 175 and *Quinn v United States* (1955) 349 US 155 at 160-161.

27 *R v Richards* (1955) 92 CLR 157 at 167.

and make rules and orders with respect to the mode in which those powers, privileges and immunities should be exercised and upheld²⁸.

50 Second, it is unclear what right the plaintiffs allege is being abrogated so as to engage the principle of legality. In Australia the "right to silence" is not a constitutional or legal principle of immutable content²⁹: whilst reference was made to such a "right" by the plaintiffs in their oral submissions, this contention was not developed or explained. The plaintiffs' submissions also referred to a defamation action the plaintiffs have commenced against Fairfax Media Limited arising from articles published in the *Sydney Morning Herald* in relation to which the plaintiffs state they have been accused of serious misconduct relating to the Retail Food Group franchise business. The plaintiffs' submissions asserted that they are concerned that "[t]hese allegations are likely to be the subject of questioning by the Committee, which the plaintiffs apprehend will result in further damage to their reputation from the publicity of these allegations, which would be protected by absolute or qualified privilege". That contention was not developed in oral submissions.

51 In any event, consistent with the Parliament judging the occasion and the manner of the exercise of its own powers, the Senate has made provision through the 1988 Resolutions to deal with the protection of witnesses³⁰. Those protections are extensive. The plaintiffs have not yet sought to avail themselves of those protections. The principle of "legality" arguably has no work to do.

X7 v Australian Crime Commission

52 Next, the plaintiffs contended that, contrary to this Court's decision in *X7 v Australian Crime Commission*³¹, the Corporations and Financial Services Committee impermissibly made the October Directions "in secret" and exposed the plaintiffs to imprisonment for contempt if they failed to appear or answer questions before the Committee.

53 The October Directions are before the Court and, subject to the protections set out in the 1988 Resolutions, the proposed hearing on 26 November 2018 will

28 See also Art 9 of the *Bill of Rights 1688* and s 16 of the *Parliamentary Privileges Act*.

29 See *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 117 [39]; [2013] HCA 29.

30 See also in this regard, s 16 of the *Parliamentary Privileges Act*.

31 (2013) 248 CLR 92.

be public. It is unclear how the process of a public inquiry can be equated, as the plaintiffs contended, to the "inquisitorial procedures" of the Court of Star Chamber. Finally, the powers of the Parliament to punish individuals for contempt, derived from s 49 of the *Constitution*, were upheld by this Court in *R v Richards*³².

Lange

54 The plaintiffs also submitted, based on the decision in *Lange v Australian Broadcasting Corporation*³³, that the power of the Parliament or its committees to compel witnesses to appear was somehow inconsistent with the implied freedom of political communication. *Lange* does not assist the plaintiffs and it does not provide any basis to accept the plaintiffs' contention to re-open the decision in *R v Richards*.

55 In describing the constitutional framework giving rise to the implied freedom, *Lange* expressly recognised that, as stated earlier in these reasons, s 49 of the *Constitution* "provides the source of coercive authority for each chamber of the Parliament to summon witnesses, or to require the production of documents, under pain of punishment for contempt"³⁴.

Conclusions

56 The Corporations and Financial Services Committee exists. It has a power to direct witnesses to attend before it. It has exercised that power and directed the plaintiffs to appear before it. The plaintiffs have not identified any reason why such an exercise of power by the Committee should be reviewed by this Court or any basis for this Court to find the exercise of that power invalid.

57 Consistent with the Parliament judging the occasion and the manner of the exercise of its own powers, the Senate has made provision through the 1988 Resolutions to deal with the protection of witnesses that appear before committees. The Corporations and Financial Services Committee adopted those Resolutions as part of its procedures. The protections provided by the 1988 Resolutions are extensive. And there is nothing to suggest that the Corporations and Financial Services Committee would not comply with its own procedures. Put in different terms, even if the issues raised were justiciable, the plaintiffs' concerns about their attendance before the Committee on 26 November 2018 were not only ill-defined but hypothetical.

32 (1955) 92 CLR 157 at 167.

33 (1997) 189 CLR 520.

34 (1997) 189 CLR 520 at 558-559.

Orders

58 The plaintiffs' application by summons filed 19 November 2018 should be dismissed. Costs should follow the event. The parties, and the Attorney-General of the Commonwealth, should have the matter relisted for directions to address the future management of the plaintiffs' substantive application.