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STANDING COMMITTEE OF PRIVILEGES

Reference: Parliamentary privilege-unauthorised disclosure

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SENATE
COMMITTEE ON PRIVILIGES

Tuesday, 3 May 2005

Members: Senator Faulkner (*Chair*), Senator Knowles (*Deputy Chair*), Senators Humphries, Johnston, Payne, Robert Ray and Sherry

Senators in attendance: Senators Humphries, Knowles, Faulkner, Sherry and Robert Ray

Terms of reference for the inquiry:

To inquire into and report on:

Whether, and if so what, acts of unauthorised disclosure of parliamentary committee proceedings, evidence or draft reports should continue to be included among prohibited acts which may be treated by the Senate as contempts.

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Committee met at 9.30 am**SCOTT, Mr Mark Walter, Editor in Chief, Metropolitan Newspapers, John Fairfax Holdings Ltd****WOLPE, Mr Bruce, Manager, Corporate Affairs, John Fairfax Holdings Ltd**

CHAIR—I declare open this public hearing of the Senate Standing Committee of Privileges. On 16 March 2005, the Senate referred to the committee, at its own request, the question of:

Whether, and if so what, acts of unauthorised disclosure of parliamentary committee proceedings, evidence or draft reports should continue to be included among prohibited acts which may be treated by the Senate as contempts.

The committee has received 19 submissions, all of which have been published and are available on the internet or at this hearing. On behalf of the committee, I thank everyone who has lodged a submission and I welcome those who are supplementing their submissions with oral evidence today.

Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of witnesses. Further copies are available from the secretariat. You are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public, but under the Senate's resolutions you have the right to request to be heard in private session. It is important that you give the committee notice if you intend to ask to give evidence in camera. The committee has authorised the televising of these proceedings through the services provided by the Department of Parliamentary Services.

I welcome our first witnesses today from John Fairfax Holdings Ltd. Fairfax Holdings has lodged a submission with the committee, which we have numbered submission No. 7. Do you wish to make any amendments or alterations to that submission?

Mr Wolpe—No, we do not.

CHAIR—I now invite you to make an opening statement.

Mr Scott—Senator Faulkner and members of the committee, Fairfax appreciates the invitation by the committee to appear before your hearing today. These are important issues. We hope the committee will want to remove the threat of contempt against publishers for doing their job: reporting to our readers on the activities of their representatives and their institutions and agencies of government. Fairfax is publisher of the *Sydney Morning Herald*, the *Age*, the *Australian Financial Review*, the *Sun Herald*, regional and community newspapers and other publications, magazines and web sites. On average, our publications and web sites reach over 2.2 million Australians every day. We are pleased to respond to the committee's review of unauthorised disclosure of parliamentary committee proceedings, documents and evidence.

As this committee recalls, the *Age* was most recently involved in such an inquiry by the committee in 2002-03. The committee could find no contempt of the Senate against the *Age*, its

publisher, editor or the journalist involved. That experience informs our view of the issues being considered by the committee.

There are three key points we want to make this morning. First, there is no basis for a finding of contempt of parliament against a publisher, its mastheads, its editors or its journalists for publishing material regarding parliamentary committee proceedings, documents and evidence. It is inherently the nature of the media in a free society to investigate, to probe, to reveal and thereby to help ensure accountability of public officials and government institutions. We have a decided bias towards publication and not to withhold from publication. That is what we do. This is our job; this is our public trust. If parliamentary committee proceedings, documents and evidence are made available to journalists or are uncovered by journalists, a publisher has every right—indeed a responsibility—in fulfilment of our public trust, to publish and to publish without fear of intimidation or retribution by parliament or the government. In short, we are firmly of the view that the publication of such materials should be decriminalised.

Second, with regard to the specifics of the existing rules and how they work, there is no basis for a finding of contempt of parliament against a publisher on the grounds that publication interferes substantially with the work of a committee, if what is published is a news story regarding a final but not yet publicly released report by a committee. It is impossible to substantially interfere with the work of a committee on a report that is completed but simply not yet tabled. This was one of the particulars reviewed in the committee's investigation of the *Age* in 2002. The committee found:

It was difficult to establish ... that the unauthorised disclosure actually caused substantial interference with the ECITA Committee's work. ... the damage done to the ECITA Committee in this instance was at most minimal.

That is from the 112th report of the Privileges Committee, published in February 2003. This was the correct conclusion, as we had asserted all along.

Third, any party who makes a submission to a committee of parliament should have the right to disclose their submission publicly without the permission of the committee. We do not understand why we—or any citizen, association, interest group or corporation—should be subject to a contempt proceeding for seeking dissemination of our views without waiting for the committee's approval. Such an enforced period of silence is a denial of free speech. We believe these rules harm the public interest by inhibiting the free flow of information and debate on important public policy issues.

The Senate will undoubtedly continue to decide its standards of official conduct for members and staff with respect to disclosure of parliamentary committee proceedings, documents and evidence. What we are engaged in today will hopefully lead to the Senate drawing a new line between the rules and privileges of the Senate and the rights of a free press in a free society. Thank you.

CHAIR—Thank you, Mr Scott. Do you have anything to add, Mr Wolpe?

Mr Wolpe—No, Senator.

CHAIR—Perhaps, Mr Scott, I could commence with the third of the key points that you have outlined to the committee in your opening statement. You spoke of a party who makes a submission to a committee; I wonder what your view is in the circumstance where a disclosure is made by another person—in other words, not the submitter. The best example of this, of course, would be a member of a committee, a senator who served on a committee. Do you think that type of unauthorised disclosure should continue to be covered by the contempt provisions?

Mr Scott—I will speak broadly to the principles and then to the specifics. The statement that I made today on behalf of Fairfax couches the principle that the bar should be really very high around these matters. I think we would concede that there is a need to provide some level of protection for witnesses who are perhaps giving evidence in camera, when there are issues of national security or safety that are a concern of the witness; also, where there are issues where the revelation of evidence would inhibit someone else in coming forward. However, the bar on this should be particularly high. At the moment we feel the bar is too low as stated now.

I think it might depend on some particular circumstances and whether in fact the revelation of that material would fall into the areas that I have identified: national security, safety or inhibiting other people in coming forward. But I can see that there could be circumstances where the releasing of information, the leaking of information, would not inhibit the work of the committee, would not put anyone's life at risk and would not prevent anyone from coming forward and giving evidence. So whether there should be sanctions available in moments like that—sanctions against people publishing that material rather than sanctions against people leaking that material—I think is questionable.

CHAIR—Perhaps we could move to the issue of in camera evidence and submissions in a moment. What about the circumstance where submissions might contain damaging or defamatory material or other adverse material? Do think there is a case for perhaps treating those submissions differently from the average, run-of-the-mill type of submissions?

Mr Wolpe—I think a lot of times it is in the eye of the beholder as to whether something is defamatory or not. As far as sanctions against members, staff and those who receive this information, what the Senate and its members and staff do is one thing but publishing is another. I think it is a question of the polarity of the issue. Where the presumption is for contempt and against publication under the current rules, we would like to see the presumption reversed so that it is permissive towards it unless higher burdens and this higher bar that Mark Scott talks about can be established.

CHAIR—Are you suggesting to the committee that submissions that are sought by a submitter to be received by a committee in camera or that a committee decides should be so treated should be in some way treated differently to other submissions?

Mr Scott—No. I think the in camera example is the strong one. Where there are issues of national security, the safety of witnesses or the inhibiting of other witnesses coming forward, it might well be the view of the Senate that different rules need to apply in those circumstances. What we are concerned about here is: what is the issue that the Senate is trying to resolve here? If in fact there is a concern among senators that information they would prefer not to be released, or that they would find embarrassing to be released, is being released then the issue is not with the newspapers that publish that information. The issue is about the leaking of that information.

What we are suggesting to you is that sanctions should not be imposed on newspapers, journalists, editors and publishers who are publishing this information except where the very highest bar is present and not otherwise.

CHAIR—I understand what you are saying to the committee. What I am asking here is whether you believe that a different sanction should apply in relation to in camera evidence or submissions.

Mr Wolpe—I still think it goes to the nature of the evidence theoretically. In an in camera submission by ASIO in the run-up to the Iraq war, if someone had given evidence that intelligence could not justify that there were weapons of mass destruction in Iraq, that is a national security issue of the utmost importance given in camera to a committee. Nevertheless, a decision is pending whether to go to war. If that is published, should we be brought for contempt for publishing that information? Again, it is about the nature of the information and who is aggrieved by it. These are very difficult questions, but, even under the categories that we outlined as being legitimate for considering protecting this material, there are gradations inside those things.

Mr Scott—I think our view would be that something just simply being given in camera is not an automatic qualifier. That places the bar too low. The Senate and the committee may have a myriad of reasons why they want to give evidence in camera, but should all of those reasons automatically fetter the right of the press to investigate, reveal and disclose? We would say no.

Mr Wolpe—We can see also, in things like commercial-in-confidence, that it may be because it is embarrassing to the person submitting it and not because there is any legal reason to keep it quiet.

CHAIR—So even in relation to the unauthorised disclosure of in camera material, you would put to the committee that that ought to be dealt with on a case by case basis?

Mr Wolpe—Yes, with a reversal of the presumption in the current rules. I take it that is exactly what the committee is looking at—that is, where this should go—and for that we are very grateful.

CHAIR—Do you contemplate a situation where it is possible that there might be a need for us to consider protections? You might have a situation where in camera evidence, oral or written, is not used by a government majority, in order to ensure that some evidence might not become public that otherwise would be received in public? Is that something that the Privileges Committee and the Senate should give consideration to?

Mr Scott—Could you repeat that—perhaps with a specific example of what you might be referring to?

CHAIR—One of the issues is that you might have a situation where the taking of evidence could be determined by a committee majority. A government majority committee could determine to suppress evidence that might be in the public interest if it were not received in camera.

Mr Scott—I think that is precisely why we feel that the broad definition of something being in camera should not automatically be excluded but that the bar should be considerably higher than that. There might well be evidence provided in camera to a committee that is absolutely in the public interest to be disclosed but is not disclosed due to the political circumstances of the operation of the committee—however, it is, through the political processes that we all understand operate in this building, provided to a journalist. We should be entitled to publish that material.

CHAIR—Would you acknowledge that the provision of in camera evidence before Senate committees—or material, broadly: oral or written—is something that is very unusual? I am sure you would appreciate that. And it is something that, I think it is fair to say, is not undertaken lightly—certainly not by any Senate committee I am aware of.

Mr Scott—I accept your word on that. I suppose what we are developing are principles that will govern the operation of the Senate and the committee. These principles go to fundamental issues like the operation of a free press. We should not create those principles predicated on an assumption of continued goodwill, cooperation and bipartisanship around the operation of a Senate committee. That might be your experience and your assessment of how things have operated to this point, but I would suggest that we need to create rules that are robust enough and that operate under a myriad of political circumstances, including circumstances that might see a breakdown of the convention of the rarity of use of in camera evidence.

Mr Wolpe—I think you are also right, Senator, in that, if you look at the compilation that you provided of actions by this committee over the past 20 years or so, the vast majority have to do with committee reports—I think this is the strongest point of what we are arguing about decriminalising publication—as opposed to in camera evidence, which is very rare. It is not just that you get information and you publish it. That is what editors are for: to assess and take into account public trust responsibilities versus legal and other responsibilities, even if you disagree with the legal rules by which you are bound.

CHAIR—Has Fairfax given any consideration to the rules that you mention?

Mr Scott—In what regard?

CHAIR—You have indicated that you think there needs to be a review of these rules and you think that that is the challenge for the committee. I wonder if Fairfax had worked to try and meet that challenge.

Mr Scott—We have not worked up revised rules for the committee. Our contribution is through our submission to the committee today. We have tabled the document and are happy to speak to it. We are concerning ourselves with taking advantage of this opportunity to press forward and take away some of the sweeping powers that exist under the contempt procedures and could be implemented against newspaper publishers. That is what we are speaking to.

Senator KNOWLES—I have a bit of a problem with a number of things that you are saying. First and foremost, you are saying that we should draft a series of rules on almost a case by case basis. Evidence over 20 years in this place suggests to me that there are very few journalists who would understand parliamentary privilege now, let alone if you have a whole series of rules

according to series of evidence. I think the question that Senator Faulkner has just asked is the crucial question: how on earth would you devise a series of rules for a series of circumstances that every journalist would understand and be able to say, 'Yes, that would be a contempt, and that would not. That might, that would not, and that will'?

Mr Scott—I do not think we should get caught up in the precise use of the word 'rules'. The evidence that we are putting forward today is a suggestion that the current rules and guidelines that exist around contempt are very broad and could, if implemented, be very sweeping in their operation. We are suggesting that they are too broad and too sweeping. We are suggesting that with those guidelines and rules that exist on the record at the moment there is a situation where there could be a significant fettering of a journalistic right to publish matters in the public interest. That is the issue that we are pushing. The example that Mr Wolpe and I made reference to goes to the example of the publication of material linked to a report that is final but is yet to be tabled.

Senator KNOWLES—There are only a couple of areas where I really have concerns. One is the reporting of a draft report that is yet to be considered by a committee. The media think that is fair game. You are saying to us that you think that is fair game. I do not think that is fair game, because it can quite often impinge on the process of the committee. But you do not give us any reason for why you think it is fair game.

Secondly, I noticed that in the in camera examples that you gave, where you think virtually any in camera evidence is fair game with three exceptions, you did not, for example, give an exception where someone would be open to litigation if the evidence were exposed. Therefore, I am left to draw the conclusion that you think that is fair game as well, regardless of the impact on the witness.

Mr Scott—If we can talk about the premature publication of a committee's proceedings—premature because the final report has not been tabled—

Senator KNOWLES—No, I meant the final report has not been concluded—that is what I am driving at. There is a distinction between the final report being tabled and a draft report being considered by the committee. I have been involved in two such instances in recent times where both drafts have been leaked before the committee has even considered that draft. And you think that is fair game.

Mr Scott—There are a number of issues in response to that. I appreciate that that might be frustrating. I appreciate that it might be politically embarrassing. I would also suggest that, wherever these leaks come from, they disproportionately—nearly always—come from the members of parliament who are involved in sitting on the committee and from their staff. In a sense, it reminds one of Claude Rains: 'I am shocked, shocked to discover that there are leaks that are taking place in Parliament House.' Where do the leaks come from? If your concern is that material has been leaked then the view of the committee should be a more forthright and penetrating assessment of where leaks come from, because that is the problem.

To go to the process, the budget, I understand, is not yet completed. The work on the budget is being done. However, the lead story in the *Financial Review* this morning is 'Budget billions for major projects'. It is a significant leak about what is being considered. This is one of a number of

leaks that have come as the budget has been formulated. Is it embarrassing to the government perhaps that some of these leaks take place? Does it restrict or fetter some of the budget discussion? Perhaps. Is political advantage being sought by the leaking of that material? Almost certainly. Does the budget process go on? Yes. Do we have a budget? Yes. I do not understand why it is a different example to the leaking of a report or the leaking of the thinking of a committee whilst that report is taking place.

Senator KNOWLES—Because it is considered a breach of privilege to do so—

Mr Scott—I suppose I am asking why it is considered a breach of privilege.

Senator KNOWLES—Therefore I am asking why you believe that a journalist or any media outlet should consider that they are above privilege when they should know that the reporting of a draft that has yet to be considered by the committee is a breach of privilege.

Mr Scott—I would argue that that is what news is: revealing information and revealing the thinking and the working of the committee.

Senator KNOWLES—Regardless of the rules?

Mr Scott—One of the things we are arguing about is whether these should be the rules. If you are saying that this is somehow restricting the operation of the Senate and the committee, I would argue that budget leaks or cabinet leaks may at times restrict the operations of the budgetary or cabinet process but that governance and politics go on.

Senator KNOWLES—I am asking for a reason, other than it is your inherent right, that you should just disregard privilege and say, ‘We don’t care whether that impacts on the deliberations of the committee. We couldn’t give a continental whether or not that has an impact on the further deliberations of issues contained within a draft. It is our unfettered right to report that draft.’

Mr Scott—And we are arguing whether in fact those contempt rules are sound or valid. I would say that our default position is absolutely to publish. Our default position in nearly all circumstances is to reveal.

Senator KNOWLES—But that has been your position regardless of the outcome of today’s meeting. That has basically been your position before today—‘We couldn’t care less; we’ll just thumb our nose at parliamentary privilege.’

Mr Wolpe—No, we do not thumb our nose at parliamentary privilege.

Senator KNOWLES—It has not stopped you reporting on draft reports.

Mr Wolpe—It has not stopped us being brought before a committee to investigate whether people should be jailed, so it is a two-way street. We understand the law; we understand our responsibilities and obligations and we act within them.

Mr Scott—I would certainly say that we are not cavalier about it either. In the guidelines that are presented to all Fairfax journalists, they are briefed on contempt of parliament. Editors are

aware of this; reporters are trained around it. We understand the provisions as they currently exist. I understood that this committee was investigating whether we thought those current provisions were sound, so I ask: if one were starting again, would you believe that the operations of a Senate committee were, in a sense, so sacrosanct as to have these kinds of rules created around them? Is the operation of a Senate committee that much more sacrosanct than, say, a budget process, where we can clearly report this story without being in contempt of anyone, but we somehow cannot report a draft committee discussion because of these guidelines that are established? We would counter that, no, our default position has to be around the right to publish, and our judgment will be based around the newsworthiness of that material. In a sense, part of the pressure around news is around exclusivity. It is around receiving leaks. For whoever is leaking the material, the temptation to leak is even higher given the ground rules that can sometimes exist around Senate committees like this.

Senator ROBERT RAY—It was about 10 years ago that your organisation—you may not have been involved—did not fully sign up to the observance of D-notices. You made a comment about national security. Are you now signed up to observing D-notices?

Mr Scott—My understanding is that we have cooperated and complied around D-notices when those—

Senator ROBERT RAY—I was looking more to your philosophy towards them, because you would not give it a commitment 10 years ago that they would be complied with. You were not alone there, by the way; the ABC led the charge.

Mr Scott—From my understanding, in execution we have cooperated in recent times. That is my understanding of the operation of the D-notice system in practice by Fairfax.

Senator ROBERT RAY—You rightly draw the committee's attention to the potential abuse of in camera evidence, although you underestimate the capacity of Senate committee members to expose that long before a leak is made to you. But, for instance, I am on the joint intelligence committee and we receive material that we would not like to see published in newspapers. You say, 'That's okay. We won't do that.' The real question is: how do we draw the rules that indicate to you where to draw the line? If we were to take away all the currently existing rules applying to committees—which we are contemplating—but were to say that in camera evidence would be sacrosanct and the onus of proof would be on you if you publish, surely that would be a fair proposition.

Mr Scott—The question I would ask would concern the ability to create a guideline like that which covered in camera evidence in all circumstances and for the actual operation of in camera evidence not to change over time. At the moment you might suggest that in your other committee in camera evidence fundamentally goes to issues of national security that you do not want published—and that is in the vein of the operation of D-notice issues now. What is to stop a committee that is dominated by members of one political party using in camera evidence as a cover to try and fetter the right of the press to report on information that would cause political embarrassment or scandal to whatever party is in control?

Senator ROBERT RAY—I am sorry: if you have that majority on the committee, you do not hear the evidence. It would never get to in camera evidence; you just would not hear it. The

bigger danger here is that a government member—none here, of course—might leak out in camera evidence. If that happened, the government would have a ready made excuse not to provide any evidence to committees and one of the great scrutiny tools that keep governments honest in this country would disappear—that is the danger of you publishing in camera evidence in these circumstances. I agree that if there suddenly were a plethora of in camera evidence in hearings that would be a defence.

Mr Scott—That would be our concern.

Senator ROBERT RAY—But that is your defence. It does not actually clear you but at least you have a defence. But I do not see why we should have to prove in each case of publication of in camera evidence that it is a breach of national security or whatever else.

Mr Wolpe—Sometimes even under our freedom of information laws when we can get documents out there are exclusions, but one defence that is not permitted is to keep information that covers up failures in accountability or the integrity of government. We should be able to get that information. But sometimes it is not provided. These definitional questions really are very important. There is a definition of ‘national security’ in a bill that the Attorney-General had pending last year which included the words ‘and national interest’. Anything is in the national interest; the weather is in the national interest. Scope is very important. As a starting point for a revision of the rules, I like what you say a lot.

Senator ROBERT RAY—You mentioned today’s *Financial Review* article. If it were an article saying the government was going to authorise the purchase of another 200 radiographic machines—the expensive ones—and you read that this morning at the right time and you bought shares in the one company that makes them, would it be fine to publish that? It is a different story. You see, there are cases, especially on revenue measures, where a government needs to protect its information. That is why they have a budget lockup; that is why you are not allowed out of the room until 7.30.

Mr Scott—That is true. But are you suggesting that if someone out of cabinet tips a journalist off that we should not be allowed to publish that leak in the *Financial Review*? That leak has been made to provide either political advantage or political embarrassment. It happens all the time. The IVF case that is currently being debated is exactly the same.

