

**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**THE SENATE**

**COMMITTEE OF PRIVILEGES**

**POSSIBLE UNAUTHORISED DISCLOSURE  
OF REPORT OF ENVIRONMENT,  
COMMUNICATIONS, INFORMATION  
TECHNOLOGY AND THE ARTS  
LEGISLATION COMMITTEE**

**112<sup>TH</sup> REPORT**

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# **POSSIBLE UNAUTHORISED DISCLOSURE OF REPORT OF ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS LEGISLATION COMMITTEE**

## **Introduction**

1.1 On 27 June 2002 the Senate referred the following matter to the Committee of Privileges, on the motion of the Chair of the Environment, Communications, Information Technology and the Arts Legislation Committee, Senator Eggleston:

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.<sup>1</sup>

## **Background**

1.2 On 17 June 2002, *The Age* featured an article by Ms Annabel Crabb entitled 'Senators tinker with media bill'.<sup>2</sup> The article contained references, including summaries of two of four recommendations, to the contents of the Environment, Communications, Information Technology and the Arts Legislation (ECITA) Committee's report on the Broadcasting Services Amendment (Media Ownership) Bill 2002, which was to be tabled the next day.

1.3 Senator Eggleston wrote to the President of the Senate on 26 June 2002,<sup>3</sup> advising that, the disclosure of the report having been unauthorised, the committee had sought, in accordance with the procedures adopted by the Senate on 20 June 1996, to ascertain the source of the disclosure, but was unable to do so. The chair's letter stated:

The Committee has come to the conclusion that the disclosure caused substantial interference with its work. The unauthorised disclosure of the committee's report may in future limit open and frank discussion and cooperation among members, with potentially long term negative consequences for committee operations. Additionally, witnesses may in

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1 Volume of Submissions and Documents, p. 4.

2 *ibid.*, p. 3.

3 *ibid.*, p. 2.

future be disinclined to provide evidence to the committee on an in camera basis.<sup>4</sup>

The letter reflected a decision of the ECITA Committee recorded in minutes, subsequently forwarded to the Committee of Privileges, of 26 June 2002.<sup>5</sup>

1.4 In drawing the matter to the President's attention, the chair, on behalf of the committee, advised that 'the journalist who authored the media report did so knowing that a contempt of the Senate may be involved'.<sup>6</sup>

1.5 The President gave precedence to the matter of privilege on 27 June 2002 and the matter was referred to the Committee of Privileges without debate on the same day.

## Conduct of inquiry

### *Initial written submissions*

1.6 In accordance with normal procedures, the Committee of Privileges wrote to Ms Crabb, as the author of the article in question, and forwarded a copy of that letter to Mr Greg Hywood, Editor and Publisher in Chief of The Age Company Limited. It also wrote to all members and the secretary of the ECITA Committee at the relevant time.

1.7 The members of the committee responded to the invitation to comment, denying any knowledge of the unauthorised disclosure.<sup>7</sup> However, Senator Lundy advised the Committee of Privileges that Ms Crabb had telephoned her office on Friday, 14 June 2002, requesting information about the contents of the report. Senator Lundy continued:

I advised that such information was under privilege and I was not able to assist. I also advised that the report was due to be tabled the following week on Tuesday, and that she would have to wait until then.<sup>8</sup>

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4 *ibid.* That the ECITA Committee might be concerned about the possible consequences for witnesses giving in camera evidence was illustrated by Senator Mackay, as a member of the ECITA References Committee, during public hearings on 6 December 2002 (*Hansard*, p. ECITA 343). She voiced her concern that, even though certain witnesses had been offered the capacity to give their evidence in camera, they refused to do so on the grounds that retaliatory action might be taken against them notwithstanding the committee's decision to hear the evidence in private.

5 Volume of Submissions and Documents, pp. 86-87.

6 *ibid.*, p. 2.

7 *ibid.*, pp. 5-9, 13, 18 and 19.

8 *ibid.*, p. 9.



Senator Lundy further stated that her media adviser had received a subsequent telephone message from the same journalist, on Sunday, 16 June, but did not return the call.

