

The Senate

Committee of Privileges

Possible imposition of a penalty on a
witness before the Rural and Regional
Affairs and Transport References
Committee

161st Report

August 2015

© Parliament of the Commonwealth of Australia 2015

ISBN 978-1-76010-268-5

ISSN 1038-9857 (Print)

ISSN 1447-1396 (Online)

This document was produced by the Committee of Privileges, and printed by the Senate Printing Unit, Parliament House, Canberra

MEMBERS OF THE COMMITTEE

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from 12 February 2015

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Senator Dean Smith (Western Australia)

Senator Anne Urquhart (Tasmania)

The Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3360
Facsimile: (02) 6277 3199
Email: priv.sen@aph.gov.au
Internet: www.aph.gov.au

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Report

1.1 The Committee of Privileges reports to the Senate on its inquiry into the possible imposition of a penalty on a witness before the Rural and Regional Affairs and Transport References Committee. The matter was referred to the committee in the following terms:

In the context of an inquiry by the Rural and Regional Affairs and Transport References Committee into aviation accident investigations and Budget estimates hearings of the Rural and Regional Affairs and Transport Legislation Committee in May 2013:

- (a) whether disciplinary action was taken against either a witness before the committee or a person providing information to the committee; and
- (b) if so, whether any contempt was committed in respect of those matters.¹

1.2 The reference, initiated on the motion of the chairs of the Rural and Regional Affairs and Transport References and Legislation Committees, subsumes a similar matter raised by Senator Xenophon.² The letters raising these matters of privilege appear in the Appendix, together with the President's statements granting the matters precedence in debate.

1.3 The background is substantially as set out in the letter from the two chairs. An employee of the Civil Aviation Safety Authority (CASA), who had given in camera evidence to the references committee, made a complaint that the authority was taking disciplinary action against him, which he alleged was connected to his giving evidence. This action involved CASA initiating proceedings for the investigation of a potential breach of its code of conduct. The witness made a further complaint when CASA broadened the code of conduct proceedings to encompass additional allegations. After jointly investigating the matter the references and legislation committees concluded that the witness may have been subjected to a penalty in respect of his giving evidence. The chairs then raised a matter of privilege with the President and it was referred by the Senate on 17 July 2014.

Conduct of the inquiry

1.4 The Privileges Committee began its inquiry by seeking relevant records from the two committees, and submissions from CASA and from the witness. The committee also sought advice from the Clerk of the Senate, effected an exchange of the parties' submissions and received further responses before reaching its conclusions on the papers before it.³

1 *Journals of the Senate*, 17 July 2014, p. 1238.

2 *Journals of the Senate*, 14 July 2014, p. 1156.

3 See paragraph 1.48 for a note on the publication of material received by the committee.

1.5 The committee was made aware during the inquiry that the parties were negotiating a possible resolution of the code of conduct proceedings and considered it appropriate to allow them to conclude that process before making its findings. Noting that those proceedings have now been settled on terms acceptable to the parties, the committee turns to the matter before it.

1.6 The committee has two essential tasks. First, to establish the facts of the matter (which, in this case, primarily involves establishing the connection between the disciplinary action complained of and the giving of evidence by the witness) and secondly, to consider whether a contempt of the Senate may have been committed.

Consideration of contempt matters

1.7 The Senate's contempt jurisdiction is intended to protect the ability of the Senate, its committees and its members to carry out their functions and exercise their authority without improper interference. This overarching principle informs any inquiry into a possible contempt. It is articulated in the statutory definition of contempt in section 4 of the *Parliamentary Privileges Act 1987* and in the Privilege Resolutions which guide the committee's work. Among these is Privilege Resolution 3, which requires that the committee take the following criteria into account:

- (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...;
- (b) the existence of any remedy other than that power for any act which may be held to be a contempt; and
- (c) whether a person who committed any act which may be held to be a contempt:
 - (i) knowingly committed that act, or
 - (ii) had any reasonable excuse for the commission of that act.