Senator ROBERT RAY—I am sorry: there are prohibitions at the moment. If there is a court suppression order, you generally obey it.

Mr Scott—Indeed.

Senator ROBERT RAY—If the Senate has a suppression order, you say you do not have to obey it. If it is manifestly too broad or unfair et cetera, it is our job here to revise it. We put that on the table straight away. But as a principle it is not inviolable that you have a right to publish anything.

Mr Wolpe—In the corporate world as well, though, there are leaks about businesses and what they are doing. What happens is this: if a report is published in the paper, the stock exchange will give you a query and you have to report to the market before trading opens about what the truth

of the report that was published. If there is a leak of something with which people could take commercial advantage, because the horse is out of the barn my advice to the government or whoever was leaked against would be to disclose it so that the market and everybody else knows about it.

Mr Scott—On the comparison to court, there are some fundamental differences. My advice from our lawyers is that the rules related to contempt of court are more tightly defined and the media has a better idea of what could or could not constitute a contempt. There are provisions—you are right—that restrict what we can publish, and we comply with those. Part of the concern about the operations of contempt of parliament laws, in the powers that are given to the parliament rather than case studies of examples—but this is the kind of thing that we are discussing—is that when we are involved in a legal process in court there is indeed a right of appeal. There is no right of appeal here, except to the court of public opinion. In such circumstances parliament is the prosecutor, judge, jury and, to use a more dramatic word, executioner in some respects. But there are no rules set down as to how parliament would decide on a penalty. This unfettered power that is linked to contempt of parliament is of considerable concern, especially where there are not carefully drafted provisions saying what is or what is not a contempt. So I would suggest that there are differences to the operations of the courts.

Senator ROBERT RAY—That is a fair summary of the overall current situation. But if you were to write a rule to say that the disclosure of in camera evidence is not allowed and if you do disclose in camera evidence there is an onus of proof on you, then that would be a fairly well-defined stricture that would give you far better guidance than we currently have.

Mr Wolpe—It would. Based on where we are now, that would be an improvement.

Senator ROBERT RAY—You and all the rest of the crew, no matter where you are, always say, ‘It’s the senators that leak.’ We are one of the few chambers that are gracious enough to acknowledge that. You would not get that anywhere overseas, by the way; they would all deny it. But you can put a stop to that tomorrow, can’t you? You can just tell your employees to put a photo on the front page with the caption, ‘Senator So-and-so: well-known leaker’. You can put a stop to it whenever you like, can’t you?

Mr Wolpe—Then I think we would get sued.

Senator ROBERT RAY—You can. You ask us to try to find the leakers. The easiest way for us to do it is to bring the journalist in and ask them the questions. They will then rely on precedent and then we jail them for failing to answer. No-one wants to go down that route.

Mr Scott—That is true. But, with respect, that is a convenient position for the Senate to take. Senators leak, senators’ staff leak or this information gets out knowing well that journalists uphold the principle of keeping their sources confidential. So it is very convenient to say, ‘You shouldn’t publish that material. How dare you publish that leaked material,’ when the real problem as far as the operation of the Senate is concerned and the operation of these committees is concerned is not the publication but the fact that this material has been leaked in the first place. And why has it been leaked? It has been leaked to provide political embarrassment, to frustrate the process, to generate political advantage. So the issue is not with the publication of this material; it is with the leaking.

Senator ROBERT RAY—I am only upbraiding you for the hypocrisy of asking us to chase the leakers when you have the information yourself. All of what you have said, Mr Scott, I agree with. But you could put a stop to it, so why don't you put a stop to the little homilies that we get about chasing down the leakers? That is all.

Mr Scott—I am just suggesting that the real issue is with the leakers rather than with the publication. But do we publish the leaked material? Yes, we do. Is that news under our definition of it? Yes, it is.

Senator ROBERT RAY—May I pick you up on just two other points. When you talk about substantially interfering with the committee's report work, when the report is final and therefore it is only a matter of days, aren't you really overlooking the fact that what it may be disrupting all the committee's future work? Trust gets destroyed et cetera. It is not about interfering with their work on that report. It is about interfering with their future work. That point should be made because I do not think you quite grasp it.

Mr Scott—That is a perspective you can bring to it. I gathered Senator Knowles was attempting to draw a distinction between the work of the committee in process and the final report. In the case with the *Age*, that report was final and ready to go. Senator, you are in a better position to know whether in fact the leaking of a final report fundamentally fetters the operation of the committee going forward. My perspective would be that leaks are the lifeblood of this place. We all know that. We should not pretend to be Pollyanna and suggest that they are not. It is a very robust structure; it is a very robust institution. The committees, just like cabinet, just like party rooms and just like everyone else that suffers under leaks here, seem to endure and go on strongly.

Senator ROBERT RAY—I would like to thank you for your submission today and note that, in spite of unctuous and pompous editorials from News Ltd, you are the ones who have fronted up. I really appreciate it.

Mr Wolpe—Thank you. I also want to say that we had eminent fairness in working with you and all the members of the committee the last time we were before this committee, which we appreciated very much. If you get to a discussion about how to draw the rules and you want to talk with us further on that basis, we would be honoured and delighted to do so.

Senator HUMPHRIES—You imply in your submission that the present rules of contempt are likely to offend the implied freedom of political expression that was found in *Lange v the Australian Broadcasting Corporation*. Do you have legal advice to suggest that that is the case?

Mr Wolpe—We do, and we will provide a supplemental memorandum to you.

Senator HUMPHRIES—That would be very helpful. Thank you.

CHAIR—Thank you, gentlemen. Mr Scott, I remember that Claude Rains also said these very famous words: 'Round up the usual suspects.' It would not happen on this committee. Thank you both very much.

Mr Wolpe—They don't make movies like they used to, Chair.

[10.12 am]

WARREN, Mr Christopher John, Federal Secretary, Media, Entertainment and Arts Alliance

CHAIR—Welcome. I draw your attention, Mr Warren, to my opening remarks this morning. The Media, Entertainment and Arts Alliance has lodged a submission with the committee, which we have numbered submission No. 16. Mr Warren, do you wish to make any amendments or alterations to that submission?

Mr Warren—No.

CHAIR—Do you have an opening statement?

Mr Warren—I want to briefly reiterate the points that we make in the submission. Confidentiality of sources is an issue that has been grappled with not only by this committee; it is an issue of global conflict between free media, governments, governmental authorities, parliaments and legislatures. I think there is much that this committee can draw from those experiences—some positive things and some negative things. Our primary concern in this issue—and I hope the committee starts from this position—is to ensure that the free flow of information is encouraged and that the rights and ability of journalists to do their job to keep our communities informed is able to continue without unnecessary restrictions. We have noted the comments that were made in the debate in the Senate on this reference, and we welcome many of the comments that indicate an understanding by the Senate, broadly, and by members of this committee of the principles involved here and of the really quite difficult policy conflict that is at the heart of this issue. We have made certain recommendations that we believe would assist the committee in getting the right balance between the public's right to know, the journalists' ability to do their job and the needs of the operations of the Senate.

CHAIR—On page 4 of your submission you say:

... as a matter of principle, the Senate should continue to refer leaking of closed hearings to the Privileges Committee.

You then go on to qualify that statement. Is it the view of your organisation that the unauthorised disclosure or misrepresentation of committee deliberations should therefore continue to be treated as possible contempts in all circumstances?

Mr Warren—No, it is not. Our view in relation to the far more common experience, which is the unauthorised disclosure of committee reports either at a draft stage or prior to them being tabled in the Senate, is that that really should not be considered a breach of the privileges of the Senate but rather should be considered—to the extent that it needs to be considered as anything at all—as a matter for the members of that committee. In almost every case, if not in every case, where those sorts of matters have come before this committee or the Senate it has been a member of the committee who has been involved in the leaking. I take the point that Senator Ray made earlier: it is about the ongoing relationships within that committee, and that is a matter for

the committee to work out among themselves, not necessarily a matter that should be seen as going to the heart of the privileges of the Senate.

CHAIR—Are you drawing a distinction about evidence and material, oral or written, that is provided or received in camera?

Mr Warren—I think there is clearly a difference between the two. While I can understand that the unauthorised release of information that is at some stage going to be made public may be frustrating to individual members of the committee and may undermine the relationship of trust on a committee, it is hard to see where the public interest lies in penalising people for releasing a document to the public domain earlier than it would have otherwise have been in the public domain. I can understand that there is at times a political interest, particularly with regard to the government's timing of releases, but frankly that governmental, political interest is not necessarily the same as the public interest or the journalist's interest.

Material that is intended to be in confidence is obviously in a different category. The key test has to be: is it appropriate that that information be in confidence? We have the view, and we refer to this to a certain extent in our report, that in the Australian context material is much more likely to be kept in confidence—and this is particularly the case with governments—than would be the case in many countries overseas. There is a greater enthusiasm about declaring matters to be in confidence than is the case, for example, in the United States or large parts of northern Europe. But if a matter is deemed to be in confidence then I think everyone needs to go through the appropriate test to determine whether that confidence is appropriate, whether that is done prior to it being released or as a result of people dealing with an unauthorised disclosure.

CHAIR—So you think this material should be subject to an appropriate test, as opposed to the unauthorised disclosure of in camera material, be it oral or written, always being treated as a contempt?

Mr Warren—That is right. We believe that there should be tests. These include the test of intent: is that the intended effect of it? Does it have a significant effect? Does it have a deleterious effect beyond the operations of the committee? Even if all those tests were met, there should still be consideration, and if it is still in the public interest that the information be made publicly available then that should not be a breach of the privileges of the Senate.

CHAIR—Have you given any consideration to what measure might be used for a test of intent or, for that matter, a test of significance, which is one of the other elements that you have raised in your submission?

Mr Warren—I think to a certain extent they are tests of the facts of the matter. The test of intent goes to the question, 'Was it leaked in a way that was intended to disrupt?' I think that is a fairly easy test to determine. The test of significance will always be a judgment, and we accept that we may make a different judgment to you. The test of a deleterious effect is likely to be far more objective. There is often a tendency—and this is an experience that comes up with governments far more often—to argue that things have had a deleterious effect when in fact the effect is more political embarrassment than any other type. We talk in our submission about the Tillack case in Belgium and I think that is very much the experience there. The investigator was

embarrassed by the leak and by the fact that a journalist could expose things that they were not able to discover.

Senator HUMPHRIES—Putting aside in camera proceedings of committees, is it your view that parliamentary committees should meet and deliberate in the open, as the Senate itself meets and deliberates in the open?

Mr Warren—Our prima facie view would be that, as far as practicable, the operations of the parliament and indeed of the government should be conducted in the open. Australian proceedings—certainly at a governmental level but perhaps less so at a parliamentary level—are excessively secret by comparison to countries overseas, and that is true whichever party happens to be in government. It is true at both the federal and the state level. So, yes, our default position, if you like, is that proceedings should happen in the open more often than not.

Senator HUMPHRIES—Wouldn't you appreciate that there is a difference between the way committees work and the way the Senate as a whole works, in that on the floor of the Senate there is nothing confidential. Members operate on a very political basis as a rule and the political jousting goes on fairly liberally, whereas in committees members put aside their political allegiances to some extent and they discuss confidentially the issues from the point of view of attempting to resolve them and to find solutions that might be politically acceptable and efficacious. If you effectively remove that cloak of confidentiality and if you say there is no such thing as a private meeting, don't you destroy that very valuable public benefit that flows from committees being able to meet and talk confidentially and privately about major public issues?

Mr Warren—No, I do not think that is necessarily right. I do not know whether it would damage the operations of senators to be exposed to be acting in a bipartisan fashion in committee hearings. Clearly it would change the nature. There is no doubt about that. When something happens in the open, that can change the nature of the discussion. That is not necessarily a bad thing and it would not necessarily reduce the ability to have a free flow and open discussion of issues. We would say that the default should be the other way around: rather than say things should be held behind closed doors, to use a neutral term, perhaps, they should be held in the open unless there is some compelling reason in the particular circumstance to hold them in confidence.

Senator HUMPHRIES—Wouldn't you say that the general operations of committees, where they discuss things behind closed doors, make an atmosphere conducive to finding solutions to problems that you would not find on, say, the open floor of the Senate?

Mr Warren—I can accept that it may well be that it would be appropriate to have discussions where senators wanted to play devil's advocate, for example, in a way that I can understand people would not want to do in a public forum because it could be misunderstood. But again, I think that the test should be the exception rather than the rule. The default position should be, 'Is this something that needs to be done behind closed doors or not?' rather than the tendency—particularly in government but also across society as a whole—that things should be done in secret unless there is some compelling reason for doing it in public.

Senator HUMPHRIES—One of the things that you say should draw the line between those two cases is a test of whether a particular matter is in the public interest or not. The last

witnesses said to us, ‘Anything is in the national interest’—and I assume ‘national’ and ‘public’ are the same thing here. ‘Anything is in the national interest. The weather is in the national interest.’ Would you like to define your view of what the public interest or the national interest would be for us to use as a working measure of what should or should not fall the other side of that line?

Mr Warren—The public interest test is a common test; it is not something that we have invented. It is a common test in defamation law, for example. There is a difference between having a certain vagueness in a test that is about establishing whether something should be allowed to be published as distinct from vagueness in a test to establish that something should not be able to be published. So I think there is a different usefulness of vagueness. But I would think that public interest—and this is a circular way of saying it—is something that is in the interest of the Australian community, or a significant or relevant part of it, to know. I think that is the test that is applied through defamation laws, although perhaps not as widely by judges as we would like.

Senator HUMPHRIES—I am not sure about that, but that is a very broad test. Who defines what it is in the public’s interest to know?

Mr Warren—In the case of defamation, I believe the courts make that determination as to whether a matter is in the public interest or not.

Senator HUMPHRIES—How is the early disclosure of a committee report, say, before it is published, in the public interest to know? They will know about it a week or two later. What is the public interest in disclosing it two weeks beforehand?

Mr Warren—I would actually put that the other way around. I think the test should always be not ‘Is it in the public interest to publish?’ but ‘Is it in the public interest not to publish?’ Where is the public interest in not publishing it? From a journalist’s perspective—indeed, the public’s perspective—if the information is relevant and interesting to them, we say the public interest is in knowing that information as soon as practicable, not necessarily at the discretion of those who happen to have that information in their possession at the beginning of the process.

Senator SHERRY—I have two quick issues. Following on from your thoughts about making public the discussion of committee members in exchanging ideas and putting together their thoughts and suggestions for compilation in a report, if that happened wouldn’t you run the risk of people saying absolutely nothing at those meetings? They would just ring up on the phone or flick an email, because of the difficulties. In most committees and most inquiries I have been involved in, there generally has not been a predetermined position. There is a genuine exchange of view. That just would not take place.

Mr Warren—I think everyone accepts that one of the strengths of the Senate committee process, other than for acutely politicised issues, has been that it has operated in a sense of public policy. It has sought to identify what is the most effective public policy that can attract broad support across the various tendencies that are reflected in the Senate.

When that happens there are probably two stages of debate. There is a level of debate that is probably now held behind closed doors but which could just as easily be held in public. Our

default position is that in public is always better. But I do accept, as I hope I indicated to Senator Humphries, that there are obviously circumstances where people are discussing issues and where they might want to play the devil's advocate to tease some concept out, and where there is a lot more ebb and flow. Being in public does automatically formalise things to a certain degree. It does not have to formalise them unacceptably, but it does formalise them to a greater extent. But there would be some of those circumstances where the committee would meet 'in committee', if you like, to workshop those issues.

Senator SHERRY—At the end of your submission you talk about leaking of reports, and other members of the committee have touched on this with other witnesses. You say that the leaking of reports prior to release should not be considered a breach of the privileges of the committee if it does not directly affect the operation of that committee at that point in time. But, if we adopted that, would that not mean that in future where leaks occur they would inevitably occur earlier in the process? We would have leaks of 'the committee is likely to recommend' or 'the committee is leaning towards', rather than the completed report, if you like, before publishing. It just shifts the leaking back.

Mr Warren—Yes. Most of the cases, as you know, are in that period between the finalisation of the report and its tabling. I am not sure that the principle changes if you push the report back.

Senator SHERRY—No, I am suggesting that you push the leaking back.

Mr Warren—Yes, but I am not sure that the principle changes as a result of that. I can understand that it might increase the tension within the committee.

Senator SHERRY—Yes. That is my point: it would affect the future operation of the committee, because you simply have the leaking further back in the process.

Mr Warren—I think that is a matter that the committee need to work out among themselves. It goes to the personal relationships within the committee, which is something that needs to be dealt with within that committee rather than it being effectively criminalised by putting it in the privileges process.

Senator KNOWLES—I want to come back to the point that Senator Sherry made. Do you understand the implication to a committee of a leak at a draft stage?

Mr Warren—Do you mean in terms of the operations of the committee?

Senator KNOWLES—Yes.

Mr Warren—Yes. I can understand that it could render relations on the committee difficult.

Senator KNOWLES—But do you understand what the process of consideration of a draft report entails?

Mr Warren—Yes, but I do not see why that changes the principle about whether that process should be criminalised.

Senator KNOWLES—Just explain to me what your understanding of a draft report entails, as opposed to a final report.

Mr Warren—I presume, Senator, that a draft report is a report that is continuing to be discussed between members of the committee.

Senator KNOWLES—You say that it does not matter whether it is a draft report or a final report. To you it is one and the same and it is open season.

Mr Warren—I do not think that I do say that. I think what I do say is that the unauthorised disclosure of those documents should not be unnecessarily criminalised. That is the key point. It is not necessarily an issue of whether something is right or wrong.

Senator KNOWLES—Should it not be whether something is right or wrong? The privileges situation thus far has been that it is right or wrong, and journalists by and large have said, ‘I don’t care whether it is right or wrong. I know that I’m going to protect my source and my source knows that I’m going to protect them, so I don’t really care what the Senate says. I’m going to report it regardless.’

Mr Warren—Indeed. My view would be that senators, the Australian community in fact, should be very proud of their journalists in their preparedness to risk jail and criminal records to protect their sources.

Senator KNOWLES—They should be proud of their journalists for thumbing their noses at the Senate?

Mr Warren—For protecting the key press freedom principle that confidentiality of sources needs to be respected. The responsibility of the Senate in this sense is, I believe, not to criminalise that process.

Senator KNOWLES—Are you honestly saying to me that the public should be proud of its journalists for thumbing their noses at the parliament and saying, ‘We don’t care what rules you’ve got. We’re going to operate under our rules and hang the consequences.’? I confess I had a bit of a chuckle at page 1 of your submission where you said, ‘That is why journalists commit to a code of ethics.’ A code of ethics should include not only what they are doing on a day-to-day basis but also what the courts demand, what the parliament demands and so forth. We are not seeing that here and we are not seeing an alternative being put to us as to how we deal with it.

Mr Warren—You do not see it in the code of ethics because, in relation to confidentiality of sources—and I am sorry to put this as bluntly as this—journalists do not accept and will never accept the principle that they should be compelled to reveal their sources. This is not something we have made up in Australia one morning over morning tea.

Senator KNOWLES—I am not talking about revealing sources; I am talking about parliamentary privilege.

Mr Warren—But it is exactly the same principle.

Senator KNOWLES—Is it really?

Mr Warren—Unless you are arguing that we get a report leaked to us that we believe is in the public interest to publish. That is a test that we go through. Whether it is characterised as news or whatever, the basic test is to ask, ‘Is this something that is in the public interest?’

Senator KNOWLES—But you said that one of the tests that should be passed was related to whether the leak was intended to disrupt.

Mr Warren—That is right.

Senator KNOWLES—Gee whiz, I would whistle dixie in a west wind until the cows came home if I ever thought that a journalist was going to say: ‘This leak is intended to disrupt. Therefore I won’t report it.’

Mr Warren—I think you misunderstand what we are saying. I believe that, if the Senate believes that the leaking of a document or of confidential evidence in the case that we are referring to is intended to disrupt the operation of the Senate, does disrupt the operation of the Senate, does it in a deleterious way and is not in the public interest then it should consider that a breach of its privileges. But the person responsible for that is not the journalist; it is the senator who has done the leaking. That is the process by which that could occur.

Senator KNOWLES—So the journalist is absolved of all responsibility so that they do not have to pass any of those tests. There are a lot of rungs to that ladder. If they could climb up all those rungs and get to the end and say, ‘Hang it. It doesn’t matter anyway—

Mr Warren—I think you would find it very hard to identify cases—including the cases that have come before this parliament or cases on this issue of unauthorised disclosure of information that have come before the courts of Australia—where a journalist has not taken all those matters into account in deciding whether or not to publish.

