HIGH COURT OF AUSTRALIA

Sankey

Vs.

Whitlam

(Gibbs A.C.J., Stephen, Mason, Jacobs and Aickin JJ.)

09.11.178

JUDGMENT

GIBBS A.C.J.

On 20th November 1975 informations were laid under the Justices Sankey, against Mr. Whitlam, who had recently ceased to be Prime Minister of Australia, and three other gentlemen who had been members of his Ministry: Mr. Connor, who had been Minister for Minerals and Energy, Dr. Cairns, who had been Treasurer, and Mr. Justice Murphy (as he now is) who had been Attorney-General. For convenience I shall refer to these four former Ministers as "the defendants". One of them, Mr. Connor, has since died. Two informations were laid against each defendant, and a summons was issued on each information. The first information alleged an offence against s. 86 of the Crimes Act 1914 (Cth), (as amended) ("the Crimes Act"), and the second a conspiracy at common law. The informations were respectively in the following terms, omitting immaterial words:

1. "That on or about the thirteenth day of December, in the year of Our Lord one thousand nine hundred and seventy four in Australia" (the defendants) "conspired with each other to effect a purpose that was unlawful under a law of the Commonwealth, that is to say to effect the borrowing by the Commonwealth of Australia from overseas sources a sum in the currency of the United States of America not exceeding the equivalent of $4,000 million in contravention of the Financial Agreement, 1927 as amended, the Constitution Alteration (State Debts) Act, 1928 and the Financial Agreement Act, 1944 as amended."
2. "That on or about the thirteenth day of December, in the year of Our Lord one thousand nine hundred and seventy four within New South Wales and the Australian Capital Territory" (the defendants) "conspired with each other to deceive His Excellency the Governor-General of Australia, the Honourable John Robert Kerr, K.C.M.G., K. St. J., in that they being members of the

Federal Executive Council and at a meeting of the same agreed with each other to recommend for the approval of the said Governor-General inter alia that the said Honourable Reginald Francis Xavier Connor be authorised to borrow for temporary purposes a sum in the currency of the United States of America not exceeding the equivalent of $4,000 million, notwithstanding that at the time of the said agreement the said proposed borrowing was not for nor intended to be for temporary purposes only and was in contravention of the Financial Agreement, 1927 as amended, the Constitution Alteration (State Debts) Act, 1928 and the Financial Agreement Act, 1944 as amended."

2. The matters came before Mr. Leo S.M. in the Court of Petty Sessions at Queanbeyan. Mr. Leo first heard argument on questions of jurisdiction and on whether the informations charged offences known to the law. He gave his decision on these questions on 15th March 1976. He ruled, inter alia, that the Financial Agreement is a law of the Commonwealth within s. 86 of the Crimes Act, and that the first information discloses an offence against that section. He announced that he would proceed to take the evidence for the prosecution under s. 41 of the Justices Act. Two of the defendants, Messrs. Whitlam and Connor, then applied to the Supreme Court of New South Wales for orders in the nature of certiorari, prohibition and mandamus and for a declaration that the magistrate should not proceed further with the hearing of the informations but should discharge the defendants. Their applications were heard by the Court of Appeal, which dismissed them: Connor v. Sankey (1976) 2 NSWLR 570 . One question raised by these applications was whether the magistrate was correct in holding that the first information, laid under s. 86 of the Crimes Act, alleged an offence known to the law. The majority of the Court (Moffitt P. and Reynolds J.A.) declined to answer that question. They held that it was estalished by the decision of the Full Court of New South Wales in Ex parte Cousens; Re Blacket (1946) 47 SR (NSW) 145 that the Supreme Court, in the exercise of its supervisory power under the prerogative writs, would not interfere with the decision of a magistrate conducting committal proceedings, and that it would not be proper to usurp the authority of a magistrate conducting such proceedings by making a declaration as to the order he should make. The third member of the Court of Appeal, Street C.J., held that Ex parte Cousens; re Blacket (2) should not be followed and that the Supreme Court had power to grant prohibition against a magistrate conducting committal proceedings if there were a want or excess of jurisdiction; he further held that if the defendants could establish that the informations alleged offences not known to the law declaratory relief should be granted. However, he rejected the defendants' arguments, and held inter alia that the first information alleged an offence known to the law.

3. After the decision of the Court of Appeal was pronounced, the proceedings in the Court of Petty Sessions were resumed. There had been issued, on behalf of Mr. Sankey, a number of subpoenas duces tecum; those with which we are concerned were addressed, respectively, to Mr. D. F. N. Reid, Secretary of the Executive Council, Parliament House, Canberra; The Secretary, Department of Minerals and Energy, Canberra; Mr. A. R. G. Prowse, Department of the Treasury, Canberra; Sir Frederick Wheeler, Secretary of the Treasury, Canberra; and Mr. John O. Stone, Deputy Secretary (Economic), Department of the Treasury, Parkes. A second subpoena duces tecum addressed to Sir Frederick Wheeler had been issued on behalf of Mr. Whitlam. Counsel were given leave to appear on behalf of the Commonwealth to object to the production of some, but not all, of the documents covered by these subpoenas, on the ground that they belonged to a class of documents which the public interest required should not be disclosed. Affidavits, sworn respectively by Mr. A. T. Carmody (the Secretary to the Department of the Prime Minister and Cabinet), Mr. Lynch (the Treasurer) and Mr. Nixon (the Minister of State for Transport and the Acting Minister of State for National Resources), were filed in support of the objections. It will be necessary to refer in more

detail, later in this judgment, to the nature of the documents in question and to the form of objection raised. Counsel for Mr. Whitlam, Mr. Connor and Dr. Cairns supported the objection made by the Commonwealth, even in respect of the documents mentioned in the subpoena issued on behalf of Mr. Whitlam, but went further, and argued that the documents to whose production the Commonwealth had not objected should not be produced. It will be convenient to refer to these objections as claims to privilege, although the expression "Crown privilege" is now regarded as inaccurate to describe the rules of evidence with which we are concerned. The argument as to the admissibility of the documents extended over some days. Evidence was given by Mr. Wentworth M.H.R. and Senator Wright that certain of the documents had been tabled in the House of Representatives and in the Senate. It appears that neither House gave leave to Mr. Wentworth or Senator Wright to give evidence of this kind, and for this reason Mr. Leo later held that the evidence was admitted in breach of parliamentary privilege and should be disregarded. This evidence had not been completed when Mr. Leo decided to discontinue the proceedings on the ground that he was disqualified by reason of possible bias. This decision led to further litigation in the Supreme Court, which ordered the magistrate to continue the hearing: Sankey v. Whitlam (1977) 1 NSWLR 333 . The defendants other than Mr. Justice Murphy applied for special leave to appeal to this Court from that decision but their applications were eventually dismissed by consent.

4. Thereafter Mr. Leo again resumed hearing argument and evidence in relation to the question whether the documents were privileged from production. On 3rd November 1977 he gave his decision. He upheld the claim to privilege for all documents for which privilege was claimed except certain documents described as the "Loan Council documents" which he decided to inspect. He also decided to inspect all documents the subject of the subpoenas for which privilege was not claimed by the Commonwealth. An objection had also been taken, in Mr. Carmody's affidavit, to oral evidence being adduced relating to certain discussions concerning the formulation or carrying out of government policy, but Mr. Leo gave no ruling on that question and it was agreed in argument before us that it would be premature to deal with it at the present stage. After inspection, Mr. Leo decided that he would not order the production of the Loan Council documents, but would order the production of all other documents for which privilege had not been claimed on behalf of the Commonwealth.

5. Mr. Sankey then commenced proceedings against the defendants (other than Mr. Connor who was deceased), the magistrate and the Commonwealth in the Supreme Court of New South Wales for declarations that the documents to which the magistrate had accorded privilege should be produced and could be used if otherwise admissible in the committal proceedings. He also sought an order in the nature of mandamus requiring the magistrate to order the production of the documents or alternatively an order that the Commonwealth produce the documents for inspection by the Court. Mr. Whitlam lodged a cross-claim by which he sought declarations that the Financial Agreement 1927, as amended, was not a law of the Commonwealth within the meaning of s. 86 (1) (c) of the Crimes Act and that the effecting of a borrowing by the Commonwealth is not, by reason of such borrowing being in contravention of the Financial Agreement 1927, as amended, the effecting of a purpose that is unlawful under a law of the Commonwealth within the meaning of s. 86 (1) (c) of the Crimes Act. Mr. Whitlam further sought declarations that the documents for which the Commonwealth had not claimed privilege nevertheless should not be disclosed or admitted in evidence. Upon the application of the Attorney-General of the Commonwealth this cause pending in the Supreme Court has been removed into this Court. By consent, an order has been made that Mr. Justice Murphy cease to be a party to the cause so removed.

Declaratory Relief.

6. At the outset it is necessary to consider an argument advanced by counsel for Dr. Cairns that the Court has no power to grant declaratory relief on the application of an informant in committal proceedings, or alternatively that if it has such power it would not be a proper exercise of its discretion to use it. Counsel drew a distinction between the position of an informant and that of a defendant in such proceedings. He submitted that where an accused person is wrongly denied the protection of the law, and his liberty is endangered, the Court will make a declaration; accordingly, he said, a declaration could be made on the cross-claim. However he submitted that no similar reason exists for making a declaration on the application of an informant.

7. It is well established that the power of the court to make a declaration, under a provision such as s. 75 of the Supreme Court Act, 1970 (N.S.W.), as amended, or O. 26, r. 19 of the Rules of this Court, is a very wide one: Forster v. Jododex Aust. Pty. Ltd. [1972] HCA 61; (1972) 127 CLR 421, at pp 435-436 . It is clear enough that the power of the court is not excluded because the matter as to which a declaration is sought may fall for decision in criminal proceedings. Indeed in Dyson v. Attorney-General (1911) 1 KB 410 , which is one of the foundations of the law on this subject, it was held that the court had power to make a declaration that the plaintiff was not under any obligation to comply with the requisitions contained in a notice sent to him by the Commissioners of Inland Revenue, notwithstanding that neglect to comply with the notice was an offence - see especially per Farwell L.J. (1911) 1 KB, at p 422 . Since that time there have been many cases in which the courts have made declarations in relation to questions which could have fallen for decision in criminal proceedings. A reference to some of these cases is given in Young: Declaratory Orders (1975) par. 2005, but it is enough for me to refer to only two of them. In Munnich v. Godstone Rural District Council (1966) 1 WLR 427, at pp 435, 437, 438; (1966) 1 All ER 930, at pp 933, 935, 939 it was held that the fact that the question of law which was in issue in that case had already arisen in criminal proceedings and had been decided adversely to the plaintiff was no bar to the making of the declaration which the plaintiff sought. In this Court, in I.X.L. Timbers Pty. Ltd. v. Attorney-General (Tas.) [1963] HCA 10; (1963) 109 CLR 574 , Windeyer J. made a declaration on a question of constitutional law that arose in a pending prosecution, although he expressed the view that it would have been preferable if the matter had proceeded before the magistrate and been brought to this Court on appeal if necessary (1963) 109 CLR, at pp 575-576 .

8. Most of the cases in which declarations have been made in matters which could have been, or were, the subject of criminal proceedings were cases where the criminal offence consisted of a breach of a regulatory provision, such as a failure to comply with an administrative requirement, a planning provision or a by-law. It has accordingly been suggested that a distinction should be drawn between offences involving moral turpitude - mala in se - and breaches of statutory and administrative regulations and prohibitions - mala quia prohibita - and that it is only in the latter case that a declaration will be made: see Zamir: The Declaratory Judgment (1962), pp. 215-224. There is however no authority that would deny to the courts the power to make a declaration in matters which could be or have been the subject of proceedings for crimes involving moral turpitude, and it would be most unsatisfactory to make the power of the court depend upon so arbitrary and uncertain a test, although the nature of the criminal conduct alleged to have been committed or contemplated will no doubt be one of the circumstances to be considered in deciding in what manner the discretion of the court should be exercised. Some of the cases to which I shall later refer provide illustrations of circumstances in which there would be power to make declarations which would have the effect of interfering with criminal proceedings in respect of offences which involve serious criminality in the ordinary sense.

9. It seems that the question whether a declaratory judgment may be made in relation to pending

committal proceedings has arisen only in New South Wales. The discussion of the question in the courts of that State often begins with the decision in Ex parte Cousens; Re Blacket (1946) 47 SR (NSW) 145 . In that case the defendant, who was charged with treason allegedly committed in Japan and was brought before an examining magistrate, sought prohibition to restrain the magistrate from further proceeding on the ground that the courts of New South Wales had no jurisdiction to adjudicate upon the charge. Prohibition was refused, and it appears that the ground of the decision - or at least one of the grounds - was that the Supreme Court has no power to interfere by a prerogative writ with a magistrate conducting committal proceedings, because such proceedings are executive in their nature. However I am, with respect, unable to agree that it is involved in this decision that the Supreme Court has no power to make a declaration which will affect the conduct of committal proceedings. The two sorts of relief are governed by different principles, and if the decision of a magistrate is immune from review by means of the prerogative writs it does not follow that a declaration cannot be made in relation to the subject matter of the proceedings - so much is recognized in the judgment of Walsh J. in Forster v. Jododex Aust. Pty. Ltd. (1972) 127 CLR, at p 428 . On the other hand, if prohibition does lie, a declaration can nevertheless be made, for the existence of an alternative remedy is no bar to the making of a declaration, but merely a matter to be weighed by the court in the exercise of its discretion. For these reasons I do not consider it necessary in the present case to consider whether Ex parte Cousens; Re Blacket (1946) 47 SR (NSW) 145 was correctly decided.

10. As Jordan C.J. pointed out in Ex parte Cousens; Re Blacket (1946) 47 SR (NSW), at p 147 : "In substance, a committing magistrate determines nothing, except that in his opinion a prima facie case has been made out for committing the accused for trial." The Attorney-General, in deciding whether or not to present an indictment, will not be bound by the decision of the magistrate as to whether a prima facie case has been made out. These circumstances, however, seem to me to be irrelevant to the question whether the court has power to make a declaration which will affect the conduct of committal proceedings. The word "right", in the expression "declarations of right" in s. 75 of the Supreme Court Act, 1970 (N.S.W.) and O. 26, r. 19 is used in a sense that is wide and loose. It includes what might more precisely be described as privileges, powers and immunities. And the power to make a declaration extends to enable a plaintiff to have it declared that he is under no duty or liability to the defendant - that was established by Guaranty Trust Co. of New York v. Hannay & Co. (1915) 2 KB 536 as well as by Dyson v. Attorney-General (1911) 1 KB 410 . There is no reason in principle why a declaration should not be made that committal proceedings have been invalidly instituted or wrongly continued against the person seeking the declaration. For example, if the courts of New South Wales had no jurisdiction to entertain the charge brought against the defendant in Ex parte Cousens; Re Blacket (1946) 47 SR (NSW) 145 it would in my opinion have been within the power of the Supreme Court to make a declaration accordingly. Another example is provided by Reg. v. Schwarten; Ex parte Wildschut (1965) Qd R 276 . In that case the Full Court of Queensland issued prohibition to a magistrate to restrain him from wrongly proceeding with the hearing of a committal proceeding in respect of a charge of manslaughter which had been commenced by another magistrate. Whether or not prohibition lay in such a case, the court could in my opinion have made an appropriate declaration.

11. Not all judges in New South Wales have shared the view of the majority of the Court of Appeal in Connor v. Sankey (1976) 2 NSWLR 570 or have regarded the decision in Ex parte Cousens; Re Blacket as authority preventing the making of declarations in relation to the conduct of committal proceedings. In Bacon v. Rose (1972) 2 NSWLR 793 . Street C.J. held that if it had been established that committal proceedings had been begun without the prior approval of the Minister, which was made by statute a condition precedent to the institution of proceedings for the offence in question,

he could and would have made a declaration to that effect. In the event, however, he found that the plaintiff had not made out her entitlement to the declaration sought. In Willesee v. Willesee (1974) 2 NSWLR 275 Holland J. made a declaration that the plaintiff (who was charged with assault) was entitled, under the First Offenders (Women) Act, 1918 (N.S.W.) to have the hearing of committal proceedings conducted in private and otherwise in accordance with the provisions of that Act. On the other hand in Acs v. Anderson (1975) 1 NSWLR 212 the Court of Appeal upheld a decision of Holland J. who had refused, in his discretion, to make a declaration that the liquidator of a company had power to waive professional privilege claimed by a solicitor called to give evidence at committal proceedings of instructions given to him by persons acting on behalf of the company. The majority of the Court of Appeal left open the question whether a declaration could have been obtained in such a case. Finally in Bourke v. Hamilton (1977) 1 NSWLR 470 Needham J. held that if it were demonstrated that the evidence taken on behalf of the prosecution at committal proceedings was not such as would have enabled a magistrate correctly applying the law to have formed the opinion that a prima facie case had been made out, he had power to make a declaration and would be prepared to exercise the power. However after reviewing the evidence he was not satisfied that it had been established that no charge could properly result in the committal of the plaintiffs for trial and he declined to make a declaration.

12. Of these cases Bacon v. Rose and Willesee v. Willesee present little difficulty. In the former case it was claimed that the plaintiff was exposed to proceedings that had been wrongly brought, and in the latter that the proceedings were being conducted in a manner contrary to that provided by statute. There was in these cases clear power to grant a declaration. In both cases the question involved was principally one of law and the decision of that question was determinative, in the first case, of whether the proceedings should continue and, in the second case, of whether they should be conducted in public or in private. In these circumstances there were good reasons for exercising the discretionary power of the court by granting a declaration. Similar considerations apply to the cross-claim brought by Mr. Whitlam for the declarations as to the Financial Agreement 1927. If the provisions of that Agreement are not a "law of the Commonwealth" within s. 86 (1) (c) of the Crimes Act, the charges against the defendants under that section cannot be sustained. In my opinion the court has power to declare that a charge brought against an accused person is one not known to the law, since the accused has a "right" not to be exposed to proceedings that have no legal substance. Of course in exercising its discretion the court will have regard to the power of the examining magistrate to commit the accused for trial for an offence different from that charged in the information (see Justices Act, ss. 30,41) but in the present case the circumstances are such that it is quite improbable that evidence given on committal proceedings on the charge under s. 86 (1) (c) could make out a prima facie case of any other offence (except possibly that of conspiracy which is already charged).

13. The question whether the power to grant declaratory relief extends to enable the court to declare that particular evidence is admissible or inadmissible, or that the evidence led by an informant is sufficient to make out a prima facie case, is a much more difficult one, because it is not so clear, in such cases, that the plaintiff has any "right", even within the widest sense of that word, in respect of which he can seek relief. Grave doubts on this point were expressed by Hutley J.A. (with whom Moffitt P. agreed) in Acs v. Anderson (1975) 1 NSWLR, at pp 215-217 , but I need not consider whether there would be power to grant declaratory relief in all such cases. In my opinion it would be within power to grant a declaration of the kind sought by Mr. Sankey in the present case. It seems to me that when an informant has properly required the production on subpoena of an admissible document, and the Commonwealth has objected to the production of the document on the ground that the public interest requires that it should not be disclosed, it is possible to regard the

Commonwealth as asserting, against the informant as well as against the court, a "right" to withhold production of the document, and that in those circumstances the court has power to grant declaratory relief if the objection is held to be untenable. The same reasoning would not justify the making of a declaration that documents for which privilege was not claimed should not be admitted, but as will appear I need not decide whether it would be proper to make a declaration in such a case.

14. In any case in which a declaration can be and is sought on a question of evidence or procedure, the circumstances must be most exceptional to warrant the grant of relief. The power to make declaratory orders has proved to be a valuable addition to the armoury of the law. The procedure involved is simple and free from technicalties; properly used in an appropriate case the use of the power enables the salient issue to be determined with the least possible delay and expense. But the procedure is open to abuse, particularly in criminal cases, and if wrongly used can cause the very evils it is designed to avoid. Applications for declarations as to the admissibility of evidence may in some cases be made by an accused person for purposes of delay, or by a prosecutor to impose an additional burden on the accused, but even when such an application is made without any improper motive it is likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process. I am not intending to criticize those concerned with the conduct of Bourke v. Hamilton (1977) 1 NSWLR 470 , or to show any disrespect for the careful judgments delivered in that matter - indeed I have derived much assistance from them - when I say that that case provides an example of the way in which criminal proceedings may be needlessly protracted if they are interrupted by an application for a declaration - in the end the declaration sought was refused but the proceedings had been delayed for the space of almost a year. The present case itself is another regrettable example of the delay that can be caused by departures from the normal course of procedure. For these reasons I would respectfully endorse the observations of Jacobs P. (as he then was) in Shapowloff v. Dunn (1973) 2 NSWLR 468, at p 470 , that a court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order. Although these remarks may be no more than mere "administrative cautions" (cf. Ibeneweka v. Egbuna (1964) 1 WLR 219, at p 224) I nevertheless consider that if a judge failed to give proper weight to these matters it could not be said that he had properly exercised his discretion.

15. Notwithstanding the importance of refraining from interfering with the ordinary course of committal proceedings I have formed the opinion that we should proceed to dispose of the questions raised by Mr. Sankey's claim. The circumstances of the case are of course most exceptional. In addition the very fact that the questions have been argued in this Court after the proceedings have already been long delayed is a cogent reason for putting them finally to rest. In this respect the attitude of an ultimate appellate court before which questions of this kind have been argued may necessarily be somewhat different from that which would be taken by a court lower in the judicial hierarchy. There is no reason to doubt that we should dispose of the cross-claim for declarations as to the questions arising under s. 86 of the Crimes Act. I have not overlooked that a declaration which raised the same issues of substance, although it was different in form, was sought in Connor v. Sankey (1976) 2 NSWLR and that no application was made for special leave to appeal against the decision of the Court of Appeal. However that circumstance is outweighed by the desirability of bringing this matter to a conclusion.

Section 86 (1) (c) of the Crimes Act and the Financial Agreement.

16. Section 86 (1) of the Crimes Act provides (inter alia) as follows:

"A person who conspires with another person ◆

(a) to commit an offence against a law of the Commonwealth;

(b) to prevent or defeat the execution or enforcement of a law of the

Commonwealth;

(c) to effect a purpose that is unlawful under a law of the Commonwealth;

(d) to effect a lawful purpose by means that are unlawful under a law of the Commonwealth; or

(e) to defraud the Commonwealth or a public authority under the Commonwealth, shall be guilty of an indictable offence."

By s. 86 (3) it is provided that in s. 86 "'law of the Commonwealth' includes a law of a Territory". The first charge in each information is framed on the assumption that to effect a borrowing "in contravention of the Financial Agreement 1927 (as amended), The Constitution Alteration (State Debts) Act 1928 (sic) and the Financial Agreement Act 1944 (as amended)" is to effect a purpose that is unlawful under a law of the Commonwealth.

17. The Financial Agreement was made between the Commonwealth and the States in December 1927 and was "approved" by the Financial Agreement Act 1928. Subsequently the Constitution was altered, as appears in the Constitution Alteration (State Debts) 1928 (No. 1 of 1929), by the insertion of s. 105A. The material provisions of that section are as follows:

"1. The Commonwealth may make agreements with the States with respect to the public debts of the States, including -

. . .

(f) the borrowing of money by the States or by the Commonwealth, or by the

Commonwealth for the States.