1.8 The secretary to the committee gave details of the processing of the report. While advising that he was unable to explain the disclosure, he drew attention to two elements:

- (1) [I]n one respect the article contained information which was not known to the secretariat prior to its publication. I refer to the final paragraph of the article that states that the report ‘will be accompanied by a dissenting report from Labor and the Democrats’. The secretariat was, in fact, unaware that a joint dissenting report was to be prepared by the Australian Labor Party and Australian Democrats until 8.38 am on the morning of 17 June, when the report was received in the secretariat as an attachment to an email.
- (2) [Ms Crabb’s article] would appear to have been drawn from the three-page *Executive Summary of Conclusions and Recommendations* contained in the chair’s draft report. It appears that Ms Crabb was either supplied with a copy of the document or was briefed in detail of its contents.<sup>9</sup>

1.9 The chair of the committee, in his personal response, expanded considerably on his letter on behalf of the ECITA Committee to the President of the Senate. In summary, he advised the Committee of Privileges that:

During the week prior to the tabling of the report, Ms Crabb rang me seeking information about the report but I declined to provide any details.

On Sunday 16 June, Ms Crabb left a message on my phone message bank<sup>10</sup> stating that as a matter of courtesy she was informing me that she had an article in the *Age* of Monday 17 June giving details of two of the recommendations in the report.

In a jocular manner, Ms Crabb made remarks showing that she was aware of privilege and she subsequently went on to refer to being put in jail, which indicates that she was aware that by referring to the Committee’s recommendations before they were tabled that she was breaking the privilege rules.<sup>11</sup>

The letter also advised that he had returned her call at approximately 10.30pm,<sup>12</sup> some hours after she had made it, upon his arrival in Sydney from Perth. He advised the

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9 *ibid.*, pp. 10-11.

10 At 6.45pm, Eastern Standard Time - Volume of Submissions and Documents, p. 7.

11 Volume of Submissions and Documents, p. 5.

12 Suggested in later evidence as more likely to have been 11.00pm (*Hansard*, 24 October 2002, pp. 14 and 27).

committee that the purpose of his call was to attempt to ‘cast doubt on the accuracy of her information.’<sup>13</sup>

1.10 The Committee of Privileges received a response from Mr Michael Gawenda, Associate Publisher and Editor of *The Age*. Briefly, he stated ‘that at no time did *The Age* journalist view or possess a copy of the report before it was tabled in parliament.’<sup>14</sup> After arguing that there had been no substantial interference with the operations of the ECITA Committee, he summarised his case as follows:

Given that the article:

- was published only one day before the tabling of the report;
- did not influence the deliberations of the Committee;
- did not disclose information substantially different to that already in the public arena; is not significantly different in content to articles published the day after the tabling of the report; and
- that the source of the disclosure has not been punished, let alone identified,

*The Age* submits that this is not a situation where there have been ‘improper acts’ which have substantially obstructed Senators in the performance of their functions.<sup>15</sup>

### ***Further written submissions***

1.11 Following its consideration of these responses, the committee decided to hold a public hearing to examine the matter further. It invited all ECITA committee members at the relevant time, the secretary to the committee, Mr Gawenda and Ms Crabb to attend, and also to make any further written submissions that they might have.

1.12 All ECITA committee members, the secretary and Mr Gawenda accepted the committee’s invitation to attend the hearing. Ms Crabb declined to do so. However, she made a written submission which gave considerable detail of her preparation and filing of the story, together with her reasons for telephoning Senator Eggleston. She also advised that she had asked her ‘sources’<sup>16</sup>, whom she approached following the matter having been referred to the committee, whether she could reveal them. They reiterated ‘... their desire to remain anonymous and their view that I remain bound by

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13 Volume of Submissions and Documents, p. 5.

14 *ibid.*, p. 14.

15 *ibid.*, p. 17.

16 Ms Crabb chose to refer to ‘sources’ ‘in the plural ... not so as to confirm or deny the presence of more than one source, but so as to avoid any indication of the sources’ identity and to preserve anonymity’ – Volume of Submissions and Documents, p. 40.

my undertakings to keep their identity confidential.’<sup>17</sup> As previously demonstrated,<sup>18</sup> the Committee of Privileges does not make a practice of forcing journalists to disclose their sources, irrespective of its power to do so.