Senator ROBERT RAY—I think we should say for the record that it is not just senators in this case that we are looking at because Senate standing orders apply to most joint committees. What we are looking at today is going to have an even wider coverage. I thank Mr Warren for his non-evasive answers. He has been a good witness from that point of view. One of the difficulties we have with this is getting rid of all the pomposity and getting down to the core of it. Sometimes we appear a little more hostile to the concepts being put forward, not because of their substance but because of the way they have been dressed up. I want to take you to page 5 of your submission, Mr Warren, because I find it puzzling. You say in paragraph 2:

... the Privileges Committee should extend a shield to journalists’ ethics and accept that it will not seek to force disclosure of confidential sources.

I have a pretty simple question: when did we last seek the disclosure of confidential sources? I have been on this committee for a long while.

Mr Warren—Currently under the rules of the Senate you have the capacity to bring a journalist before you and ask them to reveal—

Senator ROBERT RAY—What I am really asking is: when did we last do that?

Mr Warren—Certainly in the most recent case that I was involved in, involving the *Age* and Annabel Crabb, I think the Senate did take a sensible approach to this issue, and I have also noted the comments in the debate on the reference to this committee which I think shows the Senate does understand the ethical principles involved. Our view is that there is a need for those ethical principles to be incorporated into the consideration of the rules, as there is increasingly a tendency—not a fast enough tendency, I must say—for legislatures to amend the Evidence Act to extend in a different sense some privilege to journalists to respect their sources.

Senator ROBERT RAY—If you followed the debate in the chamber you probably saw that the potential core submission would be to remove all contempts from committee proceedings and then possibly reserve one area, in camera evidence—and let's work on the assumption that that is not abused, that the net is not thrown so wide. I think you can assume that, because opposition senators and in some cases government senators are not going to be in a ramp and rort that disadvantages them. However, if in fact we come down with a conclusion that all the rest is fair game but the disclosure of in camera evidence is a contempt—journalists can still do it and go to jail; we still reserve that right for them—should there be an onus of proof on the journalist and the publishers to prove that what they did was correct, rather than us having to prove at that point that it was incorrect?

Mr Warren—If I was sitting here as a trade union official negotiating an outcome, I would probably take that outcome back and say, 'That's a pretty good deal,' because it would be a significant improvement on the current position and would remove probably over 90 per cent of the conflicts that have been generated to date. So there is no doubt that would be a dramatic improvement of the current position, and I think it would largely lay the basis for cooperative ongoing coverage of these issues. If you ask me what I think in principle, then I am always uncomfortable where the onus is on the journalist or the media to prove that something is not in the public interest rather than the other way around. I think the onus, particularly when you are dealing with the issue of free speech, should always be on the authority, not on the media. I should also note that we recommend to the committee that it pick up the recommendations of the 1999 UK inquiry and remove the penal powers generally for contempt of court, but that is obviously a separate issue.

CHAIR—Finally, Mr Warren, I wondered if the alliance had given consideration to any specific changes to the Parliamentary Privileges Act, to Senate standing orders or Senate privilege resolutions.

Mr Warren—Some guidance for this in terms of shield laws would be the wording that was put into the New South Wales Evidence Act. Although I must say I am not as enthusiastic about the way courts have applied that as I am about the actual wording of the act itself, it at least recognises that journalists come to this with a competing ethical principle that needs to be taken into account in dealing with that issue.

CHAIR—We have noted that in your submission. Thank you very much, Mr Warren.

Mr Warren—Thank you.

[10.44 am]

BONGIORNO, Mr Paul, Vice-President, Press Gallery Committee

GRUBEL, Mr James, Secretary, Press Gallery Committee

CHAIR—Welcome. I refer you to the comments I made in opening the hearing this morning. The Press Gallery Committee has lodged a submission with the committee, which we have numbered as submission No. 5. Do you wish to make any amendments or alterations to that submission?

Mr Bongiorno—We would like to make a few additional amendments to our submission if we could.

CHAIR—Mr Bongiorno, were you planning to make an opening statement?

Mr Bongiorno—We could do it by way of an opening statement. I have one point to make and Mr Grubel, our secretary, has about six points that he would have to make.

CHAIR—Please proceed.

Mr Bongiorno—First of all, I would like to apologise to the committee for the absence of our president, Karen Middleton. She is on assignment covering the UK election this week. I would like to go to dot points 3 and 4 in our submission, where we say:

The Gallery Committee does not believe the publication or broadcast of such information—

that is information passed on to journalists by senators—

represents interference with the operations of a committee. Publication cannot, therefore, be considered to be contempt.

We would like to clarify that by making the point that any contempt would happen when information is leaked to a journalist, not when the journalist reports the leak. We would submit this would cover draft reports, submissions not released by the committee, reports of private meetings and in camera hearings. We have a view on in camera hearings that James would like to put to you briefly. That is the only addition or amendment that I have to our broad submission.

Mr Grubel—Having looked at many of the other submissions that have come in, we have had a bit of a think. We agree with the broad thrust of many of those submissions, particularly the sentiments in the Fairfax submission that witnesses or people who have given a submission to a committee should be free to disclose that submission to the media whether or not the committee has authorised the release of that submission. We agree with the News Ltd submission in relation to what evidence can be taken in camera. We think that as much of hearings as absolutely possible should be held in public, and it would be nice to see some defined rules about what can and cannot be taken in evidence and some limits put on that. We support Dr Ian Holland's comments that the proceedings of parliament should be as open as possible and his suggestion

that minutes of private meetings should be available or tabled or made available to the media. He sees no problem with that, as they do so in Britain.

We strongly support the views of many of the submissions that the test of contempt should be that a leak has somehow interfered with the work of a committee or caused some damage or repercussion, rather than just the fact that a leak has happened. We disagree with some of the submissions on in camera evidence that there should be an automatic contempt. We believe that there should be proof of damage before there is a suggestion of contempt. For example, a person who gives evidence in camera may then want to publicly disclose what they have said. We think that should be an option that is available and that if there is no damage and if that person agrees we see no reason why that should be a contempt.

I have one other point. The Clerk of the Senate, Harry Evans, raises the possibility of an interference with a court hearing or a legal proceeding that is going on and that a draft report may be withheld because of another proceeding elsewhere. We submit that if that were published the court would actually have its own ability to take action under sub judice rules, so we do not necessarily see why parliament should have the same powers as the court in that respect.

CHAIR—Thank you. I will commence with the issue of the disclosure of submissions. Do you draw a distinction between a disclosure made by a submitter, which you believe should not be a contempt, and the disclosure of a submission perhaps by a committee member? Do you think that should continue to be covered by the contempt provisions?

Mr Bongiorno—Going to first principles from our submission, we believe that the only tests for whether any information that becomes available to a journalist should subsequently be published would be tests of fairness, accuracy, truth and public interest, and we would define public interest as anything that the committee does.

CHAIR—So regardless of whether, for example, a submission was highly defamatory or very damaging to individuals?

Mr Bongiorno—There are other constraints on highly defamatory. I suppose it also goes to the extension of privilege of the committee.

CHAIR—Not if a submission—

Mr Bongiorno—Attracts privilege.

CHAIR—Yes.

Senator ROBERT RAY—It is working for you not against you.

Mr Bongiorno—That is right.

CHAIR—So, in that circumstance, do you consider that such a damaging submission, perhaps such a defamatory submission, ought to receive very serious consideration by a parliamentary committee before it is made public?

Mr Bongiorno—The rules of ethical journalism would demand that, even though this does attract privilege and you are to publish it, you should give the person who is being defamed the right of reply. I submit that is just part of ethical journalism. What you are reporting is a submission to a parliamentary committee.

CHAIR—But there is obviously a concern, after the horse has bolted, about a right of reply. I think many of us on this side of the table understand what that means. Over the years I have had many minor corrections printed in very small print in a very small box on page 2 of very prominent newspapers. I am sure they have been read by at least a dozen people!

Mr Bongiorno—That is true. I guess you might say that this is one of the downsides, if you like, of free speech. But I submit to you that the abuse of something does not take away its use. In fact, the broader principle is precisely that accountability, openness and transparency are paramount in a democracy.

CHAIR—You do not think that parliamentarians and others have certain obligations to ensure that this abuse does not occur in the first instance? You really do not think that is an obligation placed on parliamentarians and, for that matter, on journalists?

Mr Bongiorno—Yes, but often people are defamed because the defamer believes that they are righting a wrong or exposing a wrong.

CHAIR—But obviously a defamer at times has to face the full force of the law, but does not have to face the full force of the law if this defamation is contained in material which attracts parliamentary privilege.

Mr Bongiorno—That is a difficulty.

CHAIR—How do you think we should deal with that difficulty?

Mr Bongiorno—As a journalist I would say that you would have to take into account all of that, but there is an overriding broader public interest test as well.

CHAIR—From your comments, Mr Grubel, I think you are suggesting that the gallery has given some consideration to the issue of in camera evidence and submissions—oral or written material. Is that correct?

Mr Grubel—The gallery committee, mainly Paul and I—as representing the gallery.

CHAIR—Is the gallery committee of the view that such material ought to be treated differently from other material that is not received or accepted to be in camera?

Mr Grubel—As Fairfax was saying, if it is detrimental to the national security or to a person's safety there are good arguments why that might be held in camera, but our submission is that the leaking of that information to the journalist would be where the contempt would happen, not necessarily the publication. Each media organisation would then have to weigh up whether it felt that that should be published. We submit that it would be better if less was held in camera than more.

Senator ROBERT RAY—Do you understand the consequences of what you are arguing? You are saying that it is the leakers that are at fault—I do not disagree—but you are putting this committee and the Senate into the position where if we make that the one contempt we then have to force the journalist and the publishers to reveal the criminal's name. It is not in your self-interest to argue this.

Mr Grubel—I do not think journalists would disclose.

Senator ROBERT RAY—So let us cut the facade and get that one off the planet straightaway. It is not going to happen. What is going to happen, we hope, are practical reforms that will make your job a lot easier and clearer. What worries me about your evidence, Mr Grubel, is your comments about in camera evidence. You seem to want to make it very complex and still open to massive misinterpretation. The simple proposition is that if you protect in camera evidence and release all those other obligations you are in a lot better position. Every journalist knows the position they are in. It does not stop them from publishing in camera evidence. They can, provided they do not mind being fined or jailed for their principles—good. Whether it disrupts the committee work or not, I think we are beyond that, we are passed all that. We will just have to put up with all that. But we have to have clear guidelines. I do not want the evidence I hear at a joint intelligence committee appearing in the newspapers. I do not think the two of you at the table do either, by the way. But if it does I think it is then up to you to prove why you published it.

Mr Bongiorno—I accept that. What we are struggling with and I guess what the committee is throwing back at us are competing roles or competing obligations, if you like, in the national interest. This conflict goes back to all the discussions over D-notices and the abuse of them by government. The judgment that has to be made is: what is in the national interest and what is in, for example, the party political interest? These are judgments that journalists have to make. That is where our submissions are coming from. I understand where the points you are making are coming from. But we are here arguing as basically vacuum cleaners, as I think a former prime minister described us—and that is what distinguishes us from Nazi Germany and the Soviet Union.

Senator ROBERT RAY—I do not think you give senators any credit at all that they are not going to be involved in a rort that extends in camera evidence. Apparently the building is full of leaks and you know everything, according to other evidence—and I do not dispute that.

Mr Bongiorno—I do.

Senator ROBERT RAY—I invite you to name one instance where a Senate or a joint committee acting under standing orders has invoked in camera evidence for political and cover-up reasons. I want you to name one instance.

Mr Grubel—We are not saying it is done for political reasons. We are just making the point that we think evidence to committees should be as open as possible and that the media should get all of that.

Senator ROBERT RAY—That is precisely the current position. Committees hear in camera evidence reluctantly. A couple of committees—the one that looks at Corporations Law and the

joint intelligence committee—by their very nature have to hear far more in camera evidence than even they would like to hear. But the point is that they face this choice. They either get full and absolute disclosure by the executive or they get fed pap in open session. That is the choice. I think the public interest is to get all the material, to get scrutiny of the executive government. That committee can publish in camera evidence by the way, if there is a cover-up, and that has happened in the past. I want to see simple, precise, clear rules so every journalist will know where the line is. And if the line is that the only prohibition is in camera evidence, you want to cross the line, you will know the consequences, and we can get on with life. It seems to me a pretty good deal.

Mr Grubel—That would be a simple rule but, as I said, there may be times when in camera evidence does not interfere or cause damage.

Senator ROBERT RAY—I agree. But I am saying that in that case it is the journalist's and publisher's job to prove it, because they have made the decision. They have contravened the Senate's decision or the parliament's decision and published in camera evidence. Therefore, it is for them to prove, not the parliament. That is my only point.

Mr Bongiorno—That is a fair point but it is one that is not easily resolved by us agreeing, as it were, to give away or trade away the role of journalists and the media to disagree with the government, senators and members of parliament over what the—

Senator ROBERT RAY—You should never trade away any of your rights and you should not even trade away what you consider is your duty to publish in camera evidence. The only difference is, do not whinge afterwards if the Senate or the parliament takes action to enforce its rules, because if they are fair rules, as opposed to the current nebulous and convoluted rules, you have less of a case to complain, in my view.

Mr Bongiorno—That is good and I would agree with that.

Mr Grubel—We are more in agreement, but I also make the point that forcing media organisations or anyone to prove that something did not happen is very difficult.

Senator ROBERT RAY—You are the arbiters. You hold the torch of public interest high. Every submission here that comes from you—or associated submissions—rams it down our throats. That is good. Great. You prove it. That is your job. You are the ones who espouse it; you have to uphold it, not us.

Mr Bongiorno—It is a difficult position that we have. We are a lot like the slave who was in the chariot with Caesar coming back from conquering Gaul who had to remind Caesar that he was mortal and to dust he would return. Sometimes the slave got kicked out of the chariot. That is what can happen in a society such as ours, because power resides with the Senate, with the government and with the House of Representatives.

Senator ROBERT RAY—To carry the analogy further, it is the Senate committee's job, being the slaves, to remind executive government that it is open to scrutiny et cetera. It is not helped when you are fiddling with the wheel bearings.

Mr Bongiorno—I like that. You could have a job in journalism!

CHAIR—I am pleased to hear the odd chariot had wheel bearings.

Senator KNOWLES—I just want to come back one stage. We have talked about the national interest. We have talked about a whole range of highly sensitive in camera evidence. There are also circumstances where the in camera evidence given to a committee is evidence that one would consider less sensitive in terms of the national interest, although it is probably nonetheless controversial. Both Senator Humphries and I were involved in a situation not long ago where in camera evidence was given that would have been very controversial and would have been very tasty, I suspect, to the media. But the potential problem associated with such evidence is that the person who provided the information in the first case could have ended up very poor because they could have been sued. What is the position that journalists take on evidence that looks tasty and tempting—that blows the lid on, say, an industry that might not be performing as well as one might want—and yet, if they use it, they totally disregard the effect on the person giving the evidence or the person who provided the information to the person who gave the evidence?

Mr Bongiorno—The test has to be, first of all, truth, fairness and public interest. Fairness is the test for accuracy. Just going to your example, are you saying that this evidence was not tested?

Senator KNOWLES—Not tested, no. It was not particularly tested but nonetheless was pretty alarming evidence. I would imagine that any journalist would have said, ‘That’s nice. I’d like to blow the lid on these people.’ They named names.

Mr Bongiorno—But that is happening all the time, isn’t it?

Senator KNOWLES—But it shouldn’t be—that is the point of what I am saying: it is in camera evidence.

Mr Bongiorno—It is not only happening in the forums of the Senate or of the parliamentary committees.

Senator KNOWLES—That is the point of what I am saying. This is in camera evidence given to a committee that has the potential to really blow the lid on something, which I think a journalist would think was pretty jolly tempting.

Mr Bongiorno—And how does the journalist get hold of it?

Senator KNOWLES—They may just happen to get hold of this in camera evidence the same way that they get hold of any other in camera evidence.

Senator ROBERT RAY—A senator gives it to them.

Mr Bongiorno—Yes, a senator gives it to them.

CHAIR—I think the members of this committee acknowledge, Mr Bongiorno, that these leaks come from senators themselves. We have been very frank about that.

Senator KNOWLES—Or their staff.

CHAIR—As far as I am concerned—

Senator ROBERT RAY—Senators are responsible for their staff.

CHAIR—Exactly.

Senator KNOWLES—That is right.

CHAIR—They originate from the senators themselves. We have made a distinction, I think you will find, on the floor of the Senate between the senators and the staff of committees. It is the senators who have been, in the view of members of this committee, responsible for these leaks.

Mr Bongiorno—As a member of a mainstream media organisation, I can say that just because you get a leak does not mean it will be published. There is an editorial process. There are decisions made along the lines that Senator Knowles is outlining and sometimes leaks are not published. One of the tests of a leak of course is to ask, ‘Why has this been leaked?’. We have to ask, ‘Why has this senator or this staffer given it to us? Is it because it has been covered up? Is it because it is dynamite but, because it affects a person who is extremely powerful, it won’t be dealt with in any other way?’. All these sorts of tests are applied.

CHAIR—Or is it completely self-serving?

Mr Bongiorno—Yes, sometimes it is completely self-serving; that is true.

CHAIR—Very often, I would have thought.

Mr Bongiorno—Sometimes the self-serving nature of it also has other implications which are not necessarily all bad or all against the public interest. It is very hard to deal with these matters in the abstract, I must say.

Mr Grubel—I think also for journalists to be covered by privilege they are supposed to seek balance. The same applies if somebody gets up in the Senate and says something about a member of the public or another politician—that report is only covered by the qualified privilege of the media if they seek balance.

CHAIR—Let us use the example that Senator Knowles used earlier in this hearing today about the leak of material from one of the references committees. A senator abiding by their obligations is in no position to be able to provide balance. If a leak has come from a committee, an unauthorised disclosure, a senator acting properly and responsibly is in no position to do anything about this until a later stage when such a report has been tabled and is in the public arena. It is a tough ask. Balance could only perhaps be achieved in such a circumstance by another senator acting improperly, surely. So balance is very difficult.

Mr Bongiorno—That is true. But if it is so controversial, and I am dealing with this example, you will find that the person who has been defamed will protest their innocence and put a counter argument.

CHAIR—But most people would say, ‘Don’t defame them in the first instance’. Most reasonable people would say that it would be preferable not to have a circumstance where such an outrage occurs.

Mr Bongiorno—One of the difficulties with this discussion is that defamation itself is difficult to define because often defamation is true and the defamation can be in the public interest eventually—or even immediately when you think about it.

CHAIR—But the point here is that the material before committees attracts privilege. You might care to say some things about me at this hearing across the table—here is your chance—that you might be less comfortable about saying on Channel 10 News this evening, and I am sure you appreciate that is the case. That brings certain obligations, of course, on the person who is making the original comments or providing the original evidence or submission. In other words: to be able to do this, knowing that such material attracts privilege, leads to certain responsibilities on committee members, and committee members then making decisions about whether it is appropriate or otherwise to have such material published. I asked you about that before, and you said, ‘This is a conundrum,’ and that you do not really have an answer to it.

Mr Bongiorno—I can only answer it from my position as a journalist and within the context of the parliament we have got and the society that we run. The good thing about this discussion, indeed about this inquiry, is that what we as journalists are trying to take full advantage of, thanks to the opportunity offered by the committee, is to push disclosure to the limit.

Senator HUMPHRIES—I have a question about what you said before about defining public interest. I think you said that there are a number of tests to use to judge whether something should be or could be disclosed or not, and the test of public interest was satisfied by being before a committee—that anything before a committee was in the public interest. This is a very broad test. Can you explain to me what the public interest is—and this is a situation that frequently occurs—where a committee’s proceedings or report is disclosed early? Nothing is going to change about the report by virtue of it being disclosed early. There is certainly some titillation on the part of the person who leaks it about getting it out there earlier, and there is no doubt it is a scoop for the paper concerned that puts it out there before anybody else does. But what is the public interest in it being out at that time and in that way?

Mr Bongiorno—Immediately, it is evidence of the healthy political process. I presume that it is out there because a member of the committee put it out there for various reasons—and they could even be party political reasons. After all, one of the safeguards of our democracy is precisely that: party politics. In that sense, the media is, in this circumstance, just reporting the process that Senator X or MP X from this party takes a very different view from MP Y from the other party.

Senator HUMPHRIES—It might just be a case of Senator X wanting to put the thing out there and curry favour with the journalist by saying: ‘Here’s the report, mate; put it out there. You’ve got it first.’ There is actually no public interest in that at all really, is there? The public is

going to see the report; it is not a case of the public not getting to see the report. It is just that paper X or paper Y releases it before the other media outlets.

Mr Bongiorno—That is true, but the broader context answers that, does it not? The broader context is that this is a committee of the parliament, doing the parliament's work, and this is its report. And then we get into commercial rivalry where, as you have suggested, one journalist is going to look a hell of a lot better if he or she has got a scoop. I must say that is true—and I would not mind a few!

CHAIR—You see, Mr Bongiorno, there was no need to be nervous. You are in very safe hands.

Mr Bongiorno—Thank you very much.