1.8 These are the criteria the committee must consider in determining whether any act may amount to a contempt.

Penalty to a witness as a possible contempt

1.9 A prohibition on penalising witnesses is among the list of possible contempts in Privilege Resolution 6:

- (11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

1.10 The Senate has long regarded the intimidation of, or imposition of penalties on, witnesses as the most serious of all possible contempts. Committees rely upon the integrity of the evidence presented to them, so conduct which deters witnesses from giving evidence, or penalises them for doing so, can compromise the inquiry process and interfere with the performance by committees of their functions. Any suggestion

that a penalty has been imposed upon a witness as a result of giving evidence is therefore treated with the utmost seriousness. The first step in determining whether such a contempt has occurred is to establish the connection between the imposition of a penalty and the witness's participation in committee proceedings; that is, to establish whether the penalty was imposed upon the witness *on account of* the evidence given.

1.11 As the committee noted in its 125th report, 'although it may conclude that penalty, injury or reprisal has occurred, in order to find a contempt of the Senate it must be satisfied that any such penalty or intimidation was as a result of participation in parliamentary proceedings'.⁴ If this connection cannot be demonstrated, the committee cannot recommend that a contempt be found.

Background

1.12 In February 2013 Mr Rogers,⁵ then an employee of CASA, gave in camera evidence and produced documents to the references committee. He was not identified as having done so, so CASA did not know he was a witness and did not know what evidence he gave. Questions were subsequently asked in an estimates hearing of the legislation committee that were based, in part, on the in camera evidence.

1.13 On 9 October 2013 CASA informed Mr Rogers it had undertaken an audit of access to its files, and alleged that he had used CASA's IT system to access documents which CASA says "he had no legitimate business need to access".⁶ CASA then initiated an investigation into a potential breach of its code of conduct, which culminated in a recommendation that Mr Rogers' employment be terminated.

1.14 The chairs of the references and legislation committees identified a link to their committees' proceedings, in that the estimates questions appear to have caused the then Director of Aviation Safety, Mr John McCormick, to suspect a possible leak. It was on that basis that he arranged the file audit.⁷ This chain of events is broadly supported by evidence from both parties.⁸

1.15 The question for the committee is whether a contempt of the Senate may have occurred. It is not disputed that CASA took disciplinary action against Mr Rogers; what is at issue is whether that action was taken *on account of* his giving evidence. To determine the matter the committee looked first at the motivation for the audit of files and then at the different aspects of the code of conduct investigation, having regard in each case to the criteria in Privilege Resolution 3.

4 See 125th report, at paragraphs 4.79 – 4.84.

5 Referred to in some correspondence as Mr Cho.

6 Letter, 19 December 2014, Mr Terry Farquharson, Acting Director of Aviation Safety.

7 Chairs' letter to the President, 11 July 2014, p. 1.

8 Rogers' submission, 14 November 2014, paragraph 17; CASA submission, 17 September 2014, pp. 1 – 2.

The motivation for the audit of files

1.16 CASA maintains that it had no knowledge when it undertook the audit of files that Mr Rogers had given evidence, nor of the evidence he had given; nothing in the material before the committee contradicts this. CASA accordingly invites the conclusion that its action could not have occurred on account of the evidence he gave.

1.17 Mr McCormick submits that, after hearing estimates questions asked by Senator Fawcett, he “formed a suspicion that a CASA officer may have informally provided or ‘leaked’ information to a person who had passed that onto Senator Fawcett, or other members of the committee”.⁹ Mr Rogers’ representatives suggest there is no basis for assuming a third party was involved.¹⁰ Both parties agree, however, that the audit was motivated by the estimates questions.

