



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE OF PRIVILEGES

**Reference: Possible unauthorised disclosure of report of Environment,
Communications, Information Technology and the Arts Legislation Committee**

THURSDAY, 24 OCTOBER 2002

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SENATE
STANDING COMMITTEE OF PRIVILEGES
Thursday, 24 October 2002

Members: Senator Ray (*Chair*), Senator Knowles (*Deputy Chair*), Senators Chris Evans, Johnston, Payne, Reid and Sherry

Senators in attendance: Senators Chris Evans, Johnston, Knowles, Payne, Ray, Reid and Sherry

Terms of reference for the inquiry:

To inquire into and report on:

The matter raised by the Environment, Communications, Information Technology and the Arts Legislation Committee in its letter of 26 June 2002 to the President, whether there was an unauthorised disclosure of a report of that committee and whether any contempt was committed in that regard.

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Committee met at 4.34 p.m.

CHAIR—I declare open this public meeting of the Senate Committee of Privileges. On 27 June 2002, the following matter was referred to the committee:

Having regard to the matter raised by the Environment, Communications, Information Technology and the Arts Legislation Committee in its letter of 26 June 2002 to the President, whether there was an unauthorised disclosure of a report of that committee, and whether any contempt was committed in that regard.

The committee has received a number of documents as evidence as required. All relevant documents have been compiled into a separate volume which the committee has published and made available to all persons at this hearing. Is it the wish of the committee that this volume, which will be the reference point throughout these proceedings, be treated as a volume accompanying the transcript of evidence? There being no objection, it is so ordered.

The committee proposes to hear evidence substantially in accordance with the indicative procedures sent to all parties on 3 September 2002, with one exception. Ms Annabel Crabb, the journalist who wrote the article which is the subject of the committee's inquiry, declined the committee's invitation to attend the hearing, as set out in pages 39 and 40 of the volume of submissions and documents. The committee normally proceeds by invitation and thus did not press her attendance at the hearing. Furthermore, in order to accommodate commitments of various senators appearing before the committee, it proposes to call them in order as circulated on today's committee order of business. Is it the wish of the committee that the procedures be incorporated in the transcript of evidence? There being no objection, it is so ordered.

The procedures read as follows—

INDICATIVE PROCEDURES FOR CONDUCT OF HEARING**24 OCTOBER 2002**

1. Chair to make opening statement, declaring purpose of hearing. [Note: Various submissions from Senators Eggleston, Mackay, Lundy, Tchen and Tierney and Ms Bourne (members and former member of the Environment, Communications, Information Technology and the Arts Legislation Committee), Mr Mick McLean (Secretary, Environment, Communications, Information Technology and the Arts Legislation Committee), on behalf of The Age Company Limited, and from Mr Michael Gawenda, (Associate Publisher and Editor, *The Age*), Ms Annabel Crabb (journalist, *The Age*), and Mr Christopher Warren, Federal Secretary, Media, Entertainment & Arts Alliance, have been incorporated in a volume of documents circulated to all participants.]
2.
 - (a) Senator Tierney to be called and sworn.
 - (b) Senator Tierney to be invited to make opening statement.
 - (c) Chair, and other members if they wish, to ask questions of Senator Tierney.
 - (d) Chair to invite Mr Gawenda, or *The Age* representatives, to examine Senator Tierney if they wish.
 - (e) Chair, and other members, to ask further questions, if required.
 - (f) Senator Tierney to be invited to make statement.
3.
 - (a) Senator Tchen to be called and sworn.
 - (b) Senator Tchen to be invited to make opening statement.
 - (c) Chair, and other members if they wish, to ask questions of Senator Tchen.
 - (d) Chair to invite Mr Gawenda, or *The Age* representatives, to examine Senator Tchen if they wish.
 - (e) Chair, and other members, to ask further questions, if required.
 - (f) Senator Tchen to be invited to make statement.
4.
 - (a) Senator Lundy to be called and sworn.
 - (b) Senator Lundy to be invited to make opening statement.
 - (c) Chair, and other members if they wish, to ask questions of Senator Lundy.
 - (d) Chair to invite Mr Gawenda, or *The Age* representatives, to examine Senator Lundy if they wish.

- (e) Chair, and other members, to ask further questions, if required.
- (f) Senator Lundy to be invited to make statement.
- 5. (a) Senator Eggleston to be called and sworn.
 - (b) Senator Eggleston to be invited to make opening statement.
 - (c) Chair, and other members if they wish, to ask questions of Senator Eggleston.
 - (d) Chair to invite Mr Gawenda, or *The Age* representatives, to examine Senator Eggleston if they wish.
 - (e) Chair, and other members, to ask further questions, if required.
 - (f) Senator Eggleston to be invited to make statement.
- 6. (a) Senator Mackay to be called and sworn.
 - (b) Senator Mackay to be invited to make opening statement.
 - (c) Chair, and other members if they wish, to ask questions of Senator Mackay.
 - (d) Chair to invite Mr Gawenda, or *The Age* representatives, to examine Senator Mackay if they wish.
 - (e) Chair, and other members, to ask further questions, if required.
 - (f) Senator Mackay to be invited to make statement.
- 7. (a) Ms Bourne to be called and sworn.
 - (b) Ms Bourne to be invited to make opening statement.
 - (c) Chair, and other members if they wish, to ask questions of Ms Bourne.
 - (d) Chair to invite Mr Gawenda, or *The Age* representatives, to examine Ms Bourne if they wish.
 - (e) Chair, and other members, to ask further questions, if required.
 - (f) Ms Bourne to be invited to make statement.
- 8. (a) Mr McLean to be called and sworn.
 - (b) Mr McLean to be invited to make opening statement.
 - (c) Chair, and other members if they wish, to ask questions of Mr McLean.
 - (d) Chair to invite Mr Gawenda, or *The Age* representatives, to examine Mr McLean if they wish.
 - (e) Chair, and other members, to ask further questions, if required.
 - (f) Mr McLean to be invited to make statement.
- 9. (a) Mr Michael Gawenda to be called and sworn.
 - (b) Mr Gawenda to be invited to make opening statement.
 - (c) Chair, and other members if they wish, to ask questions of Mr Gawenda.
 - (d) Chair to invite *The Age* representatives to examine Mr Gawenda if they wish.
 - (e) Chair, and other members, to ask further questions, if required.
 - (f) Mr Gawenda to be invited to make statement.
- 10. Committee may adjourn for a brief deliberative meeting to determine whether it wishes to receive any further evidence or to examine any other witnesses.

If other witnesses called:

- (a) Witness to be called and sworn.
 - (b) Witness to be invited to make opening statement.
 - (c) Chair, and other members if they wish, to ask questions of witness.
 - (d) Chair to invite other witnesses or legal counsel to examine witness if they wish.
 - (e) Chair, and other members, to ask further questions, if required.
 - (f) Witness to be invited to make statement.
- 11. Chair to invite Mr Gawenda, or *The Age* representatives, to make closing statement, if desired.
 - 12. Hearing to conclude.

BOURNE, Ms Vicki, Former Senator, and Member, Environment, Communications, Information Technology and the Arts Legislation Committee

EGGLESTON, Senator Alan, Chair, Environment, Communications, Information Technology and the Arts Legislation Committee

LUNDY, Senator Kate, Member, Environment, Communications, Information Technology and the Arts Legislation Committee

MACKAY, Senator Sue, Member, Environment, Communications, Information Technology and the Arts Legislation Committee

TCHEN, Senator Tsebin, Member, Environment, Communications, Information Technology and the Arts Legislation Committee

TIERNEY, Senator John, Member, Environment, Communications, Information Technology and the Arts Legislation Committee

McLEAN, Mr Michael, Secretary, Environment, Communications, Information Technology and the Arts Legislation Committee

GAWENDA, Mr Michael, Associate Publisher and Editor, The Age

RARES, Mr Steven, Counsel for The Age Co. Ltd., Michael Gawenda and Ms Annabel Crabb

CHAIR—As the procedures indicate, the committee conducts matters such as these as nearly as possible consonant with normal committee proceedings.

The proceedings will be held in public unless the committee accedes to a request by a witness that the evidence of that witness be heard in private session; or the committee determines that the interests of a witness would best be protected by hearing evidence in private session; or the committee considers that the circumstances are otherwise such as to warrant the hearing of evidence in private session. While the committee may be prepared to accede to a request that evidence be taken in camera, the committee itself or the Senate may subsequently consider it necessary to authorise publication of such evidence.

Copies of the Senate's Privilege Resolutions containing these and other procedures have previously been sent to persons who appear today and/or to their representatives.

The committee has also authorised the televising of these proceedings through the services provided by the Department of the Parliamentary Reporting Staff.

As advised to all witnesses, the purpose of the hearing is to gain information to assist the committee in its deliberations and to give an opportunity to witnesses to put relevant submissions to the committee. As previously mentioned, the committee is conducting its inquiry on a voluntary basis and is not summoning witnesses to give evidence or produce documents.

Should you perceive difficulties in answering any of the questions asked of you by the committee, please alert the committee to your concerns.

Like all committees, when it has completed its inquiries the committee will draw conclusions based on evidence and documents before it.

I remind those present that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee and evidence given before it. Any act by any person which operates to the disadvantage of a witness, on account of evidence given by him or her before the Senate or any committee of the Senate, is unlawful and may also be treated by the Senate as a contempt.

I also remind you that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I now ask the first witness to come to the table to be sworn.

[4.39 p.m.]

(Senator Tierney sworn)

CHAIR—Thank you for your presence, Senator Tierney, and I know you have to get away early to serve our country overseas. I explain to any witnesses to the inquiry that it is traditional that the chair of the inquiry asks the bulk of the questions to begin with, and I will be doing that throughout the entire inquiry. Senator, did you divulge without authorisation of the Environment, Communications, Information Technology and the Arts Legislation Committee any information relating to the report of the committee to (a) Ms Annabel Crabb, the author of the article published in the *Age* on 17 June 2002, (b) Mr Michael Gawenda, the associate publisher and editor of the *Age*, and (c) any other journalist or any other unauthorised person?

Senator Tierney—The answer to all parts of the question, (a), (b) and (c), is no.

CHAIR—Have you made any inquiries to ascertain whether any other person to whom you may have given access to the report made the report available without authorisation of the committee to Ms Crabb, Mr Gawenda or any other journalist or any other unauthorised person?

Senator Tierney—No.

CHAIR—Do you have any knowledge of how information relating to the report was made available to Ms Crabb, Mr Gawenda or any other journalist or any other unauthorised person?

Senator Tierney—No. But it might be helpful if I make a brief statement relating to my knowledge of this matter. My first knowledge of this matter was when the secretary of the committee, Mr Mick McLean, raised it in the Environment, Communications, Information Technology and the Arts Committee. He invited us all to make a written statement to the committee on our knowledge of this matter. I believe you have those documents. For the *Hansard* record, what I said in my letter to you, Chair, was:

In reference to your letter dated 27 June 2002. I accept your invitation to comment on the matter mentioned.

I did not disclosed any part of the Committee's Cross Media Ownership Report before the report was tabled in the Senate.

CHAIR—Finally, in the chair's letter to the President he advised that the ECITA Committee came to the conclusion that the disclosure caused substantial interference with its work. Is that your view and, if so, could you detail what substantial damage it has done?

Senator Tierney—Committee reports should stay confidential until they are tabled. It does interfere with the processes of the Senate if information does get out to the public before it is appropriate, which is at the tabling point, and this leads to unnecessary speculation in the press which could be based on partial information because it depends on what a journalist has written. That is not necessarily a reflection of what is in the report because at that point in time people have not seen what is in the report. So, if people do release information before tabling, it can create a distorting effect in the public's perception on what the report actually says.

CHAIR—If you do not mind me saying so, that is the rationale for having that as the key criterion in terms of contempt. I do not think anyone will challenge that. But what I am asking you is: has it had that effect on this committee?

Senator Tierney—I think the committee was disturbed by the fact that this had happened. It has happened in previous committees a number of times.

CHAIR—I am really asking whether it has interfered with you working on that committee in any real sense on this occasion.

Senator Tierney—We were at the final point of the wrap-up of this inquiry, so it was near the point of reporting. The committee had actually finished its substantive work on this matter.

CHAIR—I think I understand that, but has it had the effect of in some way disrupting your work on the committee and your relationship with your colleagues or has it on this occasion not had that effect?

Senator Tierney—I would not say it disrupted my work. It was pointed out by the secretary what had happened. We were asked to respond in writing. I responded in writing.

CHAIR—I invite any one of my colleagues to further pursue questions, starting on this occasion—just coincidentally on my extreme right—with Senator Johnston.

Senator JOHNSTON—Senator Tierney, does the likelihood of an improper release or pre-emptory release of a committee report cause you to feel constrained as to your participation in committee duties and committee activities?

Senator Tierney—On this occasion we were right at the end of the process. So, in relation to this report, no. But it is disturbing that, if this became common practice—if people leaked reports before we had finally signed off and if all people in the community and all the journalists did not have an equal amount of the same information, which indeed they get at the point of reporting—that can, I believe, distort Senate processes and obviously it is why it is a matter of privilege.

Senator JOHNSTON—Would you feel constrained in the conduct of your duties on committees if you knew that there was going to be a pre-emptory release of your deliberations as a committee member?

Senator Tierney—Do you mean if this sort of thing happened as a matter of routine?

Senator JOHNSTON—Yes.

Senator Tierney—I would say I would. Fortunately, these sorts of incidents only occasionally happen. I am involved in an inquiry at the moment on another matter and we are at a point where we are just about to consider what we are going to put in the report. I would not say I am constrained in any way in how I am going to proceed as a senator on that, because I believe that such events are relatively rare. The odds are it probably will not happen with this report.

Senator SHERRY—Senator Tierney, I just want be clear: you had finished the report; it had been closed off and was ready for publication? You had finished your deliberations, finalised your vote, and everything that was required to be done prior to the publication of the report had been completed?

Senator Tierney—To the best of my recollection, that was the point we were at, but of course we have so many committees and so many reports and I am thinking back several months. But I think that was the point we were at when the secretary of the committee notified us that this had happened.

CHAIR—Let me welcome—I should have done it earlier—Mr Gawenda, the editor of the *Age*, and Mr Rares, who is a recidivist in these matters.

Mr Rares—Thank you.

CHAIR—Mr McHugh and Mr Barnett, welcome. I assume, Mr Rares, you would like on each occasion to be the one to ask questions. Is that the way you want to proceed?

Mr Rares—Yes.

CHAIR—I invite you to do so.

Mr Rares—Thank you, Chair. Senator Tierney, I think the chair asked you whether this particular disclosure interfered with your relationship with your colleagues. I am not sure that you answered that question.

Senator Tierney—I suppose I am not clear what was meant by ‘interfered with my relationship with my colleagues’.

Mr Rares—In this particular case, according to the secretary’s letter to the Privileges Committee, the committee had resolved on 7 June to have a final report, with the recommendations—including the two that were in the newspaper article—tabled in the Senate on 18 June. Would you accept that that is the position?

Senator Tierney—To the best of my recollection, yes.

Mr Rares—As at 7 June, you had already come to a conscious view about the recommendations you were going to put forward as a member of the majority. Is that correct?

Senator Tierney—We had spent a very long time considering this report. Our deliberations on what we would finally put in the report had gone on over several weeks.

Mr Rares—So, from 7 June until the report was tabled, there were no more deliberative processes with which you were involved in the committee?

Senator Tierney—It is my understanding that that was the time span, yes.

Mr Rares—The report in the newspaper came a day before the final report of the committee was to be tabled?

Senator Tierney—I do not have the exact time. I would need to be guided by you on that. But my main point, as I made to the chair, was that we get an unequal release of information—that one journalist only, presumably, knows or purports to know what is in the report and then selectively writes a story about it, when no-one else has that opportunity. That is really an abuse of the democratic processes, even if it is only one day before the release of the report.

Mr Rares—The recommendation which you were prepared to agree with on 7 June contained views that you had formed after mature consideration on the position?

Senator Tierney—Absolutely, and after discussion with many of our colleagues. It was a very interesting inquiry and I have had a longstanding interest in this matter and we did throw around the issues on what is an incredibly difficult piece of public policy. So, yes, we had very carefully deliberated on this matter.

Mr Rares—And having formed those views, you knew that they would be the subject of debate when the report became public?

Senator Tierney—Obviously it would be debated when it became public, because it has been a major piece of public debate for about 15 to 20 years.

Mr Rares—The fact that a recommendation you were going to make became public one day before this particular report was tabled in the Senate did not in any way affect you as a senator from carrying out your duties either as a member of the committee or as a senator in the house?

Senator Tierney—I do not know whether you can say that. It is disturbing when these things are released. In terms of the rest of your work on other committees, you have just got to think carefully about what you are saying and what you are recommending if it is going to be reported selectively.

Mr Rares—Your relationship with other members of the Environment, Communications, Information Technology and the Arts Legislation Committee remains today as it was before the report in the *Age*, doesn't it?

Senator Tierney—If someone on the committee has leaked information, which seems to be the case—as it did get out—then, when you are on that committee with the same members on other inquiries, it is obviously not the case that you are holding discussions which you feel are confidential within the bounds of the committee room if people are leaking information out. That perhaps can over time hamper your work, if it becomes common practice to do that sort of thing. But, as I mentioned earlier, fortunately these sorts of things are rare.

Mr Rares—But the answer to my question is—leaving aside the theoretical possibility of what might happen in the future—that your relationship with members of the committee has not changed as a result of the publication in the *Age*, has it?

Senator Tierney—It is something which, if it became common practice, might.

Mr Rares—But it has not, has it?

Senator Tierney—Well, let us hope it is a rare event.

Mr Rares—But the answer to my question, if you would please answer it, is that—

Senator Tierney—I am giving you the answer to your question.

Mr Rares—your relationship has not, in fact, changed, has it?

Senator Tierney—I would say it is changing on the basis that this has been leaked. We do not know which member of the committee has leaked it. If it became common practice, that would certainly change it.

Mr Rares—That is all I wish to ask. Thank you.

CHAIR—I have no further questions. Do you want to make a final statement?

Senator Tierney—No, Chair.

CHAIR—Enjoy your nonjunket.

Senator Tierney—Thank you.

CHAIR—I will now call the next witness, Senator Tchen, and ask him to be sworn or to take an affirmation.

[4.53 p.m.]

(Senator Tchen sworn)

CHAIR—Do you have an opening statement?

Senator Tchen—No, not really.

CHAIR—Senator, did you divulge without authorisation of the ECITA committee any information relating to the report of the committee to Ms Annabel Crabb, the journalist; to the editor of the *Age*; or to any other journalist?

Senator Tchen—No.

CHAIR—Did you make the report available to any staff member or anyone else and, if so, what steps have you taken to ascertain that they have not, in an unauthorised manner, disclosed any of the information?

Senator Tchen—The answer to the first part of the question is no.

CHAIR—You do not have to answer the second part then. Do you have any knowledge as to how the information relating to the report was made available to Ms Crabb, Mr Gawenda or any other journalist or unauthorised person?

Senator Tchen—No.

CHAIR—The chair's letter to the President advises that the ECITA committee came to the conclusion that the disclosure caused substantial interference with its work. Is that your view? Has it caused substantial interference and, if so, could you explain to me how it has caused substantial interference?

Senator Tchen—I do not think it caused any interference with the work on that particular inquiry per se. But I think that in the longer term it certainly has the potential to cause mischief among the members of the committee in that the trustworthiness amongst members is thrown into some question.

CHAIR—We have to draw the distinction here between its potential and the actuality. Has it actually caused you to mistrust all the other members of the committee?

Senator Tchen—No, I tend to look upon all my colleagues kindly.

CHAIR—Thank you. I will now start, again appropriately on my extreme left, with Senator Evans.

Senator CHRIS EVANS—It is a long time since I was accused of that!

CHAIR—It is only in relation to others! I have Western Australians on either side. Do you have any further questions?

Senator CHRIS EVANS—No, I am just recovering from the allegations!

CHAIR—Are there any other questions? Mr Rares?

Mr Rares—I do not have any questions.

CHAIR—Thank you, Senator Tchen. I now call the next witness, Senator Lundy, and ask her to be sworn or to take an affirmation.

[4.57 p.m.]

(Senator Lundy sworn)

CHAIR—Do you have an opening statement?

Senator Lundy—No.

CHAIR—Senator, did you divulge without authorisation of the ECITA committee any information relating to the report of the committee to Ms Annabel Crabb, in relation to an article published in the *Age* newspaper on 17 June 2002, or to the editor of the *Age* or to any other journalist or unauthorised person?

Senator Lundy—My answer is no to all parts of that question.

CHAIR—Have you made inquiries to ascertain whether any other person to whom you may have given access to the report made the report available without authorisation of the committee to Ms Crabb, the editor of the *Age* or any other unauthorised person or journalist.