2. The Parliament may make laws for validating any such agreement made before the commencement of this section.

3. The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

4. Any such agreement may be varied or rescinded by the parties thereto.

5. Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

. . ."

Thereafter the Financial Agreement was "validated" by the Financial Agreement Validation Act 1929. Since that time the Financial Agreement has been amended on a number of occasions and the agreements effecting the amendments have been "approved" by various statutes, including the Financial Agreement Act 1944. A copy of the agreement approved or validated was in each case set out in the schedule to the Act effecting the approval or validation.

18. Under cl. 3 (8) of Pt I of the Financial Agreement, as amended, the Commonwealth and each State must submit to the Australian Loan Council constituted by the Agreement a programme setting forth the amount it desires to raise by loans during each financial year for purposes other than (inter alia) "temporary purposes". If the Loan Council decides that the total amount of the loan programme for the year cannot be borrowed at reasonable rates and conditions it then decides the amount to be borrowed during the year and the Agreement provides for the allocation of such amount between the Commonwealth and the States: cl. 3 (9), (10). Any such decision of the Loan Council is final and binding: cl. 3 (15). By cl. 4 (4) of Pt I of the Agreement it is provided as follows:
"While Part III of this Agreement is in force, moneys shall not be borrowed by the Commonwealth or any State otherwise than in accordance with this Agreement."
Part III of the Agreement is still in force. Clause 6 of Pt I deals with borrowings by the Commonwealth within the Commonwealth, and cl. 6 (3) provides that where any such borrowing is for temporary purposes, the provisions of the Agreement, other than cl. 6, shall not apply.

19. The purpose alleged by the informations to have been "unlawful under a law of the Commonwealth" was the borrowing by the Commonwealth of the sum of $4,000 million. If the Commonwealth had borrowed that sum otherwise than in accordance with the Agreement it would have committed a grave breach of the Agreement itself. In one sense such a borrowing would have been unlawful, for a breach of contract is unlawful in the sense that it involves the violation of a legal right and creates a legal wrong: see Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129, at pp 1186, 1201, 1234 . However the phrase "a purpose that is unlawful under a law of the Commonwealth" is clearly intended to mean a purpose that is rendered unlawful by the law itself. A written law which authorizes or approves of the making of a contract does not thereby render a breach of the contract unlawful; that result is brought about by the rules of the common law. Where a law of the Commonwealth does no more than approve of or validate an agreement, the purpose of breaking that agreement could not be said to be "unlawful under a law of the Commonwealth". The only provision that might have rendered unlawful the proposed borrowing to which the informations refer was cl. 4 (4) of Pt I of the Financial Agreement. Two questions therefore arise: (1), was the Financial Agreement itself "a law of the Commonwealth"; and (2), if not, did the Financial Agreement derive its efficacy from some law of the Commonwealth in such a way that the law, rather than the Agreement, could properly be regarded as the source of the prohibition contained in cl. 4 (4) and as rendering a breach of the Agreement unlawful.

20. The Financial Agreement purports to be an agreement, not a law. It was not made by any

legislature, although it received legislative approval and ratification. It may be varied or rescinded by the parties: s. 105A (4). Section 105A itself draws a distinction between the agreements which it authorizes on the one hand and laws made to validate or carry out any such agreement on the other. It is apparent that the Financial Agreement is not a law in the ordinary sense and is not treated by s. 105A as being a law. However s. 105A (5) makes the Financial Agreement binding upon the Commonwealth and the States, notwithstanding anything in the Constitution, or in the Constitutions of the States, or in any law of the Parliament of the Commonwealth or of any State. The effect of this provision "is to make any agreement of the required description obligatory upon the Commonwealth and the States, to place its operation and efficacy beyond the control of any law of any of the seven Parliaments, and to prevent any constitutional principle or provision operating to defeat or diminish or condition the obligatory force of the Agreement": New South Wales v. The Commonwealth (No. 1) (1932) 46 CLR 155, at p 177 . It has been said by Starke J. that the Financial Agreement "is part of the organic law of the Commonwealth" and by McTiernan J. that s. 105A (5) "imbues with the force of a fundamental law any agreement to which it applies": New South Wales v. The Commonwealth (No. 1) (1932) 46 CLR, at pp 186, 229 . In Bank of New South Wales v. The Commonwealth (1948) 76 CLR 1, at p 282 , Rich and Williams JJ. said that "the agreement derives overriding statutory force from s. 105A of the Constitution". None of these statements was made with the present question in mind and all fall far short of saying that the Financial Agreement is a law of the Commonwealth. It is true to say that the Financial Agreement has the force of law, even of an organic law, so far as the Commonwealth and the States are concerned. However it does not create rights in or impose duties on other persons; it is binding by s. 105A (5) only on the Commonwealth and the States. Notwithstanding s. 105A (5) I do not think it accurate to describe the Financial Agreement as a law. It is in truth sui generis, an agreement whose provisions are rendered paramount over the Constitutions of the Commonwealth and the States and over their laws. However even if it could be described as a law, it is not a law of the Commonwealth, because it is not made by or under the authority of the Parliament of the Commonwealth.

21. Section 105A (3) enables the Parliament to make laws "for the carrying out by the parties thereto of any such agreement", and this power authorizes the enactment of "laws to procure the fulfilment of the agreement": New South Wales v. The Commonwealth (No. 1) (1932) 46 CLR, at p 178 . In my opinion it would have been competent for the Parliament to procure the enforcement of the Financial Agreement by making it an offence to conspire to effect any purpose which the Agreement prohibits. The Parliament has not however enacted any such law. The penal provisions of s. 86 (1) should not be extended to include matters which in their ordinary and natural meaning they are not apt to embrace. I conclude that the Financial Agreement is not "a law of the Commonwealth" within the meaning of that section.

22. The question then is whether the prohibition contained in cl. 4 (4) of the Financial Agreement should be regarded as in effect imposed by the Financial Agreement Acts or the Financial Agreement Validation Act, which were of course laws of the Commonwealth. The original agreement itself provided (by cl. 1 of Pt I) that it should have no force or effect and that it should not be binding on any party unless and until it was approved by the Parliaments of the Commonwealth and of the States. The amending agreements contained similar provisions. The Financial Agreement Acts fulfilled this condition precedent: cf. Placer Development Ltd. v. The Commonwealth [1969] HCA 29; (1969) 121 CLR 353, at p 357 . The validation of the original agreement was necessary because the agreement was made before s. 105A came into force. The Financial Agreement Acts and the Financial Agreement Validation Act enabled the provisions of the Financial Agreement to come into operation, but they did not go further and require that those

provisions should be observed. There is nothing in those Acts that provides expressly or by implication that the Financial Agreement should have the same effect as if it were contained in the Acts themselves and the Acts do not themselves prohibit the parties from acting in breach of the Financial Agreement. The mere approval by statute of an agreement does not give to the rights and obligations created by the agreement the same effect as if they had been contained in the statute; the authorities to which we were referred in argument illustrate that further words are necessary to achieve that result - see Caledonian Railway Co. v. Greenock and Wemyss Bay Railway Co. (1874) LR 2 Sc & D 347, at p 349 ; Reg v. Midland Railway Co. (1887) 19 QBD 540 and Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government (1960) AC 260, at pp 283-285, 312-313 . For these reasons it is not possible to say that the Financial Agreement Acts or the Financial Agreement Validation Act rendered it unlawful for the Commonwealth to borrow money other than in accordance with the Financial Agreement.

23. A similar conclusion should be reached in relation to s. 105A. That section renders the Financial Agreement binding and gives it paramountcy over the Constitutions and laws of the Commonwealth and the States. However, s. 105A does not make it unlawful to effect a borrowing otherwise than in accordance with the Financial Agreement; it is left to the Parliament, if so advised, to make laws having that effect. In any case, if it could be said that a borrowing in breach of the Financial Agreement was unlawful under the Constitution, in my opinion the Constitution is not a law of the Commonwealth within s. 86 of the Crimes Act. The Constitution is not a law made by or under the authority of the Parliament of the Commonwealth. In its original form it was an enactment of the Parliament of the United Kingdom. Assuming that a law passed in accordance with s. 128 for the alteration of the Constitution can be described as a law of the Commonwealth, the alteration, when it takes effect, becomes part of the Constitution - part of the fundamental law from which the Parliament of the Commonwealth derives its legislative power - and can no longer be regarded merely as an exercise of the legislative power of the Commonwealth.

24. The same reasoning disposes of the arguments based on the Constitution Alteration (State Debts) 1928. That Act provided only for the alteration of the Constitution by the insertion of s. 105A. If it was a law of the Commonwealth it did not require the prohibition contained in cl. 4 (4) of the Financial Agreement to be observed, and it did not render unlawful a borrowing made otherwise than in accordance with the Financial Agreement.

25. For these reasons the purpose specified in the first charge in each information was not a purpose that was unlawful under a law of the Commonwealth within s. 86 (1) (c). The first charge discloses no offence in law. It should be declared accordingly.

Section 26 of the Justices Act.

26. Before I turn to consider the claims that certain documents should not be produced or admitted in evidence I should notice a preliminary submission made by counsel for Dr. Cairns. This was that s. 26 of the Justices Act, under which the subpoenas for the production of the documents were issued, does not, indeed could not, bind the Commonwealth. The answer to this submission is of course that the subpoenas were not issued to the Commonwealth. They were issued to individual persons who do not cease to be subject to the law because they happen to hold official positions under the Commonwealth. However counsel for Dr. Cairns went on to submit that the persons to whom the subpoenas were addressed held the documents only as servants of the Commonwealth and could not be compelled to produce them without the authority of the Commonwealth. His argument

was that the proper course, if a servant lacks authority to produce documents, is to issue a subpoena to the employer, but that this could not be done in the present case because s. 26 does not apply to the Commonwealth. It is unnecessary to consider whether this argument could have been sustained if properly taken. No objection has been taken to the production of the documents on this ground either by the persons to whom the documents were addressed or by the Commonwealth; as will shortly be seen, the objections which they have raised were that the documents belonged to a class which public interest required should not be disclosed. This preliminary argument must fail.

The documents in question.

27. I must now describe the documents which it is claimed by one party or another are privileged from production. First there are the documents in respect of which privilege was claimed by the Commonwealth and allowed by the magistrate. These were as follows:

1. An explanatory memorandum and schedule relating to a meeting of the Executive Council held on 7th January 1975. It should be explained that when a matter is brough before a meeting of the Executive Council a minute paper is prepared; it sets out the advice tendered to His Excellency the Governor-General in Council and is signed by the Minister concerned. Each minute is accompanied by an explanatory memorandum which usually sets out the reasons for the advice. All minutes to be submitted to the Executive Council are listed on a schedule, which is signed by those present at the meeting. If the Governor-General is not present at the meeting the minute and the schedule are later submitted to him for signature. The Commonwealth did not claim privilege for the minute paper to which the explanatory memorandum and schedule now in question related.

2. (a) Three memoranda from a senior official of the Treasury to a senior official of the Department of Minerals and Energy. To one of these memoranda are attached copies of two letters from the then Treasurer to the then Minister for Minerals and Energy. (b) A note in the files of the Treasury recording a meeting with the Prime Minister on 13th December 1974.

3. A minute paper from Mr. John O. Stone to the Treasurer dated 10th December 1974, being a communication (or a copy thereof) addressed by a senor official of the Treasury to his Minister. This document is said to be distinguishable from those in category 2, because what purported to be a copy of it has been published in The Bulletin and in a book by Alan Reid called The Whitlam Venture.

4. "The Loan Council documents", viz. loan programmes submitted by or on behalf of the Commonwealth to certain meetings of the Loan Council, loan programmes approved at such meetings and minutes of such meetings.

28. Privilege was claimed for the documents in category 1 by the affidavit of Mr. Carmody, which stated that all members of the Executive Council are required to take an oath or affirmation of secrecy. The affidavit contained the following:

"The documents referred to . . . relate to advice given and recommendations made to the Federal Executive Council and the deliberations and decisions of that Council and to the inner workings of the Executive Government of the Commonwealth of Australia. In my opinion such documents belong to a class of documents which public interest requires should not be disclosed. Further, disclosure of such documents would inhibit the proper functioning of the Executive Government

and non-disclosure of such documents is necessary for the proper functioning of the public service."

Mr. Carmody personally considered the documents for which he claimed privilege, but the Ministers by whose affidavits privilege was claimed for the documents in the other categories did not. The claim in relation to the documents in categories 2 and 3 was made in words of which the following are typical:
"I have formed the opinion that the document referred to should be withheld from production and disclosure on the ground that it belongs to a class of documents which public interest requires should not be disclosed. Further, in my opinion, the non-disclosure of documents of that class is necessary for the proper functioning of the Executive Government. Further, non-disclosure of such documents is necessary for the proper functioning of the Public Service."

In the case of the Loan Council documents it was claimed that they belonged to a class of documents which public interest requires should not be dislosed and that their non-disclosure is necessary for the proper functioning of the Australian Loan Council and that it would be prejudicial to the proper functioning of that Council to make any such disclosure.

29. The documents for which privilege was not claimed by the Commonwealth, and which the magistrate has ordered to be produced, but in respect of which the cross-claim is made, are the following:

5. (a) Minute paper for a meeting of the Executive Council of 13th December 1974 with explanatory memorandum and schedule. (b) Minute papers for meetings of the Executive Council held on 7th January 1975, 28th January 1975 and 20th May 1975.

6. (a) A number of documents ("documents (a) to (x)") being letters, telexes and notes, mainly between the Minister for Minerals and Energy or his senior officals and various companies or persons not in the service of the Government. (b) Documents containing list and cost of energy items, compiled by or on behalf of the Minister for Minerals and Energy or his Department and presented to a meeting of the Executive Council on 13th December 1974.

30. The documents in categories 5 and 6 appear to be indistinguishable in their general nature from those in categories 1 and 2 respectively. It appears that the Commonwealth did not claim privilege for them because they had been tabled in Parliament. However the magistrate refused to act on the evidence that the documents had been so tabled. On behalf of Mr. Whitlam it was submitted that he was right in doing so. To receive and act upon the evidence would, it was said, infringe the privileges of Parliament. To that submission I now turn.

Privileges of Parliament.

31. It is not in contest that the privilege declared by Art. 9 of the Bill of Rights 1688 is one of the privileges of the Senate and of the House of Representatives under s. 49 of the Constitution. By Art. 9 it was declared:

"That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

In the present case the charges brought against the defendants are not based on anything said or done in Parliament, and it is not sought to support those charges by evidence of anything which was said or done in Parliament. The purpose of the evidence given by Mr. Wentworth and Senator

Wright is to show that certain documents were tabled and were thereby made public and were for that reason not privileged from production assuming that they would otherwise have been privileged. However one important reason for the privilege stated in Art. 9 is that a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences. From this it was argued that if evidence could be given that documents had been tabled in Parliament, with the effect that the documents were thereby rendered admissible, in some cases against the Minster who had tabled them, Ministers might be inhibited in the performance of their duties and might be led, by fear of the possible consequences, to refrain from tabling documents that ought to be tabled. This argument carries the doctrine of parliamentary privilege beyond its proper limits. To prove that a document had been tabled would not be to use against the Minister concerned evidence that he had tabled it. What might be used against the Minister in the case suggested would be a document which had come into existence outside Parliament, and which was not part of the proceedings of Parliament or entitled to protection as such, but which was claimed to be privileged from production for quite a different reason, namely that it should not be disclosed in the public interest. One matter relevant to the consideration of such a claim is whether the document has been published. A document which has been tabled in either House of the Parliament must be "considered public", and even if not ordered to be printed may be inspected at any time by any member of the House in which it was tabled and by other persons with the permission of the President of the Senate or the Speaker as the case may be: Standing Order 362 of the Standing Orders of the Senate and Standing Order 320 of the Standing Orders of the House of Representatives. It would be an absurd result if it were impermissible to prove that a document which by the Standing Orders of both Houses of the Parliament should be "considered public" could not be proved to be so, and if the question whether a document should be allowed in evidence had to be decided on the assumption that the document had never been made public, when that assumption was false and notoriously so. If it were proved that a document had been tabled, and had become public, so that it would not be against the public interest to disclose it, it would of course be irrelevant to the question of admissibility whether the document had been tabled by the person against whom it was intended to be used, or by a stranger to the suit. To show that it had become public, it would not be necessary to prove by whom it had been tabled, but simply that it had been tabled.

32. An alternative argument submitted was that it was a breach of parliamentary privilege for Mr. Wentworth and Senator Wright to give evidence that the documents had been tabled in Parliament when neither of those gentlemen had first obtained the leave of the House of which he was a member to give the evidence. The effect of the decisions as to the admission of evidence as to proceedings in Parliament is stated in May's Parliamentary Practice, 19th ed. (1976), pp. 88-89 as follows:

"The practice of the Commons regarding evidence sought for outside the walls of Parliament touching proceedings which have occurred therein also conforms to Article 9 of the Bill of Rights. This fact is well recognized by the courts, which have held that Members cannot be compelled to give evidence regarding proceedings in the House of Commons without the permission of the House."

The cases of Plunkett v. Cobbett (1804) 5 Esp 136 (170 ER 763) and Chubb v. Salomons [1851] EngR 609; (1852) 3 Car & K 75 (175 ER 469) support this view. The relevant passages from those decisions are set out in Royal Commission into Certain Crown Leaseholds, (1956) St R Qd 225, at pp 230-232 by Townley J., who regarded them as establishing the proposition that "a member of the

House of Commons is not bound to give evidence of what passes within the House without the permission of the House". The law as stated in these authorities is that a member of Parliament is not compellable to give the evidence without the permission of the House, rather than that he is not competent to give it without that permission, and the reports of the two English cases cited make it clear that it was there considered necessary that the witness should take an objection before the privilege would be granted. No doubt the privilege is that of the House, rather than that of the individual member, but the circumstances of the present case do not make it necessary to consider what the position would be if it appeared that the House wished to insist upon the privilege but the member took no objection.

33. The material placed before us is in some respects unsatisfactory. It does not contain a transcript of the evidence of Mr. Wentworth and Senator Wright but it does appear that neither of them objected to giving evidence. It appears from the reasons given by the magistrate that the House of Representatives had, by resolution, granted leave to Mr. Sankey and his legal representatives "to inspect the documents tabled in this House during the course of its proceedings which took place between 2.55 p.m. and 10.09 p.m. on 9th July 1975", and to issue and serve a subpoena for the production of the said documents in the proceedings commenced by Mr. Sankey, and had further granted leave to an appropriate officer of the House to attend at the hearings of the said proceedings and to produce the said documents. We were told that the Senate had passed a similar resolution. The magistrate considered that this leave did not go far enough; he held that "the leave granted does not waive any parliamentary privilege". In my opinion he took too narrow a view of the effect of the leave granted. Permission to produce to the court documents described as "documents tabled in this House" clearly implied permission to place before the court evidence as to what documents had been tabled, assuming that such permission was necessary. For all these reasons in my opinion the evidence of Mr. Wentworth and Senator Wright was properly received.

34. Moreover it appears from both Plunkett v. Cobbett (1804) 5 Esp 136 (170 ER 763) and Chubb v. Salomons [1851] EngR 609; (1854) 3 Car & K 75 (175 ER 469) that a member of Parliament, even if he has not obtained the permission of the House, cannot object to giving evidence of facts that occurred in the course of a sitting of Parliament, such as that a particular member spoke (without disclosing what he said) or was present and acted in a particular capacity (for example as Speaker, or as a peer). The fact that documents were tabled (without disclosing who tabled them) seems to be evidence of the same kind, i.e., merely of an event which happened, and must be divulged by a member called as a witness, even without the consent of the House.

35. I therefore conclude that we are not compelled to shut our eyes to reality, but must consider the question whether the documents that were tabled in Parliament should be produced in the light of the fact that they were so tabled.

Evidence Excluded as Prejudicial to the Public Interest ("Crown Privilege").

36. I must now attempt to state the principles according to which we must decide whether the documents which the Commonwealth seeks to withhold should nevertheless be produced and admitted in evidence, and whether the documents which the Commonwealth is willing to produce should nevertheless be withheld. For convenience I have spoken of the claims that the documents should be withheld from production as claims to privilege, but in Reg. v. Lewes Justices; Ex parte Home Secretary (Rogers v. Home Secretary) (1973) AC 388, at pp 400, 406-407, 412 , the expression "Crown privilege" was criticized as wrong and possibly misleading. The decision in

Conway v. Rimmer [1968] UKHL 2; (1968) AC 910 did more than merely decide that an objection validly taken to the production of a document on the ground that it would be injurious to the public interest is not conclusive; it threw a new light on the principles governing the exclusion of evidence whose admission would be contrary to the public interest. The principles which I am about to discuss apply in relation to oral as well as to documentary evidence, but since in the present case it has been agreed that it would be premature to deal with the objections taken to oral evidence, I may confine my remarks to the application of the principles to documentary evidence.

37. The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in Conway v. Rimmer (1968) AC, at p 940 , as follows:

"There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."

It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in Conway v. Rimmer (1968) AC, at p 940 , "the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it". In such cases once the court has decided that "to order production of the document in evidence would put the interest of the state in jeopardy", it must decline to order production.

38. An objection may be made to the production of a document because it would be against the public interest to disclose its contents, or because it belongs to a class of documents which in the public interest ought not to be produced, whether or not it would be harmful to disclose the contents of the particular document. In the present case no suggestion has been made that the contents of any particular documents are such that their disclosure would harm the national interest. The claim is to withhold the documents because of the class to which they belong. Speaking generally, such a claim will be upheld only if it is really necessary for the proper functioning of the public service to withhold documents of that class from production. However it has been repeatedly asserted that there are certain documents which by their nature fall in a class which ought not to be disclosed no matter what the documents individually contain; in other words that the law recognizes that there is a class of documents which in the public interest should be immune from disclosure. The class includes cabinet minutes and minutes of discussions between heads of departments (Conway v. Rimmer (1968) AC, at pp 952, 973, 979, 987, 993 ; Reg. v. Lewes Justices; Ex parte Home Secretary (1973) AC, at p 412 ; Australian National Airlines Commission v. The Commonwealth ([1975] HCA 33; 1975) 132 CLR 582, at p 591), papers brought into existence for the purpose of preparing a submission to cabinet (Lanyon Pty. Ltd. v. The Commonwealth [1974] HCA 11; (1974) 129 CLR 650), and indeed any documents which relate to the framing of government policy at a high level (cf. In re Grosvenor Hotel, London (No. 2) (1965) Ch 1210, at pp 1247, 1255). According to Lord Reid, the class would extend to "all documents concerned with policy making

within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies": Conway v. Rimmer (1968) AC, at p 952 .

39. One reason that is traditionally given for the protection of documents of this class it that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. Some judges now regard this reason as unconvincing, but I do not think it altogether unreal to suppose that in some matters at least communications between Ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure. For instance, not all Crown servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned. However this consideration does not justify the grant of a complete immunity from disclosure to documents of this kind. Another reason was suggested by Lord Reid in Conway v. Rimmer (1968) AC, at p 952 :

"To my mind the most important reason is that such disclosure would create or fan ill-formed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind."

Of course, the object of the protection is to ensure the proper working of government, and not to protect Ministers and other servants of the Crown from criticism, however intemperate and unfairly based. Nevertheless, it is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No Minister, or senior public servant, could effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public. The public interest therefore requires that some protection be afforded by the law to documents of that kind. It does not follow that all such documents should be absolutely protected from disclosure, irrespective of the subject matter with which they deal.