1.18 Mr McCormick also notes, however, that the estimates questions were asked in the legislation committee, rather than the references committee, and that “nothing which occurred in either Senate Estimates or References Committee hearings suggested or indicated that a CASA officer gave evidence (or documents) to either Committee”.¹¹ Mr Rogers’ representatives submit that, regardless of whether CASA knew the source of the committees’ information, “this audit was plainly designed to identify the person who provided the information in question to the Senate”.¹² In a later response they submit:

There can be little doubt that the reasons for CASA’s actions against our client were motivated by the Senate processes. The investigation in which he was identified was instigated because of a concern about leaks to the Senate.¹³

Committee’s view

1.19 The committee accepts that, in undertaking its file audit, CASA was attempting to identify the source of a suspected leak, and that its suspicions were aroused by the estimates questions. However the committee does not consider that CASA’s actions here meet the criteria it is required to consider in determining whether a contempt may have occurred.

1.20 The committee is required to consider whether a person who committed an act which might be held to be a contempt did so knowingly, or had any reasonable excuse for doing so.¹⁴ It will not generally recommend that a contempt be found where it was not knowingly committed. Mr McCormick summarises CASA’s argument here:

9 CASA submission, 18 September 2014, p 2.

10 Response on behalf of Mr Rogers, 4 March 2015, paragraph 9.

11 CASA submission, 18 September 2014, p. 2.

12 Submission on behalf of Mr Rogers, 14 November 2014, paragraph 17.

13 Response on behalf of Mr Rogers, response, 4 March 2015, paragraph 13.

14 *See* Privileges Resolution 3(c).

...in circumstances where CASA (a) did not know Mr Cho gave evidence to a Senate committee, and (b) was not aware that Senator Fawcett's line of questioning was based on evidence from Mr Cho in a different Committee or at all – CASA could not be said to have taken any action against Mr Cho on account of that evidence being given.¹⁵

1.21 CASA had no knowledge when it undertook its file audit that Mr Rogers – or any other CASA officer – had given in camera evidence to the references committee. On the material before it, the committee accepts that CASA could have had only limited knowledge of the circumstances in which information may have been provided to a member of the legislation committee. Although CASA officers may have been motivated to search for a possible leak, it is difficult to sustain an argument that those actions were causally connected to proceedings they had no reason to know about. The evidence before the committee does not support this argument.

1.22 The threshold for a finding of contempt is a high one, requiring, in this case, evidence of an improper act intended or likely to substantially interfere with the functions of a committee by interfering with a witness.¹⁶ The Privileges Committee does not consider that this threshold is met where CASA's actions were motivated not by evidence known to have been given, but by a mere suspicion that information may have been provided to a senator. This is consistent with the committee's approach to other matters; for example, the committee has previously declined to recommend a contempt be found where "the requisite intention to punish the witness specifically as a result of her evidence before the committee had not been established".¹⁷

1.23 In any case, the committee also considers that CASA officers had a reasonable excuse for their initial actions, in that it was reasonable in the circumstances for CASA to take steps to identify the source of a possible leak. The committee may have a different view were extravagant or extraordinary steps taken, but that did not occur in this matter: CASA simply undertook an internal audit of its own records and discovered anomalies.

1.24 There are two further points to make on the question whether CASA's actions were reasonable. First, the committee does not consider that an audit of files is *in and of itself* a disciplinary action. Secondly, the sanction immediately imposed at that point – restricting Mr Rogers' access to CASA's file system while investigating a concern that it may have been used in an unauthorised manner – may be considered a reasonably proportionate measure.

1.25 For these reasons, the committee finds that CASA's actions in undertaking the audit do not amount to a contempt.

15 CASA submission, 18 September 2014, pp. 3 – 4.

16 *Parliamentary Privileges Act 1987*, section 4; Privileges Resolution 3(a).

17 *See 125th report*, paragraph 4.74, relating to the committee's 17th report.

