THE SENATE

COMMITTEE OF PRIVILEGES

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

112th REPORT

SUBMISSIONS AND DOCUMENTS

FEBRUARY 2003

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Contents **Page**

Contents **Page**

Contents **Page**

Contents **Page**

PRIVILEGE

The PRESIDENT (9.30 a.m.)—The Environment, Communications, Information Technology and the Arts Legislation Committee, by letter dated 26 June 2002, under the signature of its chair, Senator Eggleston, has raised a matter of privilege under standing order 81, namely, the unauthorised disclosure of the committee's report before its presentation to the Senate. The committee indicates that the press item referred to by the committee shows that there was an unauthorised disclosure of the report.

In accordance with the Senate's resolution of 20 June 1996, the committee has investigated the unauthorised disclosure to the extent that it is able to do so. The committee has also, in accordance with that resolution, come to a conclusion that the unauthorised disclosure caused substantial interference with its work.

The committee having conformed with the resolution of the Senate, the matter meets the criteria which I am required to consider before giving precedence to a motion to refer the matter to the Privileges Committee. I therefore give precedence to such a motion. I table the letter from the committee and attachment.

As the Senate is to rise tomorrow for a period of more than one week, in accordance with standing order 81(7) the reference to the Privileges Committee may proceed immediately.

Senator EGGLESTON (Western Australia) (9.32 a.m.)—I move:

> That the following matter be referred to the Committee of Privileges:
>
> > 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.

Question agreed to.

AUSTRALIAN SENATE

ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS

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26 June 2002

Senator the Hon Margaret Reid
President of the Senate
Parliament House
CANBERRA ACT 2600

Dear Madam President

I write on behalf of the Environment, Communications, Information Technology and the Arts Legislation Committee to raise a matter of privilege in accordance with Standing Order 81.

An article published in the *Age* on 17 June 2002 entitled 'Senators tinker with media bill' contained references to the contents of the Committee's report on the Broadcasting Services Amendment (Media Ownership) Bill 2002. The report's contents were, of course, confidential until tabled in the Senate on 18 June 2002.

In accordance with the procedures adopted by the Senate on 20 June 1996, the Committee has sought to discover the source of the disclosure, including by my writing to all members and staff to ask them if they can explain the disclosure, but without success.

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 future be disinclined to provide evidence to the Committee on an in camera basis. Your attention is also drawn to the fact that the Committee has evidence that the journalist who authored the media report did so knowing that a contempt of the Senate may be involved. Such behaviour is, of course, a key consideration in Resolution 3 (c) of the Senate's privilege resolutions of 25 February 1988 in relation to the criteria to be taken into account when matters relating to contempt are determined.

Accordingly, I request that you give consideration to the matter and determine that a motion relating to the matter should have precedence of other business.

Yours sincerely

Alan Eggleston
Chairman

Bin: 0167
Brief: SENATE

Age Monday 17/6/2002
General News Page 2
Circulation: 193,500
Size: 184.15 sq.cms.

Senators tinker with media bill

Annabel Crabb
Canberra

Journalists would be asked to declare their bosses' media interests in their stories under recommendations from government senators in a report on the media ownership legislation to be handed down tomorrow.

In another blow to the planned dismantling of media ownership laws, the senators also want a partial retention of cross-media restrictions in regional areas, which would further complicate and delay the legislation.

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

For example, this would compel a print journalist, when mentioning a television network owned by their proprietor (or a show or personality appearing on that network), to disclose the proprietor's interest.

It is unclear how such an arrangement would be policed.

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

The legislation as it stands will allow proprietors to own all three as long as they maintain separate editorial structures.

Much of the adverse evidence given during the Senate's inquiry concerned fears that diversity of opinion and news sources in regional areas would suffer if proprietors were allowed to take over radio, television and newspapers in country towns.

The proposed changes, while not necessarily unpalatable to the government, would further complicate the legislation and are likely to delay the bill further.

The government had originally hoped to begin debating the legislation this week in an attempt to push it through before parliament rises on June 27, but Communications Minister Richard Alston is now resigned to waiting until late August at the earliest.

Further delays could push the debate back towards the end of the year, by which time Senator Alston and colleagues hope to be fully occupied with currying favour for the full sale of Telstra.

The recommendation on regional areas reflects strong backbench concerns, particularly in the National Party, about the relaxing of cross-media ownership bans.

The recommendation on journalistic disclosure is likely to anger the Press Council, which already has reservations about the legislation's intrusion into newsrooms.

The Press Council protested against the legislation's clause authorising the Australian Broadcasting Authority to monitor news organisations and ensure they keep separate editorial structures.

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

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
THE SENATE

Extract from Journals of the Senate
No. 21 dated 27 June 2002

2 PRIVILEGES—STANDING COMMITTEE—STATEMENT BY PRESIDENT—REFERENCE

The President made a statement relating to a matter of privilege raised by the Chair of the Environment, Communications, Information Technology and the Arts Legislation Committee (Senator Eggleston) concerning the unauthorised disclosure of a report of the committee and indicated that the committee had investigated the matter in accordance with the order of the Senate of 20 June 1996.

The President informed the Senate that, pursuant to the procedures provided by standing order 81 and resolutions of the Senate of 25 February 1988, she had determined that a motion relating to the matter may have precedence of all other business today.

Document: The President tabled the following document:

Privileges—Standing Committee—Reference—Letter from Senator Eggleston to the President, dated 26 June 2002 and attachment.

Senator Eggleston moved—That the following matter be referred to the Committee of Privileges:

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.

Question put and passed.

AUSTRALIA

THE SENATE

28 June 2002

Miss Anne Lynch
Secretary
Senate Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Miss Lynch

In response to Senator Robert Ray's letter, I wish to advise that I have no knowledge of who may have given Ms Annabel Crabb of the *Age* details of the recommendations contained in the Senate Environment, Communications, Information Technology and the Arts Legislation Committee Report on the Broadcasting Services Amendment (Media Ownership) Bill 2002.

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 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.

When I reached Sydney airport at about 10.30pm on the evening of 16 June, after listening to the message of Ms Crabb, I pondered what the most appropriate course of action for me to follow would be. I concluded that I should not confirm the accuracy of her story in any way which would be the case were I to ask her not to publish the story or warn her of the consequences of knowingly breaking privilege. Instead, I decided to seek to cast doubt on the accuracy of her information. Accordingly, I rang Ms Crabb and said I would be nominating her for the "Enid Blyton Creative Fairy Story of the Year Award".

SENATOR ALAN EGGLESTON
Liberal Senator
for Western Australia

Chair: Senate Legislation Committee on Environment, Communications, Information Technology and the Arts

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STANDING
- *Privileges*
- *Procedure*

JOINT
- *Migration*
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Subsequently, after the article was published on 17 June, I was rung by journalists from the *Sydney Morning Herald*, the *Australian*, and the *Australian Financial Review* seeking confirmation of the accuracy of Ms Crabb's story. In all three cases, I repeated my comments about nominating Ms Crabb for the Enid Blyton Fairy Story Award.

I have appended a transcript of Ms Crabb's voice mail message.

Yours sincerely.

DR ALAN EGGLESTON
SENATOR FOR WESTERN AUSTRALIA

Transcript of telephone message

TELSTRA introductory message: 6.44PM SUNDAY

Hello Allan, it's Annabelle Crabb at The Age. I just rang to let you know that I am writing a story about your Committee's report to go in tomorrow's paper.

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

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

Anyway, look if you want to ring and discuss I am on 0411 517 549. Time now is about 6.45pm. Thanks. Bye.

AUSTRALIA

AUSTRALIAN SENATE

SENATOR JOHN TIERNEY

Liberal Senator for New South Wales

Chair of the Senate Standing Committee on Employment, Workplace Relations, Small Business and Education

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6 August 2002

Senator Robert Ray
Chairman
Committee of Privileges
Parliament House
Canberra ACT2600

Attention: Miss Anne Lynch

Dear Senator Ray

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

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

Yours sincerely,

Senator John Tierney

FAXED 12.8.02

SENATOR KATE LUNDY

SHADOW MINISTER FOR INFORMATION TECHNOLOGY AND SPORT

SENATOR FOR THE AUSTRALIAN CAPITAL TERRITORY

Senator Robert Ray
Chair
Committee of Privileges
Parliament House
CANBERRA 2600

Dear Senator Ray

I write to you in relation to the matter raised in your correspondence dated 27 June 2002.

I would like to take the opportunity to restate the fact that I have no knowledge or involvement in the unauthorised disclosure of the report in question.

I would also like to take this opportunity to advise the committee that my office received a phone call request from journalist Ms Annabelle Crabb on Friday 14 June 2002 requesting information about the contents of the report in question. I advised that such information was under privilege and I was not able to assist. I also advised her that the report was due to be tabled the following week on Tuesday, and that she would have to wait until then.

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

Yours sincerely

Kate Lundy
9 August 2002

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AUSTRALIAN SENATE

ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS

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12 August 2002

Senator Robert Ray
Chair
Senate Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

Your letter of 27 June 2002 invited my comment on the unauthorised disclosure of the report of the Environment, Communications, Information Technology and the Arts Legislation Committee on the Broadcasting Services Amendment (Media Ownership) Bill 2002. Evidence of the unauthorised disclosure was contained in an article by Annabel Crabb published in the *Age* on 17 June 2002.

At the outset I wish to state that I am unable to explain the disclosure and that I have every confidence that no officer of this secretariat was responsible for the unauthorised disclosure. The two other secretariat officers involved in the finalisation of the report, Principal Research Officer, Ms Catherine Rostron, and Executive Assistant, Ms Christine Wilson, advised the Committee's Chairman, Senator Eggleston, on 21 June that they were unable to explain the disclosure and I have no reason to doubt the veracity of their statements.

In this respect, it is material to note that, while some of the information in the Crabb article was known to the secretariat at the time she would have prepared it, in 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.

Prior to then, the secretariat was aware only that representatives of the Australian Labor Party and the Australian Democrats had formally flagged their intention to prepare dissenting reports and that there was some informal indication of their intending to collaborate in this regard. The secretariat had no reason to expect, and would not therefore have been in a position to tell Ms Crabb in definitive terms, that those indications implied the provision of a single dissenting report, rather than two separate ones (but which might have expressed the existence of some common ground between their two positions).

I have closely examined the Crabb article and it 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. It will no doubt assist the Committee of Privileges in its deliberations if I detail the administrative processes behind the preparation and distribution of the chair's draft report.

The Committee Chairman, Senator Eggleston, gave the secretariat drafting instructions for the chair's draft report as soon as the public hearings were concluded on 22 May 2002. Drafting continued in the secretariat in close coordination with Senator Eggleston until reaching a sufficiently advanced stage on 3 June 2002 for a document entitled Executive Summary of Conclusions and Recommendations to be compiled for the first time. It is my understanding that, at that stage, only the Government members of the Committee (and probably also some of their staff) and the secretariat, had access to the document.

The draft report continued to be revised until at about 4.30 pm on 5 June the Chairman authorised the release of the chair's draft report in accordance with standing order 38(1). Ten copies were made by the Senate Committee Office's Resources Officer, Mr Michael Griffiths. Each copy carried the annotation on the cover of 'CHAIR'S DRAFT 5 June 2002' and was prominently stamped 'CONFIDENTIAL' in red ink. Ten copies had been made to allow for copies to be provided to each of the six Committee members, three spares in case an additional copy was requested by a Committee member or a participating member, and a copy for proof-reading by the two key secretariat officers, Ms Rostron and myself. The original version is, of course, retained on an appropriate file.

At 5.34 pm I finalised a letter of transmittal for the report addressed to the six Committee members for the Bill inquiry: Senators Eggleston, Bourne, Lundy, Mackay, Tierney and Tchen. Four of the six members of the Committee were known to be in Canberra for estimates hearings and copies were delivered to them either in person or to their Parliament House offices in sealed envelopes.

Having earlier determined that Senators Bourne and Mackay were in their electorate offices, copies of the report were placed in Australia Post *Express Post* envelopes and deposited in the Australia Post mailboxes in Parliament House. While Australia Post guarantees next day delivery for its *Express Post* service to both Sydney and Hobart, experience has taught me that this guarantee cannot be relied on. Accordingly, and given that the Committee was scheduled to consider the draft report on 7 June, only two days later, I made arrangements with Dr David Sutton and Ms Jane Mulligan, staff members of Senators Bourne and Mackay respectively, to send them copies of the report by email. Those emails were sent at 5.32 pm and included the comment 'Please remember it is a **confidential** document and under embargo until tabled' (emphasis in original).

The spare copies and the original have been retained in a locked cabinet in my office, other than when in use. One copy cannot now be accounted for, however. The secretariat has no written record, nor does any officer have a recollection, of a second copy of the report being requested by a Committee member, nor of any copy being sought by a participating member.

The meeting of the Committee to consider the chair's draft report commenced at 4.03 pm on 7 June by teleconference, in accordance with standing order 30(3)(a). Senators Eggleston, Bourne and Mackay, Catherine Rostron and myself were parties to the teleconference call. The Committee resolved that the chair's draft report be the report of the Committee for tabling on 18 June 2002, with Senators Bourne and Mackay indicating their intention to provide dissenting reports. The informal comment referred to above about there possibly being some degree of collaboration in the drafting of these dissenting reports was made towards the end of the deliberations.

I should inform the Committee of Privileges that I have a vague recollection of Annabel Crabb contacting me at some fairly late stage in the inquiry to seek advice about the tabling arrangements for the report. I did not record the call in my diary as I saw it as being of a relatively straightforward nature, being one of numerous calls on the same topic from members of the media and the general public received at around that stage of the inquiry.

I would have told her the same as I told all callers - that the reporting deadline was 18 June and that, depending on the progress of the business of the Senate on the day, tabling could be expected to take place at any time after the completion of Question Time, but more probably in the late afternoon/early evening period. And, if anyone asked about the report's contents, that I could not disclose its contents prior to its tabling because they were confidential until that time.

Finally, and for completeness of the administrative processes with which this matter was handled, I advise the Committee of Privileges that on 20 June, following the Committee's decision that day to follow the provisions of the Senate's procedural order of continuing effect of 20 June 1996 in relation to unauthorised disclosures, Senator Eggleston wrote to Senators Bourne, Mackay, Lundy, Tchen and Tierney, and to me, Ms Rostron, Ms Wilson, Ms Mulligan and Dr Sutton to ask if they could explain the disclosures in the Crabb article. I wrote to Senator Eggleston in similar terms that day.

All parties responded in a timely manner. Mr Robert Wallace, Research Officer to Senator Eggleston, also provided a statement given his close involvement in advising Senator Eggleston with the development of the chair's draft report.

The several responses have not been published by the Committee and it would be inappropriate for me to provide details of their contents to the Committee of Privileges without the Committee's authorisation. I point out, however, that Senator Eggleston confirmed in his letter to Madam President of 26 June 2002 that no respondent was able to explain the disclosure.

Please do not hesitate to contact me if I can further assist your Committee.

Yours sincerely

Michael McLean
Secretary

VICKI BOURNE

14 August, 2002

Senator Robert Ray
Chair
Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Senator Ray,

Thank you for your letter of 27 June concerning the recent unauthorised disclosure of a report of the Environment, Communications, Information Technology and the Arts Legislation Committee.

I am happy to tell you that I had nothing whatever to do with any unauthorised disclosure of any material from that Committee. The confidential report was delivered to my office, but was only seen by my researcher, David Sutton and myself. I only discussed its contents with David, with other Committee members and with Committee staff. David only discussed its contents with me, with Committee staff, and with the staff of other members of the Committee.

Neither of us had any contact with the journalist concerned, Ms Annabel Crabb, while we had the confidential report, and before the final report was tabled.

If I can elaborate any further, please do not hesitate to contact me.

Yours sincerely,

Vicki Bourne

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FAXED 19-8-02

Michael Gawenda
Associate Publisher & Editor

19 August 2002

Miss Anne Lynch
Secretary to the Committee
Committee of Privileges - Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Miss Lynch

Committee of Privileges

I refer to the letter of Senator Robert Ray dated 27 June 2002, addressed to Annabel Crabb and respond as follows.

I apologise for the delay in responding to the letter. As a result of a break down in communication between our reporter in the Canberra Bureau and our office, there was a significant delay in your letter coming to my attention. This delay was compounded by the reporter's absence from the Bureau on annual leave.