1.13 Ms Crabb advised that her purpose in ringing Senator Eggleston at approximately 6.45pm, around the time she filed her story, was not to have the story confirmed but simply to tell him that she had written it and that it would be appearing in *The Age* on Monday, 17 June. She gave the principal reason for telephoning him as being:

an act of courtesy to Senator Eggleston, both personally and as Chair of the ECITAL Committee, in the interests of maintaining a good working relationship and avoiding a situation where he and/or other committee members might be taken by surprise.<sup>19</sup>

1.14 The committee also received a detailed response on behalf of *The Age* Company Limited, Michael Gawenda and Annabel Crabb (*The Age* submission)<sup>20</sup>, which was intended to supplement Mr Gawenda’s letter of 19 August. The submission acknowledged that disclosure of the two recommendations referred to at paragraph 1.2 above, and the fact that there was to be a minority report, had not been authorised but disputed that the report itself was disclosed to any of the parties. After discussing whether the unauthorised disclosure should constitute contempt, including responding to certain matters raised by Senator Eggleston, the submission concluded as follows:

In the circumstances, it is submitted that the appropriate course would be for the Committee:

- (a) to cancel its public hearing on 24 October, 2002; and
- (b) report to the Senate that, on the basis of its investigation, it has concluded:
  - (i) that there was an unauthorised disclosure of the two recommendations referred to above and the fact that there was to be a minority ECITAL Committee report; but
  - (ii) no contempt was committed in that regard.<sup>21</sup>

1.15 *The Age* submission included as an attachment a further letter from Mr Gawenda in which he suggested to the Committee of Privileges that:

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17 *ibid.*

18 Committee of Privileges 99<sup>th</sup> Report, PP No. 177/2001 – Volume of Submissions and Documents, August 2001, p. 54.

19 *ibid.*, p. 41.

20 *ibid.*, pp. 22-33.

21 *ibid.*, p. 33.

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.<sup>22</sup>

1.16 The committee also agreed to receive as evidence a written submission from the Media, Entertainment and Arts Alliance, which concluded with a recommendation that the Committee of Privileges should ‘recognise that the Senate should accept that it is subject to the same public review as the Cabinet and other arms of the executive government’.<sup>23</sup> The committee noted the submission.

## Public hearing

1.17 Notwithstanding The Age submission, the public hearing proceeded as planned on 24 October. The Age submission having acknowledged that the disclosure was unauthorised, and also having advised that the actual report itself had not been disclosed, the hearing concentrated on two elements raised in the submission. Firstly, the committee asked all members of the ECITA Committee the basis of that committee’s conclusion that the disclosure ‘had caused substantial interference with its work’. All committee members declared that the actual disclosure had not in fact interfered with the ECITA Committee’s work since the time of the publication of the article,<sup>24</sup> although subsequently-provided minutes of the ECITA Committee’s proceedings, which led to the raising of the matter of privilege, proved that a resolution in those terms formed the basis of the letter from the chair of the committee to the President of the Senate<sup>25</sup>. During the public hearing the chair expressed unease about the relationship of trust between committee members, linking his disquiet to the two bases on which the ECITA Committee had concluded on 26 June that substantial interference had occurred, that is, that the disclosure might ‘in future limit open and frank discussion and cooperation among members’ and the potential disinclination of witnesses to provide evidence to the committee on an in camera basis.<sup>26</sup>

1.18 The second matter to which the hearing was directed was whether the unauthorised disclosure had met the threshold test which this committee is required to consider when determining whether a contempt of the Senate has been committed. Both counsel for The Age, and Mr Gawenda himself, queried whether the first criterion of Privilege Resolution 3 had been met:

- (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

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22 *ibid.*, p. 35.

23 *ibid.*, p. 50.

24 *Hansard* pp. 5, 9, 10, 38, 39.

25 Volume of Submissions and Documents, p. 87.

26 *Hansard*, pp. 13-14. And see footnote 4, above.

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.<sup>27</sup>

1.19 Counsel and Mr Gawenda also drew attention to the essential element of offences against Houses of Parliament as established under section 4 of the *Parliamentary Privileges Act 1987* as follows:

**Essential element of offences**

4. 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.<sup>28</sup>

Counsel for The Age pointed to the distinction, which the committee itself had made in its 99<sup>th</sup> report,<sup>29</sup> between publication of a report after its finalisation and publication of in camera documents.