1.26 The committee now turns to the question whether CASA's actions in undertaking code of conduct proceedings in this matter may amount to a contempt. There are three aspects of those proceedings which are of interest in the inquiry:

- the initiation of code of conduct proceedings, communicated to Mr Rogers on 9 October 2013;
- the broadening of code of conduct proceedings and Mr Rogers' suspension from duty on 28 October 2013; and
- the continuation of those proceedings despite correspondence to CASA from the RRAT Committees about possible privilege implications.

Initiation of the code of conduct proceedings

1.27 The code of conduct proceedings did not themselves relate to Mr Rogers' participation in committee proceedings, but to possible misuse of CASA's ICT system. Alleging that Mr Rogers had accessed documents he had no need to access, CASA initiated an investigation into a potential breach of its code of conduct. Mr Rogers' representatives noted that:

The disciplinary action identified as a reason for the action the fact that he had searched for and accessed documents. Those documents formed the basis of evidence to the Committee and formed the basis of the questions that displeased Mr McCormick...¹⁸

Committee's view

1.28 These activities – searching and accessing documents – are not sufficiently connected to parliamentary proceedings to themselves be protected under the Senate's contempt jurisdiction. This reflects the purpose of those powers, which is to protect the ability of the Senate, its committees and senators to carry out their functions. It might also be noted that the disputed access to documents began some months before Mr Rogers first engaged with senators and the references committee, and encompassed documents later submitted to the committee as well as unrelated documents.¹⁹ None of these actions are themselves connected to the proceedings of committees in a relevant way.

1.29 The question whether CASA's action in initiating the code of conduct investigation amounts to a contempt must therefore be assessed on the same basis as the question about the motivation for the audit of files. Absent evidence of an improper motive (that is, evidence that the action was intended to penalise the witness for giving evidence), and given that CASA did not know that Mr Rogers had given evidence, the committee cannot conclude that the initiation of the code of conduct proceedings amounts to a contempt.

18 Response on behalf of Mr Rogers, 4 March 2015, paragraph 14.

19 Submission on behalf of Mr Rogers, 14 November 2014, Appendix 1, paragraphs 5 to 8; CASA response, 24 February 2015, p. 1

Investigation by the references committee

1.30 The fact that the references committee was initially prevented from investigating the circumstances of the penalty to the witness is also relevant here. Privilege Resolution 1(18) requires a committee concerned that a witness “has been subjected to or threatened with any penalty or injury in respect of evidence given” to investigate the matter and, if its investigation discloses such conduct, report it to the Senate. A committee investigating such concerns would commonly intervene by writing to those who might take action against a witness to caution them against doing so. The committee is then able to identify particular concerns and provide guidance about avoiding the risk of committing a contempt.

1.31 In this case, however, that avenue was not immediately available as Mr Rogers initially asked that the references committee not reveal to CASA that he had appeared as a witness. This meant that the references committee was unable to intervene with CASA on his behalf when the matter first arose. In a practical sense, this removed the opportunity for the references committee and CASA officers to consider whether CASA’s early actions may have amounted to a contempt. By the time Mr Rogers permitted the references committee to disclose that he had been a witness, the proceedings against him had been broadened to encompass other matters.

Broadening of the code of conduct proceedings

1.32 After being informed of the code of conduct investigation, CASA alleges that Mr Rogers attempted to send an email attaching numerous documents from his work account to a private email address, in breach of its policies on IT usage. CASA broadened the code of conduct proceedings to encompass this matter and, citing an apprehension that he may attempt to remove CASA documents, advised Mr Rogers that he was suspended from duty. These actions were not mentioned in the submission made on behalf of Mr Rogers, but were acknowledged in the later response.

1.33 The submission made on behalf of Mr Rogers argues:

... the only logical, rational, and sustainable explanation for the initial audit was to identify the person who provided information in question to the Senate. If that be accepted, as we submit it should, the subsequent actions taken against our client as the person so-identified must similarly be characterised as being motivated by our client’s participation in Parliamentary proceedings.²⁰

Committee’s view

1.34 Regardless of the motivation for the initial code of conduct proceedings, it does not follow that CASA’s subsequent actions were motivated by Mr Rogers’ participation in parliamentary proceedings. To reach this conclusion is to ignore both Mr Rogers’ own conduct and other matters known to either party relevant to their decisions. It is not clear to the committee that CASA would have had cause to broaden

20 Submission on behalf of Mr Rogers, 14 November 2014, paragraph 18.

the code of conduct proceedings against Mr Rogers but for his attempt to send documents to a private email address.