Disclosure of Report

In a letter dated 26 June 2002, the Chairman of the Environment, Communications, Information Technology and the Arts Legislation Committee states that the subject article contained references to the contents of the Committee's report on the *Broadcasting Services Amendment (Media Ownership) Bill 2002* ('the Bill').

Although reference is made in the article to the contents of the report, I state for the record that at no time did The Age journalist view or possess a copy of the report before it was tabled in parliament.

Public interest

Technology has moved on since the cross media rules were made. The public has an interest in the ownership of the media in Australia and restraints on media ownership, foreign ownership and cross media ownership.

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Previous reporting of issue

The issue of media ownership reform in Australia, and more specifically the Bill, has received significant media coverage.

In referring the Bill to the Committee, Senator Alston stated that the purpose of a Senate review of the Bill was 'to enable public input into the proposed changes'. The article contributed to the public debate of this proposed legislation.

There has already been substantial public debate on this issue, there were direct public submissions to the inquiry, and much of the information contained in the article had already been disclosed in prior reporting of the issue. Therefore, there was little confidentiality in reality surrounding the report.

Time lapse between article and tabling of report

The article appeared in The Age on 17 June 2002. The report was tabled the following day. It is difficult to see how such a short time lapse between the publication of the article and the tabling of the report could cause 'substantial interference with [the Committee's] work'.

Substantial Interference

The Committee states that the disclosure of the contents of the report have caused substantial interference with its work.

The Privileges Committee in Chapter One of the 74th report 'Possible unauthorised disclosure of parliamentary committee proceedings' raises concerns that the media is attempting to 'influence or distort the outcomes of deliberations of a committee' by the report on committee proceedings before the report is released.

Given that the article was published one day before the report was tabled in parliament, it is difficult to see how the article has influenced the deliberations of the Committee.

Effect of publication

I would have thought that the practical effect of publication of the article prior to tabling of the report is negligible.

This is evidenced by a comparison between the article and articles published after the tabling of the report:

The subject article dated 17 June	Financial Review Article dated 19 June
'Journalists would be asked to declare their bosses media interests under recommendations from government senators ...' '... recommends that journalists be compelled to disclose proprietors' cross-media interest when reporting news stories that affect those interests.'	'Howard Government Senators are pushing for changes to the Coalitions proposals on media regulation, call for a new requirement that journalists declare when media proprietors have an interest in their news stories'
'... the senators also want a partial retention of cross-media restrictions in regional areas ...'	'A Senate committee report into the Broadcasting Services Amendment Bill, tabled last night, also calls for the continuation of a form of cross media ownership regulations in regional Australia

Clearly, there is no significant difference between the subject article, and those articles published two days later.

Other contempt proceedings

It is noted that in its report 'Possible unauthorised disclosure of parliamentary committee proceedings' the Privileges Committee asserts that in recent cases involving disclosure to the media:

> '... the committee has concentrated almost exclusively on attempts to find the source, virtually ignoring the role of the media in publishing such disclosures.'

Additionally, the report notes that the Committee:

> '...has not been willing to punish the publisher of the information without being able to penalise the source.'

In its letter of 26 June 2002 , the Chairman of the Environment, Communications, Information Technology and the Arts Legislation Committee admits that it has been unsuccessful in determining the disclosure of the contents of the report.

The Age submits that it would be unfair for the Privileges Committee to ignore this convention on this occasion. The Committee should focus its attention on the source or sources.

Guidelines for contempt proceedings

The Senate Privilege Resolutions of 25 February 1998 requires the Committee of Privileges, when inquiring into matters relating to contempt, to take in 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, 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.'

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.

Yours sincerely,

Michael Gawenda
Associate Publisher & Editor

PARLIAMENT OF AUSTRALIA • THE SENATE

SENATOR TSEBIN TCHEN

Liberal Senator for Victoria

22 August 2002

Senator the Hon Robert Ray
Chair, Privileges Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Ray,

I am reminded that the Privileges Committee had enquired of me by letter dated 27 June 2002 on a matter of unauthorised disclosure that was raised by the Environment, Communications, Information Technology and the Arts Legislation Committee, to which I had not responded by the nominated date of 14 August 2002.

I offer my sincere apologies to the Privileges Committee for this oversight, which was caused by confusion on mine part of an enquiry on the same issue sent to me by the Environment, Communications, Information Technology and the Arts Legislation Committee, to which I did respond.

As for the matter that is the subject of your query, I wish to advise that I have no personal knowledge or information about it. Nor does my office or any of my staff have any such knowledge or information.

Yours sincerely,

TSEBIN TCHEN

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Sue Mackay

Labor Senator for Tasmania
Opposition Senate Whip

26th August 2002

Miss Ann Lynch,
Secretary, Senate Privileges Committee
Parliament House
Canberra ACT 2600

Dear Miss Lych,

I refer to the letter dated 27th June 2002 concerning the matter raised by the Environment, Communications, Information Technology and the Arts Legislation Committee in its letter of 26th June 2002 to the President, whether there was an unauthorised disclosure of a report to that committee, and whether any contempt was committed in that regard.

Further to what I indicated in my statement to the Environment, Communications, Information Technology and the Arts Legislation Committee with regard to this matter, I confirm to you that I have no knowledge of how the unauthorised disclosure took place.

Yours sincerely,

Senator Sue Mackay

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14 October 2002

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PRIVATE AND CONFIDENTIAL

Senator the Honourable Robert Ray
Chair
Committee of Privileges
The Senate
Parliament House
CANBERRA ACT 2600

Dear Sir

We confirm that we act on behalf of The Age Company Limited, Mr Michael Gawenda (Associate Publisher and Editor) and Ms Annabel Crabb (the reporter).

We refer to Mr Gawenda's letter to you of 19 August 2002 and your subsequent letter of 3 September 2002.

We now enclose:

1. Written submission on behalf of our clients;

2. Letter from Mr Gawenda, with attachments; and

3. Letter from Ms Crabb, with attachment.

We confirm that at the hearing at 4.30 pm on Thursday 24 October 2002, our clients will be represented by Mr Steven Rares SC and Mr Robert McHugh, with Adam Barnett from Minter Ellison. Mr Gawenda will also appear.

As mentioned in the submission, in the light of the material now before the Committee, our clients request that the Committee:

(a) Cancel its public hearing on 24 October 2002; and

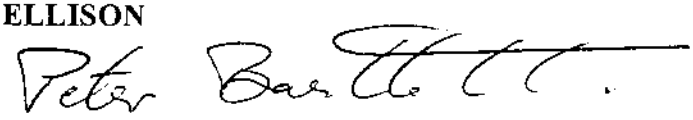
(b) Report to the Senate that on the basis of its investigation, it has concluded:

   (i) that there was an unauthorised disclosure of the two recommendations referred to in the submission and the fact that there was to be a Minority ECITAL Committee Report; but

   (ii) no contempt was committed in that regard.

Could you please advise this office of your position as to whether this matter should continue to a public hearing.

Yours faithfully
MINTER ELLISON



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Our reference: PLB 30-3962203

AUSTRALIAN SENATE
COMMITTEE OF PRIVILEGES

INQUIRY INTO MATTER REFERRED ON 27 JUNE, 2002

WRITTEN SUBMISSIONS OF

THE AGE COMPANY LIMITED,

MICHAEL GAWENDA AND ANNABEL CRABB

Introduction

1. These submissions are made on behalf of The Age Company Limited (**"The Age"**), Michael Gawenda and Annabel Crabb pursuant to the invitation given by Senator the Hon Robert Ray, the Chair of the Committee of Privileges (**"the Committee"**), by letter dated 3 September, 2002.

2. These submissions are intended to supplement Mr Gawenda's letter to the Secretary to the Committee dated 19 August, 2002.

The article

3. The present inquiry relates to the publication by The Age on 17 June, 2002 of an article written by Ms Crabb, a journalist employed by The Age, entitled "Senators tinker with media bill" (**"the Article"**).

4. The Article referred to two recommendations which it was expected would be made on the following day, 18 June, in a report by a majority of Senators on the Environment, Communications, Information Technology and the Arts Legislation Committee (**"the ECITAL Committee"**). Those two recommendations were described in the Article in the following terms:

(a) the majority recommended "*that journalists be compelled to disclose proprietors' cross-media interests when reporting news stories that affect those interests*"; and

(b) the majority recommended "*adopting a different cross-media regime for regional Australia, in which proprietors would be allowed to own only two forms of media in any given area — out of television, print and radio.*"

The Article also stated that the majority ECITAL report would be accompanied by a dissenting report.

5. The Article did not otherwise refer to the content of any draft or final report by the ECITAL Committee.

6. It is important to note that the Article did not refer to any confidential submission made to the ECITAL Committee or to any oral evidence taken in camera. The only reference in the Article to evidence given to the ECITAL Committee was the statement that "*[m]uch of the adverse evidence given during the Senate's inquiry concerned fears that diversity of opinion and news sources in regional areas would suffer if proprietors were allowed to take over radio, television and newspapers in country towns.*" That evidence was given in public hearings and there can be no question that it was available and appropriate for public report.

The reference

7. On 27 June, 2002 the Senate referred to this Committee the matter raised in a letter from the Chairman of the ECITAL Committee to the President of the Senate dated 26 June, 2002 ("**the Reference**"). The two issues raised in the Reference are as follows:

(a) "whether there was an unauthorised disclosure of a report of [the ECITAL] committee"; and

(b) "whether any contempt was committed in that regard".

Unauthorised disclosure

8. The Age, Mr Gawenda (who is the Associate Publisher & Editor of The Age) and Ms Crabb ("**the Age Parties**") do not dispute that the disclosure of:

   (a) the two recommendations referred to above; and

   (b) the fact that there was to be a minority ECITAL Committee report;

   ("**the Disclosures**") was not authorised by the ECITAL Committee.

9. However, the Age Parties do dispute that the report itself was disclosed to any of them.

10. Moreover, the Age Parties submit that the Disclosures did not constitute contempt.

Contempt — the thresholds in section 4 and Resolution 3

11. The Age Parties submit that given the nature of the Disclosures and the circumstances in which they were made, no contempt was committed either by the person or persons who initially disclosed those matters to Ms Crabb or by any of the Age Parties.

12. Section 4 of the *Parliamentary Privileges Act* 1987 provides:

> "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." (emphasis supplied)

13. Section 4 enacts a threshold test for all conduct which is alleged to amount to contempt, whatever its description. The clear purpose of the provision is to ensure that conduct which amounts to a mere technical breach or which does not have any substantial effect on the workings of the House or committee will not *constitute* contempt.

14. Resolution 3 of the Resolutions agreed to by the Senate on 25 February, 1988 relevantly provides as follows:

"The Senate ... requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it:

(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 appeared to be of a *trivial* nature or unworthy of the attention of the Senate; ..." (emphasis supplied)

15. The effect of Resolution 3(a) is to raise the threshold for investigation by this Committee even higher than the standard in section 4. That is so because, while section 4 limits the scope of the matters which constitute contempt, resolution 3(a) confines still further those contempts which justify investigation.

The nature and circumstances of the present Disclosures

16. There does not appear to be any question in the present case of interference with the free performance of any individual member's duties. The only issue for consideration concerns the possibility of improper interference with the authority or functions of a House or committee.

17. There can be no suggestion that the Disclosures were *intended* to amount to an improper interference with the authority or functions of the Senate or the ECITAL Committee. There is no evidence of any improper intention. To the contrary, as is apparent from Ms Crabb's and Mr Gawenda's letters to the Committee, the Article was published for the important public purpose of promoting debate on issues of great social, political and constitutional significance. The proposed legislation and the recommendations referred to in the Disclosures, if enacted, would have an immediate effect on freedom of speech, diversity of opinion, media power and political communication generally.

18. The question whether the Disclosures *in fact* amounted to, or were *likely to* amount to, an improper interference with the authority or functions of the Senate or the ECITAL Committee must be judged in light of the nature and circumstances of the Disclosures. The following matters are significant for this purpose:

(a) The Disclosures did not relate to any evidence given or submission made confidentially to the ECITAL Committee.

(b) To the extent that the Disclosures referred to the content of any as yet undisclosed report, they were confined to two *final* recommendations of the ECITAL Committee. At the time the Disclosures were made, the political and deliberative process of the ECITAL Committee had come to an end[1]. The members of that committee had made their decision. They were committed to the publication of their recommendations and to the need to stand before the Parliament and the electors to defend them.

(c) The issues involved were of manifest public importance and public interest in the true sense.

(d) There was a suggestion, referred to in the Article itself, that the government originally had intended to enact the legislation before 27 June — just 10 days after the date of the Article, although a longer period was indicated as more probable. There was, in all the circumstances a pressing need for a full and extensive public debate on the proposed legislation and recommendations for its amendment.

(e) The ECITAL Committee's report and its recommendations were to be, and were in fact, published on the following day.

19. The Chairman of the ECITAL Committee, Senator the Hon Alan Eggleston, in his letter to the President of the Senate dated 26 June, 2002 raised three matters which would touch upon the question of improper interference with the work of the committee. Each of the Chairman's assertions is unexplained and unsubstantiated by any evidence. None of the assertions deals directly with the nature or circumstances of the Disclosures at issue.

20. First, Senator Eggleston asserts that in relation to the ECITAL Committee the disclosure in fact "... *caused substantial interference with its work.*" No description is

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[1] see the annexures to Mr Gawenda's letter dated 14 October 2002

given of the actual interference alleged. It is difficult to see what the interference could have been. Indeed, given that the information-gathering and deliberative processes had already come to an end by 17 June, 2002[2], it is clear that there was no such interference, much less a substantial interference.

21. Secondly, Senator Eggleston asserts that the disclosure "... *may in future limit open and frank discussion and cooperation among members, with potentially long term negative consequences for committee operations*".

(a) While there might be some basis for this assertion if the disclosure at issue had been made at an earlier stage of the committee's deliberations, it is difficult to see how disclosure of two of the final conclusions to which committee members had come, just one day before those conclusions were to be tabled in the Senate, could have any substantial effect on future cooperation among them. Is it really likely that professional politicians will be put off the performance of their duties because their final recommendations are made public 24 hours ahead of schedule? Would the Committee conclude that Senators who had come to considered political decisions and who were prepared to defend them in and out of Parliament would be inhibited in forming their views by such a disclosure? Senators are made of sterner stuff: they are not prone to abandon their well thought out positions merely because those positions are leaked.

(b) In any event, to the extent that there could be any such effect, its cause would not be the publication of the Disclosures by The Age, but rather the fact that a member of the committee had himself or herself made an unauthorised disclosure. It is thus not surprising that this Committee has often stated the view that it is not appropriate to pursue media outlets with respect to unauthorised disclosures of this nature without also pursuing the person who

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2 This is shown by the fact that the letter dated 11 June 2002 of Mr B Wolpe, Manager, Corporate Affairs of John Fairfax Holdings Ltd to the ECITAL Committee was received *after* that Committee "... *had finalized its consideration of its report* ...": see the annexures to Mr Gawenda's letter dated 14 October 2002.

disclosed the matter[3].

22. Thirdly, Senator Eggleston asserts that "... *witnesses may in future be disinclined to provide evidence to the Committee on an in camera basis*". There is simply no basis whatever for this assertion. The Article did not refer to any in camera evidence. Indeed, in the present case, it appears that in fact no evidence was given in camera to the ECITAL Committee.

23. While it is understandable that Senator Eggleston might be upset that the ECITAL Committee's recommendations were not kept confidential, nevertheless the circumstances and consequences of the Disclosures do not fall within section 4 of the Act. It follows that there has been no "*offence against a House*" within the meaning of that section. That is, no contempt has been committed.

24. Another way of looking at the question is to ask what would have happened after Senator Eggleston spoke to Ms Crabb had he sought an injunction from the Court. Of course, the Courts do enjoin persons who seek to publish confidential material, but the availability of this remedy is very limited when government secrets are involved. For this purpose the Parliament is one of the three arms of government under the *Constitution*. The legal principles which apply to the Executive government's claims for confidentiality apply also to the present situation or, alternatively, may be thought to be analogous to some breaches of Parliamentary privilege.