1.20 Conversely, during the public hearing committee members drew attention to Privilege Resolution 6, which declares:

**6. Matters constituting contempts**

... [T]he Senate declares, as a matter of general guidance, *that breaches of the following prohibitions ... may* [emphasis added] be treated by the Senate as contempts.

***Unauthorised disclosure of evidence etc.***

- (16) 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,

unless the Senate or a committee has published, or authorised the publication of, ... a report of those proceedings.<sup>30</sup>

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27 Senate Privilege Resolution 3(a), Standing Orders and Other Orders of the Senate, February 2003, p. 106.

28 *Parliamentary Privileges Act 1987*, section 4.

29 Committee of Privileges, 99<sup>th</sup> report, PP. No. 177/2001.

30 Privilege Resolution 6, Standing Orders and Other Orders of the Senate, February 2003, pp. 108-110.

Senator Eggleston, as chair of the ECITA Committee and formerly a member of the Committee of Privileges, pressed the point that an act so deliberate and blatant as Ms Crabb's, endorsed through the publication of her article in *The Age*, could not be lightly passed over. He also advised the committee that he was hesitant about whether he should ring her, but decided to do so to see how accurate her story might be, with the intention of doing his best to create a doubt in her mind as to its accuracy.

1.21 This led to a subsidiary question, which was argued at length on behalf of *The Age*, that, if Senator Eggleston had advised both Ms Crabb and *The Age* management of his concerns about the possible contempt implications in his telephone call, consideration would have been given to holding back the article until the following day.<sup>31</sup>

## **Proceedings following public hearing**

1.22 At the conclusion of the hearing, the committee invited all witnesses to submit any further written material they might wish to put to the committee before its deliberations.

1.23 The chair of the ECITA Committee forwarded copies of all documentation which that committee had considered when deciding to seek a reference of the unauthorised disclosure to the Committee of Privileges<sup>32</sup> and subsequently made a brief response to the committee's invitation under Privilege Resolution 1(11) to reply to an allegation made by Mr Gawenda during the committee hearing.<sup>33</sup> The secretary of the ECITA Committee provided a clarification of one aspect of his evidence, relating to procedures for the dissemination of information since the unauthorised disclosure of the committee's report.<sup>34</sup>

1.24 A supplementary written submission of *The Age Company Limited*, Mr Michael Gawenda and Ms Annabel Crabb reinforced the points made during the public hearing, and also annexed material related to training on contempt, including contempt of parliament.<sup>35</sup>

## **Comment**

### ***Previous committee views***

1.25 Too often, the deliberate, premature and unauthorised disclosure of committee reports, documents and proceedings is brushed aside as trivial, having no material effect. As the committee's 74<sup>th</sup>, 99<sup>th</sup> and 100<sup>th</sup> reports have pointed out, however, the

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31 Which, in fact, would still have constituted unauthorised disclosure since the report was not due for tabling until 18 June 2002.

32 Volume of Submissions and Documents, p. 69.

33 *ibid.*, p. 89.

34 *ibid.*, p. 88.

35 *ibid.*, pp. 90-107. For further comment on the annexure, see paragraphs 1.46-1.47 below.

Privileges Committee and the Senate have always taken seriously such disclosure, usually by or on behalf of a committee member, with the express purpose of publication in the media. The committee hoped that its 74<sup>th</sup> report, in particular, would provide such a clear statement of its views and intentions in respect of deliberate unauthorised disclosure and publication of committee proceedings and documents that this practice would diminish, if not disappear entirely. Recent cases prove that it has not done so.

### ***Deliberate disclosure of unauthorised material***

1.26 The Committee of Privileges has always regarded the deliberate purveyor of unauthorised material as contemptible, as well as being in contempt of the Senate. It is particularly contemptuous of members of parliamentary committees, who think they might gain advantage from someone, either in authority or in the media, as a result of their unauthorised disclosure. There is, however, some danger for these committee members in doing so. If the matter comes before the Committee of Privileges and the committee decides, as in several cases now, that it will hold a public hearing, involving sworn evidence from each member of the committee which has raised the matter of privilege that he or she did not improperly divulge committee information, at least one other person knows that the member is lying.