[11.20 am]

MARTIN, Mr Michael John, Supervising Lawyer, Legal Services, Australian Broadcasting Corporation

CHAIR—Before I welcome our next witness, I will mention that we have two further submissions, which will be numbered 20 and 21. One is from the President of the Legislative Council of the Parliament of Victoria and the other is from the President of the Legislative Council in New South Wales. I now welcome Mr Michael Martin, representing the Australian Broadcasting Corporation. I refer you, Mr Martin, to the comments I made in opening today's hearing. The ABC has lodged a submission with the committee, which we have numbered submission No. 4. Mr Martin, do you wish to make any amendment or alteration to your submission?

Mr Martin—No. We will have some additions to make, but no alterations or amendments as such.

CHAIR—Do you have an opening statement that you would care to make?

Mr Martin—A short one. Essentially, the thrust of our submission—or a large part of it, as you senators will probably notice—is that we are one of probably two organisations that walk both sides of the street in respect of committees and disclosure of evidence and submissions and so forth. We appear before committees frequently and, as our submission indicates, our witnesses and people that appear are well aware of the rules relating to unauthorised disclosure. I think there may have been one or two suggestions in the past that witnesses may have leaked, but as far as I am aware that is simply not the case. So I think the thrust of what we would like to say here today pertains to the other side of the street, where we have journalists who are recipients, from time to time, of unauthorised information from committees. The question is: what is to happen and what is to be considered a contempt of the Senate in that respect?

While we mentioned the obvious tension that arises for journalists who are recipients of that information, I would like to pick up on a couple of the points made by some of the other media organisations, in particular SBS, who have made the submission that parties who make submissions to a parliamentary committee should be able to publish their submission without the permission of the committee. I suggest that that is a reasonably uncontentious proposition, if the parties themselves want to make it public. I will give you an example. Prior to coming here, there was an issue between SBS and us as to whether we could even exchange our submissions to this committee. Luckily, as it turned out, they had been published and it was a nonissue. I suggest that in a case like that there should not be a problem.

Secondly, the test that seems to have arisen—I think as a result of a resolution in 1996—for this committee is the test of substantial interference. We would suggest, as SBS has, that that should remain the overall test for contempt. It is not something that should be dealt with lightly. I guess it may also come into the issue addressed by the Clerk of the Senate in his submission, which is really a matter of enforcement: when should something be referred to the committee in the first place? That is, if you like, part of the same question.

Finally, this vexed issue of in camera evidence: I was looking at the Parliamentary Privileges Act last night and something occurred to me. The fact is that under section 13 of that act it is already a statutory offence to disclose in camera evidence. Again, it comes back to the issue of enforcement in that regard. That leads me to think, ‘What is actually served by the notion of considering whether it should be an automatic contempt of the Senate when you already have that section 13 statutory offence?’ Those are my additional submissions.

CHAIR—Thank you very much, Mr Martin. The first additional point that you make relates to the issue of submissions being made public before committees so determine and your suggestion that that is uncontentious. I think it is a contentious matter. You were speaking of a circumstance where a submitter himself took that course of action. Do you take the same view in relation to the unauthorised disclosure of a submission from, let us say, a committee member? Do you think that should continue to be covered by the contempt provisions?

Mr Martin—I think so, but again subject to the substantial interference test, whereby I think the committee is then put in a position of weighing up the seriousness of what has occurred. I think if it is guided by that test, there will be times when that may fall over the line and be contempt. There may be others where it remains a relatively—I emphasise ‘relatively’—trivial matter, which should not invoke a contempt finding.

CHAIR—Do you contemplate a circumstance where a submission might contain some very controversial, damaging or defamatory material? Do you think that sort of adverse material should be treated the same way as perhaps a submission that is quite straightforward in its nature?

Mr Martin—That raises a very interesting legal point. As far as I can see, it is a very grey area as to whether you would actually be able to freely report that submission as an unauthorised disclosure, whether in fact the fair report defences that would normally be available to you for reporting the proceedings of parliament would be available to a media organisation reporting that unauthorised disclosure. It may well be that they could not rely on the fair report defence, and therefore they would be subject to a defamation action and they would have to try to rely on, for instance, truth, if it were available. So there is that to consider as well. It is arguably not in the same category as the reporting of an authorised disclosure.

CHAIR—But do you think that Senate or committee procedures should take account of this circumstance?

Mr Martin—Yes, I think they can and, again, I think your substantial interference test can come to bear on that. If it is really damaging material, I think it is at least strongly arguable that there is substantial interference occurring with the work of the committee or the Senate in that regard because it is undermining, I guess, the position of that witness to start with, or whoever the witness was speaking about.

CHAIR—You raise the issue of the ABC’s approach to in camera material, oral and written. Could you outline for the committee what your view is in relation to unauthorised disclosure of that material?

Mr Martin—As I mentioned in the first instance, I think you have the very real issue of the statutory offence under section 13 of the act. There is also the notion of general contempt as a privileges issue, which will be referred to the committee. I think it is highly likely that, on most occasions, that would fall foul of the substantial interference test. So, as constituted under the resolutions that the committee is guided by at the moment, you have the capacity, I would suggest, on most occasions, or perhaps many occasions at least, to find a contempt on the basis of the unauthorised release of in camera evidence.

CHAIR—Do you think that unauthorised disclosure of in camera evidence or material should always be treated as a contempt?

Mr Martin—I do not, actually, because I think, for a start, as I mentioned, you already have the statutory provision. I am just not quite clear about how that is enforced—whether statutory offences against the act are matters which come to the committee or whether they are something that you would see as referable off to the DPP. I just do not know how they are dealt with. But, given the fact that you have this statutory offence, I do not know that you really need a parallel, automatic contempt provision.

CHAIR—My understanding is that such cases are dealt with on a case-by-case basis. I am interested in relation to the editorial policies of the ABC. In your submission, you have outlined section 5.3 of the editorial policies. You outline 5.3.1 in full in the submission. It says:

The media do not have an unrestricted right to say what they like. Laws relating to copyright, defamation, Contempt of Court, orders suppressing publication—

and so forth—

all apply to the ABC.

Of course, contempt of parliament is not included there.

Mr Martin—It is not expressly included, but it is well understood to be part and parcel of the same regime, if you like—of a different character, of course.

CHAIR—I note that you go on to say that it is not expressly mentioned but:

... ABC lawyers recognise that potential contempt of Parliament is a further issue that must be considered ...

Are you able to explain to the committee why it is not there?

Mr Martin—Not having written it, the most I could speculate is that it is simply a discursive suggestion about the range of laws or the range of restraints and constraints that apply to the ABC. It does not attempt to be exhaustive. That is the main reason. Also, frankly, as a matter of everyday legal practice, when you are involved in prepublication advice, contempt of parliament is nowhere near as frequent an issue as, for instance, defamation and contempt of court. That would be the main reason. It is no less serious, but I would suggest that it is a rarer issue for working journalists and therefore for program makers, in the main.

CHAIR—It may not be exhaustive, but it seems a rather odd exclusion, given what is included in the list.

Mr Martin—I would not see anything sinister in it.

CHAIR—I am not suggesting that it is sinister; I just wondered whether the ABC, given those editorial policies, took any extra steps in relation to contempt of parliament. Perhaps you could inform the committee about how that takes place within your organisation.

Mr Martin—I can. It really takes place within the context of the legal training of journalists, which occurs frequently and is quite organised. We get around the country each year to all places, and contempt of parliament forms part of the general discussion of contempt. We normally deal with the big issues of defamation and contempt of court, but we also refer to contempt of parliament in that context. Most program makers, not just journalists but radio presenters and television presenters, take part in these training sessions, so it is brought to their attention through the training process.

CHAIR—And this training is in house, conducted by the ABC?

Mr Martin—Yes, it is in house—I do it, for instance, and other lawyers do it.

Senator KNOWLES—So what do you actually tell journalists about contempt of parliament?

Mr Martin—Without going into chapter and verse, we say that it is a very real matter which they will confront. This is precisely the sort of situation—unauthorised disclosure of documents is the main situation—that will confront them. We say that, *prima facie*, you have an issue of contempt of parliament. As to whether it amounts to a contempt of parliament, the broad thrust of the advice is along the lines that it is a matter for the Privileges Committee—or the equivalent in any state assembly or whatever—as to whether a finding of contempt is made against you. We say to them that, for instance, in some legislatures, the penalty can be at large—that does not happen to be the case here, because you have the Parliamentary Privileges Act—and we just go through the range of issues.

Senator KNOWLES—What issues do you go through, though?

Mr Martin—What will often happen on an occasion like this is that we will raise the question of contempt of parliament and then a journalist will throw at us either a hypothetical or possibly a real situation and we will workshop it as to whether that unauthorised disclosure might amount to contempt of parliament and whether it can be dealt with. At the end of the day, I think journalists realise that—and this is something along the lines of what Senator Ray was saying earlier—there is an occupational hazard in their journalistic requirement to get stories to air and the issue of contempt of parliament if they have unauthorised disclosure to deal with. It is something that individual journalists ultimately have to sort out for themselves. But they are guided by editorial policies, which actually tell them that they are not free to report everything—that there are constraints. They also have a process of upward editorial referral. So I do not think any ABC journalist would normally take upon themselves a risk of contempt of parliament without seriously considering the implications.

CHAIR—Is there any proposal that you are aware of to actually amend the editorial policies to take account of this?

Mr Martin—Yes, I think it is referred to in our submission. A review is actually under way. I am not quite sure how far it has got.

CHAIR—Your expectation will be that, in the future, account will be taken of this?

Mr Martin—I think you could expect to see an express reference to contempt of parliament amongst the list of legal constraints in this section of the editorial policies.

CHAIR—To follow on from Senator Knowles's questions: are you providing advice to journalists in relation to specific instances as well as broad advice and training, as you have described it, to employees?

Mr Martin—Yes.

CHAIR—Do you also face a situation from time to time when someone might come to ask you for a view about defamation or contempt of court or whatever?

Mr Martin—Yes, we may. As I said before, it is fairly rare that contempt of parliament comes up as a specific issue.

CHAIR—Has that occurred?

Mr Martin—It has occurred in this context of unauthorised disclosure.

Senator KNOWLES—On that issue, what has triggered the revision of these editorial policies when for so long the ABC has been in existence with an editorial policy that specifically excludes contempt of parliament?

Mr Martin—I do not think it specifically excludes it.

Senator KNOWLES—It does, according to what you have given us here.

Mr Martin—It has not included it, I think is probably a better way to put it.

Senator KNOWLES—It is six of one and half-a-dozen of the other.

Mr Martin—It has not been taken out at any point. I guess what is in that list is the most common legal problems confronted by our working journalists and program makers.

Senator KNOWLES—What has triggered the revision?

Mr Martin—They just happen regularly. The last one came to fruition in 2002. It is just a regular process. Almost as soon as the editorial policies are published, a review process starts again.

Senator KNOWLES—So in 2002 contempt of parliament was not considered an issue?

Mr Martin—It is an issue; it is just not one that was specifically referred to in that non-exhaustive list.

Senator KNOWLES—The secretary has just drawn my attention to our 112th report, which stated in reference to the *Age*:

The documentation supplied is an illustration of the disregard with which the media view possible contempts of a house of parliament. The material has led irresistibly to the conclusion that the media are far more concerned about possible court-imposed sanctions than they will ever be about contempts of parliament, no matter how serious they might be.

Those words could equally apply to your submission, because clearly your submission does not really give a tinker's about contempt of parliament.

Mr Martin—I would not agree with that, with respect. Certainly for the lawyers in the organisation, there is every regard for contempt of parliament as a serious, live issue that can come up at any time. That advice would be given to any journalist or program maker seeking advice on those issues.

Senator KNOWLES—What reference documents are journalists given in their training about contempt of parliament?

Mr Martin—I am not sure that they are given any specific documents but—

Senator KNOWLES—So they are not given a copy of—

Mr Martin—No, there are examples generally handed out which raise the issue. They will vary from time to time, but there are case studies, examples and hypotheticals, and contempt of parliament does come up in that context.

Senator KNOWLES—They are not given a copy of the act?

Mr Martin—On parliamentary privilege? No, we do not give them a copy of the act. We have normally got two hours or so to get through a range of issues, so we do not burden them with legislation.

Senator KNOWLES—But two hours would surely mean that, when parliament is specifically excluded from this, contempt of parliament would not rate too highly out of two hours.

Mr Martin—That is one of the issues which is almost invariably touched on. It just depends how much time we have. We would always like more time, but we have to fit in with their working arrangements. Sometimes we get two-hour sessions in a day. That is as much as we would normally get with any individual group of journalists, because there are other calls on their time obviously.

Senator KNOWLES—How often would a journalist go through these courses? Do they have refresher courses?

Mr Martin—They do.

Senator KNOWLES—How often?

Mr Martin—It is hard to say precisely how often. One journalist I encountered last year was complaining that it was the third she had had that year. That was a regional journalist. But I suggest they have the opportunity to have a refresher course at least once a year.

Senator KNOWLES—Thank you.

Senator ROBERT RAY—I cannot quite understand why witnesses today are a bit worried about the premature publication of submissions—that they should have a right to publish their own submission. You could have published your submission today as a background paper and just not mentioned that it was a Senate submission and all the material would be out there.

Mr Martin—I understand that.

Senator ROBERT RAY—I would have thought there were two reasons to wait for the committee to authorise publication. The first is that everybody's submission gets released at the same time, so it is a more informed discussion, and the second is that they are all covered by privilege from that point on. So I do not see what the great advantage is, other than absolute opportunism—and that would be in rare cases—of publishing your submission in advance.

Mr Martin—There was the example I gave—which is probably the most innocuous, I suppose—which is SBS and the ABC just wishing to see—

Senator ROBERT RAY—And usually committees try to get them authorised for publication before the public hearing so everyone knows what everyone else has said. They do not always get copies, because sometimes they just arrive on the day and decide to pick one up. But that is curious. I am equally curious about you wanting to retain the test of substantial interference. One of our remits at the moment is thinking about bowling the lot out, because it is such a nebulous concept. Basically, if three senators on the committee come along and say, 'This substantially interfered with the work of the committee,' that is enough to prove it. How would a journalist be able to anticipate that?

What I would like to see is absolutely precise rules so that every journalist in the ABC and elsewhere knows where they stand. If we said, 'Look, we will cut the Gordian knot and simply restrict the offence to disclosure of in camera evidence'—as you have pointed out, it is a sort of a statutory offence anyway—and we just restricted it to that, you would not have to worry about substantial interference or anything else. The problem for journalists is that, if they disclose in camera evidence, they are then going to have to carry the case in some form that is justified. I am still waiting for someone, a witness at the table, to show me where that is wrong.

Mr Martin—So you are suggesting boiling it down to the really substantial issues being offences, and the rest are simply not to be regarded as even prima facie contempts?

Senator ROBERT RAY—Yes. The disclosure of in camera evidence is the offence. I could also ask you about the following matter—and I doubt that you could answer it, but I will put it to you. The argument against that is that more and more committees might engage—or would engage at some stage—in a process of getting evidence in camera that should have been heard in open session. I have been here, as has Senator Knowles, for well over 20 years and I have never seen an instance of it. If it happened on a committee that I was on—the majority said, ‘We’re going to hold this evidence in camera’—I would be down in the Senate chamber and everywhere else exposing it so that it would not happen again. But I think at some point parliament has some right to say, ‘This class of evidence’—and it may be highly sensitive evidence from ASIO or ASIC—‘should be protected.’

Mr Martin—Yes, and I can understand that fully. I am just wondering what the problem in practice is at the moment, though, when you do have the statutory provision to rely on if you want to.

Senator ROBERT RAY—To get to the point of a contempt of the Senate through our processes, we have to prove substantial interference. We do not insist that journalists reveal their sources, so we cannot pursue the leaker. You have probably seen the duality today of people asking, ‘Why don’t you go after the leakers?’ We are happy to, but which journalist is going to sit here and nominate the leaker? None, so that avenue is blocked. We are not the inquisition; we are not CSI—we do not have all these labs available to us to track down the leakers. We at least have the honesty to acknowledge in public that we reckon they are fellow senators.

Mr Martin—The ABC would appreciate the suggestion of limiting the notion of contempt of the Senate to, if you like, unauthorised disclosures of in camera evidence. I do not want to argue against ourselves, but I would have thought there were one or two other species of contempt occasionally that might deserve to be referred to the committee.

Senator ROBERT RAY—This is in terms of disclosure. I think there are another 11 contempts cited as well, like threatening a witness. There is a whole range of parliamentary privilege we are not looking at, and there are things which would remain contempts.

Mr Martin—Yes. In terms of unauthorised disclosure: to make it an automatic contempt to release unauthorised disclosure of in camera evidence, when you have a substantial interference test—I cannot see why 99 per cent of cases would not fall foul of that anyway.

Senator ROBERT RAY—Because by that point of time it involves a degree of partisanship by senators and, in the case of joint committees, members of the House of Representatives. They may, for all sorts of reasons, argue that there was no substantial interference, or that there was interference, for political gain. I do not know what journalist in the country would want to put you in the hands of that process. I would not want to be in it.

Mr Martin—On the other hand, to not have any possibility of availing yourself of any kind of defence on the basis of the real importance of whatever material was disclosed—

Senator ROBERT RAY—Isn’t the point about standing on your principles and taking the consequences? If you want to disclose in camera evidence, go ahead, but take the consequences—don’t whinge, don’t scream freedom of the press and don’t put out all the

standard campaign of the media when someone gets barrelled for it. That is the risk you take. But at least you have cleared the decks of all the other possible contempts, hearings et cetera, and you have clear and precise rules.

Mr Martin—Again, I come back to the fact that you have already got section 13. I do not know why you need the automatic contempt aspect when you have that.

Senator ROBERT RAY—Then at least you have your hearing. You go through the procedure I am suggesting and you do not have doubts about whether it goes to the court or a hearing; you have the normal hearing processes with the historic guidelines. Everyone will at least know where they stand.

Mr Martin—I just think it is a fairly draconian proposition to have an automatic contempt.

Senator ROBERT RAY—It is an automatic contempt; it is not an automatic sentence. Understand that, *prima facie*, the leaking and publishing of *in camera* evidence is a contempt of the Senate. It does not stop you having a hearing. It does not stop the journalist and media organisation leading what evidence they like. It may well only end up in a reprimand, it may well end up in jail—I don't know; I cannot anticipate it.

Mr Martin—So you would basically be left with a hearing in mitigation.

Senator ROBERT RAY—Exactly. We get this term 'public interest' thrown in our faces, and definitions change according to circumstances. I am not even sure public interest in those cases would be a defence. But clearly, if there has been damage to national security or something else, there have to be consequences.

Mr Martin—I would have thought there could be right now, though, if that had happened. I do not know whether the laws or procedures of the committee need to be changed to deal with an issue of partisanship blocking what should occur already.

Senator ROBERT RAY—I think that, if you look at the track record of this committee's public hearings on contempt proceedings, they are pretty faultless. We have allowed legal representation and we have not insisted on journos declaring their sources or identifying who leaked to them. I think even those who have participated would say that the procedures have been remarkably fair so far.

Mr Martin—Perhaps another solution would be to modify the resolution about substantial interference as it applies to section 13 of the act—the unauthorised disclosures provision. Maybe you need a different test.

Senator ROBERT RAY—We will agree to disagree.

CHAIR—Thank you very much, Mr Martin.

[11.50 am]

HERMAN, Mr Jack Richard, Executive Secretary, Australian Press Council

CHAIR—Welcome. Mr Herman, I refer you to my remarks in opening today's public hearing. The Australian Press Council has lodged a submission with the committee, submission No. 6. Do you wish to make any amendments or alternations to your submission?

Mr Herman—Apart from proofreading one omitted comma, no.

CHAIR—We appreciate a good proofreader. Do you have an opening statement?

Mr Herman—First of all, I apologise to the committee for the absence of my chairman, Professor Ken McKinnon, who was anxious to resume dialogue with Senator Ray on these questions. The committee picked the day for the hearing on which Professor McKinnon had committed to an event in Burnie, where he is meeting today with the editors of the Tasmanian daily press. We have these meetings perennially with editors around Australia to make sure that we keep in touch with what is happening around Australia with the press. Unfortunately, today was the day for the Tasmanian editors and Professor McKinnon could not get out of it.

You will see from the Press Council's submission that our primary concern is not so much with what should or should not be disclosed or classed as an unauthorised disclosure but more with who it is that should be held responsible, when such a disclosure is made. It is our argument that the person who is responsible for the disclosure should be the person who the Senate should be concerned with, not those who publish the material given to them by the person making the disclosure. That would be our primary concern.

Secondary to that we would argue that, in considering what should or should not be unauthorised disclosures, the Senate should err on the side of making information available and that only in the most extreme circumstances should material be classed as 'not for release'. It is our argument, with all material of public interest and public concern, that the onus should not be on people to show why material should be released; it should be on people to show why material should be suppressed. Apart from those two concerns, you have our written submission in front of you and I am quite happy to answer questions as best I can.