1.35 While the committee makes no comment as to the merits of the expanded proceedings, it is clear that the conduct to which they relate has no relevant connection to the giving of evidence or the provision of information to senators. This conclusion is not affected by the consideration that some of the documents Mr Rogers sought to attach to his email may have related to matters on which he gave evidence, or that they may previously or subsequently have been given to senators or to a committee. In these circumstances, the committee cannot conclude that the broadening of the code of conduct proceedings amounted to a contempt of the Senate.

Continuation of the code of conduct proceedings

1.36 The initiation and broadening of the code of conduct investigation occurred before the references committee disclosed to CASA that Mr Rogers had been a witness. It appears that CASA officers considered that initiating proceedings against Mr Rogers was justified. They did not initially know that Mr Rogers had been a witness and claimed that there was nothing that occurred in either the references committee inquiry or at estimates to indicate that a CASA officer may have been a witness. However, having subsequently been advised that Mr Rogers had given evidence, it might be asked whether CASA was entitled to continue with the disciplinary action.

1.37 On 31 October 2013, the references committee wrote to Mr McCormick disclosing that Mr Rogers had appeared as an in camera witness and reminding him of the protections under parliamentary privilege for witnesses to Senate committees. The committee sought Mr McCormick's "written assurance that CASA will immediately cease any action it may be undertaking... which relates to evidence he provided to the committee". Representatives for Mr Rogers argue that from the time of that correspondence CASA was "on notice of the concern that action being taken against Mr Rogers was being taken because of his participation in Senate processes."²¹

1.38 On 5 November, Mr McCormick provided a response, assuring the committee that the disciplinary action against Mr Rogers was not taken *on account of* evidence he gave to the committee. However, not knowing the nature of the evidence given in camera, CASA could not say whether the disciplinary action *related to* that evidence. He also advised the committee of CASA's intentions in progressing and reviewing its decisions.²² This correspondence, occurring in October and November 2013, raised but (in this committee's view) did not settle questions about the nature of the committee's concerns. This apparent impasse remained unacknowledged over the next 6 months, during which time there was no further correspondence on the matter.

1.39 In the meantime, however, the code of conduct proceedings continued. On 26 June 2014, having been advised that CASA intended to terminate Mr Rogers' employment, his representatives wrote to the chairs of the legislation and references

21 Submission, 14 November 2014, Appendix A, paragraph 22.

22 Letter to the chair of the references committee, 5 November 2013.

committees to raise a further complaint that the disciplinary action being taken against him “had arisen as a consequence of evidence he gave to the Senate”.

1.40 The references committee again wrote to Mr McCormick, informing him it was considering raising the disciplinary action against Mr Rogers as a matter of parliamentary privilege, and requesting that CASA cease any further action in respect of Mr Rogers until the outcome of any privileges process is known. Mr McCormick responded, in a letter dated 7 July 2014:

I repeat the assurance that I gave to the Committee on 4 November 2013, that CASA has not taken, and will not take, 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.

1.41 He added that “CASA is not aware of any possible basis on which the discipline process would infringe Parliamentary privilege or be a contempt of the Senate” and offered to meet with the references committee to discuss the matter,²³ however no meeting eventuated. By this time, Senator Xenophon had written to the President raising the matter as a matter of privilege. The letters from the chairs of the two committees followed on 11 July.

Committee’s view

1.42 The only question for the committee here is whether CASA had a reasonable excuse to proceed with the disciplinary action after being informed that Mr Rogers had appeared as a witness.