### ***Deliberate publication of unauthorised material***

1.27 The 74<sup>th</sup> report, in setting out the committee's general views on unauthorised disclosure and publication of committee proceedings, specifically warned that its previous reluctance to pursue the recipients and publishers of the information, even if it was unable to find and punish the more culpable provider, might not continue.<sup>36</sup> The 99<sup>th</sup> and 100<sup>th</sup> reports demonstrated its commitment to do so, the committee finding in each case that a contempt had been committed by both the undiscovered leaker and the readily-identified publishers of the newspapers concerned.

1.28 The 100<sup>th</sup> report is of particular relevance to the committee's current inquiry. In that case the committee concluded that:

even though on its face the obstruction of the [relevant] committee was not overwhelming it was sufficiently serious to warrant a finding that it constituted improper interference with the work of the committee.<sup>37</sup>

The committee further commented that this was especially the case:

given that ... the journalist admitted to knowing that the report had been improperly disclosed

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36 Committee of Privileges 74<sup>th</sup> report, para. 1.40, p. 8, PP No. 180/1998. And see 99<sup>th</sup> report, para. 48, p. 14, PP No. 177/2001.

37 Committee of Privileges 100<sup>th</sup> report, para. 13, p. 3, PP No. 195/2001.

and noted that the decision to publish had been made despite the warning of the chair of the relevant committee, before publication, that the draft had been improperly disclosed.

### ***Present matter before Committee of Privileges***

1.29 The parallels with the present case are obvious. The attachment to the submission by the chair of the ECITA Committee made it abundantly clear that the journalist was conscious of what she was doing in filing a story based on leaked information. The committee accepted the chair's view that, given Ms Crabb's advice in her telephone message that she was filing a story which she knew to be in conflict with the rules prescribed under the Senate Resolutions, he could not realistically make a serious attempt to stop publication. Ms Crabb's own written evidence indicates that she did not ring him for any reason other than to advise what she had done, so that he was not ambushed subsequently.

1.30 Ms Crabb herself, as the recipient of the unauthorised information, was in no doubt that she was in blatant breach of the rules relating to publication of that material. The committee is also entitled to conclude that so, too, were her editors after she filed the story. As the committee has acknowledged many times when dealing with unauthorised disclosure, often the only factor that makes an otherwise innocuous comment or proposal newsworthy is that it has been leaked to a favoured journalist. Thus, it appears likely to the committee that The Age management was aware that the real story was the leak, rather than the actual content of the report. Even then, they obviously did not regard the story as of supreme significance. The committee elicited from Mr Gawenda during evidence that a page two story was not at the upper end of newsworthiness, and also that he could not recall registering its importance when reading the paper on the morning of publication.<sup>38</sup>

1.31 The Age made much of the fact that the report was prematurely disclosed after the ECITA Committee had completed its deliberations and only slightly before its tabling. The committee does not regard the timing as any mitigation of a potential offence, although obviously the actual damage which might be caused could be considerably greater if disclosure of proceedings occurs at an early stage of deliberations.

### ***Publication 'in the public interest'***

1.32 The committee also canvassed during its hearings the justification for The Age's insistence on publishing the story prematurely. Mr Gawenda told the committee that it is his instinct to publish, rather than withhold, material.<sup>39</sup> However, the shield of freedom of speech and the defence of public interest – which to the credit of the legal representatives of The Age were used sparingly – were singularly weak in this case. It is difficult, if not impossible, for the committee to discern what public interest is

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38 *Hansard*, p. 73.

39 *Hansard*, p. 49.



involved by publishing, one day early, matters that are going to be publicly disclosed anyway.

1.33 As the committee pointed out in its 99<sup>th</sup> report, and again during its recent public hearing, it is a pity that journalists and news organisations do not afford the same rights to parliamentary committees to protect their own information and informants from improper disclosure and publication as journalists and their publishers demand as a right for their own sources. After all, publishers and journalists alike expect, and rely on, members of parliament to follow media protocols in dealing with them and their journalists. For example, Ms Crabb, in refusing the committee's invitation to attend its public hearing, took advantage of the normal practice of this committee not to force persons to appear, and relied on its already-declared self-restraint in relation to forcing journalists to reveal their sources.<sup>40</sup> In addition, she has been able to rely on the committee's well-established view that it is the editor and ultimately the publisher who must take responsibility for the actions of their staff. The parliament is entitled to expect reciprocity whereby the media respect the conventions and laws of the Parliament.