25. The High Court of Australia has adopted[4] the explanation of the principles made by Justice Mason in *The Commonwealth of Australia v John Fairfax & Sons Ltd*[5] in the following passage. The case dealt with leaked documents the publication of which was said to be detrimental to relations with foreign countries and to prejudice national security. Justice Mason said:

> "It may be sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a

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3 see, e.g. 74th Report at para. 109; 107th Report at para. 4.4; 99th Report at para. 44

4 see *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at pp 31-32 per the Chief Justice, Sir Anthony Mason, with whom Justices Dawson and McHugh agreed at pp 39, 48

5 (1980) 147 CLR 39 at p 52

> relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. *It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.*
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
>
> The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. *Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs.* If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality." (emphasis supplied)

26. The Disclosures enabled the public to know of and then discuss the two final recommendations earlier than they would otherwise. Sometimes leaks are necessary and they are accepted as part of the lifeblood of our democracy. However, it is accepted that on occasion damage can be done by leaks. And, there will also be circumstances where a balanced view needs to be reached between the public's interest in knowing and expressing its opinions and the need to censure the breach of confidence which brought about a leak.

27. The essence of what Sir Anthony Mason said in the passage set out above and what section 4 of the *Parliament Privileges Act* 1987 provides is that the mere fact that the Disclosures occurred by the publication of the Article is not enough to constitute an offence.

28. The power to find that an offence or contempt has occurred should be exercised sparingly and only when some real harm – some "*improper interference*" in the words of section 4 – can be identified as having flowed from the conduct referred to the Committee. The same principle applies in the case of Resolution 3(a).

29. Here, no improper interference occurred. No offence or contempt was committed.

30. Moreover, even if the present Disclosures could amount to a technical contempt, it is beyond argument that their circumstances and consequences were such that it would not be "*necessary*" for the Senate to deal with them within the meaning of Resolution 3(a). There is simply no basis for a conclusion that the Disclosures had any tendency "*substantially to obstruct*" the ECITAL Committee or its members in the performance of their functions. It is respectfully submitted that the technical contempt in question — if any — is properly described as "*trivial*" in nature.

31. The triviality is all the more apparent in light of:

(a) the light-hearted conversation which Senator Eggleston had with Ms Crabb on the night of 16 June, in which he said he would nominate her for the "*Enid Blyton Creative Fairy Story of the Year Award*";

(b) the fact that Senator Eggleston apparently did not refer to privilege at all in that conversation. Indeed, he did not refer to *any* concern about the publication of the Disclosures; and

(c) the fact that Senator Eggleston did not require of Ms Crabb, Mr Gawenda or The Age that they not publish the Article.

32. While the Age Parties make no criticism of Senator Eggleston in regard to that conversation, they submit that the Disclosures should be viewed in light of the circumstances as they appeared at the time and, particularly, as those circumstances were reflected in the Senator's own contemporaneous response to them. It is open to the Committee to take the view that the Age Parties — who gave the Senator an opportunity to respond to the Article before it was published but who were denied any opportunity to address the concerns which the Senator voiced in his letter of 26 June — were entitled to proceed on the footing that no substantial question of privilege was involved and that no improper inference with the ECITAL Committee or the Senate would occur.

33. The Age Parties submit that, in light of section 4 and Resolution 3(a), the Committee has no need — and indeed, no jurisdiction — to pursue this matter any further.

Suggested bases for any contempt

34. In any event, there appear to be only two bases suggested for any contempt in the present case:

(a) section 13 of the Act; and

(b) Resolution 6(16) of the Resolutions agreed to by the Senate on 25 February, 1988.

35. The Age Parties submit that, even if the threshold requirements of section 4 and Resolution 3 were inapplicable, the Disclosures did not contravene either section 13 or Resolution 6(16).

Contempt — section 13

36. Section 13 of the Act relevantly provides:

> "A person shall not, without the authority of a House or a committee, publish or disclose:
>
> (a) a document that has been prepared for the purpose of submission, *and submitted*, to a House or a committee *and* has been directed by a House or a committee to be treated as *evidence* taken in camera; or
>
> (b) any oral *evidence* taken by a House or a committee *in camera*, or a report of any such oral evidence,
>
> unless a House or a committee has published, or authorised the publication of, that document or that oral evidence." (emphasis supplied)

37. Section 13(a) requires both:

(a) that the document in question actually be submitted to the House or committee in question; and

(b) that there be a direction that the document be treated as evidence taken in camera.

In the present case, the ECITAL Committee's report had not yet been submitted to the Senate at the time of the disclosures. Nor is there any evidence of any direction that the report be treated as evidence taken in camera. It follows that section 13(a) cannot apply.

38. Section 13(b) plainly does not apply in this case as there was no question of disclosure of any oral evidence taken in camera.

Contempt — Resolution 6(16)

39. Resolution 6(16) of the Resolutions agreed to by the Senate on 25 February, 1988 relevantly provides as follows:

> "A person shall not, without the authority of the Senate or a committee, publish or disclose:
>
> (a) a document that has been prepared for the purpose of submission, *and submitted*, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential the Senate or the committee;
>
> (b) any oral *evidence* taken by the Senate or a committee *in private session*, or a report of any such oral evidence; or
>
> (c) any *proceedings in private session* of the Senate or a committee or any report of such proceedings,
>
> unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings." (emphasis supplied)

40. Resolution 6(16)(a), which is similar in terms to section 13(a) of the Act, does not apply because the ECITAL Committee's report had not yet been submitted to the Senate.

41. Resolution 6(16)(b) does not apply because there is no question of disclosure of any oral evidence taken in private session.

42. Resolution 6(16)(c) does not apply because there is no disclosure of any *proceedings* in private session of the ECITAL Committee. What was disclosed was a summary of two final recommendations which had been made by the majority.

Conclusion

43. The Age Parties submit that:

(a) particularly by reason of section 4 of the Act, no contempt has been committed in the present case; and

(b) in any event, the circumstances of the Disclosures are such that further investigation is not justified in terms of Resolution 3(a).

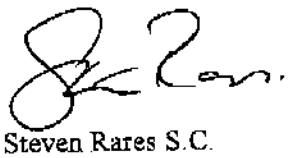
44. In the circumstances, it is submitted that the appropriate course would be for the Committee:

(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.



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Michael Gawenda
Associate Publisher & Editor

14 October 2002

Senator the Honourable Robert Ray
Chair
Committee of Privileges
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Ray,

The Age Company Ltd

The Age has a long-standing commitment to quality journalism in Australia, which it believes is fundamental to the proper workings of a liberal democracy. In addition to the matters to which I referred in my letter to the Secretary to the Committee dated 19 August 2002, I would like to address the following matters.

Debate about the cross-media ownership Bill is clearly a matter of national significance, and it was, and remains, our view that publication of the story by Annabel Crabb on June 17, 2002 was a responsible act to inform the readers on a topic that was already enjoying active public scrutiny.

While I did not see the article prior to publication, I do not believe that the article interfered with the workings of the Environment, Communications, Information Technology and the Arts Legislation (**ECITAL**) Committee, particularly at such a late stage, the day before the Committee's report was to be formally tabled. As the report was in its final form and simply awaiting distribution, publication of the story could not, and did not, prejudice the workings of the ECITAL Committee.

This is made clear by the following matter which came to my attention after my letter of 19 August 2002 was sent. On 11 June 2002, Bruce Wolpe, the Manager, Corporate Affairs of John Fairfax Holdings Ltd, *The Age*'s parent company, made a written submission to the ECITAL Committee (**copy attached**).

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On 24 June 2002, that Committee's secretary responded saying in part:

'your letter was received after the Committee had finalised its consideration of its report on the Bill' (**copy attached. my emphasis**)

The final recommendations remained unaffected by either Mr Wolpe's letter or the article.

Nevertheless, as editor of *The Age*, I have the authority to delay or withhold publication of a particular story if I believe it appropriate not to publish, particularly if it was a matter involving intelligence, defence or national security – which was not the case in this instance. On several occasions, I have been contacted by Members of Parliament who have expressed their views and concerns as to what should and should not be published. I have always listened to their views.

At no time prior to the publication of Ms Crabb's article did Senator Eggleston, nor any other representative from his office or the ECITAL Committee, contact either the journalist or myself in order to alert me to what they considered to be problems with publishing the article in question. I am advised by Ms Crabb that when she spoke with Senator Eggleston, the issues of contempt and privilege were never raised by him.

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

While a degree of tension is inherent between a free press and the workings of Government, such incidents merit a case-by-case assessment.

In this instance, it is *The Age*'s view that in light of all the circumstances involved – including the subject matter of the article, the timing of the report's tabling by the Senate Committee, and the lack of any communication to *The Age* by either Senator Eggleston, any other member of the Committee, or the Committee staff, to caution against publication – the paper acted responsibly, and did not in any way impede the work of the Committee or interfere with its processes.

I sincerely appreciate your consideration of our views on this matter.

Yours faithfully

Michael Gawenda
Associate Publisher & Editor

Fairfax

John Fairfax Holdings Limited
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June 11 2002

Hon Alan Eggleston
Chairman
Senate Environment, Communications,
Information Technology and the Arts Legislation Committee
Parliament House
Canberra ACT 2600

Dear Senator Eggleston

As the Committee prepares its report on the Broadcasting Services Amendment (Media Ownership) Bill 2002, we wanted respectfully to urge consideration of a recommendation in the Committee's report to modify the language in the Bill that addresses the "editorial separation" issue.

As Fred Hilmer stated in his evidence, and as outlined in our submission, we would prefer that the language was removed in its entirety from the Bill.

However, we believe that the language of Section 61F can be modified to remove the most serious concerns we have, and render the provision more acceptable to us.

We would urge the Committee to adopt a recommendation in support of an amendment that would delete clause (2) (c) in Section 61F.

This approach would leave in place for companies that obtain waivers of the cross media rules:

(1) the legislative statement of the objective of editorial separation;

(2) the requirement that there be separate editorial policies with respect to each media operation, and that those policies are consistent with the principle of editorial separation and separate editorial decision-making responsibilities, and that they be available to the public for inspection on the internet; and

(3) organisational charts, also available for inspection on the internet, that reflect the separate editorial decision-making responsibilities.

The editorial separation policy, and the affirmative statement by the companies involved that there are separate editorial policies, would remain intact, would be transparent, and would be enforceable through the ABA.

This approach would remove the very troublesome -- and to Fairfax, unacceptable -- language of (2) (c) that provides for "separate editorial news management," "separate news compilation processes," and "separate news gathering and news interpretation capabilities."

This language is fraught with peril, and we respectfully urge the Committee to recommend its deletion.

First, and most important, such words are not necessary to establish the editorial separation that is sought. If the Bill prescribes separate editorial policies, and a separate editorial structure, those requirements are fully sufficient to establish, and enforce, editorial separation. The Bill does not have to go any further to achieve its objective. In such a sensitive area, less is presumptively best.

Second, as we outlined to the Committee, such words and phrases with respect to the media have never been applied in law, and no one knows what they mean. The degree of subjectivity is therefore enormous, providing broad latitude to the ABA, which will enforce 61F, to enquire on what Fairfax and other media companies actually do, on a day-to-day basis, on "news management," "news compilation," "news gathering," and "news interpretation."

These words are therefore exceptionally intrusive in terms of Government oversight and potential regulation of our editorial processes. This would put the ABA over the shoulder of every reporter and editor in our papers.

This is why we firmly believe this clause is inconsistent with a free press and must not be given the respectability conferred by enactment into law.

For all these reasons, we hope the Committee can adopt a recommendation supporting the deletion of 61F(2)(c). I am copying this letter to all Members of the Committee for their reference.

With appreciation for your consideration, I am

Sincerely,

Bruce C. Wolpe
Manager, Corporate Affairs
02 9282-3640 bwolpe@mail.fairfax.com.au

cc: Committee members

AUSTRALIAN SENATE

ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS

REFERENCES COMMITTEE
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24 June 2002

Mr Bruce C. Wolpe
Manager, Corporate Affairs
John Fairfax Holdings Limited
Level 19
201 Sussex Street
SYDNEY NSW 2000

Dear Mr Wolpe

I refer to your letter to Committee members dated 11 June 2002 about the Broadcasting Services Amendment (Media Ownership) Bill 2002.

Because your letter was received after the Committee had finalised its consideration of its report on the Bill, it resolved to forward the letter to the Minister for Communications, Information Technology and the Arts for his consideration.

Yours sincerely

Michael McLean
Secretary

14 October 2002

Senator the Honourable Robert Ray
Chair, Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Senator Ray,

Thank you for your letter of 3 September 2002, and the invitation to appear before the Senate Privileges Committee (the Committee) hearing planned for 24 October 2002.

I have given serious consideration to your invitation to attend the hearing but in the end I have decided not to accept it. I mean no disrespect to the Committee in doing so, and I wish to provide it with the following information so that it will be able to consider the matter with what I hope the Committee will accept is the assistance I feel I can offer it which I have intended to be as complete (consistent with my ethical objections) as I can make it.

BACKGROUND

When the Senate referred the Broadcasting Services Amendment (Media Ownership) Bill 2002 to the Senate's Environment, Communications, Information Technology and the Arts Legislation (ECITAL) Committee in late March 2002, I had already been covering the debate about media ownership reform since just before the November 2001 election, when Communications Minister Senator the Honourable Richard Alston announced that the Government planned to revisit the area.

As The Age's Canberra journalist with responsibility for the communications field, I had also dealt with the ECITAL Committee and its members regularly since November 2000, when I joined The Age.

In the course of the ECITAL Committee's brief inquiry into the legislation, I attended the public hearings held in Canberra on 21 and 22 May 2002, and spoke regularly during the proceedings with ECITAL Committee members, witnesses, staff and lobbyists, filing regular stories about the progress of the inquiry and the political activity 'behind the scenes'.

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By the time the ECITAL Committee was nearly due to report, I was aware that the Government was keen to proceed with the legislation, and that there were hopes of bringing the legislation back to the Senate for debate as soon as possible after the ECITAL Committee's report was tabled.

During the week 10-14 June 2002, I learned that the report had been finalised and would be tabled as planned in the Senate on Tuesday, 18 June 2002.

By Sunday, 16 June 2002, I had been informed that the ECITAL Committee would recommend substantial amendments to the legislation as part of a majority report.

Prior to it being tabled in the Senate on 18 June 2002, I did not see, nor did I ever have in my possession, a copy of the ECITAL Committee report or any extracts or draft of it. The information about its principal recommendations was conveyed to me verbally. However, I was confident that the recommendations in question were final and that those recommendations would not be revisited by the ECITAL Committee before tabling the final report in the Senate.

SOURCES

In accordance with undertakings given and my obligations under the Australian Journalists' Association Code of Ethics (**copy attached**), I am not prepared to reveal, nor would I be prepared to reveal if asked under oath, the identity of the source or sources of that verbal advice.

In this letter I have chosen to refer to the *'sources'* in the plural (sources) - 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.

When I received the original information from the sources about the report's significant recommendations, undertakings were sought from me that the sources' identity would remain confidential. I gave such undertakings to the sources.

I now understand that the Committee may seek to establish the identity of the sources as part of its investigation into the matter on 24 October 2002. In light of the proceedings, I have had further discussions with the sources, who have reiterated to me their desire to remain anonymous and their view that I remain bound by my undertakings to keep their identity confidential.

I, in turn, explained that my promise as a journalist not to reveal sources is a central and indispensable part of my professional viability, and that if asked under oath to do so I would refuse, regardless of the consequences.

I hope that all members of the Committee will understand and appreciate my position as a professional journalist in this matter, having dealt with journalists individually in the course of their duties as Honourable Senators as well as through the Privileges Committee.

SENATOR EGGLESTON PHONE MESSAGE

By late Sunday afternoon on 16 June 2002, I was confident of the story's accuracy. I cannot recall precisely at what time I filed the story by sending it through to the Melbourne news desk, but I assume it would have been between 6pm and 7pm as is usually the case on a Sunday.

At around the same time, I placed a call to the mobile telephone of Senator Alan Eggleston, Chair of the ECITAL Committee.

I cannot remember whether I did this before or after filing the story.

It didn't make much difference at the time, as my purpose for ringing Senator Eggleston was not to have the story confirmed, but simply to tell him that I had written it.

The following day was a parliamentary sitting day, and I knew that Senator Eggleston would be in Canberra on the following day. I wanted to advise him that the story would be appearing in Monday's Age.

I did this for a number of reasons.

Principally, it was 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.