Senator Lundy—I have made inquiries and I am satisfied from the response from my staff that they did not divulge any information.

CHAIR—Do you have any other knowledge of how the information relating to the report was made available to Ms Crabb, Mr Gawenda or any journalist or other unauthorised person?

Senator Lundy—No.

CHAIR—In the chair's letter to the President, he advised that the ECITA committee came to the conclusion that the disclosure caused substantial interference with its work. Is it your view that it caused substantial interference to the work of the committee?

Senator Lundy—Given the late stage of the disclosure in the course of the preparation of the report, it is not my view that it caused a substantial problem.

CHAIR—Has the effect of that unauthorised disclosure made dealing with your colleagues more difficult in relation to this committee?

Senator Lundy—Not particularly.

CHAIR—Not particularly?

Senator Lundy—In fact I would say no.

CHAIR—Thank you. Does anybody else have any questions? Mr Rares?

Mr Rares—No, thank you.

CHAIR—Do you have a concluding statement?

Senator Lundy—No.

CHAIR—Thank you for your appearance. I now call Senator Eggleston.

[5.00 p.m.]

(Senator Eggleston sworn)

CHAIR—Welcome. Do you have an opening statement?

Senator Eggleston—Yes, I do. Privilege is an important matter to members of parliament and to the conduct of Senate committees. This is because the witnesses who appear before Senate committees frequently represent large corporations and powerful interests. It is important that such groups who appear before Senate committees have confidence in the system of privilege; otherwise it is quite possible that they will not provide confidential information to Senate and other committees. The groups which appear before the Senate Environment, Communications, Information Technology and the Arts Legislation Committee include the media, the television industry and telecommunications companies representing large interests.

Twelve months ago, the committee was conducting hearings into proposed changes to the legislation concerning so-called interconnect charges, which are what Telstra charges other telecommunications carriers to use its network. This was a matter of great significance, because Telstra had only ever issued interim charges to the other companies and had used various legal avenues to thwart the imposition of final charges to the other companies for a period of more than four years. This had the effect of meaning that the other companies were uncertain of their true financial position because the possibility existed of their having to provide extremely large back payments to Telstra if the final interconnect charges, when eventually determined, were greater than the interim charges.

The committee decided that it would be of assistance to have some specific information about certain matters from the other three companies who had appeared before it that day. Accordingly, the committee secretary approached the three other companies to determine whether they would be willing to provide the information on a confidential basis, protected by privilege. After consulting with their head offices and company lawyers, two of the three companies declined to provide the requested information on the grounds that they did not have confidence in the protection provided by the privilege system. The third company only agreed to provide the information after extensive reassurance about the protection the Senate privilege system would provide.

This example illustrates the fact that the work of Senate committees has been compromised in a serious and significant manner by the undermining of the Senate privileges system by the publication in the media of information covered by privilege. The rules of privilege are very clear. As they apply to the findings and recommendations of Senate committees, these rules are that, until a Senate report is tabled and publication of its contents is authorised by the Senate, the report is confidential and is covered by privilege.

As stated in paragraph 39, page 11 of the *Age* submission to the inquiry, this is set out in resolution 6(16) of a resolution of the Senate agreed to on 25 February 1988 which states:

A person shall not, without the authority of the Senate or a committee, publish or disclose:

- (a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee ...
- (c) any proceedings in private session of the Senate or a committee or any report of such proceedings,

unless the Senate or a committee has published, or authorised the publication of, that document ...

I append a form copy of a universal Senate tabling document which includes the words ‘that the report be printed’, meaning that it be published and therefore is no longer confidential. In this case, the *Age* clearly broke this requirement with the publication on 17 June 2002 of the recommendations of the committee in the article under consideration. The importance of this action by the *Age* is that it is exactly the reason why confidence in the privilege system has diminished, with the result that, as demonstrated in the example I have given, the work of Senate committees is being undermined. In this case, the journalist concerned was well aware of the rules of privilege and knew that the recommendations of the committee were confidential until the report was tabled in the Senate, scheduled for 18 June. Apart from anything else, this was because my research officer, Mr R.W.J. Wallace BA LLB, advised her of this fact when she rang him seeking a copy of the report prior to tabling. Mr Wallace has set this out in a letter to the committee secretary, Mr Michael McLean, dated 24 June 2002—a copy of which I append to this document.

More importantly, however, the *Age* newspaper as an organisation must also have been aware that the rules of privilege were being breached by the publication of this article. Journalists operate within a hierarchical structure, and in this case Ms Crabb’s article should have been reviewed or would have been reviewed by her subeditor, who in turn was responsible to the news editor, to the general editor and so on, up to the managing editor, all of whom should have been aware that the article in question breached the rules of privilege and should therefore have been withdrawn and not published. The *Age* is a mature newspaper and has been represented in the press gallery since the day the federal parliament first met. In my opinion, it is a sad reflection on the internal systems and sense of corporate public responsibility of the *Age* organisation that a breach of this kind has occurred.

CHAIR—Senator, do you have a copy of that for the representatives of the *Age*?

Senator Eggleston—I do indeed.

Mr Rares—Thank you, Chair.

CHAIR—Thank you, Senator Eggleston, for your opening statement. Let me take you through some of this. Did you divulge, without authorisation of the ECITA committee, any information relating to the report of the committee to Ms Annabel Crabb, the author of the article published in the *Age* newspaper on 17 June 2002, or to the editor of the *Age* or to any other journalist or any other unauthorised person?

Senator Eggleston—No, I did not.

CHAIR—Have you made inquiries to ascertain whether any other person to whom you gave access to the report in turn made it available to any unauthorised person—Ms Crabb, the editor of the *Age* or any other journalist?

Senator Eggleston—The matter was raised at a meeting of the ECITA committee and the senators present said that they did not divulge the information.

CHAIR—I am talking about your own personal staff, whom you may have used to help in drafting or research, not so much the staff of the ECITA committee.

Senator Eggleston—I did, and nobody did.

CHAIR—When you wrote to the President, you advised that the ECITA committee had come to the conclusion that the disclosure caused substantial interference with the work of the committee. I understand what you have said in your opening statement but can you outline where the substantial interference is?

Senator Eggleston—That letter reflected the views of the committee at the time. The reason that statement was made was that it was felt that, because a leak had occurred, somewhere within the system the confidentiality of the information provided to the committee might be compromised.

CHAIR—But you seem to be saying—and I cannot necessarily grab this immediately out of your statement, but I wrote it down at the time—that Senate committees are being undermined. Our task is to see whether this committee has been undermined. We have heard from three of your colleagues and, frankly, not one of them has demonstrated to me yet where the committee has been interfered with.

Senator Eggleston—Nevertheless, the letter reflected the views of the committee at the time that it was written. The issue is really one of principle. A system of privilege exists. Privilege is a bit like pregnancy; either you have it or you do not. In this case, this report was covered by privilege and that privilege was breached. Therefore, as a simple fact, that undermines the work of the committees and this committee in particular, because it means that in any future report one cannot rely on the recommendations of the committee or the content of the report remaining confidential. In this case, there were very unexpected recommendations relating to regional media, and the release of those recommendations was expected to cause some surprise in the media community and may have been of great interest to persons involved in the media in the regions. I think it was important that those recommendations remained confidential and the premature release of those recommendations in fact undermined the work of the committee in my opinion.

CHAIR—Do you have less trust in your colleagues on the committee than you had before?

Senator Eggleston—One cannot have the same degree of trust in one's colleagues, because a leak occurred. That means that someone somewhere within the system—either one of my Senate colleagues or someone in one of their offices who had access to that report—prematurely released it to a journalist, who had sought quite aggressively during the previous week to gain

some information about the report. It does mean that I have less confidence in my colleagues accordingly. This committee sometimes deals with matters involving great deals of money and with very important and powerful organisations and powerful interests. It is quite vital that the work of this committee remains confidential.

CHAIR—In that statement you choose your words very carefully in defining this leak as coming from senators. I presume that is because of your experience, on this august committee—the Senate Privileges Committee—and elsewhere; these things nearly always leak from senators, don't they?

Senator Eggleston—That is said to be the case but I have no personal knowledge, not having actually leaked anything myself or having been able to identify a person who did. But senators do have offices and offices do have staff and so in fact within the system of the senators and their staff, as well as the committee staff, one must presume there are a great number of people who do see and read these reports before they become public.

CHAIR—Would you acknowledge that the only time that we have detected a Senate leaker was because he gave a press conference televised right throughout the building?

Senator Eggleston—That was a case in which there was absolutely no doubt who the leaker was.

CHAIR—I have a couple of other questions, based on the information you have given. You did have a conversation with the journalist concerned, Ms Annabel Crabb, on the Sunday night at about 10.30 p.m. It should be pointed out for the record that you are a Western Australian, so it takes you a long while to get here, and hence that time. At that stage, why did you not indicate directly to the journalist that by publishing this she would be in breach of privilege?

Senator Eggleston—Because she had made it quite clear that she knew that she was breaching privilege and because I knew that my research officer had informed her the previous week that until it was published by the Senate the content of the report was confidential and therefore covered by privilege. I rang the journalist a little later than 10.30, I think, because I came in on a flight from Perth that arrived later than I realised it had. While I was waiting to book into a hotel I listened to my phone messages. My purpose in ringing the journalist concerned was purely to determine what information she had and what she was going to publish. I saw no point whatsoever in asking her not to publish it, because she was well aware of what she was doing and that she was breaking privilege. I also think the *Age* organisation was aware that this article breached privilege.

CHAIR—Thank you.

Senator JOHNSTON—Senator Eggleston, you mentioned that you sought to persuade some companies to come before your committee and to disclose some confidential, commercially sensitive information. Did you personally seek to persuade those witnesses to come before the committee?

Senator Eggleston—We asked the committee secretariat to ask them if they would be willing to appear at an in camera session. I spoke to the political liaison officer of one of those companies, and that in fact was the company which eventually appeared.

Senator JOHNSTON—Did you make personal representations as chairman to the companies? You have just indicated that you actually had a discussion with one of the companies. Did you make representations about the nature of the protections afforded by the Parliamentary Privileges Act?

Senator Eggleston—I did not personally, but the committee secretary at the time did. The decision to seek to have these three companies appear before the committee on a confidential basis was taken during the course of other evidence being given, and the plan was that they would appear first after lunch. So the committee secretariat advised the companies concerned that their evidence would be covered by privilege.

Senator JOHNSTON—So there were assurances given to these witnesses in seeking to invite them to come and give evidence as to the state of the law and the confidentiality and protection of evidence?

Senator Eggleston—Yes, that is very much the case.

Senator JOHNSTON—At the end of the day when, in the face of those assurances, the report was disclosed prior to tabling—in other words, the confidentiality was obviously and clearly breached—is it fair to say that you, the secretariat that gave the assurances and I suppose all of the committee members were left exposed to those companies in that the assurances turned out to be quite hollow?

Senator Eggleston—I think I must clarify a point: when this inquiry which we were referring to occurred a year ago, a company did provide evidence in camera. Two of the companies declined, but the evidence remained confidential and was never publicly disclosed.

Senator JOHNSTON—So the evidence was never in the report?

Senator Eggleston—No.

CHAIR—This was a separate report, wasn't it?

Senator Eggleston—This was a year ago. It is a separate report.

Senator JOHNSTON—But those companies were told that what they said to the committee would be kept in confidence?

Senator Eggleston—They were, and two of them declined to give the evidence because they had no confidence that the confidentiality of their evidence would be respected.

Senator JOHNSTON—Did you feel that, as a result of the subsequent early disclosure of the report, the assurances given to those witnesses were undermined?

Senator Eggleston—No, I think you basically misunderstand. This is a separate matter that we are dealing with. This report under consideration by this committee is the cross-media ownership matter. A year ago, it was the Telstra interconnect charges, and the evidence given at that time has remained confidential.

Senator JOHNSTON—When you called witnesses under the second report—the one that was disclosed by Ms Crabb—did you give all the witnesses that were called by your committee a statement as to the protections afforded to them by parliamentary privilege?

Senator Eggleston—We do state that in the opening statement at every committee hearing—that if the witnesses wish to give evidence in confidence, they may seek to do so and that evidence will be covered by privilege but that the Senate may, at its discretion, make the evidence public at some later date.

Senator JOHNSTON—As chairman of the committee, do you take or feel any sense of responsibility for the adherence to proper procedure being followed by the committee during the course of its investigations and hearings?

Senator Eggleston—Yes, I do. I strongly believe that procedure should be followed.

Senator JOHNSTON—Do you feel that your capacity as chairman to ensure that those procedures are followed was undermined by the early, pre-emptory release of the report in this instance?

Senator Eggleston—I do not feel my position as chairman was undermined, but I did feel a great sense of disappointment that that leak occurred from wherever. It was a matter of great regret to me that a leak occurred from within the ECITA committee and its associated members and their staff or the committee secretariat.

Senator JOHNSTON—So that, at the end of the day, the two corporations were justified in declining to appear because they failed to have any faith or confidence in the privileges system?

Senator Eggleston—Yes, they were.

Senator PAYNE—Can I just clarify one matter with Senator Eggleston, and it pertains to Senator Eggleston's letter of 26 June to the then President of the Senate, Senator Reid. Was that letter written on behalf of the Environment, Communications, Information Technology and the Arts Committee?

Senator Eggleston—Yes, it was.

Senator PAYNE—As the result of a committee meeting?

Senator Eggleston—Yes, it was.

Senator PAYNE—And those deliberations would be minuted?

Senator Eggleston—Yes, they will.

Senator PAYNE—Thank you.

Senator REID—On page 30 of the submission from senior counsel for the *Age*, dated 14 October 2002, he referred to the conversation with the journalist and he said:

It is respectfully submitted that the technical contempt in question—if any—is properly described as “*trivial*” in nature.

I take it that he is referring to the conversation that you had with Ms Crabb on the Sunday evening. He goes on then to say that the triviality is all the more apparent in light of that conversation in which you said you would nominate her for the ‘Enid Blyton Creative Fairy Story of the Year Award’.

CHAIR—Senator, sorry to interrupt, but I think that is a reference to the publication, and another section of that submission has referred to that. I think the section you have quoted is there beyond the publication of it, but there is another section in that that deals with the nature of that.

Senator Eggleston—Senator Reid is referring to paragraph 31.

Senator REID—That is what I am referring to.

CHAIR—The light-hearted?

Senator REID—Yes. Did you regard your taking the trouble to telephone her at that hour of the night a trivial matter?

Senator Eggleston—No, I did not. I thought about whether or not I should telephone her. I really wanted to know what information she had, and that was the purpose of my call. Ms Crabb told me what she was going to publish, and her information accurately reflected the two most unexpected recommendations of the committee, if you like, concerning regional media. I felt that, if I said anything about privilege, asked her not to publish the story or confirmed to her that her story was correct, I would be simply giving her a degree of satisfaction, which I felt was unwarranted. So I said I would nominate her for the ‘Enid Blyton Creative Fairy Story of the Year Award’. The following day when three other newspapers rang me, I said the same thing: that we would be nominating her for that award. I must say that the journalist from the *Sydney Morning Herald* said that she did not know that such an award existed and was terribly interested in knowing who might have won it in the past. It seemed to be an effective ploy, because none of the other newspapers actually published those recommendations so there was uncertainty created about whether or not the story in the *Age* was accurate.

Senator REID—Would you describe the conversation you had with her as trivial or light-hearted? It was civilised.

Senator Eggleston—I did have a fairly sort of friendly relationship with Ms Crabb, whom I must say I respect as a journalist. I thought she was an excellent journalist and I was actually quite disappointed that she published this article reporting these findings, because I felt that it was not a professional action on her behalf.

Senator REID—But you would not agree that it was just a light-hearted conversation; it was a serious discussion with a journalist you respected.

Senator Eggleston—From my point of view, it was a conversation with a very serious intent: to establish what information the journalist had. It may have been couched in slightly less than

formal terms, but that was also with intent, because I did not wish to confirm that the story she was publishing was accurate.

Senator REID—It is also suggested that this is a trivial matter because you did not refer to privilege at all in that conversation. I think you have already dealt with that today, and it is referred to in your letter. You say in your letter to the secretary of this committee:

... she was aware of privilege and she subsequently went on to refer to being put in jail ...

That was a part of the conversation?

Senator Eggleston—It was indeed. I do actually have the tape here, if it is required. But the transcript in the document accurately reflects the content.

Senator REID—And you can confirm, for the reasons that you have given, that you did not ask her not to publish the article?

Senator Eggleston—I did not ask her not to publish the article, because I knew that she knew she was breaking privilege, and to do so would simply confirm to her that her story was accurate.

Senator REID—So you would not regard it as a correct interpretation to say that the matter was trivial because you did not ask her not to publish it?

Senator Eggleston—Yes, I would agree with what you have just said.

Senator KNOWLES—I would like to come back to the question Senator Payne asked you, about your letter to the President on 26 June. If I may, I want to quote the first sentence of the fourth paragraph:

The Committee has come to the conclusion that the disclosure caused substantial interference with its work.

I understand from your previous answer, Senator Eggleston, that you wrote this letter as chairman, and it is on ECITA letterhead. You have also told Senator Payne that the discussion at that meeting would have been minuted. I am therefore a little confused as to why, thus far, three members of the committee have come before us saying that the work of the committee has not been substantially interfered with by you in leaking this report. Do you think there has been a change of heart?

Senator Eggleston—I have no idea; I cannot explain that.

Senator KNOWLES—That makes two of us. I want to come back to your further letter of 28 June and the letter that you have supplied today from Mr Wallace in your office. Mr Wallace not only, according to your statement, told Ms Crabb that for her to do what she was seeking was going to be a breach of privilege but also stated that in a letter to Mr McLean, the secretary of the committee. You have further said that she aggressively sought a copy of the report in advance. When one combines all of those facts with the message that was left on your message bank, does that mean that you were left in absolutely no doubt whatsoever that Ms Crabb really knew that she was intentionally breaching privilege?

Senator Eggleston—I believe that is the case. But I also think that you have to see Ms Crabb's article in the broader context of the *Age* newspaper. I think that the *Age* organisation, as such, also would have been well aware that the rules of privilege were being breached.

Senator KNOWLES—I would say, at least according to the 74th report of the Privileges Committee, that the *Age* should have been aware, even if they claim now that they were not aware. I would like to go on to a further possible breach of privilege, and that is what I read as somewhat of a threat in the transcript of that message. The second paragraph of the transcript says:

Now I know you are very virtuous and didn't tell me anything about it when I called you but I just thought I would let you know out of courtesy seeing as your career could possibly be on the line for breaking privilege or whatever ...

How did you read that message?

Senator Eggleston—Ms Crabb had rung me the previous week—I think on the previous Wednesday—and discussed the outcome of this inquiry in a general way. She said that she supposed I would not tell her what the recommendations were. I assured her that she was quite correct; I would not. I saw her remarks on the tape not so much as a threat, but simply as remarks in the context of a call in which she was telling me, quite clearly, that she was going to publish an article containing key recommendations and that she was aware that privilege was being broken.

Senator KNOWLES—What did you read into the words, though, seeing your career could possibly be on the line?

Senator Eggleston—I really did not know what to read into that, except perhaps that somebody might infer when the article was published that I was the likely leaker of the information—since I am known to have something of an interest in regional Australian affairs, and that I might have been identified as a potential leaker. In fact, that did occur. Several people did suggest that they thought that I was probably the source of the information which Ms Crabb had published. I suppose that is why I kept the message and the tape—because she states at the beginning, 'You were very virtuous and did not tell me anything.'

Senator KNOWLES—I refer to the next sentence from that transcript, which says, 'Anyway, when you put me in jail I am sure I shall make an impassioned plea for my own freedom.' How did you read that—as some flippant comment that privilege does not matter and 'I do not care what anyone says; I am going to do this anyway'?

Senator Eggleston—I think that is how I read it. It was a statement which implies that the journalist was well aware that she was breaking privilege. It was a sort of a challenge, in a way: 'I have broken privilege and if you put me in jail then I will plead for my release.' It was being treated in a somewhat jocular way, I suppose, but the essential and key point is that the journalist is making it quite clear that she is aware that privilege is being broken and perhaps is not showing a great deal of respect for the privilege system.

Senator KNOWLES—Were you aware, at the time, that Ms Crabb had also made a phone call to Senator Lundy's office, not on one occasion but on two occasions, and was told the same message?

Senator Eggleston—I had no idea who else she had contacted.

Senator KNOWLES—It is interesting that Senator Lundy, in her response to the committee, has said that Ms Crabb had called requesting information about the contents of the report in question. Senator Lundy said:

I advised that such information was under privilege and I was not able to assist.

She went on to say:

My media adviser received a subsequent phone message from the same journalist on Sunday 16 June with a similar request. My adviser did not return the call.