1.43 It is for committees, operating in accordance with Privilege Resolution 1(18), to investigate concerns about possible interference with their witnesses. In this regard the committee is of the view that it was reasonable for CASA to rely upon communication with the references committee in determining whether there was a concern that its actions would amount to an improper interference with that committee’s processes. As noted above, a committee investigating possible interference with a witness is able to identify particular concerns and provide guidance about avoiding the risk of committing a contempt. In this case, there was little detail in correspondence to CASA about the references committee’s concerns and, in the view of this committee, it was not unreasonable for CASA to proceed on the basis that its assurance of 5 November 2013 had been accepted.

1.44 Once again, the committee is unable to conclude that a contempt should be found.

Conclusions and recommendation

1.45 This inquiry raised some complex issues, and submissions raised matters unrelated to the committee’s central task of establishing causation between the disciplinary action and Mr Rogers’ giving of evidence. The committee was also concerned in the early stages of the inquiry about the seriousness of the proposed

23 Letter to the chair of the references committee, 7 July 2014.

penalty, and it is clear that the legislation and references committees were similarly concerned. As has been noted, the code of conduct proceedings were subsequently settled on terms acceptable to the parties.

1.46 In coming to its conclusions, the committee was guided by the criteria it is required to consider under privilege resolutions. Without cogent evidence of an improper motive for initiating the code of conduct proceedings, the committee is unable to conclude that there was a causal connection between the disciplinary action and the giving of evidence, particularly given that CASA had no knowledge of the in camera hearing. This conclusion is also warranted because CASA's initial actions were, in the committee's view, reasonable in the circumstances, and because CASA was subsequently entitled to proceed on the basis that its assurances to the references committee about its treatment of the witness had been accepted.

1.47 The committee therefore **recommends** that the Senate not find a contempt in relation to the matter referred.

Publication of evidence

1.48 The records and submissions received by the committee ran to hundreds of pages, much of which the committee has resolved not to publish. Some of the evidence goes to the detail of matters put before the references committee in camera, and the Privileges Committee has refrained from publishing such material in deference to the right of that committee to exercise control over the evidence it has taken. Nor has the committee published material directly drawn from legal proceedings between the parties.

Additional comments

1.49 The committee considered that it would be useful to comment on two further matters: the nature of protections for witnesses before Senate committees; and the investigation by committees of possible adverse actions against witnesses.

The protection of witnesses

1.50 It was submitted on behalf of the witness in this matter that he "may well have been able to obtain the protection" of the *Public Interest Disclosure Act 2013* and CASA's corresponding policy had they been in force at the relevant time.²⁴ That Act establishes a framework to enable public officials to report wrongdoing in Commonwealth agencies and ensure that agencies properly investigate and respond to public interest disclosures. Public officials who make disclosures under the Act are protected from civil, criminal and administrative liability for making those disclosures. The absence of that remedy in this matter was put forward as a reason for the Senate to take action. The expectation that the Senate and its committees may offer witnesses something akin to whistle-blower protection is increasingly prevalent, but misunderstands the nature of the protections available to them.

1.51 There are two distinct ways in which the giving of evidence to a Senate committee may be said to be protected. First, the Senate may protect witnesses giving

24 Submission on behalf of Mr Rogers, 14 November 2014, paragraphs 20 – 21.

evidence by the use of its contempt powers, whose nature and purpose in protecting the Senate, its committees and members have been described elsewhere.²⁵ While the penalties which may be applied, including fines and imprisonment, are significant, a finding of contempt may only be made in respect of conduct tending to obstruct the Senate, committees and senators in their functions and duties. The Senate's powers do not otherwise apply.