CHAIR—Thank you. You used the terminology 'only in extreme circumstances should material not be released' in your opening statement. Perhaps for the benefit of the committee you could outline your view of what those extreme circumstances might be.

Mr Herman—We can look at some of the ways in which material is being restricted from release at the moment. The council is happy that the committee is holding this hearing today on World Press Freedom Day—a day on which the world press notes and tries to push for greater press freedom. One of the things that the Press Council has been saying is that information should be generally available. In extreme circumstances, we would understand that occasionally material has to be kept secret for reasons of national security or national defence, or when there is definite danger to an individual from the release of that information. In those circumstances

the council would say, yes, there are good reasons for that material to be restricted in its availability. But, again, the argument has to be made for that restriction, rather than having a series of automatic restrictions.

For example, one of the automatic restrictions under the Freedom of Information Act is cabinet confidentiality and for that reason large numbers of cabinet papers are not released. We note, for example, that the Welsh parliament publishes its cabinet papers on the internet immediately after meetings. It has no trouble with the release of cabinet papers, yet that is used as a defence against releasing information. We would say that far more information about how deliberations are made in our national parliament should be made available.

CHAIR—So the cases you see of the extreme circumstances of material not to be released would be limited to national security, firstly, and, secondly, issues that might lead to damage to an individual. You do not see any other possible—

Mr Herman—No, I would not say those were the exclusive categories; I would say they are examples of the sorts of material that may be kept from public release. There may be other circumstances. It would depend on the situation, and the argument would have to be made that that is material that should not be made generally available.

CHAIR—Do you have a view about material that has sought to be received in camera by the committee or material that the committee determines should be received in camera? Do you think that should be treated, in a sense, differently perhaps from other material that comes before committees?

Mr Herman—Provided that the committee process for determining what material should be in camera is one where the argument is made that that material needs to be kept in camera. Again it comes down to there having to be a suggestion that there are good reasons for that material being kept in camera. But, yes, the council can understand some Senate committees needing to keep submissions or evidence in camera.

CHAIR—So you accept a situation where a submitter seeks, for example, to have material received in camera; that is, you accept that situation in all cases?

Mr Herman—Not in all cases. I think a submitter may request but the Senate does not automatically grant. Let me give an analogy of the Press Council. We deal with complaints about invasion of privacy by the press. Generally when we issue an adjudication we name the person who has made the complaint but in some cases that involve invasion of privacy we do not name the complainant, particularly if they have not been identified directly by the story as originally published. So there are cases where the council would recognise that for good reasons you do not identify the person involved because it may lead to a further invasion of their privacy. Newspapers in some circumstances will publish letters to the editor that have underneath them 'Name and address supplied but withheld'. They do so when they believe there are good reasons not to disclose the name of the person who wrote the letter. There would be similar circumstances where for good reasons the Senate might decide to keep matters in camera, and we would recognise that that is the case.

CHAIR—When a determination has been made by a Senate committee that certain material is to be treated as in camera material and such material subsequently is subject to unauthorised disclosure, is it the view of the Australian Press Council in those circumstances that such unauthorised disclosure should be treated as a contempt?

Mr Herman—According to the act that you work under, it should be done so only when it amounts to an improper interference with the work of the committee or of the Senate. That is a separate additional step that has to be demonstrated. I do not think that it should automatically be classified as a contempt, but if it can be established that the leak led to an improper interference with the work of the committee or of the Senate, then the Senate might hold that it was contemptuous. But in that circumstance the person the Senate should be seeking is the person who disclosed the in camera information.

Senator ROBERT RAY—Accepting that, is it not too narrowly confined to say that the only offence in disclosing in camera evidence—for instance, it interferes with national security or otherwise—is that it might interfere with the workings of the committee? Is there not a bigger picture here that certain information in the overall political compact remains confidential? We will argue around the fringes how much. If you have taken evidence from ASIS officers before a committee, in camera, it is not just a matter of whether the disclosure would affect or interfere with the workings of the committee that should be taken into account; it is that the very disclosure of that information might mean that there will be no more openness by government to committee scrutiny. There is a bigger picture here.

Mr Herman—And there are other acts that might be breached by the disclosure of that information if it reveals material that is of a nature that interferes with the actions of ASIS—if that is the body you are talking about.

Senator ROBERT RAY—The difficulty there is that parliamentary privilege means that you cannot go back to the transcript or anything else and adduce that in a court of law. So in this case it would then be a lot harder to invoke any of those other acts, because of parliamentary privilege.

Mr Herman—I understand that, but the parliamentary privilege applying to the evidence might not apply to the disclosure of that evidence.

Senator ROBERT RAY—I do not think we are in disagreement here, but I just want to make the point that disclosure of some in camera evidence goes well beyond just interference with the committee.

Mr Herman—I understand the point you are making but I was making reference to what is in the current act, which talks about improper interference with the committee, the Senate or the member. A widening of that would have to be very carefully written to make sure that it did not widen things too far.

Senator ROBERT RAY—I am actually arguing for much narrower. I want to follow up an interesting comment that you made that we have not really heard before in relation to in camera evidence. I think a variety of views are expressed in this submission, but you said that one of the tests should be that there should have been some discussion, some evaluation, done by the

committee of whether the evidence should be done in camera. I assume you mean that, if anyone was ever charged with contempt of the Senate for disclosure of in camera evidence, they could lead as part of their defence whether there was a proper discussion and consideration.

Mr Herman—And whether in fact the material was kept in camera for proper purposes.

Senator ROBERT RAY—That is a good point, and it is an interesting point that no-one else has made, so we will take note of that.

Mr Herman—It is a point we have made on other matters. We have made it with regard to disclosure of confidential information in courts as well. We think that such suppressions have to be for proper purposes, and might need to be justified.

Senator ROBERT RAY—It is an interesting point that we have not picked up before.

Senator HUMPHRIES—What is the view of the Press Council about the analogous situation of disclosure of proceedings in a jury? Let us put aside proceedings while a jury is still deliberating. You get a situation where someone comes forward after the jury has delivered its verdict and wants to talk about what happened in the jury room. I understand that it is illegal in every jurisdiction for that information to be disclosed or published. I assume that your members would generally respect that law and not publish information that came forward about that. What would you see, though, as being essentially different about the disclosure of information about the workings of a jury after a verdict was delivered from the disclosure of proceedings of a parliamentary committee?

Mr Herman—The Press Council has argued to state attorneys-general that there should be no automatic ban on such reporting. It happens in the United States without apparent injury to their legal process—that jury processes are discussed and reported on subsequent to trials. The Press Council has argued that there should be greater openness about how juries perform; were such information available, we might have a better idea about our legal system. We have not yet prevailed in those arguments with attorneys-general about juries. There has been permission given to some researchers, both in Australia and New Zealand, to do some research with juries about how they go about deliberations. We think that has made things clearer.

With regard to the specifics, if there were a public interest in disclosing what had happened in the jury room—for example, if it involved an accusation that there had been jury tampering—and the information that came from the jury was to expose that, and the jury had tried its best, through the courts or the legal system, to expose that and had not succeeded, we would see that there would be some justification in a newspaper doing it, in the realisation that it would probably find itself in legal hot water, but it would do so knowingly.

Senator HUMPHRIES—Obviously, your members have dealings all the time with parliamentary committees, observing their public hearings and reporting on their reports and so forth. Do you accept that there is a grave danger that effectively removing any sanctions—except in those exceptional cases that you mentioned—against disclosure of what goes on in those committees will change the nature of the work of those committees and, whereas what goes on on the floor of parliament happens in a very political context, where people take party political positions and argue those against each other, in committees you have a much more temperate

situation where members are attempting to resolve problems to reach agreement and that that would be damaged or even destroyed if everything that went on in those committees was effectively open to public scrutiny? Effectively, a journalist could open the door during a private deliberation, come in, sit down and start reporting on what senators were saying to each other.

Mr Herman—Our argument would be that Senate committees should, unless there are good reasons otherwise, hold all their hearings in public. There would have to be recognition that, where there are good reasons, there are good reasons. I think you would find that, in a majority of cases, the press recognises that.

Senator HUMPHRIES—What about deliberations of the committee? Forget about the hearings. Almost all of those are in public anyway. What about the deliberations where you get into the nitty-gritty, talking about issues, trying to resolve them, testing evidence?

Mr Herman—I was going to say that I was looking through the table that was incorporated in *Hansard* of the references to the committee on privileges on unauthorised disclosures. The overwhelming majority are the unauthorised disclosures of reports before they are printed. There are very few—I think I found one in the last eight years—that dealt with disclosure of in camera evidence. It is not the majority.

Senator HUMPHRIES—There are three sorts of proceedings: in camera evidence, public evidence and deliberations where the committee members sit down and talk to each other.

Mr Herman—And there are a couple there about private deliberations.

Senator HUMPHRIES—That sort of thing. The latter is very much subject to potential to be leaked.

Mr Herman—Again, I think what the Press Council would say is that, if that information reached a journalist, it did so from someone who was party to those private deliberations.

Senator KNOWLES—Does that make it okay?

Mr Herman—No, it does not make it okay, but what it means is that, if you are trying to stop the disclosure of unauthorised information in that sense, the people you should be addressing are the members of the committee. As we say in our submission, as Professor McKinnon said to Senator Ray, Commonwealth heads of departments, public servants and others are subject to courses of action from authorities when there are leaks that they may be responsible for. At this stage, the Senate has not taken such action with regard to its own members. Whether it wants to do that—

Senator ROBERT RAY—Hold on. We have had them as witnesses sitting where you are. We have put direct questions to them. We have put letters to them. Don't say we did not take action. That is just unfair.

Mr Herman—No, but what sort of action I was talking about was the use of phone records, looking at the computers—that sort of thing, which has been done within Commonwealth departments when there have been leaks.

Senator ROBERT RAY—We are not resourced to do that; the Press Council might be, but we are not.

Mr Herman—We are not resourced to do that at all.

Senator ROBERT RAY—Neither are we—nor are we trained to do it and nor should you expect us to do it. If we set up a CSI unit in the Senate, you would be the first to object, wouldn't you?

Mr Herman—Yes.

Senator ROBERT RAY—So it is a nonsense argument.

Senator HUMPHRIES—If you say it is all right to report it because the participant invites you to do that, or gives you the material, then going back to the situation of the jury, where a juror says, 'I can tell you what happened in the jury room,' on that principle you would similarly be empowered to report what happened in the jury room.

Mr Herman—The Press Council would argue that there is no necessity to publish merely because you have the information. The possession of information is not the reason for publishing material. The Press Council would say that, if a publication has material that it has obtained by an unauthorised disclosure—a leak—it has to determine whether there is a public interest in disclosing that information. You would be aware that the press gets far more leaks than it actually publishes. It has to think about the motives of the person who leaked the material and make a decision as to whether or not the material was leaked in good faith or for improper purposes. Occasionally the material is not published, even though the media organisation has the material. Further, as you would be aware, all newspapers are 'legalled' before they go to press. Lawyers read everything over to see if there is potential for defamation, contempt or other breach of the law. Occasionally the lawyer will say: 'Yes, this is defamatory, but it is defensible. Yes, it is contentious, but we think it is either defensible, or in the public interest, to publish it.' That decision is made daily within newspapers. The Press Council would argue that the press, as well as being free, has to be responsible. Part of our job is to try and ensure a responsible press.

Senator HUMPHRIES—Let us take the last situation you raised. A newspaper has a senator come to it and say: 'Here is a committee report which has just been completed. It is due to be published next week but, because you are my mate, I will give it to you now so that you can get the march on the other papers.' The paper publishes the report a week early. There is no public interest in it being published one week before its due publication date. Nothing is changed by it being published early except that the journalist concerned gets a bit of kudos and the paper gets a march on its rivals. Would you accept that, in those circumstances, there is no public interest being served by the early unauthorised disclosure and that it is open to the Senate or a committee to find, in those circumstances, that contempt has occurred and proceed accordingly?

Mr Herman—We use in our submission the phrase 'publication in a timely fashion'. The publication of material early—if that is what you are saying—may in fact serve the public interest by getting the information out earlier or by helping to develop debate on the matter.

Senator HUMPHRIES—Let's face it that in 99 per cent of cases there is no public interest in early disclosure, is there? It is going to happen in a few days time. If someone gets it early the only interest served is presumably that of the leaker, who gets some titillation out of seeing the thing they leaked early, and the journalist, who gets credit for having snared a scoop that the others do not have. That is the only public interest involved, isn't it?

Mr Herman—There may be a public interest in the publication of the material if there is a situation—and I can imagine it—where a member of the committee feels that perhaps the committee report is not going to be released in a timely fashion, that some event is going to happen before the report is released.

Senator HUMPHRIES—That would not happen in 99 cases out of 100, would it?

Mr Herman—It may not, but again that is something the journalist has to determine.

Senator KNOWLES—How does a journalist determine that? That is just crazy!

Mr Herman—What I was saying is that the journalist needs to make a determination by looking to the motive of the leaker, and this is something they do every day. They get many more pieces of information than they use and they have to determine which are going to be used. Even if the journalist writes the article, there is no guarantee that the editor is going to place it in the paper, so a number of leaks happen futilely anyway. We would argue that the early release of the report does not in any way interfere with the political process. It may serve a purpose in getting the information out earlier. There may be a public interest in its revelation if there is a suggestion that the report is being delayed for some reason—

Senator HUMPHRIES—We are not talking about those situations.

Mr Herman—You cannot talk about all situations generally. We would argue that in circumstances such as the *Age* report a couple of years ago there is no harm, no foul.

Senator ROBERT RAY—And no public interest served by its coming out four days earlier. It was going to be tabled in a sitting of the parliament and it came out on the Sunday night.

Mr Herman—Perhaps there was no public interest in Laurie Oakes publishing a budget early or in the Victorian budget being leaked.

Senator ROBERT RAY—The public interest was that it was a leak.

CHAIR—The newsworthiness was the leak itself.

Senator ROBERT RAY—That is why it got published.

Mr Herman—I understand that part of or the whole of the Victorian budget has just been leaked as well. Those things happen and newspapers judge those to be—

Senator SHERRY—Do they?

Senator KNOWLES—Mr Herman, you are basically saying to the committee here today that we have to trust the journalists and the news outlets to be the arbiters of what should and should not be released—end of story; game, set and match.

Mr Herman—No, that is not what I am saying at all. The newspapers are subject to a fairly large number of restrictions on what they can and cannot publish, and they are subject to legal sanction either from a court or from a parliament if they publish material that is found to have been published improperly.

Senator KNOWLES—But I am talking about material from the parliament that, under the current situation, is subject to a breach of privilege. You are saying to the committee this morning that it does not matter what the sanctions might be: ‘We will decide’—‘we’ being the media—‘what we will print and what we won’t.’

Mr Herman—In fact I am saying that the decision to publish material is an editorial decision made by a free press.

Senator KNOWLES—That is exactly right. So, ‘Hang the consequences of parliamentary privilege; we don’t care what parliamentary privilege says.’

Mr Herman—No, that is not what I said at all. That recognises the fact that there is going to be material which, if it were published, should be and would be the subject of sanction, either by a court or a parliament. The newspapers have to recognise that, as Senator Robert Ray has said. If there are clear rules about what newspapers or the press cannot publish, then they know what those rules are.

Senator KNOWLES—But the rules have been crystal clear to date: thou shalt not publish a committee report in advance of its tabling. The media has waved goodbye to the parliament with two fingers instead of five. It is as simple as that.

Mr Herman—No. The rules state that the publication of unauthorised material which would lead to an improper interference—

Senator ROBERT RAY—I do not blame you here. One is a breach of privilege; the other is a contempt of parliament. The premature disclosure and publication of a report is a breach of privilege. It becomes a contempt when it interferes in the operation of the committee. That is little understood.

Mr Herman—Yes, I do understand the difference between those two things.

Senator KNOWLES—You have responded to questions from Senator Humphries about the premature leaking of a final report. What is your opinion about the leaking—not the premature leaking but the plain, old, garden fresh leaking—of a draft report? Do you think that is acceptable? What test do you believe that should pass before a leak of that nature is reported?

Mr Herman—That is a much more difficult question.

Senator KNOWLES—It has happened twice in the last couple of months.

Mr Herman—Again, what we would say to the Senate is, ‘Who is providing that information and what is their motive for providing it?’

Senator KNOWLES—Hold on. As Senator Robert Ray said, if we challenged your members and said, ‘You tell us who it was so that we can then exercise the full responsibility with which we are charged,’ your journalists would say, ‘No, we’re not going to tell you.’ So let us not go around and around that circle. Let us just go to the issue of whether or not you consider that the publication of a draft report should be considered a breach of privilege in the first instance.

Mr Herman—The first question is whether the leaking of the draft report should be a question of privilege. The second is whether the publication of that should be considered.

Senator KNOWLES—We are splitting hairs.

Mr Herman—The publication is not the leaking. The publication may in fact be in the public interest.

Senator KNOWLES—But if you know that you are not meant to report that leak, what is wrong with a journalist saying, ‘I cannot report that leak because that is a breach of parliamentary privilege’?

Mr Herman—The council has had to determine these questions in a number of cases. Some of them have not dealt with breaches of parliamentary privilege. Some of them have dealt with, for example, breaches of the rules of local government in the publication of reports et cetera. The council has said that those rules applied to the councillors. If the press believes that the publication of material is a matter of public interest then it is not a breach of journalistic ethics to publish it. I think we are talking a little at cross-purposes, because I am talking about a question of journalistic ethics, about what is ethically proper for a newspaper to do.

Senator KNOWLES—But what would be ethically proper for a journalist to do if they understood parliamentary privilege would be to say to the leaker, ‘I cannot report that.’

Mr Herman—Unless, of course, there was a matter of public interest involved.

Senator KNOWLES—Therefore it comes back to what I said before. You are saying to the committee: ‘We will be the arbiter of what we will and won’t print. We don’t care what you say.’

Mr Herman—No, what I am saying to the Senate is that newspapers will make that decision and the Senate can then review that decision on the basis of their rules.

Senator KNOWLES—That is exactly what I am saying you have said: ‘We will be the arbiter of what we are printing.’ I just want to come back, because I know we are running short of time, to where you would consider it appropriate to publish a draft report.

Mr Herman—I cannot give you the circumstances for that because the circumstances would differ in each case.

Senator KNOWLES—What happens when a draft report, as has been put to us by another witness who has provided a submission, contains in camera evidence which the entire committee in its consideration might decide to have removed if, in the meanwhile, the media has decided in its wisdom or judgment that it is going to report it come hell or high water anyway?

Mr Herman—Again let me make clear the council's position: we do not publish newspapers. We are the body that reviews the publication of newspapers—

Senator KNOWLES—Exactly.

Mr Herman—and in some circumstances we would be in a similar position to your committee in making a determination as to whether the newspaper did right or wrong. We have a rule, for example, that the publication of leaked material where the newspaper was aware that the material had been stolen is improper. On the other hand, we have ruled that the publication of leaked material where a public interest was served and the newspaper's journalist was involved in no breach of law was proper. We would make that judgment were the matter to come to us. I am not in a position as an officer of the Press Council to tell you what judgment a newspaper would make in those circumstances.

In my estimation, the newspaper would make a determination based on a consideration of the public interest involved in the material and what consequences might occur to the newspaper, from either a court or the parliament, as a result of publication. In those circumstances, newspapers in a large number of situations do not publish the material and in fact make a determination not to publish it. There is a great deal of self-censorship, if you want to call it that, amongst the press because of a fear of legal consequences. That situation occurs daily in newsrooms.

Senator KNOWLES—I have not seen much of that self-censorship in the cases that have come before this committee in recent times.

Mr Herman—There may be a large number of cases that have not come before this committee because the material was not published.

CHAIR—Thank you, Mr Herman.

Mr Herman—Thank you, Senators.

[12.27 pm]

SHERGOLD, Dr Peter Roger, Secretary, Department of the Prime Minister and Cabinet

BELCHER, Ms Barbara, First Assistant Secretary, Government Division, Department of the Prime Minister and Cabinet

CHAIR—Welcome. Dr Shergold has lodged a submission with the committee which we have numbered submission No. 9. I refer the witnesses to my standard opening statement of this morning which both of you would be well aware of. Could I ask you, Dr Shergold, whether you wish to make any amendments or alterations to your submission.

Dr Shergold—No, I do not.

CHAIR—Do you have an opening statement?

Dr Shergold—Very briefly, I would like to say how much I welcome this inquiry. I am happy to comment on that part of it which concerns the behaviour of public servants. As you say, I have presented a submission—in fact I have written a letter, and that letter focuses on three key issues. The first is the treatment of in camera evidence. Most evidence from public servants, quite appropriately, is given publicly. In rarer instances it is in camera, and I have indicated in my letter that in my view the unauthorised disclosure of such evidence should continue to be treated as a prohibited act and potentially a contempt of parliament.