I wondered whether you were aware, prior to your writing to the President, that Ms Crabb had actually made a number of calls and, in the clear knowledge that it was a breach of privilege, had continued to persist in trying to find the contents of the report.

Senator Eggleston—At the time of writing to the President, I was aware that she had rung other people within the committee, but at the time of publication I was not aware of that.

Senator SHERRY—In the statement on page 3 you refer, with some emphasis, to the difficulty the committee had in obtaining confidential information from three companies. The information that was provided by the third company on this occasion was not leaked, was it?

Senator Eggleston—No, it was not.

Senator SHERRY—While you have been a member of the ECITAL committee, has confidential information been provided on other occasions?

Senator Eggleston—Yes, quite often.

Senator SHERRY—Has that confidential information provided by companies ever been leaked, to your knowledge, on other occasions?

Senator Eggleston—Not to my knowledge. I have been a member of this committee for seven years. At times companies have provided information about intentions and plans, but we have never in fact had quite such sensitive financial information provided to the committee.

Senator SHERRY—I understand that, but is it true that when confidential information of varying degrees of sensitivity has been provided to the committee on no occasion, including the example you give, has it been leaked to the media?

Senator Eggleston—I think that is true.

CHAIR—I want to return to two or three points. You talked about Ms Annabel Crabb pursuing you and other committee members aggressively, trying to find out the recommendations. Were any other journalists making similar queries at the time?

Senator Eggleston—A number of journalists rang, but Ms Crabb was the most persistent.

CHAIR—But no other journalist carried this story prematurely, to your knowledge?

Senator Eggleston—That is correct.

CHAIR—Senator Knowles raised the question of whether you took Ms Crabb's comments as threatening. You are a member of the Western Australian branch of the Liberal Party, and that is fairly robust. You would have been threatened by absolute experts over the years, like I have in the Victorian branch of the Labor Party. Surely you would not have found her intimidating.

Senator Eggleston—No, I did not find her intimidating.

CHAIR—Finally, we have to return to this question of substantial interference. I take the point you made about the committee signing off on this, but it seems to me that time and time again—even in your evidence to an extent, and I do not want to verbal you—you are talking about the potentiality here rather than the actuality. It has the potential to interfere in the future of this or any other committee, but I am still trying to divine how it has gone to the internal cohesion of this committee and has actually interfered in it. Can you give me any further examples of that?

Senator Eggleston—The most important point to make in that regard is that I as chairman would not have the same confidence in my fellow committee members that I had prior to the publication of that article in terms of their respecting the confidentiality of the proceedings, recommendations and reports of the committee. I think it is true to say that the issue is really one of principle in the most important way—that is, that there is a privilege system, as I said. It is very like pregnancy: you either have it or you do not. It was quite clear that this report and its recommendations were covered by privilege until such time as that report was tabled in the Senate and published.

CHAIR—I am not sure about that, because there is a syndrome known to you medical people as false pregnancy! But we will not follow that. I think Senator Johnston would actually like to follow up something that has been raised.

Senator JOHNSTON—Is it fair to say that you thought one of the committee members had in fact breached the provisions of section 13—that is, had improperly released the report prior to its tabling?

Senator Eggleston—I thought it was possible, yes.

Senator JOHNSTON—That would have been a breach of their duty to the committee?

Senator Eggleston—Yes.

CHAIR—Mr Rares.

Mr Rares—Senator Eggleston, did you trust Senator Tierney less as a result of this leak?

Senator Eggleston—I do not want to go through the individuals in the committee, and I would decline to answer that question.

Mr Rares—You are complaining that the committee's work has been substantially interfered with in a way that would amount to an offence under the Parliamentary Privileges Act, aren't you?

Senator Eggleston—I am.

Mr Rares—And this is a public hearing about whether or not my clients have committed an offence, isn't it?

Senator Eggleston—It is indeed, Mr Rares.

Mr Rares—And you decline to nominate which member of the committee, if any, you say you feel your relations have been interfered with as a result of a leak.

Senator Eggleston—What I said was that in a general way it has undermined my confidence in my colleagues. I am not prepared to identify any particular colleague, and I do not think that that is an argument which you can object to. The members of the committee are members of the committee. It is my feeling that there must be some doubt in my mind about whether or not other members of the committee respect the rules of privilege.

Mr Rares—Unless you can suggest that there is some one or more members of the committee whom you no longer have the same degree of confidence in dealing with, then we just have to take your assertions on trust and we are not able to test them. Is that what you want to put forward?

Senator Eggleston—Quite obviously there was a leak somewhere, either from another senator, from a member of their staff or from the committee secretariat. What I am saying is that it is not impossible to exclude the possibility that another senator may have leaked that information even though all have denied it and, therefore, as I cannot identify the leaker I am not prepared to suggest to you that there may be a member of the committee in whom I have less confidence. But in a general way there must be doubt in my mind about the other members of the committee and their staff respecting the privileges system.

Mr Rares—These two recommendations that were disclosed in Ms Crabb's article were recommendations that you yourself had formulated after considerable deliberation. Is that right?

Senator Eggleston—They were formulated by members of the committee and I was one of the members of the group which formulated them. Having formulated them, those recommendations went into the chairman's draft and the chairman's draft was then circulated to all other members of the committee and to their offices.

Mr Rares—On 7 June the chairman's draft was formally adopted as the committee's report, wasn't it?

Senator Eggleston—Yes, it was.

Mr Rares—And, thereafter, those recommendations were going to be the recommendations that you, as one of the majority, were going to make to the Senate when the report was tabled. Is that right?

Senator Eggleston—That is correct.

Mr Rares—And you were going to defend those views in parliament and in public, weren't you?

Senator Eggleston—That is correct.

Mr Rares—Nothing about reporting those recommendations one day early made the slightest difference to you in the performance of your work in defending the formal recommendations that were leaked, did it?

Senator Eggleston—Well, it is a nice point, Mr Rares, but the point is that there is a privileges system and that system was in place, and those recommendations were confidential until they were tabled and published by the Senate. So there are not degrees of privilege and it is not the media's role to decide that some things are slightly less privileged than others, which is essentially what you are seeking to do. There is a system and that system is absolute.

Mr Rares—There is an act of parliament which you are bound by called the Parliamentary Privileges Act, isn't there?

Senator Eggleston—Yes.

Mr Rares—And there are degrees of privilege, I suggest to you, which section 4 of the act requires parliament to recognise, don't you agree?

Senator Eggleston—I am not familiar with the detail of this section but nevertheless the fact remains, very simply and clearly, that the reports of Senate committees are confidential until such time as they are tabled and published, and that is the core matter which this committee needs to consider.

CHAIR—I might just intervene for a moment and suggest to Mr Rares that, when you put a question to a witness about section 4, it may be more helpful to quote section 4.

Mr Rares—Yes, I am sorry.

CHAIR—Every section is not actually in everyone's mind.

Mr Rares—Thank you. In the documents the committee has before it today, if you go to page 24, you will see that paragraph 12 of the submission that we prepared sets out section 4. While you are reading that, also look at resolution 3(a), which is set out in paragraph 14 at the bottom of page 24 and the top of page 25.

Senator Eggleston—I have made some notes on paragraph 12, which are essentially the points I have already made to you. The notes I made when I read this are that the privilege

system has been set up to protect the committee system and it is not for the media to interpret degrees of privilege. It is quite clear that the rule exists and should be abided by.

Mr Rares—If you look at the plain words of section 12, would you agree that interference that does not amount to improper interference is not a breach of any privilege of the House?

Senator Eggleston—Premature publication of recommendations I hold to be improper interference.

Mr Rares—But I am asking you to agree with a proposition in the law of this nation that interference which does not amount to improper interference is not a breach of any privilege of the House.

Senator Eggleston—As I said, and repeat, I think the premature release of recommendations is an improper interference with the work of the committee.

Mr Rares—Is that not a task for this committee to decide?

Senator Eggleston—I said ‘I think’—it is my opinion.

Mr Rares—Senator Eggleston, have you read Mr Gawenda’s two letters to the chair of the committee and Ms Crabb’s letter to the chair of the committee.

Senator Eggleston—I have read all of them.

Mr Rares—Having read those, would you agree that, on consideration, had you raised the issue which you put before the Senate as a serious breach of privilege with Ms Crabb on the night of 16 June as a serious breach of privilege, the matter might have proceeded differently after that?

Senator Eggleston—I believe that proposition is quite disingenuous. Ms Crabb was very well aware that she had broken privilege. The hour was around 11 o’clock at night. The *Age* had been printed. I hold the view that the editorial staff of the *Age* were well aware of the rules of privilege and should have had a protocol in place such that when a journalist like Ms Crabb presented a story which quite clearly broke privilege then that protocol should have gone into operation from the subeditor to the editor and, if necessary, to the managing editor to have the story withdrawn.

Mr Rares—So you say that after reading their letters to the chair it would have made no difference in your mind to what might have happened had you said fairly and squarely to Ms Crabb, ‘Whatever you do, be sure you do not publish something that is in a report that has not been tabled because that would be a breach of privilege and it is a very serious matter, and I urge you not to do it because it will interfere with the committee’s work.’ If you had said that, do you think it would have made any difference?

Senator Eggleston—My opinion is that it would have made absolutely no difference whatsoever. Ms Crabb quite consciously was breaking privilege, and I think that proposition is quite disingenuous.

Mr Rares—You held a jocular conversation with Ms Crabb following what you have said in your letter to the committee of 28 June was a jocular message from her on your answering service. Is that right?

Senator Eggleston—It was fairly light-hearted, but as I have said already there was a serious intent in my phone call to her.

Mr Rares—Your serious intent in your phone call to her was to find out what was going to appear in the *Age* the next day.

Senator Eggleston—Quite so.

Mr Rares—Not to tell her not to do it because it might seriously interfere with the parliament's or the Senate's or the committee's work. Is that right?

Senator Eggleston—Ms Crabb had rung me the previous week and, in terms of the content of that conversation, made it clear that she knew that I would not reveal the recommendations to her because they were covered by privilege. She had rung my research officer and sought an early copy of the report and he advised her that it was confidential until it was tabled and published. I believe that Ms Crabb was very well aware of the rules of privilege. She rang me, as she said, as a courtesy simply to inform me that she was going to publish the article. If one looks at the content of that conversation as the transcript covers, she was very well aware that she was breaking privilege. There was no point in my asking her not to publish the article, because she had determined to publish it. Had I asked her not to publish it because it was breaking privilege, it would have given her the satisfaction of knowing that her article was correct, and I did not wish to do that.

Mr Rares—So you did not see it as your responsibility to do something to stop what you now say you regarded as a serious breach of the privileges of the House?

Senator Eggleston—I think that is twisting the intent somewhat. Ms Crabb makes it quite clear that she knew she was breaking privilege. The *Age* as a newspaper organisation is well aware of the rules of privilege. There was absolutely nothing to be gained by my asking her not to publish that article. As I have said two times, and I will say it again, I think the proposition you are putting forward is disingenuous. I think the remarks contained in the various letters that if only I had raised the question of privilege—this is around 11 o'clock at night—then consideration would have been given not to publish the article are absolute nonsense. The *Age* knew they were publishing an article which broke privilege and had decided to go ahead and publish it.

Mr Rares—You talked to her in a jocular vein on the night—correct?

Senator Eggleston—Yes, I concede that.

Mr Rares—That tends to convey to somebody the way in which you might be thinking about the matter. Would you agree?

Senator Eggleston—In some circumstances it might, but Ms Crabb was very well aware that I was not going to breach the rules of privilege, and that matter had been effectively canvassed

the previous Wednesday when she rang me and said, ‘I know you are not going to tell me anything.’

Mr Rares—What I am asking you, Senator, is that when you engage in a light-hearted conversation on the night on which publication starts to take place, because the thing needs to be printed—

Senator Eggleston—When the publication was concluded, I would suggest.

Mr Rares—you send a message, don’t you, that the matter is not one that you regard as serious?

Senator Eggleston—With respect, this conversation occurred after the *Age* had been published, and that is confirmed by Mr Gawenda’s letter when he said that most of the copies had been printed. In my view, there was very little point in my seeking to have the article withdrawn. The *Age* newspaper had very largely gone to press. Mr Gawenda says words to the effect—I think it was Mr Gawenda—that most of the newspaper had been published; he would have given consideration to and perhaps had been able to stop publication. The point is that it is not beholden on me to advise the newspaper that they are breaking privilege when one is dealing with a newspaper of the maturity of the *Age*. The *Age*, as I said in my submission, has been around Parliament House since the day the federal parliament opened and the *Age* newspaper is very well aware of the rules of privilege. I did not wish to give the journalist the satisfaction of knowing that her story was correct. I humorously said we would nominate her for the ‘Enid Blyton Fairy Story of the Year’ award to make her feel uncertain about the content of her article.

Mr Rares—Could you turn to page 35 of the booklet and go to the paragraph that Mr Gawenda has written. Would you like to read that and perhaps reflect on any misunderstanding you may have? On about the middle of the page, he says:

Had I been contacted, and the nature of the concerns of the ECITAL Committee been voiced to me, I would have certainly considered holding back the article until the following day. Even at such a late stage on the evening of June 16, I would have been able to have the story removed from the Melbourne edition, where the majority of our readership lies, and it is quite possible that the story could have been removed from all editions.

Having seen that, you would agree, in the answer you gave a moment ago, that you were under a misapprehension about the state of printing?

Senator Eggleston—Firstly, I think it is important to understand that the time was later than we would think. It was around 11 o’clock at least.

Mr Rares—Senator, would you just answer my question. Would you agree you were under a misapprehension when you said to the committee a moment ago that, having read Mr Gawenda’s letter, most of the paper had been printed and had gone out and it was too late to stop?

CHAIR—Before he does so, do not interrupt the answer. You will get ample opportunity to follow it through and have it clarified.

Mr Rares—I am sorry.

CHAIR—Let the senator answer and, if it is not satisfactory, pursue it further.

Mr Rares—I apologise, Senator Eggleston.

Senator Eggleston—Quite frankly, I regard those comments as disingenuous and that paragraph as disingenuous. I believe that, first of all, the time frame was incorrect and that it was later in the evening than the 10.30 hour given when I called Ms Crabb. As I have said several times, the *Age* is well aware of the rules of privilege and there should have been a protocol in place to stop and withdraw the publication of an article which so clearly broke privilege.

I am from Western Australia. One can go to the streets of Northbridge in Perth on any night of the week and buy the *West Australian* from a newsboy at half past nine at night. I am sure that the *Age* works in a similar way and that most of the newspaper is published and printed quite early in the evening. I had no doubt at all that, by 11 o'clock, which is the earliest hour when this phone call would have occurred, the newspaper would have been printed and distributed. That is a personal opinion, and that is why I saw no point in ringing the *Age* newspaper as an organisation, quite apart from the fact that I think the very proposition that the *Age* would have withdrawn the article is, as I have said several times, disingenuous.

CHAIR—Could I interrupt you for a moment to assist, I hope. I think there may be a difference between Senator Eggleston's understanding of when the *Age* is first available and when it is actually available. My experience is that the *Age* is available somewhat later. It used to be five past 12 once, or maybe a little earlier, but I do not think it is available at 9.30. But that does not affect Senator Eggleston's view of when it was printed.

Mr Rares—No—

CHAIR—You may pursue that of course—

Mr Rares—But there is something about his view being expressed in a way that reflects upon the honesty of the issue before the committee and his willingness to make a serious charge under absolute privilege about that.

CHAIR—You are absolutely inclined to pursue that. I was just trying to get for the record that it is not quite clear to anyone who may be listening that there may be a difference between the perception and reality of when the *Age* actually hits the streets. That is all.

Senator Eggleston—That may well be the case. The *West Australian* is available quite early in the evening, and the *West Australian* is, like the *Age*, a major metropolitan newspaper. It is my assumption that the *Age*, because it no doubt has country editions and interstate editions, would have to get those published in time to get them distributed to various outlets. That certainly was a factor in my consideration.

Mr Rares—But you were consciously giving evidence a moment ago saying that you regarded as disingenuous what Mr Gawenda has written in the paragraph I read to you on page 35; that is, it was a lie. That is what you were saying, was it not?

Senator Eggleston—Not that it was a lie but it was a statement which was designed to convey an impression which in fact really did not reflect the situation, in that, as I have said several times, the *Age* was aware of the rules of privilege, there is a hierarchical structure within the *Age*, the subeditor should have picked up the fact that Ms Crabb's article was covered by privilege and breached privilege, and if the subeditor had a query he should have rung the editor who, in due course, could have contacted Mr Gawenda. It was not beholden upon me to contact Mr Gawenda, especially in the circumstances of dealing with a journalist who, quite simply and defiantly, was aware of the rules of privilege and intended to proceed to submit and publish the article.

Mr Rares—Do you agree that it is the fact that one of the members of the committee, or a member of staff or someone who has seen the final recommendations has the primary responsibility for a breach of trust of the privilege system?

Senator Eggleston—An individual provided the information to a journalist who knew the rules of privilege and chose not to observe them. That is the correct situation.

Mr Rares—And you were prepared, without any attempt to stop it, to allow the publication to go ahead in the newspaper. Is that what you are saying?

Senator EGGLESTON—There was nothing, in my view, that I could do to stop the publication.

Mr Rares—You have seen Mr Gawenda's letter. Would you accept from me that the second edition of the *Age* does not get printed until around midnight?

Senator EGGLESTON—That may be the case, but it does not alter the fact that the *Age* editorial staff should have known the rules of privilege and withdrawn the article.

Mr Rares—If they had been told—

Senator EGGLESTON—They do not need to be told.

Mr Rares—for example, that there was a jocular conversation in which you laughed off the matter and referred to an Enid Blyton award, they might have taken the view, mightn't they, that you did not regard this as a serious breach of parliamentary privilege?

Senator EGGLESTON—I do not think you can interpret my conversation as 'laughing it off'. What I was implying was that the journalist was making up a story which was not true—a fairy story.

Mr Rares—And that was a lie on your part, wasn't it?

Senator EGGLESTON—I thought it was a political statement. I had to protect the system. I did not wish this information to appear in other newspapers.

Mr Rares—When you say you had to protect the system, you were a member the Privileges Committee when it wrote its 99th report, weren't you?

Senator EGGLESTON—Until recently, I was, yes.

Mr Rares—And that was the report about the publication in the *Australian* newspaper where I appeared for the *Australian*. Is that right?

Senator EGGLESTON—I do remember that.

Mr Rares—Do you remember what paragraph 49 of that report said in relation to the journalist? We can have copies available for the committee and for you, too, Senator, so you can see it. Perhaps that can be distributed.

CHAIR—In that case, just pause a moment while we have it in front of us before you ask the question.

Mr Rares—Yes. I would invite you to read paragraph 49, Senator, when it is shown to you. Did you agree with the terms of this report when it was tabled in the Senate?

Senator EGGLESTON—I did.

Mr Rares—You will see in this report in paragraph 49 the statement is made:

Nor did [the journalist]—

I add the words ‘the journalist’ instead of ‘he’—

make any attempt whatsoever to make contact with the chairman or secretary of the Corporations and Securities Committee either to establish the authenticity of the document or to canvass any possible consequences of its improper disclosure.

Do you see that?

Senator EGGLESTON—I did actually read paragraph 48 first. I have now read 49.

Mr Rares—It is fairly clear from that statement in paragraph 49 that the Committee of Privileges was suggesting that a journalist should make contact with the chair of a committee to establish the authenticity of a document which might have been leaked or about the contents of which the journalist might have been told and to canvass the consequences of improper disclosure.

Senator EGGLESTON—That is true, yes.

Mr Rares—And there is no suggestion there that, when the journalist spoke to the chairman of the committee in that hypothetical situation, the chairman should do anything other than make clear to the journalist the consequences, if there were to be a breach of privilege by publication, of that course of action. Don’t you agree?

Senator EGGLESTON—I agree with that. But in this situation the journalist did, during the preceding week, make contact with me and sought apparently also to gain a copy of the report from my research officer and made it quite clear that she knew about and was aware of the rules

of privilege. So there seems little point in believing that any representation to her would have made any difference to her intention finally to publish that article.

Mr Rares—But in this context you were the chairman of the relevant committee. Is that right?

Senator Eggleston—Indeed.

Mr Rares—The journalist contacted you and told you about the report when you asked her about that.

Senator Eggleston—Indeed.

Mr Rares—And you did not tell her, as you have said, anything about the consequences of a breach of privilege through the publication of that material.

Senator Eggleston—I think, if one looks at Ms Crabb's submission, she makes it quite clear that she was simply informing me as a matter of courtesy that the article was to be published.

Mr Rares—Yes, but you chose to ring her when you got the voice message, didn't you?

Senator Eggleston—That is true.