On sitting days, arriving senators and MPs are often door-stopped by radio, television and wires journalists and I felt it would be unfair on Senator Eggleston, and unhelpful to the ECITAL Committee, for him to be hijacked in any way by a story in The Age which he was probably not likely to have read as it is not a local paper circulating in his home state.

I reached Senator Eggleston's answering service, and left a message for him advising him that I had decided to write a story about the report and that it would be appearing in The Age the following day.

In hindsight, I can see that the message was a silly one, and I now regret joking about being thrown in jail, but as mentioned, I had intended the phone call as a private courtesy: I had no fears at the time that my publication of the story would prove particularly controversial or create any difficulties for the ECITAL Committee or any of its members or other Senators. I certainly did not believe that the story would expose me to any risk of jail or that any contempt of the Senate or ECITAL Committee could be suggested.

As a Canberra journalist I had seen many such stories, foreshadowing the contents of committee reports before they are tabled in the Senate or House of Representatives, published without adverse comment.

I was surprised to see my private telephone message to Senator Eggleston transcribed and forming part of the materials.

While I believe the transcript is substantially accurate, I do not have any recollection of referring to Senator Eggleston's career being "on the line".

In light of our existing friendly relationship and the benign purpose behind the call, I cannot help thinking it unlikely I would have taken such an antagonistic tone; certainly I have no recollection of saying those words or of having any belief that Senator Eggleston was in any way threatened by the story.

At the time, I considered my relationship with Senator Eggleston to be a good one. I spoke to him quite frequently and found him to be a pleasant conversationalist and the possessor of a good sense of humour.

Our conversations often had a jovial tone, and I would regard the message I left for him on Sunday, 16 June 2002 as typical of our communications and the rapport we enjoyed.

At about 10.30pm that evening, Senator Eggleston returned my call. I was at home, and he telephoned the mobile number I had left in my message. Senator Eggleston opened by chiding me good-humouredly, describing me as "naughty" and asking me what I was up to. I told him I had written a story; he asked me what it said, and I summarised it for him.

I did not seek confirmation from him that the story was accurate, but Senator Eggleston made repeated remarks to the effect that I made up "terrible fairy stories" and that I was like Enid Blyton. We laughed about this, then he thanked me for letting him know and rang off.

At no stage during the conversation - or afterwards - did Senator Eggleston ask me not to publish the story, or indicate that he thought publication would be a problem. In particular, at no stage did Senator Eggleston expressly or impliedly say anything to the effect that if the story were published I would have committed a breach of parliamentary privilege or contempt; I viewed the jocular tone of the conversation as perfectly in keeping with the message that I had left for him and ended our discussion unconcerned about the story.

I am advised by my editor, Michael Gawenda, that his office was not approached by Senator Eggleston's office that evening to request that The Age not publish the story because it violated Senate rules, or in the following days to protest publication of the story. It had been my experience that Members of Parliament, if they have issues with the content of a story from a journalist, will call their editor to discuss such issues. This was not done in this instance.

I acknowledge that exploring hypothetical situations is often a risky exercise, but if Senator Eggleston had raised with me any concern about parliamentary privilege or contempt, I would certainly have considered the matter seriously and I would also have consulted my editor, who holds the ultimate authority to publish or not publish.

REASONS FOR PUBLICATION

I knew that the ECITAL Committee's report was not due to be tabled until Tuesday 18 June 2002. However having seen many examples of publication of early disclosures before reports were tabled, I was of the view that the Senate only took exception when publication in a real and material way inconvenienced or compromised the relevant committee, or when a matter of national security or market sensitivity was involved.

I did not believe that any of those circumstances was present in this case and I further believed that the story was important enough to warrant immediate publication.

The Government, I knew, was anxious to get the legislation through as soon as possible. Given that the amendments recommended by the ECITAL Committee were sponsored by Government senators, there was a good chance they would be accepted or adopted by the Government and possibly become law. This was likely to happen over a short period of time, in light of the Government's tight schedule, and the opportunity for public debate around these recommendations was therefore likely to be very limited-possibly not more than 10 days.

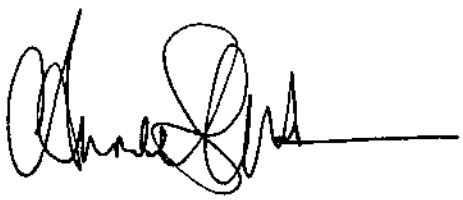
There was a real possibility that an attempt might be made to get the legislation passed by both Houses before they rose at the end of June 2002, but I noted in the story that this was unlikely to occur. On balance I felt it was important to write the story, as the public had a right to know as soon as possible so as to maximise the time for debate about a matter of such national significance (not national security).

As a professional journalist, I also owe a duty to readers to report news contemporaneously and to help foster the kind of competitive and diverse media industry that the ECITAL Committee's report itself holds sacrosanct.

I hope that the Committee will find this account assists in its investigations. It has never been my intention to hamper or sabotage the workings of the ECITAL Committee, and indeed I have always found both senators and staff involved in that Committee to be helpful and professional.

Apart from seeking to preserve the anonymity of my sources, the above represents my entire recollection of events surrounding the research and publication of the story, "Senators Tinker With Media Bill", *The Age*, 17/06/02

Yours faithfully



Annabel Crabb

The Age Company Ltd

HOW TO COMPLAIN

If you feel a journalist is in breach of the Code of Ethics you can complain by following this procedure.

AJA CODE OF ETHICS

Respect for truth and the public's right to information are fundamental principles of journalism. Journalists describe society to itself. They convey information, ideas and opinions, a privileged role. They search, disclose, record, question, entertain, suggest and remember. They inform citizens and animate democracy. They give a practical form to freedom of expression. Many journalists work in private enterprise, but all have these public responsibilities. They scrutinise power, but also exercise it, and should be accountable. Accountability engenders trust. Without trust, journalists do not fulfil their public responsibilities. MEAA members engaged in journalism commit themselves to

EMAIL THIS PAGE

- **Honesty**
- **Fairness**
- **Independence**
- **Respect for the rights of others**

1. Report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. Do not suppress relevant available facts, or give distorting emphasis. Do your utmost to give a fair opportunity for reply.

2. Do not place unnecessary emphasis on personal characteristics, including race, ethnicity, nationality, gender, age, sexual orientation, family relationships, religious belief, or physical or intellectual disability.

3. Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.

4. Do not allow personal interest, or any belief, commitment, payment, gift or benefit, to undermine your accuracy, fairness or independence.

5. Disclose conflicts of interest that affect, or could be seen to affect, the accuracy, fairness or independence of your journalism. Do not improperly use a journalistic position for personal gain.

6. Do not allow advertising or other commercial considerations to undermine accuracy, fairness or independence.

7. Do your utmost to ensure disclosure of any direct or indirect payment made for interviews, pictures, information or stories.

8. Use fair, responsible and honest means to obtain material. Identify yourself and your employer before obtaining any interview for publication or broadcast. Never exploit a person's vulnerability or ignorance of media practice.

9. Present pictures and sound which are true and accurate. Any manipulation likely to mislead should be disclosed.

10. Do not plagiarise.

11. Respect private grief and personal privacy. Journalists have the right to resist compulsion to intrude.

12. Do your utmost to achieve fair correction of errors.

Guidance Clause

Basic values often need interpretation and sometimes come into conflict. Ethical journalism requires conscientious decision-making in context. Only substantial advancement of the public interest or risk of substantial harm to people allows any standard to be overridden.

15 October 2002

Anne Lynch
Secretary
Privileges Committee
The Senate
Parliament House
CANBERRA ACT 2600

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FEDERAL PRESIDENT
Patricia Amphett

FEDERAL SECRETARY
Christopher Warren

Dear Ms Lynch

Re: Referral from the Environment, Communications, Information Technology and the Arts Legislation Committee

Please find attached a submission from the Media, Entertainment & Arts Alliance on the referral from the Environment, Communications, Information Technology and the Arts Legislation Committee to the Privileges Committee of the Senate.

The Alliance is the professional association and trade union for people working in the media and entertainment industries, including journalists and others working for the media.

We are happy to assist the committee in this matter in any way we can.

Yours sincerely

Christopher Warren
Federal Secretary
Media, Entertainment & Arts Alliance
245 Chalmers Street
Redfern, NSW, 2016

1.0 Introduction

Parliamentary privilege exists for the purpose of enabling the Houses of Parliament to carry out their functions effectively. It includes the powers of the House to protect the integrity of their processes, particularly the power to punish contempts.

However, it is increasingly being used to penalise journalists and the media for carrying out their job.

It is the one residual area under Australian law where journalists and the media regularly face fines and, perhaps, jail for doing their job.

This current inquiry offers the Senate the opportunity to step back and review the path it has been taking in the past few years. It is an opportunity for the Senate to bring its practices into line with current law and democratic practice.

It is a potential tragedy of public policy that sees the Senate on the one hand positioning itself as the house of review which protects against undemocratic excesses of executive government, while on the other taking an increasing anti-democratic posture on contempt.

We urge this inquiry to:

- Find that the action by journalists and media to publish confidential material does not of itself tend substantially to obstruct Senators in the performance of their duties and so does not constitute contempt of parliament.

- Recognise that journalistic ethics means it is inappropriate to pursue journalists to identify confidential sources.

- 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.

2.0 Unauthorised disclosure

In recent reports, there has been a tendency for the Senate Committee to move to an extreme position on unauthorised – certainly far more extreme than the position taken by the Executive Government.

The Parliamentary Privileges Act 1987 restricts contempt. Section 4 says:

> 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.

The restrictions inherent in this wording have been picked up Senate Privilege Resolution 1988 No 3 which sets out the criteria to be taken into account by the Privileges Committee when determining matters relating to contempt:

(1) the power to deal with contempts should only be used where 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; [emphasis added]

According to *Odgers' Senate Practice*, the Privileges Committee now regards a culpable intention on the part of the person concerned as essential for the establishment of contempt.

However, in its 74th report in 1998, the Privileges Committee took these restrictions to an extreme position when it said:

> Deliberate release of drafts at an early stage of committee deliberations has one purpose alone: to influence the outcome of deliberations, thereby impairing the integrity of committee proceedings. Only in rare circumstances should a committee ignore the privilege implications of disclosures of this nature...
>
> Unauthorised disclosure of documents or proceedings of a committee can be expected to be examined by the Committee of Privileges on an assumption that contempt is likely to be found...
>
> The committee therefore warns media recipients of leaked information that, while it has in the past been reluctant to punish the media without satisfying itself as to the source of the information, it may not be so restrained in future."

In other words, the committee is now approaching all publications of unauthorised disclosures as a "culpable intention" which substantially obstructs Senators in carrying out their duties.

This is a quantum leap even from a 1984 report of the committee which established a policy that the Privileges Committee would not make a finding of contempt against the publisher of the unauthorised disclosure without also making an attempt to find and punish the person who disclosed the matter.

Yet, there is no evidence to sustain this leap.

Rather it seems to reflect a growing frustration by the Privileges Committee with their inability to clamp down on information being leaked. Almost invariably, a peer – another Senator - is the informant and there are few, if any, procedures of any rigour to identify them. The 107th report admits the process if "frustrating and ineffectual". Instead we see a growing tendency to go after the journalist involved and the publisher of the information even though they are the receivers of the information.

Journalists and publishers also appear to be caught in a vicious circle with the the conclusion in the 100th report that unauthorised disclosure tends substantially to obstruct because of the need to undertake an inquiry into a leak.

Accordingly, the time is now right for the Senate and its Privileges Committee to stop and take stock of the path it is following. We recommend that the committee:

- Find that the action by journalists and media to publish confidential material does not of itself tend substantially to obstruct Senators in the performance of their duties and so does not constitute contempt of parliament.

3.0 Confidential sources

The Australian journalists code of ethics places a clear obligation on journalists. It says: "Where confidences are accepted, respect them in all circumstances."

This is because the ability of people to talk to journalists off the record or not for attribution is an essential part of freedom of the press and freedom of speech.

Almost all public figures – including many members of the Senate – rely on the integrity of journalists in refusing to reveal confidential sources.

Since 1989, three journalists have been jailed, one has received a suspended sentence and others have been fined for refusing to reveal confidences.

The Australian community should be rightly proud that its journalists have been consistently prepared to pay the price necessary to defend and extend freedom of the press in this country.

Knowing this, the Privileges Committee should not put journalists or publishers appearing before them in the position of being in contempt by refusing to answer a question under oath on the identity of a confidential source.

To date, based on the 1984 report, the committee has followed this commonsense policy, although in the 48th report, when a journalist refused to reveal a source, the committee decided not to pursue the matter further. Instead, they referred the issue of journalistic ethics to the Senate Standing Committee on Legal and Constitutional Affairs.

However, the Committee should make it clear that it will not force journalists into contempt to reveal confidential sources and:

- Recognise that journalistic ethics means it is inappropriate to pursue journalists to identify confidential sources.

4.0 Executive government

All this is at distinct odds with the powers of the Executive Government.

Under the Commonwealth Crimes Act unauthorised disclosure of 'Official Information 'by a Commonwealth Officer is an offence: [ss 70, 79]. However, a recent proposal by the Attorney-General to create a related offence of receiving

unauthorised disclosures was withdrawn after a public outcry over its undemocratic nature.

The Alliance believes that the powers of the Executive Government should be strictly circumscribed to protect whistle blowers as recommended by the Review of the Commonwealth Criminal Code by Sir Harry Gibbs in 1991.

There is no good reason why the Senate should seek to impose powers greater than those of the Executive Government.

Indeed, it is contrary to the important role of the Senate as a house of review of the actions of the executive to act in a less democratic manner than that allowed to the executive.

The words of his honour Justice Mason in Commonwealth vs John Fairfax Pty Ltd (1980) should also provide some guidance to the appropriate limits of power of both the executive and this privileges committee:

> The question then, when the executive government seeks the protection given by equity, is: What detriment does it need to show? The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles. It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

Accordingly, we recommend that this committee 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.

SENATOR ALAN EGGLESTON

OPENING STATEMENT TO THE SENATE

COMMITTEE OF PRIVILEGES

POSSIBLE UNAUTHORISED DISCLOSURE OF REPORT OF

ENVIRONMENT, COMMUNICATIONS, INFORMATION

TECHNOLOGY & THE ARTS LEGISLATION COMMITTEE

- Privilege is important to Members of Parliament and Senate committees.

- Frequently witnesses represent large corporations and powerful interests.

- Important that such groups have confidence in the system otherwise they will not provide confidential information.

- Groups which appear before the Committee in the communications and IT sector, including media, television and telecommunications companies represent large interests.

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

- The Committee decided it would be of assistance to have some specific information about certain matters from the other three companies who had appeared that day.

- Accordingly, the Committee secretary approached the three companies to determine if they would be willing to provide the information on a confidential basis protected by privilege.

- After consulting their head offices and company lawyers, two of the three companies declined to provide the requested information on the grounds that they did not have confidence in the protection provided by the privilege system.

- The third company only agreed to provide the information after extensive reassurance about the protection the Senate privilege system would provide.

- This example illustrates the fact that the work of Senate committees has been compromised in a serious and significant manner by the undermining of the Senate privilege system by the publication of information covered by privilege in the media.

- The rules of privilege are very clear, and as they apply to the findings and recommendations of Senate committees are that until a Senate report is tabled and publication of its contents is authorised by the Senate, the report is confidential and covered by privilege.

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

> *A person shall not, without the authority of the Senate or a committee, publish or disclose:*
>
> *(a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential [to] the Senate or the committee ...*
>
> *(c) any proceedings in private session of the Senate or a committee or any report of such proceedings,*
>
> *unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.*

- I append a form copy of a universal Senate tabling document which includes the words, "that the report be printed", meaning that it be published and therefore no longer confidential.

- In this case, *The Age* clearly broke this requirement with publication of the recommendations of the Committee in the article under consideration published on 17 June 2002.

- The importance of this action by *The Age* is that it is exactly the reason why confidence in the privilege system has diminished with the result that, as demonstrated in the example I have given, the work of Senate committees is being undermined.

- In this case, the journalist concerned was well aware of the rules of privilege and knew that the recommendations of the Committee were confidential until the report was tabled in the Senate scheduled for 18 June. Apart from anything else, this was because my Research Officer, Mr RWJ Wallace BA LLB advised her of this fact when she rang him seeking a copy of the report prior to tabling, as Mr Wallace set out in his letter to the Committee secretary Mr Michael McLean dated 24 June 2002, a copy of which is appended.

