

POSSIBLE UNAUTHORISED DISCLOSURE OF PRIVATE DELIBERATIONS OR DRAFT REPORT OF SELECT COMMITTEE ON THE FREE TRADE AGREEMENT BETWEEN AUSTRALIA AND THE UNITED STATES OF AMERICA

Introduction

1.1 On 5 August 2004, on the motion of Senator Ridgeway, the Senate referred the following matter to the Committee of Privileges for inquiry and report:

Whether there was any unauthorised disclosure of the private deliberations or the draft report of the Select Committee on the Free Trade Agreement between Australia and the United States of America, and, if so, whether any contempt was committed in that regard.¹

Background

1.2 On Friday evening, 30 July 2004, the Select Committee on the Free Trade Agreement between Australia and the United States of America (the FTA Committee) held a meeting by telephone. The following day various press articles appeared, purporting to give reports of the discussion at the meeting and the content of the draft report.

1.3 At a press conference on 2 August 2004, the Labor Party members of the FTA Committee – the Chair, Senator Cook, who participated via teleconference, Senator O'Brien and Senator Conroy – disclosed their recommendations in relation to the provisions of the legislation which was before the committee, and released a document setting out those recommendations.

1.4 Senator Ridgeway, a member of the committee, wrote to the President of the Senate on 3 August 2004,² advising that the disclosure of the private discussions, the draft report and the Labor senators' recommendations had not been authorised by the committee.

1.5 On 4 August 2004, the President made a statement relating to the matter raised by Senator Ridgeway.³ The President indicated that the appropriate course normally would be for the FTA Committee to investigate unauthorised disclosures in

1 Appendix, p. 12.

2 Appendix, pp. 13-14.

3 Appendix, p. 11.

accordance with the order of the Senate of 20 June 1996. The President reminded the Senate, however, that the committee would cease to exist when it presented its final report to the Senate, and that there would therefore not be an opportunity for that committee to investigate the unauthorised disclosures. The President, pursuant to the procedures provided by standing order 81 and resolutions of the Senate of 25 February 1988, determined that the matter may have precedence. As indicated, the matter was referred to the Committee of Privileges on 5 August.

Conduct of inquiry

1.6 For reasons stated at paragraph 1.5, the Committee of Privileges was not assisted in this case by efforts of the FTA Committee to find for itself the culprit or culprits in relation to the leaking of supposed private proceedings of that committee. Nor did it have the advantage, at the time of receipt of the reference, of that committee's evaluation of whether the leaking and public circulation of committee proceedings constituted substantial interference with the work of the FTA Committee. This is because of the rule that the moment a select committee reports to the Senate it goes out of existence, and there was no time before the report's tabling for the FTA Committee to undergo the normal procedures, which might have obviated the need for the Privileges Committee's inquiry.

1.7 However, in accordance with its own normal procedures, the Committee of Privileges wrote to all members and the secretary of the FTA Committee at the relevant time.⁴ All members of the FTA Committee, with the exception of Senator Cook who was on sick leave, and Senator Ridgeway, responded to the committee's invitation of 5 August to comment on the issues arising from the reference to the committee.⁵

1.8 In addition, all members of the Committee of Privileges had the opportunity to view a videotape of the proceedings of a press conference held by the three Labor members of the FTA Committee at which the possible unauthorised disclosure of content of the draft report was alleged by Senator Ridgeway to have occurred.

Responses by FTA Committee members to Committee of Privileges questions

1.9 All members of the FTA Committee denied any knowledge of the unauthorised disclosures of proceedings and the draft report which appeared in the media on the 31 July-1 August 2004 weekend. Self-evidently, the possible unauthorised disclosure on 2 August involved the three Labor FTA Committee members. Those members who addressed the Privileges Committee's question whether the disclosure amounted to an act tending substantially to interfere with, or actually interfered with, the work of the FTA Committee answered "no". The

4 Appendix, pp. 37-38.

5 Appendix, pp. 39-42; 48-61.

secretary to the FTA Committee gave details of the processing of the report and confirmed that neither he, nor any member of the secretariat, disclosed an account of the private deliberations nor had any knowledge or evidence of who might have done so.⁶

1.10 The Committee of Privileges was surprised that Senator Ridgeway did not respond in writing to its invitation. However, Senator Ridgeway orally advised that he considered that his letter to the President, initiating the inquiry sufficiently covered his concerns and that he had nothing further to contribute. Because Senator Cook was ill, the committee did not pursue the matter further with him. All relevant documentation is included as an appendix to this report.