Mr Rares—And before you picked up the phone to call her you decided that you were going to adopt the course of action set out on page 5 of the booklet, namely, that you would not confirm the accuracy of the story in any way and you would not ask her not to publish the story or warn her of the consequences of knowingly breaking privilege. That is correct, isn't it?

Senator Eggleston—Broadly, yes.

Mr Rares—So do you see any conflict between your considered decision about how you were going to approach the conversation with Ms Crabb prior to your ringing her on that night and the suggestion the Committee of Privileges in paragraph 49 of its 99th report makes?

Senator Eggleston—You must bear in mind the time lapse. Ms Crabb rang me at six o'clock or 6.30 Eastern Time. Had she reached me at four o'clock or 4.30 Western Time, I may well have adopted a different approach. I received her call when I arrived in Sydney around 11. I rang her from the foyer of a hotel while I was waiting in a very long queue to check in, so it was probably somewhat after 11. So there seemed little point at that stage in seeking to have her withdraw the story which she was really just informing me that she was going to have published. She was aware, as I have said repeatedly, of the rules of privilege, and there was very little point, it seemed to me, in repeating to someone who was so quite clearly aware of the rules and quite clearly determined to break them that to do so would not be a well-considered thing for her to do.

Mr Rares—So there was no point whatsoever in your saying anything to her to cast doubt on the accuracy of her story, was there?

Senator Eggleston—That is not the case. She alone had apparently obtained these recommendations, and I felt that the very least I could do was to make her doubt the accuracy of her information. That was the purpose of my remarks about the ‘Enid Blyton Fairy Story of the Year Award’.

Mr Rares—And the only reason you could have wanted her to doubt the accuracy of her information at the time you decided to call her was that you believed it was not too late to get her to pull the story, if she had such doubts. Isn’t that right?

Senator Eggleston—That is not the case at all. I believed that it was completely pointless asking her to pull the story. It was my belief, as I have said already, that the *Age* was very largely printed. It was my belief also that the *Age* editorial staff were well aware of the rules of privilege and should have had a protocol in place to withdraw a story which quite clearly broke privilege.

Mr Rares—Did you tell Matt Price of the *Australian* that the reason you complained to the President of the Senate about a possible breach of privilege was because you feared colleagues might think you had leaked details of the report to Ms Crabb?

Senator Eggleston—Not true. I said that is why I retained the tape.

Mr Rares—Did you see a story in the *Australian* on 3 October this year?

Senator Eggleston—I saw it in the ‘Media’ section, yes. We also wrote a letter, I must say, to the editor of the ‘Media’ section, which was not published, pointing out that the letter which I wrote to the President was written on behalf of the committee and not on my personal behalf.

Mr Rares—In that letter you did not dispute the statement attributed to you in Mr Price’s story—namely, that you told him that you complained for fear colleagues might think you had leaked details of the report to Ms Crabb.

Senator Eggleston—No, I retained the tape for that reason.

Mr Rares—The reason you made the complaint about the alleged breach of privilege was because you feared that you might get the blame for it.

Senator Eggleston—Not at all. The decision to make a complaint of breach of privilege was a committee decision. The reason I retained the tape was quite simply because Ms Crabb said that I did not leak the story. These are two separate issues, Mr Rares—very clever but not the case.

Mr Rares—If you would not mind, Senator, could you answer my question with a direct yes or no, because it is capable of being answered with a yes or no—

Senator Eggleston—This is not a court of law.

Mr Rares—No, but I am sure the committee—

CHAIR—The senator will answer the question as he pleases and, if it does not please you, you can follow through.

Mr Rares—Did you tell Mr Price, as published in the *Australian* on 3 October this year, that you complained about the breach of privilege—you allege—for fear colleagues might think you leaked details of the report to Ms Crabb?

Senator Eggleston—No, I did not.

Mr Rares—So that is a misreporting of you?

Senator Eggleston—It is indeed.

Mr Rares—But it is not one that you complained of to the *Australian*, is it?

Senator Eggleston—We wrote a letter because he said that the letter making the complaint of breach of privilege was made by me personally; it was made on behalf of the committee.

Mr Rares—In other words, you agree you made no complaint about the accuracy of the attribution to you that the reason for making the complaint was a fear on your part that you would be blamed for the leak?

Senator Eggleston—As I have said, the reason I retained the tape was simply because of her statement that I was not the source of the information. The Price article in no way alters the fact that there are rules and those rules were broken.

Mr Rares—You formed the views to go ahead with the recommendations that were in Ms Crabb's article and then in the report tabled the next day, after you clearly thought out your position on those two recommendations. Is that right?

Senator Eggleston—Indeed, yes.

Mr Rares—And there was no way in the world that Ms Crabb's publication in the *Age* on 17 June was going to get you to change from the views that you had expressed in those two recommendations, was there?

Senator Eggleston—No.

Mr Rares—And you were prepared to be subjected to public scrutiny and debate on your espousing of those views. Is that right?

Senator Eggleston—Post publication of the report, indeed, yes.

Mr Rares—Given that they were your considered views, it would not have mattered whether it was published one day earlier or one day later, would it?

Senator Eggleston—There is a system in place which requires that until the report is tabled and published it shall remain confidential.

Mr Rares—But it did not interfere with you holding or expressing the views in those two recommendations, did it?

Senator Eggleston—No.

Mr Rares—And it did not interfere, to your knowledge, with any of the other members of your committee who contributed to that report adhering to the views that they expressed in their recommendations either in the majority or in the dissenting report. Is that right?

Senator Eggleston—No, but it sets a precedent.

Mr Rares—There is no suggestion that you, as a member of the Senate or a committee, would be intimidated from forming a final view and expressing it in a recommendation in a report because that final view might get out a day or two early, is there?

Senator Eggleston—It is a matter of principle. There is a system in place and, until such time as a report is tabled and published, the content is confidential. You cannot have degrees of privilege and have those degrees determined by the media at its discretion.

Mr Rares—You are adopting a stance on principle because you know that this particular publication did not do any damage. That is right, isn't it?

Senator Eggleston—Not at all. In any other situation, I would adopt the same approach.

Mr Rares—Because of the principle. Is that right?

Senator Eggleston—Indeed.

Mr Rares—Not because of any damage you can point to.

Senator Eggleston—It sets a precedent under which journalists feel that there is a bit of a laissez-faire attitude towards privilege and it is okay to break it. Sometimes, in some situations, revealing committee recommendations can have quite significant consequences in a commercial sense or affect the interests of other parties in quite a real sense, so it is important that the principle is observed.

Mr Rares—In cases of that kind it is appropriate to refer the matter to the Privileges Committee so that it may be dealt with in accordance with the procedures of the house. Is that right?

Senator Eggleston—Quite so.

Mr Rares—And in cases where there is no real damage or interference to the committees or their work it is not appropriate to make a complaint, is it?

Senator Eggleston—Yes, it is, because there is a principle involved and the principle has been broken.

Mr Rares—Are you saying that, every time there is any leak at all, the final recommendation from a senator's point of view is that that is a matter of substantial breach of privilege which requires punishment?

Senator Eggleston—Yes, I am. It is a matter of principle which can affect other reports of a more substantial nature at other times. It sets a precedent and creates an atmosphere in which journalists are less respectful of the system. That is why it is important.

Mr Rares—When the Minister for Defence said the other day that he was quite happy to pre-empt some findings that were going to be released about the people overboard matter, was that something you considered it your duty as a senator to report to the Privileges Committee? Have you reported it to the Privileges Committee?

Senator Eggleston—It is very much a matter for the Minister for Defence.

Mr Rares—No; the Minister for Defence was interviewed this week asking whether his expressed views about a committee report that had not been tabled were designed to pre-empt that committee report when it was tabled. Do you remember that?

Senator Eggleston—I do. But the question is—

CHAIR—We can weigh up that point later.

Senator Eggleston—The minister, as has been said—

Senator CHRIS EVANS—I am no defender of the Minister for Defence, but it seems to me that this is a slightly different case.

Senator Eggleston—should not have had access to the report.

CHAIR—I think Senator Evans has assisted you, Mr Rares, but I am not sure you appreciate that.

Mr Rares—I will pass to another point. If you were prepared to accept for a moment that Mr Gawenda's statement was not disingenuous but was a serious statement that, had he been contacted, he would have considered the matter on the night, would you agree that it would have been wiser for you to have contacted him?

Senator Eggleston—Not at all. As I have said several times, my view was that the *Age* had been published, that the *Age* as an organisation was aware of the rules of privilege and that the journalist had made it quite clear that she knew what the rules were. It seemed pointless to pursue that issue with either the journalist or the *Age* editorial section. I may have been wrong, but that was my point of view.

Mr Rares—I appreciate that. What I was trying to ask you to consider is a little bit different from the way I think you understood my question. Let me try to spell it out. If you assume that Mr Gawenda is seriously telling the committee the truth—that, had he been contacted by you and told, 'If there is a breach of privilege involved it will be a serious matter and we would treat

it seriously,' he would have considered what to do—and if you also assume that your understanding of when the *Age* is published may not have been correct and that there was still time to do something about that, would you agree that, with the benefit of those two assumptions the matter might have fallen out differently had you contacted the *Age*?

Senator Eggleston—There is a remote possibility that that would have been the case, but the fact remains that the *Age* editorial section should have been aware of the rules of privilege and should have known that this article, which quite openly breached privilege, should have been withdrawn.

Mr Rares—And if one took the view that the members of the Senate, whose recommendation was being disclosed one day early, would not be deflected in resolutely defending their point of view in those recommendations by the early publication, wouldn't it be fair to say that you could take the approach that there would be no interference in the work of the committee on this occasion?

Senator Eggleston—You are a lawyer, Mr Rares. You know that the law is the law—there is a set of rules that govern privilege and they say that until a report is tabled and published its contents remain confidential. There is a principle involved and it is not a question of anything else but that principle.

Mr Rares—Would you agree that, in light of the jocularly with which you engaged with Ms Crabb on the night, she was entitled to form the view that you did not regard this as being a matter involving her getting into trouble?

Senator Eggleston—As I have said, the previous Wednesday Ms Crabb rang me and used a form of words in which she said, 'I know you will not tell me what is in this report.' This implies that she understood that I was not going to give her any information about the report and that she, on the other hand, understood the rules of privilege and by Sunday night had made a determination to publish an article regardless. It does not change the situation at all. There was no point in my raising the issue of privilege with her when she had made it clear that she was well aware of it, with respect.

Mr Rares—But you had deliberately decided not to raise the issue with her before you began the phone call. That is right, isn't it?

Senator Eggleston—I had decided not to raise it with her because I knew that she knew the rules, that she had been informed by my research officer at the end of the week. I saw her phone call as a courtesy in which she was informing me that, notwithstanding the rules of privilege, she was going to publish the article.

Mr Rares—If we move to a slightly different area, just to test your proposition that every possible breach of the rules is always serious, would you say somebody should be severely fined and dealt with for going one kilometre per hour over the speed limit, even though that is a breach of the law?

Senator Eggleston—Again we are dealing with the question of degrees, and I do not think it is for the media to set up or to assume that they have the right to determine degrees of privilege.

Mr Rares—I am asking you, Senator: do you say that every single breach of the speeding rules, whether it is one kilometre over or two kilometres over, should be treated as a serious offence because it breaches the technical terms of the statute?

CHAIR—Do you come from Victoria?

Mr Rares—No.

CHAIR—You would not have asked that otherwise.

Senator Eggleston—I must say in Western Australia the police radar guns are set to pick up even the slightest breach and so one is careful not to break them, Mr Rares.

Mr Rares—Yes, and that being so you know that there are degrees of seriousness of the breach. Is that right?

Senator Eggleston—It is possible that there may be but, as I have said, I am not prepared to accept that argument of degrees of seriousness of breaching privilege.

Mr Rares—I think you have made the point that, in relation to confidential information, you would regard any leak of that in breach of privilege as being a very serious matter. Would you agree?

Senator Eggleston—It is because of its broader implications. A culture has developed in which privilege is not being taken very seriously. In fact, a journalist told me that privilege was a joke. Privilege is not a joke; it is there for a very good reason because at times there are very important matters that come before these committees. So any breach, therefore, is important because it sets a precedent and gives journalists the feeling: 'Maybe this one isn't so serious, so we'll go ahead with it.' But any breach therefore interferes with the work of committees because it attacks the very basis of the whole system.

Mr Rares—Even though you are not able to point to any effect on your committee as a result of this particular leak.

Senator Eggleston—As I said, this situation has created an air in which one has to look at one's colleagues around the table and wonder whether or not confidential information given to the committee will remain confidential through either their own activities or those of their staff or of the committee staff. It does have serious implications.

CHAIR—Mr Rares, I am going to call, out of order, former Senator Bourne next because of cancelled flights, waitlisting et cetera, but do not feel under any pressure time wise.

Mr Rares—Thank you. I had just finished, before you indicated that.

CHAIR—Senator Eggleston, we will now take the opportunity for other members of the committee to ask you questions and, if you wish, you can make a final statement. Senator Johnston, did you indicate that you had a question?

Senator JOHNSTON—No, I have no questions.

CHAIR—I have just one further question. Often in these cases—although I must say that the *Age* almost commendably resisted on this occasion—the media has said to us that the public have a right to know. In the case of your report, is there any reason why the public had a right to know on Monday rather than on Tuesday that you can divine?

Senator Eggleston—The day that the public had the right to know was Tuesday, after the report had been tabled and published.

CHAIR—Do you want to make a closing statement, Senator?

Senator Eggleston—No, I do not think so.

CHAIR—Thank you for preparing that opening statement in particular—that was helpful—and thank you for your attendance. I now call ‘Senator Bourne’. I am a bit American: I keep using the title, even after you have left office! It is the one thing where I am Americanised.

[6.27 p.m.]

(Ms Bourne sworn)

CHAIR—Ms Bourne, did you divulge without authorisation of the ECITA committee any information relating to a report of the committee to Ms Annabel Crabb, the author of the article published in the *Age* newspaper on 17 June 2002, or to Mr Michael Gawenda, the Associate Publisher and Editor of the *Age*, or to any other journalist or other unauthorised person?

Ms Bourne—No, none of those.

CHAIR—Have you been able to ascertain whether any other person, such as staff that you may have shared the report with for the purposes of drafting, made an unauthorised disclosure to any of the abovementioned people?

Ms Bourne—I rang David Sutton, my staff member who was dealing with it, again today and he assures me still—and I have absolutely zero reason to doubt him—that the only people he spoke to about the report were me, the secretary of the committee and parliamentary staff advisers to other committee members.

CHAIR—Do you have any other knowledge of how information relating to the report was made available to Ms Crabb, the editor of the *Age* or any other journalist or unauthorised person?

Ms Bourne—No. I have no idea at all.

CHAIR—This question will probably be a little more difficult for you to tackle than the other witnesses, but I must ask it: given the chair’s letter advising that the ECITA committee came to the conclusion that disclosure caused substantial interference with the work of the committee, was that your experience?

Ms Bourne—No. It did not affect me at all because it was so late. I have just checked with the secretary and I was not even at the meeting of the committee when it was decided to send that letter. I do not think it had any effect on me at all.

CHAIR—Senator Sherry, do you have any questions?

Senator SHERRY—No. I would just like to welcome Ms Bourne back.

Ms Bourne—Thank you. I am leaving soon!

Senator JOHNSTON—Ms Bourne, did you become aware of the improper publication of the report prior to its tabling—that is, before it was tabled you knew that it had been released and published in the newspaper?

Ms Bourne—I think the copy of it came around from the secretariat the same day it was published, but I am not positive. If so, that is when I found out about it. So, yes, I would have, if that were the case.

Senator JOHNSTON—Did anyone ask you at that time or was there any question asked of you as to whether you had released it improperly?

Ms Bourne—No, I do not think so—although the committee secretariat did send around a request soon after asking me and David Sutton on my staff if we would make statements about whether we had disclosed anything or if we knew how it had been disclosed, and we both sent back statements saying, no, we had no idea. But I am not sure what the timing of that was. I think it was a bit after.

CHAIR—This is a bit like *Alice in Wonderland*. I should have asked you whether you wanted to make an opening statement.

Ms Bourne—No.

CHAIR—I presume not. You have no final statement?

Ms Bourne—No; just to thank the committee for rearranging and to thank Senator Mackay for letting me go on.

CHAIR—I now call Senator Mackay.

[6.31 p.m.]

(Senator Mackay sworn)

CHAIR—Do you have an opening statement?

Senator Mackay—No.

CHAIR—Senator Mackay, did you divulge without authorisation of the ECITA Committee any information relating to the report to the committee (a) to Ms Annabel Crabb, the author of the article published in the *Age* newspaper on 17 June 2002, (b) to Mr Michael Gawenda, the associate publisher and editor of the *Age*, or (c) any other journalist or unauthorised person?

Senator Mackay—No.

CHAIR—Have you made inquiries to ascertain whether any staff or other person that you shared this information with in the preparation of the report divulged this to an unauthorised person, including the three abovementioned?

Senator Mackay—I did, Chair, to the extent that, because I was in my electorate office, the emailed copy of the report came to my Canberra office which went to a member of my staff. That was the conduit through which I got the report. Given that the committee had determined that that particular staff would be required to make a similar statement to the rest of us, obviously I did inquire. No, there was no—

CHAIR—Have you any knowledge of how the information relating to the report was made available to Ms Crabb, the editor of the *Age* or any other unauthorised person?

Senator Mackay—No.

CHAIR—In the chair's letter to the President, he advised that the ECITA Committee came to the conclusion that the disclosure caused substantial interference with its work. Has that been your experience?

Senator Mackay—No. I probably should canvass this issue now. I am aware that the letter came from the committee—and I appreciate I may pre-empt some questions which may come from people on your right in relation to this. This is generally a very cooperative committee. We do get on very well. I have a lot of time for the chair of the committee. When this matter came before the legislation committee—it is a sad fact of life, Chair, as you would be aware, that we as the Labor Party do not have the numbers on the legislation committees—I felt, as did Senator Lundy, that Senator Eggleston did feel very personally aggrieved in relation to the matter. I myself did not feel that it interfered with my work at all.

CHAIR—At some stage a journalist may be criticised for a lack of attention to the Privileges Act, and you are basically saying that when this letter was sent you did not pay much attention to that aspect of it.

Senator Mackay—I am saying at that point I was fairly sanguine in relation to the reference. I recall I had been made aware—I cannot remember how—that Senator Eggleston had seemingly advised the journalist concerned that she was in fact breaching privilege. At that point that was my impression. What has subsequently emerged is that it seems that Senator Eggleston didn't. I am not sure where I got that information from, but that was my recollection. If that were the case, then clearly he had a point, I think.

CHAIR—I may have misunderstood Senator Eggleston's evidence today, but he said to us he gave a clear indication on the Wednesday, rather than the Sunday, that there may have been a breach of privilege involved.

Senator KNOWLES—Senator Mackay, what is your attitude towards parliamentary privilege? Do you believe that a journalist has a right to basically do what they want unfettered, regardless of whether it is a day before, an hour before or 10 weeks before a report is handed down?

Senator Mackay—No, of course I don't. I think that it has to be determined on a case-by-case basis. In this case I can say that, in terms of my working with the committee, it did not interfere with my tasks; nor did it interfere, I believe, ultimately with the relationships on the committee on this basis. That is not to say that in different circumstances I would have the same view, because I wouldn't.

Senator KNOWLES—Do you believe that that absolves the journalist or the *Age* from any responsibility of flouting the Privileges Act?

Senator Mackay—No, I don't. Having said that, though, if the key criterion is in relation to whether the committee's activities were adversely affected, in this case—from my perspective, and I can only talk on my behalf—I just cannot see how they were. They certainly were not, from my perspective.

Senator KNOWLES—Given that—from your perspective—do you still think that absolves everyone and that we should all just pack up our bags and go home and say: 'It does not really matter what the media does. They can just pick and choose a time that suits them to release any document regardless of whether or not it breaches privilege'?

Senator Mackay—I understand your point. No, I don't. My point is that in this case—the criterion that the chair has talked about; that is, did this impact adversely in relation to my view and my workings on the committee—I would have to say no. But I do accept your point.

Senator KNOWLES—I suppose I am pursuing a different dimension to that which you put to the chair, and that is that there is privilege, there are rules, and if one wants to just simply thumb their nose at the rules then you may as well throw out the whole rule book, not just part of the rule book.

Senator Mackay—I do appreciate your point, but I think there is an argument for a case-by-case assessment. But, having said that, I totally respect the nature of privilege and I do accept your point. This is my first Privileges Committee hearing ever, and I can simply make the point that, in terms of this case, I did not feel that it deleteriously impacted on my work within the committee or my relationship with my colleagues, which I believe is very good. I enjoy this committee very much.

CHAIR—I meant to follow up on that. We also have before us a fairly obviously contempt of the Senate to the person who disclosed the report. Senator Knowles has quite correctly been pursuing one angle, but you would concede that any senator or other person who leaked this particular matter has committed a contempt of the Senate.