- More importantly, however, *The Age* newspaper as an organisation must have also been aware that the rules of privilege were being breached by the publication of the article.

- Journalists operate within a hierarchical structure and in this case Ms Crabb's article would have been reviewed by her sub-editor, who in turn was responsible to the news editor, then the general editor and so on up to the managing editor – all of whom should have been aware that the article in question breached the rules of privilege and should therefore have been withdrawn and not published.

- *The Age* is a mature newspaper and has been represented in the press gallery since the day the Federal Parliament first met. In my opinion, it is a sad reflection on the internal systems and sense of corporate public responsibility of *The Age* organisation that a breach of this kind should have occurred.

<COMMITTEE NAME>—

PRESENTATION OF REPORT

(at tabling of documents)

SENATOR <SURNAME>:

I present the report of the <Committee Name> on the <insert title of report>, together with:

- the *Hansard* record of proceedings, minutes of proceedings and submissions received by the committee,

- the *Hansard* record proceedings and documents presented to the committee,

(pick either dot point)

and <delete printing motion component if not required> move—

→ That the report be printed.

(when motion agreed to)

<delete seeking leave component if being tabled in cttee reports time slot under so62(3)>

I seek leave to move a motion in relation to the report.

(when leave granted)

I move—That the Senate take note of the report.

(seek leave to incorporate tabling statement in Hansard

OR

speak to motion, if desired

OR

seek leave to continue your remarks)

THE SENATE

24 June 2002

Mr Michael McLean
Secretary
Senate Environment, Communications, IT and
the Arts Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Michael

I am writing to advise you that I have no knowledge of who might be responsible for the unauthorised disclosure of the Committee's Report on the Broadcasting Services Amendment (Media Ownership) Bill 2002 to the *Age* journalist Ms Annabelle Crabbe.

I would like to add that on 3 June 2002 (when the Report was originally due to be tabled) Ms Crabbe called this office and asked what was happening with the Report. I informed her that the Senate had agreed to a change of tabling date and that the Report would not be tabled until 18 June 2002. She asked me if it was possible to have access to the Report prior to this date and I informed her that it was not, because the Report would not become a public document until it was tabled in the Senate.

Yours sincerely.

Rob Wallace

Robert Wallace
Research Officer
Office of Senator Eggleston

SENATOR ALAN EGGLESTON
Liberal Senator
for Western Australia

Chair: Senate Legislation Committee on Environment, Communications, Information Technology and the Arts

OTHER COMMITTEE MEMBERSHIPS

STANDING
- *Privileges*
- *Procedure*

JOINT
- *Migration*
- *Parliamentary Education*

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(1937) 37 S.R. (N.S.W.)

1937.

Ex parte BREAD MANUFACTURERS LTD.; *Re* TRUTH AND SPORTSMAN LTD.

News Ltd. (1); *Phillips* v. *Hess*(2); *R.* v. *Daily Mail*; *Ex parte Factor*.(3)

Lastly, the continuance of the discussion of a matter of public importance and interest cannct be prevented on the ground of the commencement of litigation: *Ex parte N.S.W. Fresh Food and Ice Co.*; *Re McGrath*.(4)

Piddington K.C. in reply. The validity of the company's registration cannot be challenged by way of preliminary objection. The registration is a judicial act, and by s. 30 of the Companies Act, 1899, the certificate shows that the company is duly registered, and the registrar's decision can only be impeached in proceedings properly instituted for that purpose. He referred to *Bowmen* v. *Secular Society Ltd.*(5)

[*Jordan* C.J. The Court can go behind the registration: *British Association of Glass Bottle Manufacturers* v. *Nettlefold*.(6)]

As to knowledge, its absence does not excuse a contempt, which is a crime. Apart from difficulties of proof of knowledge, the evil aimed at would not be checked if knowledge of a *lis pendens* was necessary. He referred to *Read and Huggonson's Case*(7); *Ex parte Hovell*(8); *R.* v. *Dunbabin*; *Ex parte Williams*.(9)

Cur. adv. vult.

June 15.

JORDAN C.J. [after stating the above-mentioned facts, continued:] It is convenient in the first instance to consider the general principles which are applicable in such a case as the present. It is a well established general rule that any publication which has a tendency to interfere with the administration of justice by preventing the fair trial of any proceeding in a Court of justice is a contempt of court, and that if it is shown beyond reasonable doubt that such interference was either intended or likely, this Court will exercise its jurisdiction to punish summarily the criminal offence which

(1) 18 T.L.R. 208.
(2) 18 T.L.R. 400.
(3) 44 T.L.R. 303.
(4) Unreported 22nd Aug., 1935.
(5) [1917] A.C. 406 at p. 439.
(6) 27 T.L.R. 527.
(7) [1742] 2 Atk. 469.
(8) 8 S.C.R. 163; 4 Austn Digest 272.
(9) 53 C.L.R. 434.

1937.

Ex parte BREAD MANUFACTURERS LTD.; *Re* TRUTH AND SPORTSMAN LTD.

Jordan C.J.

is constituted by the contempt: *Bell* v. *Stewart*.(1) When intention is established to interfere with the proper administration of justice by means of a publication which had a tendency to produce that result, a clear case of contempt is made out, calling for sharp punishment. Where the particular form of contempt complained of is the publication of matter which in fact has a tendency to prevent a fair trial by prejudicing the parties to litigation in a Court of justice in conducting that litigation, if intention to cause such prejudice is established a serious case of contempt is at once made out, whether the publication refers to the subject matter of the litigation, or takes the form of mere general denigration of the party in question: *Higgins* v. *Richards*(2); *Ex parte Myerson*; *Re Packer and Smith's Weekly Publishing Co.*(3) But if no such intention is established, the rule that the publication of matter tending, or even likely, to prejudice a party in conducting litigation constitutes a contempt of Court is not invariable.

It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a Court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.

It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by

(1) 28 C.L.R. 419 at pp. 4[illegible]; 4 Austn Digest 277.
(2) 28 T.L.R. 202.
(3) 39 W.N. 260; 4 Austn Digest 280.

1937.

Ex parte BREAD MANUFACTURERS LTD.; *Re* TRUTH AND SPORTSMAN LTD.

Jordan C.J.

reason merely of the fact that the matter in question has become the subject of litigation, or that a person whose conduct is being publicly criticised has become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which is under discussion or with respect to some other matter: *In re Labouchere*; *Kensit* v. *Evening News Ltd.*(1); *Phillips* v. *Hess*(2); *R.* v. *Daily Mail*; *Ex parte Factor*(3); *Gaskell & Chambers Ltd.* v. *Hudson, Dodsworth & Co.*(4) If, however, under colour of discussing, or continuing to discuss, a matter of public interest statements are published the real purpose of which is to prejudice a party to litigation, the contempt is none the less serious that an attempt has been made to cloak it: cf. *In re Cornish*; *Staff* v. *Gill*(5); *Higgins* v. *Richards.*(6)

The authorities show also that where the contempt is alleged to consist in the publication of matter likely to prejudice a party to litigation it is a good answer if it is proved to the satisfaction of the Court that the party alleged to be in contempt was ignorant of the litigation and at the time of the publication had no reason to suppose that litigation existed: *Metropolitan Music Hall Co.* v. *Lake*(7); *In re The Marquis Townshend*(8), or was then impending; *R.* v. *Parke*(9); *Ex parte Hovell*(10); *Gray* v. *Davies Bros. Ltd.*(11); *Re Robinson*; *Herring* v. *British and Foreign Marine Insurance Co. Ltd.*(12) Such evidence negatives any possibility of intention to interfere; and a person cannot be held to be guilty of contempt in such a case if it is proved that neither he nor anyone for whose acts he may be vicariously responsible: *In re Bennett*(13); *R.* v. *Parke*(14), had any knowledge of the proceedings with which it is alleged the publication has a tendency to interfere. There is, no doubt, a certain analogy between the law of contempt and the law of libel: *Gaskell & Chambers Ltd.* v. *Hudson, Dodsworth & Co.*(15), but that analogy has never been held to

(1) 18 T.L.R. 208.
(2) 18 T.L.R. 400.
(3) 44 T.L.R. 303.
(4) [1936] 2 K.B. 595 at p. 602.
(5) 9 T.L.R. 196.
(6) 28 T.L.R. 202.
(7) 60 L.T. 749.
(8) 22 T.L.R. 341.
(9) [1903] 2 K.B. 432 at pp. 437-8.
(10) 8 S.C.R. 163 at 170; 4 Austn Digest 272.
(11) 11 Tas. L.R. 48; 4 Austn Digest 279.
(12) 11 T.L.R. 345.
(13) 14 S.C.R. 33 at pp. 40-41; 4 Austn Digest 275, 318.
(14) [1903] 2 K.B. 432 at p. 4
(15) [1936] 2 K.B. 595 at p. 602.

1937.

Ex parte BREAD MANUFACTURERS LTD.; *Re* TRUTH AND SPORTSMAN LTD.

Jordan C.J.

make the case of *Hulton* v. *Jones*(1), applicable to the law of criminal contempt; nor indeed has it been held that that authority is applicable in the law of criminal libel: *ibid.* pp. 25-26; *R.* v. *Lord Abingdon.*(2)

When these principles are applied to the facts of the present case, I am of opinion that it is impossible for this Court to be satisfied beyond reasonable doubt that a case of contempt has been made out. We have no concern with the question whether the charges made in the articles in question were justifiable or unjustifiable. It is at least clear that they were made in relation to a matter which may fairly be regarded as one of public interest. There is positive evidence which there is no reason to doubt that they were not intended to influence the litigation in question, and that any tendency which they might have to influence it is purely fortuitous. The fact that the articles complained of formed part of a series which began before the litigation had commenced, although not conclusive, goes to corroborate the evidence that any tendency to interfere with the litigation was unintentional. There was no such change in orientation of the articles after the litigation began as to raise an irresistible inference that they must have been directed to the litigation in question.

Again, I am satisfied by the evidence that the respondents had no knowledge when the articles were published that the litigation existed; and there is nothing to suggest that they wilfully or recklessly closed their eyes to indications that it was likely to come, or to have come, into existence: cf. *Gray* v. *Davies Bros. Ltd.*(3)

For these reasons, I am of opinion that the rule *nisi* should be discharged.

It is, however, necessary also to consider the status of the applicant company, because it has been contended that this in itself constitutes a reason for non-intervention by the Court. Mr. Shand has argued that the applicant is a trade union, that it has admittedly not been registered as a trade union, and that its registration as a company is necessarily void. He submitted that it followed that a non-existent corporation can neither approach this Court as applicant nor suffer pre-

(1) [1910] A.C. 20.
(2) 1 Esp. 226 at p. 228.
(3) 11 Tas. L.R. 48; 4 Austn Digest 279.

by the Federal Court do not feature prominently in the judgment, it seems that their significance was undervalued.

Indeed, though acknowledging in accordance with the comments of Jordan C.J. in *Bread Manufacturers* (23) that it was necessary to balance competing public interests, the Federal Court appears to have approached the question as if the integrity of the deregistration case was virtually all that mattered. Thus, if a continuation of public proceedings by the Commissioner had a tendency to prejudice the Federation in the s. 143 case then there was a contempt. That the restraint imposed on the Commissioner involved a serious detriment to the public was not thought to be of critical importance.

Why this should be so the argument in this Court has failed to elucidate. The remarks of Jordan C.J. and more recently of Lord Scarman stress the overriding importance of freedom of discussion and speech to which should be added the equal importance of the public having access to information which it has a legitimate interest in knowing. Where the alleged contempt consists of newspaper discussion or report it is this public interest that is weighed in the balance against the public interest in maintaining the integrity of the administration of justice by taking such steps as may be necessary to protect it from interference. In weighing the competing factors that arise in that situation and in the present situation, weight must be given to freedom of speech, discussion and information. Without information there can be no meaningful discussion. In a given case it is not easy to point to specific and tangible benefits that flow from preserving that freedom. But general experience of human affairs enables us to say that the freedom should not be qualified except in the face of a competing public interest of equal or greater importance. This induces me to conclude that in a case such as the present the restraint should not be imposed unless it is established that it is necessary to avoid a substantial risk of serious injustice. It is not enough in my view to show that there is some apprehension of injustice arising from some tendency to prejudice.

The argument that there is a risk of contempt has in my view drawn too heavily on the principles that have been applied in cases in which newspapers have published material in advance of a criminal trial. These principles have been fashioned to meet the dangers of trial by newspaper when the very occasion for the report in the newspaper is the pending or expected criminal trial and the report, generally of a sensational and dramatic kind, is

(23) (1937) 37 S.R. (N.S.W.) 242.

H. C. OF A. 1981-1982. VICTORIA v. AUSTRALIAN BUILDING CONSTRUCTION EMPLOYEES' AND BUILDERS LABOURERS' FEDERATION. Mason J.

directed to the very issue which will arise at the trial — the guilt or innocence of the accused. In such a case the paramount public interest is that of maintaining the administration of justice free from prejudice and interference. The countervailing public interest — freedom of discussion — is exclusively related to the guilt or innocence of the accused, the issue to be determined at the trial. In this situation freedom of discussion has no independent value and is therefore readily subordinated to the public interest in the administration of justice. Consequently the test to be applied is whether the publication has a tendency to interfere with the administration of justice.

Here, however, the ultimate worth of the Royal Commissions is bound up with the publicity that the proceedings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner. Consequently the public interest in freedom of discussion has an important value which is quite independent of the deregistration case. That public interest is not as readily subordinated to the need to maintain the administration of justice free from interference as it is in the trial by newspaper situation. Accordingly the test to be applied here in determining whether there is an apprehended contempt is one which lays emphasis on the need to establish a substantial risk of serious injustice as an essential qualification of obtaining relief.

Is there a substantial risk of serious injustice? The Federal Court did not address itself to this precise question. They simply found that the proceedings were calculated to prejudice the public mind, liable to have an undesirable effect on prospective witnesses and bring subconscious pressures to bear on judges. In the context of a newspaper article dealing with conduct the subject of a pending criminal prosecution Dixon C.J., Fullagar, Kitto and Taylor JJ. in *John Fairfax & Sons Pty. Ltd. v. McRae* (24), speaking of the summary jurisdiction to punish for contempt, after noting that it ought to be exercised with great caution, said: "... and, in this particular class of case, to be exercised only if it is made quite clear to the court that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case." One can determine from reading a publication in a newspaper whether it has this tendency, bearing in mind that it must be a practical reality, not a mere theoretical tendency. But how does one make a similar determination in the case of proceedings to

(24) (1955) 93 C.L.R. 351, at p. 370.

formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283–284, Lord Goff of Chieveley expressed the opinion that in the field of freedom of speech there was in principle no difference between English law on the subject and article 10 of the Convention. In *Derbyshire County Council v. Times Newspapers Ltd.* [1993] A.C. 534, 550–551 Lord Keith of Kinkel, speaking for a unanimous House, observed about article 10:

"As regards the words 'necessary in a democratic society' in connection with the restrictions on the right to freedom of expression which may properly be prescribed by law, the jurisprudence of the European Court of Human Rights has established that 'necessary' requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate to the legitimate aim pursued."

In that context Lord Keith observed that he reached his conclusion on the issue before the House without any need to rely on the Convention. But he expressed agreement with the observation of Lord Goff of Chieveley in the *Guardian Newspapers* case and added "that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field." I would respectfully follow the guidance of Lord Goff of Chieveley and Lord Keith of Kinkel.

Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market:" *Abrams v. United States* (1919) 250 U.S. 616, 630, *per* Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country: see *Stone, Seidman, Sunstein and Tushnet, Constitutional Law*, 3rd ed. (1996), pp. 1078–1086. It is this last interest which is engaged in the present case. The applicants argue that in their cases the criminal justice system has failed, and that they have been wrongly convicted. They seek with the assistance of journalists, who have the resources to do the necessary investigations, to make public the wrongs which they allegedly suffered.

[2000] 2 A.C.

The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech. Given the purpose of a sentence of imprisonment, a prisoner can also not claim to join in a debate on the economy or on political issues by way of interviews with journalists. In these respects the prisoner's right to free speech is outweighed by deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons. But the free speech at stake in the present cases is qualitatively of a very different order. The prisoners are in prison because they are presumed to have been properly convicted. They wish to challenge the safety of their convictions. In principle it is not easy to conceive of a more important function which free speech might fulfil.