The second issue I address in my letter is the handling of submissions made by APS agencies. My perspective on this is that an agency is a part of the whole of the Commonwealth. It is my view that Commonwealth agencies should be able to circulate final submissions to other relevant agencies as they are presently allowed to do with drafts. My reason for arguing that is that I think it is useful for government agencies to be aware of the full content of what is in effect a whole-of-government submission so when they are called to give evidence they are informed by the submissions made by other relevant agencies.

The third issue I address in my letter is about ensuring that documents produced by parliamentary committees that attract privilege are clearly identified. On one issue that I am aware of, that was not the case. The fact that a document is circulated with ‘confidential’ on it does not alert a public servant to the fact that this is a document that might attract privilege. Indeed, to most public servants ‘confidential’ has a security meaning and it is entirely appropriate to circulate confidential documents to other public servants who have appropriate clearance and a need to know. So in my view it would be an easy step and a very useful step to make sure that documents are clearly identified as attracting parliamentary privilege, so there can be no doubt.

You will be aware of my strong view that confidentiality is an essential element of the Westminster system of government. Maintaining the confidentiality of public service policy—the policy advice given to the executive—lies at the heart of frankness and fearlessness between government and the Australian Public Service. Similarly, the unauthorised declaration of

committee materials by public servants undermines the trust between parliament and the Australian Public Service. It should always be viewed as a serious breach of privilege and be referred to the Privileges Committee for investigation. In other words, whether with government, parliament, cabinet minister or parliamentary committee member there needs to be a relationship of trust with the professional administrative class—the Australian Public Service. It is my view that public servants who betray that trust need to bear the full consequences of their actions.

CHAIR—Thank you. Do you have anything to add, Ms Belcher?

Ms Belcher—No.

CHAIR—Perhaps I could go to a couple of the process issues that you raised, Dr Shergold. The first in your submission is the issue of final submissions and how they are treated across government. I understand and I am sure the committee understands the point you make. Could you see any implications for any change there? Might this actually have some implications outside the Public Service in any way? It is a unique circumstance we have, with a range of different agencies dealing with cross-portfolio or cross-agency issues. Do you see the circumstances that you face in the APS in this regard as effectively unique?

Dr Shergold—On first reflection I think they are unique in the sense that it is always a matter of decision whether before a committee there is a single submission made on behalf of the whole of government or whether agencies quite usefully bring forward their own submissions. But I would argue that all those submissions are collectively submissions on behalf of the Commonwealth. Just as it is useful to be able to exchange submissions as drafts, it is useful to be able to exchange submissions as finals. That is particularly the case where someone—a public servant from one of those agencies—is called to give evidence and may not have seen the final submission that has been made by another relevant agency.

Senator ROBERT RAY—Whilst I agree with the thrust of what you are saying, I can think of at least one instance in my recent experience where I would not have wanted what you have just argued for to happen. That was when we looked at the WMD issue. We had submissions and evidence from ONA and DIO. Looking at them in separation was very useful for the committee because it reflected what happened at the time that all these decisions were made. But if you had had a whole-of-government approach maybe those submissions as they eventually came to us would have been different. I am just wondering whether it would be best to basically adopt what you are suggesting but give a committee the opportunity to direct that there be no circulation—that is, in some rare circumstances they could actually say, ‘No, we do not want consultation and direction because we want to actually go back and see what happened leading up to a decision.’

Dr Shergold—That would be a halfway compromise. Let me make it clear that in that particular instance I am not suggesting that, rather than ONA and DIO putting forward their own separate submissions, they should merge them into a single submission. All I am saying is that both agencies should be aware of the final submission that has been made by their counterpart agency. The danger, quite simply from my point of view, and what I would hate to see is a situation where one agency is in effect being cross-examined against the evidence of another agency when they have not seen the submission that has been made.

Senator ROBERT RAY—It depends which side of the table we are sitting on with that one.

CHAIR—It is possible that some of those issues could be dealt with by the actual timing of any circulation of final submissions after final submissions from all relevant agencies had been provided. That might take some of the heat out of that issue.

Dr Shergold—I would be happy if the presumption were that we were able to circulate the final submissions, with the committee in certain instances being able to say that that was not appropriate.

CHAIR—Okay. The second process issue that you have drawn to our attention—and it is helpful—is the inadequacy of the terminology ‘confidential’. I gather from your comments that on at least one occasion this has actually led to some unforeseen circumstances. Is that correct?

Dr Shergold—Correct. When I was Secretary of DEWRSB, a member of the senior executive received a document circulated to others for comment and only later recognised that it was a document that attracted parliamentary privilege. It is very important to ensure that public servants are trained to understand parliamentary privilege and the notion of contempt of parliament. But it is also helpful to make sure there is unambiguous terminology so that a public servant will always be clear about the status of the document they have in front of them. To label a document ‘confidential’ is inadequate.

Senator HUMPHRIES—What terminology do you suggest we should use?

Dr Shergold—Something like ‘this document is privileged’ or ‘this document is protected by privilege’. It would need to be something that indicates very clearly to a trained public servant that the document has to be handled quite differently from most of the confidential documents which they handle in their day-to-day work.

Senator ROBERT RAY—So you are really saying that that should be on the cover sheet. You do not need it on every page.

Dr Shergold—It would help to have a single stamp on every page which says—

CHAIR—Separately, you indicate in your submission that you feel that there ought to be a statement on the cover sheet or at the beginning of a document that makes clear what the marking actually means.

Dr Shergold—That is correct. It would be useful because then there can never again be denial by a public servant that they did not fully comprehend what they were doing when they circulated such a document.

CHAIR—But the key thing you can say to us is that, in at least one instance you are aware of, unforeseen circumstances have arisen because of a lack of understanding or, alternatively, a lack of clarity in the terminology that was used.

Dr Shergold—That is correct. That is from personal experience.

Senator ROBERT RAY—The department of communications was a serial offender in my early years as chair of the committee.

CHAIR—You also have made one of the strongest defences—if not the strongest defence—in the submissions we have received for the position that any unauthorised disclosure of evidence or submissions, written or oral, that have been received by the committee and agreed by the committee to be in camera should always be treated as a contempt of the Senate.

Dr Shergold—Yes, I have taken that position. It is not that I am in favour of an increasing array of evidence being given in camera; it is that once such evidence has been accepted to be given in camera it should be treated as such. In my view, that works well. I think the Parliamentary Joint Committee on ASIO, ASIS and DSD works very effectively because those who present evidence in camera are able to do so with the expectation that it will be treated as being in camera. I would be concerned if evidence given in camera was to become more widely available.

CHAIR—How would you hope to see the genuinely inadvertent release of such material being treated? I cannot think of too many examples, but let us say a senator unfortunately left some material in a taxi on the way home.

Dr Shergold—I would leave that to your committee to consider.

CHAIR—That is most generous of you, Dr Shergold!

Dr Shergold—But my starting position would be that in camera evidence needs to retain its present status, that committees need to work on that basis and that your present committee, in particular, needs to do all it can to enforce that status.

Senator HUMPHRIES—I am just going to make the observation that the form of words you suggested a moment ago for the markings on a submission would be clear to a public servant but would not necessarily be clear to anybody else. In fact, it would be much less explicit for the ordinary person than the word ‘confidential’. I assume you would not mind the word ‘confidential’ continuing to appear but with the others words you suggested added to that.

Dr Shergold—I would be very happy for that to happen.

Senator ROBERT RAY—The major objection voiced so far about narrowing the whole area of breach of privilege and contempt down to disclosure of in camera evidence is a view that, maybe, more and more committees will hear more and more issues in camera—something that you do not have control over. Occasionally government departments will request that evidence be taken in camera. What sort of guidance would you give those departments as to the sort of issues that they should request be taken in camera? You have said today that most evidence should be in public. Ultimately, I would think you are not so much the arbiter but the guider of this across the Public Service. I am very encouraged to hear what you have said today, but how do you inculcate that across the Public Service?

Dr Shergold—I think we should start from the premise that, to the greatest extent possible, the evidence of public servants should be given in public. I work on the basis that a good public servant giving evidence in public will know the rules sufficiently as to know when they are able to say, ‘I do not intend to answer; it is not necessary for me to give that answer,’ or ‘This is a matter that will have to be taken up by the minister.’ That can be done in public. I suppose the

major instances where I think it is important for evidence, on occasions, to be given in camera is when it is to do with matters of intelligence; national security; and defence, to a limited extent. It may be necessary on what I hope are rare occasions regarding matters of law enforcement or public security, and on even rarer occasions—but I can think of instances where it might be appropriate—because of commercial sensitivity, public safety issues and even defamation. In my view, that should be rare. I think it is very important that public servants start from the assumption that their dealings with parliament should be public and I think it is important that when they seek to give evidence in camera the committee should very carefully consider whether the request is appropriate.

Senator ROBERT RAY—You make a good point in your submission that it is not just disclosure of in camera evidence but also disclosure of in camera material contained in a draft report. Do you want to expand on that or is it self-evident?

Dr Shergold—On occasions, most of the evidence that is presented does not need to be in camera. The majority of a submission does not need to be treated in that way. But it may contain within it various information that entirely appropriately should be treated as being given in camera. It is that portion that I would like to seek to protect.

CHAIR—Unless you have any concluding remarks, thank you for your submission and for appearing before the committee.

Proceedings suspended from 12.46 pm to 1.48 pm

BARTLETT, Senator Andrew, Senator for Queensland

Evidence was taken via teleconference—

CHAIR—Welcome. Senator Bartlett, you would be aware of all the detail of a normal opening statement by a committee chair, so I will not repeat that. You have lodged a submission with the committee, which we have numbered submission No. 17. Do you wish to make any amendments or alterations to that submission?

Senator Bartlett—Not that I am aware of, no. I have not reread it since I put it in, so there may be typos.

CHAIR—Do you have an opening statement that you would care to make to the committee?

Senator Bartlett—I would make just a few general points. I really put in a submission to try to contribute to discussion rather than put forward a cut-and-dried, black-and-white insisting type of position. That is the intent of my contributions today as well. I also emphasise, as I think I did in the submission, that my appearance today is officially as an individual. I have quasi-endorsement of the other Democrat senators, but that does not mean they would necessarily agree with every comment I make. That is just to make the context of my appearance clear.

Beyond that, there are a few other points I would make, having read a few of the other submissions since I put mine in. I have a lot of empathy for the thrust of the position that the clerk has put forward, which basically warns against the dangers of the cut-and-dried position that certain types of disclosure never cause any harm and other types automatically always will but recognises that there are general categories that, broadly speaking, we can be less apprehensive about and others that we should automatically be more wary of. I think the proposed resolution he has put forward is a good start in that direction.

Another point I want to emphasise and which I did make in my written submission is that, even if we do go down the path of much more finely targeting offences that we think are clearly to be highly frowned on and highly inappropriate, that still does not negate the problem that was identified in the debate in the Senate when this referral was made—that is, it still has a difficulty with enforcement. Firstly, there is the problem of finding culprits, or the original leakers, anyway. Obviously, when they report it in the media, we know that the media is a culprit, but finding the original culprit is still very difficult. Secondly, there is the problem of a penalty. I think we do have a broader problem with the whole concept of Senate privilege, whether it is in this area or in some of the debates we have had about failure to comply with returns to order or other issues such as how far we go in forcing witnesses to attend committees. What do we actually do when people defy Senate rulings or committee resolutions or whatever? That is partly a political problem, I appreciate, but I think it still has that continual problem there. Unless we are actually willing, if we find the contempt, to impose some sort of penalty of consequence then we will still have the problem of rules that cannot be enforced.

My personal leaning is not to be afraid of considering options like suspending or fining people. I certainly would not go with jailing people. I actually think it might be better, if we were

going to go down that path, to specifically rule out the Senate ever having that power, because I think it is a bit of an unnecessary distraction. Some sorts of actions, such as suspending people from the Senate, are obviously problematic because of the impact on the numbers. The very fine principle that has been repeatedly pointed out, I think by Senator Faulkner in particular, is that the Senate's voting should reflect the decision of the electorate. There may be other punishments we can impose, such as excluding people from committees and those sorts of things. I think we do need to give more thought to being more willing to actually impose penalties on people.

The final point I would make, which is probably a smaller but not totally irrelevant one in the context of this whole debate, is to do with the point that the President made, which is that, in his view—and he has been in the Senate certainly longer than I have—there seems less of a tendency amongst Senate committees these days to strive for unanimous recommendations. We seem to have more and more dissenting reports. Without in any way suggesting that dissenting reports are always bad in principle—I have written plenty myself—I do think that the general principle of seeing if Senate committees can move back towards a more constructive and less partisan approach is a good one. Some of the issues on disclosure of evidence that we are talking about come from that change. Whether it is for the better or the worse, committees have become more of a point-scoring exercise, or more frequently anyway, and less of a dispassionate attempt to explore the issues. I do not want to sound too naive and idealistic about it, because obviously there are always political elements in there.

The only other point I would make, which I made in the written submission, is in regard to some of the submissions put in by the media. They make the very fine and important point about the important role of discovering the truth and reporting it fairly and accurately, as the media always does, and contempt provisions of the Senate should not be used to obstruct this role. I certainly agree with all of that, but we need to look at the contrast between contempt of the Senate or contempt of the parliament and contempt of courts. While they are not totally parallel, there are certainly a few similarities. There is quite clearly a lot more respect or fear, I do not know which it is, from the media towards contempt of court than there is towards contempt of parliament. There are a whole lot of reasons for that, and again a lot of that could probably be blamed on us parliamentarians. What we need to be aiming towards, if we are going to be serious about this notion of contempt and privilege, is getting it up to the level of importance that contempt of court still has for very good reasons. In the same way that you should not be prejudicing the operations of a court, obviously the notion behind parliamentary privilege is not impacting on the operations of the parliament. They are both fairly important institutions and, in some ways, repairing the importance of the notion of Senate privilege helps repair the importance that people might hold parliament in. They are my introductory comments. I am happy to tease out any thoughts from them or any of the submissions, including my own.

CHAIR—Thank you very much, Senator Bartlett, for your opening statement. In the last point you made you compared the way courts deal with contempt of court and the way the parliament might deal with contempt of parliament. I wonder if the significant difference is that courts deal very harshly with persons found guilty of contempt of court. I do not think the same could be said of those who have been found in contempt of parliament. Do you think that is a fair statement?

Senator Bartlett—It is true. It is partly going back to the point I made that, if we are genuinely concerned about and do believe that it is important to prevent the inappropriate

interference with the work of committees or of parliament or of the Senate, then we need to consider being willing to impose penalties. Again I make the point that I specifically rule out any suggestion of jailing or even hugely significant fines in the early stages. Any sort of penalty of any sort would be sufficiently significant a move to have its own weight. There are obviously significant differences in what the parliament does and what Senate committees do to what courts do as well. There is a danger of looking like we are pumping ourselves up to be more important than we are in terms of our day-to-day deliberations. But, at the same time, when we are looking at actions that can inappropriately interfere with the work of committees—and I use the example that has been spotlighted of disclosure of in camera evidence—that can have very significant consequences. Obviously, if we are considering some sort of penalty, it would take the potential consequences into account.

That is certainly one of the reasons why there is a difference, and we do play different roles. I would not want to overstate the analogy, but I do think that, if we believe that the parliament does important work, which I am sure we all do, and that on occasion disclosure of evidence or proceedings can significantly prejudice that work, then one of the options you have to have on the table is some form of penalty. If we are not prepared to pursue that as an option, it does make the whole enforcement of the concept rather difficult.

CHAIR—In fact, you make a strong statement in your submission that the unauthorised disclosure of any in camera material should always be treated as a contempt. I think that is a fair statement about your submission. I wonder whether you have given consideration to the circumstances of inadvertent release. I used an example with one of the witnesses early today, where a senator might accidentally have left some material in a taxi or the like.

Senator Bartlett—That is a fair point, and I probably should qualify that aspect—the difference between a finding of contempt and the potential of a breach of privilege to explore whether contempt has happened. My intent was probably more an assumption that any unauthorised disclosure of in camera evidence should be automatically examined. The word to add to ‘disclosure’ there would be ‘deliberate’, although obviously that is part of what would need to be examined. If it were found to be completely accidental and innocent—I would not put it past myself to do something like that—then whether to even make a finding without any sort of penalty may be something to consider. It may impress on all of us that this sort of material is very important. I speak purely from my own experience.

I guess one of the problems with the lessening of the foreboding surrounding the whole concept of unauthorised disclosure is that over time you tend to be less careful with material. No doubt many of you are better organised in your lives than I am, but, when you get mountains of committee submissions and some are confidential—on whatever colour paper that is—and some are not and you are carrying them all around the place and leaving some in Canberra, some in the office in Brisbane and some at home, it is easy to lose track of them all. Perhaps an action to specifically re-emphasise how important that material is could be a useful warning for all of us to be more diligent.

CHAIR—Some might suggest, I suppose, that the inadvertent release of in camera evidence might be treated as a strict liability offence on the grounds of negligence—this concept of culpable negligence.

Senator Bartlett—Those sorts of things could be tossed around. I think we would all want a specific indication of what that means in practice and how serious it is. I do not automatically object to that. There should always be a balance between the overreaction that every piece of paper has some sacred, holy writ nature attached to it and the importance of demonstrating how serious the general principle is. If a committee decides to make something in camera, they do so for an important reason. I would not resist giving consideration to that sort of thing.

CHAIR—You have spoken about the issue of sanctions, which is always a difficult problem. You rule out jailing an individual. Do you rule out fining or otherwise penalising senators in contempt?

Senator Bartlett—Not in this discussion phase I would not. As I said before, I recognise that it would be highly problematic to be chucking people out of the chamber unless there was a pairing arrangement or something, given the situation with numbers. Nonetheless, other restrictions on what people could do are all things that are worth exploring, given that it is extremely rare for us to impose a penalty on other senators. The imposition of any sort of penalty would be significant just in the fact of it happening, even if it was in itself quite minor. The other aspect I would raise, which I touched on in my submission as a general idea, is how viable it is for senators to basically sit in judgment on themselves or on their colleagues. That is very difficult, even with the best will in the world. There could be an independent group or body of whatever sort. There are all sorts of ideas that could be explored there. In my submission I pulled in the notion the Democrats put forward before of some sort of parliamentary commissioner. Even some sort of advisory committee of esteemed ex-senators—basically some group that were able to be seen as one step removed from some of these decisions—is worth considering.

Senator HUMPHRIES—I am still relatively new in this place—until 1 July I am the second shortest-serving senator. I was intrigued by the comments that you made—

CHAIR—You are going to go up the batting order in a substantial way in very short period of time.

Senator HUMPHRIES—I will and I look forward to that. In the meantime I need to improve my political education a bit. I was struck by the remarks you made in your submission, Senator Bartlett, about there being circumstances where unauthorised disclosures might even enhance a committee's decision-making processes or do not really involve bad faith. Can you give any examples of when that has occurred?

Senator Bartlett—I suppose it depends on what you call unauthorised disclosure. I have been so busy reading everybody else's submissions that I do not have my own in front of me but, from memory, the problem I raised in my submission, which I have found a number of times, relates to when I get information through a committee, whether it is submissions or whatever, and I know people with expertise either in the community, in the party or staff of colleagues and I am not at liberty to show them material. It would assist me in my role to be able to show material to people that I trust and ask them for their input or response. That is an example where it is not disclosure to the wide world but is still disclosure to a person who is not authorised to see it. I came into contact with that sort of situation in an inquiry I was involved in on refugee issues a few years ago where there were confidential submissions about particular cases with various allegations of inappropriate behaviour. I found a way around it within consultation, but it would

certainly have assisted me to have been able to show those to somebody I knew who had a lot of expertise in the area to get their input on that material.

Another issue—and this is perhaps not absolutely vital in the general scheme of what you are looking at but it is a regular irritation we all have—is the release of reports. Part of what our reports are for is to increase community awareness about an issue and part of that is getting a decent media run. Often the fact that reports end up being tabled at 4.30 or five o'clock in the afternoon gets in the way of them getting a decent run in the media. Leaving to one side the aspect of a decent run that means that each of us gets our position in there, there is the broader issue of getting a decent run about the general thrust of some of the reports. For example, there are a number of unanimous reports that we produce on various issues. It enhances the work of the committee if the reports are disclosed at a time when they are more likely to get a decent run in the media cycle, rather than late in the day. So that would be another example I would be thinking of. Whether through this committee's deliberations now or some other mechanism, we need to look at a way around that so that reports can be officially tabled earlier in the day or even be able to be authorised to be released by the committee itself before they are tabled—those sorts of ideas.

Senator HUMPHRIES—That sounds dangerously like a confession, if I might say so. With regard to the comments you make about a commissioner of parliamentary ethics perhaps having a capacity to investigate breaches rather than a privileges committee, on my time on this particular committee I have not observed political imperatives, as you refer to them, interfering with the work of tracking down or dealing with cases of breach of privilege or contempts. Isn't there a danger that giving this role to a commissioner of parliamentary ethics would obscure the other, perhaps more important, role for a person or body like that, which is to educate and act as counsel to members of parliament and to help them to better understand their role and what rights they have in that role? You have an investigative or enforcement capacity thrown in with an educative role, so isn't there a danger you are going to confuse those two functions?