Senator Mackay—Of course, Chair—absolutely. That is without question.

Senator JOHNSTON—Do you view a contempt of the Senate as a serious offence?

Senator Mackay—Of course I do.

Mr Rares—Senator, do you have the little booklet of materials that the committee has published?

Senator Mackay—I do. My staffer has it.

Mr Rares—I just wondered if I could ask you about something in the submissions.

Senator Mackay—Yes.

Mr Rares—In the discussion that you were having with Senator Knowles, you were talking about in effect degrees and the particular circumstances of the allegation of a breach of privilege being relevant to determining whether or not the matter amounted to a substantial breach of privilege. Could you please turn to page 25, which comes out of part of the submissions that my clients Ms Crabb and Mr Gawenda and the *Age* have made to the committee. At the top of page 25 there is an extract from resolutions of the Senate made on 25 February 1988. Is resolution 3(a) as extracted there the consideration that you had in mind when you were giving your answer to Senator Knowles a little while ago?

Senator Mackay—This would seem, I guess, to substantiate my personal contention that there are degrees and that it may well be germane to judge matters on a case by case basis. I think that is right. Having said that, I do not wish to take away from my commitment to both the chair and Senator Knowles that a breach of privilege is extremely serious. I do not resile from that.

Mr Rares—But, as the resolution of the Senate makes clear, the principle of invoking an actual finding that a contempt has occurred should only be made in cases where it is necessary to provide reasonable protection for the Senate and its members against improper acts, which tend to substantially obstruct them.

Senator Mackay—Yes. I think there are caveats there that need to be taken into account.

Mr Rares—May we take it from the exchange that you had with the chair, particularly about the way you perceived this particular disclosure in Ms Crabb's article to have happened, that from your point of view there has not been any interference with the work of the committee or with your ability to function as a member of the committee?

Senator Mackay—No.

Mr Rares—Thank you.

CHAIR—Do you have a concluding statement?

Senator Mackay—No.

CHAIR—Thank you.

[6.43 p.m.]

(Mr McLean sworn)

CHAIR—Do you have an opening statement, Mr McLean?

Mr McLean—No, thank you.

CHAIR—Did you divulge without authorisation of the ECITA Committee any information relating to the report of the committee to Ms Annabel Crabb, the author of the article published in the *Age* newspaper on 17 June 2002, or to the editor of the *Age* or to any other unauthorised person or journalist?

Mr McLean—No.

CHAIR—Have you made inquiries amongst your own secretariat, people who would have had access to the report, as to whether any of those individuals would have disclosed the report to any unauthorised person including the editor of the *Age*, Ms Annabel Crabb or any other journalist?

Mr McLean—As indicated in my submission, I sought the advice of secretariat colleagues, who have assured me that they made no such disclosures.

CHAIR—It is very much in the ethics of the committee to protect such information, isn't it?

Mr McLean—Yes.

CHAIR—The clerks of the Senate and others would remind you of your obligations in this regard, not constantly but on a regular basis.

Mr McLean—Indeed.

CHAIR—I am sorry, it is probably Ms Anne Lynch who does it. Do you have any other information relating to the report made available to Ms Crabb or the editor of the *Age* as to how this occurred?

Mr McLean—No.

CHAIR—I am not going to ask you whether the premature disclosure affects the cohesion of the committee. I do not think that I could expect you to offer an opinion on that one way or the other.

Mr McLean—I was going to plead the fifth!

CHAIR—I thought you might. In any event, I do not intend to pursue that with you.

Senator SHERRY—Since this incident occurred, have you had to change any of the procedures or the way in which the committee is operated in terms of disseminating information?

Mr McLean—I do not believe we have disseminated any information since this incident, but procedures have been in place and have worked successfully for many years.

Senator SHERRY—I am not going to the area that the chair talked about, and I do not want comments about individual members, but has the way that you operate as a committee continued in the same manner—

Mr McLean—It is completely unchanged.

CHAIR—I have one final question that has come up from other evidence. I think that we have evidence before us by way of submission that Ms Crabb did not see the report but had a verbal summary of a couple of the recommendations. When you actually circulate printed reports, do you vary them up so that each individual report can be identified?

Mr McLean—No.

CHAIR—That is the practice of one or two committees that deal with more sensitive material, I suspect. Mr Rares.

Mr Rares—I have no questions, thank you, Chair.

CHAIR—Thank you, Mr McLean.

Proceedings suspended from 6.47 p.m. to 7.01 p.m.

(Mr Gawenda sworn)

CHAIR—Mr Gawenda, I invite you to make an opening statement.

Mr Gawenda—All I want to do is take this opportunity to let the senators know that I take this matter seriously. The *Age* respects the Senate and the workings of the Senate committees. Indeed, for a long time the *Age*'s position on Senate committees has been that they are very important. They serve a very important function in our system and we would not want to do anything that undermined the committees. I do not believe that anything we have done has undermined the committee system. That is all I want to say at this stage.

CHAIR—Thank you for that. Are you acquainted with the terms of reference of this committee?

Mr Gawenda—I am not sure what you mean.

CHAIR—I am just asking you, as a preliminary question, if you are aware of what has been put before the committee.

Mr Gawenda—I am aware, yes.

CHAIR—Do you take responsibility for the publication of the article by Ms Annabel Crabb which is the subject of the present inquiry?

Mr Gawenda—Yes, I do.

CHAIR—You advised us on page 34 that you did not see the article before publication, so could I ask you who made the decision to publish?

Mr Gawenda—The decision to publish would have been made by the duty editor on the night, the Sunday night. I try not to work Sundays.

CHAIR—I was about to ask you if you were unfortunately on duty on the night of the 16th to 17th.

Mr Gawenda—I am always on duty but I was not in the office.

CHAIR—So you were not physically present. Was any indication given to you prior to that night that there would be an article on this particular subject and that it may contain matters referred to in a forthcoming report?

Mr Gawenda—Prior to the Sunday?

CHAIR—Yes.

Mr Gawenda—No.

CHAIR—When did you become aware that the article was an article which purported to be based on a yet to be published parliamentary committee report?

Mr Gawenda—My recollection is that I probably would have become aware of it when I read the article.

CHAIR—When you read the paper?

Mr Gawenda—Yes, in the paper.

CHAIR—I am not trying to verbal anyone here but I think it is pretty much assumed by the committee that Ms Crabb was aware that the disclosure was unauthorised. You do not have to respond to that part. To your knowledge, did she draw this to the attention of the person that night responsible for the publication?

Mr Gawenda—I do not know.

CHAIR—Have you discussed it with the person who authorised publication in terms of whether they thought the publication was of unauthorised material? I am sorry, that is a bit convoluted. In other words, Ms Crabb submitted the article and one of your assistants there decided to publish it and clearly did not ring you about it. Was it ever in their mind that they were publishing unauthorised material?

Mr Gawenda—I think they were aware that they were publishing a report by a committee that had not yet been tabled in the Senate. Yes, they were aware of that. From speaking to them, I think that their recollection is that there was some perfunctory discussion with Annabel on the night, just in terms of the story, but no real discussion about the status of the story. I think that is an accurate reflection of what happened on the night. I think that the editor on the night made the decision that this was not a serious matter—in other words, that publication would not interfere with the workings of the committee. Whether he got that information from Annabel, I do not know.

CHAIR—What sort of knowledge is there at that sort of level? For instance, if there had been—and there was not—an extant D-notice, how conscious would the people that hold these positions where they make a decision to publish something or otherwise be of parliamentary privilege or of any other restriction? For instance, if there were an article that contained the name of an ASIS officer, it would not be printed, would it?

Mr Gawenda—I am not sure. I am not sure how aware they are. Obviously, we are all generally aware of the position with reports of this kind. We are aware of the issues of contempt in criminal matters. I cannot answer the question off the top of my head as to whether it would be proper or not for us to publish the name of an ASIS officer. I would have to have advice on that; I do not know. If that was the question, I do not know the answer to it.

CHAIR—It is now not just subject to a D-notice; we have legislated that it is a criminal offence. I am not trying to trick you with that at all, but I am just trying to get to the point of what the extant knowledge is within the *Age* and the hierarchy of what is privileged, what is covered by a D-notice or what is defamatory and then what the procedure is to check all those criteria against any article coming in.

Mr Gawenda—I am not sure how widespread the knowledge is of what is covered by a D-notice, but I think amongst senior editors the knowledge of what constitutes contempt in criminal proceedings is pretty widespread, and I think the knowledge is pretty widespread of what constitutes one of the issues with privilege in terms of publishing material that comes out of Senate committees, for instance, or state government upper house committees.

CHAIR—It is not relevant to this inquiry, but I would like you to have a good look at the ASIO and ASIS act to make sure you never breach it.

Mr Gawenda—I will.

CHAIR—In this case was it ever considered, to your knowledge, by any inquiries you may have made of the people on duty that night, whether any of them thought they might be in contempt of the Senate?

Mr Gawenda—No.

CHAIR—What is the term here—that you often send an article off to be ‘legalled’? Is that the term that you use?

Mr Gawenda—That is true.

CHAIR—This one was not?

Mr Gawenda—This one was not.

CHAIR—Has Ms Crabb revealed to you her source?

Mr Gawenda—No, she has not.

CHAIR—Is it your understanding that this committee traditionally has not pursued either editors or journalists to name their sources?

Mr Gawenda—I do not know whether this committee has or has not pursued editors or journalists to reveal their sources.

CHAIR—I will come back to that, because it relates to another question I want to ask later. I think in your submission you imply—in fact, I think it is addressed fairly strongly—that Senator Eggleston had a responsibility to either remind the journalist or make some contact with the *Age*, urging them not to publish. Would you like to expand on that?

Mr Gawenda—My view is that at the point that Senator Eggleston became aware that such an article was going to be published, if he thought that it constituted a serious breach of privilege, it was open to him—and I would have thought it was his duty—to convey that to the journalist and if not to the journalist then to me. There are many instances where politicians contact me, not just on matters of privilege but on other matters, where they put a view about publication of a particular article. I always take those views into account; sometimes I do not publish and sometimes I do.

CHAIR—On this occasion Ms Crabb rang Senator Eggleston at 6.30—I think that is the case, isn't it?

Mr Rares—About 6.45, I think.

CHAIR—I am only saying that because it probably goes to Ms Crabb's credit that she did not ring one minute before publication time. But, first of all, would you clear up when you print and when you publish et cetera on a Sunday, just so we have it on the record?

Mr Gawenda—On Sunday night the first edition of the paper starts printing at around 10.30. Often, because our presses are not in terrific shape and we are about to move to new presses—

CHAIR—What—out Tullamarine way?

Mr Gawenda—out at Tullamarine, it starts printing even later than that—never earlier. That edition is a country edition. Of that edition we print less than a third of the papers that we distribute. Printing of the second edition starts around midnight. Up to midnight it is possible to change anything in the paper, and even after midnight.

Senator KNOWLES—Likely to change or possible to change?

Mr Gawenda—Some things are likely to change. If we discover a major mistake or that there is a report that is going to cause us some difficulties, we can even stop the presses after they have started and make a change. That happens quite often.

CHAIR—You may not be able to answer this question, or you may not want to, but it has been my experience that sometimes journalists cynically ring you when it is too late to change anything. To your knowledge, Ms Crabb would not have understood that Senator Eggleston, being a Western Australian, would have been in the air when she rang him?

Mr Gawenda—No. I would like to make this point: I have been editor of the *Age* for five years and in the five years that I have been there I have stressed to journalists that that is something I do not find acceptable, that people have to be given an opportunity to respond at the earliest possible time.

CHAIR—Yes. You have looked at the transcript of the conversation between Ms Crabb and Senator Eggleston's message bank. I know it has not been challenged so far. Do you have any comments to make on that?

Mr Gawenda—In my experience, and I have been a reporter in Canberra, reporters and politicians develop relationships. I would have thought that this was an example of a conversation between a journalist and a politician who knew each other pretty well, and that was the tone of the conversation.

CHAIR—I have never had a journalist ring me and say, 'I might be going off to jail.' You do not find that part of the conversation passing strange?

Mr Gawenda—I found it surprising but not strange.

CHAIR—I do not want to verbal you, but you are saying that that is part of the repartee, is it?

Mr Gawenda—I think it is, yes.

CHAIR—How do you think all the other journalists who were following this felt when they got scooped? We in the Labor Party might even say ‘got scabbed on’, but ‘scooped’ is the word I will use.

Mr Gawenda—How would the journalists have felt?

CHAIR—Yes.

Mr Gawenda—I do not know.

CHAIR—What if you are a diligent little eager beaver working for the *Australian* and you do not have the story and the *Age* has it? Won’t the editor of the *Australian* say, ‘Ms Crabb’s pretty good. She got the story; you didn’t’?

Mr Gawenda—I can only tell you how I would feel. If I were scooped, I would feel annoyed, yes, and I would think that I had been beaten to a story.

CHAIR—I was going to ask you about the 74th report, but I think you have indicated to me that whilst you are aware of the general principles of privilege you are not terribly au fait with them. Is that a fair comment?

Mr Gawenda—I am not an expert on privilege; that is true.

CHAIR—What is your knowledge of it? This is not an exam, Mr Gawenda, but do you have a general knowledge of it? Is it more state related or federal related?

Mr Gawenda—Could you ask me a specific question—how wide is my knowledge? I think that—

CHAIR—Yes, you are absolutely right to ask for a more specific question. Did you realise that one of the key criteria once you proceed down the contempt way is that a matter has to substantially interfere with the work of a committee? Were you aware of that before the matter was referred to this committee?

Mr Gawenda—Yes, I was aware of that. Why else would you have privilege if it was not about interfering with the work of the committee?

CHAIR—If you use that as a criterion, you cannot really make the judgment as to whether that is going to happen or not, can you, because you do not know the committee terribly well?

Mr Gawenda—I did not make the judgment in this case on that basis.

CHAIR—Yes, but I think you said if you had been rung and that had been explained to you, would you have taken that into account? Senator Eggleston said that that is disingenuous; I am taking what you are putting at face value.

Mr Gawenda—Are you asking me a question of how I would have responded had Senator Eggleston called me?

CHAIR—Yes.

Mr Gawenda—If Senator Eggleston had called me and expressed to me how seriously he took this issue—the way he did here today—I think I certainly would have taken his view seriously and I would have sought legal advice on the publication of the story.

CHAIR—You heard me ask someone earlier about the public’s right to know. Would you put that forward as a serious proposition: ‘I have a right to know on the Monday rather than the Tuesday’? I do not know that you have, but would you?

Mr Gawenda—I would put it a different way—that, as a journalist and an editor, my first instinct is to publish.

CHAIR—Why is that?

Mr Gawenda—Because that is the business we are in. The business we are in is to disclose and, given that that is the business we are in, that is my first instinct. There are, of course, lots of constraints on disclosure.

CHAIR—You would expect us to respect that?

Mr Gawenda—I would indeed, yes.

CHAIR—Why do you not respect the Senate’s desire to keep its reports confidential until they are published in the parliament and until every journalist and every newspaper proprietor has had an even go at it? Why do you not respect us?

Mr Gawenda—I do respect the Senate and its committees, but I do not think that the publication of this story showed disrespect to the Senate or to the committee, because in my view it in no way interfered with the operations of that committee.

CHAIR—I do not think you would contest the fact that premature disclosure by a senator—I am excluding staff here—is a contempt of the Senate. That is clear, isn’t it? We may quibble when it comes to the publisher but the actual disclosure prematurely of a report by a senator is a contempt.

Mr Gawenda—Yes.

CHAIR—My problem with this is that I do respect your right to protect your source. We could compel the journalist to come here and legally demand disclosure of the source, and then we could find the failure to do so as a contempt of the Senate. We have not exercised that

power; committee members and I have indicated that we do not intend to because we respect the profession of journalism and the job that you are in. I simply put to you again: why can't you respect our job? The premature disclosure of this information, whilst it may in some circumstances constitute a contempt of the Senate and in other circumstances not, is a breach of the way we do business, the same as it would be to demand that you provide us with a source. Why don't you give us that right?

Mr Gawenda—The question of whether we are in contempt is the key question, isn't it? If that is not the question, then I have to say that my first instinct, as I said to you before, is to disclose and to publish.

CHAIR—You see, this question does not go to whether you are in contempt or not; it goes to the argument you have adduced in your submission. That is why I have asked it. It does not make me decide with any finality as to whether any contempt has occurred or not. You say this is the business you are in; I accept that this is the business you are in. I am just trying to convey to you that we are also in a business. The fact is—and I have asserted very strongly to you—I bet a senator leaked this, not some staffer. We are also culpable and, until we can find the leakers, you are in a much safer position from criticism from me. Anyway, we can let that ride. Thank you for assisting me.

Senator KNOWLES—Mr Gawenda, are you aware of resolution 6(16) of the Senate on parliamentary privilege?

CHAIR—Could I interrupt here, as I did with Mr Rares? Make him aware and then we can get a response, because I cannot even remember what (16) is, off the top of my head.

Senator KNOWLES—It is:

Unauthorised disclosure of evidence etc.

(16) A person shall not, without the authority of the Senate or a committee, publish or disclose:

- (a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee ...

Were you aware of that, Mr Gawenda?

Mr Gawenda—In that sort of detail, no, I was not aware of it.

Senator KNOWLES—Who in your organisation is aware of it?

Mr Gawenda—I cannot answer that question.

Senator KNOWLES—Is there anyone in your organisation who would be familiar with parliamentary privilege?

Mr Gawenda—In general terms?

Senator KNOWLES—No, in precise terms, so that when an article is submitted by a journalist, someone in your organisation knows whether or not that is a breach or a contempt.

Mr Gawenda—As I said in answer to the chair, in general terms, I think that senior people on the paper know the position. What is that? This particular section, (16)(a), goes to it, doesn't it? We would know that. I would know that. I think most of the senior journalists on the paper would know that.

Senator KNOWLES—But it did not stop you printing the article.

Mr Gawenda—But I do not think we did that. I do not think we covered any document that was 'prepared for the purpose of submission, and submitted, to the Senate or a committee'. We published no such document.

Senator KNOWLES—But the report is just as important. The report has a deadline, and the report has a reporting date. Somewhere along the line, someone in the *Age* must say, 'I take responsibility for making sure that anything we print does not breach parliamentary privilege.' I want to know if there is anyone in the organisation that takes such responsibility.

Mr Gawenda—Ultimately, I take the responsibility.

Senator KNOWLES—But you have admitted you do not know anything about parliamentary privilege.

Mr Gawenda—I did not say that, Senator, with respect.

Senator KNOWLES—Were you aware that the disclosure of this document was a breach of parliamentary privilege?

Mr Rares—Can I object to that in the sense that—

CHAIR—No. We have not sworn you as a witness, Mr Rares, so you can indicate to Mr Gawenda that you would like to consult with him and he will in fact respond.

Mr Rares—I was not meaning any disrespect to you, Senator Knowles—

CHAIR—I am sorry. We have not sworn you as a witness. Does it suit you to operate that way?

Mr Rares—Would that be permissible?

CHAIR—Yes.

Mr Gawenda—Can you repeat the question, Senator?

Senator KNOWLES—Were you aware, in terms of the early reporting of this report, that under resolution 16(c):

A person shall not, without the authority of the Senate or a committee, publish or disclose:

.....

- (c) any proceedings in private session of the Senate or a committee or any report of such proceedings ...

Mr Gawenda—I was aware of that—I was aware of (c).

Senator KNOWLES—So you are quite happy that the report of the committee was disclosed in advance of being tabled and in contempt of the Senate?

Mr Gawenda—I was not there on the night but, in retrospect, I would have been aware of that and I would have made the judgment, unless I was warned, that this was not a serious breach of parliamentary privilege because it did not in any way interfere with the workings of the committee.

Senator KNOWLES—So you grade breaches? You take it on your shoulders to grade the breach. You make a decision that this is not an important breach, which is basically what you said to the chair in response to questions—that your first instinct was to disclose and publish, and that you did not really think this was a serious breach.

Mr Gawenda—That is right, yes.

Senator KNOWLES—What then makes you say in your letter that, had you been contacted by Senator Eggleston, you probably would have stopped the presses?

Mr Gawenda—I did not say that I would have stopped the presses. Nothing I said suggested that I would have stopped the presses.

Senator KNOWLES—In your letter, you state:

Had I been contacted, and the nature of the concerns of the ECITAL Committee been voiced to me, I would have certainly considered holding back the article until the following day.

Mr Gawenda—I said ‘considered’.

Senator KNOWLES—Exactly. So what you are saying to me is: ‘Whistle *Dixie* in a west wind. I would have considered it, but I did not think it was important, so I would have continued with the contempt of the Senate.’

Mr Gawenda—With respect, I do not think that is what I am saying at all.