#### ***Possible interference with operations of ECITA Committee***

1.34 During the public hearing, the committee turned to the question raised by *The Age* as to whether the premature publication actually caused, or had a tendency to cause, improper interference with the operations of the ECITA Committee. It was difficult to establish from the documentation available to the committee at the time – and in fact oral evidence directly contradicted the assertion in the ECITA Committee's original letter to the President of the Senate – that the unauthorised disclosure actually caused substantial interference with the ECITA Committee's work.<sup>41</sup> Even taking into account the minutes subsequently sent on behalf of the ECITA Committee, the evidence before the Privileges Committee, particularly the oral evidence adduced in the public hearing, leads to the conclusion that the damage done to the ECITA Committee in this instance was at most minimal.

1.35 This does not absolve *The Age* from its own behaviour in knowingly defying the rule relating to unauthorised disclosure: the best that can be said is that *The Age* was fortunate in the committee it chose. The question is whether the 'receivers of stolen goods' are, in addition to being both contemptible and contemptuous, in contempt of the Senate. The committee therefore considered the contention of the chair of the ECITA Committee that, even accepting that the work of the ECITA Committee was not impaired, the actual act of premature and unauthorised disclosure and publication was sufficient to establish contempt.

1.36 As the committee has commented before, and as the chair of the ECITA Committee emphasised in his submission and evidence in the present inquiry, the potential for a loss of confidence, both personally and in a committee system

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40 See footnote 16, above.

41 But see paragraph 1.17 above.

generally, is considerable. Members of committees are in a relationship of trust with not only their own party colleagues, but also with other colleagues. Sometimes these members, in an effort to reach a productive committee outcome, might on the basis of trust during a deliberative committee meeting be prepared to canvass views which are otherwise inimical to those members' own political interests. They are unlikely to do so if they fear that their attempts at compromise might subsequently be used against them.

1.37 The matter does not end there. Because a committee member has lied, all other members of a committee have hanging over them a suspicion by their own colleagues and others (except for the journalist or other person(s) who know(s) the leaker) that they cannot be trusted, that they are possibly in contempt of the Senate, and, in the case of leaking in camera evidence, potentially guilty of a criminal offence. And as the Committee of Privileges has so strenuously asserted in previous reports<sup>42</sup> a betrayal of trust is even more serious when it is the evidence and documents of witnesses which are involved.

### ***The Age's defence***

1.38 The Age's defence was twofold. First, during the hearing, Mr Gawenda and counsel for The Age suggested that, had Senator Eggleston either warned Ms Crabb of the likely consequences of publication, or alternatively immediately rung the management of The Age with a similar warning, rather than responding to Ms Crabb by attempting to cast doubt on her story, serious consideration would have been given to 'stopping the presses'. Given the reasons in Ms Crabb's own submission for making contact with Senator Eggleston, this seems unlikely. And the time at which he received and responded to the telephone call makes this outcome even more unlikely, particularly given the article's placement at page two of the paper.

1.39 The committee also considers that it was reasonable for Senator Eggleston to expect that, if The Age were serious about taking contempt of the Senate into account, there should have been sufficient failsafe devices within its management structure to ensure that the unauthorised nature of the disclosure was consciously in the minds of the editorial staff on the night in question.

1.40 It appears that the best Senator Eggleston could hope for was to attempt, as he did, to cast doubt in the mind of Ms Crabb, and subsequently other journalists, as to the story's accuracy. These diversionary tactics were effective to the extent that they confined premature publication to the one journalist only, by dissuading journalists from other media from running the story as well. In some ways, this doubles the grievance that other journalists might have against The Age journalist, who gained her scoop, not from a fair process of investigative journalism, but from a leak from someone in the know – obviously after unsuccessfully applying considerable pressure to at least two committee members and their staff. It appears to this committee that

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42 Committee of Privileges 54<sup>th</sup> Report, PP No. 133/1995, 74<sup>th</sup> Report, PP No. 180/1998 and 99<sup>th</sup> Report, PP No. 177/2001.

she, like the leaker of the information, has sought improper advantage over her own colleagues, possibly to their detriment before their editors, by her use of improperly obtained material.