40. Although it is sometimes categorically stated that documents of this class will not be ordered to be disclosed, at least if proper objection is taken, it has been acknowledged in some authorities that the protection which this class enjoys is not absolute. In Conway v. Rimmer (1968) AC, at p 952 , Lord Reid recognized one exception - that cabinet minutes and the like can be disclosed when they have become only of historical interest. In Lanyon Pty. Ltd. v. The Commonwealth, Menzies J. said (1974) 129 CLR, at p 653 that there might be "very special circumstances" in which such documents might be examined. In Attorney-General v. Jonathan Cape Ltd. (1976) QB 752, at p 764 , Lord Widgery C.J. accepted that no court would compel the production of cabinet papers, but nevertheless refused an application to restrain publication of the diaries of a former cabinet Minister, which revealed, amongst other things, details of cabinet discussions and of advice given to cabinet. He said (1976) QB, at p 767 : ". . . it seems to me that the degree of protection afforded to Cabinet papers and discussion cannot be determined by a single rule of thumb. Some secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over."

41. Later his Lordship said (1976) QB, at p 770 :

"The Cabinet is at the very centre of national affairs, and must be in possession at all times of information which is secret or confidential. Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations, but to identify the Ministers who voted one way or another is objectionable because it undermines the doctrine of joint responsibility."

He concluded that there cannot be a single rule governing the publication of such a variety of matters. These remarks, althought directed to a different issue, afford useful guidance in considering the present question.

42. Although the statement that cabinet documents and other papers concerned with policy decisions at a high level ("state papers", as I shall henceforth call them) are immune from disclosure was repeated in Conway v. Rimmer [1968] UKHL 2; (1968) AC 910 , it accords ill with the principles affirmed in that case. The fundamental principle is that documents may be withheld from disclosure only if, and to the extent, that the public interest renders it necessary. That principle in my opinion must also apply to state papers. It is impossible to accept that the public interest requires that all state papers should be kept secret for ever, or until they are only of historical interest. In some cases the legitimate need for secrecy will have ceased to exist after a short time has elapsed; this will be so, to take Lord Widgery's example, when new taxation proposals have passed into legislation. In other cases it may be necessary to maintain secrecy for many years. This may be so where the documents concern national security or diplomatic relations, to give two obvious examples. In other words state papers do not form a homogeneous class, all the members of which must be treated alike. The subject matter with which the papers deal will be of great importance, but all the circumstances have to be considered in deciding whether the papers in question are entitled to be withheld from production, no matter what they individually contain.

43. If state papers were absolutely protected from production, great injustice would be caused in cases in which the documents were necessary to support the defence of an accused person whose liberty was at stake in a criminal trial, and it seems to be accepted that in those circumstances the documents must be disclosed: Duncan v. Cammell, Laird & Co. [1942] UKHL 3; (1942) AC 624, at pp 633-634 ; Conway v. Rimmer (1968) AC, at pp 966-967, 987 ; Reg. v. Lewes Justices; Ex parte Home Secretary (1973) AC, at pp 407-408 . Moreover a Minister might produce a document of his own accord if it were necessary to do so to support a criminal prosecution launched on behalf of the government. The fact that state papers may come to light in some circumstances is impossible to reconcile with the view that they enjoy absolute protection from disclosure.

44. The fact that members of the Executive Council are required to take a binding oath of secrecy does not assist the argument that the production of state papers cannot be compelled. In Attorney-General v. Jonathan Cape Ltd. (1976) QB 752 , Lord Widgery C.J. dealt with the suggestion that the publication of the diaries in that case would have been a breach by the Minister of his oath as a privy councillor, and said that it was necessary to show that whatever obligation of secrecy or discretion attaches to former cabinet Ministers, that obligation is binding in law and not merely in morals (1976) QB, at p 767 . Similarly, state papers are not protected from disclosure because they are confidential or because the Minister has taken an oath not to reveal them. The question is whether the disclosure of the documents would be contrary to the public interest. Confidentiality is not a separate head of privilege, but may be a material consideration to bear in mind when privilege is claimed on the ground of public interest: Alfred Crompton Amusement Machines Ltd. v. Customs

and Excise Commissioners (No. 2) (1974) AC 405, at p 433 .

45. For these reasons I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with especial care, giving full weight to the reasons for preserving the secrecy of documents of this class, but it will not treat all such documents as entitled to the same measure of protection - the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned. If a strong case has been made out for the production of the documents, and the court concludes that their disclosure would not really be detrimental to the public interest, an order for production will be made. In view of the danger to which the indiscriminate disclosure of documents of this class might give rise, it is desirable that the government concerned, Commonwealth or State, should have an opportunity to intervene and be heard before any order for disclosure is made. Moreover no such order should be enforced until the government concerned has had an opportunity to appeal against it, or test its correctness by some other process, if it wishes to do so (cf. Conway v. Rimmer (1968) AC, at p 953).

46. Before Conway v. Rimmer [1968] UKHL 2; (1968) AC 910 it had become established that an objection to production should be taken by the Minister who is the political head of the department concerned, or failing him by the permanent head, and that the person taking the objection should himself have read and considered the documents and formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents to which they belong: Duncan v. Cammell, Laird & Co. (1942) AC, at p 638 ; Robinson v. South Australia (No. 2) (1931) AC 704, at p 722 ; Bruce v. Waldron (1963) VR 3, at p 10 ; In re Grosvenor Hotel, London (1964) 1 Ch 464 ; In re Grosvenor Hotel, London (No. 2) (1965) Ch, at pp 1243-1244 . Although an affidavit sworn by a Minister or departmental head is no longer conclusive, it appears to me to be still highly desirable that the person who swears the affidavit should himself have seen the documents in question. Where the claim is that it would be contrary to the public interest to publish the contents of a particular document, it is obviously essential that the person asserting the claim should himself have seen the documents in question. Even where the claim is that the document belongs to a class which should be withheld, the court is still required to give proper respect to the assertion by the Minister or departmental head that production would be contrary to the public interest, and the weight that would be given to an affidavit making an assertion of this kind would necessarily be reduced if the person swearing it had not himself seen the document.

47. It is however clear that the court should prevent the disclosure of a document whose production would be contrary to the public interest even if no claim is made by a Minister or other high official that its production should be withheld. In Conway v. Rimmer (1968) AC, at p 950 , Lord Reid said that it is the duty of the court to prevent the disclosure of a document, without the intervention of any Minister, "if possible serious injury to the national interest is readily apparent". In Reg. v. Lewes Justices; Ex parte Home Secretary (1973) AC, at p 407 Lord Simon of Glaisdale said that any litigant or witness may draw attention to the nature of the evidence with a view to its being excluded. There is earlier authority to the same effect, including, in this Court, Marconi's Wireless Telegraph Co. Ltd. v. The Commonwealth (No. 2) [1913] HCA 19; (1913) 16 CLR 178, at pp 192, 206 . It is necessary that the court should have the power and the duty to prevent the production or

use of a document when it would be injurious to the public interest to produce or use it even if the proper procedure for objection by or on behalf of the Minister has not been followed. In some cases a document may be called for and produced in circumstances in which there has been no opportunity to consider at an appropriate level of government whether objection ought to be taken to its disclosure. The court must then intervene if it appears that the public interest requires the document to be protected from disclosure. However it is very different if a Minister has considered the question and decided that no objection should be taken. In those circumstances it would be most exceptional for the court to intervene. No less respect is due to the opinion of a Minister who decides that the public interest would not be harmed by the production of the document than to that of a Minister who considers that the document ought not to be produced.

48. In Robinson v. South Australia (No. 2) (1931) AC, at p 718 , it was said that "the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published". Other cases support that view: see Marconi's Wireless Telegraph Co. Ltd. v. The Commonwealth (No. 2) (1913) 16 CLR, at pp 188, 195, 199 ; Christie v. Ford (1957) 2 FLR 202, at p 209 . However the submission made by counsel for Mr. Whitlam was that the position is different when the exclusion of a document is sought not because of its contents but because of the class to which it belongs. In such a case the document is withheld irrespective of its contents; therefore, it was said, it is immaterial that the contents are known. That is not so; for the reasons I have suggested, it may be necessary for the proper functioning of the public service to keep secret a document of a particular class, but once the document has been published to the world there no longer exists any reason to deny to the court access to that document, if it provides evidence that is relevant and otherwise admissible. It was further submitted that if one document forming part of a series of cabinet papers has been published, but others have not, it would be unfair and unjust to produce one document and withhold the rest. That may indeed be so, and where one such document has been published it becomes necessary for the court to consider whether that circumstance strengthens the case for the disclosure of the connected documents. However even if other related documents should not be produced, it seems to me that once a document has been published it becomes impossible, and indeed absurd, to say that the public interest requires that it should not be produced or given in evidence.

49. What I have just said applies to cases where it is established that a true copy of the document sought to be produced has in fact been published. The publication by an unauthorized person of something claimed to be a copy of an official document, but unauthenticated and not proved to be correct, would not in itself lend any support to a claim that the document in question ought to be produced. In such a case it would remain uncertain whether the contents of the document had in truth been disclosed. In some cases the court might resolve the problem by looking at the document for the purpose of seeing whether the published copy was a true one, but it would not take that course if the alleged publication was simply a device to assist in procuring disclosure, and it might be reluctant to do so if the copy had been stolen or improperly obtained.

50. Finally, the power of the court to inspect the document privately is clear, and once a court has decided, notwithstanding the opposition of a Minister, that on balance the document should probably be produced, it will sometimes be desirable, or indeed essential, to examine the document before making an order for production: see Conway v. Rimmer (1968) AC, at pp 953, 979, 981-982, 995; cf p 971 . However, where the objection is to the disclosure of a document because it belongs to a class, and the Minister, being represented, does not suggest that there is anything in its contents that ought to be withheld from production, there will not always be the same need to examine the document before ordering its production if the objection is overruled.

Disclosure of the particular documents.

51. It clearly follows from what I have said that Mr. Whitlam's cross-claim for a declaration that the documents in what I have called categories 5 and 6 should not be disclosed cannot succeed. Those documents have already been published, in the most formal and regular way, by tabling them in Parliament. Not only has the Minister concerned refrained from taking any objection, but counsel for the Attorney-General of the Commonwealth has submitted that the documents should be produced. The magistrate was correct in ordering them to be produced.

52. The documents in categories 1, 2 and 3 are all "state papers" within the meaning I have given to that expression. They belong to a class of documents which may be protected from disclosure irrespective of their contents. Full respect must be paid to the objections taken to their production, even though the Ministers did not swear that they had personally seen the documents. On the other hand the documents relate to a proposal which was never put into effect, has been abandoned and is of no continuing significance from the point of view of the national interest. The matters to which they refer occurred over three years ago. Their disclosure cannot affect any present activity of government. Moreover, if the documents can be withheld, the informant will be unable to present to the court his case that the defendants committed criminal offences while carrying out their duties as Ministers. If the defendants did engage in criminal conduct, and the documents are excluded, a rule of evidence designed to serve the public interest will instead have become a shield to protect wrongdoing by Ministers in the execution of their office. I hasten to add - although it should be unnecessary for me to do so - that these remarks are not intended to suggest that any of the defendants has been guilty of any offence; the material placed before us does not enable us to form any opinion whether or not Mr. Sankey can produce evidence that could make out a prima facie case against any defendant. I have been speaking hypothetically, and with reference to the principles concerned rather than to any established facts. For these reasons I conclude that the public interest in the administration of justice outweighs any public interest in withholding documents of this class, and that the public interest does not render it necessary that the documents in categories 1, 2 and 3 should be withheld from production.

53. This leaves category 4, the Loan Council documents. Although the charges laid under s. 86 of the Crimes Act are bad, the charge of conspiracy at common law states as an element that the proposed borrowing was in contravention of the Financial Agreement. The arguments presented to us did not raise for our consideration whether the charge was properly drawn or whether it was necessary to allege that the proposed borrowing was in contravention of the Financial Agreement. However, assuming that allegation to be material, the proposed borrowing, even if not made for temporary purposes, would not have contravened the Financial Agreement if it had received the approval of the Loan Council. If the assumption stated is correct, in endeavouring to substantiate the charge of conspiracy at common law it would be relevant to establish that the proposed borrowing was not authorized by the Loan Council. For the purpose of establishing that fact Mr. Sankey now wishes to prove by means of the Loan Council documents the amount which the Commonwealth was authorized by the Loan Council to borrow in the year in question. In fact the amount actually borrowed in that year is now public knowledge.

54. The Loan Council documents are concerned with decisions of policy made at a very high level by a body which exercises great financial power within the federation. There are strong reasons why the negotiations between the Commonwealth and the States during the meetings of the Loan Council should be protected from disclosure. However, all that Mr. Sankey now seeks to have

disclosed is so much of the Loan Council documents as reveals the amount which the Commonwealth was authorized to borrow during the year 1974-1975, and disclosure of that amount after this lapse of time could not be detrimental to the public interest. If it is possible to seal up or otherwise deal with the documents so that they reveal that fact and no more, it would not be necessary in the public interest to withhold the relevant documents, with all else hidden, from production. In my opinion we should now inspect the Loan Council documents to see whether it is practicable to make this very restricted disclosure, and if it is practicable we should order disclosure to be made.

Conclusions.

55. 1. Mr. Sankey's application: I would make a declaration that all the documents in question, except the Loan Council documents, should be produced. If the Loan Council documents can be sealed up or otherwise dealt with so as to reveal only the amount which the Commonwealth was authorized to borrow during the year 1974-1975, I would declare that the relevant documents, so covered, be produced.

2. Mr. Whitlam's cross-claim: (a) I would make an appropriate declaration to the effect that the charges laid under s. 86 (1) (c) of the Crimes Act are unknown to the law. (b) I would dismiss the cross-claim for declarations that the documents to whose production no objection was taken should nevertheless not be produced.

STEPHEN J. This case is concerned with two quite distinct matters, the scope and application of the doctrine of Crown privilege and the meaning and effect of s. 86 (1) (c) of the Crimes Act 1914 (Cth).

Crown privilege: the problem generally.

2. The first of these matters, that of Crown privilege, involves two principles which are of quite general importance to our system of government and of justice. Such is the vigour and breadth of these principles that each, given its fullest extent of operation, will at its margins encounter and conflict with the other. This case involves just such a conflict and it is with its resolution that the Court has to concern itself.

3. These principles, stated in their broadest form, each reflect different aspects of the public weal. Because disclosure to the world at large of some information concerning sensitive areas of government and administration may prejudice the national interest there exists a public interest in preventing the curial process from being made the means of any such disclosure. At the same time the proper administration of justice, of prime importance in the national interest, requires that evidence necessary if justice is to be done should be freely available to those who litigate in our courts.

The problem restated.

4. These general principles may be restated more narrowly and in a form which reflects the problem presented by the particular facts of this case. On the one hand, a measure of secrecy must surround at least some aspects of what has been called the counsels of the Crown; the executive government of the Commonwealth should, in those cases where real need arises, be able to preserve the

confidentiality both of information which it possesses and of advice which it receives. On the other hand, in civil and criminal cases alike, the course of justice must not be unnecessarily impeded by claims to secrecy and those who, with the Governor-General, exercise the executive power of the Commonwealth, Ministers of the Crown acting in exercise of their offices, should, in common with those officers of the public service of the Commonwealth who advise them, be as amenable to the general law of the land as are ordinary citizens.

5. Some understanding of the way in which the interaction of these principles presently arises for consideration can be gained from a narration of the following sequence of events: the institution by a private informant of proceedings charging a former Prime Minister and members of his cabinet with conspiracy unlawfully to effect the borrowing by the Commonwealth of four billion dollars and with conspiracy to deceive the Governor-General in relation to that borrowing; the service by the informant of subpoenas duces tecum upon a number of senior public servants seeking production of a number of official papers at the ensuing committal proceedings; claims by the executive government of the Commonwealth to immunity from the production of certain of those papers at those proceedings; the upholding of those claims by the magistrate; the institution of declaratory proceedings, independent of the committal proceedings, to test the lawfulness of those claims; finally the removal of those declaratory proceedings into this Court. Add to this the fact that certain of these documents have been tabled in Parliament, the informant contending that they thereby lose any confidentiality which they may previously have possessed while for some of the defendants it is said that to permit evidence of their tabling is to infringe Parliamentary privilege. This, in summary, forms the background to the present proceedings.

6. Leaving aside for the moment the question of Parliamentary privilege, the area in which apparent conflict of principle calls for reconciliation lies in the extent to which what is commonly, although somewhat inaccurately, described as Crown privilege will operate to exclude from evidence matter otherwise admissible and which may be highly material to the case sought to be made out by the informant. The scope of Crown privilege has been much examined in recent times and a number of aspects formerly debatable no longer remain in doubt. However the quite special features of this case involve aspects hitherto little explored. Prominent among these special features is the fact that it is criminal proceedings against former Ministers of the Crown in relation to their conduct in office which are in question, that a number of documents of which production is sought, relating as they do to that conduct, concern the affairs of the executive government at the highest level, and that the proceedings have been instituted by a private citizen and not by the Crown.

7. So much for the general nature of the problems which this case presents. As already mentioned, the case also involves a quite distinct argument concerning the meaning of s. 86 (1) (c) of the Crimes Act, the provision relied upon as the foundation for one of the two charges laid against the defendants to the committal proceedings. However it is to the question of Crown privilege that I first turn.

The criminal proceedings.

8. Rather than set out in full the two informations laid against the four defendants I summarize their terms. The first alleges that the four of them conspired to effect a purpose unlawful under a law of the Commonwealth, namely the borrowing by the Commonwealth from overseas sources of a sum not exceeding four billion United States dollars in contravention of the Financial Agreement 1927, the Constitution Alteration (State Debts) 1928 and the Financial Agreement Act 1944 (Cth). The

second alleges that the four defendants conspired to deceive the then Governor-General in that, being members of the federal Executive Council, they agreed at a meeting of that Council to recommend for his approval that one of them, the late Mr. Connor, be authorized to borrow for temporary purposes not more than four billion United States dollars, notwithstanding that that borrowing was not intended for temporary purposes only and was in breach of the three above instruments. (at p50)

9. These informations were returnable at Queanbeyan Court of Petty Sessions as long ago as 8th December 1975 yet the hearing of the committal proceedings has not much advanced. It is unnecessary to follow the convoluted course of those proceedings to date. It has already involved more than one sortie into the New South Wales Supreme Court and an application to this Court. By November 1977 matters had progressed to the stage that the magistrate, having heard lengthy argument on behalf not only of the informant and of the defendants other than Mr. Justice Murphy, whose counsel neither made any submissions in relation to Crown privilege nor took any part in the argument thereon, but also of those entities, including the Commonwealth, whose officers were in receipt of subpoenas, ruled on the several claims to Crown privilege that had been made in respect of certain of the documents the subject of those subpoenas. He did so in the course of a carefully considered judgment, in which he dealt with the modern authorities on Crown privilege. His ruling was largely adverse to the informant who, in December 1977, instituted proceedings in the New South Wales Supreme Court seeking various declarations. Although not taking the form of an appeal, the declarations sought to challenge much of the magistrate's conclusions as reflected in his ruling. One of the defendants, Mr. Whitlam, soon afterwards filed a cross-claim which challenges other aspects of the ruling, being those adverse to the interests of the defendants. (at p51)

10. I defer comment upon the propriety of seeking declaratory relief in the circumstances and in the terms which it has been sought. Nor will I debate the appropriateness of the term "Crown privilege". I use it to describe those situations in which the law requires that relevant evidence be not tendered because to do so would be detrimental to the public interest. Its use is convenient; it has for many years served as a generic description of this area of the law and, despite the inaptness of the two words of which it is composed, should not mislead if treated as no more than a descriptive label. (at p51)

The claims to privilege.

11. The documents for which Crown privilege are claimed in the present case are not documents in any way concerned either with the defence of the Commonwealth or with the conduct of the nation's foreign affairs. They are, however, very much concerned with the highest level of the executive government, with the deliberations of Cabinet Ministers and with the advice given to those Ministers by heads of Commonwealth departments. (at p51)

12. It was only for some of the documents the subject of subpoenas that the Commonwealth claimed privilege, claims which the magistrate upheld. Moreover the informant is no longer concerned to insist upon production of certain of these documents the area of debate as between informant and Commonwealth being narrowed accordingly. However the claim to Crown privilege is insisted upon on behalf of Mr. Whitlam in instances where the Commonwealth did not assert it and this has enlarged again the area of inquiry, as well as raising the question whether it is open to Mr. Whitlam to claim a Crown privilege which the Commonwealth has consciously foregone. The magistrate rejected each of Mr. Whitlam's claims to Crown privilege. (at p52)

13. The documents for which the Commonwealth successfully claimed privilege and which remain in issue between it and the informant are as follows: an explanatory memorandum and schedule referable to the minutes of a meeting of the Executive Council held on 7th January 1975, memoranda of various kinds passing between Treasury and the Department of Minerals and Energy together with letters between the respective Ministers, a Treasury minute paper and certain Loan Council documents. (at p52)

14. On behalf of Mr. Whitlam additional claims to privilege apply to minutes of the meeting of the Executive Council held on 13th December 1974 together with the explanatory memorandum and schedule for that meeting, Executive Council minutes of three subsequent meetings and documents passing between the Department of Minerals and Energy or its Minister and persons not forming part of the executive government, including a so-called "list of energy items". (at p52)

Executive Council documents.

15. The first category in which the Commonwealth claim is contested, the Executive Council explanatory memorandum and schedule for its meeting of 7th January 1975, was the subject of an affidavit sworn by Mr. Carmody, the Secretary to the Department of the Prime Minister and Cabinet, who is also Secretary to Cabinet. He there described the general character of these documents as follows:

"8. Where a matter is to be brought before a meeting of the Federal Executive Council a Minute Paper for the Federal Executive Council is prepared. Such minute sets out the advice which is tendered to the Council in the form of a recommendation for the approval of the Governor-General in Council. The minute is signed by the Minister of State submitting the matter for approval.

9. Each such minute is accompanied by an Explanatory Memorandum containing a brief explanation of the matter of which approval is sought. The Explanatory Memorandum also usually sets out the reasons for the advice tendered to the Governor-General in Council.

10. All minutes to be submitted to the Federal Executive Council are prior to the meeting listed on what is known as a Schedule. The Schedule is a formal document which is signed by those present at the meeting of the Council as a record of the proceedings and as evidencing the approval of minutes listed on it. If the Governor-General is not present at the meeting the minute and the Schedule are subsequently submitted to him for signature.".

