

MATTERS OF PRIVILEGE RAISED BY SENATOR XENOPHON STATEMENT BY THE PRESIDENT

By letter dated 26 June 2014, Senator Xenophon raised a matter of privilege under standing order 81.

The matter of privilege concerns the possible imposition of a penalty by the taking of disciplinary action, either on a witness before the Rural and Regional Affairs and Transport References Committee or on a person providing information to the committee, in connection with its inquiry into aviation accident investigations which reported in 2013.

In determining whether a notice of motion to refer the matter to the Privileges Committee should have precedence, I am required to have regard **only** to the following criteria in Privilege Resolution 4:

- (a) 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; and
- (b) the existence of any remedy other than that power for any act which may be held to be a contempt.

With regard to the first criterion, the Privileges Committee has often stated that it regards the protection of persons providing information to the Senate, and in particular of witnesses before parliamentary committees, as constituting the single most important duty of the Senate, and therefore of the committee as its delegate, in determining possible contempts.

There is no question that this matter satisfies the first criterion I am required to consider.

With regard to the second criterion, there is no other such remedy in this case. The contempt jurisdiction is the only avenue available to deal with the alleged

conduct and to protect the Senate's rights and freedoms and those of its committees.

I have therefore determined that a motion to refer the matter to the Privileges Committee should have precedence over other business for the day on which it is given.

Before I call Senator Xenophon, I remind the Senate that this determination of precedence is not a judgement of the substantive issues or merits of the matter, beyond the threshold judgement that:

- it is not of a trivial nature or unworthy of the attention of the Senate;
- it is necessary to take action to protect the Senate and senators against improper acts;
- there is no satisfactory remedy for dealing with the matter other than the contempt jurisdiction.

It is for the Senate to make a judgement whether a matter merits referral to the Privileges Committee.

I table the correspondence and call Senator Xenophon to give notice of the motion.



NICK XENOPHON
Independent Senator for South Australia
AUSTRALIAN SENATE

Our ref: HOG – N/HW

Senator the Hon. John Hogg
President of the Senate
Parliament House
CANBERRA ACT 2600




Dear President

RE: Matter of privilege

I am writing to you under the provisions of Standing Order 81 to raise a matter of privilege.

On 13 September 2012, the Senate referred the issue of aviation accident investigation processes and standards to the Senate Rural and Regional Affairs and Transport References Committee for inquiry. The inquiry reported on 23 May 2013, and its findings have since become colloquially known as the 'Pel-Air report'.

The inquiry generated a significant amount of interest in the aviation sector, not least because of its close examination of the activities of CASA and the ATSB in relation to aviation accident investigations. The inquiry received evidence that indicated a marked mistrust of CASA in the sector, including reports of bullying and harassment. These concerns have been born out, at least in part, in the findings of the Government's Aviation Safety Regulation Review.

During the inquiry, an employee of CASA (Mr Ben Cho Rogers) provided evidence to the committee *in camera*. Following that hearing, Mr Cho Rogers continued to correspond with the committee on issues within CASA, which he felt had a direct relevance to the inquiry and to the committee's broader oversight of this agency. This information included, broadly, matters of bullying and workplace harassment, and issues with CASA's Sky Sentinel software program.

In May 2013, during Senate Estimates, Senator David Fawcett established and followed a line of questioning to CASA and its Director of Aviation Safety, Mr John McCormick, regarding issues with the Sky Sentinel program.

In my discussions with him, Senator Fawcett indicated that this line of questioning was based, at least in part, on information provided by Mr Cho Rogers, both in his *in camera* evidence and in further documentation he provided to the committee.

I have received information, which I am happy to provide to you on a confidential basis, which shows that in July 2013, the Deputy Director of Aviation Safety in CASA (Mr Terry Farquharson) requested an employee of CASA run audit reports of users who had accessed CASA's Total Records Information Management system (TRIM) under a variety of key words, namely:

- a. ASOP & Aviation Safety Oversight Program
- b. Surveillance Enhancement Project
- c. Sky Sentinel Business Implementation Project
- d. Sky Sentinel Technical Implementation Project
- e. Pentana
- f. PAWS
- g. Pentana Audit Work System
- h. Audit Work System
- i. AWS

These terms are consistent with the matters raised by Senator Fawcett in his line of questioning.