Analysis of responses

1.11 The Committee of Privileges has been ordered by the Senate, under the terms of reference of 5 August 2004, to consider three separate acts of unauthorised disclosure:

- Content of the FTA Committee's draft report
- Content of Labor senators' comments on the draft report
- Purported disclosure of deliberative proceedings of a committee

Possible unauthorised disclosures

1.12 As the press reports and the Labor senators' comments, attached to Senator Ridgeway's letter to the President, clearly illustrate, there is no doubt that unauthorised disclosure of the report's contents occurred. In addition to asserting that news reports over the weekend of 31 July-1 August indicated that the FTA Committee's report had been divulged without authority, Senator Ridgeway drew attention specifically to examples from the Labor senators' document circulated on 2 August which were direct responses to the draft report, thereby in themselves divulging both the content of the draft report, as finally tabled, and the additional comments that were attached to the report.

1.13 In his response, Senator Brandis stated:

In relation to the alleged disclosure of sections of the Draft Report, I would point out that the document which was produced by Senators Cook, Conroy and O'Brien at their press conference shortly before the private meeting of the Committee on the afternoon of Monday 1 [sic] August was not a section of the draft report, merely the Labor Senators' additional remarks. I would not have thought it a breach of privilege for a member of a Senate Committee (either alone or expressing a corporate view with party colleagues) to announce that view in advance of the Committee's report

6 Appendix, pp. 43-47.

being tabled, even if they were to do so in the very words which they subsequently included as additional remarks in the Committee's report.⁷

1.14 Senator O'Brien supported this view:

The document circulated by Labor Senators had no status beyond that of a statement representing our views on the FTA. The document was not prepared by the committee. It had not been submitted to the committee by Labor Senators. It had not been subject to consideration by the committee. It did not constitute a draft report of the committee or part thereof.

Reference in the document highlighted by Senator Aden Ridgeway in his letter to the President of 3 August, and claimed by Senator Ridgeway to disclose details of the draft report, impart no information about its contents beyond confirming the draft report deals with the subject of the inquiry.⁸

1.15 Senator Conroy advised the committee that:

Prior to the press conference, a member of my staff rang the Clerk of the Senate, Mr Harry Evans, to discuss the disclosure of recommendations in relation to the FTA by Labor Party Senators.

Mr Evans advised that recommendations by the Labor Party Senators in relation to the FTA could be disclosed, although the Committee's draft report could not be disclosed.

Following this conversation, the statement of recommendations was distributed at the press conference.⁹

1.16 Senator Conroy continued:

Following the press conference, Mr Evans rang my office and said that the statement of recommendations which was released at the press conference also included references to the draft committee report. Mr Evans referred my staffer to five references, in the statement of recommendations, to the draft committee report.

Senator Ridgeway, in his letter dated 3 August 2004, refers to the statement of recommendations and raises the same five references to the draft committee report.¹⁰

1.17 Upon receipt of Senator Conroy's letter, the Committee of Privileges decided to seek comment from Mr Harry Evans, Clerk of the Senate. Mr Evans informed the committee that:

In the first conversation, the staff member rang me to inform me that the Labor Party senators were proposing to hold a press conference and release

7 Appendix, p. 39.

8 Appendix, p. 48.

9 Appendix, pp. 60-61.

10 Appendix, p. 61.

a document about their recommendations on the free trade agreement, and asked whether there would be any problem with this. I indicated that there would be a serious problem with the unauthorised disclosure of the report of the committee. I said that, if they insisted on holding the press conference and releasing the document, they should cast both the document and their statements at the press conference in the form of statements of the Labor senators' views and positions on the free trade agreement, and not refer to anything in the committee's report.

Following the press conference, I was shown a copy of the distributed document, and then rang the staff member to point out that the document had done the very thing which I warned against doing, namely, it referred to the content of the report of the committee. I pointed out specific instances where the document appeared to disclose material in the committee's report. I indicated that this could be raised as an unauthorised disclosure of the report.

Subsequently, when asked about the document and the press conference by other senators, I advised that they could constitute unauthorised disclosures.¹¹

Comment on possible unauthorised disclosures

1.18 It is significant that the three Labor Party senators who held the press conference did not pretend other than that they were appearing as members of the committee. The Chair, Senator Cook, who was unwell at the time, participated by teleconference; the other two senators participated in person. One journalist who attended the conference specifically asked whether a question of privilege might be involved, and the Labor Party senators went to considerable lengths to desist from referring to committee proceedings. Unfortunately, it is clear from the document handed out that not merely did they reveal their own views, as committee members, on the subject, but by releasing the recommendations they revealed both the structure and, in some cases, the content of the report.