In par. 14 of Mr. Carmody's affidavit he goes on to say:

"14. The documents referred to in the last preceding paragraph of this my affidavit relate to advice given and recommendations made to the Federal Executive Council and the deliberations and decisions of that Council and to the inner workings of the Executive Government of the Commonwealth of Australia. In my opinion such documents belong to a class of documents which public interest requires should not be disclosed. Further, disclosure of such documents would inhibit the proper functioning of the Executive Government and non disclosure of such documents is necessary for the proper functioning of the public service.".
This is followed by his formal statement of objection to the production of these documents and to the adducing of oral evidence "relating to discussions concerning the formulation or carrying out of government policy. . .". (at p53)

16. Some features of the claim to privilege for these particular documents should be mentioned. None is claimed for the minute papers of the four meetings of the Executive Council mentioned in the subpoenas but the schedules of each meeting, apparently no more than a list of relevant minutes although naming and bearing the signatures of those present at the meeting in question and signed by the Governor-General, are, in respect of three of those meetings, the subject of such a claim. It is solely because the informant now seeks production of one only of these schedules that it is only the production of that one which remains in issue. Paragraph 14 of Mr. Carmody's affidavit does not reveal, nor is it otherwise readily apparent, why the disclosure of such schedules would involve those detrimental consequences of which Mr. Carmody speaks, the minutes of the very meetings to which the schedules relate are not themselves the subject of any claim by the Crown to privilege. The same comment applies to the memoranda for those meetings, since they are described as containing no more than "a brief explanation of the matter of which approval is sought" that is, of the recommendation which, when adopted, appears in the disclosed minutes. Again, no objection is made to production of the explanatory memorandum or schedule for the Executive Council meeting of 13th December 1974, being documents of the same class as those for which privilege is claimed: yet the claim to privilege in par. 14 is based primarily upon the class, rather than any particular contents, of those latter documents. (at p54)

17. The explanation of all this must lie in the fact that the Commonwealth, unlike Mr. Whitlam, has made no claim to privilege wherever documents have come to be tabled in Parliament. The minutes of the four meetings of the Executive Council were, apparently, so tabled. It is not clear to me whether the explanatory memorandum and schedule for the meeting of 13th December 1974 was also tabled; if so it would, no doubt, account for the distinction which is drawn between it and later explanatory memoranda and schedules. Although the foregoing explains the existence of features of this claim to privilege which are otherwise puzzling, those features nevertheless exist and may prove relevant to the availability of Crown privilege for these documents. (at p54)

Other documents.

18. The remaining documents for which the Commonwealth claims Crown privilege can conveniently be dealt with in three categories; first, a number of inter-ministerial and inter-departmental documents; secondly, a minute paper by a Treasury officer addressed to the Treasurer; thirdly, papers which may be described as Loan Council documents. (at p54)

19. The first of these categories, the general body of inter-ministerial and inter-departmental documents, are the subject of affidavits sworn by two Ministers of the present government, Mr. Nixon and Mr. Lynch. The former refers to three Treasury memoranda to the Department of Minerals and Energy, together with two copy letters from the then Treasurer to the Minister for Minerals and Energy. It describes them as of a class which public interest requires should not be disclosed, adding that their non-disclosure is "necessary" for the proper functioning of the Executive Government and of the public service. The affidavit of Mr. Lynch refers to two documents presently relevant. The first is a "note for file", recording a meeting held between the Secretary to the Treasury and certain of his senior officers at which the Secretary reported upon an earlier meeting he had attended with Ministers and the Secretary of the Department of Minerals and Energy and gave instructions for the carrying out of decisions made at that earlier meeting. This was, incidentally, a document not sought by the informant but only by Mr. Whitlam in a subpoena served by him. The second is a letter from the Minister for Minerals and Energy to the Treasurer. The claim to privilege is again a class claim and, with only slight verbal changes, the reasons urged for non-

production are the same as those given by Mr. Lynch. (at p55)

20. Neither deponent claims to have read the relevant documents and the privilege claimed is expressly founded upon the class of documents in question. (at p55)

21. In a separate affidavit Mr. Lynch claims Crown privilege for a minute paper from a Mr. Stone of Treasury to the Treasurer relating to the proposed overseas borrowing of four billion dollars. Again the same grounds of objection are taken, grounds relying upon the class of document in question, being "a communication between a senior official of the Australian Public Service and a Minister of the Crown in relation to matters of policy". What is notable about this minute paper is that what purports to be a complete copy of it appeared not only in one of the many books published in Australia and dealing with the political and constitutional crises of 1975, in relation to which the author thought that the former government's attempted overseas borrowings was relevant, but also in a national news magazine circulating throughout Australia. If what has been so published is in fact a copy of Mr. Stone's minute it will have already received very wide publicity in this country. (at p55)

22. The last category of documents the subject of the Commonwealth's claim to privilege which the magistrate upheld and which the informant contests consists of various documents associated with the Commonwealth's Loan Programme as submitted to meetings of the Australian Loan Council in 1974 and early 1975. It emerged in argument before us that all that the informant required from the numerous documents falling within this category was the negative evidence that the Commonwealth's programme did not include the proposed loan of four billion dollars. For reasons which will later emerge it is unnecessary now to say more about these documents, production of which is objected to upon the ground that it will be injurious to the proper functioning of the Loan Council. (at p55)

23. This concludes the category of documents for which the Commonwealth claims Crown privilege. On behalf of Mr. Whitlam that same privilege is also claimed for all Executive Council documents, whether or not tabled in Parliament, and for a group of documents passing between the Department of Minerals and Energy or its Minister and outside parties, which were tabled in Parliament. (at p55)

24. Leaving aside, for the present, the case of Loan Council documents, I consider that none of the documents for which privilege has been claimed, whether by the Commonwealth or on Mr. Whitlam's behalf, should, in the circumstances of this case, be accorded Crown privilege. (at p56)

Factors in the balancing process.

25. I have reached this conclusion by weighing as best I can those competing aspects of the public interest here in question and by concluding that those favouring non-disclosure are outweighed by those favouring disclosure. The latter consist not only of the usual, quite general concern that the course of justice should not be impeded but also of more particular considerations which flow from the unusual character of the present proceedings, involving as they do criminal charges against a former Prime Minister and senior members of his Ministry directly related to their conduct in office. (at p56)

26. The character of the proceedings has a triple significance. First, it makes it very likely that, for

the prosecution to be successful, its evidence must include documents of a class hitherto regarded as undoubtedly the subject of Crown privilege. But, then, to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who may occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices. Those in whom resides the power ultimately to decide whether or not to claim privilege will in fact be exercising a far more potent power: by a decision to claim privilege dismissal of the charge will be well-nigh ensured. Secondly, and assuming for the moment that there should prove to be any substance in the present charges, their character must raise doubts about the reasons customarily given as justifying a claim to Crown privilege for classes of documents, being the reasons in fact relied upon in this case. Those reasons, the need to safeguard the proper functioning of the executive arm of government and of the public service, seem curiously inappropriate when to uphold the claim is to prevent successful prosecution of the charges: inappropriate because what is charged is itself the grossly improper functioning of that very arm of government and of the public service which assists it. Thirdly, the high offices which were occupied by those charged and the nature of the conspiracies sought to be attributed to them in those offices must make it a matter of more than usual public interest that in the disposition of the charges the course of justice be in no way unnecessarily impeded. For such charges to have remained pending and unresolved for as long as they have is bad enough; if they are now to be met with a claim to Crown privilege, invoked for the protection of the proper functioning of the executive government, some high degree of public interest in non-disclosure should be shown before his privilege should be accorded. (at p57)

27. The strongest ground made out for the claim to Crown privilege in this case is, however, that many of the documents do concern this very level of government decision-making, an area which has customarily been spoken of as pre-eminently one for the application of the privilege. For example, it has, in the past, been usual to speak of cabinet minutes and the like as unquestioningly entitled to Crown privilege; in Conway v. Rimmer [1968] UKHL 2; (1968) AC 910 each of their Lordships in turn spoke in this vein (1968) AC at pp 952, 973, 979, 987, 993 and in Reg. v. Lewes Justices; Ex parte Home Secretary (Rogers v. Home Secretary) (1973) AC 388, at p412 Lord Salmon said much the same, as did Menzies J. in Lanyon Pty. Ltd. v. The Commonwealth [1974] HCA 11; (1974) 129 CLR 650, at p 653 , albeit with a qualification relating to "very special circumstances"; so too Mason J. in Australian National Airlines Commission v. The Commonwealth [1975] HCA 33; [1975] HCA 33; (1975) 132 CLR 582, at p591 . Documents of this character have often been coupled with defence secrets and with the nation's diplomatic relations with foreign governments as archetypes of Crown privilege. However, all this has been said in judgments which were concerned with situations very different from the present and usually in the context of a general description of the doctrine of Crown privilege, often as a preliminary to the actual application of that doctrine to the particular facts of the case in hand. (at p57)

28. In no case, from what seems to have been one of the first judicial considerations of Crown privilege, viz. Anderson v. Hamilton (1816) 2 Br & B 156n (129 ER 917) , to date, has a Court been concerned with criminal charges alleging against Ministers of the Crown that they conspired together, in their role as Ministers, to effect unlawful purposes. Judicial descriptions of the general doctrine of Crown privilege must necessarily be affected by the facts of the case in hand; they cannot be applied to wholly unforeseen and quite different circumstances and used as rules of law governing those circumstances. Instead the principles upon which Crown privilege is founded and by reference to which it has operated must be applied to the very special circumstances of the present case. (at p57)

29. Those principles are, I think, clear enough and I entertain no doubt as to their application in the present case. (at p58)

30. That the task of a Court, in dealing with a claim to Crown privilege, is to weigh competing public interests is clear: their Lordships said so in Conway v. Rimmer, notably by Lord Reid (1968) AC, at pp 950-995 , by Lord Morris (1968) AC, at pp 956-957, 972 ,by Lord Pearce (1968) AC, at pp 986-987 and by Lord Upjohn (1968) AC, at p 992 ,and again in Rogers v. Home Secretary, especially by Lord Reid (1973) AC, at p 400 , by Lord Pearson (1973) AC, at p 406 by Lord Pearson (1973) AC, at p 406 and by Lord Salmon (1973) AC, at p 712 . Lord Denning M.R. had earlier expressed a like view in In re Grosvenor Hotel, London (No. 2) (1965) Ch 1210, at p 1246 . In Konia v. Morley (1976) 1 NZLR 455 the New Zealand Court of Appeal similarly spoke of weighing the two aspects of public interest against each other (1976) 1 NZIR, at pp 46, 467 . Scottish law, as declared on appeal to the House of Lords in Glasgow Corporation v. Central Land Board [1955] UKHL 7; 1956 S.C. (H.L.) 1. , is to the same effect-per Lord Normand 1956 S.C. (H.L.), at pp. 12-14, 16. and especially per Lord Radcliffe who 1956 S.C. (H.L.), at pp. 18-19. , speaks of the interests of government as not exhausting the public interest, another aspect of which is the need that impartial justice be done in the courts of law. The United States, Supreme Court, in United States v. Nixon [1974] USSC 159; (1974) 418 US 683, at p 711 (41 Law Ed 2d 1039, at p 1066) , spoke of the same concept, although the weight it attached to the due administration of justice gave to its balancing process a quality different from that applicable in Commonwealth jurisdictions. (at p58)

31. What are now equally well established are the respective roles of the court and of those, usually the Crown, who assert Crown privilege. A claim to Crown privilege has no automatic operation; it always remains the function of the court to determine upon that claim. The claim, supported by whatever material may be thought appropriate to the occasion, does no more than draw to the court's attention what is said to be the entitlement to the privilege and provide the court with material which may assist it in determining whether or not Crown privilege should be accorded. A claim to the privilege is not essential to the invoking of Crown privilege. In cases of defence secrets, matters of diplomacy or affairs of government at the highest level, it will often appear readily enough that the balance of public interest is against disclosure. It is in these areas that, even in the absence of any claim to Crown privilege (perhaps because the Crown is not a party and may be unaware of what is afoot), a court, readily recognizing the proffered evidence for what it is, can, as many authorities establish, of its own motion enjoin its disclosure in court. Just as a claim is not essential, neither is it ever conclusive, although, in the areas which I have instanced, the court's acceptance of the claim may often be no more than a matter of form. It is not conclusive because the function of the court, once it becomes aware of the existence of material to which Crown privilege may apply, is always to determine what shall be done in the light of how best the public interest may be served, how least it will be injured. (at p59)

32. That this is the touchstone by which the doctrine of Crown privilege operates emerges from those passages to which I have already referred in Conway v. Rimmer [1968] UKHL 2; (1968) AC 910 and Rogers v. Home Secretary (1973) AC 388 , It was felicitously expressed by Lord Radcliffe in the Scottish appeal already referred to, Glasgow Corporation v. Central Land Board. His Lordship was there referring to Scots law but subsequent cases have shown it to be no different to what has now been established as the law in England. His Lordship said 1956 SC (HL), at pp 18-19 :

"The power reserved to the Court is therefore a power to order production even though the public interest is to some extent affected prejudicially. This amounts to a recognition that more than one

aspect of the public interest may have to be surveyed in reviewing the question whether a document which would be available to a party in a civil suit between private parties is not to be available to the party engaged in a suit with the Crown. The interests of government, for which the Minister should speak with full authority, do not exhaust the public interest. Another aspect of that interest is seen in the need that impartial justice should be done in the Courts of law, not least between citizen and Crown, and that a litigant who has a case to maintain should not be deprived of the means of its proper presentation by anything less than a weighty public reason. It does not seem to me unreasonable to expect that the Court would be better qualified than the Minister to measure the importance of such principles in application to the particular case that is before it." (at p59)

33. I refrain from further citation of authority other than to quote the concise statement by Lord Pearson in Rogers v. Home Secretary where his Lordship said (1973) AC, at p 406 :

"The court has to balance the detriment to the public interest on the administrative or executive side, which would result from the disclosure of the document or information, against the detriment to the public interest on the judicial side, which would result from non-disclosure of a document or information which is relevant to an issue in legal proceedings. Therefore the court, though naturally giving great weight to the opinion of the appropriate Minister conveyed through the Attorney-General or his representative, must have the final responsibility of deciding whether or not the document or information is to be disclosed." (at p60)

The public interest as a variable.

34. Relevant aspects of the public interest are not confined to strict and static classes. As Lord Hailsham of St. Marylebone observed in D.v. National Society for the Prevention of Cruelty to Children [1977] UKHL 1; (1978) AC 171, at p 230 "The categories of public interest are not closed . . .". In that case their Lordships discerned an aspect of the public interest, hitherto unremarked and which was quite unconnected with the affairs of central government but which was nevertheless proper to weigh in the balance and which in the outcome sufficed to outweigh that other public interest which exists in there being available to the court the information necessary for it to do justice between litigants. (at p60)

35. That case provides an illustration of the need to consider the particular nature of the proceedings in which the claim to Crown privilege arises in order to determine what are the relevant aspects of public interest which are to be weighed and what is to be the outcome of that weighing process. It was just such a recognition of the need to take account of what was in issue in the particular case that led Lord Keith, in Glasgow Corporation v. Central Land Board 1956 SC (HL), at p 25 , to cite with approval an earlier authority which spoke of the possibility that "a matter of private right might be of such magnitude, and might indeed be so related to public interest, as to make the problem a delicate one and difficult to solve" and then to go on to consider the magnitude of the private right in the instant case, concluding that "everything must depend on the particular circumstances of the case. It is impossible to lay down broad and general rules" 1956 SC (HL), at pp 25-26 . Lord Reid referred to the like consideration when, in Conway v. Rimmer, in rejecting the notion that a Minister's claim to privilege was conclusive, he pointed out (1968) AC, at p 943 , that the Minister had no duty to consider the degree of public interest involved in a particular case in frustrating the due administration of justice, it mattering not to the Minister "whether the result of withholding a document is merely to deprive a litigant of some evidence on a minor issue in a case of little

importance or, on the other hand, is to make it impossible to do justice at all in a case of the greatest importance". In Rogers v. Home Secretary Lord Reid (1973) AC, at p 401 , adverted to the same theme when, in weighing the competing claims of public interest, he gave less weight to the public interest that the course of justice should not be impeded than might otherwise have been the case because the documents production of which were being resisted "only came into existence because the applicant is asking for a privilege and is submitting his character and reputation to scrutiny. The documents are not used to deprive him of any legal right." (at p61)

36. Perhaps the most striking example of the way in which the nature of the case will bear upon the judicial process of weighing aspects of the public interest is afforded by that well recognized exception to the general rule that Crown privilege is properly applicable to conceal the identity of police informers. It is an exception of long standing and is discussed by Kellock J. in the Supreme Court of Canada in Reg. v. Snider (1954) 4 DLR 483, at pp 490-491 . His Lordship refers first to the way in which Viscount Simon in Duncan v. Cammell, Laird [1942] UKHL 3; (1942) AC 624 explicitly confined his observations on Crown privilege to civil cases and continues:

"Even in criminal proceedings it has been held, for example, that the usual rule that the channel of information giving rise to a prosecution is not to be disclosed upon the ground of public interest, is not an absolute rule. In Hardy's Case (1794) 24 State Trials 199, at p 808 Eyre C.J. said: 'There is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed: if it can be made appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it'.

In referring to the above statement and to others of the same character, Viscount Simon said at the above page: 'Indeed, Eyre C.J., in the passage referred to appears only to be restricting needless cross-examination.' (1942) AC, at p 634 .

There is, accordingly, not only a public interest in maintaining the secrecy of documents where the public interest would otherwise be damnified, as, for example, where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of document is necessary for the proper functioning of the public service, but there is also a public interest which says that 'an innocent man is not to be condemned when his innocence can be proved': per Lord Esher M.R. in Marks v. Beyfus (1890) 25 QBD 494, at p 498 . It cannot be said, however, that either the one or the other must invariably be dominant."

This exception was referred to in Rogers v. Home Secretary (1973) AC 388 and, most recently, by Lord Diplock and by Lord Simon of Glaisdale in D. v. National Society for the Prevention of Cruelty to Children (1978) AC, at pp 218, 232 . Lord Simon of Glaisdale said of it (1978) AC, at p 232 :

"The public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged, so that, exceptionally, such evidence must be forthcoming when required to establish innocence in a criminal trial:". (at p62)

37. If in the balancing process the circumstances of a particular case can affect the relative weight to

be given to each of the respective public interests when placed in the scales, the outcome in the present case seems to me to be clear. I have already described the quite special aspects of the present case which in my view serve to give unusual weight to considerations favouring disclosure. The only outstanding characteristic of the contents of the other scale is that many documents in question are communications at or near the highest level of government; if not all attain the status of "Cabinet papers and the like" most at least approach it. This feature apart, the documents in question are unremarkable; nothing about them or the claims to privilege made for them comes anywhere near tipping the scales in favour of non-disclosure. The affidavits sworn by members of the present ministry and by senior public servants make it clear that all the claims to Crown privilege are class claims, not contents claims; it is not suggested that to disclose the contents of any of the documents, the Loan Council documents apart, will of itself result in detriment to the public interest flowing directly from the nature of what is disclosed. The detriment perceived is, rather, that generalized form of apprehended harm which, it is said, will flow from a realization by Cabinet Ministers and by public servants that what they conceived to be confidential communications can, in the event of appropriate curial proceedings being instituted, become public knowledge. (at p62)

38. Those who urge Crown privilege for classes of documents, regardless of particular contents, carry a heavy burden. As Lord Reid said in Rogers v. Home Secretary (1973) AC, at p 400 the speeches in Conway v. Rimmer [1968] UKHL 2; (1968) AC 910 have made it clear "that there is a heavy burden of proof" on those who make class claims. Sometimes class claims are supported by reference to the need to encourage candour on the part of public servants in their advice to Ministers, the immunity from subsequent disclosure which privilege affords being said to promote such candour. The affidavits in this case make reference to this aspect. Recent authorities have disposed of this ground as a tenable basis for privilege. Lord Radcliffe in the Glasgow Corporation Case remarked 1956 SC (HL), at p 20 that he would have supposed Crown servants to be "made of sterner stuff", a view shared by Harman L.J. in the Grosvenor Hotel Case (1965) Ch, at p 1255 : then, in Conway v. Rimmer (1968) AC 901 , Lord Reid dismissed the "candour" argument but found the true basis for the public interest in secrecy, in the case of cabinet minutes and the like, to lie in the fact that were they to be disclosed this would "create or fan ill-informed or captious public or political criticism. . . . the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind" (1968) AC, at p 952 and see as to the ground of "candour" per Lord Morris (1968) AC, at p 959 , Lord Pearce (1968) AC, at pp 987-988 and Lord Upjohn (1968) AC, at pp 933-934 . In Rogers v. Home Secretary (1973) AC, at p 413 Lord Salmon spoke of the "candour" argument as "the old fallacy". (at p63)

39. It is, then, only the status or near-status of many of the documents in question as cabinet papers that requires further consideration. I have already referred to those authorities which have given unqualified recognition to the clear entitlement of such documents to Crown privilege; also to the fact that what was said in those cases was said in the course of a general consideration of the doctrine, and this in a context which did not require any decision upon documents in fact having the character of Cabinet papers. Moreover those cases involved none of the quite special features which pervade this case. While according to those authorities the great respect to which they are clearly entitled, it would be wrong to regard them as determinative of this case. To do so would be to ignore the warning so recently given by Lord Diplock when he said that "To construe a judgment as if its function were to lay down a code of law is a common error into which the English reliance upon precedent makes it easy to fall": D. v. National Society for the Prevention of Cruelty to Children (1978) AC, at p 220 . The judge-made law relating to Crown privilege is no code, it erects no immutable classes of documents to which a so-called absolute privilege is to be accorded. On the

contrary its essence is a recognition of the existence of the competing aspects of the public interest, their respective weights and hence the resultant balance varying from case to case. (at p64)

40. The considerations to which I have already referred and which arise out of the circumstances of this case do, I think, in themselves suffice to require that Crown privilege be denied to the documents here in issue, even those of the status of cabinet papers and the like. (at p64)

Prior Publication.