In October 2013, Mr Cho Rogers received a letter from CASA, informing him that he was under investigation for accessing files in TRIM that he had no authority to access. These files contain the information that was provided to the committee, and formed the basis for Senator Fawcett's questioning.

At this stage, the committee wrote to Mr McCormick, seeking assurance that any action being taken in relation to Mr Cho Rogers was not linked to the evidence he provided to the committee *in camera*. In response, Mr McCormick gave such an assurance, but noted that as Mr Cho Rogers' evidence was *in camera*, Mr McCormick did not know what the evidence contained and so could not say whether CASA's actions related to the evidence.

In a further discussion with the committee Secretary, Mr McCormick indicated that Senator Fawcett's line of questioning in the May 2013 estimates hearing had prompted him to direct that audits of TRIM be undertaken, and that these audits had led him to Mr Cho Rogers.

This would seem to be consistent with information I have received regarding the direction to undertake the audits and the key words specified.

As such, it is my view that Senator Fawcett's line of questioning, based on information provided by Mr Cho Rogers, directly led to CASA undertaking the audits of TRIM and action against Mr Cho Rogers.

I have previously raised these matters with the committee, and Senator Glenn Sterle, in his role as Chair, sought advice from the Clerk of the Senate.

The advice states:

*Section 16 of the Parliamentary Privileges Act 1987 reaffirms the application of article 9 of the Bill of Rights 1689 which provides that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. Section 16 also explicates what the phrase "proceedings in Parliament" means for the purposes of article 9. It includes "all words spoken and acts done in the course of, or **for purposes of or incidental to, the transacting of the business of a House or of a committee.**" (emphasis added)*

The Clerk's advice continues:

For example, if a person provided information to a senator for the purpose of that senator raising the matter in the Senate or asking questioning in a committee inquiry, and the Senator did so, then a direct link could be made between the provision of the information and the transacting of the business of a House or committee.

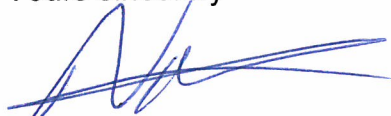
I consider that the link between the information provided by Mr Cho Rogers and the fact that it prompted the line of questioning by Senator Fawcett that led to the audits of TRIM, which in turn led to action by CASA against Mr Cho Rogers, could be considered a breach of privilege under these provisions.

Mr Cho Rogers is facing dismissal from CASA, as well as possible charges related to improper access to and dissemination of documents, as it appears that CASA has referred the matter to the AFP.

As such, I request that you determine whether a motion to refer this matter to the Privileges Committee should have precedence over other business for the day on which it is given.

I would be happy to provide you with any further information to aid you in your consideration, and I look forward to hearing from you at your earliest convenience.

Yours sincerely



NICK XENOPHON

26/06/ 2014

**MATTERS OF PRIVILEGE RAISED BY THE CHAIRS OF THE RURAL AND
REGIONAL AFFAIRS AND TRANSPORT LEGISLATION AND REFERENCES
COMMITTEES – STATEMENT BY THE PRESIDENT**

By letter dated 11 July 2014, the Chairs of the Rural and Regional Affairs and Transport Legislation and References Committees, Senators Heffernan and Sterle, have raised a matter of privilege under standing order 81.

The matter of privilege concerns the possible imposition of a penalty by the taking of disciplinary action, either on a witness before the Rural and Regional Affairs and Transport References Committee or on a person providing information to the committee, in connection with its inquiry into aviation accident investigations which reported in 2013 and in connection with questions asked at the 2013 Budget estimates hearings.

Apart from the last element, this is essentially the same matter of privilege raised by Senator Xenophon, in relation to which I made a statement and gave precedence on 10 July 2014.

For the same reasons given in relation to the matter raised by Senator Xenophon, I am also satisfied that this matter meets the criteria to which I am required to have regard.