(b) Miscarriages of justice identified by investigative journalism

My Lords, the members of the Court of Appeal were under the impression, and acted on the basis, that it was not necessary for a prisoner to have an oral interview with a journalist since he can correspond with a journalist, and in that way advance his argument for the thorough investigation and possible eventual reopening of his case. As a result of the appeal to the House there is now available material which the Court of Appeal had no opportunity to consider. First, Mr. Woffinden, the journalist in the Simms case, has provided details of some 60 cases over the last 10 years where journalists played a substantial role in identifying miscarriages of justice which led to the quashing of the convictions. In the absence of contrary information I regard this document as relevant material tending to establish in a general way the value of investigative journalism in exposing miscarriages of justice. Secondly, and more importantly, an affidavit by Gareth Peirce, an experienced and distinguished practitioner, was placed before the House. Gareth Peirce has acted in more than 20 references to the Court of Appeal in which convictions were eventually quashed. She advised on the setting up of the Criminal Cases Review Commission and subsequently conducted training exercises for the new commissioners and caseworkers. She was asked to discuss the importance of the role of the press in undoing wrongful convictions and did so. Despite the length of the quotation it is necessary to set out in full the core passages in her affidavit. She listed following factors as "important and universal:"

"(a) There is no legal aid for investigations. (On the rare occasions that the green form scheme has allowed for extensions, these amount to little more than several hours' work by a solicitor.) (b) I am informed by the Criminal Cases Review Commission that more than 90 per cent. of applicants are not represented by solicitors. (c) The criteria for referring cases to the Court of Appeal are interpreted as requiring new evidence or new and important considerations of substance. (d) Any commitment to attempting to undo a wrongful conviction is a substantial one; as a solicitor, I am aware that each such commitment will involve me in enormous personal expenditure

disclosure. In passing, it notes claims made on behalf of the journalist of confidentiality on the basis of journalistic ethics and the integrity of his source.[56] At no stage did *The Australian* respond to the question raised in the committee's letter of 7 September 2000[57] as to whether the journalist consulted his source to ascertain whether the person(s) would have any objections to revealing his/her/their identity to this committee. It is unfortunate that news organisations do not afford the same rights to parliamentary committees similarly to protect their own information and informants from improper disclosure and publication.

47. Predictably, therefore, the Committee of Privileges has been unable to discover the source of the disclosure, or to establish with certainty whether the disclosure was deliberate.

(b) Culpability of information recipients

48. The Committee of Privileges now turns to the unauthorised publication of the information. In various submissions, legal representatives for *The Australian* have suggested, somewhat sanctimoniously, that it is for the parliament to deal with its own,[58] through investigative techniques – which were, as it happened, used unsuccessfully in the present case. But this does not absolve journalists and publishers from their own responsibility to exercise some degree of constraint in receiving what are, in effect, stolen goods. While the journalist concerned would not have a publishable story without the collaboration of a leaker, nor would the leaker gain an audience without the irresponsible and equally short-term thinking of a journalist and ultimately his or her publisher. Thus, even when, as in the present case, the Committee of Privileges cannot find the source of the disclosure, it does not consider that the publisher should escape censure on the basis claimed by *The Australian*.

49. Internal evidence from the articles themselves reveals that the journalist was in no doubt that he was reporting unauthorised information. Nor did he make any attempt whatsoever to make contact with the chairman or secretary of the Corporations and Securities Committee either to establish the authenticity of the document or to canvass any possible consequences of its improper disclosure. In the absence of any other evidence to the contrary, the committee is entitled to conclude that the journalist's articles were 'calculated and deliberate', as declared by Senator Chapman.[59] Nationwide News Pty Limited,[60] as the publisher of the articles in *The Weekend Australian* and *The Australian*, is directly responsible for the unauthorised disclosure, and can claim no immunity from the contempt powers of the Senate.

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56 Volume of Submissions and Documents, p. 33.

57 ibid. p. 54.

58 See especially paragraph 21, above.

59 Volume of Submissions and Documents, p. 5.

60 A.C.N. 008 438 828.

50. As previously outlined,[61] at the hearing of 25 May counsel for *The Australian* attempted, with great skill, to confine any culpability for contempt to the narrowest possible compass. The committee considers this approach entirely understandable, because any attempt to argue the case against potential harm to the operations of committees generally was doomed to failure. Counsel emphasised that most of what had been published was already on the public record, and that no material harmful to the reputation of persons the subject of ASIC inquiries had been included in the articles.

51. Without access to the document which formed the basis of the articles,[62] the committee is in no position to judge the significance or otherwise of matters included in the full document provided to the Corporations and Securities Committee. As counsel argued, such extracts as were published appear to the Privileges Committee to be relatively innocuous, and mostly already on the public record.

52. The committee might have been more open to counsel's persuasion if *The Australian* or its counsel had provided or were to provide evidence,[63] in whatever form, that the journalist concerned:

(a) had returned, or had never received, the document from the undisclosed source; or

(b) had arranged for the destruction of the document; and/or

(c) had given an assurance that the document was no longer in his possession and had not been provided to any other unauthorised person.

53. In the absence of any such assurances,[64] the Committee of Privileges must, on balance, take the view that the concerns expressed by both the Corporations and Securities Committee and ASIC about the potential damage to the operations of that committee are well founded. *The Australian*'s declared respect for parliamentary committees and their operations seems to the Committee of Privileges to be somewhat hollow, particularly when allied with the discourtesy shown to the Corporations and Securities Committee[65] – and at least initially to the Privileges Committee.[66] The Committee of Privileges has the impression that, until the latter stages of its own

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61 Paragraphs 40-41.

62 For reasons stated at paragraphs 54 and 55 below, the Committee of Privileges deliberately did not seek access.

63 Such evidence has now been provided, in the form of a letter from the journalist concerned (see *Submissions on behalf of Nationwide News Pty. Ltd, Mr David Armstrong & Ors*, Volume of Submissions and Documents, pp. 96-97, 101). However, it does not affect the committee's findings, which are based on paragraphs 54 to 57 below.

64 But see footnote 63.

65 See paragraphs 6 and 16 above.

66 See paragraph 16 above. For response, see *Submissions on behalf of Nationwide News Pty. Ltd. Mr David Armstrong & Ors*, Volume of Submissions and Documents, p. 100.

inquiry, *The Australian* and its legal representatives took the matter less than seriously.

54. But the actual content of any such document is not, in this case, at issue. In drawing the committee's attention to what he considered to be other instances of improper disclosure, counsel for *The Australian* avoided the most significant feature of the present case, that is, that the unauthorised disclosure related to a document received by a committee *in camera*. As previously observed,[67] such disclosure is not merely one of the matters set out in Privilege Resolution 6 as potentially constituting contempt: it can separately be prosecuted in the courts under section 13 of the *Parliamentary Privileges Act 1987*. The limited illustrations of possible unauthorised disclosure presented at the hearing were singularly inapposite to prove *The Australian*'s case: each related to the disclosure of a finalised parliamentary committee report – and indeed in one case, involving another newspaper,[68] it was by no means clear to the committee that the disclosure was unauthorised or improper at all. As for the publications in *The Australian*, the committee must take *The Australian's* own admissions of prior offences of unauthorised disclosure, because to its knowledge none of the items has been referred to the Committee of Privileges of either house as constituting possible contempts. As the committee reminded *The Australian* in its letter of 7 September 2000,[69] the Senate has found *The Australian* guilty of contempt once in its history, thirty years ago. If, however, *The Australian* wishes to admit to being a 'serial offender', the committee can but take its word.

55. Be that as it may, the committee's concern must be with the more serious offence of improper publication of *in camera* evidence. The committee is normally loath to make judgements about classes of documents,[70] rather than to evaluate individual documents on their merits. In this case, however, the committee has no doubt that the nature of the document places it firmly within a 'class claim'. By including *in camera* evidence in the Parliamentary Privileges Act as a statutory offence, in addition to the general parliamentary contempt jurisdiction, the Parliament has signalled the gravity with which it considers improper disclosure of such material. In this regard, the Committee of Privileges suggests that other parliamentary committees should be wary of using their undoubted right to receive evidence and documents *in camera*, so that only the most significant documents and evidence should be afforded the protections which such a major decision implies.

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67 See paragraphs 40 and 43 above.

68 *The Age*.

69 Volume of Submissions and Documents, p. 54.

70 'A distinction is often drawn between a "class claim" and a "contents claim". A class claim is a shorthand reference to those claims for immunity which are made in relation to documents which belong to an identifiable class. ... It may be that the document in question comprised in the class contains no sensitive material. A contents claim, on the other hand, is made in respect of a particular document on the ground that it contains material the contents of which are so sensitive as to warrant the non-disclosure of the document.' NTEIU v *the Commonwealth* [2001] FCA 610.

Conclusion

56. It follows, therefore, that, while not making a judgment on the content of the document which formed the basis of the articles, the committee rejects *The Australian's* attempt to place the publication of a document submitted *in camera* in the same category as other, palpably less serious, premature publications.[71] However improper the premature release of a parliamentary committee report before it is tabled can be – and the committee has made its views on this subject abundantly clear in previous reports – this is not of the same order as the deliberate disclosure of a document prepared by another person or organisation and received as *in camera* evidence by a parliamentary committee. The betrayal of trust always implicit in deliberate, unauthorised disclosure of committee documents is compounded in this latter case, when persons other than committee colleagues are involved.

57. The committee has concluded that, even if the unauthorised disclosure or publication were relatively 'responsible', in that counsel for *The Australian* has claimed that only material already in the public domain was published and that no harm was caused to the reputations of persons the subject of ASIC inquiries,[72] the publication falls into the category of the more serious of contempt offences.

Notification of findings

58. The committee, having considered the material before it, determined certain findings to be included in its report to the Senate. Given the nature of these findings, the committee was required under Privilege Resolution 2(10) to acquaint Mr David Armstrong, as editor in chief of *The Australian* and *The Weekend Australian*, of the findings, and afford him 'all reasonable opportunity to make submissions to the committee, in writing and orally, on those findings.'[73] In order to assist Mr Armstrong the committee provided him and his legal representatives with both the findings and a working document which set out the committee's analysis leading to those findings.

59. Mr Armstrong's legal representatives responded on his behalf within the timeframe sought by the committee, and the response is included in the volume of submissions and documents tabled with this report.[74] As required by the resolution, the committee took the response into account before making its report to the Senate.

FINDINGS

60. The Committee of Privileges makes the following findings:

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71 See volume of documents provided by *The Australian*, op. cit., note 50.

72 See paragraph 50 above.

73 Standing Orders and other Orders of the Senate, February 2000, p. 104.

74 *Submissions on behalf of Nationwide News Pty. Ltd, Mr David Armstrong & Ors*, Volume of Submissions and Documents, pp. 95-101.

(a) That articles appearing in *The Weekend Australian* of 12-13 February 2000 and *The Australian* of 14 February 2000, written by the national business correspondent, were based on a document submitted to and received by the Parliamentary Joint Committee on Corporations and Securities as *in camera* evidence of that committee.

(b) That the Parliamentary Joint Committee on Corporations and Securities did not authorise the release of the document; nor did it authorise that its content be divulged.

(c) That the unauthorised disclosure to the national business correspondent was probably deliberate, but that the Committee of Privileges is unable to find the source of that deliberate disclosure.

(d) That, while unable to make a finding in terms sought by counsel for ASIC,[75] the Committee of Privileges considers it unlikely that any officer of the Australian Securities and Intelligence Commission was the source of the unauthorised disclosure.

(e) That the publication of the information in *The Weekend Australian* and *The Australian*, based on the unauthorised disclosure, was deliberate and was made in the full knowledge that the document had not been authorised for publication.

(f) That the person or persons who disclosed the information to the national business correspondent has/have committed a contempt of the Senate.

(g) That Nationwide News Pty Limited, the publisher of *The Weekend Australian* and *The Australian*, as the organisation responsible for the actions of its employee the national business correspondent, has committed a contempt of the Senate.

Penalty

61. The committee has concluded that, in view of the nature of the contempts it has found, it should recommend the following penalties:

(a) In respect of the person or persons, if ever discovered, who disclosed to the national business correspondent of *The Weekend Australian* and *The Australian* – either a fine at the maximum amount of $5,000 authorised by the *Parliamentary Privileges Act 1987*, or that the Senate initiate a prosecution for an offence under section 13 of the *Parliamentary Privileges Act 1987*.

75 See paragraph 32 above.

(b) In respect of Nationwide News Pty Limited – that the Senate resolve to administer a serious reprimand to Nationwide News Pty Limited, as publisher of *The Weekend Australian* and *The Australian*, and that such resolution be transmitted to the publisher by the President of the Senate.

If, following the presentation of this report to the Senate, any further matters of improper disclosure involving newspapers published by Nationwide News Pty Limited are subsequently referred to the Committee of Privileges as possible contempts, and the committee so finds, it will seek the Senate's endorsement of a recommendation that the publisher's access to the part of the precincts under the management and control of the President of the Senate be restricted.[76]

Robert Ray
Chair

76 For response, see *Submissions on behalf of Nationwide News Pty. Ltd, Mr David Armstrong & Ors*, Volume of Submissions and Documents, pp. 97-100.

AUSTRALIAN SENATE

ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS

REFERENCES COMMITTEE
LEGISLATION COMMITTEE

25 October 2002

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Miss Anne Lynch
Secretary
Senate Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Miss Lynch

Having regard to the consideration by your Committee of the unauthorised disclosure of a report of this Committee, at its meeting on 16 September 2002 the Committee resolved to make available to the Committee of Privileges all relevant documents.

Given that your Committee did not request any of the material at last night's meeting, I am now forwarding copies of the following documents for your Committee's information:

- my statement to the Secretary dated 24 June 2002
- the statement of Senator Tchen dated 20 June 2002
- the statement of Senator Tierney dated 20 June 2002
- the statement of Senator Lundy dated 20 June 2002
- the statement of Senator Mackay dated 24 June 2002
- the statement of then Senator Bourne dated 21 June 2002
- the statement of Mr Michael McLean, Committee Secretary, dated 20 June 2002
- the statement of Ms Catherine Rostron, then Principal Research Officer, dated 21 June 2002
- the statement of Ms Christine Wilson, then Executive Assistant, dated 21 June 2002
- the statement of Ms Jane Mulligan, Senator Mackay's adviser, dated 21 June 2002
- the statement of Dr David Sutton, then Senator Bourne's adviser, dated 20 June 2002
- the statement of Mr Robert Wallace, my Research Officer, dated 24 June 2002
- An extract from Minutes of Meeting No. 14/40 dated 7 June 2002
- An extract from Minutes of Meeting No. 16/40 dated 20 June 2002
- An extract from Minutes of Meeting No. 17/40 dated 17 June 2002

I trust these documents assist the Committee of Privileges in its deliberations.

Yours sincerely

Alan Eggleston
Chair

AUSTRALIA

THE SENATE

24 June 2002

Mr Michael McLean
Secretary
Senate Environment, Communications, IT and
the Arts Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Michael

In response to your letter, I wish to advise that I have no knowledge of who may have given Annabelle Crabbe of the *Age* details of the recommendations contained in the Legislation Committee Report on the Broadcasting Services Amendment (Media Ownership) Bill 2002.

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

On Sunday 16 June, Ms Crabbe left a message on my phone message bank 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.

Ms Crabbe went on to add in a jocular manner that she was aware that she was breaking the privilege rules.

When I reached Sydney airport at about 10.30pm on the evening of 16 June, after listening to the message of Ms Crabbe, I pondered what the most appropriate course of action for me to follow would be. I concluded that I should not confirm the accuracy of her story in any way which would be the case were I to ask her not to publish the story or warn her of the consequences of knowingly breaking privilege. Instead, I decided to seek to cast doubt on the accuracy of her information. Accordingly, I rang Ms Crabbe and said I would be nominating her for the "Enid Blyton Creative Fairy Story of the Year Award".

Subsequently, after the article was published on 17 June, I was rung by journalists from the *Sydney Morning Herald*, the *Australian*, and the *Australian Financial Review* seeking confirmation of the accuracy of Ms Crabbe's story. In all three cases, I repeated my comments about nominating Ms Crabbe for the Enid Blyton Fairy Story Award.