41. There is, moreover, a further factor pointing in the same direction. The public interest in non-disclosure will be much reduced in weight if the document or information in question has already been published to the world at large. There is much authority to this effect, going back at least as far as Robinson v. South Australia (No. 2) (1931) AC 704, at p 718 per Lord Blanesburgh. In 1949 Kriewaldt J., sitting in the Supreme Court of the Northern Territory, had occasion to review the relevant authorities in his judgment in Christie v. Ford (1957) 2 FLR 202, at p 209 . The reason of the thing necessarily tends to deny privilege to information which is already public knowledge. As Lord Blanesburgh observed (25) "the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published". In Whitehall v. Whitehall 1957 SC 30, at p 38 the Lord President (Clyde) in referring to a document already the subject of some quite limited prior publicity observed that "The necessity for secrecy, which is the primary purpose of the certificate, then no longer operates . . ." (at p64)

42. If the Executive Council minutes have in fact received wide publicity and if involved in that process has been the tabling of the minutes in Parliament, questions of proof and in particular of whether the proof of tabling involves an infringement of parliamentary privilege is said to arise. This I deal with later. Subject only to this, I would regard such publicity as going far towards destroying any claim to Crown privilege. The schedules associated with the minutes can scarcely survive as proper subjects for privilege if the minutes themselves have been made public. Likewise in the case of explanatory memoranda: if the minutes to which they relate have been made public, and in the absence of any claim that the actual contents of the memoranda are such that to publish them will prejudice the public interest, a mere class claim to privilege for them seems to be of relatively little weight. (at p64)

43. Mr. Stone's minute is also said to have been published, apparently without authorization. One question which arises is whether what has been published, copies of which appear as exhibits, is truly that minute. That could readily enough be resolved were the court to compare the original with those exhibits. I would see no objection to the adoption of such a straightforward course. It would provide a sure answer to the central question whether any aspect of the public interest will be injured by requiring the minute to be produced. If what has been published proves not to be Mr. Stone's minute the public interest will be furthered by ending the masquerade; if it is that minute, then its contents are already in the public domain and there can be no great public interest to be served by preserving its present ambiguous status. The prospect of a Court making a private examination of a document in the absence of the parties has long ceased to be regarded either as an impropriety or as a novelty. As Lord Hodson said in Conway v. Rimmer (1968) AC, at p 979 : "Each case is to be decided by the court. This means private inspection by the court in a proper case before production is ordered. This was thought at the time of the decision in Beatson v. Skene [1860] EngR 813; [1860] EngR 813; (1860) 5 H & N 838 (157 ER 1415) to have been objectionable and the same view was taken by this House in Duncan's Case [1942] UKHL 3; (1942)

AC 624 , but I see no objection to it in principle. Indeed the books contain a number of cases where as a preliminary to the consideration of production to the parties inspection by the court has been ordered."
and see per Lord Reid (1968) AC, at p 954 , Lord Pearce (1968) AC, at p 981 , and Lord Upjohn (1968) AC, at p 995 . To allow this minute Crown privilege if it has in fact featured on every news-stall in Australia would be to achieve "a result...little short of being ridiculous", as Lord Reid said of not altogether a dissimilar situation in his speech in Conway v. Rimmer (1968) AC, at p 950 . (at p65)

44. In Rogers v. Home Secretary Lord Reid had occasion to distinguish between documents lawfully published and those which, as a result of "some wrongful means", have become public (1973) AC, at p 402 . That case was, however, concerned with a quite special class of document, confidential reports on applicants for licences to run gaming establishments, a class to which must apply considerations very similar to those which affect the reports of, or information about, police informers. There is, in those cases, the clearest public interest in preserving the flow of information by ensuring confidentiality and by not countenancing in any way breach of promised confidentiality. Those quite special considerations do not, I think, apply in the present case. (at p66)

45. The other documents here in question have largely not been the subject of prior publication but all of them are in some degree affected by it. They consist of inter-ministerial and inter- and intra-departmental documents and of documents passing between a department and outside persons. All are apparently concerned with the proposed borrowing of four billion dollars which was the subject of the published Executive Council minutes. Once those minutes became public and subject to public speculation and discussion it is not easy to identify the particular quality of public interest which is said to reside in the non-production of these associated documents. Certainly the ministerial and other affidavits, involving no more than class claims and making only very general and unspecific references to the proper functioning of the executive and of the public service, provide no assistance in this regard. (at p66)

46. It is in the light of all these circumstances that I have concluded that no Crown privilege should be accorded to any of these documents, once against excepting the Loan Council documents. (at p66)

Loan Council documents.

47. The position of what I have described as the Loan Council documents is in two respects different from that of other documents. The affidavit of Mr. Lynch which supports this claim to privilege is not confined to a mere reference to the proper functioning of the executive government and of the public service. It is both explicit and specific in relation to the class claim which it makes; its description of Loan Council meetings, of the matters there discussed between representatives of the governments of each entity in our federation and of the circumstances of those discussions, makes out a prima facie case of detriment to the public interest if these discussions, designedly held in secret, are to be subject to disclosure. What is, perhaps, more important is that it emerged in argument that the informant's case is in no way concerned with the contents of any of these Loan Council documents except in one specific, and what might be described as negative, respect. The informant has sought their production only for the purpose of establishing, if the need arises, that the alleged proposed borrowing of four billion dollars was not the subject of Loan Council consent. (at p66)

48. The extent to which the Commonwealth has in fact availed itself of borrowings consented to by the Loan Council during the relevant period is information which is freely available to the public. It can only be to establish that any proposed borrowing consented to but not availed of did not include the sum of four billion dollars that the Loan Council papers are of materiality. At the conclusion of argument it seemed to me scarcely credible that an inspection of the papers would not reveal the practicability of extracting material in itself quite innocuous, consisting perhaps of no more than the figure of approved Commonwealth borrowings not in fact availed of, which would provide evidence of this negative character. Were production of such material, and of such material only, to be permitted, no public interest would be prejudiced and at the same time the course of justice would not be impeded unnecessarily. Authority for such a course is to be found in Conway v. Rimmer. Lord Reid (1968) AC, at p 946 , contemplated that part only of a document might properly be withheld, according to it alone privilege from production: Lord Pearce said (1968) AC, at p 988 , that the court might call for and itself inspect a document and then, if "part of a document is innocuous but part is of such a nature that its disclosure would be undesirable, it should seal up the latter part and order discovery of the rest, provided that this will not give a distorted or misleading impression." A statement of the outcome of the inspection of the Loan Council documents which has in fact been undertaken by this Court appears at the end of the several statements of reasons for judgment in this case. (at p67)

49. As will appear below, I have concluded that the terms of the charge alleging a conspiracy in breach of s. 86 (1) (c) of the Crimes Act 1914 in fact disclose no offence. Nevertheless, I have thought it appropriate to state my views concerning these Loan Council documents: they are, I think, relevant to the second charge, having regard to its concluding words. (at p67)

The informant as private prosecutor.

50. It remains only to say something of three matters related, directly or indirectly, to the Crown privilege point. The fact that the informant is a private citizen and that the committal proceedings are not the result of any initiative on the part of any government or police force can, I think, have no effect upon the question of Crown privilege. The nature of proceedings may affect the relative weight to be given to the respective public interest considerations but should not otherwise be of significance. If the criminal law should ever be found to be being used as a mere instrument with which to obtain access to material otherwise the proper subject of Crown privilege a solution lies not in any change in the doctrine of Crown privilege but rather in preventing any such mischievous abuse of the processes of the criminal law. (at p68)

Who may rely on Crown privilege.

51. The second matter can also be disposed of quite shortly. It is whether a party other than the Crown can raise a claim to Crown privilege and, if so, whether he may do so in the face of a deliberate failure by the Crown itself to claim such privilege. The first part of this question is not, I think, in doubt; the second part I prefer to leave unanswered for reasons which I shall state. The first must, I think, be answered "Yes". If, as the authorities disclose, it is appropriate for a court of its own motion to exclude material from evidence when it appears to it that to permit its production in open court will be prejudicial to the public interest, it can scarcely be contended that a litigant may not himself initiate matters by inviting the court's attention, in the first instance, to the character of such material. Such a litigant will necessarily be at a disadvantage. He will not possess the special

knowledge and resources which uniquely qualify the Crown competently to judge what may imperil the public interest if publicly disclosed. But this goes rather to the outcome of his claim than to the making of it and will in any event, in obvious cases of State secrets, perhaps present little difficulty. Much will no doubt depend upon the apparent character of the document or information in question. (at p68)

52. The second part of the question is of direct application to the present case. I have proceeded upon the footing that Mr. Whitlam may properly advance a claim to Crown privilege for such of those Executive Council papers as the Crown made no claim for. That has seemed to me a convenient course in this particular case, having regard to the conclusion which I have reached upon the Crown privilege claims generally. However this is not to be taken as reflecting any concluded view on the issue, which I prefer to leave open. I do so because I consider that much may depend upon particular circumstances, especially upon the reasons for the Crown's deliberate failure itself to claim privilege. If, for example, it were to do so upon some erroneous view of the law as to entitlement to Crown privilege that might present a very different circumstance from the case where the Crown expressly states that it makes no claim because it considers that no detriment to the public interest will flow from disclosure. The present case might have provided an example of the former: if it had appeared both that the Crown's sole reason for not claiming privilege for certain Executive Council papers was that it believed that their being tabled in Parliament was a necessary disqualification and that that belief was erroneous in law it may be that this would have afforded good ground for entertaining another party's claim to privilege. I think this issue is, on the whole, one better left to be resolved when the occasion positively requires it. (at p69)

The issue of parliamentary privilege.

53. The third matter is that concerning parliamentary privilege. Counsel for Mr. Whitlam relies upon this as requiring that, in the case of cabinet minutes, their tabling in Parliament should be excluded from all consideration. To do otherwise, so it is said, impeaches or questions that "freedom of speech and debates or proceedings in Parliament" insisted upon in 1688 in the Art. 9 of the Bill of Rights and infringes parliamentary privilege. (at p69)

54. The intrusion into these proceedings of this question of parliamentary privilege demonstrates some of the difficulties which arise when resort is had to an action seeking declaratory relief as a means of affecting the course of pending proceedings. Neither this Court nor the Supreme Court of New South Wales before which these proceedings were first instituted has any appellate jurisdiction in respect of the still part-heard committal proceedings and this Court is concerned with what occurred in the committal proceedings only to the limited extent to which it provides a factual background against which declarations might be made. What is more, all it can know of those proceedings is what the parties have chosen to put before it. This consists of some material on affidavit together with the magistrate's summary of his decision and his reasons for that decision. It has before it no transcript of the committal proceedings as a whole. (at p69)

55. The issue as to parliamentary privilege is not the subject of any claim for declaratory relief. It arises, if at all, only as a response to one answer which the informant makes to the cross-claim by Mr. Whitlam seeking a declaration that documents for which Crown privilege was not claimed by the Commonwealth should nevertheless be accorded that privilege. Whether it ever properly arises at all is, I think, at best very doubtful. (at p69)

56. I have said that, in my view, prior publicity given to a document is a factor in determining whether a claim to Crown privilege properly attaches: such publicity necessarily affects whatever weight might otherwise be given to a submission that to fail to shield that document from the public gaze would be injurious to the public interest. But it is the fact of prior publicity that is material, not the particular medium by which publicity has been obtained. Before the magistrate the informant set out to prove tabling of the documents in Parliament; whether he sought also to show the fact of ultimate importance, namely that the documents in fact received wide publicity in consequence, does not precisely appear but it rather seems that he did not. The magistrate apparently had before him the relevant Standing Orders of both Houses. These provide that documents presented to the House "shall be considered public"; however they go on to restrict all public access to such documents, making it wholly dependent upon the permission of the presiding officer. (at p70)

57. If the claim to Crown privilege for these particular documents depended exclusively upon the question of their having become matters of public knowledge it would be necessary for this Court either to have before it an adequate factual basis concerning public knowledge upon which to determine the claim to Crown privilege or to adopt the probably undesirable course of making a declaration the effect of which was expressed so as to depend for its operation upon subsequently established facts as to the extent of public knowledge. What it should not do in such circumstances is enter into a consideration of the propriety of the magistrate receiving evidence of tabling of the documents in Parliament, perhaps only to find that on the resumption of the committal proceedings that quite subsidiary, or perhaps false, issue may be wholly eclipsed by evidence of wide publicity having otherwise been given to the documents. The undesirability of my doing so is, of course, the greater since I have already concluded that, regardless of the issue of prior publicity, these documents are not entitled to Crown privilege. It may be noted that the magistrate, although ultimately ruling that he should give effect to the submission as to parliamentary privilege, nevertheless himself refused, for quite other reasons, to accord these documents Crown privilege. (at p70)

58. There is, of course, an air of unreality about this whole issue; few persons who read Australian newspapers or listened to new bulletins during July 1975 could fail to recall that these documents were headline news throughout this continent at that time and became so not by any underhand means but by their full disclosure in the national Parliament. To ignore this fact may show a nice regard for the limits of judicial notice but scarcely justifies an otherwise unwarranted venturing into the debatable area of parliamentary privilege. (at p71)

The s. 86 (1) (c) issue.

59. By his cross-claim Mr. Whitlam has sought declarations that neither the Financial Agreement 1927 nor any one of the four specified clauses of that agreement is a law of the Commonwealth within s. 86 (1) (c) of the Crimes Act 1914 and that to effect a borrowing by the Commonwealth in contravention of the Agreement is not to effect an unlawful purpose under a law of the Commonwealth within that section. These declarations are aimed at that information laid against the defendants which alleges a conspiracy to "effect a purpose that is unlawful under a law of the Commonwealth". Section 86 (1) (c) makes such a conspiracy an indictable offence. The particular unlawful purpose here alleged is the effecting of a borrowing by the Commonwealth in contravention of the Financial Agreement 1927, as amended. The Constitution Alteration (State Debts) 1928 and the Financial Agreement Act 1944 are also said to have been contravened but the particulars supplied disclose that it is the Financial Agreement itself that is central to the offence

charged. Were this Court to make the declarations sought in the cross-claim the information charging a breach of s. 86 (1) (c) could not then be sustained: what it charges would then be seen to involve no offence, the conspiracy it alleges would not be one to effect a purpose "unlawful under a law of the Commonwealth". (at p71)

60. The Financial Agreement 1927 was entered into before there existed any specific head of constitutional power authorizing the Commonwealth to make agreements with the States concerning their public debts. However the Agreement itself contemplated that an alteration should be made to the Constitution to confer such a power upon the Commonwealth. By s. 2 of the Financial Agreement Act 1928 (Cth) the agreement, which was scheduled to the Act, was "approved". Then by the Constitution Alteration (State Debts) 1928, which received the Royal assent in February 1929, the Constitution was altered by the inclusion of s. 105A, which specifically confers upon the Commonwealth a power to make such agreements with the States. This measure, being a proposed law for the alteration of the Constitution, had, in accordance with s. 128, been passed by absolute majorities of each House and had been approved by the requisite majorities of electors at a referendum before being presented for the Royal assent. (at p71)

61. Then, in March 1929, the Financial Agreement Validation Act 1929 (Cth) was assented to. As its lengthy preamble reveals, its purpose was to validate the Agreement following alteration of the Constitution. This was done by s. 2 of the Act, the Agreement being scheduled to the Act for this purpose. Since 1929 the Financial Agreement has been consensually amended on a number of occasions, on each occasion the amending agreement made between Commonwealth and States being scheduled to a Commonwealth Act and being approved by the Parliaments of the Commonwealth and of the States. The Financial Agreement Act 1944 relates to such an agreement: it approves the amending agreement of that year, which is scheduled to the Act and to which the original Financial Agreement 1927 is in turn scheduled. (at p72)

62. It is within one or more of the measures to which I have referred that the informant must locate his "law of the Commonwealth" upon which he relies to render "unlawful" the purpose of effecting the alleged borrowing by the Commonwealth, that being the purpose which he says that the defendants conspired to effect. For Mr. Whitlam it was contended that the Financial Agreement is not such a "law of the Commonwealth", nor is s. 105A of the Constitution or the Constitution Alteration (State Debts) 1928 and that in any event breach of the Financial Agreement by the Commonwealth is not "unlawful" within the meaning of s. 86 (1) (c). If unlawful in any sense it is only unlawful under the Constitution, which is not a law of the Commonwealth, and is not unlawful under any "law of the Commonwealth" such as the Constitution Alteration (State Debts) 1928, the Financial Agreement Acts of 1928 and 1944 or the Financial Agreement Validation Act 1929. (at p72)

63. The context in which the phrase "unlawful under a law of the Commonwealth" occurs in s. 86 (1) (c) of the Crimes Act is largely neutral, neither providing particular guidance as to meaning nor requiring that any special or unusual meaning should be given to the words. What is at the core of the phrase is clear enough, namely offences against enactments of the federal legislature; it is at its periphery that doubts may exist. It has been with such peripheral areas that previous decisions of this Court on similar but not identical phrases have dealt: for instance, whether industrial awards or laws of a Territory form part of the law of the Commonwealth. However with such problems this case is not concerned. (at p72)

64. It is convenient, at the outset, to dispose of such of the measures above referred to as appear to

me to be clearly incapable of being "laws of the Commonwealth" which might render "unlawful" the alleged borrowing. The first of these is the Constitution itself and in particular s. 105A. The Constitution as originally enacted is not, I think, "a law of the Commonwealth" as that expression is employed in s. 86 (1) (c). It forms part of an enactment of the Imperial Parliament, not of the Commonwealth legislature, and rather than being a law of the Commonwealth it is the constitutional instrument to which that legislature from which laws of the Commonwealth emanate owes its existence and its law-making power. Section 61 of the Constitution, when it speaks of "the execution and maintenance of this Constitution, and of the laws of the Commonwealth" recognizes the Constitution as a measure distinct from the laws of the Commonwealth. No doubt the Constitution may be spoken of, in one sense, as being the fundamental law of the Commonwealth: but the words of s. 86 of the Crimes Act do not speak in any such broad jurisprudential terms. The past decisions of this Court which have in any way treated of this matter have always confined that which is a law of the Commonwealth to that which emanates directly or indirectly from an exercise of the legislative power of the federal Parliament. (at p73)

65. If this be so, it would be curious to say the least, were an amended portion of the Constitution, such as s. 105A, to be regarded as a law of the Commonwealth while that which stands unamended is not. While the difficulties to which such a view gives rise would no doubt be most acute in the case of piecemeal amendments, such as those made to s. 13 of the Constitution, they remain formidable even where, as in the case of s. 105A, the amendment involves a new section, complete in itself. I regard that view as untenable. When the Commonwealth of Australia Constitution Act enacted the Constitution it provided, in s. 128, a means of altering that Constitution. That means involved a combination of legislative initiative and popular assent by referendum, followed by Royal assent. Whether that means should, despite the injection of the element of popular assent, be described as a law of the Commonwealth, may be debatable. Be that as it may, the means should not be confused with the result; if the means be relevantly a law of the Commonwealth it does not follow that so too is the result, namely that portion of the Constitution which reflects the alteration. The result remains the Constitution, the means prescribed for its alteration does not transmit to and infect with the character of the means that portion of the Constitution which it alters. An analogy exists in company law. A company's articles of association may be altered by special resolution but after alteration what is altered remains the company's articles; while the means is a special resolution the result is articles of association, albeit in amended form. (at p74)

66. A consideration of the process of constitutional alteration confirms this. The measure for alteration, when assented to, does not itself become part of the constitutional text. It merely enacts the alteration and the alteration thereupon takes effect because the Commonwealth of Australia Constitution Act, by including in the Constitution which it creates the provisions of s. 128, so provides. (at p74)

67. Accordingly, I do not regard either the Constitution in original form or any amendment to it as "a law of the Commonwealth" for the purposes of s. 86 (1) (c). (at p74)

68. Even were this not so, s. 105A being in relevant respects to be regarded as a law of the Commonwealth, it would not, I think, be a law upon which the informant could rely as a source of "unlawfulness" for the purposes of s. 86 (1) (c). (at p74)

69. The relevant unlawfulness is said to be disobedience of the requirement of cl. 4 (4) of the Financial Agreement 1927, which provides that moneys shall not be borrowed by the Commonwealth or any State otherwise than in accordance with the Agreement. To describe a

conspiracy to effect a borrowing in breach of the requirement of cl. 4 (4) as the effecting of a purpose unlawful under s. 105A (5) gives to s. 105A (5) an operation it does not possess. The sub-section does not render the breach of an agreement to which it applies an act unlawful under the sub-section. Its purpose and effect is quite different: it is to place beyond the reach both of statutes and of constitutional principles and provisions the obligatory force of such agreements. The agreements which s. 105A contemplates are contracts between quite special parties, each possessing legislative powers and to whose capacity to contract and to perform its obligations constitutional principles and provisions apply. For the enforcement of the obligations of subjects the law of contract suffices, but for the parties to agreements under s. 105A more is required if the imposition upon them of contractual obligations is to be wholly effective. What more is required is, however, purely negative in form: the parties' power to legislate and the effect which constitutional principles and provisions may have upon their capacity must not be allowed to defeat, diminish or condition their contractual obligations. Sub-section (5) attains this by providing that such agreements shall be binding "notwithstanding anything contained" in the constitutions or laws of any party. (at p74)

70. This is what I understand to have been the operation given to s. 105A (5) by the majority judgments in New South Wales v. The Commonwealth (No. 1) [1932] HCA 7; (1932) 46 CLR 155 and it accords full and exact effect to the words of the sub-section. (at p75)

71. The law of contract gives to such agreements their binding force, which is then protected from the effects both of statute and of constitution. The failure to perform an obligation under such an agreement results in breach of contract but not in "unlawfulness under" s. 105A (5). Even were a party to such an agreement so to legislate or so to amend its constitution as purportedly to free itself from its contractual obligations under such an agreement, the consequence would be that the statutory or constitutional provision would be inoperative for that purpose in the face of s. 105A (5) but not, I think, "unlawful" within s. 86 (1) (c). It follows that s. 105A (5) cannot be relied upon to support the offence charged in the information. (at p75)

72. I have described as debatable the question whether a measure to alter the Constitution under s. 128 is a law of the Commonwealth within s. 86 (1) (c). The presently relevant measure is the Constitution Alteration (State Debts) 1928. Its special character is reflected both in its preamble and its title. Its preamble accords recognition to the measure's compliance with the special requirements of s. 128 of the Constitution: instead of referring, in the usual way, to enactment of the measure by the Sovereign, the Senate and the House of Representatives, it adds the words "with the approval of the electors, as required by the Constitution". Its title significantly omits the word "Act", and this for good reasons since it is more than a mere enactment of the legislature: it is effective to do what no enactment of the legislature can achieve, that is, alter the terms of the Constitution. I find it unnecessary to determine whether the special character of this measure takes it out of the category of enactments which are laws of the Commonwealth, and this because, whether or not it be such a law, it is not a measure under which anything is rendered "unlawful", as is called for under s. 86 (1) (c). Its only operative effect is to alter the Constitution, that and no more. It contains but two sections, the first supplying its short title, the second stating that "The Constitution is altered" in a certain respect. Of its nature it is therefore incapable of being a law under which anything is made "unlawful". (at p75)

73. I next turn to the Financial Agreement 1927 itself. Viewed in isolation it is not a law of the Commonwealth such as s. 86 (1) (c) refers to any more than it is a law of any of the other entities of our federation which were parties to it. It is but the expression, in written form, of the consensus attained by the parties and is purely contractual in character. Whatever meanings "law" may have in

some areas of jurisprudential discussion, I think it clear enough that when used in s. 86 (1) (c) the term "law" is incapable of extending to such an agreement. I speak, of course, of the Agreement itself; the effect of its approval or validation and of its inclusion as a schedule to federal legislation may, for the moment, be deferred. (at p76)

74. It was submitted that the effect of s. 105A (5) upon the Agreement, according it a binding force which prevails over constitutions or statutes, served to make its provisions "law". Such a contention seems to involve first the construction of a hierarchy, then the identification within it of what are undoubtedly "laws", whether of the Commonwealth or of States, and, finally, the extension of the description "laws" so as to include all else in the hierarchy which may have an operation or effect superior to what are undoubted laws. Such a process assumes, without justification, that all that is more potent than a statute must, like statutes, be included in the description "law" as it is used in s. 86 (1) (c). However the assumption confuses that which answers the description of a law with that which has an effect similar, or superior, to such a law. It is with the former that s. 86 (1) (c) is alone concerned and, of course, then only with laws "of the Commonwealth". That the Financial Agreement may be immune from the effect of conflicting Commonwealth or State legislation does nothing to make it a law of the Commonwealth for the purpose of s. 86 (1) (c), any more than the Constitution itself is such a law. (at p76)

75. There remain for consideration the Financial Agreement Act 1928, the Financial Agreement Validation Act 1929 and the Financial Agreement Act 1944. The first approves and the second validates the Financial Agreement 1927 and to each that agreement is scheduled, as it also is to the third of these measures. The approval of the Financial Agreement by the Act of 1928 produced, I think, a consequence no different from that which was held to flow from the similar statutory approval which had been accorded to the scheduled agreement which was in suit in Placer Development Ltd. v. The Commonwealth [1969] HCA 29; (1969) 121 CLR 353 . Of it Kitto J. said (1969) 121 CLR, at p 357 that the approval "merely fulfilled a condition precedent which the agreement itself set to its binding operation", it conferred no "more extensive legal obligation that the terms of the agreement themselves provided". In the present case the approval of the Financial Agreement cannot convert its contractual obligations into statutory duties a breach of which would be "unlawful" in the sense referred to in s. 86(1) (c). (at p77)

76. The Act of 1929, which validated the Agreement following amendment of the Constitution, was passed in exercise of the specific power of legislative validation conferred by s.105a (2) of the Constitution. Such retrospective validation would appear to have the same effect as does prospective authorization, of which Dixon J. said, in P.J. Magennis Pty. Ltd. v. The Commonwealth [1949] HCA 66; (1949) 80 CLR 382, at p 410 that it put "beyond doubt the authority of the signatory to execute the instrument", securing parliamentary approval of the transaction but going no further, "It does not otherwise change the legal character of the instrument or of the transaction it embodies". Thus the validation does not have the effect of converting the Agreement into a law such as s.86 (1) (c) calls for. With this quite limited effect may be contrasted that of statutes which not only schedule agreements but expressly enact that the terms of the scheduled agreement shall be observed by the parties. As Lord Cairns L.C. said of such a statute in Caledonian Railway Co. v. Greenock and Wemyss Bay Railway Co. (1874) LR 2 Sc & Div 347, at p 349 , "every provision and stipulation in that agteement becomes as obligatory and binding" as if repeated in the statute. This is not, however, the effect of the present legislation which, in the words of Lord Cairns goes no further than to "give statutory validity to the agreement" (1874) LR 2 Sc & Div 347, at p 349 . In Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government (1960) AC 260 there are reviewed the more recent English authorities as to statutory notice being accorded to contracts. Bearing in

mind the words of the statute in question in the Pyx Granite Case (1960) AC 260 and the fact that there was there no executed agreement at the time of that statute's enactment, nothing in their Lordships' speeches is, I think, in any way opposed to the conclusions expressed above. (at p77)

77. It follows that in my view no one of the provisions upon which the informant might seek to rely, as being a law of the Commonwealth under which the purpose of the alleged conspiracy is made unlawful, in fact answers that description: nor will the interaction of any combination of these provisions better serve his purpose. My conclusion is that the information which alleges this conspiracy to affect a purpose unlawful under a law of the Commonwealth cannot be sustained. I would not make declarations precisely in the form sought by the cross-claim. Instead I would declare that, for the purposes of s. 86 (1) (c) of the Crimes Act 1914, no one of the provisions the effect of which I have discussed above, including the Constitution and the Financial Agreement 1927, is, separately or in combination with another or others of them, a law of the Commonwealth under which the purpose alleged in that information is unlawful. (at p78)

The declaratory relief.