Senator KNOWLES—Can you tell me what you are saying?

Mr Gawenda—I said I would have given it serious consideration. If Senator Eggleston had said to me that he considered this to be a serious breach of privilege and had set out to me why he considered it a serious breach, I would have obviously taken that view very seriously. I would have got advice on it from our legal advisers and then I would have made a decision on whether we should publish or withhold the article.

Senator KNOWLES—But you keep saying to the committee that you do not believe on this occasion that the contempt was a serious contempt, because—you qualify—you believe that it did not affect the working of the committee.

Mr Gawenda—Or seriously interfere with the workings of the committee.

Senator KNOWLES—The resolution does not have that rider on it.

Mr Gawenda—That is true, but if you look at page 25—this has already been referred to—at the top of the page it says:

... the principle that the Senate's power to adjudge and deal with contempts should be used only where it is *necessary* to provide *reasonable* protection for the Senate and its committees and for senators against *improper* acts tending *substantially to obstruct* them in the performance of their functions, and should not be used in respect of matters which appear to be of a *trivial* nature or unworthy of the attention of the Senate ...

I do not believe that anything that we disclosed or published had the effect of seriously interfering with, nor did it in any way work to substantially obstruct, the senators in the performance of their duties. I think that the evidence that I have heard here today seems to confirm that.

Senator KNOWLES—Is it not a bit cute to qualify it when, in black and white, the resolution states:

A person shall not, without the authority of the Senate or a committee, publish or disclose—

(a), (b) and (c), and (c) reads—

(c) any proceedings in private session of the Senate or a committee or any report of such proceedings ...

Is it not now a bit cute to say, 'That does not apply to us because this did not affect the proceedings of the committee'?

Mr Gawenda—The resolution that you referred to and the resolution that I read out are all part of the same resolutions passed on the same day.

Senator KNOWLES—I am reading from Parliamentary Privilege, Resolutions agreed to by the Senate on 25 February 1988', section 6, subsection (16).

Mr Gawenda—Yes, I am reading that. I am saying resolution 3 is from the same date, passed by the Senate on 25 February 1988. So the qualifier is part of the same resolutions.

Senator KNOWLES—I am sorry but it is not a qualifier in subsection (16).

Mr Gawenda—It seems to me that it is a qualifier.

Senator KNOWLES—In subsection (16) it has no such qualification. If you like, I will read it out to you in its entirety before it moves onto subsection (17). I have basically done that, but if you would like I will do it again. I will read it out in its entirety:

(16) A person shall not, without the authority of the Senate or a committee, publish or disclose:

- (a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;
- (b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or
- (c) any proceedings in private session of the Senate or a committee or any report of such proceedings,

unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.

The next clause is section 7. That is it.

Mr Gawenda—I would like to refer you to section 4 of the Parliamentary Privileges Act, which provides that:

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

Senator KNOWLES—That is another section.

Mr Gawenda—Yes, but it goes to the same question, doesn't it?

Senator KNOWLES—It might in your mind; it does not in mine. You are reading a section that might serve your purpose today. I am reading a section that I have read, unfortunately, many times before and this section quite clearly states that the report shall not be printed prior to it being put down in the Senate.

Mr Gawenda—I understand that, Senator. But what I am pointing out is that these sections that I have referred to show that there are degrees of breaches of privilege and of contempt, and that to establish a serious contempt section 4 makes clear what has to be established, as does the section that I read out before. That is the argument that I have made all along.

Senator KNOWLES—I understand that.

CHAIR—I cannot see how you can argue there are degrees of privilege. There may be degrees of assessment as to whether the breach of conduct constitutes a contempt. Surely that is a better way of expressing it.

Mr Gawenda—Okay, thank you; I agree with that.

Senator KNOWLES—You said that you were first aware of the article when you read the paper. What did you do then? Did any alarm bells ring and say, 'Uh-oh! This is pre-empting the tabling of a committee report. This is a possible breach of parliamentary privilege'?

Mr Gawenda—I cannot recall. That is the truth—I cannot recall.

Senator KNOWLES—I would have thought that in a situation of a breach in parliamentary privilege one might have a vague knowledge and one would pick up a phone and say, 'Who on

earth let this go to print when it is a breach of privilege?’ So you have no recollection of such an action?

Mr Gawenda—No, I do not.

Senator KNOWLES—Did you immediately realise that it was a contempt or a possible breach of parliamentary privilege?

Mr Gawenda—I cannot recall what my reaction was when I read that article.

Senator KNOWLES—Am I left to think that, if you cannot recall the seriousness of this when you read it, maybe you did not think much about it? You just thought, ‘Oh well, it is just another report.’

Mr Gawenda—No, I do not think that is true.

Senator KNOWLES—Either you did think it was a problem with parliamentary privilege or it just went straight through to the keeper.

Mr Gawenda—At some stage, I must have become aware that this article, in some way, might have breached privilege. I cannot recall this. Let me make the point that we publish hundreds of articles, many of them about parliament, including the Victorian parliament. We publish many articles about committee reports. I cannot tell you categorically that I remember my response to this report. My feeling probably would have been: ‘It is the day before the report is published’—or whatever it is; I cannot recall—and this is not a serious issue.’ If I had thought it was a serious issue, I would recall it as having been serious at the time. I do not recall that and therefore I assume that that must have been the case.

Senator KNOWLES—Are you aware of the 99th report when News Limited was found to have disclosed material contrary to parliamentary privilege?

Mr Gawenda—I have not read the report.

Senator KNOWLES—Am I right in saying that this was provided?

Mr Gawenda—I did not see that report. It was not provided.

Senator KNOWLES—It was referred to in submissions but not read? It was referred to in your submission.

Mr Gawenda—It was not referred to by me.

Senator KNOWLES—It was referred to by your counsel.

Mr Gawenda—Yes, it was.

Senator KNOWLES—I would have thought that that would be something with which you might make yourself familiar, considering it is in your submission.

CHAIR—You were asked the question whether you have read it and you have said no, so we will proceed.

Senator KNOWLES—Are you likely to make yourself aware of the findings against News Limited in the 99th report?

Mr Gawenda—I do not know. I will probably read the report, yes.

Senator KNOWLES—Why do you believe it was the responsibility of Senator Eggleston to ensure that parliamentary privilege was known by Ms Crabb on the Sunday night when he had already done so? His staff member had already done so; Senator Lundy had already done so. Why is it that you now come before the committee and say that, having done all that, Senator Eggleston still had a responsibility to say to her, when she had admitted that she knew it was a breach of parliamentary privilege, that she was breaching parliamentary privilege? Isn't that sawing sawdust?

Mr Gawenda—I do not think so. I think it was incumbent on the chairman of the committee to make it clear to the journalist in the clearest possible terms—or to me—that he considered this a serious breach of parliamentary privilege.

Senator KNOWLES—Why do you believe that Senator Eggleston had not already done that when he has sworn on oath that he has done it, his staff have done it and Senator Lundy has done it? And you can still sit there and say to me, 'Oh well, I think someone else should have done it again,' when she has admitted in her transcript that she knows it is a breach of privilege.

Mr Gawenda—I do not think she admits that she knows at all that it is a serious breach of privilege.

Senator KNOWLES—Why would she expect to go to jail then?

Mr Gawenda—That was a joke, Senator.

Senator KNOWLES—Oh, come on, Mr Gawenda, really!

Mr Gawenda—Are you suggesting to me that she thought she was going to go to jail?

Senator KNOWLES—No. I am seriously suggesting to you, Mr Gawenda, that she knew that it was a breach of privilege because she had been trying to source the document for the entire week beforehand and was repeatedly told by senators and their staff that they would not provide the document on the basis that it was going to be a breach of parliamentary privilege.

Mr Gawenda—For them to give her the document, yes, that is true.

Senator KNOWLES—For them to give her the document and for her to report it.

Mr Gawenda—I do not know whether that was—

Senator KNOWLES—She knew that. That is why she made the call.

Mr Gawenda—That was not Senator Eggleston's evidence as far as I heard. His evidence was that his staff said that they could not release the document because that would be a breach of parliamentary privilege.

Senator KNOWLES—That is right and she knew that, and that is why she made the call and said, 'I am going to go to jail but ha-ha-ha.' I think it is admirable that you defend your staff at all costs but I think we need to look at the words that she said:

Anyway when you put me in jail I am sure I shall make an impassioned plea for my own freedom.

Are you honestly suggesting to me that those words did not resonate with some concern with you—

Mr Gawenda—I am honestly suggesting to you that at that point Senator Eggleston, instead of making a joke about Enid Blyton, should have said to her, 'Annabel, this is serious in my view and this could have serious consequences.' That is all he had to say.

Senator KNOWLES—Even though he and others had done so regularly throughout—

Mr Gawenda—He had not. I do not think he had.

Senator KNOWLES—He had.

Mr Gawenda—He had never said to her, 'Do not publish because publishing anything would be a serious breach of privilege.' I do not believe that he ever said that. All I am saying here is that she made a joke. It may not have been an appropriate joke. His response to the joke was to make another joke.

Senator KNOWLES—Thank you.

Senator REID—In paragraph 32 on page 30, you state that you make no criticism of Senator Eggleston, but I have to say that I take the two previous paragraphs as actually doing so. The point that I wanted to raise is that you said:

It is open to the Committee to take the view that the Age parties ... were entitled to proceed ...

However, the little bit interposed there says:

... who gave the Senator an opportunity to respond to the Article before it was published ...

Where is the evidence that that opportunity was given to him?

Mr Gawenda—The phone call was that opportunity and he took that opportunity.

Senator REID—You have a Western Australian senator returning to Canberra on a Sunday night. You are saying that a phone call at 6.44 p.m. when he would not get to Sydney until somewhere between half past 10 and 11 is a serious attempt to give a man an opportunity to respond to an article being published that very night—the first edition of which was probably out before his plane landed?

Mr Gawenda—The first edition was not out. That is the first thing. I am not aware whether Annabel Crabb knew that the senator was on a plane or not.

Senator REID—She must know that he is a Western Australian.

Mr Gawenda—I do not know if she knew whether he was on a plane or not.

Senator REID—It is a pity that she did not come. She could have told us some of these things herself.

Mr Gawenda—I assume that she contacted the senator at the earliest opportunity that she had.

CHAIR—By that, are you implying that the article was only finalised some time just after six o'clock?

Mr Gawenda—I do not know. It is possible; I do not know the answer to that question. I said before that the rule at the *Age* is that we give people every opportunity to respond. It is a general rule. I am not saying that rule is never breached but it is a general rule well known by journalists on the *Age* that we do not wait until the last minute to give people an opportunity to respond. We give them an opportunity to respond at the first available chance that we have got after the story has been confirmed.

Senator REID—I hear what you are saying as far as that is concerned. In paragraph 33 you attack the jurisdiction of this committee. Have I interpreted that correctly?

Mr Gawenda—Sorry?

Senator REID—In paragraph 33, on the same page, you suggest that this committee has no jurisdiction to pursue this matter. I am just wondering if you could elucidate? In a sense I am questioning what definition you put to 'jurisdiction' in that context.

Mr Gawenda—That question should go to our legal adviser.

Senator REID—My problem is that he has not been sworn as a witness.

CHAIR—We will rephrase the question. Do you agree with the submission put in by the legal team on your behalf?

Senator REID—I am not agreeing with it, but I understand what you say when you say that the *Age* submits that the committee has no need to pursue the matter. I accept that as your submission even though I may disagree with it. But then there are the words:

... —and indeed, no jurisdiction—...

What was the significance of that comment?

Mr Gawenda—I do not feel competent to answer that question.

Senator REID—Perhaps we should just strike it out.

CHAIR—No, you might ask Mr Rares, when he submits on behalf of the *Age* at a later hour, to address this issue. Is that suitable for you, Mr Gawenda?

Mr Gawenda—Yes.

Senator REID—It may not be very significant. It just struck me as something that ought to be explained, if you are suggesting that this committee has no jurisdiction to be hearing this matter. I have nothing further to pursue.

Senator PAYNE—Let me first of all, Mr Gawenda, apologise for the disruptive nature of the current state of my health to the committee's proceedings—I have tried to leave the room as much as possible. I want to ask you a couple of questions flowing from your responses to Senator Knowles, which will require me to paraphrase what I understood you to be saying, so please correct me if I get that wrong. I understood you to say that your probable response—although not necessarily your specific recollection, given the volume of work that your newspaper produces—was that, when you read the story, you looked at it and you probably thought that it was the day before the report was to be published, so, although you were cognisant of the implications of breaching the privilege rules of the Senate, it probably was not a very serious problem.

Mr Gawenda—I think that is probably a reasonable summary of what I was saying, yes.

Senator PAYNE—Would you have regarded it as a serious problem if you had read a similar story that indicated the report was to be published in one week's time? Would two weeks time have been a serious problem? Where do you, as the editor of the *Age*, draw the line on what is a serious problem in terms of breaching Senate privilege?

Mr Gawenda—I would make that judgment on the basis, again, of whether publication of the story would be, or could be, seen as seriously interfering with the work of the committee. If the committee's report was final—finished—I am not sure that a day before or a week before makes all that much difference.

Senator PAYNE—I am not sure that I understand why you use the guideline of time as your question of degree of seriousness. For example, a committee is producing a report on a highly contentious, extremely serious issue which is a matter of significant political moment and, for the senators concerned, producing that report entails some effect or repercussion on them as individual senators in how they go about doing their work—an impact, to put it entirely bluntly, on their own careers—and they are taking their jobs very responsibly and are trying to produce a responsible report. If you decide outside the normal processes of Senate procedures and the privilege procedures of the parliament that, just because it is the day before the report is meant to be published, it is not a very serious issue, what about the serious impact that it has on the senator trying to fulfil their professional role, which you have indicated you do regard as important?

Mr Gawenda—Of course I would take that into account. I was not arguing that this was simply about the fact that this was published a day before the report was going to be released.

Senator PAYNE—Then I have misunderstood you. What was the fine point of your argument?

Mr Gawenda—I was saying that it goes to the question of whether this could have interfered with the work of the committee or the work of the senators. In my view, given that the report was final, finished and about to be published, I cannot see how it could have.

Senator PAYNE—But how do you make the judgment that it is not serious for a senator who is in the position in this specific instance of making a recommendation which it appears may not be entirely popular in their own party—in the government, in this instance—given that you did not even see the story, of course?

Mr Gawenda—I assume that a senator who has been part of this committee and has worked to and agreed to the final recommendations of that committee is in a position where he or she can defend the committee's recommendations and his or her views on the committee's recommendations.

Senator PAYNE—I think that is a safe assumption to make, Mr Gawenda, but do you also then assume that reporting dates are chosen for no reason at all, that we just pluck them out of the sky and think, 'That will do, that is between Monday and Wednesday, and why not'?

Mr Gawenda—No, of course not.

Senator PAYNE—Or do we choose them for a reason?

Mr Gawenda—Of course I don't think they are just plucked out of the sky.

Senator PAYNE—I am trying to get to what you really identify—what guidelines you choose—to say that this was not serious but others are.

Mr Gawenda—I have tried to explain why I thought this was not serious, and why I continue to think it is not serious. The evidence before this committee from senators on the committee seemed to suggest to me that they did not feel like they had been interfered with in the execution of their duties, they did not feel like they trusted the senators that they worked with any less than they had before and there had been no improper interference with the working of the committee. It seemed to confirm that.

Senator PAYNE—If your interpretation is correct, and I am not saying that I accept your interpretation, is that not a huge relief for the *Age*?

Mr Gawenda—It is always a relief to get things right, Senator. I will repeat this again: we are in the disclosure business. That is where I come from. I think that the senators on the committee understand that. They deal with journalists all the time—

Senator PAYNE—Yes, we do understand that.

Mr Gawenda—and know what motivates journalists and know what our role is. We share some things in common and in some things we are in conflict or in disagreement. This is what happens, because we come from different perspectives.

Senator PAYNE—To paraphrase the chair, and he will certainly correct me if I am doing it in an inaccurate manner, we are in the business of trying to observe the professional responsibilities that we have as well. Clearly some of us do not or we would not be here tonight. I acknowledge that and I have been down this road myself, so I know exactly what sort of experience we are talking about.

Mr Gawenda—Senator, do you understand that I am not going to be critical of politicians who leak?

Senator PAYNE—Of course you are not. I assume you want your bread and butter, so I do not expect you to be critical of politicians who leak. I might be, but that is another issue. In your submissions in paragraphs 16 and 17, you refer to the nature and circumstances of the present disclosure and most specifically in paragraph 17 you say, ‘There is no evidence of any improper intention.’ But there is evidence to the committee, isn’t there, that there was an absolute intention to publish the recommendations of the committee before the report was tabled? I regard that as an improper intention. It is not a proper intention.

Mr Gawenda—There was no improper interference with the workings of the committee.

Senator PAYNE—But that is not what that says. That says, ‘There is no evidence of any improper intention.’ I regard the deliberate publication of the recommendations of a committee report before it is tabled as improper, and certainly as intentional in this case, particularly if you read the transcript of Ms Crabb’s message.

Mr Gawenda—If you go back to the first sentence of paragraph 17, I think it answers that question:

There can be no suggestion that the Disclosures were intended to amount to an improper interference with the authority or functions of the Senate or the ... committee.

The next sentence goes to that same thing.

Senator PAYNE—In fact, you have helped me enormously, Mr Gawenda. They clearly were intended to amount to improper interference with the authority or functions of the committee in this respect because clearly they were improperly intending to release the recommendations of the report before it was tabled.

Mr Gawenda—They were not designed to improperly interfere with the committee.

Senator PAYNE—So they properly interfere with it?

Mr Gawenda—The committee’s report was finished. There was no intent here to influence the committee in any way or to reveal confidential evidence that had come to the committee. Nothing like that was there.

Senator PAYNE—So we are back to it not being serious?

Mr Gawenda—The degrees of seriousness matter, don't they?

Senator PAYNE—A bit like degrees of separation, yes, I suppose they do; in your view, yes, they certainly do.

Mr Gawenda—Don't they in all proceedings?

Senator PAYNE—The question which we are trying to determine today and which I was pursuing with you earlier was: where do you decide to draw the line on what is serious and what is not? It does not leave me with a great deal of confidence to know that the way your organisation determines the seriousness of a breach of parliamentary privilege is according to whether you think it is going to have a real impact on the senators concerned or the procedures, as opposed to whether it is a blatant breach of the rules of parliamentary privilege, which I regard as fundamentally serious. Thank you, Chair.

CHAIR—Mr Gawenda, did you want to comment on that final comment?

Mr Gawenda—No.

Senator JOHNSTON—Mr Gawenda, how long have you been a newspaperman?

Mr Gawenda—Thirty years.

Senator JOHNSTON—Have you been editor-in-chief of a number of newspapers?

Mr Gawenda—No.

Senator JOHNSTON—Have you been on the publishing side?

Mr Gawenda—You mean have I been the editor of other publications?

Senator JOHNSTON—Yes.

Mr Gawenda—I was the editor of *Time* magazine before I came to the *Age*.

Senator JOHNSTON—Are you the editor of the *Age*?

Mr Gawenda—Yes, I am.

Senator JOHNSTON—When I look at that article Ms Crabb has written, it seems very clear that she is, and I wonder whether you would concede, obviously purporting to be relating a report that has been given to her in some form or other—oral or written or whatever. Do you accept that?

Mr Gawenda—No, I do not.

Senator JOHNSTON—Let us have a look at Ms Crabb's article, which is on page 3 of the small booklet. In the last three lines of the first paragraph, she says:

... a report on the media ownership legislation is to be handed down tomorrow.

In the third paragraph in the first column, she says:

It is believed the report from the Senate's communications committee supports the legislation but recommends that journalists be compelled to disclose proprietors' cross-media interests when reporting news stories that affect those interests.

She goes on at the top of the second column:

The Age believes the committee's report, due to be tabled in Federal Parliament tomorrow, also recommends adopting a different cross-media regime for regional Australia, in which proprietors would be allowed to own only two forms of media in any given area —out of television, print and radio.

Lastly, in the third column, at the bottom of the very last paragraph, she says:

Tomorrow's report from the committee's Coalition majority will be accompanied by a dissenting report from Labor and the Democrats, which have pledged to oppose the legislation in the Senate.

Do you accept that she is clearly privy to inside information as to the workings, resolutions, views and findings of that committee?

Mr Gawenda—No. I think your question is too broad. I think that this article suggests that someone or some number of people have told the journalist some things—a limited number of things—about what this committee might recommend, and she refers to those.

Senator JOHNSTON—Your concession is that she has been told things about what this committee may recommend?

Mr Gawenda—Indeed, yes.

Senator JOHNSTON—In other words, there has been a clear disclosure to her as to the committee's report and the contents thereof?

Mr Gawenda—No.

Senator JOHNSTON—Or some of the contents thereof?