1.52 The other manner in which witnesses are protected is by way of a legal immunity, descended from Article 9 of the Bill of Rights 1688 and recited in section 16 of the *Parliamentary Privileges Act 1987*, more commonly known as freedom of speech in parliament. Under the Act, a witness providing evidence or documents to a committee attracts the protection which is given to proceedings in Parliament, so that their actions in giving evidence or producing documents cannot be used against them in proceedings before a court or tribunal.²⁶ *Odgers' Australian Senate Practice* notes that the act of submitting a document to the Senate or a committee:

...cannot be used as evidence against the person in any action relating to the composition or acquisition of the document. If the document is composed or acquired for the purpose of submission to the Senate or a committee, the composition or acquisition of the document is also protected.²⁷

1.53 This provides a basis upon which a witness may resist administrative penalties, such as those imposed in code of conduct proceedings, upon administrative and judicial review. It is this legal immunity, rather than any exercise of the contempt powers, which has some equivalence with whistle-blowers legislation. The interpretation and application of these provisions is not a matter for the Senate, but for the courts.

1.54 Committees and individual senators, in their dealings with witnesses, must ensure that they understand the scope, source and limitation of their protection.

Investigation by committees of adverse actions against witnesses

1.55 A committee concerned that a witness may suffer adverse actions on account of giving evidence is required to investigate the matter under Privilege Resolution 1(18). Committees may take whatever steps they consider necessary, and may resolve such matters themselves or report them to the Senate. Individual committees will often be best-placed to assess the risk of interference and determine what preventive or remedial action to take. Experience has shown that the effective intervention of committees while their proceedings are in train generally provides a

25 See 1.7 – 1.11, above.

26 The provision of information to a senator may similarly be covered by parliamentary privilege if there is a sufficiently direct connection between the provision of information to a senator and the senator's use of it in proceedings in Parliament.

27 Evans, H and Laing R (eds), 13th edition p 531.

better remedy than recourse to the Senate's formal contempt powers, although committees should always consider referring serious matters to the Senate.

1.56 Committees should keep in mind that the purpose of the Senate's contempt powers is to ensure the institutional integrity of its proceedings, and that this includes ensuring that witnesses before its committees are neither deterred from nor penalised for giving evidence, and that their evidence is not tainted by undue influence. These contempts are among those listed in Privilege Resolution 6. It must equally be kept in mind that the penalties the Senate may impose in contempt matters are similarly directed toward protecting its ability to carry out its work. There is little capacity for the Senate to make orders in the nature of compensation or restitution for a witness. As the Clerk of the Senate noted in advice to the committee:

Recommendations that go to the strict treatment of a person by an agency go well beyond what the committee has considered appropriate in previous cases. Even where contempt has been found, the committee has gone no further than recommend that agencies apologise to the affected person.

1.57 It is important that committees and individual senators give witnesses accurate and measured information about their protections, and equally important that committees are as forthcoming as possible, when dealing with people they apprehend will take adverse actions against witnesses, in detailing their concerns. The requirement to investigate under resolution 1(18) provides an opportunity to provide guidance about avoiding the risk a contempt may occur and ideally this will be the primary goal in all such undertakings.

(Senator the Hon. Jacinta Collins)

Chair

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.

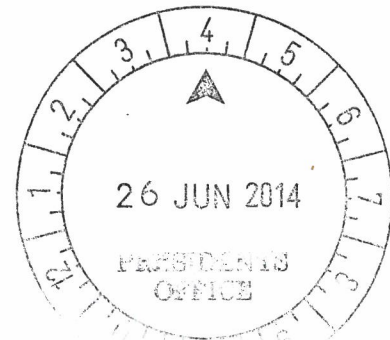
I table the correspondence and call Senator Xenophon to give notice of the motion.



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.

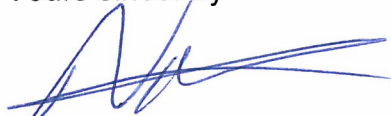
I consider that the link between the information provided by Mr Cho Rogers and the fact that it prompted the line of questioning by Senator Fawcett that led to the audits of TRIM, which in turn led to action by CASA against Mr Cho Rogers, could be considered a breach of privilege under these provisions.

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