78. Counsel for one of the defendants, Dr. Cairns, made two distinct submissions each of which raised in quite different ways the utility and propriety of the procedure adopted in this case, the seeking of declaratory relief in relation to rulings by a magistrate in committal proceedings. The first submission was that the various subpoenas duces tecum issued by the magistrate at the instance of the informant and which have given rise to the question of Crown privilege should be treated as in fact addressed to the Crown in right of the Commonwealth or to persons entitled to its immunities. So regarded, s.26 of the Justices Act, 1902 (N.S.W.) does not, it is said, authorize the issue of such subpoenas or, if it does, it goes beyond power. (at p78)

79. This submission was not made before the magistrate, is not the subject of any claim to relief either in the informant's summons or in the cross-claim and is not relied upon by counsel for the Commonwealth, the party most directly affected. It has been said that there are procedural and practical advantages which justify the institution of these proceedings. If there be such advantages, they may very readily be dissipated if, regardless of what has gone before, any party may canvass matters extraneous to the substance of the declaratory relief which is sought. This Court has heard lengthy argument upon Crown privilege for documents the production of which was sought by the issue of subpoenas. That argument has all proceeded upon the assumption, unchallenged in the committal proceedings, that the subpoenas were properly issued. I do not consider it appropriate now to embark upon the course of inquiry which this present submission, unsupported though it is by any express prayer for relief, would require. Accordingly I do no more than note that it was made. (at p78)

80. The second submission urged on behalf of Dr. Cairns is that the Supreme Court of New South Wales lacks jurisdiction to give declaratory relief in the circumstances of this case; alternatively that as a matter of discretion no declaratory relief should be granted. On the question of jurisdiction I go directly to the authoritative statement of Gibbs J. in Forster v. Jododex Aust. Pty. Ltd. [1972] HCA 61; (1972) 127 CLR 421, at pp 435-536 . Omitting his Honour's citation of authorities, the passage runs as follows:

"The jurisdiction to make a declaration is a very wide one. Indeed, it has been said that, 'under O.XXV, r.5, the power of the Court to make a declaration, where it is a question of defining the

rights of two parties, is almost unlimited; I might say only limited by its own discretion': . . . However, the jurisdiction may be ousted by statute, although the right of a subject to apply to the court for a determination of his rights will not be held to be excluded except by clear words." The passage has quite recently been relied upon by Needham J. in Bourke v. Hamilton (1977) 1 NSWLR 470 . His Honour's detailed review of those recent decisions in the New South Wales Supreme Court in which the use of declaratory relief in connexion with committal proceedings has been considered makes it unnecessary for me to traverse that ground. I need, I think, do not more than apply, as did Needham J., what was said by Gibbs J. in the Jododex Case [1972] HCA 61; (1972) 127 CLR 421 to the case in hand. That the informant was entitled to institute the committal proceedings is unquestioned, s. 13(a) of the Crimes Act 1914 (Cth) confers that right and to the extent that it does so it reflects the position at common law. It has always been the position, subject only to occasional statutory exceptions, that it is "the right of any member of the public to lay an information and to prosecute an offence", per Diplock J. in Lund v. Thompson (1959) 1 QB 283, at p 285 ; and see Duchesne v. Finch (1912) 28 TLR 440, at p 441 . As Lord Wilberforce observed in Gouriet v. Union of Post Office Workers [1977] UKHL 5; [1977] UKHL 5; (1978) AC 435, at p 482 , "All citizens have sufficient interest in the enforcement of the law to entitle them to take this step", that is, to institute a prosecution - and see per Viscount Dilhorne (1978) AC, at p 490 and Lord Fraser of Tullybelton (1978) AC, at pp 520-521 . Having the carriage of the prosecution, the informant then caused subpoenas duces tecum to be issued and served. Again he had a clear right to do so-s. 85E of the Crimes Act 1914 (Cth) and s. 26 of the Justices Act, 1902 (N.S.W.). When objections to compliance with those subpoenas were raised, based upon claims to Crown privilege, that immediately affected the informant in the exercise of the rights to which I have referred. That the rights which the informant is asserting are not concerned with the defence of his own person or property is no reason to deny them recognition. They are entitled to such recognition and there is, accordingly jurisdiction to make declarations such as are sought. (at p80)

81. That proper sense of responsibility to which Lord Radcliffe refers in Ibeneweka v. Egbuna (1964) 1 WLR 219, at p 225 when he reminds us that "judicial pronouncements ought not be issued unless there are circumstances which call for their making", will not, in my view, be lacking if this Court, in exercise of its discretion, determines to use the jurisdiction it possesses. I would, with respect, adopt the words of Walsh J. in the Jododex Case when he said (1972) 127 CLR, at p 428 , "I think that we ought not now to decide that the questions of law upon which the parties are in dispute should be left unresolved in these proceedings". If there be any merit in these proceedings it surely lies in the opportunity they afford of resolving once and for all questions of law first raised years ago in the magistrat's court at Queanbeyan and which have ever since troubled the parties and the courts. It being a matter of discretion, this Court should, in the particular circumstances of this case, grant such declaratory relief as the parties are entitled to. In many like cases an exercise of discretion in the contrary sense may be called for so as to avoid interference with the due and orderly administration of the law and with the proper exercise by magistrates of their functions in committal proceedings. The past history of this case, to which sufficient reference has already been made, is such that these considerations, often proper to be taken into account and which may even prove decisive, are here of little if any weight. In conclusion on the question of discretion, it is, of course, relevant that in these proceedings it is no mere question of the admissibility of evidence in any ordinary sense that is in issue. (at p80)

82. In addition to declaratory relief the informant in his summons sought mandatory orders. These were not, however, pressed in argument and should not, in the circumstances, be made. (at p80)

Conclusions.

83. It remains only to summarize my main conclusions as follows:

1. Both the Commonwealth and Mr. Whitlam fail in their respective claims to Crown privilege for the various documents identified in the course of my reasons for judgment other than Loan Council documents. With regard to the latter, for the reasons discussed the proper course has been to inspect them. The Court has done this, with the consequence stated at the conclusion of the judgments in this case.

2. The information charging a conspiracy to effect a purpose unlawful under a law of the Commonwealth discloses no offence, the informant having failed to establish that any law of the Commonwealth makes the alleged purpose an unlawful one.

3. There is jurisdiction to make declaratory orders to give effect to the foregoing conclusions and in its discretion the Court ought to exercise that jurisdiction. (at p81)

MASON J. These proceedings, which were removed at the outset of the hearing into this Court by an order made under s.40 of the Judiciary Act 1903 as amended, raise some interesting and difficult issues. Initially there is the quesiton whether declaratory relief of the kind sought should be granted in relation to issues arising in committal proceedings pending before a magistrate in a court of petty sessions. As the proceedings have been removed into this Court, it is this Court's jurisdiction to grant declaratory relief that is engaged. This Court's jurisdiction to grant declaratory relief, delimited as it is by O. 26, r. 19 of the High Court Rules, is no less extensive than the jurisdiction conferred upon the Supreme Court of New South Wales by s. 75 of the Supreme Court Act, 1970. All that was said in Forster v. Jododex Aust. Pty. Ltd. (1972) 127 CLR, at pp 434 et seq as to the extent of the jurisdiction formerly conferred upon the Supreme Court by the legislation which preceded the Supreme Court Act, 1970 has equal application to this Court's jurisdiction to make declarations of right. Having regard to the breadth of our jurisdiction to grant relief of the kind sought, I see no impediment in point of jurisdiction to the grant of declaratory relief in the present case. (at p81)

2. However, whether the Court should exercise its discretion to grant declaratory relief in this case gives rise to a more acute problem. In Forster v. Jododex Aust. Pty. Ltd. (1972) 127 CLR, at p 438 , Gibbs J., with whose judgment on this point McTiernan and Stephen JJ. and I agreed, referred to Lord Radcliffe's observation in Ibeneweka v. Egbuna (1964) 1 WLR, at p 225 that "the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making". Except in New South Wales where the grant of declaratory relief is more fashionable than elsewhere (see Bourke v. Hamilton (1977) 1 NSWLR, at pp 476-479 and the cases cited by Needham J. in his judgment), there is a dearth of authority supporting the grant of declaratory relief in relation to committal proceedings. The absence of authority is doubtless to be explained by a variety of circumstances - the recognition that the function of a magistrate in hearing committal proceedings is to decide whether there is a prima facie case against a defendant which warrants his being put upon trial; that a committal for trial is a preliminary examination which involves no final determination of the defendant's guilt of the offence charged; the absence of any appeal from the magistrate's decision; and the existence of the Attorney-General's discretion to commit for trial. All these factors tend to indicate that a plaintiff for declaratory relief in relation to committal proceedings needs to show some special reason why the court should grant the relief sought in lieu of allowing the committal proceedings to pursue their ordinary course. The chequered history of the committal proceedings in this very case is a salutary example of what may occur when proceedings

are commenced in a superior court seeking answers to some, but of necessity not all, of the issues arising in committal proceedings. The proceedings before the magistrate are interrupted whilst the superior and appellate courts give attention to particular questions upon which guidance is sought. It may result in unacceptable discontinuity and delay. (at p82)

3. In this case the two informations were laid on 20th November 1975. The proceedings before the magistrate were first interrupted when the defendants sought relief in the nature of certiorari, prohibition and declarations in Connor v. Sankey (1976) 2 NSWLR 570 . After this decision was given by the Court of Appeal on 15th October 1976 and the committal proceedings had been resumed, further proceedings were then instituted in the Supreme Court arising out of the magistrate's announcement that he would no longer hear the case on the ground of appearance of bias. The Supreme Court ordered him to continue the hearing. This decision was affirmed by the Court of Appeal and an application for special leave to appeal from that decision to this Court was subsequently withdrawn. It was after a further resumption of the proceedings before the magistrate in which he decided various questions relating to the production of documents that the current proceedings were launched in the Supreme Court. The result has been that the committal proceedings have been fragmented and inordinately delayed. Almost three years have elapsed since the informations were laid, yet the committal proceedings are a long way from completion. Indeed, it seems that the magistrate has not yet received oral evidence. (at p83)

4. Confronted with this unsatisfactory and exceptional situation the Court should, I think, grant the declaratory relief if it appears that by so doing it will facilitate the committal proceedings and finally put beyond doubt important and difficult issues of law. The very nature of the offences charged and the character of the defendants demonstrate the high public importance of the proceedings. The questions relating to the production of documents involve a fundamental examination of the scope and extent of Crown privilege and the counterclaim calls for a consideration of s. 105A of the Constitution, the Financial Agreement and s. 86 of the Crimes Act. All these questions, especially those which relate to the Constitution, merit the attention of this Court. (at p83)

5. Whether the issues now sought to be determined could be raised for decision in other proceedings in the Supreme Court is not of decisive importance. There has been a long-standing controversy as to the availability of common law prohibition and certiorari to a magistrate hearing committal proceedings. Supreme Courts in New South Wales and Victoria have held that the writs do not lie (Ex parte Cousens; Re Blacket (1947) 47 SR (NSW) 145, at p 147 ; Ex parte Lyndon; Re Cooper (1957) 57 SR (NSW) 626 ; Ex parte Donald; Re McMurray (1969) 89 WN (Pt 1) (NSW) 462, at pp 466, 467 ; Ex parte Coffey; Re Evans, (1971) 1 NSWLR 434, at pp 449, 457, 458 ; Phelan v. Allen (1970) VR 219). The Supreme Court of Queensland has taken a different view (Reg. v. Schwarten; Ex parte Wildschut (1965) Qd R 276), as has the Supreme Court of Ontario (Reg. v. Botting (1966) 56 DLR (2d) 25). In this conflict of authority my preference is for the view that prohibition will lie to a committing magistrate to correct for want or excess of jurisdiction. Although it has been said that committal proceedings are ministerial (Ammann v. Wegener (1972) 129 CLR 415, at pp 435-436), it should now be recognized affirmatively that a magistrate hearing committal proceedings has, within the meaning of Atkin L.J.'s observations in R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ltd. (1924) 1 KB 171, at p 205 , authority to determine questions affecting the rights of subjects and that he has a duty to act judicially. It is his function to determine whether there is a prima facie case against the defendant sufficient to warrant his being put upon trial. That determination is one which materially affects the defendant because it exposes him to trial upon indictment and to a deprivation of his liberty pending trial. There can be

no doubt that in arriving at his decision the magistrate is bound to act judicially in the sense that he must observe certain standards of fairness appropriate to be applied by a judicial officer. It would be quite unacceptable to say that a committing magistrate is not under a duty to act judicially or that he is entirely free from supervision by a superior court, even when acting without jurisdiction or in excess of his jurisdiction. (at p84)

6. If the magistrate, when he exceeds his jurisdiction, is subject to supervision by the prerogative writs, then there is little to be said for the view that the court should not intervene by making a declaration of right when the offence charged in the summons and information is one which is not known to the law. The distinction between no jurisdiction and jurisdiction to entertain proceedings for an offence unknown to the law is not sufficiently formidable to warrant intervention in one case but not in the other. (at p84)

7. On the other hand, if a committing magistrate is not subject to prohibition, even for absence or excess of jurisdiction, it may be said that this constitutes an additional reason for exercising the discretion to grant declaratory relief if it be otherwise appropriate. (at p84)

8. The plaintiff's case for an exercise of the court's discretion to grant declaratory relief is, if anything, even stronger than that presented by the defendants in relation to the first information, that which is based on s. 86 (1) (c) of the Crimes Act 1914 (Cth), as amended. An order by a magistrate compelling or refusing production of documents may be susceptible of appeal under s. 112 of the Justices Act, 1902 (N.S.W.), as amended, or by prerogative writ (see Ex parte Brown; Re Tunstall (1966) 67 SR (NSW) 1 ; Ex parte Attorney-General (N.S.W.); Re Cook (1967) 2 NSWLR 689). There is nothing then in the point that the magistrate's rulings on production of documents are not subject to review; indeed, it would be surprising if that were so, particularly in cases involving a claim to Crown privilege. Though in some cases a court may refuse to give declaratory relief when similar relief is available in other proceedings, that is not a reason for refusing declaratory relief when it is otherwise convenient to grant it. (at p84)

9. As the production of documents turns to some extent on the issues which arise in connexion with the offences charged in the informations, it is necessary to look in the first instance to the declaratory relief sought by the defendants in relation to the first information. There it is alleged that the defendants "conspired with each other to effect a purpose that was unlawful under a law of the Commonwealth, that is to say to effect the borrowing by the Commonwealth of Australia from overseas sources a sum in the currency of the United States of America not exceeding the equivalent of $4,000 million in contravention of the Financial Agreement, 1927 as amended, the Constitution Alteration (State Debts) Act, 1928 and the Financial Agreement Act, 1944 as amended". (at p85)

10. The charge is based on s. 86 (1) (c) of the Crimes Act. The sub-section provides:

"A person who conspires with another person ◆

. .

(c) to effect a purpose that is unlawful under a law of the Commonwealth;

shall be guilty of an indictable offence."

According to particulars given by the plaintiff, the purpose was unlawful in that it was to effect a borrowing by the Commonwealth from overseas sources of up to $4,000 million for purposes other than temporary purposes without reference to and approval by the Australian Loan Council and without the proposed borrowing being included in any loan programme approved by the Council, with the consequence that the proposed borrowing was contrary to the Financial Agreement. All this, it is said, involves contraventions of cll. 3 (8), 3 (15), 4 (4) and 6 of the Financial Agreement, s. 105A (5) of the Constitution, and the Financial Agreement Act 1944. (at p85)

11. The Financial Agreement ("the Agreement") was made on 12th December 1927 between the Commonwealth and the States before s. 105A was introduced into the Constitution. The Agreement has been varied from time to time, each variation having been approved by Commonwealth and State statutes. The Agreement recited that the scheme which it embodied was designed to make provision for the adjustment of Commonwealth and State financial relations. It also recited that permanent effect could not be given to the scheme unless the Constitution was altered so as to confer power on the Commonwealth Parliament to make laws for carrying out and giving effect to the proposals and that, pending submission to a referendum of a proposed law, the parties agreed that for the period commencing on 1st July 1927 and ending on 30th June 1929 certain provisions of the scheme should be temporarily adopted. (at p85)

12. Clause 1 of the Agreement provides:

"This Agreement shall have no force or effect and shall not be binding on any part unless and until it is approved by the Parliaments of the Commonwealth and of the States."

Clause 3 provides for the establishment of the Australian Loan Council consisting of representatives of the Commonwealth and the States. Its function is to regulate (inter alia) the annual borrowings of the Commonwealth and the States. Clause 3 (8) provides:

"The Commonwealth and each State will from time to time, while Part III. of this Agreement is in force, submit to the Loan Council a programme setting forth the amount it desires to raise by loans during each financial year for purposes other than the conversion, renewal or redemption of existing loans or temporary purposes. Each programme shall state the estimated total amount of such loan expenditure during the year, and the estimated amount of repayments which will be available towards meeting that expenditure. Any revenue deficit to be funded shall be included in such loan programme, and the amount of such deficit shall be set out. Loans for Defence purposes approved by the Parliament of the Commonwealth shall not be included in the Commonwealth's loan programme or be otherwise subject to this Agreement."

Provision is made for the Loan Council's determination of the amount to be borrowed each year, the allocation of the amount between the Commonwealth and the States (cl. 3 (9), (10), (11) and (12)). The Commonwealth and the States are obliged to submit statements of the amounts that they require during each year for the conversion, renewal or redemption of existing loans (cl. 3 (13)). (at p86)

13. Clause 3 (15) is in these terms:

"A decision of the Loan Council in respect of a matter which the Loan Council is by this Agreement empowered to decide shall be final and binding on all parties to this Agreement." (at p86)

14. Except in cases where the Loan Council has decided that moneys shall be borrowed by a State, the Commonwealth shall, while Pt III of the Agreement is in force, subject to certain provisions in

the Agreement, arrange for all borrowings for or on behalf of the Commonwealth or any State (cl. 4 (1)). Provision is made for borrowing outside Australia by a State if the Loan Council so decides and moneys so borrowed are deemed to be moneys borrowed by the Commonwealth for and on behalf of the State (cl. 4 (2)). (at p86)

15. Clause 4 (4) is critical. It provides:

"While Pt III. of this Agreement is in force, moneys shall not be borrowed by the Commonwealth or any State otherwise than in accordance with this Agreement." (at p86)

16. Clause 6 (3) provides:

"Where any such borrowing or use is solely for temporary purposes, the provisions of this Agreement, other than this clause, shall not apply." (at p87)

17. Part III of the Agreement is still in operation. It contains cl. 8 which is in these terms:

"This Part of this Agreement shall not come into force or be binding upon any party hereto unless before the 1st July, 1929, the Constitution of the Commonwealth has been altered in accordance with the proposals referred to in Pt IV. of this Agreement and a law of the Parliament of the Commonwealth has been made thereunder validating this Agreement, but shall come into full force and effect if and when before the said date the Constitution is so altered and this Agreement is so validated." (at p87)

18. Clause 15 provides for the submission to the Parliament and the electors of a constitutional alteration in the form subsequently expressed by s. 105A of the Constitution. Action taken in accordance with the clause resulted in approval by a referendum of the proposed alteration to the Constitution and the insertion by the Constitution Alteration (State Debts) 1928 of s. 105A. (at p87)

19. The critical provision upon which the first information is based is cl. 4 (4) which prohibits the borrowing of moneys by the Commonwealth or any State otherwise than in accordance with the Agreement. In essence the case made against the defendants in the committal proceedings on this information is that they conspired to effect a borrowing by the Commonwealth in breach of this prohibition, the motive being to avoid the inclusion of the borrowing in the Commonwealth programme required to be submitted to the Loan Council, and that such a borrowing, if made, is unlawful under a law of the Commonwealth. I turn now to the statutory provisions, including s. 105A, which relate to the Agreement and which are said to give the prohibition in cl. 4 (4) the character and status of a law of the Commonwealth. (at p87)

20. The original Agreement was approved by the Financial Agreement Act 1928. The Agreement as varied has been approved by the Financial Agreement Act 1928-1966. As the original Agreement was intended to have an operation before s. 105A was introduced into the Constitution it required validation. Section 105A did not itself validate the Agreement, but by sub-s. (2) it gave the necessary authority to the Parliament to enact such a validation. The Commonwealth Parliament exercised that authority by the Financial Agreement Validation Act 1929. (at p87)

21. Section 105A (1) of the Constitution authorizes the Commonwealth to make agreements with the States with respect to the public debts of the States. The section then goes on to provide:

"(2) The Parliament may make laws for validating any such agreement made before the

commencement of this section.

(3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

(4) Any such agreement may be varied or rescinded by the parties thereto.