Mr Gawenda—Clearly, yes.

Senator JOHNSTON—There has been a clear disclosure to her of the committee's report and some of the contents thereof. Do you accept that?

Mr Gawenda—No. I say again that the article clearly sets out what she believes are some of the recommendations in this report—two of them specifically.

Senator JOHNSTON—Are you saying she is guessing?

Mr Gawenda—No, I am not saying she is guessing at all.

Senator JOHNSTON—So she has had disclosed to her, from a source or sources unknown, some of the contents of the report? All I am asking you to do is to confirm that that is what the article clearly imparts.

Mr Gawenda—I assume so, yes. But the article does not say any more than that.

Senator JOHNSTON—That is fine. So she has had disclosed to her some of the contents of the report, and she has republished those disclosures in this article?

Mr Gawenda—Not as fact, mind you, but ‘it is believed’.

Senator JOHNSTON—Certainly. So you are saying that the words ‘it is believed’ absolve you as editor and publisher from the allegation that she has been privy to some disclosure from the committee?

Mr Gawenda—No, not at all.

Senator JOHNSTON—That is good. Given your 30-year experience, if you had seen this article on the Sunday night in the form we now see it, would you have had any concerns with it?

Mr Gawenda—It is a very hard question for me to answer, given everything that has happened since. It is very difficult for me to give you an answer to that question.

Senator JOHNSTON—I want you to think how many times you have had to refer matters to lawyers for legal advice, and you probably have them on the end of a phone every night.

Mr Gawenda—Yes, that is true.

Senator JOHNSTON—Just readdress that consideration to the answer to the question: given you have said that you understand subsection (16)(c) of the resolutions and given your 30-year experience, would you have had any concerns with Ms Crabb’s article?

Mr Gawenda—Senator, as I said to you before, my view now would necessarily be tainted by what has happened subsequently, so it is difficult for me to answer that. It is like an ‘in hindsight’ question, so I find it difficult to answer. There are lots of things that I refer to lawyers.

Senator JOHNSTON—So you are saying that you cannot say whether or not you would have referred that article for legal advice?

Mr Gawenda—It is possible.

Senator JOHNSTON—Why would it be possible?

Mr Gawenda—It is possible for lots of reasons. It is possible that, had I been in the office, I would have spoken to Annabel.

Senator JOHNSTON—I am saying we are assuming you were there. I am not saying you had any discussion; I am saying just looking at the article.

Mr Gawenda—It is possible I would have spoken to Annabel.

Senator JOHNSTON—Why?

Mr Gawenda—Because I might have had some concerns about the article.

Senator JOHNSTON—What concerns?

Mr Gawenda—It involved a Senate report that was going to be released the next day.

Senator JOHNSTON—Thank you. You say that you had one-third of your edition out and about, released and published and that, if there had been a question raised with you, you could have, if you had so decided, withdrawn the article from the balance two-thirds of the publication. How many newspapers comprise approximately one-third of your publication?

Mr Gawenda—First edition comprises not exactly a third; it is about 60,000 copies.

Senator JOHNSTON—And where do they get sent to?

Mr Gawenda—They mostly get sent to country Victoria.

Senator JOHNSTON—Do they go to Canberra?

Mr Gawenda—No. If we do not have printing problems, Canberra gets a second edition of the paper. If we have printing problems, Canberra tends to get a first edition.

Senator JOHNSTON—So you concede that, at the time of Senator Eggleston's discussion with Ms Crabb, one-third of the publication going out to country Victoria was on the road and the article was in there and unable to be altered?

Mr Gawenda—I do not know the answer to that. I cannot concede that, because I do not know when printing first began on that night. When printing starts, it does not mean that it cannot be stopped. Between 10.30 and 11, we might have printed a few thousand copies of the paper.

Senator JOHNSTON—If I can just take you to the middle paragraph on page 35 commencing 'Had I been contacted', the second sentence reads:

Even at such a late stage on the evening of June 16, I would have been able to have the story removed from the Melbourne edition, where the majority of our readership lies, and it is quite possible that the story could have been removed from all editions.

Mr Gawenda—Indeed.

Senator JOHNSTON—What time is your deadline for removal of stories from all editions?

Mr Gawenda—Firstly, can I explain what that means.

Senator JOHNSTON—Yes.

Mr Gawenda—The approximate starting time for printing that first edition of the paper is 10.30. Sometimes the printing of that paper does not start until 11 or 11.30—for various reasons. Unfortunately, because of the problems we have with old presses, more often than not we start printing later than the scheduled times for starting to print. That is what that refers to. But certainly in terms of the second edition, the main edition, which involves about 140,000 to 150,000 papers, that could have been stopped.

Senator JOHNSTON—Who is the person who determines whether those editions are stopped, withheld or altered or the article is pulled? Who is the person that that power resides with?

Mr Gawenda—With me.

Senator JOHNSTON—Would you have done it on this occasion, given the knowledge you have tonight?

Senator KNOWLES—And that you were working.

Mr Gawenda—Sorry?

CHAIR—No, just respond to Senator Johnston's question.

Senator JOHNSTON—I am not sure it is appropriate for counsel to assist the witness in that instance. It is a personal question. It is not a legal matter.

CHAIR—I will just remind you, Senator Johnston, that I invited him to assist at any stage, so he is entitled to. You can draw your own conclusions from that, of course.

Senator JOHNSTON—Thank you.

Mr Gawenda—Senator, I think I have answered that question, but I am happy to answer it again. Had Senator Eggleston called me and expressed the sorts of concerns that he expressed here today, I would have, at the very least, consulted our legal advisers, told our legal advisers what Senator Eggleston had conveyed to me and then listened to their advice.

Senator JOHNSTON—Why would you have done that?

Mr Gawenda—I will go back to what I said before: because my instinct is to publish. That is the business I am in and so I want to do whatever I can to publish.

Senator JOHNSTON—You would have seen the risk in publishing this, and that is why you would have consulted your solicitors with the object of obtaining advice that would have permitted you to publish?

Mr Gawenda—I would have asked the solicitors for advice on how serious this was. Yes, that is exactly what I would have done.

Senator JOHNSTON—There is a possibility that it is quite serious, isn't there?

Mr Gawenda—I cannot answer that question, Senator. That is for you to decide.

Senator JOHNSTON—I think that is right. When, as editor, a contempt of court is committed, it is very often the case that the editor is not even aware of the publication giving rise to that contempt. Correct?

Mr Gawenda—Sorry, I do not understand the question.

Senator JOHNSTON—Let me give you an example. If you publish a story about a person who is then before the courts on a matter separate to the article, that is a contempt of the current proceedings. Correct?

Mr Gawenda—Yes.

Senator JOHNSTON—And it is quite often that the editor will be prosecuted for contempt for that publication?

Mr Gawenda—I do not know about 'quite often'; it does happen.

Senator JOHNSTON—Yes, and the editor's knowledge of those sub judice proceedings is not a defence to those charges of contempt. Correct?

Mr Gawenda—In my experience—and it is limited on this—it is a mitigating factor.

Senator JOHNSTON—Certainly, but it is not a defence.

Mr Gawenda—It is a seriously mitigating factor.

Senator JOHNSTON—I will accept that, a seriously mitigating factor, but it is not a defence.

Mr Gawenda—But we are talking about degrees of offence, and it mitigates the seriousness of the offence.

Senator JOHNSTON—Let me take you to section 13 of the act, which you refer to on page 31 of your submission.

CHAIR—Is this about in camera evidence?

Senator JOHNSTON—No. It states:

“A person shall not, without the authority of a House or a committee, publish or disclose:

- (a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera;
.....

unless a House or a committee has published, or authorised the publication of, that document ...

Are you familiar with that?

Mr Gawenda—Yes.

Senator JOHNSTON—You will note that there are no penalties available in that section in the copy you are reading from. Are you aware of the penalties for breaching that section?

Mr Gawenda—I am aware that the Senate is able to impose both monetary penalties and prison sentences for contempt.

Senator JOHNSTON—Do you view a breach of that section as being a serious matter?

Mr Gawenda—It is such a wide question. It depends on paragraph 12, section 4, doesn't it?

Senator JOHNSTON—I am just asking about the section. It says that a person shall not disclose a document that has been prepared for submission et cetera, and then it has penalties. The penalties appear to be quite severe to me. I will leave it up to you. They are \$5,000 and imprisonment for six months; or, for a corporation, \$25,000. Do you consider that a serious matter?

Mr Gawenda—They sound like serious penalties, but I assume that, again, it is a question of degree. Anyway, I think this is a hypothetical question. I do not think we were guilty of this.

Senator JOHNSTON—Let us go back to resolution 6(16)(c), which says that a person shall not disclose:

- (c) any proceedings in private session of the Senate or a committee or any report of such proceedings.

Do you believe that the public interest of a newspaper would override the necessity for that provision?

Mr Gawenda—It is a hypothetical question that I cannot answer.

Senator JOHNSTON—In this instance, do you believe that the public interest in the article published by your newspaper was of a greater priority than the provisions that I have just read out to you?

Mr Gawenda—I have got to answer that in the only way that I can, and I have answered that before: I do not think that this was a serious breach.

Senator JOHNSTON—I was asking you about whether the publication of this article—and you are the man where the buck stops at that newspaper, so I am led to believe by you—

Mr Gawenda—That is the truth, Senator. You are not just led to believe. It is true.

Senator JOHNSTON—I accept that. That is why I am asking you the question. Do you consider that the public interest in that article was superior and of greater priority than the provisions that I have taken you to?

Mr Gawenda—In retrospect, are you asking?

Senator JOHNSTON—I am asking you now.

Mr Gawenda—You are asking me in retrospect. In retrospect, I go back to what I said before: had Senator Eggleston alerted me to the fact that he considered this to be very, very serious, I would then have seriously considered what he was saying to me and got advice on it. Perhaps the outcome of that would have been nonpublication of the article, but I cannot guarantee that.

Senator JOHNSTON—But I am not asking you that; I am asking you whether, now that the article has been published and your submissions say this—I am not going to put your submissions to you, because I know how those came to be made; the lawyers are doing something on the margin and you are not particularly aware of that—and you have read the subject matter of the article and understood all of the background to that story, you now consider the public interest in that story to be of greater importance than compliance with the provisions of the parliament.

Mr Gawenda—I answer it again in the same way: I do not think that this was a serious breach of parliamentary privilege. My instinct and my interest is disclosure. That is the only way I can answer the question.

Senator JOHNSTON—Do you think there was any public interest in the story?

Mr Gawenda—There is always public interest in the story.

Senator JOHNSTON—So you concede that the contempt, if there was one, was trivial or technical?

Mr Gawenda—I do consider that to be the case.

Senator JOHNSTON—Do you accept that Senator Eggleston would have been telling the truth if he had said to Ms Crabb, ‘Annabel, this is a very serious breach of privilege’?

Mr Gawenda—I accept that that would have been his considered view.

Senator JOHNSTON—Why do you accept that?

Mr Gawenda—I have no reason to believe that he would lie.

Senator JOHNSTON—So you think that he is an honest, believable person?

Mr Gawenda—Do I believe that now?

Senator JOHNSTON—Yes.

Mr Gawenda—No, I do not. I think Senator Eggleston lied to Annabel. I do not think lying is justified under most circumstances, and it is certainly not justified under these circumstances.

CHAIR—We are getting a bit close to the wind here.

Mr Gawenda—I am being asked the question.

CHAIR—I understand that. I said ‘getting a bit close to the wind’; I did not rule you out. You are responding to a question asked.

Senator JOHNSTON—Your evidence was that things would have been very different if he had said, ‘Annabel, this is a serious breach of privilege.’

Mr Gawenda—Yes, indeed.

Senator JOHNSTON—Is that because you would have believed what he had said?

Mr Gawenda—Yes. I have said that. But that is not what he said.

Senator JOHNSTON—That is right. Have you read the words of the phone call to the senator?

Mr Gawenda—I have.

Senator JOHNSTON—Do you maintain that something could still have been done to kill the story had Senator Eggleston said what you think he should have said?

Mr Gawenda—Indeed I do.

Senator JOHNSTON—Doesn’t that stand in the face of the tenor and the tense of her words?

Mr Gawenda—I do not understand the question.

Senator JOHNSTON—Aren’t you seeking to create a situation that really, on the facts, cannot be created? If you look at page 7, you will see that she said ‘anyway, when you put me in jail’. Isn’t that a fait accompli?

Mr Gawenda—That she thinks she is going to be put in jail?

Senator JOHNSTON—Yes.

Mr Gawenda—I do not think so.

Senator KNOWLES—Because she knows the penalty.

Senator JOHNSTON—I am not asking you to give an opinion as to whether she will or will not be going to jail; I am asking what you think those words could reasonably be construed to mean.

Mr Gawenda—Those words can reasonably be construed to be a joke, as is the whole tenor of her message.

Senator JOHNSTON—But don't they—

CHAIR—With respect, Senator Johnston, I do not think you can pursue that. I think you have got your answer to that. You cannot expect someone to put themselves entirely in the mind of someone else, and you have got an answer.

Senator JOHNSTON—I have nothing further.

CHAIR—Thank you for your efforts. Senator Reid might want to follow something up before I defer to colleagues on my—

Senator REID—It is probably a matter to be dealt with by counsel, but the statement I referred to talks about giving the senator an opportunity to respond to the article before it was published. I have now found the bit that I should have had at my fingertips at the time. On page 41, briefly, she says that she phoned between six and seven. She was not sure whether she did it before or after filing the story, but she did it simply to tell him she had written it. I do not think she did it to invite him to respond. She goes on to say that it was an act of courtesy and she was telling him that it would be appearing in the *Age* the following day. It was that which caused me to challenge the statement in paragraph 32, which was that he was given an opportunity to respond before it was printed.

Mr Gawenda—But he clearly was given an opportunity, whatever way you put it. Whether she rang to give him that opportunity or rang to inform him, he used that as an opportunity to respond, to find out what was in the article and then to tell her that it was not true.

Senator REID—I do not agree with you. I am pointing out that she did not intend to give him an opportunity to respond. As I read what Ms Crabb has said, she was not intending to give him—

Mr Gawenda—No, she did not want a response. This was a courtesy call. I agree with you that what she was saying was that, as a matter of courtesy, she was going to let the chairman of the committee know that she going to publish this story.

CHAIR—She also says that she was worried about him being doorstopped the next morning without having read the article, without having knowledge of the article et cetera.

Senator REID—That is fine, but I do not think that sits comfortably with the suggestion that the *Age* parties gave the senator an opportunity to respond to the article before it was published. It is just a matter for counsel to refer to.

Mr Gawenda—I understand that, but I really have to say that I think that is a matter of semantics. He did respond; he was given the opportunity to respond.

Senator REID—He did not see the article.

Mr Gawenda—She did not call him—I assume; I can tell you what I think here—to confirm what was in the story, because she knew that he would not do that. I assume that is the case. She called him on the basis of courtesy. He took that opportunity to respond, and he responded in a particular way. The ability to respond was there for him and he took it. The possibility of response was there for him and he took up that possibility, did he not?

Senator REID—I do not accept it, because I would regard an opportunity to respond would be an opportunity to make a comment about the article which may even be included in it. She had already filed it. It may be semantics, but—

Mr Gawenda—No, she does not know whether she had filed it or not.

Senator REID—But she did not care.

Mr Gawenda—Either way, had he said something on the record to her about what she was writing, she would have included it in the article. She would have changed the article.

Senator REID—But she had already filed it several hours before.

Mr Gawenda—Did she? I do not know whether she did or not.

Senator REID—I invite you to—

CHAIR—We understand that, but you have been maintaining here that it is a policy of the *Age* to ring and give people a chance to respond. No-one challenges that but, on the evidence of Ms Crabb, she did not ring to ask him to respond; she rang as a courtesy to forewarn him that the article was written so he would not be ambushed at doorstops the next day, obviously wanting what has, in the past, been an open and productive relationship to continue.

Mr Gawenda—Indeed, but it is part of the same thing, surely. This is not a response to allegations. We are not talking about allegations being made here against the senator. That is not the sort of response that we are talking about. What happened here was that she informed him that this article was going to be published. He then used that as an opportunity to respond to what she was saying.

CHAIR—The crucial point that Senator Reid is trying to make is that these matters are considered by this committee on the basis of the evidence taken tonight and on the documents and she is just saying that that aspect of the document could be a bridge too far. She has raised it with you, and Mr Rares might like to address it shortly.

Senator REID—I find comments on page 41 to be very inconsistent with the statement in paragraph 32.

Senator SHERRY—I have a couple of brief matters. You touched earlier on the issue of contempt in criminal proceedings. Does the *Age*, either verbally or in writing, set out guidelines for its reporters and editors about what to take into account when writing stories that may cross the contempt—

Mr Gawenda—All reporters go through a training program where they would be made aware of the laws of contempt, yes.

Senator SHERRY—Does that training program cover the issue of parliamentary privilege?

Mr Gawenda—I am not sure. I cannot answer that question.

Senator SHERRY—Could you get a response on that matter back to the committee?

Mr Gawenda—Yes.

Senator SHERRY—I have no further questions.

CHAIR—I have three or four final questions. This article was on page 2. Where does that rank in terms of importance in the pantheon of the *Age*? I assume that page 1 is the most important.

Mr Gawenda—It ranks behind page 1 and page 3. They would be the key news pages.

CHAIR—So that is the third order. Thank you.

Senator REID—What about the back page?

CHAIR—That is important for some of us. Mr Gawenda, you have been very kind to answer some hypothetical questions—if it was one day, then you might make this judgment; if it was a week, then you might make this judgement; and if it was two weeks, then you might make this other judgment. I raise with you the fact that it is not just a question of premature disclosure here. If in fact you had this report two weeks before publication—it deals with cross-media ownership—what steps would you take within your organisation to make sure that this was not passed up to the bean counters, who could commercially exploit it, frankly? It is unlikely but possible, because this is dealing with cross-media ownership and other factors that affect the whole viability of the *Age*, Fairfax and publishing in Australia.

Mr Gawenda—I would not expect any journalist from the *Age* to use information that they obtained in the course of their journalism to further the commercial interests of Fairfax. I cannot imagine that happening.

CHAIR—That is not quite my question—the journalist submits the story; how do you put a Chinese wall around it to prevent it going to another section of the newspaper that could exploit it?

Mr Gawenda—Do you mean the non-editorial part of the newspaper?

CHAIR—Yes.

Mr Gawenda—The *Age*'s code of ethics would preclude the release of that information to the commercial part of Fairfax, just as they would preclude releasing that sort of information to outside commercial interests. In terms of our ethics, there is absolutely no difference. I cannot imagine any circumstances under which anybody at the *Age* or anyone on the commercial side of Fairfax would call a journalist for confidential information which they obtained in the course of their journalism.

CHAIR—You said that, if Senator Eggleston had taken the opportunity to ring you, you might have responded in a different way. I do not have your phone number; I have been parliament for 21 years. You would also acknowledge that I would never bother to ring to complain about an article.

Mr Gawenda—No, you have not.

CHAIR—That would have been an inhibition, wouldn't it? If he had rung up your duty editor and said, 'I need to speak to your boss urgently over this matter,' would he have been given the number, or would they have rung you and told you to ring him?

Mr Gawenda—They would have called me. They do not give out my number.

CHAIR—No. That is what I am saying.

Mr Gawenda—But they would have called me, and I would have called the senator. You have not called, but I can tell you that many of your colleagues have called.

CHAIR—We will save that for a later discussion. Finally, I was not going to ask this question, but you did say—and I do not want to verbal you—that you like to get it right.

Mr Gawenda—Yes.

CHAIR—Which raises for us the question of what happens when you get it wrong. Let me give you a semihypothetical: some sleazy gossip journalist names a minor in a family assault case, and on 19 September I read that, in the Magistrate's Court, he has pleaded guilty and is doing community service. What obligation do you have to re-educate that particular 'journalist' in the ethics of his profession, and what obligation is on you to print something about that error?

Mr Gawenda—Is this a hypothetical question?

CHAIR—I said 'semihypothetical' because I am not sure whether you know about it or not. I am not sure whether you cover the *Sunday Age* as well as the six days a week *Age*. That is why I said semihypothetical.

Mr Gawenda—I know something about this case. While I am not the editor of the *Sunday Age*, I am responsible for the *Sunday Age*.

CHAIR—Let us not go to the actual case, let us go to how you would handle that, in terms of ‘you like to get it right’. What happens? I have read nothing in the *Age* about this. I have read it in the *Herald Sun*.

Mr Gawenda—The disclosure was inadvertent.

CHAIR—I see—inadvertent?

Mr Gawenda—It was inadvertent. We were not aware of a key element here, and the court actually took that into account.

CHAIR—Could I ask Mr Rares to pick up his sign and move over here, because he would find it more comfortable to face you across the table than whispering questions in your ear. Mr Rares, I invite you—because we may not have covered areas or you may not think we have clarified some areas—to ask some questions.