Senator Bartlett—That is certainly a potential problem; I would acknowledge that. If it were a matter of tossing aside one to get the establishment of the other I would be happy to do that, because I think, as with a lot of those sorts of positions, they can evolve over time in the direction that has the most usefulness to them. I certainly did not mean to imply that the Privileges Committee is riven with partisan brawling or, indeed, is engaged in some sort of collective cover-up. I have said on the record a few times that it does work quite effectively together. I think it is partly just a perception issue—and I am particularly thinking of the ever cynical media. A group of senators investigating the leaking of material by other senators can always be portrayed as looking after their own. So there is that side of it, although again I do not suggest that has happened at all.

Secondly, whether it is an independent group, a commissioner or somebody else doing the investigation or whether it has some other form of advisory role, to be called in during particularly awkward circumstances or to give advice to the committee or whatever, I do not particularly have a set view on that. I am just raising the issue that having some form of once-removed body or person involved in some aspects of the process may be beneficial.

Senator ROBERT RAY—Can you think of any instance where a Senate committee has taken evidence in camera where there is no justification for that evidence to be taken in camera? One

of the points made is that if we just protect in camera evidence, this whole area may get expanded to encompass most evidence. In your experience in the various committees you have served on, can you think of one instance that has been brought to your attention where an in camera process was used or, more to the point, abused?

Senator Bartlett—I certainly would not say ‘abused’. There can always be different views about whether it is necessary in a particular circumstance, particularly if it is a request of a witness or of someone putting in a submission. As a member of a committee, if somebody specifically asks that it be in camera you would tend to agree with them. You may wish to persuade them otherwise, but if they insist and say, ‘I’m only putting it in if it is in camera,’ then normally you would say, ‘Okay, better that than nothing,’ even though you may not think it is necessarily the way to go. I would not characterise that as an abuse, but you can certainly have a difference of views about whether it was necessary.

Senator ROBERT RAY—That is your general view. I am asking: can you think of an instance where this has occurred?

Senator Bartlett—I have certainly seen some submissions where I did not see why they needed to be in camera or needed to be confidential. They were not pivotal to investigations, by any means. They were some of smaller ones we have had in some of the refugee areas, where people have a particular obsession about not having their name known, but they were not pivotal submissions anyway. But I think I would support the general thrust of what I understand your question to be: I certainly do not think there has been rampant usage of it just at a whim or whatever.

Senator ROBERT RAY—You have commented on penalty, especially with regard to senators. What would your attitude be to a penalty for journalists—to withdraw their access pass to Parliament House—if in fact they have published in camera evidence in contravention to a Senate direction?

Senator Bartlett—I would not have a problem with that at all, if it was sufficiently serious et cetera and not just out of irritation, spite or whatever. Again, those are potentially political decisions, not partisan political decisions, that would pull the wrath of people down upon us. But I do not have a problem with the principle, for the reason I was giving earlier about giving this sufficient importance. As I mentioned in my submission, I was particularly struck by the ABC’s submission that mentioned their editorial policies, specifically mentioned contempt of court and then said, ‘We don’t actually mention contempt of parliament but obviously it is in there.’ That sent a pretty strong signal to me that it is not seen as terribly significant. I think it is in some circumstances. If it is sufficiently severe, I do not have a problem with considering those sorts of things.

Senator KNOWLES—Senator Bartlett, on the last page of your submission, you said:

I support suggestions ... that a stronger case needs to be made demonstrating serious interference with the work of the Senate or a Committee, before the question of Privilege is triggered.

I would like your opinion, an expanded view, of what you really mean there, in light of the fact that in a lot of cases where there has been a breach of privilege it will be up to the individual

senators. Quite often it is on a party basis, because of the nature of the leak, and one group considers it not to be important and the others consider it to be significant. How would you overcome that dilemma? Do you have any additional suggestions about that high-jump bar being raised to a level where you think it will be appropriate?

Senator Bartlett—That is a dilemma, as you rightly describe it. I would certainly go back to the general suggestions of the Clerk about some general groupings of activities that are less likely to be a problem. It is another reason why the President's noble plea for attempts to move back towards less partisan approaches where possible is also a good idea. Having said that, I think these circumstances are still going to rise from time to time.

I do not know. It is part of the perpetual dilemma. I guess when you get a situation where views about that sort of thing are dividing on party political lines then you are getting to a stage where the committee's work itself is obviously fracturing along those sorts of lines as well. I am thinking of the committee's report into the free trade agreement legislation fairly recently. I do not profess to have as intimate a knowledge of it as the members of the committee do, because you were part of looking at it, but it appeared to me that, on the face of it, significant breaches of privilege had occurred but in the context of a committee that had ceased to work together terribly effectively as a single entity in any case. That made the situation much more in the eye of the beholder about what got in the way of the effective working of the committee—whether it was the disclosure or whether it was the way the committee was already operating.

That probably does not help answer your question very much beyond acknowledging that in those circumstances, particularly whenever you get committee members from one party on one side and committee members from another party on the other side with opposing views, it becomes more about moving into the world of a partisan dispute and less about the broader, less partisan issue of privilege. Again, without being too purist about it, the issue of privilege is somewhat outside the day-to-day partisan arena—even though people obviously in the past have leaked material for partisan purposes. I can think of occasions where one individual may have done something but other colleagues from the same party might not have been as keen on that sort of approach. I guess I would just say that, as some sort of guide, the width of the party political chasm on the particular issue might be an indication as to how serious the actual privilege issue is in itself.

CHAIR—Thank you very much indeed, Senator Bartlett.

[2.23 pm]

HOLLAND, Dr Ian Hamilton, Private Capacity

CHAIR—I now welcome Dr Ian Holland and remind him of the opening statement I made on behalf of the committee. Dr Holland has lodged a submission with the committee which is submission No. 15. Dr Holland, do you wish to make any amendments or alterations to your submission?

Dr Holland—No, thank you.

CHAIR—Do you have an opening statement to make?

Dr Holland—Yes, I do. I thought I would elaborate a little bit on aspects of the submission based on some of the other submissions that have come in subsequently. Reading across the submissions, I think there is some difference of view on the issue of what should constitute unauthorised disclosures of committee work and what should be done about them. Reading the submissions, the media organisations, such as News Limited or the Media, Entertainment and Arts Alliance, want radically to narrow the range of material and circumstances that might be subject to contempt. Those submissions talk about a combination of raising the bar by requiring a test of the intention of leaks and their publication, not just the consequences, reducing the range of documents the release of which is prohibited or having disclosure as an offence confined to evidence or material subject to an in camera direction. News Limited suggests that last point be underpinned by a new Senate resolution. There is some overlap between these approaches and that put by Senator Ray in his speech of 16 March that normal leaks be dealt with internally by committees and leaking of in camera evidence be the offence that is dealt with by the Senate.

At the other end of the spectrum are submissions by the Clerk of the Senate; Dr Shergold, in some ways; and Senator Eggleston, as chair of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee, in some ways, that matters should not be devolved to committees, that there should not be a reduction in the scope of material that could potentially attract a finding of contempt but that perhaps there should be some guidance from the Senate as to what would not normally be referred to the Privileges Committee for further inquiry.

Across the range of views there are three points of common ground. The first is that there is a view in favour of transparency to the greatest practical extent, whatever that might imply. Second, there is a recognition that the point of this exercise is to protect the work of parliament and its committees. Third, there is across this range support for some resolution from the Senate to clarify what constitutes a serious breach of the rules: what is deserving of the attention of the Privileges Committee and what is potentially deserving of the attention of the Senate. I thought that common ground suggested that a resolution of the Senate that effectively creates a filter between committees in general and the Privileges Committee is a good idea and that the Clerk's draft could be an effective starting point for considering its content.

The Senate could also resolve to reduce the range of material that gets caught in that filter in the first place by increasing the range of things that are routinely published. I am specifically referring to the proposal in my submission to publish the approved minutes of committee meetings, as is done in other jurisdictions such as Canada, the UK and Scotland. The committees could even, dare I say, consider publishing draft or interim reports to help foster debate, which is how organisations like the Productivity Commission work. My point is that there is more than one approach to take to reduce the number of unauthorised leaks. You can reduce what is unauthorised in the first place, as well as having a more sensible mechanism for responding to leaks when they do happen.

On that question of responding to unauthorised disclosures, I would make two points. First, there has been a suggestion from the Media, Entertainment and Arts Alliance, and perhaps others, that there could be a test of intent when examining potential contempts of the Senate. It has been suggested that something should be found to be contempt only if the leak or the publication of the leak was intended to disrupt the work of the Senate or of a senator. With respect, I think this is an inappropriately strict test. The Senate is a vital institution. The rules, whatever weaknesses they have, are actually fairly clear and fairly simple. If someone breaks them and parliamentary work is impaired as a result then this is extremely serious. If the damage really was inadvertent, I am sure the Senate is capable of recognising that through leniency and responding to the contempt. But contempt it is and contempt it should remain.

Second, the Senate does need to be seen to respond to contempts. As my submission mentions, contempts, whether due to unauthorised disclosure or any other inappropriate conduct, go largely unpunished. At some point the Privileges Committee and the Senate may need to act. That may be awkward. Senator Ray has made the point also made by Sir Humphrey in *Yes, Minister* that the ship of state is the only ship that leaks from the top. Tackling leaks from the top, from senators and from ministers' offices, will not be comfortable or simple, but an effective regulatory regime is one where people know that breaches will be punished. Sooner or later the increasing number of leaks—identified, for example, by the president of the NSW Legislative Council, Meredith Burgmann—is going to demand a response. This increasing problem is a sign that there is a regime in place that is not being effectively policed, and any reformed regime put in place will need, sooner or later, to tackle this. In summary, think about reducing the scope of what might be considered a leak in the first place. I do not think it is a good idea to have a test of intent. I do think that the Senate and its committees will perhaps need to be a little more prepared to discipline breaches when they occur.

CHAIR—Thank you very much indeed, Dr Holland, for your submission and statement. I want to ask you about the transparency issue or principle that you raise. You have spoken about one of your key conclusions: that the scope for unauthorised disclosures would be reduced if the minutes of committee meetings were published. I would be interested to understand what leads you to that conclusion.

Dr Holland—A range of material is unauthorised material—I think that is the term—that is, if that material were published there is the potential for a breach, a contempt. I am simply saying that the less material that is in that list the fewer things are a potential contempt. In a sense, it is a fairly simple suggestion: take something out of that box and there is less in the box. In a different way, I think that is what Senator Ray was talking about in his speech and it is what I have heard in some of the questions asked here. I am saying, 'Here is some material that you

could take out of that box so that it would no longer be a breach that would attract the attention of the Privileges Committee’—say, if a senator were to talk about the decisions of a committee, because the decisions of a committee, as long as they were part of the approved minutes of the committee, are published.

CHAIR—I can see the impact it would have in terms of transparency, but effectively how often has there been an issue about the unauthorised disclosure of parliamentary committee minutes?

Dr Holland—I do not think it is a big part of the problem, but I do think it is part of establishing the culture, if you like, of what is open, what is closed, and what is the culture of the environment that senators and staffers are working in.

Senator ROBERT RAY—There is a reason it would not work. You talked about the free trade issue and looking at private meetings. What happens is that they meet on a Friday and then someone helpfully rings up a journalist from the *Australian* and relates what happened at the meeting or, as it turned out, did not happen, and that triggers a whole series of events. Publishing the minutes would not have helped—

Dr Holland—Not in that case.

Senator ROBERT RAY—firstly because you do not know whether the minutes reflect the full debate and, secondly, the minutes do not get published until they are approved at the next meeting. So your qualification at the end that you want to change the culture is accepted—I understand that—but that will not actually prevent the malicious leak meant to embarrass others.

Dr Holland—Not in a scenario like that.

Senator ROBERT RAY—It may not even disprove the case. The one thing it might do is release other bound members of the committee to respond.

Dr Holland—Yes, and that is, I guess, part of that cultural shift. But you are right: none of these things are easy or ready solutions and, even when you take some things out of that box, you are still going to have situations like that, but it seems to me to be a potentially valuable part of a cultural shift.

CHAIR—However, I certainly accept the transparency point in relation to the minutes of many private meetings of committees. No doubt we can ask the Clerk or the Deputy Clerk for some background as to how this practice has grown and the good reasons, or not so good reasons, for it. You talked about willingness. That is another of your key points and it is something that has just been canvassed with Senator Bartlett. You propose demonstrating a willingness to recommend genuine punishments for cases of contempt that impede the parliament’s work. That has always been a difficulty for parliamentarians and parliamentary committees, not to mention the chambers themselves. Could you outline to the committee what you think a genuine punishment might be?

Dr Holland—I would have to say that one occurred to me as I listened to Senator Bartlett—

Senator ROBERT RAY—Not sending everyone to the Democrats party room—

CHAIR—Dr Holland, we are hoping that this is a specific punishment for Senator Bartlett.

Dr Holland—When he was speaking in response to one of the questions, he mentioned a concern—for example, if a senator was in contempt and was barred, ejected or whatever from the chamber for a period. In mentioning that, in passing he referred to having to deal with the need for pairs to preserve the numbers. My point is: that is the incentive. If you get barred, you put the numbers out of balance, and if the numbers are finely balanced you had better behave because you are needed in there. It had not occurred to me previously, but I think that is one of the simplest ways of doing that. When it comes to Senate votes, exactly what numbers are there is potentially very serious. This represents the smallest departure from current chamber practices, where members are ejected for periods for disorderly conduct or whatever. It actually fits in very much with the existing practices. In the case of the Senate, I would have thought that could potentially be a quite effective deterrent.

CHAIR—It has not seemed to work particularly effectively in the House of Representatives, I have noted, in relation to poor behaviour during question time.

Dr Holland—That is because the numbers seldom matter in the House of Representatives.

CHAIR—The point is that perhaps this will be a less effective sanction in a few short months time in the Senate.

Dr Holland—Or a more effective sanction, because there is only a one-seat majority in a government made up of three parties. I take your point that it would be less effective than at present, but I do not think it would be by any means absent as an issue.

CHAIR—Have you given consideration to any other possible sanctions that would be, if you like, a genuine punishment?

Dr Holland—There are some that might be regarded as cruel and unusual for senators! No, it was not something that I gave a great deal of consideration to, except perhaps that, when there were debates about this issue some 10, 15 or more years ago, one of the things that came up was this idea that it would be totally inappropriate to seriously punish—I mean with serious fines or imprisonment—a public servant who refused to answer a question when they had received a direction from somewhere that they should not answer a question. I actually think that is wrong. It is wrong because, if there is a choice between obeying a lawful direction of the parliament and what is in fact an unlawful direction from a secretary of a department or even a minister, people have to understand what the law is and respond lawfully.

Tying one's hands and saying, 'That's not fair or kind to someone,' is not the right response. When these situations become difficult, which they rarely but occasionally do, people have to confront what it means to responsibly comply with the law. I do not have in mind a scale of punishments that ought to be exercised, but I do think it is the wrong thing to send signals that it is not appropriate to use severe punishment in these cases. It simply contributes to an increasing problem, I think, of Senate committees basically not getting what they ask for and what, with the imprimatur of the Senate, they deserve to get.

CHAIR—I think you are a comparatively new committee secretary in this place. Could you tell us briefly, from your own experience, from what you have seen from a committee staff perspective and also of senators, your view about the knowledge of the application of parliamentary privilege to the work of committees?

Dr Holland—My knowledge about what—the understanding of—

CHAIR—Your view of the understanding amongst committee staff and senators.

Dr Holland—I think it is perceived to be reasonably complicated and sometimes I think it is perceived to be slightly more complicated than it is. But on the whole I think it is well understood that there are certain types of document and work that have a certain status and that should be looked after. I think, if anything, the biggest single problem that people find working within the agency is that, although they know what the rules are, they tie themselves into certain numbers of knots practically applying them with each kind of piece of paper, as Senator Bartlett alluded to.

Senator KNOWLES—Dr Holland, I want to come back to the issue of enforcement. You have talked about enforcement in the Senate and among the senators. How about enforcement in other areas? The media are quite flippant about parliamentary privilege. They almost wear it as a badge of honour—the fact that none of them have had to cough up money or have been reprimanded in any way. What do you think would be a sanction against media outlets who, quite willingly and intentionally, disregard parliamentary privilege as something that they should consider first and foremost, and as importantly as the courts of law?

Dr Holland—I do not think I have a view about whether the media need to be dealt with in any particular way other than others who breach privilege. I have some sympathy for their institutional position. They say: ‘We see ourselves as playing a particular role in society of transmitting information and ensuring that things we think the public think are newsworthy are brought to their attention. If others are the ones who breach privilege by bringing us information, we do not think it is fair that we are the ones who get punished.’ I have some sympathy for that position, given that they are not the ones who started the ball rolling. But I think the Senate can take a pragmatic view of this, to some extent. It may be a little uncomfortable, but if upbraiding the media in some meaningful way is what is needed to bring the practice to a halt then perhaps that is what the Senate needs to do. In doing that, the judgment the Senate need to make is: is this a practice we want to bring to a halt? That seems to me to be part of the issue that Senator Ray raised in the chamber in March. Just what is it here that we think we need to police and sort out and what is it here that is not something that needs policing and sorting out? If the Senate can be clear about that and clear in its communications to the media about that then the media should be no more immune than anybody else.

Senator KNOWLES—That goes to your conclusion point 3, which reads:

Demonstrating a willingness to recommend genuine punishments for cases of contempt that impede the parliament’s work.

Quite clearly from what I have been saying today and in other places I think some of these media outlets do impede the Senate’s work—but they do not care. That in itself is quite contemptuous.

Dr Holland—If something is impeding the Senate’s work, something needs to be done. My sense has been that, on a lot of the issues that come before the Privileges Committee, after some toing and froing and thinking about it the committee has tended to reach the view—a view that I assume the Senate as a whole has shared—that there has not been an impairment of the Senate’s work or the committee’s work, even though there has been a breach. If there has been impairment then it needs to be dealt with.

Making an unauthorised disclosure is breaking the law. It is an unusual form of law, in a sense, but if it is a contempt it is breaking the law. If the media want to respond to having broken the law by releasing something by not telling you or the chamber who actually did the leak so that it can be tracked up the line, I do not think it is appropriate to then say, ‘Oh well, we won’t touch the media.’ If it is impairing the work of the Senate then the responsible media should be brought in and told: ‘This has impaired the work of the Senate. This is a contempt. Can you tell us the origin of this?’ If they say, ‘No,’ the answer is, ‘Okay, we’ll throw the book at you,’ because otherwise it does not get stopped. But I am aware that in most cases most of those leaks tend not to be regarded as having impaired the work of the Senate, and that is a reasonable judgment to reach in many cases.

Senator KNOWLES—Sadly, I have to look back on 20 years and say that I think I have witnessed a degradation of respect for the institution of the parliament. Saying that does not give me any joy. I am on the verge of leaving the place, and I think that the respect that the media and sections of society have for it is less than it was when I arrived. I hope I cannot take any credit for that! This is all part and parcel of it. They simply thumb their noses at us as an institution and think that they have a right to do anything they want. As you say, they have put to us that the premature release of reports by an hour, two hours or a day or so is neither here nor there. What is your opinion of the premature release of reports or the release of draft reports?

Dr Holland—I think the Clerk of the Senate makes a good point in his submission: one of the problems with trying to significantly reduce the range of things that might attract contempt is that it is hard to predict in advance what things, if released, might cause a problem for the workings of the Senate. I think the release of some draft reports could potentially be damaging, particularly to the internal dynamics and deliberations of a committee, in a way that I think the release of a final report tends not to be. The question for you—and I do not have an answer exactly—is: should that be then treated on a case-by-case basis in some way, or should draft reports continue to be in a category that all draft reports are things that, if released, potentially represent a contempt and should be investigated by the committee? But I certainly would have thought that final reports are rather another matter—and I think I mentioned this in the submission. Senator Bartlett makes a good point that, if we had our business arranged on the day in the Senate in such a way that these things were reliably released early in the day so there could be discussion of them on the day in the lead-up to the afternoon and evening media, that might at least sort out that particular part of the problem.

Senator KNOWLES—But they generally are. I do not quite understand that, because most reports, and particularly contentious reports, are brought down early in the day.

Senator ROBERT RAY—I have a practical question. Dr Shergold thought one area in which we could make an improvement would be to indicate on any copy of any report before it is tabled that the report is subject to privilege, cannot be circulated et cetera. What has happened on

a few occasions—and I think it goes this way—is that government backbenchers took the reports around to the minister's office to get assistance with writing minority reports, the reports were sent to the department, the department did not realise what they had, the reports were circulated everywhere in breach of privilege and we had to send out more letters to educate people all over again. As a committee secretary, do you think you would be able to stamp the copies of those reports in such a way that makes it quite obvious what the reports are?