(5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State." (at p88)

22. The contention is that s. 105A (5) gives the force of law to the provisions of the Agreement, in particular to the prohibition which is contained in cl. 4 (4), with the consequence, so the argument runs, that a borrowing contrary to the prohibition contained in that sub-clause is a borrowing contrary to a law of the Commonwealth, the relevant law being that expressed in cl. 4 (4) by virtue of the provisions of s. 105A (5). (at p88)

23. It has been pointed out in this Court on more than one occasion that the Financial Agreement is given paramountcy by s. 105A and that it overrides Commonwealth and State laws, even the Constitution itself (New South Wales v. The Commonwealth (No. 1) [1932] HCA 7; (1932) 46 CLR 155, at pp 172, 177, 186, 202 ; Melbourne Corporation v. The Commonwealth [1947] HCA 26; (1947) 74 CLR 31, at pp 62, 95, 101 ; Bank of New South Wa les v. The Commonwealth [1948] HCA 7; (1948) 76 CLR 1, at pp 244-246, 279-283, 326, 338-339). The plaintiff relies particularly on the remark of Starke J. in New South Wales v. The Commonwealth (1932) 46 CLR, at p 186 that the Agreement, "is part of the organic law of the Commonwealth. It can only be varied or rescinded by the parties thereto. Nothing in the Constitution or in the Constitutions of the States can effect it or prevent its operation. It creates rights and duties as between the Commonwealth and the States upon and in respect of which the judicial power of the Commonwealth can be exerted." In Bank of New South Wales v. The Commonwealth (1948) 76 CLR, at pp 279-280 , Rich and Williams JJ. referred to Starke J.'s observations, evidently with approval. (at p88)

24. Of Starke J.'s statement and other statements to the same effect the comment must be made that they were not directed to the issue with which the Court is now concerned. It is one thing to say that the effect of s. 105A (5) is to make the Agreement binding on the parties and to deny an operation to Commonwealth and State laws which would render the Agreement invalid or ineffective. It is quite another thing to say that the provisions of the Agreement have the force of law in the sense that they are laws. To say, even in a statute, that an agreement is binding on the parties, is to do no more than give the agreement validity and efficacy as a contract, more especially when in the absence of statute the contract would have been invalid. (at p89)

25. The distinction between a statutory provision which merely gives validity to a contract and makes its provisions binding on the parties, thereby overcoming some obstacle to its validity or operation, and one which goes further by imposing a statutory obligation on the parties to carry out the terms of the contract, thus giving them the force of law, is well brought out in the judgment of Lord Cairns L.C. in Caledonian Railway Co. v. Greenock and Wemyss Bay Railway Co. (1874) LR 2 Sc & Div 347, at p 349 . In that case the statute not only "sanctioned and confirmed" the antecedent agreement, it also required the parties to carry out the provisions of the agreement. Of

the first provision Lord Cairns said: ". . . the enactment does no more than give statutory validity to the agreement." Of the second provision his Lordship went on to say:

". . . when an agreement between two companies who are coming for an Act of Parliament is scheduled to the Act of Parliament, and when an enactment is found in the body of the Act that each company shall be required to implement and fulfil all the provisions and stipulations in the agreement, every provision and stipulation in that agreement becomes as obligatory and binding on the two companies as if those provisions had been repeated in the form of statutory sections." The distinction so made between a statutory provision giving validity to an agreement and one which goes further so as to impose a statutory obligation to carry out the provisions of the agreement has been accepted and acted upon in later cases (Reg. v. Midland Railway Co. (1887) 19 QBD 540, at pp 544, 546, 548, 549-550 ; Manchester Ship Canal Co. v. Manchester Racecourse Co. (1900) 2 Ch 352; affd (1901) 2 Ch 37 ; Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government (1960) AC 260). (at p89)

26. Section 105A does not impose any separate statutory obligation on the Commonwealth and the States to carry out the provisions of the Agreement. It makes the Agreement binding on the parties, but that is to give its provisions the binding force which they have as contractual provisions. Section 105A (3), by empowering the Parliament to make laws for the carrying out by the parties of the Agreement, suggests that the imposition of a statutory obligation to perform the Agreement was a matter left for Parliament to determine. (at p90)

27. The plaintiff relies strongly on the last clause in s. 105A (5). But to say that the contract is binding, notwithstanding anything contained in constitutions or laws, is to preserve its validity and operation immune from the impact that those constitutions and laws might otherwise have on the contract. The unique status thereby given to the Agreement is the product of s. 105A (5) which is itself the relevant fundamental law. It is not a status which the Agreement acquires because it is a fundamental law or even a law. It remains a contract, though one with very special qualities. It is not converted from a contract into a law with each of its clauses having the character of a statutory provision. Like every contract it continues to be capable of variation or rescission by the parties, a circumstance for which s. 105A (4) makes provision. It may be that a statute could provide for the alteration of the content of a relevant law by reference to the terms of a contract made or to be made by the parties to that contract, but this is not what s. 105A says or attempts to say. It treats the Agreement as a contract that may be varied or rescinded by the parties. (at p90)

28. It is convenient now to refer to the related statutory instruments which might be said to give the Agreement the force of law. Section 2 of the Financial Agreement Act 1928 approved the Agreement. In doing so it satisfied in part the condition precedent to the operation of the Agreement created by cl. 1 of the Agreement itself. That clause stipulated that the Agreement should have no force or effect unless and until it was approved by the Parliaments of the Commonwealth and of the States. It was therefore the function of s. 2 of the 1928 Act to satisfy this condition and, by giving statutory approval, it did no more than that - see Placer Development Ltd. v. The Commonwealth [1969] HCA 29; (1969) 121 CLR 353, at pp 357-365 . The statute did not itself impose legal obligations on the parties to the Agreement to carry out its provisions. The same comment must be made about s. 3 of the Financial Agreement Act 1944 which approved the Agreement as it had been varied. (at p90)

29. The Financial Agreement Validation Act 1929 satisfies the condition which is expressed in cl. 8 of the Agreement. Section 105A (2) contemplated that a statute validating an agreement made

before the commencement of s. 105A would be enacted and conferred power upon Parliament in that respect. Validation is an authorization which operates retrospectively - see P. J. Magennis Pty. Ltd. v. The Commonwealth [1949] HCA 66; (1949) 80 CLR 382, at pp 402, 410 . (at p91)

30. I conclude, therefore, that the Agreement does not have the force of law, and for this reason cl. 4 (4) is not a law of the Commonwealth within the meaning of s. 86 (1) (c) of the Crimes Act. In reaching this conclusion I should make clear that I reject the defendants' submission that a law amending the Constitution stands outside the expression "law of the Commonwealth" and why I reject it. (at p91)

31. In Reg. v. Foster; Ex parte Commonwealth Steamship Owners' Association [1953] HCA 86; (1953) 88 CLR 549, at p 556 , the Court, when speaking of s. 109 of the Constitution, said: "The expression 'inconsistent with a law of the Commonwealth' . . . relates to laws made under the legislative powers of the Commonwealth directly or indirectly." (at p91)

32. A similar view was expressed by Barwick C.J. in Spratt v. Hermes [1965] HCA 66; (1965) 114 CLR 226, at p 247 , when his Honour said that the expression "embraces every law made by the Parliament whatever the constitutional power under or by reference to which that law is made or supported: see per Dixon C.J. in Lamshed v. Lake (1958) 99 CLR, at p 148 ". The Chief Justice is not to be taken as confining "a law of the Commonwealth" to a law made by the Parliament so as to exclude a regulation made pursuant to statutory authority. For, as Windeyer J. observed in the same case (1965) 114 CLR, at p 276 :
"The phrase 'laws made by the Parliament' seems to be less extensive in denotation than 'laws of the Commonwealth': see R. v. Kidman [1915] HCA 58; (1915) 20 CLR 425, at p 438 . But, however that may be, I see no ground for refusing the name 'a law of the Commonwealth' to any law validly made by or under the authority of the Commonwealth Parliament wherever that law operates."

WINDEYER J. was speaking of the use of the two expressions in ss. 76 and 80 of the Constitution. His statement gave expression to his view that the broad proposition in R. v. Bernasconi [1915] HCA 13; (1915) 19 CLR 629 , that Ch. 3 does not apply to the Territories is unacceptable. To that extent what his Honour said may require qualification because it was not a view which commended itself to a majority of the Court in that case. (at p91)

33. So understood, the view expressed by Windeyer J. is at least as wide as that expressed in Reg. v. Foster; Ex parte Commonwealth Steamship Owners' Association [1953] HCA 86; (1953) 88 CLR 549 and by Barwick C.J. in Spratt v. Hermes (1965) 114 CLR, at p 247 . It certainly extends to laws made in or pursuant to the exercise of the legislative powers conferred upon the Parliament. For present purposes I am prepared to assume that s. 61 of the Constitution, when it speaks of "the execution and maintenance of this Constitution, and of the laws of the Commonwealth", draws a distinction between the Constitution as an Act of the Imperial Parliament and laws made by or under the authority of the Commonwealth Parliament and that this distinction is reflected in the expression "law of the Commonwealth" elsewhere in the Constitution so as to confine it to laws made by or under the authority of the Parliament in the exercise of its legislative powers. I am also prepared to assume that the expression is used in a similarly restricted sense in s. 86 (1) (c) of the Crimes Act, though I should be inclined to interpret it more widely. Yet it does not follow from this assumption that s. 105A of the Constitution, as a law amending the Constitution, stands outside the category of laws of the Commonwealth. A law that amends the Constitution is nonetheless a law made by the Parliament and, further, a law made by the Parliament in the exercise of the legislative power conferred upon it by s. 128 of the Constitution. The circumstance that the section prescribes

compliance with special and additional conditions before the proposed law enacted by Parliament becomes a law does not in my view deny that what Parliament does under s. 128 is exercise legislative power. What distinguishes an exercise of power under s. 128 from the normal exercise of legislative power by the Parliament is that the section requires that the proposed law shall be submitted to a referendum and that it shall be passed at that referendum by a prescribed majority before it shall be presented to the Governor-General for the Queen's assent. What is required is the approval by the prescribed majority ascertained in the manner described in the section before the proposed law for alteration of the Constitution can be presented for assent. The section refers to the enactment before assent as a proposed law, this being the description that the Constitution elsewhere gives to bills before assent (see ss. 53 and 54), bills which, upon receiving assent, constitute laws made by the Parliament. Furthermore, it proceeds on the footing that the proposed law, when assented to, like all other laws made in the exercise of the legislative power, will take effect as law. In all this there is nothing inconsistent with the exercise of the legislative power of the Commonwealth which by s. 1 of the Constitution is vested in the Parliament consisting of the Queen, the Senate, and a House of Representatives. As I say, the only difference from an ordinary exercise of the legislative power lies in the prescription that before assent the approval of a prescribed majority of electors shall be obtained at a refendum. (at p93)

34. I would therefore make a declaration that the first information discloses no offence known to the law. This conclusion has some importance for the questions relating to the production of documents. (at p93)

35. An examination of the issues relating to the production of documents must begin with a reference to s. 26 of the Justices Act, 1902 (N.S.W.), as amended, for the summonses requiring production of the documents in question were issued under that section. The section requires a Justice to issue a summons to a person to produce documents whenever on oath it is made to appear to the Justice "that any person . . . is likely . . . to have in his possession or power any document or writing required for the purposes of evidence". In this instance, each of the summonses was, with one exception, addressed to a named individual stating the official position or office which he held, requiring him to produce documents which, by their description, are clearly official documents of the Commonwealth. The one exception was a summons simply addressed to the Secretary of the Department of Minerals and Energy which called for the production of documents of a like character. Mr. McHugh, for the defendant Dr. Cairns, submitted that s. 26 does not, and cannot, authorize the production of Commonwealth documents on the ground that the State Parliament cannot legislate so as to bind the Commonwealth. This point was raised for the first time in this Court by a stranger to the summonses who has no interest in the documents, though he is a party to the proceedings. The submission has not been supported by the Commonwealth which is evidently content to have the documents produced by the persons to whom the summonses are directed if the claims to Crown privilege are overruled. The case should be approached accordingly, with the result that there is no occasion to canvass the scope of the operation which s. 26 has. (at p93)

36. However, in passing it should be noted that the proceedings before the magistrate involved an exercise of federal jurisdiction because the first information is based on s. 86 (1) (c) of the Crimes Act. It would therefore be necessary to take into account s. 85E of the Crimes Act and ss. 68, 79, 80 and perhaps s. 64 of the Judiciary Act 1903, as amended. It might then be said that by virtue of Commonwealth law the provisions of s. 26 were made applicable to the proceedings - John Robertson & Co. Ltd. v. Ferguson Transformers Pty. Ltd. [1973] HCA 21; (1973) 129 CLR 65, at pp 93-95 . Likewise, it would be necessary to consider those decisions which indicate that a subpoena ad test may be served on a person to compel the production of documents which he holds

as servant or agent when his employer or principal consents to their production (Austin v. Evans [1841] EngR 234; (1841) 2 Man & G 430 (133 ER 814) ; Crowther v. Appleby (1873) LR 9 CP 23 ; Re Higgs; Ex parte Leicester (1892) 66 LT 296). As it is, I may put these problems to one side and turn to the question of Crown privilege. (at p94)

37. Stephen J., in the reasons for judgement which he has prepared, has set out in detail the documents to which claims of Crown privilege have been made and the manner in which those claims have been formulated. His Honour has also stated the approach taken by the learned magistrate to the objections to production which were made. It will be sufficient, therefore, if I briefly state the categories into which the documents now in contention fall. They are:

1. Explanatory memoranda and schedule containing recommendations relating to the revocation of authority to borrow $US4,000 million for temporary purposes approved by the Executive Council on 7th January 1975.

2. Reports and correspondence from the Department of the Treasury or the Secretary of that Department in relation to the proposed borrowing of $US4,000 million for the period from 1st September 1974 to 20th May 1975.

3. Reports from the Department of Minerals and Energy and/or Mr. R.F.X. Connor concerning the proposal to borrow overseas up to $US4,000 million.

4. Australian Loan Council papers comprising - (a) Loan programmes submitted by or on behalf of the Commonwealth at Loan Council meetings held during 1974 and before 20th May 1975; (b) Loan programmes approved at any Loan Council meeting held during 1974 and before 20th May 1975; and (c) Minutes of all Loan Council meetings held between 1st January 1974 and 20th May 1975.

5. Minute paper from Mr. J. O. Stone to the Treasurer dated 10th December 1974 relating to a proposal for borrowing from Middle East sources.

6. Minute for file dated 13th December 1974 of a record of a meeting with the Prime Minister at 2 p.m. on that day, referring to the advice of the Solicitor-General and the Attorney-General that the proposed loan of $US4,000 million was valid under s. 61 of the Constitution without the need for Loan Council approval, being for temporary purposes in order to alleviate the critical employment situation.

7. Cabinet submissions and decisions and Cabinet decisions without submissions relating to a wide variety of topics dealt with by Cabinet in the period after September 1973 and before 13th December 1974. (at p95)

38. The documents described above, except those in categories 6 and 7, were the subject of summonses issued by the plaintiff. Those described in 6 and 7 were the subject of summonses issued by Mr. Whitlam. The Crown claims privilege in respect of all the documents listed above except those in category 1. Mr. Whitlam claims that the documents in that category are the subject of Crown privilege, notwithstanding the Crown's failure to object to production. (at p95)

39. The claim of Crown privilege, to use a term acknowledged to be convenient, though apt to be inaccurate or misleading, is that the documents other than those in category 1 are immune from production because they fall into a class of documents which the public interest requires to be

immune from disclosure. It is said that non-disclosure of the documents is necessary for the proper functioning of the Executive Government and the proper functioning of the Public Service. In some instances it is said that disclosure would inhibit complete candour in discussion. Except as to the Loan Council papers, it is not contended that the disclosure of information contained in the documents would itself be prejudicial to the national interest. (at p95)

40. It has generally been assumed that important State documents relating to high level policy decisions, in particular Cabinet decisions and Cabinet papers, are immune from production (In re Grosvenor Hotel, London (No. 2) (1965) Ch 1210, at pp 1247, 1255 ; Conway v. Rimmer, [1968] UKHL 2; (1968) AC 910, at pp 952, 993 ; Reg. v. Lewes Justices; Ex parte Home Secretary (Rogers v. Home Secretary) (1973) AC 388, at p 412 ; Lanyon Pty. Ltd. v. The Commonwealth [1974] HCA 11; (1974) 129 CLR 650, at p 653 ; Australian National Airlines Commission v. The Commonwealth [1975] HCA 33; (1975) 132 CLR 582, at p 591). It is now recognized that in considering an objection to production on the ground of Crown privilege the court must evaluate the respective public interests and determine whether on balance the public interest which calls for non-disclosure outweighs the public interest in the administration of justice that requires that the parties be given a fair trial on all the relevant and material evidence (Conway v. Rimmer [1968] UKHL 2; (1968) AC 910 ; Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2) (1974) AC 405). In determining this question the court, though it will give weight to the Minister's opinion that the documents should not be produced, is entitled to inspect the documents and form its own conclusion upon the question whether the public interest will be better served by production or non-production. (at p96)

41. Cabinet decision and cabinet papers do not stand outside the general rule that requires the court to determine whether on balance the public interest calls for production or non-production. They stand fairly and squarely within the area of application of that rule. Consequently, it has been accepted that the public interest does not call for the non-disclosure of cabinet documents when their significance is purely historical (Conway v. Rimmer (1968) AC, at p 952 ; Attorney-General v. Jonathan Cape Ltd. (1976) QB 752). The Commonwealth submits that, subject to this qualification, the public interest will always on balance be found to favour non-disclosure of cabinet decisions and papers, government policy documents and high level communications passing between Ministers and senior public servants. (at p96)

42. To evaluate this submission it is necessary to identify, first, the various elements which sustain the public interest against production of documents of the kind referred to. In identifying these elements I have gained little assistance from the affidavits sworn by Ministers and heads of departments in support of the objection to production. They have sought refuge in the amorphous statement that non-disclosure is necessary for the proper functioning of the Executive Government and of the public service, without saying why disclosure would be detrimental to their functions, except for the reference to want of candour. Perhaps affidavits in this form were acceptable in the days when it was thought that the court should uphold an objection once made by the Crown through its appropriate representative. But they are plainly unacceptable now that the court is to resolve the issue for itself, after an inspection of the documents when that is thought to be appropriate. An affidavit claiming Crown privilege should state with precision the grounds on which it is contended that documents or information should not be disclosed so as to enable the court to evaluate the competing interests. The affidavits in this case fall far short of this standard and I must therefore look beyond them for the considerations which tend to support non-production. (at p97)

43. In Conway v. Rimmer, Lord Reid said (1976) QB 752 :

"Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-formed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition. But there seems to me to be a wide difference between such documents and routine reports." (at p97)

44. I agree with his Lordship that the possibility that premature disclosure will result in want of candour in cabinet discussions or in advice given by public servants is so slight that it may be ignored, despite the evidence to the contrary which was apparently given and accepted in Attorney-General v. Jonathan Cape Ltd. (1976) QB 752 . I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient. I also agree with his Lordship that the efficiency of government would be seriously compromised if Cabinet decisions and papers were disclosed whilst they or the topics to which they relate are still current or controversial. But I base this view, not so much on the probability of ill-formed criticism with its inconvenient consequences, as upon the inherent difficulty of decision making if the decision-making processes of cabinet and the materials on which they are based are at risk of premature publication. Cabinet proceedings have always been regarded as secret and confidential. Both the Franks Committee in its report dated September 1972 and the Committee of Privy Councillors on Ministerial Memoirs (the Radcliffe Committee) in its report dated January 1976 considered that the efficiency of the Cabinet system would be seriously impaired if secrecy and confidentiality were not maintained. The Radcliffe Committee stated:

"33. . . . The constitutional doctrine which attributes to each member of a Government his share of collective responsibility for its actions and policies undertaken during the period of his membership is no more than an expression of this association in which individual attitudes and opinions are merged in the general resolution of the whole body. In our view such a system of working could not survive in practical terms unless the members were prepared to observe the confidentiality of all that has gone on in the course of their deliberations.