Mr Rares—Thank you, Chair. May we consult briefly?

CHAIR—Yes.

Mr Rares—Mr Gawenda, you have been asked a number of questions by members of the committee about your role as editor. In terms of what happens in producing a newspaper every night, could you give the committee an overview of the sorts of decisions that you, as editor, are called upon to make and the sorts of things that sometimes you find out about afterwards, such as unintentional contempt?

Mr Gawenda—In the course of any particular day we would publish enough words to fill a book of many chapters, and stories that vary in complexity, from some very simple ones to some very complex ones. I am very aware of the fact that, beyond the legal issues of contempt of court and of defamation, what is published in a newspaper like the *Age* can have a very large impact on the people to whom those stories refer. I am very aware of that. Often you have to make very complicated decisions very quickly and, given that we are in the business of producing a daily newspaper, you cannot always be aware of every single fact that goes to a story.

Mr Rares—One of the areas that has been explored with you by the honourable senators has been whether you see it as your role in effect to judge whether or not a breach might amount to something that was serious. Then there are questions about interpreting the requirements of section 4 of the Parliamentary Privileges Act and the resolution. But, in terms of those sorts of judgments, can you relate to the committee how you deal with that for court proceedings—where you are aware that there are court proceedings and you have to make a judgment about a report in relation to those court proceedings and there is a possibility of contempt—and how the question of seriousness becomes a consideration for you at that point?

Mr Gawenda—In terms of court proceedings, if I have any doubt at all about whether publication of certain details is going to involve a contempt, I will seek legal advice on that. That legal advice is meant to set out for me what the consequences might be of whatever action I take and not to advise what I should do. That is how legal advice happens. In the main in court cases, these issues do not arise, but the issues of fairness arise. We always have to be careful

that in court cases where people's lives or a significant proportion of their lives is at stake that we are fair and accurate in our coverage.

Mr Rares—You may have heard some evidence, from Senator Eggleston in particular, about the consequences of in camera or secret evidence being given to a committee of the Senate or of the House and the consequences of improper publication on people being willing to come forward and give evidence in circumstances where in camera protection is offered to them. Are you able to tell the committee about your views in relation to that topic?

Mr Gawenda—I am not saying that it is not possible but I cannot imagine circumstances on which we would breach a court order on suppression of details in a court case. I do not think we ever have; I do not think I would. In terms of evidence given in conditions of confidentiality or Senate committee, again, I cannot be absolutely cut and dried on this, because there could be circumstances in which I could think that some greater public interest is involved. But, in the main, I cannot imagine circumstances under which we would breach that confidentiality.

Mr Rares—I take it from that answer that there has not been such a situation in which you as the editor responsible or the journalist publishing something have been involved in the publication of something that has been taken in camera, either in court or in parliament or in a parliamentary committee?

Mr Gawenda—That is my knowledge. No.

Mr Rares—In your experience in your own state of Victoria, have there been occasions when there has been disclosure of what may be published or tabled in a parliamentary committee's report in advance of the report being tabled?

Mr Gawenda—Yes, I think that happens quite often.

Mr Rares—From your experience and observance of the parliamentary privilege issues in that regard, can you tell the committee how that works in Victoria?

Mr Gawenda—I am not aware of any instance in which a newspaper or a television station or a radio station has been brought before the privileges committee of the Victorian parliament for releasing contents of a report of one of its committees. But I am aware of situations where journalists have, at the very least, speculated about what was likely to be in a particular committee's report and, in some instances, have used the form that Annabel used that 'It is believed that the committee is going to report A, B, C or D' or that 'The ombudsman is going to look at this and decide A, B, C and D.' That has happened.

Mr Rares—In terms of Ms Crabb's personality, Senator Eggleston in his letter talked about having heard the voice message of Ms Crabb as being delivered in a jocular tone, and when he discussed the matter with her, he responded—as his evidence today has indicated—in that way. Are you able to say, from your own knowledge of her and her personality, how she tends to interact in such circumstances?

Mr Gawenda—When I read the transcript of the telephone conversation I thought, 'Yes, that's the Annabel I know.'

Mr Rares—In terms of the Annabel you know when you are giving that answer, how do you perceive her coming across? It has been suggested, particularly by Senator Knowles, that there was a side to the tape whereby, if you just read the transcript, you may not get the flavour that you would get if you actually knew the person and the tone, and you may not take it as having being said, as Senator Eggleston said, in a jocular tone. Are you able to elaborate?

Mr Gawenda—I think Senator Eggleston summed it up pretty well. He said she was a very good journalist, she was accurate in her reporting, she took her job seriously, and nothing about that phone call, if you know Annabel, would suggest anything other than that. My belief is that the phone message would have been different if she thought she had a serious issue with this.

Mr Rares—Could I ask you a question about the issues that arise when you are considering questions of possible contempt in relation to court proceedings. As the editor of a newspaper in that situation, would you have to weigh in your mind the relative public interest in publishing and the public interest in what the effect a publication might have on the administration of justice in that court case?

Mr Gawenda—Yes, indeed; I would have to do that.

Mr Rares—How do you do that?

Mr Gawenda—It is a difficult question to answer.

Mr Rares—Could you apply principles to it?

Mr Gawenda—Obviously I would have to weigh the importance of this information in terms of the public knowing about it on the one hand. On the other hand, I would have to weigh how serious this would be in terms of court proceedings, the possibility of us aborting a trial—which is very serious—and whether disclosure would have that sort of impact. I would have to weigh that against how important the information is and how important it is that the public know about it.

Mr Rares—Is it your experience that that is a test the courts apply in determining whether or not a contempt has been committed in circumstances where you can see a technical breach that might be made out?

Mr Gawenda—Yes, the court takes that very much into account.

Mr Rares—And if the court takes the view that balancing the two competing public interests—the right of the public to know particular information and the right of, say, an accused to a fair trial—it takes the view that the right of an accused to a fair trial is overborne by the public importance of what is disclosed, there is no contempt as you understand it.

Mr Gawenda—I think that is right, yes.

Mr Rares—So when you are talking about trivial or less serious breaches, may we take it that you understood that the reference to the committee by the Senate was to inquire into whether there had been an unauthorised disclosure of the report and whether any contempt had

been committed in that regard? That is, there were two elements: one was the unauthorised disclosure and the other was whether that was enough to get to the point of being in contempt.

Mr Gawenda—Yes.

Mr Rares—And do you understand the issues, so far as you have approached them—the committee might say you are wrong—to have a similar balancing exercise to be undertaken as in a court case?

Mr Gawenda—Indeed. They are the same, yes.

Mr Rares—Those are all the questions that I have.

CHAIR—Do any of my colleagues have any further questions to follow up? Senator Johnston?

Senator JOHNSTON—No.

CHAIR—Do you wish to make a closing comment?

Mr Gawenda—No.

Proceedings suspended from 8.45 p.m. to 8.51 p.m.

Mr Rares—You have heard the evidence of the Senate committee. It is perfectly clear that there was no interference with their work or their relationships with one another as a result of this publication. Each one of them gave that evidence, even Senator Eggleston. I just want to make it clear that I was not seeking to attack the senator personally but I was seeking to try to elaborate his argument. He was quite dogmatic, as obviously he was entitled to be, that the mere fact that there was a breach, as he saw it, of privilege by this incident was the be-all and end-all. He did not examine and did not give the committee any evidence of any examination of the relationships with the other members of the committee. But it is quite clear that every other one of the members of the committee, in answer to the chair's questions at the beginning, made it clear that they were not affected by this. That, in our submission, is the end of the matter.

You go back to the act because that governs the committee. It is the law of the Commonwealth that the conduct has to amount to, or is intended or likely to amount to, an improper interference. The evidence is that there was no interference, and that being the case there is no basis for an offence against the House. That is why one needs to focus on the question when you are looking at professional politicians having come to a clear and definite view of what they wish to recommend in reports, you know from your own experience that, having decided that—and as this committee had decided—the publication one day early of those recommendations was not going to affect any of those members in the way they conducted their duties or formed their honest views. These were their views; they were going to go in to bat for them in parliament.

Yes, one can recognise the consideration—and we do not seek to suggest to the committee that it is not a consideration that is perfectly proper for the committee to have a look at—that the report was not published. But if one looks at this as being a situation where harm flows that is sufficient to bring into play the concept behind resolution 3(a), which is one of the resolutions that was passed on 25 February 1988, you go to the question as to whether something should flow from a publication that has not affected the members of the committee and has not detracted from their work. Senator Eggleston tried to address it—and it is obvious that he had a legitimate concern and was upset—but he did not communicate that on the night.

His argument was in camera evidence. If you go back to the 99th report, that was what that was all about. There is no suggestion of that here. There is no suggestion that any witness has been intimidated or would not come forward. We know that did not happen. It may be my fault for the phrasing of it—and, Senator Reid, you picked it up in terms of how we expressed it in paragraph 32 of the report and dealt with this when Mr Gawenda was questioned—but what we were intending to express in paragraphs 32 and 33 is that once you come to the view that no ultimate interference was made with this committee in respect of this disclosure then that is where the jurisdiction of the Committee of Privileges stops; you do not go further than that. That is what we meant by the words 'to pursue this matter any further' in paragraph 33. We were not seeking to suggest that the committee is not entitled to hold such an inquiry as we are having tonight. If the choice of words has caused an impression to be put forward that that is the way we were approaching it, I am sorry, that was not our intention. We are here and we take the committee's consideration very seriously. The committee is obviously entitled to have a look at what happened and to form a view. We certainly were not seeking to suggest the contrary.

One of the things that one learns as an advocate particularly when doing appeals is that the transcript of what took place at the trial is no substitute for seeing and hearing the witness actually saying it in court. You have probably experienced it reading *Hansards*. Transcripts or *Hansards* are no substitute for the experience of actually being there. Senator Knowles, particularly, and Senator Johnston too have taken the transcript of the telephone conversation and, of course, it is open to interpretation, if you treat it as words on a printed page, such as was put by senators about Annabel Crabb's state of mind. But the fact is that the person to whom it was addressed, Senator Eggleston, on page 5 of the bundle of documents, said that it was in a jocular manner that this was delivered. That is how he understood it. If you think about it, it is a bit difficult to believe that the journalist who has had a good relationship with him, as he says and she says, is going to be confronting him in a manner intended to be a serious one or a threatening one about what is going to happen to him as opposed to having a joke, which she has acknowledged was inappropriate. Mr Gawenda said that was that. But that is her nature—that is the way she is—and that is the way Senator Eggleston took it.

When he was questioned by Senator Knowles, in particular, he did not drop to the same interpretation as you have. Therefore it really is important, when you are thinking about this and working out what happened, to say: 'The two people involved in the conversation at the time did not take it this way, and therefore it is really not open to the committee to start putting a different interpretation on it that was not there at the time.' And it is not really fair either to either of them when Senator Eggleston himself denies that that is how it was taken. It would be quite wrong and unfair to then adopt such an interpretation. We know he was genuinely upset—we saw that—but that was as far as it went. He was not prepared to say that he felt threatened or intimidated or anything like that and did not take it as being uttered in that way. It was a bantering that the journalist who had had a long relationship—and a good relationship—with him was involved in and she was ringing up, as was pointed out in his statement, to let him know this was happening.

The distinction to be drawn here is that she had filed the story, but it was not too late to kill it or to amend it. He saw that and, if you look at his letter, he considered what he should do about this. He made a deliberate choice. I ask the committee to say that, with the benefit of hindsight, it was an unfortunate choice he made. If you look at the 99th report in paragraph 49 that I referred him to when I was asking him questions, it shows all the things you do: you ring the committee chair, and the committee chair, one would think, would have a responsibility to say, 'However much bantering had been going on before, we know she did not have this at the time the earlier discussions went on.'

The question is whether he sees this as being a really serious matter; I am not talking about whether he has done something wrong, committed a breach of privilege or done something that is irresponsible. When you look from a human point of view at how journalists and senators and members of the House interact, when you get this delicate situation—and you know that in your ordinary experience there are leaks—how do you handle it? With the benefit of hindsight, maybe saying 'Enid Blyton' was not the right way to handle it. If he had said, 'I really feel strongly about this,' things might have been handled quite differently. In that context, when you are judging how serious this is, you have to look at all the factors. The journalist speaks with him at a time when it is possible to retract some and possibly all of the editions of the paper, and he has a joke with her. We know that he felt strongly and you might come to the conclusion that he had good reason to feel strongly. But that is not what he did.

In talking about whether this is a substantial breach as opposed to a trivial breach—which is what resolution 3 involves; there might be a breach of a resolution or something that does not amount to a contempt—what makes it a contempt is that it has to go further; it has to be a substantial one. In light of the way they bantered together on the phone, she really was not aware of the seriousness of this. One adds that to the fact that the members of the committee said it really did not affect how they worked. You might think that guidance is something that could be given to members of committees and members of the Senate on how to deal with this. Maybe the Enid Blyton approach is not the right one. Maybe the right thing to say is, ‘This is serious and, if you do not kill this, I am going to ring the editor or the night editor or whoever is on duty at the paper, get on to them and tell them about it.’ At least that takes it to a different stage. But once they are having their banter on the phone, she has no cause to think that he is going to get to the point where he thinks this is a matter to be drawn to the attention of the Privileges Committee. Yet, if he had handled it differently, things might have gone differently.

We would ask you to really take into account the fact that it is one thing to say that there is a consciousness that the report had not been tabled or that the recommendations had not been tabled or announced in the Senate and it is another thing to say that the person who is responsible for it, or one of the people responsible for it, is bantering about it and saying that it is a fantasy. He is saying it at a time when he believes something could obviously happen to the story. That is why he has put in his letter on page 5 that he decided to cast doubt on the accuracy. The only reason you would logically think that he would want to do that, we would submit, is that it was not too late to kill the story. Otherwise she was not going to publish it—it was not going to get into the paper. Maybe that was a wrong turning.

The key legal question, I suppose, and our role here today, is to direct you back firstly to looking at the filter that resolution 3(a) provides. It is an overarching guidance to when a breach of one of the other resolutions—including resolution 6(16) that Senator Knowles was taking Mr Gawenda to in particular—has occurred. Resolution 3(a) is an attempt by the Senate to give people guidance about the balance you need to strike between when contempt occurs and when a breach of the privileges of the house might have occurred but it is not a contempt or an improper interference. The threshold is reached by looking at the act, because the act governs the resolutions of the Senate. It governs how you proceed. You cannot ignore section 4 of the act—that governs you.

We extracted a couple of pages from law reports—I know that is not necessarily something you are going to want to hear a great deal about. These cases are to do with the law of contempt by publishing things while court cases are taking place. Privileges of the Senate are slightly different. But the courts balance the public interest, because journalists have to fulfil their role of providing information, which is an important role in society. This particular committee report involved the quite important issues of the relations between the press and parliament and of reporting to people. I will distribute copies of the extracts. One extract is from a very famous judgment of Sir Frederick Jordan, who was Chief Justice of New South Wales, in a case called the bread manufacturers case. On page 250 of volume 37 of the report, he said:

The authorities show also that where the contempt is alleged to consist in the publication of matter likely to prejudice a party to litigation—

In other words, making somebody in a case feel intimidated—

it is a good answer if it is proved to the satisfaction of the Court that the party alleged to be in contempt was ignorant of the litigation and at the time of the publication had no reason to suppose that litigation existed ...

One of the senators asked Mr Gawenda about the fact that you could be guilty of contempt by publication and not know about it. It can be an answer; it is a defence in law to say, 'I didn't know, and I didn't have reason to know.' Obviously at the end of the day this is what happens, because the law is very strict—just as the Senate is very strict—and, even if you do not know that you are committing a contempt, sometimes you will be guilty of it. But sometimes there is an out, and it is a question of balance. The judgment, in the extract I mentioned, is very often referred to—and it has been approved by the High Court and the House of Lords in England—as being the authoritative statement about this. Towards the bottom of page 249, His Honour said:

The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.

Obviously the Senate is in a similar position. Public affairs go on; the cross-media ownership issues go on. The question is: is there a serious interference with the way the business of the Senate, the business of the committee or the members of the committee in the performance of their roles were affected by this? When you know that did not happen, it is important. His Honour goes on to discuss this and to say that it is a frequent occurrence. So when you have Mr Gawenda saying: 'Look, in my role as a newspaper editor, I do have to make these balances. I do have to sometimes decide whether it is more important to interfere with a court case that is going on by publishing something else that is very important and should be discussed in public affairs.'

It is a judgment call. You might get it wrong—and then you have committed a contempt—or you might get it right. But if you, on every occasion, refuse to publish important matters of public affairs because of the threat that you might be in contempt, that shuts down freedom of speech. The courts have not allowed that to happen, even where it interferes with them. It is not a contempt of court, for example, to publish a fair report of something that is said in parliament—even if what is said in parliament prejudices the defendant or one of the parties in the case. If it had not been said in parliament, it might be a contempt. So there is a balance to be looked at.

That is why when you look at section 4 you might think that the parliament had in mind ensuring that judgments have to be made in this. It is not just black and white, saying that the disclosure was unauthorised. We have not sought to say that to members of the committee. In our submission, we made it quite clear that we accept that the disclosure was not authorised. The question is not just that; it is whether it is an improper interference. Once you say 'improper' before 'interference', the parliament is accepting that some interferences are proper. That is the example I gave you with the law of contempt, by publishing a fair report of proceedings in parliament or in another court case. Interferences in our society are accepted in the world of checks and balances. But at the end of the day, of course, you have to make a judgment with what you report to the Senate as to whether this overstepped the line. You do that by looking at all the facts, as I have indicated.

I will distribute a quote from Sir Anthony Mason about the Victorian builders labourers case. Privilege might be able to be seen in black and white terms by you as an absolute concept, but

contempt—that is, the interference by the breach of the privilege—is relative, and you have to decide that the interference is that extra step improper, not just that there is an interference. Senator Eggleston was talking about the hypothesis that any breach of a privilege of the House is a contempt. The parliament passed section 4, which says that that is quite clearly not the case. It is an important filter for you and for the members of the public who have to deal with this that it is not the case. Even parliament accepts that there are intersections between the right of free speech and public discussion of important public affairs and the important protection that the parliament, its committees and its members are entitled to, from interference that is improper. That is why the question that was referred to the committee was in the proper terms. You look at, first, whether there was an unauthorised disclosure. Then, accepting that it is unauthorised, you move to the next question: ‘Is it a contempt?’

The passage that I want to refer to is on page 98 of the report, in the first full paragraph. It is the remarks of Chief Justice Jordan in what I have referred to as the bread manufacturers case. At about point 4 on the page, His Honour says:

Where the alleged contempt consists of newspaper discussion or report it is this public interest that is weighed in the balance against the public interest in maintaining the integrity of the administration of justice—

In your case, it is the integrity of the Senate and committee procedures, we submit—

by taking such steps as may be necessary to protect it from interference.

And that is where you get the improper interference test in the section. His Honour continues:

In weighing the competing factors that arise in that situation and in the present situation, weight must be given to freedom of speech, discussion and information. Without information there can be no meaningful discussion. In a given case it is not easy to point to the specific and tangible benefits that flow from preserving that freedom. But general experience of human affairs enables us to say that the freedom should not be qualified except in the face of a competing public interest of equal or greater importance. This induces me to conclude that in a case such as the present the restraint should not be imposed unless it is established that it is necessary to avoid a substantial risk of serious injustice.

Now the test here is a little different: it is improper interference. When you know that they did not get interfered with, you know that the balance in this case, we submit, comes down on our side.

The only other passage that I referred to—and I do not have to read it to you—is a speech in the House of Lords by Lord Steyn, in a case dealing with the right of journalists to visit and convey information from prisoners. He discusses on page 126 of the report that we have handed you the importance of freedom of speech and how courts balance that. I am sorry I went a little bit longer than you wanted.

CHAIR—You just about stretched our tolerance.

Mr Rares—If there was anything that the committee wanted addressed that I have not dealt with—

CHAIR—No, this is where you get a free hit; we do not cross-examine you. If you are complete, I will say that, firstly, if any part of the evidence needs to be qualified or corrected—and I do not imply that any part does—can I put a deadline of 12 November on that, provided you get the transcript in reasonable time. Secondly, if you wish to make further written

submissions and summary of argument—again, by 12 November—that would be very helpful to the committee. As I have indicated before, we make our recommendation to the Senate, having assessed all the documents that have been put before us and the evidence tonight. It generally takes a few weeks of mulling over these things before we actually report to the Senate. So far, we have never had a premature disclosure of one of our reports—but we will have to see. In conclusion, I would like to thank all the witnesses for their attendance—especially those who are still here, because you had to do the long shift—and their assistance in this inquiry.

Committee adjourned at 9.15 p.m.