SENATOR ALAN EGGLESTON
Liberal Senator
for Western Australia

Chair: Senate Legislation Committee on Environment, Communications, Information Technology and the Arts

OTHER COMMITTEE MEMBERSHIPS

STANDING
- *Privileges*
- *Procedure*

JOINT
- *Migration*
- *Parliamentary Education*

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PORT HEDLAND

Tel: (08) 9173 1438

I have retained Ms Crabbe's phone message of Sunday 16 June on my telephone message bank.

Yours sincerely.

DR ALAN EGGLESTON
SENATOR FOR WESTERN AUSTRALIA

Senator Alan Eggleston
Chairman
ECITA Legislation Committee
Parliament House
Canberra ACT 2600

UNAUTHORISED DISCLOSURE OF COMMITTEE REPORT

Further to your letter dated 20 June 2002, in relation to the article by Annabel Crabb in *The Age* on 17 June 2002, I state that:

I have no knowledge of this disclosure. I further state that I have no knowledge of the existence of said Annabel Crabb article.

TSEBIN TCHEN
NAME

SIGNATURE

20/6/02
DATE

Senator Alan Eggleston
Chairman
ECITA Legislation Committee
Parliament House
Canberra ACT 2600

UNAUTHORISED DISCLOSURE OF COMMITTEE REPORT

Further to your letter dated 20 June 2002, in relation to the article by Annabel Crabb in *The Age* on 17 June 2002, I state that:

I have not disclosed any part of the committees Cross Media Ownership Report before the report was tabled in the Senate

John Tierney
NAME

SIGNATURE

20/6/02
DATE

Senator Alan Eggleston
Chairman
ECITA Legislation Committee
Parliament House
Canberra ACT 2600

UNAUTHORISED DISCLOSURE OF COMMITTEE REPORT

Further to your letter dated 20 June 2002, in relation to the article by Annabel Crabb in *The Age* on 17 June 2002, I state that:

I cannot explain the disclosure and have no knowledge of how the disclosure occurred.

KATE LUNDY
NAME

SIGNATURE

20-6-02.
DATE

Senator Alan Eggleston
Chairman
ECITA Legislation Committee
Parliament House
Canberra ACT 2600

UNAUTHORISED DISCLOSURE OF COMMITTEE REPORT

Further to your letter dated 20 June 2002, in relation to the article by Annabel Crabb in *The Age* on 17 June 2002, I state that:

I did not make this disclosure, and I have no knowledge of the disclosure.

SEN. S. MARKAS
NAME

SIGNATURE

24/6/02
DATE

Senator Alan Eggleston
Chair
ECITA Legislation Committee
Parliament House
Canberra ACT 2600

UNAUTHORISED DISCLOSURE OF COMMITTEE REPORT

Further to your letter dated 20 June 2002, in relation to the article by Annabel Crabb in *The Age* on 17 June 2002, I state that:

- I have had no contact with Annabel Crabb in the period since the Chair's draft was first provided to me.
- I have not provided copies nor disclosed the contents of this report to Annabel Crabb or to any other journalist.

Vicki Bourne

Senator Vicki Bourne
21 June 2002

Senator Alan Eggleston
Chairman
ECITA Legislation Committee
Parliament House
Canberra ACT 2600

UNAUTHORISED DISCLOSURE OF COMMITTEE REPORT

Further to your letter dated 20 June 2002, in relation to the article by Annabel Crabb in *The Age* on 17 June 2002, I state that:

I cannot explain the disclosure.

MICHAEL MCLEAN
NAME

SIGNATURE

21.6.02
DATE

Senator Alan Eggleston
Chairman
ECITA Legislation Committee
Parliament House
Canberra ACT 2600

UNAUTHORISED DISCLOSURE OF COMMITTEE REPORT

Further to your letter dated 20 June 2002, in relation to the article by Annabel Crabb in *The Age* on 17 June 2002, I state that:

I am unable to explain the apparent unauthorised disclosure of the Chair's draft report on the Broadcasting Services Amendment (Media Ownership) Bill 2002

C. ROSTRON
NAME

SIGNATURE

21 JUNE 2002
DATE

Senator Alan Eggleston
Chairman
ECITA Legislation Committee
Parliament House
Canberra ACT 2600

UNAUTHORISED DISCLOSURE OF COMMITTEE REPORT

Further to your letter dated 20 June 2002, in relation to the article by Annabel Crabb in *The Age* on 17 June 2002, I state that:

I can not explain the unauthorised disclosure

Christine Wilson
NAME

SIGNATURE

21/6/02
DATE

Senator Alan Eggleston
Chairman
ECITA Legislation Committee
Parliament House
Canberra ACT 2600

UNAUTHORISED DISCLOSURE OF COMMITTEE REPORT

Further to your letter dated 20 June 2002, in relation to the article by Annabel Crabb in *The Age* on 17 June 2002, I state that:

I did not make the disclosure and have no knowledge of the disclosure.

JANE MULLICAN
NAME

J Mullican
SIGNATURE

21 June 2002
DATE

Senator Alan Eggleston
Chair
ECITA Legislation Committee
Parliament House
Canberra ACT 2600

UNAUTHORISED DISCLOSURE OF COMMITTEE REPORT

Further to your letter dated 20 June 2002, in relation to the article by Annabel Crabb in *The Age* on 17 June 2002, I state that:

- I have had no contact with Annabel Crabb in the period since the Chair's draft was first provided to me.
- I have not provided copies nor disclosed the contents of this report to Annabel Crabb or to any other journalist.

Dr David Sutton
21 June 2002

RECEIVED TIME 21. JUN. 12:23 PRINT TIME 21. JUN. 12:24

AUSTRALIA

THE SENATE

24 June 2002

Mr Michael McLean
Secretary
Senate Environment, Communications, IT and the Arts Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Michael

I am writing to advise you that I have no knowledge of who might be responsible for the unauthorised disclosure of the Committee's Report on the Broadcasting Services Amendment (Media Ownership) Bill 2002 to the *Age* journalist Ms Annabelle Crabbe.

I would like to add that on 3 June 2002 (when the Report was originally due to be tabled) Ms Crabbe called this office and asked what was happening with the Report. I informed her that the Senate had agreed to a change of tabling date and that the Report would not be tabled until 18 June 2002. She asked me if it was possible to have access to the Report prior to this date and I informed her that it was not, because the Report would not become a public document until it was tabled in the Senate.

Yours sincerely.

Rob Wallace

Robert Wallace
Research Officer
Office of Senator Eggleston

SENATOR ALAN EGGLESTON
Liberal Senator
for Western Australia

Chair: Senate Legislation Committee on Environment, Communications, Information Technology and the Arts

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CONFIDENTIAL

Meeting No 14/40

Environment, Communications, Information Technology and the Arts Legislation Committee

Minutes of Private Meeting
Friday, 7 June 2002
by teleconference

Core members present:	Senator Eggleston (Chairman) Senator Mackay (Deputy Chair)
Substitute member present:	Senator Bourne
In attendance:	Michael McLean, Secretary Catherine Rostron, Principal Research Officer

1. Meeting
The Chairman declared the meeting open at 4.03 pm.

2. Broadcasting Services Amendment (Media Ownership) Bill 2002
The Chairman invited comment on the Chair's draft report. Both Senators Mackay and Bourne noted their fundamental disagreement with the majority of its contents.

Accordingly, the Committee resolved that the Chair's draft report be the report of the Committee for tabling on 18 June 2002. Senators Mackay and Bourne indicated their intention to provide dissenting reports. Following discussion, the Committee agreed that dissenting reports should be forwarded to the secretariat by c.o.b. on Friday, 14 June.

4. Adjournment
The Committee adjourned at 4.19 pm.

CONFIRMED:

Alan Eggleston
Chairman

CONFIDENTIAL

Meeting No 16/40

Environment, Communications, Information Technology and the Arts Legislation Committee

Minutes of Private Meeting
Thursday, 20 June 2002
in Committee Room 1S5, Parliament House, Canberra

Core members present:	Senator Eggleston (Chairman) Senator Mackay (Deputy Chair) Senator Calvert Senator Lundy Senator Tchen
Substitute member present:	Senator Tierney
In attendance:	Michael McLean, Secretary Jonathan Curtis, Principal Research Officer Jacquie Hawkins, Research Officer

1. Meeting

The Chair declared the meeting open at 5.40 pm.

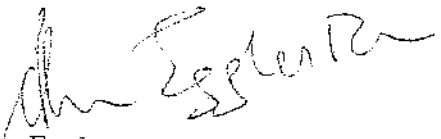
4. Broadcasting Services Amendment (Media Ownership) Bill 2002

The Committee gave consideration to an article in *The Age* on 17 June 2002 which indicated an apparent unauthorised disclosure of the Committee's draft report. Discussion ensued. On the motion of Senator Calvert, the Committee resolved to implement the procedures laid down in Senate Procedural Order of Continuing Effect No. 3 in relation to the unauthorised disclosure of a committee document. It was agreed that, in the first instance, the Chair should write to all members and staff asking them if they can explain the disclosure.

7. Adjournment

The Committee adjourned at 6.03 pm.

CONFIRMED:



Alan Eggleston
Chairman

CONFIDENTIAL

Meeting No 17/40

Environment, Communications, Information Technology and the Arts Legislation Committee

Minutes of Private Meeting
Wednesday, 26 June 2002
in the Government Advisers' Lobby, Parliament House, Canberra

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Present: Senator Eggleston (Chairman)
Senator Mackay (Deputy Chair)
Senator Lundy
Senator Tchen

In attendance: Michael McLean, Secretary
Jacquie Hawkins, Research Officer

1. Meeting

The Chair declared the meeting open at 1.52 pm.

5. Unauthorised disclosure - Committee report on the Broadcasting Services Amendment (Media Ownership) Bill 2002

The Chair reported that all members and staff had advised that they were unable to explain the apparent unauthorised disclosure of the Committee's report. Discussion ensued.

On the motion of Senator Mackay the Committee concluded that the disclosure had caused substantial interference with its work and, accordingly, that the matter be raised with the President in accordance with standing order 81.

5. Adjournment

The Committee adjourned at 1.59 pm.

CONFIRMED:

Alan Eggleston
Chairman

AUSTRALIAN SENATE

ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS

REFERENCES COMMITTEE
LEGISLATION COMMITTEE

PARLIAMENT HOUSE
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www.aph.gov.au/senate_environment

7 November 2002

Miss Anne Lynch
Secretary
Senate Committee of Privileges
Room SG.39
Parliament House
CANBERRA ACT 2600

Dear Miss Lynch

On 29 October you sent to me for correction the *Proof Committee Hansard* of your committee's hearing on 24 October. I wish to clarify one aspect of my evidence.

At the bottom of page 42, Senator Sherry asks me whether there had been implemented any changed procedures for the dissemination of information since the unauthorised disclosure of the committee's report on the Broadcasting Services Amendment (Media Ownership) Bill 2002. I responded that I did not believe that this secretariat had disseminated any information since the incident.

This statement was not accurate. At the time, I had taken Senator Sherry's question to be a reference to information of a similarly sensitive nature to the material under discussion and it is indeed the case that there have been no subsequent reports disseminated which addressed a committee inquiry into a bill.

Given that the transcript shows that Senator Sherry included no such qualification in his question, I should clarify that this secretariat does in fact disseminate a broad range of information to committee members on a regular basis. In so doing, it continues to follow longstanding, established practices for the distribution of material to committee members.

Yours sincerely

Michael McLean
Secretary

AUSTRALIA

THE SENATE

RECEIVED
11 NOV 2002
CLERK'S OFFICE

11 November 2002

Miss Anne Lynch
Secretary
Senate Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Miss Lynch

Thankyou for the opportunity to respond to the comments of Mr Michael Gawenda, Associate Publisher and Editor of *The Age*, at the public hearing on Thursday 24 October where he referred to me as a liar.

I would like to say that, while for the purposes of the record, I reject Mr Gawenda's assertion that I am a liar, I do not, however, feel that there is anything to be gained by pursuing the matter further by either seeking an apology or withdrawal by Mr Gawenda of his remark.

Yours sincerely.

DR ALAN EGGLESTON
SENATOR FOR WESTERN AUSTRALIA

SENATOR ALAN EGGLESTON
Liberal Senator
for Western Australia

Chair: Senate Legislation Committee on Environment, Communications, Information Technology and the Arts

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MinterEllison LAWYERS

12 November 2002

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PRIVATE & CONFIDENTIAL

Senator the Honourable Robert Ray
Chair
Committee of Privileges
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator

Privileges Committee submissions

We refer to the above matter and your invitation at the conclusion of the Privileges Committee Hearing on 24 October 2002 and enclose supplementary written submissions on behalf of The Age Company Limited, Michael Gawenda and Annabel Crabb.

If you require any further information please do not hesitate to contact this office.

Yours faithfully
MINTER ELLISON

Contact: Adam Barnett Direct phone: +61 3 8608 2173
E.mail: adam.barnett@minterellison.com
Partner responsible: Peter Bartlett Direct phone: +61 3 8608 2623
Our reference: ALB PLB 30-3962203

enclosure

AUSTRALIAN SENATE
COMMITTEE OF PRIVILEGES

INQUIRY INTO MATTER REFERRED ON 27 JUNE, 2002

SUPPLEMENTARY

WRITTEN SUBMISSIONS OF

THE AGE COMPANY LIMITED,

MICHAEL GAWENDA AND ANNABEL CRABB

Introduction

1. These submissions are made on behalf of the Age Parties pursuant to the invitation given by the Chair of the Committee at the conclusion of the proceedings on 24 October, 2002.

2. The material attached and indexed in **Annexure 1** as part of these submissions is in response to the query of Senator the Honourable Nick Sherry as to The Age newspaper's internal education policies and also provides an example of the training that The Age newspaper journalists and editorial staff are subject to throughout the year. The material includes an extract from the Reporter's Legal Guide used by the Age's journalists.

3. These submissions are intended to supplement the Age Parties' submissions dated 14 October, 2002 ("**the First Submissions**").

The substantial issue before the Committee is contempt

4. The two issues raised in the Reference to the Committee are as follows:

   (a) "whether there was an unauthorised disclosure of a report of [the ECITAL] committee"; and

   (b) "whether any contempt was committed in that regard".

5. The Age Parties submit that the substantial issue before the Committee is, so far as the Age Parties are concerned, not that the Disclosures were unauthorized but whether the conduct amounted to an offence against the Senate within the meaning of section 4 of the *Parliamentary Privileges Act* 1987, and in particular whether in this matter there was any improper interference. The Age Parties submit that the questions of improper interference and contempt involve questions of degree and that the seriousness of a breach of privilege must therefore be determined before the breach can be found to constitute a contempt.

6. For convenience, we set out the terms of section 4 again:

> **"4. Essential element of offences**
>
> 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."

7. As submitted in their First Submissions, the Age Parties do not dispute that the disclosure of:

   (a) the two recommendations referred to in the Article; and

   (b) the fact that there was to be a minority ECITAL Committee report;

   ("**the Disclosures**") was not authorised by the ECITAL Committee.

8. There is thus no dispute before the Committee on the first issue contained in the Reference.

9. It follows that the substantial issue before the Committee is the second issue in the Reference, namely, whether the Disclosures amounted to a contempt.

Contempt involves questions of degree

10. The Age Parties submit that the effect of section 4[1] of the *Parliamentary Privileges Act* 1987 - which, as a law of the Commonwealth, binds the Committee and the Senate - is to require an assessment of the seriousness of

---

[1] See paragraphs 12-15 of the First Submissions, set out at pp 24-25 of the Red Booklet.

any conduct said to be a contempt or breach of privilege before there can be any finding or recommendation that a contempt or offence against the Senate has been committed.

11. In particular, the Age Parties submit that there can be no "*improper interference* with the free exercise by a House or Committee of its authority or functions" within the meaning of section 4 unless the conduct at issue:

(a) "amounts, or is intended or likely to amount" to an *actual* interference with the exercise of the committee's authority or functions; and

(b) the interference tends *substantially or seriously* to obstruct the Committee in the exercise of its authority or its functions.

The Age Parties submit that the guidance given to the Committee by Resolution 3(a) of the Resolutions agreed to by the Senate on 25 February, 1988 confirms the necessity for substantial or serious obstruction of that kind.

12. The Age Parties also submit that where the conduct in question occurs in the course of the ongoing discussion of public affairs, such as the cross-media ownership debate which was the subject of the ECITAL Committee report, the Committee should be slower to conclude that an "*improper* interference" constituting contempt has been committed.