34. It is a mistake to suppose that these general conceptions represent any doctrine that is peculiar to the United Kingdom. The recent report of the Franks Committee, who in the course of their inquiry made a study of this question, suggests the reverse. They examined in some detail the relevant law and practice in four other countries, France, Sweden, Canada and the United States of America; and their finding was that: 'Governmental representatives in all four countries took it for granted that a Government cannot function completely in the open, but must be able to preserve the confidential nature of its internal processes, especially at the highest levels of policy making.'" (at p98)

45. This, to my mind, is the reason which underlies the public interest against production and disclosure of cabinet proceedings and of other high level policy deliberations. Accordingly, it is the element which has to be weighed in the balance with public interest in the administration of justice

in determining whether cabinet proceedings and high level deliberations should be disclosed. (at p98)

46. It is at this point that I am unable to agree with all that Lord Reid said. First, a prohibition against the disclosure of cabinet proceedings "until such time as they are only of historical interest" seems to me to give overmuch protection to government at the expense of the litigant's right to a fair trial unless one takes an expansive view of what is "historical". For my part, I should have thought that, if the proceedings, or the topics to which those proceedings relate, are no longer current, the risk of injury to the efficient working of government is slight and that the requirements of the administration of justice should prevail. Even in such a case the court can diminish the risk by restricting access to such documents as may be produced. (at p98)

47. In United States v. Nixon [1974] USSC 159; (1974) 418 US 683 (41 Law Ed 2d 1039) the Supreme Court refused, in the absence of a need to protect military, diplomatic or sensitive national security secrets, to accept the argument that the very important interest in confidentiality of presidential communications is significantly diminished by the production of such material for in camera inspection and went on to hold that this interest must give way to the superior public interest requiring that justice be done in criminal cases. The decision proceeded upon a consideration of constitutional provisions and principles which differ from ours. But it is significant that an issue which was broadly similar in character was decided in favour of the public interest in the administration of justice. On the other hand, the decision of the Full Court of the Supreme Court of Tasmania in Reg. v. Turnbull (1958) Tas SR 80 that cabinet proceedings are the subject of absolute privilege seems to reflect the law as it was thought to be before Conway v. Rimmer [1968] UKHL 2; [1968] UKHL 2; (1968) AC 910 and in my opinion it should not now be accepted. (at p99)

48. The second qualification that I would make is that I see no reason to extend the umbrella of non-disclosure or non-production to all documents concerned with policy making in government departments. To ensure that the protection given to cabinet proceedings is effective, documents and communications passing between a Minister and the head of his department relating to cabinet proceedings and material prepared for cabinet must be protected. Further, as important matters of policy are resolved below the level of cabinet, documents and communications relating thereto passing between Ministers and public servants will be subject to Crown privilege as, for example, reports of inter-departmental and other government committees. But a distinction should be drawn between important matters of policy and those which are not. (at p99)

49. As the range of issues which engage the attention of the Executive Government is infinite and as the manner in which those issues are considered varies from case to case, it is impossible to lay down hard and fast rules which will provide universal answers. Each case here, as elsewhere, depends upon its own circumstances and it is only by a consideration of them that a correct balance will be reached. (at p99)

50. It may be said of all the documents in question in this appeal that they are cabinet papers, Executive Council papers or high level documents relating to important policy issues. They are, or were, all capable of sustaining an objection to production on the ground of Crown privilege at an appropriate time. However, they are not recent documents; they are three and a half to five years old. They relate to issues which are no longer current, for the most part policy proposals of Mr. Whitlam's government which were then current and controversial but have since ceased to be so, except perhaps for the interest which arises out of the continuation of these proceedings. The principal issue to which they relate was the proposal to borrow $US4,000 million, a proposal which

was abandoned by Mr. Whitlam's government and has not been revived. Except for the Loan Council papers the documents do not contain information which, if published, would prejudice the national interest. So much I infer from the absence of a claim to privilege on this ground. Indeed, I have the impression that many of the matters to which the documents relate are already matters of public knowledge by reason of the publicity which the events in question attracted. (at p100)

51. It has been suggested that the Executive Council documents stand in a special position by reason of the oath of secrecy taken by Executive Councillors. But I do not think that this places Executive Council documents in a superior category, for it is well settled that confidentiality alone is not enough to render a document immune from production. (at p100)

52. In these circumstances, except for the Loan Council documents, the claim for Crown privilege lacks great strength. On the other hand, the public interest in securing a trial of the charge of conspiracy in the second information is extremely strong. The documents, excepting once again the Loan Council papers, have an obvious relevance and materiality to the informant's case and to the defendants' defences. My impression, as that of Stephen J., is that to insist on non-disclosure in a case such as this would be to confer immunity on Ministers from prosecution. And with him I agree that it is not to the point that the prosecution is a private prosecution. However, in drawing attention to the great strength of the public interest in the administration of justice as it arises in the particular circumstances of this unique case I do not intend to suggest that it is those circumstances alone which justify the production of the documents. As I have said, the case for non-production is in itself not a strong one. (at p100)

53. There is an additional reason why the explanatory memoranda and schedule in category 1 should be produced. The Commonwealth has no objection to their production. That is not to say that Mr. Whitlam cannot raise the point. He is a party to the proceedings and he may initiate a consideration of the issue by the court, for it is well established that the court may of its own motion withhold production where it thinks that the case is one of Crown privilege. But in this case the court must be strongly influenced by the circumstance that the Commonwealth, having examined the documents and having considered the public interest, has made no objection to production. Generally speaking, when a court acts in the absence of an objection to production by the Crown it is because the Crown has not had an opportunity to consider the question or has for one reason or another failed to exercise such an opportunity. This is not such a case. (at p101)

54. In the case of Mr. Stone's minute paper there is an additional complication. According to the evidence, the contents of a document purporting to be a copy of Mr. Stone's minute paper was published in The Bulletin, a weekly journal with a substantial circulation. If it were established that a document the subject of a claim to Crown privilege had been widely published in the community it would be difficult to sustain the claim to privilege. The damage, if any, consequent upon disclosure would have occurred and the additional use of the document in court proceedings would make little, if any, difference. However, to say this assumes that the circumstances of the publication are such that they leave little or no doubt as to the authenticity of what is published. If, on the other hand, there exists real doubt as to the authenticity of what is published, production of the document in court and its comparison with the published material may serve to set the doubt at rest and thereby confer the mantle of authenticity on a publication which was made unlawfully or in breach of confidence. In some circumstances this consideration might constitute a reason for upholding an objection to production but not here, where for reasons already discussed, the case for production outweighs the case for non-disclosure. (at p101)

55. In the light of my conclusion that the documents other than the Loan Council papers should be produced, I need not examine the question whether it would be a breach of parliamentary privilege to prove that the documents in question have been tabled in Parliament, thereby losing such privilege as might otherwise attach to them. (at p101)

56. As no challenge was made to the validity of the second information and as the relationship between the concluding words of the offence there alleged and the subject matter of the conspiracy alleged were only touched upon in argument, I shall assume that the information is valid and that the concluding words are an integral part of the offence which it charges. On these assumptions the Loan Council documents would appear to be relevant to the second information as it is expressed. However, because the Loan Council documents contain confidential information relating to important matters of fiscal policy the publication of which would be detrimental to the public interest, the Court should inspect them and order disclosure to be made of that part of the documents as reveals the amount which the Commonwealth was authorized to borrow in the year 1974- 1975. The disclosure of this information would not be prejudicial to the public interest. (at p102)

57. In the result I would make a declaration on Mr. Whitlam's cross claim that the first information discloses no offence and is bad. On Mr. Sankey's application I would make a declaration that all the documents in question, other than the Loan Council documents, are not privileged and should be produced. I would also declare that so much of the Loan Council documents as reveal the amount which the Commonwealth was authorized to borrow during the year 1974-1975 should be produced. (at p102)

JACOBS J. I agree that no offence is disclosed by the allegations in the first count of the information. As to the production of the documents claimed to be the subject of Crown privilege, I am of the opinion that the learned magistrate ought not to order production of any of these documents until it is determined whether the allegations in the second count of the information to which the documents are said to be material constitute a criminal offence. Both this question and the question whether documents of the kind under review ought to be produced to a court are unprecedented. The former question and to some extent the latter question raise matters which go to the root of our system of responsible government under a constitutional monarchy. Executive Councillors are not only responsible to Parliament but they, and not the Crown or its representative, are criminally responsible for their substantive acts. It does not matter that the acts are purportedly done by authority and in the name of the Crown. But it is a different question whether Executive Councillors are not only responsible under the criminal law for what they do but also may be responsible not only to the Parliament but also under the criminal law for the act of agreeing among themselves to give advice to the Crown in the federal Executive Council in relation to an act not itself criminal. This question must in my opinion first be determined. Otherwise there is a risk that documents of a kind not ordinarily allowed to be produced in a court will be so produced for no legal purpose and this situation should in my opinion be avoided. (at p102)

AICKIN J. In this matter I have had the advantage of reading the reasons for judgement prepared by my brother Stephen, with which I am in general agreement. There are, however, certain observations which I wish to make on some of the questions arising, and I shall also deal with two aspects in respect of which I wish to state in my own words the conclusions which I have formed. Save as to those two aspects, I am in complete agreement with his reasons. (at p103)

2. The proceedings before the magistrate at Queanbeyan out of which these actions for declarations in the Supreme Court of New South Wales have arisen were instituted by information lodged by the

plaintiff Sankey. The first information charged that the defendants:

". . .conspired with each other to effect a purpose that was unlawful under a law of the Commonwealth, that is to say to effect the borrowing by the Commonwealth of Australia from overseas sources a sum in the currency of the United States of America not exceeding the equivalent of $4,000 million in contravention of the Financial Agreement, 1927 as amended, the Constitution Alteration (State Debts) Act, 1928 and the Financial Agreement Act, 1944 as amended." The second information alleged a common law offence, namely, that the defendants conspired to deceive the Governor-General of Australia in that ". . .they being members of the Federal Executive Council and at a meeting of the same agreed with each other to recommend for the approval of the said Governor-General inter alia that the said Honourable Reginald Francis Xavier Connor be authorized to borrow for temporary purposes a sum in the currency of the United States of America not exceeding the equivalent of $4,000 million, notwithstanding that at the time of the said agreement the said proposed borrowing was not for nor intended to be for temporary purposes only and was in contravention of the Financial Agreement, 1927 as amended, the Constitution Alteration (State Debts) Act, 1928 and the Financial Agreement Act, 1944 as amended." (at p103)

3. The acts so particularized were alleged to be, as to the first, an offence against s. 86 of the Crimes Act 1914, as amended, and, as to the second, a common law conspiracy to do an unlawful act. Section 86 (1) (c) of the Crimes Act 1914 as amended provides that:

"A person who conspires with another person - . . .

(c) to effect a purpose that is unlawful under a law of the Commonwealth;

shall be guilty of an indictable offence".

In respect of the second charge, the unlawful nature at common law of the act alleged depended, in part at least, upon such act being contrary to the Financial Agrement, the Constitution Alteration (State Debts) 1928, and the Financial Agreement Act 1944. (at p104)

4. When the proceedings for declarations were instituted by the plaintiff Sankey in the Supreme Court of New South Wales after the magistrate had given certain rulings in relation to the production of documents and the operation of "Crown privilege" in relation thereto, he sought only declarations with respect to Crown privilege as claimed by the persons subpoenaed to give oral evidence or to produce documents. In those proceedings, however, a cross claim was made by the respondent Whitlam seeking declarations which may be summarized as follows:

1. A declaration that the Financial Agreement 1927 as amended is not a law of the Commonwealth within the meaning of s. 86 (1) (c) of the Crimes Act.

2. A like declaration in respect of c11. 3(8), 3(15), 4(4) and 6 of the Financial Agreement 1927.

3. A like declaration that the effecting of a borrowing in contravention of the Financial Agreement

1927 is not the effecting of a purpose unlawful under a law of the Commonwealth within s. 86 (1) (c).

4. Declarations with respect to certain of the documents that their disclosure and admission in evidence would be contrary to the public interest and contrary to law, notwithstanding that the Commonwealth had not raised any objection to their production. These documents were called the "Group A" documents. (at p104)

5. It follows from that brief account of the nature of the proceedings in the Supreme Court, which were removed into this Court, that no questions arise as to the second information, other than those concerning "Crown privilege". (at p104)

6. I turn now to the question whether the conspiracy charged in the first information was to do an act which would have been contrary to a law of the Commonwealth within the meaning of s. 86 (1) (c) of the Crimes Act. A preliminary question arises as to the meaning of the expression "law of the Commonwealth" in this context. This point arises in the cross claim for a declaration instituted by the defendant Whitlam. (at p104)

7. In relation to this particular issue I agree with what my brother Stephen has said, save that I express a concluded view on a point which he leaves open. I agree that the Constitution itself as originally enacted is not a "law of the Commonwealth" in the relevant sense. I would also agree that the Constitution as it stands from time to time in the light of amendments made to it is also not a "law of the Commonwealth" in the relevant sense. The amendments viewed separately, however, stand in a somewhat different position. The procedure for alteration of the Constitution is prescribed in s. 128 and, in my view, that procedure requires that the Constitution may be amended only by an Act of the Parliament of the Commonwealth which in its ordinary signification is plainly enough a "law of the Commonwealth". It is true that the process of enacting an amendment of the Constitution requires a different procedure for the production of an effective Act of the Parliament than that which is normally required. But this is not the only instance of such a situation. It is, I think, clear that a measure passed under the procedure prescribed in s. 57 of the Constitution for dealing with deadlocks as between the House of Representatives and the Senate is just as much an Act of the Parliament and a law of the Commonwealth when passed in accordance with the procedure prescribed for a joint sitting of the House of Representatives and of the Senate, to which the Royal assent is given, as is a measure approved separately by each of the House of Representatives and the Senate to which the Royal assent is given. It does not appear to me that an amendment to the Constitution under s. 128 stands in any different position. The procedure prescribed by s. 128 does not appear to me to differ materially from the special procedure prescribed by s. 57, which, with the Royal assent, produces that which is in truth an Act of the Commonwealth Parliament, i.e. a law of the Commonwealth. It is this point which my brother Stephen leaves open. (at p105)

8. That, however, is not sufficient to dispose of the present point because the essential question remains, namely, whether something done contrary to the Financial Agreement itself has the quality of something done contrary to a law of the Commonwealth, i.e. is contrary to s. 105A as enacted by a law of the Commonwealth. (at p105)

9. It has long been established that the Financial Agreement is given paramountcy by s. 105A so that it overrides both Commonwealth and State laws and indeed even the other provisions of the Constitution itself (New South Wales v. The Commonwealth (No. 1) [1932] HCA 7; (1932) 46 CLR

155 . However, I agree that the particular statements in that and other cases which were relied upon were directed to issues quite different from the present. There is, however, a long established distinction between, on the one hand, legislation which merely gives validity to a contract and makes its provisions binding on the parties, notwithstanding that their agreement cannot alone produce that result because of some lack of power or some other source of invalidity, and on the other hand, legislation which imposes a statutory obligation on the parties to carry out the terms of the contract, a provision which gives to those terms themselves the force of law. The distinction is a fine one and not perhaps wholly satisfactory, but nonetheless it is well established by decisions, both in England and in this Court. Those cases are cited in the judgment of my brother Stephen and I need not repeat the references or citations here. It is clear enough that s. 105A does not directly give to the provisions of the Financial Agreement the force of law. The obligations under the Financial Agreement derive their binding forcefrom the Agreement itself, notwithstanding that that Agreement derives its binding force from an Act of the Parliament, namely, s. 105A. The terms of the Financial Agreement accordingly derive their force only indirectly from an Act of the Parliament, and fall within the first, rather than the second, category referred to. That conclusion appears to me to make it impossible for the first information to stand. Accordingly, I agree that a declaration in the form referred to in the reasons of my brother Stephen should be made. (at p106)

10. The various questions with respect to Crown privilege apply equally in relation to the first and the second information, but in the light of what I have said about the first information, I regard them as live issues only in relation to the second. I am of opinion that the Loan Council papers are relevant to the second information as framed. The second information charges that the relevant persons conspired to deceive the Governor-General that the "proposed borrowing" was for and intended to be for temporary purposes, and was in contravention of the Financial Agreement 1927, as amended, the Constitution Alteration (State Debts) 1928 and the Financial Agreement Act 1944, as amended. For that charge to be made out it would, as I see it, be necessary to establish first the agreement between the parties and that its purpose was to deceive the Governor-General. The unlawful character of the conspiracy might be derived merely from the intention to deceive, but that involves establishing that the borrowing was not for temporary purposes only. The information, however, involves the further allegation that the borrowing was not authorized by the Financial Agreement. It is not desirable to consider now whether or not the latter is an essential element requiring proof. It may be well thought necessary to prove all the elements specified in the information, even if it might be possible to succeed by proof only of the first three. It may be enough to establish a conspiracy for an unlawful purpose within the scope of the common law offence to show that the loan was not for temporary purposes and that the conspiracy was to deceive the Governor-General into thinking that it was. The possibility remains, however, that the borrowing might have been within the limits authorized by the Loan Council and, therefore, lawful. The conspiracy as alleged involves both those elements of unlawfulness, though they may be alternatives. It appears to me, therefore, that the amount authorized by the Loan Council would be relevant to the second information. (at p107)

11. So far as the question of "Crown privilege" is concerned the only point with which I wish to deal separately is that concerning the claim for Crown privilege in relation to what were called the "Loan Council documents". The subpoena which was issued in relation to these documents was addressed to the Secretary of the Australian Loan Council and required the production of the following:

"A. Loan Programme or Programmes submitted by or on behalf of the Commonwealth at Loan Council Meetings held during 1974 and prior to 20/5/75. B. All Loan Programmes approved at any Loan Council Meetings held during 1974 and prior to 20/5/75. C. Minutes of all Loan Council

Meetings held between 1/1/74 and 20/5/75." (at p107)

12. The affidavit in which privilege was claimed in respect of these documents was sworn by Mr. P. R. Lynch, who was at the date of swearing the affidavit, the Treasurer. After referring to the nature of the Loan Council and its membership and stating that an officer of the Department of the Treasury acts as secretary to the Loan Council, and stating its function under the Constitution and under the agreements approved pursuant to the provisions of s. 105A of the Constitution, he said: "Meetings of the Australian Loan Council are as a matter of practice held in camera and attendance at such meeting is restricted to persons authorised to attend.
I am informed by Alan Paterson Bailey, Assistant Secretary (Loans and Debt Management Branch) of the Department of the Treasury and verily believe the documents referred to in the said subpoena relate to and record policy deliberations and discussions between Ministers of the Crown representing the Commonwealth of Australia and the constituent States and decisions reached by such persons after such discussions. It is apparent from the nature of the business of the Council that its discussions involve the fiscal policies of the constituent Governments. Discussion of such matters involves both contention and compromise and this upon topics which by their nature are politically sensitive. This discussion has in the past taken place in the belief that it is and will remain secret unless the Council otherwise elects." (at p108)

13. There are a number of features of those paragraphs, and corresponding paragraphs in other affidavits, which I find unsatisfactory in relation to the proper mode of claiming "Crown privilege". The deponent does not state that he has himself perused the particular documents. He does not specifically state that the minutes record either in full or in summary form the discussions which took place at those meetings or whether they record merely the decisions arrived at. Different considerations would apply to records of discussions of State and Commonwealth government policy and arguments for and against raising larger or smaller loans and the division thereof among the members, on the one hand, and the mere recording of a decision that the Commonwealth was authorized to borrow X million dollars on its own account. Moreover, the affidavit states merely that in the opinion of the Treasurer the documents "belong to a class of documents which public interest requires should not be disclosed" without indicating what is the class or category into which they are said to fall. It is not, in my opinion, enough simply to say that documents belong to a class which public interest requires should not be disclosed. That itself is not a category which is relevant or helpful. The authorities referred to in other judgments show that there are some categories of documents as to which authority has established that they should either not be disclosed at all or perhaps only in exceptional circumstances, but there is no category or class simply of documents which should not be disclosed. If a new class is to be established which is not to be produced, irrespective of the contents of any particular document, then more information than is here given would be required. Generally it seems to me that the affidavits claiming Crown privilege are cast in a form appropriate to the law as it stood prior to the decision of the House of Lords in Conway v. Rimmer [1968] UKHL 2; (1968) AC 910 and not the law as it now stands. (at p108)

14. In the case of the Loan Council documents, however, the matter is simplified by reason of the fact that, in the course of argument, counsel for the plaintiff Sankey made it clear that it was not all the documents which were mentioned in the subpoena which were in fact required, but only one part of one category of documents. He drew attention to the fact that the Auditor-General publishes the figure for the amount which the Commonwealth is authorized by the Loan Council to borrow for the States. He said that what was required was only the actual figure itself, i.e. the amount which the Commonwealth was authorized by the decisions of the Loan Council to borrow on its own account

in the relevant period. This concession, if such it be, was rightly made because there would seem to be no basis upon which any of the documents specified in par.1 of the subpoena could be relevant to the prosecution, nor any basis on which any part of the documents specified in pars. 2 and 3 could be relevant, other than those parts which recorded the decision or decisions as to the amount which the Commonwealth was authorized to borrow, including the division, if any, into amounts to be borrowed in Australia and those to be borrowed overseas. (at p109)

15. There is no doubt that the Court may cover up certain material in a document which might be either irrelevant, or contrary to the public interest if it were published, while making other parts of that document available for inspection and use in open court. This appears clearly from the speeches in Conway v. Rimmer, see per Lord Reid (1968) AC, at pp 943-944, 946, 950 and per Lord Pearce (1968) AC, at p 988 . So far as appears the magistrate did not consider this aspect and it is not clear whether or not it was argued before him. (at p109)

16. We do not know whether the relevant parts of the documents can be effectively disclosed, while covering up the balance, but it certainly seems highly probable that they could be. I can see no basis upon which it could properly be contended that a figure determined by the Loan Council as being the maximum amount which the Commonwealth might borrow on its own account in a fiscal year now some three years in the past was of so highly confidential a nature that its disclosure would be detrimental to the public interest. No satisfactory explanation as to why such publication would be contrary to the public interest was offered in the affidavit or in argument, and so far as I can see none could exist. Assuming (without deciding) that the minutes of the Loan Council belong to some class of documents (as yet unspecified) such that their disclosure must be refused without examining the contents of the particular document, I do not consider that the same rule can be applied to one part of such a document which records only a decision as to monetary limits of the Commonwealth borrowing. Details of the process of decision-making may stand in a different position, but they are irrelevant to these informations. (at p110)

17. In the circumstances it would seem that the proper course is for this Court itself to inspect the documents produced in answer to the subpoena with a view to seeing whether that part of the minutes or record of the decisions of the Loan Council, which records the limit of authorized borrowing by the Commonwealth on its own account, can be inspected, while covering up the remainder so as not to reveal the balance of the document. If on inspection it appears that it can be so inspected then, in my opinion, there can be no reason for rejecting its tender or for treating it as being the subject of Crown privilege. It is, therefore, not necessary for me to consider whether discussions as between the members of the Loan Council with respect to borrowing are of such character that it would be sufficiently contrary to public interest for them to be revealed either at all or after some particular period of time, since they would be irrelevant to either information. (at p110)

18. A relevant factor in relation to the Loan Council minutes, as distinct from other Loan Council documents, would be that if the objection taken were well founded, it would never be possible to ascertain whether the Commonwealth had borrowed in excess of an authorized figure whether on its own account or on account of the States in a manner contrary to the Financial Agreement. No reason was advanced why such breaches (if any there be) should remain suppressed forever. (at p110)

19. The result of the Court's inspection of the documents appears in a separate statement by the Court. (at p110)

20. Accordingly I agree with the order as proposed by my brother Gibbs. (at p110)

ORDER

STATEMENT OF THE COURT

The Court has examined the Loan Council documents, and finds nothing in the first nine lines of par. 71 at p. 7602 of the minutes of the 104th meeting of the Loan Council, or in the first ten lines of par. 10 at p. 7954 of the minutes of the 105th meeting of the Loan Council (being, in each case, the lines ending immediately before the words "State of New South Wales"), the disclosure of which would be in any way prejudicial to the public interest, or to the proper functioning of the Loan Council. The Court is of opinion that it is possible to seal up or otherwise deal with the documents so that only the contents of the said parts of par. 71 and par. 10 are disclosed, and that the contents of those parts of the documents should be made available in the proceedings.

On the summons of Danny Sankey: -

1. Declare that the documents or portions thereof set out in the Schedule hereto are not privileged from production and that the magistrate was in error in upholding the objections taken by the Commonwealth to their production and disclosure.

2. Order that Edward Gough Whitlam, James Ford Cairns and the Commonwealth of Australia pay Danny Sankey his taxed costs of the summons.

On the cross-claim of Edward Gough Whitlam: -

1. Declare that the information laid on 20th November 1975 against Edward Gough Whitlam, alleging an offence under s. 86 of the Crimes Act 1914, (Cth) as amended, is bad in law.

2. Otherwise dismiss the cross-claim.

3. Order that Danny Sankey pay Edward Gough Whitlam his taxed costs of the cross-claim.

THE SCHEDULE

(a) Explanatory memorandum and schedule relating to a meeting of the Executive Council held on 7th January 1975.

(b) (i) a memorandum dated 18th December 1974 from the Acting Frist Assistant Secretary, Department of the Treasury to the Secretary, Department of Minerals and Energy;

(ii) a memorandum dated 23rd December 1974 from the Deputy Secretary (Supply and General), Department of the Treasury to the Acting Secretary, Department of Minerals and Energy; and

(iii) a memorandum dated 13th January 1975 from the Acting Secretary, Department of the Treasury to the Acting Secretary, Department of Minerals and Energy enclosing a copy of letters dated 6th and 13th January 1975 from the then Treasurer to the then Minister for Minerals and Energy.

(c) Note for file in the Department of the Treasury dated 13th December 1974 and headed "Middle East Loan Proposal: Record of Meeting with the Prime Minister at 2 p.m., 13th December 1974".

(d) Minute paper from Mr. John O. Stone to the Treasurer dated 10th December 1974, being a memorandum or a copy thereof addressed to the Treasurer and/or Department of Minerals and Energy, relating to a proposal for borrowing from Middle East sources.

(e) (i) The first nine lines of par. 71 at p. 7602 of the minutes of the 104th meeting of the Loan Council; and

(ii) the first ten lines of par. 10 at p. 7954 of the minutes of the 105th meeting of the Loan Council,

(being in each case, the lines ending immediately before the words "State of New South Wales").

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