Dr Holland—If that was the desired approach, it would not be difficult to implement. All the reports are currently prepared under electronic templates. It is simply something that would get inserted into the standard template and stripped out at the end. That part of it is not a practical problem.

Senator ROBERT RAY—Good.

CHAIR—Thank you very much indeed, Dr Holland.

[2.48 pm]

EVANS, Mr Harry, Clerk of the Senate, Department of the Senate

CHAIR—Welcome. I refer the Clerk to my opening statement. Mr Evans has lodged a submission with the committee which we have appropriately numbered submission No. 1. Mr Evans, do you wish to make any amendments or alterations to that submission?

Mr Evans—No, Mr Chairman.

CHAIR—Do you have an opening statement?

Mr Evans—No, Mr Chairman. I am happy to run with the submission and discuss it with the committee.

CHAIR—Thank you. Could I ask you for a general impression about the issue that this committee is grappling with. How big a problem do you feel this has become for the Senate and the Senate committees? It certainly does appear to be a growing problem, and the Senate itself has taken the course of action to establish this reference for this committee to examine. Is it your view that this is likely to continue unchecked without some efforts at a different approach?

Mr Evans—I have difficulty in assessing whether it is a growing problem. There are certainly a growing number of Privileges Committee reports and references on the subject. I am not too sure whether things that occurred in the past were perhaps not raised as matters of privilege but are now being raised; that would be very difficult to assess. I think there is simply a growing problem, because more committees are holding more hearings—they are more active and there are more reports—and there is a greater volume of material around which is potentially subject to unauthorised disclosure. I think perhaps there is a declining respect on the part of the media, as Senator Knowles suggested—that might be an element in it too. So, with all those things together, yes, I think there is an increasing problem, but not for any simple, one cause.

CHAIR—You have suggested to the committee that all unauthorised disclosures should continue to be offences but, of course, that we should try to reduce the number of inquiries into the matters that the Senate determines by resolution—a statement where offences will normally not be investigated or proceeded against. I suppose the issue that immediately arises here is: where do you draw the line? That, I think, is the substantive issue if we decide to go down that particular path.

Mr Evans—The draft resolution, I have suggested, is an attempt to draw the line and indicate where things would normally not be raised and where they should and will be raised. Basically, that would confine it to the area that Senator Ray and everyone else is most concerned about, namely, the leaking of material that a committee has deliberately decided to treat as in camera material, although I have built into the draft resolution the concern about disclosing the deliberations of the committee in that that could adversely affect the committee's freedom to deliberate. But, basically, it would narrow down the area of concern to those two matters while at the same time leaving it open to people to raise matters of privilege and for the Senate to deal

with them in circumstances where, as I have suggested in the submission—for example, the leak of a draft report before its presentation—there could be more serious consequences.

CHAIR—Do you see any risk at all in relation to a situation where the unauthorised disclosure of any in camera material is automatically treated as a contempt? First of all, how would you suggest we might deal with, let us say, the inadvertent release of in camera material where a committee member might have been negligent? I have used the example earlier today of leaving such material on the back seat of a taxi.

Mr Evans—If it is inadvertent, there is no offence. The committee has made it pretty clear that it will not find a contempt unless there is a guilty intention, and that is the case with all offences in the ordinary criminal law. You raise the question of whether there ought to be some offence of reckless disregard for the status of a document or something like that. That is possible. I think the committee might have already foreclosed that by its strict insistence on a culpable intention in its past reports, but perhaps that is better dealt with not as a privilege matter, potentially involving punishment, but as a matter of counselling and education of the people concerned.

CHAIR—Do you think there is a case for guidelines to ensure that evidence is not taken in camera without considerable consideration of such a course of action?

Mr Evans—Yes. I think, as a general principle, committees should not be taking evidence in camera unless they think there is some good reason for doing so. The major reason, of course, is always protection of the person who is giving the evidence. A secondary reason is sensitivity of the evidence itself. As a general principle, evidence should be taken in public unless there is some really good reason. But even there, you cannot be too inflexible. Committees have taken evidence in camera simply because it makes the person who is giving it feel more comfortable when the committee itself does not feel that it really needs to be in camera; because the people themselves are fragile and do not feel secure in giving evidence in public, committees go along with their wishes. Sometimes that is quite legitimate in inquiries where you are dealing with a particularly fragile group of people. You cannot be inflexible even with that principle.

CHAIR—Do you see it as possible or plausible that you could even have a manipulation on the part of a committee majority to effectively ensure that certain evidence or submissions are received in camera which would have the impact of suppressing such evidence which otherwise might have been taken in public?

Mr Evans—That is always a possibility. We have in the standing orders a rather complicated paragraph about what a senator does if a senator wants to quote in camera evidence in a dissenting report. That provision originated at a time when people were concerned about that very point—majorities keeping evidence in camera when there was no real justification for it. It certainly is a possibility.

CHAIR—Do you think the protections are adequate? We have had a bit of tick-tacking at the committee hearing today about the nature of the political process itself being quite a substantial protection against these sort of things happening. In other words, if it were to happen, it would be quickly exposed on the floor of the Senate.

Mr Evans—Yes, I think that is right. You have to allow majorities to make decisions and you have to rely on the political process to correct abuses of that power ultimately.

Senator ROBERT RAY—If I did not want someone's evidence to be heard, and used the in camera route, why wouldn't I just not have them as witnesses if I had a majority?

Mr Evans—Yes, that is certainly so.

Senator ROBERT RAY—In taking evidence in camera I cannot guarantee that my colleagues will not put it on the floor of the chamber.

Mr Evans—Yes.

Senator ROBERT RAY—It is a bit of a straw man, that one.

Mr Evans—That is certainly so, and that just demonstrates that ultimately you have to rely on political processes.

Senator HUMPHRIES—The problem I have with the regime that you suggest in your submission is that it creates a two-tier situation. Although, obviously, it reduces the workload of this committee in that we do not have to consider as many references, it also creates, surely, as you acknowledge in the fourth-last paragraph, the real danger that we are sending a message to leakers that, if they leak in certain circumstances, they can do so with impunity. Isn't it a bit like saying that in future we will turn a blind eye to shooting guns in suburban areas—that as long as they do not hit anybody or damage any property then it is okay? Couldn't you see a situation like this leading to more cases of leaking rather than fewer?

Mr Evans—There certainly is that danger involved in it. To put it at its simplest level, you will have journalists thinking 'This is only a draft report and they said they are not going to pursue leakings of draft reports; therefore I can safely go ahead and deal with that whereas, if it were in camera evidence, I would have to be a bit more careful.' There certainly is that problem, but, as I have suggested, it is a problem of the general law anyway. It is a problem of any law, I suppose, really—that people know that there are certain offences that they are not going to get pursued for if they are not really serious. Take jaywalking on the streets. You are not going to be prosecuted for jaywalking unless something serious happens as a consequence.

It is a problem of law in general, I suppose. But you have a bigger problem with the current situation in that lots and lots of unauthorised disclosures are being pursued but nothing much is happening about them. Therefore, you are sending a bad signal to leakers and leakees anyway. The problem is there already in a different form. It is an inescapable problem.

Senator HUMPHRIES—In order to avoid sending that signal, wouldn't it be better to incorporate the suggested changes in the proposal you have made here into the internal rules of the committee rather than a resolution of the Senate? The matters will still get referred to the committee but it could dispense with them very quickly. At least there would be that period where the culprit might sweat for a few days, thinking: 'Will they investigate this? Will they find anything?' There is a little bit of a barrier there. Isn't that slightly better than putting it on the floor of the Senate?

Mr Evans—Yes. In fact, I thought of adding to this proposed resolution a paragraph 4 saying, ‘This does not prevent a committee itself from investigating any unauthorised disclosure or for taking measures that it thinks appropriate to prevent unauthorised disclosures.’ So the committee could conduct an investigation even if the thing was not serious enough to raise as a matter of privilege and, as you suggest, make it sufficiently hot for leakers and leakees in its own proceedings without going to the step of raising it as a matter of privilege and throwing it into the chamber.

Senator HUMPHRIES—I have a technical question. I assume a contempt of parliament is a breach of the law.

Mr Evans—Not necessarily, no. You have in the Parliamentary Privileges Act two contempts of parliament which are also criminal offences—that is, tampering with witnesses and unauthorised disclosure of in camera evidence. So they are contempts and criminal offences. But apart from that contempts are not automatically criminal offences by any means.

Senator HUMPHRIES—But they are breaches of civil law, aren’t they?

Mr Evans—No. They are contempts of parliament. They belong in a category of their own.

Senator HUMPHRIES—It was put to us earlier today that the contempt laws or the contempt rules are potentially in conflict with the implied expression of political freedom that was discerned by the High Court in *Lange v ABC*. Have you explored that issue? Has it been put to you before? Do you have a view about that?

Mr Evans—It has been put at great length in long, learned and heavily footnoted articles in law journals but I think it is a gigantic furphy. The demonstration of that, as I have said on numerous occasions, is that in the United States, with its huge volume of litigation, you have always had a constitutionally entrenched freedom of speech and you have had a legislative contempt jurisdiction, and nobody has ever found any conflict between them. I think it is the same here. If that point were raised in court they would not take five minutes to dispose of it. To pick an analogy, you could argue that a court making a suppression order is in breach of the freedom of political communication. That argument would go just about as far, I think.

Senator ROBERT RAY—My biggest problem with all these cases comes down to the fact that to find a contempt against an individual one has to show that it has substantially interfered with the work of a committee. The evidentiary base for that has to be that one member of a committee has sat where you are sitting and has lied to us as to whether they have disclosed the information or not. That is the sort of dilemma that we face. How can we put any weight on the evidence given by a senator who is a blatant liar?

Mr Evans—That is a predicament that you have in any system of any sort of law, I suppose. The criterion is substantial interference with the work of the Senate or the committee. It is open to the Senate to find that a particular unauthorised disclosure has interfered with its work even though it may not have interfered with the work of the committee and even though every member of the committee says that it has not interfered with the work of the committee. For example, the Senate can well say that disclosing in camera evidence has a very chilling effect on everybody who might want to give evidence in camera in the future and therefore that is a

substantial interference with the work of the Senate, even though the committee thinks that this was only a minor case and that there was no interference with the committee as such.

Senator ROBERT RAY—My other problem with it is that, if you are a working journalist and you are trying to interpret whether or not your act may substantially interfere with a committee, it is a very subjective judgment that you have to make. I have argued that disclosure of in camera evidence is an automatic offence without having to reach that hurdle. It is just the point you have made: it will always disrupt the work of all committees and interfere with the Senate, rather than in this particular case.

Mr Evans—Yes, I think that would make things much clearer if they get anything that has ‘in camera’ written on it. With anything about a committee and anything in camera they know it is an absolute taboo to deal with it. But I still go back to the original point of the submission that there may be circumstances in which other kinds of unauthorised disclosures are damaging as well and the Senate may want to pursue them. The easy solution for journalists is to ring up and ask. Journalists do in fact ring up secretaries of committees and say: ‘I’ve got a document here that seems to have some connection with your committee. Can you tell me if the committee has published it?’ When they are told, ‘No, it hasn’t,’ they say, ‘Right, in that case I’ll throw it in the bin.’ So it is very easy to find out whether you are potentially in breach or not. I get calls like that from journalists who say: ‘I’ve got something here. It’s a transcript of evidence and I’m not sure what it is or where it’s come from.’ When they are told, ‘I think that what you’ve got is an in camera transcript and you can’t do anything with it,’ they accept that.

Senator ROBERT RAY—There was an almost but not quite accidental suggestion today by the representative of the Australian Press Council that if someone does disclose in camera evidence it is still open to them to argue, maybe as part of their defence, that the committee made a frivolous decision to take the evidence in camera. What is your view on that? It was put that this will act as an inhibitor on committees frivolously going in camera rather than taking evidence in public and that you should leave that as a partial defence.

Mr Evans—I do not think that has any validity. I do not believe that committees make decisions to take evidence in camera except on good grounds. I have mentioned that circumstance of wanting to deal carefully with fragile witnesses and that that in itself is a valid reason for taking evidence in camera. So I do not think that should be a defence. Once you open that loophole you leave a large escape clause for people to start attacking the work and the deliberations of committees. They would not get too far in arguing that a judge made a wrong decision to suppress some evidence and therefore they should be allowed to publish it. That would not get them too far, and I do not think that should get them too far in a parliamentary forum either.

Senator ROBERT RAY—The difference is that mostly in those court cases they have a route of appeal whereas they do not in this case.

Mr Evans—Yes, that is true. They have a route of appeal from a committee to the Senate, of course.

Senator ROBERT RAY—Yes, that is true.

Mr Evans—It would not stop them criticising a decision by a committee. The press are free to say that a committee decided not to publish certain evidence and to criticise that decision without revealing the evidence. A committee can defend itself by saying, ‘This is the ground on which we made that decision.’

Senator ROBERT RAY—That is a fair point.

Senator KNOWLES—Mr Clerk, I am a bit concerned about your proposed resolution insofar as it seems to have a few gaps in it, and one of those is of course my hobbyhorse, the release of draft reports. There are some instances where a draft report can be released by one person while the rest of the committee hold a contrary view. The release of the draft builds up an expectation in sections of the community that that is what will be in the final report. When the final report comes down and it bears little resemblance to that expectation, the committee essentially lets the community down. In strict terminology, whether there has been interference with the committee, one might say, ‘Well, it didn’t really interfere with the outcome of the committee, because the majority of the committee held their previous view regardless of the leak.’ So it is almost the reverse of doing damage to the committee and its processes in that instance, yet your proposed resolution does not really address that problem with draft reports.

Mr Evans—It does in the sense that guideline 1 says, ‘Unless there are particular circumstances involving actual or potential interference, do not raise the matter of a leak of a draft report between the time when it has been substantially finalised and when it is presented.’ Draft reports not in that situation are covered by guideline 3, which is a general guideline saying not to raise matters unless they involve substantial interference and so on. So draft reports are covered in that sense.

I think your case that the leak of a draft report can interfere with the processes of a committee is a legitimate case, and it can work to the detriment of committee work in this way: senators can say to themselves, ‘Well, I’m not going to bother coming along to the committee and sharing my innermost thoughts about things that we might recommend and paths that we might go down if someone is going to immediately leak it and say, “Senator X is proposing to do this.”’ It is damaging to a committee’s deliberations in that way. But, under this resolution, committees would have to think about whether the leak of a particular draft report did cause that sort of damage. It would be quite legitimate for them to say: ‘The leak of this draft report halfway through the committee’s deliberations on it was damaging and harmful to those deliberations. We now feel that we can’t get on with the work of doing a report as freely as we otherwise could.’

Senator KNOWLES—But then you are confronted by the situation where all senators deny any leak when it is as plain as the nose on your face that there has been a leak for a particular reason. Then the media say: ‘Well, it’s not our problem; it’s the leaker that’s the problem. It’s not us.’ How do we deal with the media, because they simply wash their hands of the whole thing?

Mr Evans—Under the resolution the committee is obliged to conduct its own investigation before reporting it to the Senate. If a committee conducts an investigation and it is obvious that some member of the committee has leaked the draft report but all members of the committee have denied it, I think the committee members themselves have to invoke the political process and impose a political sanction of some sort, ranging from everybody on the committee getting a

very clear message that frank deliberations will cease if there is any more of this sort of thing to the committee asking the relevant party in the Senate to remove a member from a committee because they cannot be trusted to engage in free and frank deliberations in committee meetings.

Senator KNOWLES—But that senator would have denied leaking it in the first place, so how would you scrub them from the players list?

Mr Evans—I think, if you have sufficient grounds for suspicion, that is sufficient grounds to invoke the political remedy. Senators can speak very frankly to each other. I think, in a committee meeting, the chair of a committee could say, ‘If there’s any more of this, I’m going to take it to the parties in the Senate and ask for certain committee members to be removed from this committee,’ and invoke that sort of peer group remedy.

Senator KNOWLES—I doubt whether I will be here to see the day!

Mr Evans—The problem, as a problem of policing the contempt jurisdiction, is really insoluble. If you cannot prove who did it, then you cannot impose a sanction.

Senator ROBERT RAY—I must say that is the first time in 20-odd years I have heard you make a naive statement. It would be totally open to me to leak and to have one of my colleagues totally fitted up for it. I could do it—I would know which journalists to ring, because they always leak to that journalist. I would know what words to use. At the end of the day, Harry Evans, the Clerk, would point the finger at that person and say, ‘It must have been him,’ and they would know nothing about it. Come on!

Mr Evans—It would not be me pointing the finger at them; it would be—

Senator ROBERT RAY—No, but would be so easy to fit someone up if you really wanted to. You would use their favourite phrases that they always use—‘time to put the cue in the rack’ or something like that. If I wanted to fit up Senator Knowles, I would ring Dennis Shanahan and give him the information. Everyone would say: ‘Oh, it’s a Liberal leak.’

Mr Evans—But, all members of this committee being as astute as they are, they would be wary and aware of that sort of thing.

CHAIR—But, Mr Evans, I think partisan politics would also come into play. If the accused senator were a member of the Liberal Party, I would imagine that the Liberal Party would jump to his or her defence. If the senator were a member of the Labor Party, you would expect the Labor Party to do so. That is Realpolitik; that is the way the world works. Even if you do not accept what Senator Robert Ray says about the very Machiavellian capacity to set up another member of a committee, one thing is for sure and certain: we tend to catch and kill our own in politics and defend them when they are under attack from the other side. That is the way partisan politics works.

Mr Evans—If that is the situation—

CHAIR—You know that is how partisan politics works.

Mr Evans—Yes, but I also know that, when it is a matter of internal deliberations amongst the parties, the parties do not always necessarily defend their own when they know the rules are being breached.

Senator ROBERT RAY—Mr Clerk, we know where to draw the line. We know that, if one of our colleagues is absolutely caught leaking, we will deal with them as though they are not one of ours. But that is a different situation to having suspicions and prosecuting the suspicion without proof.

Mr Evans—If you are up against the situation that Senator Faulkner has mentioned, then you really have got an insoluble problem, and there is no—

CHAIR—But let us be clear: this is in the context—going back to Senator Knowles’s hypothetical—where all committee members, effectively, have signed a letter denying responsibility. That is something that this committee has dealt with on any number of occasions, as you know—this is commonplace—where clearly, in each and every case, a senator is likely to have grievously lied or misled in the statements that they have made. I think we all acknowledge here that this has occurred on a far too regular basis.

Mr Evans—If that is the situation you are up against, and you really have nothing to go on, then it is an insoluble problem. But committees could take other precautions with their documents. The chair of the committee could say, ‘Due to the leaking which has gone on from this committee, I am now instructing the secretary to allow people to come and inspect documents in my office, and they are not to take them away,’ and take those sorts of precautions which committees have taken.

CHAIR—I do not know if you heard the evidence just a moment ago from Dr Holland, who used the example of the publication of Senate committee minutes—if you like, increased transparency for Senate committee operations—as being something of a safety valve. I am not sure of the background as to why these minutes have been dealt with differently in this jurisdiction than in others. Do you see any merit in that?

Mr Evans—I think the reason that minutes are not regularly published is that it is too much trouble for committee secretaries, who are under pressure to get their reports out, to polish up their minutes and get them all in proper shape to go into the report. For the most part, they are singularly uninformative documents, and I doubt that there would be any great demand for them. I cannot see any harm, in principle, in putting them in reports. You would have to make sure you did not inadvertently disclose in camera material in the minutes. In some cases, you would get minutes with blanks in them because of the fact that witness X has appeared and has given evidence, and that has been treated as in camera and has not been disclosed. So the minutes would have to be edited every now and again. Apart from that, I cannot see any in-principle problem with it, but I do not think it would really add greatly to transparency, because they are such singularly technical and uninformative documents to the general public.

CHAIR—That is an example. Minutes are the best example I know of, and the one that has been raised with the committee. It would be a small step forward, it seems to me, in transparency, but whether it would have much impact is another issue. Small incremental improvements in transparency are often somewhat beneficial.

Mr Evans—I do not see any in-principle problem with it. In the suggested resolution, I have tried to suggest that committees be guided to think more carefully about whether things can be published more generally—papers prepared for the committee, and materials like that.

CHAIR—It gets down to the issue of the timing of such publication. One assumes that, if it were to be done, it would most appropriately be done at the time of the tabling of a report or be included in the report.

Mr Evans—Yes, and the same with the minutes, I presume.

CHAIR—Yes. Minutes are the example that was raised. Mr Evans, thank you for your evidence and for appearing before the committee. I also thank Hansard and the technical staff who have supported the committee, as well as our committee staff, who included an excellent coffee maker! I also thank all those who have made submissions to the committee and my colleagues, of course, for their interest in the hearing.

Committee adjourned at 3.23 pm