I have therefore determined that a motion to refer the matter to the Privileges Committee should have precedence over other business for the day on which it is given.

Before I call Senator Heffernan / Sterle, I remind the Senate that this determination of precedence is not a judgement of the substantive issues or merits of the matter, beyond the threshold judgement that:

- it is not of a trivial nature or unworthy of the attention of the Senate;
- it is necessary to take action to protect the Senate and senators against improper acts;
- there is no satisfactory remedy for dealing with the matter other than the contempt jurisdiction.

It is for the Senate to make a judgement whether this matter also merits referral to the Privileges Committee.

I table the correspondence and call Senator Heffernan / Sterle to give notice of the motion.



AUSTRALIAN SENATE

STANDING COMMITTEE ON RURAL AND REGIONAL AFFAIRS AND TRANSPORT

LEGISLATION AND REFERENCES COMMITTEES

11 July 2013

Senator the Hon. Stephen Parry
President of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr President

Privilege matter relating to the protection of witnesses

We write to you as the Chairs of the Legislation and References Committees, respectively, to formally raise a matter of privilege under Standing Order 81.

The matter relates to the protection of a witness who may have been subjected to a penalty in respect of evidence given before the Rural Affairs and Transport References Committee (the committee), and the question of whether a contempt may have been committed in that regard.

Background

On 9 October 2013, Mr Ben Cho Rogers (Mr Cho) was advised by his employer, the Civil Aviation Safety Authority (CASA) that he was under investigation for a potential breach of CASA's Code of Conduct. Specifically, it was alleged that between 1 July 2012 and 4 September 2013 Mr Cho engaged in unauthorised, illegal or inappropriate use of CASA's IT system, and that he accessed 233 files which had no connection to his role.

It was subsequently alleged by CASA, in correspondence to Mr Cho dated 28 October, that following the 9 October meeting between Mr Cho and an officer of CASA, Mr Cho sent an email from his CASA email account to an external private email address. Mr Cho was informed that the code of conduct investigation had been broadened to consider whether, in sending this email, Mr Cho had breached the Code of Conduct. The letter cited an apprehension that Mr Cho may again attempt to remove or forward CASA documents, and advised Mr Cho that he was suspended from duty.

The committee understands that, subject to the outcome of a review of CASA's decision that Mr Cho breached the organisation's Code of Conduct, it is CASA's intention to terminate Mr Cho's employment. However, the committee understands that termination has not yet occurred.

The References Committee wrote to CASA in June 2014 requesting it stay any action against Mr Cho until the outcome of any privilege process was known. A copy of CASA's July 2014 response follows this letter.

Interaction between Mr Cho and the committee

On 25 February 2013, the committee conducted a hearing in Canberra in connection with its inquiry into aviation accident investigations. At this hearing, Mr Cho gave oral evidence in camera. During the hearing, a number of documents were tabled which the committee received as in camera evidence. Subsequently, on 19 June 2013, the committee received as correspondence further documents from Mr Cho. In both cases, the documentation related to the procurement by CASA of computer software, called Sky Sentinel.

In a conversation with the Committee Secretary on 31 October, the Director of Aviation Safety at CASA, Mr John McCormick, said that the action against Mr Cho had been sparked by questions asked by Senator Fawcett at an Estimates hearing conducted by the Legislation Committee (on 29 May 2013) which Mr McCormick had found 'passing strange' and which led him to arrange an audit of the files pertaining to Sky Sentinel. According to Mr McCormick, this led him to identify Mr Cho.

The committee considered the matter at a private meeting on 31 October 2013, and concluded that there was reason to believe that Mr Cho may have been subjected to a penalty in respect of the evidence he provided to it. In accordance with Privilege Resolution 1(18), the committee therefore agreed that it would take all reasonable steps to ascertain the facts of the matter. To this end, the committee instructed the secretariat to write to CASA seeking its assurance that any action it may have been taking against Mr Cho was not related to evidence he gave to the committee.