1.19 Had they declared at the press conference that they were speaking as members of the Labor Party in developing policies, and had indicated certain of their thought processes – as indeed the Clerk of the Senate had suggested they do – there would have been no problem at all, and the comments of Senator Brandis and Senator O'Brien would have been valid. The problem lay not so much with the actual press conference – though, as indicated above, it was clear that they were appearing as the chair and members of the FTA Committee – but with the actual document that they circulated during those proceedings.

1.20 There is no doubt whatsoever that the document was, in the terms of section 16 of the *Parliamentary Privileges Act 1987*, a proceeding in Parliament, particularly as it directly referred to aspects of the draft report and the three Labor Party senators' proposed recommendations which formed an integral part of that

11 Appendix, pp. 62-63.

report as eventually published. Perhaps it would have been wise if the press conference had been conducted by one senator only, Senator Conroy, who at that time was the trade spokesperson and had a legitimate reason to put forward Labor Party views without reference to the committee at all.

Possible misrepresentation of private deliberations

1.21 The Committee of Privileges gained the impression that the three Labor Party committee members had been stampeded into revealing their views, notably as a result of the purported – and, accepting that the minutes of the committee proceedings, attached to this report,¹² were confirmed by the FTA Committee members,¹³ inaccurate – reports which were published in the media at the weekend. This aspect of the terms of reference, in the view of the Committee of Privileges, involved a far more serious offence than that committed by the Labor Party senators. Not merely did it purport to reveal the private deliberations of the committee but it misrepresented those deliberations – another contempt under paragraph 16 of Senate Privilege Resolution 6. This does not, however, exonerate the Labor Party senators concerned, despite their best efforts to comply with the rules of the Senate regarding unauthorised disclosure.

Possible substantial interference with work of FTA Committee

1.22 Having established that unauthorised disclosure and misrepresentation occurred, the Committee of Privileges directed itself to the question whether these improprieties actually substantially interfered with the work of the FTA Committee, or had a tendency to do so. What is clear to the Committee of Privileges is that the FTA Committee was already dysfunctional; it is hard to imagine that these latter activities caused it to be worse than it already was. For these reasons, the Committee of Privileges is prepared to accept the view of the members of the FTA Committee who addressed the question that none of the unauthorised disclosures had the effect of either actually substantially interfering, or having a tendency substantially to interfere, with the proceedings of the FTA Committee.

1.23 The committee gave consideration to going through the ritual of calling all members of the FTA Committee, and editors and publishers of the relevant media, to attend a public hearing. It decided, however, that given the nature of its conclusions such a course was not warranted. As the Senate is aware, the Committee of Privileges deals with most matters referred to it on the papers: only rarely does it consider that a public hearing is necessary or desirable. In the light of the above analysis, the Committee of Privileges regards it as counterproductive and unnecessary to pursue the matter further. Consequently it notes the denials of all concerned that they disclosed the private proceedings or draft report of the FTA Committee, as reported in the media during the weekend of 31 July-1 August 2004. Self-evidently, the Labor Party members of the FTA Committee did in fact divulge, on 2 August, aspects of the draft

12 Appendix, p. 45.

13 Appendix, p. 47.

report, including additional comments, of the committee. Again, the Committee of Privileges does not propose any further action against these members.

Conclusions

1.24 In respect of the three elements involved in the reference to the Committee of Privileges, outlined at paragraph 1.11, the Committee of Privileges has reached the following conclusions:

- (a) While unauthorised disclosure of the contents of the draft report of the FTA Committee occurred on the weekend of 31 July-1 August and again on 2 August 2004, no contempt should be found.
- (b) In relation to reports of purported private deliberations of the FTA Committee, on the evidence of the confirmed minutes of that committee there was no unauthorised disclosure as such: rather, the accounts given to media outlets were inaccurate, and were likely to have been designed to place pressure on certain committee members to reveal their intentions in relation to the committee report. While it is open to the Committee of Privileges to find that a contempt occurred, it has concluded that it should not do so.
- (c) Given the already dysfunctional nature of the FTA Committee, the unauthorised disclosures and misrepresentations did not result in any further substantial interference or tendency substantially to interfere with the working of that Committee.

Finding

1.25 Although all three matters referred to the Committee of Privileges involved deliberate unauthorised disclosure and misrepresentation of proceedings of the Select Committee on the Free Trade Agreement between Australia and the United States of America, in the light of the circumstances no contempt of the Senate should be found.

John Faulkner
Chair