13. The presence of the word "*improper*" in section 4 of the Act is a very significant qualification. It indicates that some "*interferences*" are, indeed, permissible or proper. In determining which interferences are *im*proper, a balance should be struck between parliamentary privilege and the citizen's freedom of speech.

14. When the Parliament enacted section 4 it recognized that that it was essential to place limits on the power to punish for an offence against a House, including contempt[2]. Resolution 3(a) is an acknowledgment by the Senate that its power to deal with offences, including contempt should be exercised only in appropriate cases.

---

[2] see definition in section 3(3)

15. Both section 4 and Resolution 3(a) involve striking a balance in the circumstances of each individual case. It is easy to see that premature and unauthorized disclosure of, say, a commercially sensitive report which affected the share price of a company, or of in camera evidence, might be an improper interference. On the other hand, the Committee referred, in its 99th Report, to other premature publications as being "*palpably less serious*"[3].

16. This concept of balance is akin to that which applies in the law of contempt of court[4]. In that sphere, even causing actual prejudice to an accused person in the course of a criminal trial may not constitute a contempt if in certain circumstances it occurs as the unintended by-product of the ongoing discussion of public affairs.

There was no actual interference in this case

17. In the circumstances of these Disclosures, the Age Parties submit that there was in fact no *actual, intended or likely* interference at all with the ECITAL Committee's authority or functions. Nor was any conduct sufficiently serious to amount to an "*improper interference*". It follows that the threshold for an offence or contempt in section 4 of the Act cannot be met.

18. None of the Senators on the ECITAL Committee other than Senator Eggleston suggested any such interference with the work of their committee as a result of the Disclosures. To the contrary, the five other members of the ECITAL Committee gave evidence that the Disclosures had no effect in this case.

(a) Senator Tierney, in answer to a direct question from the Chair, stated:

> "I would not say it disrupted my work."[5]

(b) Senator Tchen, in answer to similar questions from the Chair, stated:

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3 see 99th Report, paragraph 56

4 See *Ex parte Bread Manufacturers; Re Truth and Sportsman Limited* (1937) 37 SR (NSW) 242 at pp 249-250 per Jordan CJ; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 98 per Mason J (copies of these pages were handed to the Committee on 24 October 2002)

5 Page 5 of the Proof of Hansard for 24 October 2002

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

When asked by the Chair whether that had happened in this case, the Senator answered no[6].

(c) Senator Lundy, in answer to similar questions from the Chair, stated:

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

When asked by the Chair whether the effect of the disclosure had been to make dealing with her colleagues more difficult in relation to this committee, the Senator stated, "In fact I would say no."[7]

(d) Former Senator Bourne answered a similar question from the Chair,

> "No. It did not affect me at all because it was so late."[8]

(e) Senator Mackay, in answer to the Chair's question whether the disclosure caused substantial interference with the ECITAL Committee's work, answered no. The Senator also stated:

> "I myself did not feel that it interfered with my work at all."[9]

19. Senator Eggleston, while maintaining that there had been some interference with his committee's work at a general level, was unable to provide particulars of the interference *in this case*.

(a) Senator Eggleston gave the following evidence which, the Age Parties submit, shows that even he accepted that *in this instance* there was no interference at all, let alone any improper interference.

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

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6 Page 9 of the Proof Hansard
7 Page 10 of the Proof Hansard
8 Page 37 of the Proof Hansard
9 Page 39 of the Proof Hansard

> **Mr Rares** – And you were prepared to be subjected to public scrutiny and debate on your espousing of those views. Is that right?
>
> **Senator Eggleston** – Post publication of the report, indeed, yes.
>
> **Mr Rares** – Given that they were your considered views, it would not have mattered whether it was published one day earlier or one day later, would it?
>
> **Senator Eggleston** – There is a system in place which requires that until the report is tabled and published it shall remain confidential.
>
> **Mr Rares** – But it did not interfere with you holding or expressing the views in those two recommendations, did it?
>
> **Senator Eggleston** – No.
>
> **Mr Rares** – And it did not interfere, to your knowledge, with any of the other members of your committee who contributed to that report adhering to the views that they expressed in their recommendations either in the majority or in the dissenting report. Is that right?
>
> **Senator Eggleston** – No, but it sets a precedent."

(b) Senator Eggleston's reference to a precedent underscored his evident concern with what he regarded as a matter of principle. Indeed, he went so far as to say:

> "... In any other situation, I would adopt the same approach.
>
> **Mr Rares** – Because of the principle. Is that right?
>
> **Senator Eggleston** – Indeed."

(c) However, the attempt to use principle in this way is clearly contrary to the express terms of Resolution 3(a) which illustrates that some matters, including those of a trivial nature, are not sufficient to attract the use of the Senate's powers. This approach is fortified by section 4 of the Act.

(d) Earlier[10], Senator Eggleston stated in the course of answering a question from the Chair:

> "The issue is really one of principle. A system of privilege exists. Privilege is a bit like pregnancy; either you have it or you do not. In this case, this report was covered by privilege and that privilege was breached. Therefore, as a simple fact, that undermines the work of the committees and this committee in particular, because it means that in any future report one

[10] at page 13 of the Proof Hansard

> cannot rely on the recommendations of the Committee or the content of the report remaining confidential."

The Age Parties submit that in this answer the Senator failed to distinguish between cases of mere or even hypothetical or no interference and improper interference sufficient to constitute contempt (which, because of the necessity to identify a substantial or serious interference, is not absolute).

(e) The Senator's unwillingness to make that distinction was a recurring theme in the Senator's evidence. In the course of answering questions from counsel for the Age Parties as to the effect of section 4 of the Act[11], the Senator declined to accept that there were "*degrees of privilege*". Similarly[12], the Senator adopted the proposition that "*every time there is any leak at all*", that is a "*substantial breach of privilege which requires punishment*". When counsel for the Age Parties returned to the question of "*interference with the work of the [ECITAL Committee] on this occasion*", Senator Eggleston again stated, "*There is a principle involved and it is not a question of anything else but that principle*".[13]

(f) The Age Parties submit that Senator Eggleston's failure to accept the relevance of the fact that breaches of privilege vary in seriousness undermines the only evidence given by the Senator which even suggested any interference with the workings of the ECITAL Committee in this case. That evidence was as follows. When asked by the Chair whether he now had less trust in his colleagues on the Committee, the Senator answered - at the most general level:

> "One cannot have the same degree of trust in one's colleagues, because a leak occurred."[14]

(g) However, when the Chair returned to the topic of Senator Eggleston's

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11 at pages 23-24 of the Proof Hansard
12 at Proof Hansard pages 33-34
13 Page 35
14 Page 13 of the Proof Hansard

confidence in his colleagues[15] the Senator qualified his answer by reference to broad principle:

> "I think it is true to say that the issue is really one of principle in the most important way — that is, that there is a privilege system, as I said."

Moreover, in response to direct questions from counsel for the Age Parties, the Senator flatly refused to "*identify any particular colleague*" with whom he felt his relationship had been affected[16].

(h) The Age Parties submit that in the absence of any such identification - particularly given the Senator's repeated recourse to arguments of broad principle - the Committee should conclude that the Senator's evidence does not establish that there was any effect on his relationship with his colleagues *as a result of these particular Disclosures*.

20. Having regard to the evidence, the Age Parties submit that the Committee should find that, consistently with the clear sworn evidence to this Committee of at least 5, if not all 6, members of the ECITAL Committee, there was no interference at all in the authority or functions of the ECITAL Committee in this case.

Alternatively, any interference was not "improper"

21. In the event that the Committee concludes that there was some interference in the work of the ECITAL Committee in this case, the Age Parties submit that the interference was not so serious or substantial as to constitute an "*improper interference*" within the meaning of section 4 of the Act.

(a) The publication was made only a day before the final report was due to be and was in fact released.[17]

(b) The publication took place in the course of the ongoing discussion of a matter of great public interest, namely, the regulation of cross-media ownership.

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15 at page 21 of the Proof Hansard
16 Pages 21-22 of the Proof Hansard
17 Indeed, the ECITAL Committee's work had clearly come to an end several days beforehand: see Mr McLean's letter to Mr Wolpe of 24 June, 2002 reproduced at p 38 of the Red Booklet.

(c) There was absolutely no suggestion of any in camera evidence being disclosed in this case, unlike the subject matter of the 99th Report of this Committee. Yet the disclosure of in camera evidence was the main concern expressed in Senator Eggleston's opening statement.

(d) Of the six members of the ECITAL Committee, only Senator Eggleston expressed the view (in the manner discussed above) that there had been any effect on the committee at all.

(e) The suggestion that Senator Eggleston regarded this as a serious breach of privilege warranting punishment as a contempt is inconsistent with the Senator's invocation of Enid Blyton and the "jocular vein" in which he conceded he spoke with Ms Crabb on the evening before the publication[18].

(f) That suggestion is also inconsistent with Senator Eggleston's conscious decision, as Chairman of the ECITAL Committee, not to make any attempt to stop the publication or even to raise the issue of "*breaking privilege*" with Ms Crabb in the course of that conversation[19].

(g) Senator Eggleston made no attempt to stop the publication once he learnt of it. If real damage, as opposed to a question of a breach of a principle, were likely to occur, one would have expected the Senator to have told Ms Crabb of any harm she would cause. Instead, Senator Eggleston engaged in a jocular discussion with Ms Crabb[20].

(h) The Senator said that he implied to Ms Crabb that she was making up a fairy story. That was untrue[21] but it indicated to a reasonable person in Ms Crabb's position that whatever technicalities were involved, Senator Eggleston thought no real harm would be done. That would put the Senator in company with the other 5 members of the ECITAL Committee in relation to their considered view of this matter when

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18 Page 25 of the Proof Hansard
19 see the Senator's letter of 28 June, 2002 at page 5 of the Red Booklet
20 Page 25 of the Proof Hansard
21 Page 28 of the Proof Hansard

giving evidence.

(i) Finally, in answer to the Chair's question whether he took Ms Crabb's comments as threatening, Senator Eggleston expressly, and very fairly, agreed that he did not find Ms Crabb "*intimidating*"[22].

Conclusion

22. The Age Parties submit that the Committee should report to the Senate that, on the basis of its investigation, it has concluded:

(a) that the Disclosures were unauthorised; but

(b) no contempt was committed in that regard.

11 November 2002

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[22] Page 21 of the Proof Hansard

ANNEXURE 1

1. Covering statement from Editorial Training Department of The Age Company Limited.

2. List of Age journalist training courses for May-October 2002 period.

3. Course outline for:

- Media Law Course;
- Media Law Refresher;

as an example of courses offered at The Age Company Limited relevant to this inquiry.

4. Copy of excerpt from The Age Reporters Law Guide, "Contempt of Parliament".

THE AGE

Editorial Learning and Development at *The Age* provides training courses for all staff in the Editorial department including senior editors, reporters, sub editors, photographers and support staff.

These courses are designed to meet the needs of the paper and enhance the skills of staff. The needs are identified by senior editors through annual staff appraisals and by the input of individual staff.

The Age runs a one year graduate trainee program for journalists. This program provides weekly training in areas such as shorthand, news writing and media law. In addition trainees receive a one month induction and a further 2 weeks of intensive training in writing and reporting.

In 2002 Learning and Development provided 122 training days attended by more than 200 staff.

Staff evaluate the courses they attend. This ensures courses meet expectations and are constantly improved.

Address 250 Spencer Street, Melbourne, Victoria 3000, Australia Correspondence P.O. Box 257C, Melbourne, Victoria 3001, Australia
General Enquiries (03) 9600 4211 Fax (03) 9670 2156 Internet www.theage.com.au
The Age Company Ltd ABN 85 004 262 702

THE AGE JOURNALIST TRAINING COURSES 2002

Course	Date	Times	No. of Participants
Media Law Course May	14-17 May	All day (x4)	8
Media Law Course June	25-28 June	All day (x4)	8
Defensive Driving Program level 1	24 May, 21 or 28 June	All day	4
Leadership @ Fairfax	3, 4 and 11 June	17:30-17:00	12
Feature Writing Course	am 6, 13 June	9.30-13.00 (x2)	8
Investigative Journalism	19, 28 June, 3 July	9:30-5:00 (x3)	8
Time Management for Journalists	am 17 and 24 June	9:30-12:30 (x2)	12
Media Law Refresher	pm 11 July	14:00-16:00	20
Language, Grammar and Style	30 or 31 July	All day	12
Transition to Editor	23, 24 July	All day (x2)	12
Computer Assisted Reporting	am 16 July	9:30-12.30	8
Intermediate Computer Assisted Reporting	pm 16 July	14:00-17:00	8
Training for sub-Editors a	5 or 6 June	15:30-23:00	14
Training for sub-Editors b	24 + 25 July	15:30-23:00	7
Training for sub-Editors c	31 July +1 August	15:30-23:00	7
Research Methods (Business)	am 19 July	10.00-13.00	6
Valuations Analysis	22, 29August	All day (x2)	15
Peer Supervision	19, 20 August	All day (x2)	12
Media Law Course (Aug)	27-30 August	All day (x4)	8
Feature Writing Course	3, 10 October	All day (x2)	8
Interviewing course	8-Oct	All day	8
Media Law Course (Oct)	15-18 October	All day (x4)	8

Reporting for TV	7-Nov	9:30-12:30	8
Financial Statements	23, 29 October	All day (x2)	12
Time Management for Journalists	19, 26 November	9.30-12.30 (x2)	15
Off-base Reporting Course (Castlemaine)	5-11 August	All day (x5)	8
Property Law Course	17-Aug	9.30-11.30	15
Editorial for Non Journalists	6-Sep	All day	15
Transition to Editor	29, 30 October	All day (x2)	12

Media Law Course

Aim
To give print journalists a good working understanding of the different aspects of media law.

Participants will:

- Receive a detailed explanation of defamation and contempt laws.
- Examine the rights and responsibilities of a reporter in legal cases. (sources, fair and accurate reporting)
- Look at the court structures in Australia.
- Look at FOI and other helpful laws.

Suitable for
All editorial staff.

Commencement Dates
9.00 – 17.00
Mon 6 August – Fri 10 August 2001
Mon 15 October – Fri 19 October 2001

Venue
Sir John Monash Business Centre
Level 5, 253 Flinders Lane, Melbourne

Duration
5 days

Group size
5

Instructor
Communication Law Centre

THE AGE

Media Law Refresher

Aim
To refresh all aspects of defamation and contempt in Victorian Law.

Participants will:
- Receive an overview of defamation and contempt laws.
- Look at common and reoccuring mistakes
- Use recent examples from local newspapers.

Suitable for
All editorial staff.

Commencement Dates
14.00 –16.00
Tuesday 11 September 2001

Venue
Merriman Lane Training room

Duration
2 hour course

Group size
30

Instructor
Peter Bartlett, Senior Partner, Minter Ellison

6. CONTEMPT OF PARLIAMENT

- **[What constitutes contempt of parliament?]** Basically, any conduct which impedes the performance of the functions of a House of Parliament or officer of parliament is capable of constituting contempt.
- Unfortunately, because of its arbitrary nature there are no defined categories indicating specifically what does and what does not constitute contempt.
- Journalists should be aware of the following categories of publications, given that in the past they have been found to constitute contempt:
  - Publishing a comment 'reflecting' on a House of Parliament or its members;

    Example: *Labelling politicians 'lazy two-faced bludgers'.*
  - Publishing a false or misleading report of debates or proceedings, including in parliamentary committees;
  - 'Premature' publication of a committee's proceedings, evidence or findings before it has a chance to report to the relevant House of Parliament;
  - Publishing material which deters witnesses from giving evidence before a House or Committee of Parliament; and
  - Publishing material which tends to obstruct a member of Parliament in carrying out their duties.
- Other ways in which journalists may find themselves in contempt of Parliament include disobeying rules of a House, inappropriate behaviour in a gallery, or refusing to answer a question before a committee of a House.
- **[What sanctions can I expect if found in contempt?]** Both Commonwealth and Victorian Parliaments have the power to fine and/or imprison persons found in contempt of parliament.
- As with the courts, journalists have no special privilege entitling them to preserve the confidentiality of their sources or to refuse to produce a document. However, it is up to the discretion of the relevant Privilege's Committee as to whether a contempt finding will be imposed.