On 5 November 2013, CASA wrote to the committee advising that it was unaware of the evidence Mr Cho had provided in camera, but assured the committee that CASA was not (and would not be) taking action against him on account of evidence given. The same assurance was repeated in CASA's July 2014 response to the References Committee's request to stay any action.

On 10 December 2013, Mr Cho wrote to the Legislation Committee with further details of what he alleged was a deliberate attempt by CASA to withhold relevant evidence from the aviation accident investigations inquiry.

On 18, 25 and 26 June 2014, the References Committee considered correspondence from Senator Xenophon, as well as various documents from Mr Cho. The correspondence disclosed Senator Xenophon's understanding that Senator Fawcett's line of questions in the Legislation Committee hearing on 29 May 2013 was, at least in part, informed by the information supplied to the committee in February 2013.

Senator Xenophon also informed the committee that, in mid-2013, an employee of CASA said to Mr Cho words to the effect that someone was leaking information and that CASA was 'on the hunt for that person'.

Committee's conclusions

The committee has considered correspondence from Mr Cho's legal representatives and from Senator Xenophon setting out CASA's treatment of Mr Cho, and summarising his interactions with the committee. The committee has also considered CASA's November 2013 response to the committee's request for an assurance that no improper action was being taken against Mr Cho as a result of his evidence to the committee. Further correspondence containing a similar assurance was received in July 2014. Finally, the committee has considered advice on this matter from the Clerk of the Senate, which was received in November 2013 and June 2014.

Having taken the steps required in Privilege Resolution 1(18), the committees consider that the facts disclose that Mr Cho may have been subjected to penalty in respect of evidence given before the committee. The committees reached this conclusion based on the fact that there would appear to be a direct link between Mr Cho's engagement with the committees as a witness and as a person continuing to provide the committees with information, the use by committee members of that information for another purpose (estimates hearings by the legislation committee), and the identification by CASA of Mr Cho as a person who had unauthorised access to certain files. It is clear from correspondence to Mr Cho that CASA is citing that access as the basis for their disciplinary action against him.

The committees have also resolved that, given both the Legislation and References committees have considered Mr Cho's case, it is appropriate that the committees refer the matter to you jointly.

Accordingly, the committees request that you give precedence to a notice of motion to refer this matter to the Committee of Privileges. The committees are able to provide the Committee of Privileges with any supporting documentation.

Yours sincerely



Senator Glenn Sterle
Chair, References



Senator the Hon. Bill Heffernan
Chair, Legislation



Australian Government
Civil Aviation Safety Authority

OFFICE OF THE DIRECTOR OF AVIATION SAFETY

Trim Ref: F14/283

07 July 2014

Senator the Hon Glenn Sterle
Chair, Standing Committee on Rural and Regional Affairs and Transport
References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator

Matter relating to Ben Cho Rogers

I refer to your letter dated 26 June 2014, in which you request that CASA cease any further action in respect of Mr Ben Cho Rogers until the outcome of any privilege process is known.

I repeat the assurance that I gave to the Committee on 4 November 2013, that CASA has not taken, and will not take, any action against Mr Rogers on account of any evidence he gave to the Committee. In this regard, until receipt of your recent letter, CASA had assumed that the Committee had accepted that assurance.

Mr Rogers has been suspended with full pay since August 2013. On 5 May 2014, following an investigation by an external investigator, CASA determined that Mr Rogers breached the CASA Code of Conduct. Mr Rogers sought a review of that determination and has until 11 July 2014 to provide submissions on that review. Having regard to the review application by Mr Rogers and the fact that CASA is obligated to conduct it pursuant to the *CASA Enterprise Agreement 2012-2014*, CASA will proceed with the review. I note this will result in either the Code breach determination being affirmed or reversed.

CASA is not aware of any possible basis on which the discipline process would infringe Parliamentary privilege or be a contempt of the Senate. If it would aid the Committee's deliberation of whether to notify the President of the Senate of any privilege matter, I would be willing to meet with you or the Committee to discuss this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John F. McCormick'.

John F. McCormick
Director of Aviation Safety