1.41 The second aspect of The Age's defence, at the hearing and in the later written submission, was the question whether, in view of the attitude of all members of the ECITA Committee that their own work had not been compromised, it was open to the Committee of Privileges to make a finding of contempt in the circumstances of this case.

## Conclusions

1.42 All the evidence before the committee leads to the irrefutable conclusion that, in the words of Privilege Resolution 6, Ms Crabb and The Age Company Limited breached the prohibition against unauthorised disclosure of a committee report under paragraph 6(16). The committee must determine, however, whether the breach meets the threshold test under Resolution 3(a), that is, whether the unauthorised disclosure constituted an improper act tending substantially to obstruct the Senate or its committees in the performance of their functions.

1.43 The committee has concluded that, with the exception of the ECITA Committee chair, no other member had thought through the consequences of their having raised the unauthorised disclosure as a matter of privilege, leaving both the chair of the ECITA Committee and the Committee of Privileges vulnerable to the arguments raised on behalf of The Age that, while unauthorised disclosure had occurred, under the terms of Privilege Resolution 3(a) and section 4 of the *Parliamentary Privileges Act 1987* a contempt should not be found.

1.44 In dealing with this reference, the committee confronted for the first time the question whether it should consider, as the chair of the ECITA Committee invited it to do, whether the unauthorised disclosure and publication of committee proceedings is so intrinsically obstructive to the operations of the Senate, its committees, or senators that a contempt should be found almost as a strict liability offence. Given its previously-stated attitude towards strict liability offences, the committee considers that, in this particular case, it should not take into account the more general factors put forward by the ECITA chair, and its own comments at paragraphs 1.27-1.31 above.

1.45 The Committee of Privileges has therefore reluctantly concluded that, in the particular circumstances of this case, it should make a finding based on precedents and the submissions on behalf of The Age. The committee will in the next few months give consideration as to whether the criterion in Privilege Resolution 3(a) needs modification to take into account whether, notwithstanding that an unauthorised publication did not substantially obstruct a committee in a particular case, nevertheless it is of such generic seriousness that a contempt should be found.

## Other matter

1.46 Given Mr Gawenda's persistent assertions about how seriously The Age took possible matters of contempt of parliament, the committee pursued with him the nature of training given at all levels of management in respect of contempt both of court and of parliament. Having received assurances that training in these matters was undertaken, the committee was nonetheless not surprised to discover subsequently that the materials available to The Age journalists and management on the parliamentary element of contempt were scant at best.<sup>43</sup> The documentation supplied is an illustration of the disregard with which the media view possible contempts of a house of parliament. The material has led irresistibly to the conclusion that the media are far more concerned about possible court-imposed sanctions than they will ever be about contempts of parliament, no matter how serious they might be.

1.47 The committee places on notice journalists, their publishers and members of parliamentary committees that it does not intend to let this matter rest. The committee intends to send a copy of this report to the editors and publishers of the major media outlets in Australia, and to every Press Gallery journalist. If the training program of other media outlets is as derisory and superficial as The Age's has proved to be, the committee suggests that media include in their courses seminars conducted expressly for this purpose by parliamentary officers.

## Findings

1.48 The Committee of Privileges makes the following findings:

- (1) There was an unauthorised disclosure, by an unknown person, of two recommendations contained in the Report of the Employment, Communications, Information Technology and the Arts Legislation Committee on the Broadcasting Services Amendment (Media Ownership) Bill 2002, and of the fact that there was to be a joint dissenting report by the Australian Labor Party and the Australian Democrats.
- (2) Such disclosure was deliberate.
- (3) The person who deliberately disclosed the committee proceedings is *prima facie* in contempt of the Senate.
- (4) The Age Company Limited published an article by Ms Annabel Crabb, knowingly based on the deliberate unauthorised disclosure.
- (5) Under the circumstances of the particular case, as outlined above, no contempt can be found against The Age Company Limited, Mr Michael Gawenda, Associate Publisher and Editor of The Age, and Ms Annabel Crabb.

Robert Ray  
Chair

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43 Volume of Submissions and Documents, pp. 101-107.