

# Report

## Background

1.1 On 21 November 2012 the following matter was referred to the committee for inquiry and report:

Whether there was any unauthorised disclosure of the draft report of the Select Committee on Electricity Prices and, if so, whether any contempt was committed in that regard.<sup>1</sup>

1.2 The investigation of unauthorised disclosures is a subject that has attracted detailed consideration by this committee, most recently in a 2005 inquiry which considered the principles that should apply.<sup>2</sup> The committee has always considered that any unauthorised disclosure may, in some circumstances, constitute a serious contempt of the Senate. The committee has also been highly critical of breaches of confidentiality in committee processes, and of the betrayal of trust among committee members this often involves. It does not follow, however, that every unauthorised disclosure warrants investigation as a contempt.

1.3 The law and practice of parliamentary privilege is intended to protect the parliament's processes from obstruction and interference, and it is that principle of protection which guides the Senate in determining questions relating to contempt. The Senate's characterisation of unauthorised disclosures as contempts is based on an assessment of the interference that such disclosures can cause to the work of committees.

1.4 In its 122<sup>nd</sup> report the committee described the evolution of its own views and of Senate practice in relation to unauthorised disclosures, and recommended measures to assist committees in assessing the harm which might flow from such disclosures. As this is the first such matter referred since the Senate adopted those recommendations, the committee takes the opportunity to remind senators of relevant matters of practice and procedure.

### *Consideration of contempt matters*

1.5 In undertaking an inquiry into a possible contempt, the Privileges Committee has regard to the *Parliamentary Privileges Act 1987* and relevant Senate resolutions. Chief among these are the Privilege Resolutions, adopted by the Senate on 25 February 1988, which declare the manner in which the Senate will observe its privileges, and provide guidance to committees on the principles involved and procedures which must be followed.

1.6 In considering whether particular acts (or omissions) may constitute a contempt, the committee has particular regard to:

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1 *Journals of the Senate*, 21 November 2012, pp. 3343-44.

2 Senate Committee of Privileges, 122<sup>nd</sup> report, *Parliamentary privilege – unauthorised disclosure of committee proceedings*, June 2005, PP No. 137/05.

- section 4 of the *Parliamentary Privileges Act 1987*, which provides a statutory definition for contempt
- the criteria to be taken into account when determining matters relating to contempt (Privilege Resolution 3)
- the list of possible contempts in Privilege Resolution 6.

1.7 The contempt jurisdiction of the Senate is designed to protect the work of senators and the processes of the Senate and its committees against obstruction and interference. This is emphasised both in section 4 of the Act and in Privilege Resolution 3.

***Investigation of unauthorised disclosures as contempts***

1.8 The Senate has provided guidance, in Privilege Resolution 6, as to the categories of acts that may be treated as contempts. That resolution declares that breaches of certain prohibitions, and attempts or conspiracies to do the prohibited acts, may be treated by the Senate as contempts.

1.9 In relation to the unauthorised disclosure of committee proceedings, Privilege Resolution 6 provides:

(16) 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;
- (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.<sup>3</sup>

1.10 The Senate has supplemented this guidance with two additional resolutions. The first of these, agreed to on 20 June 1996, establishes the principle that committees have a responsibility to investigate any unauthorised disclosure for themselves and to undertake an assessment of the actual or potential substantial interference with their work before deciding whether to raise a matter of privilege. The second resolution, of 17 September 2007,<sup>4</sup> reinforces that principle and provides detailed guidance to

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3 The unauthorised disclosure of a draft report comes within the description in paragraph (16)(c) of proceedings in private session of a committee that have not been authorised for publication.

4 This resolution was initially adopted as a sessional order on 6 October 2005 before being adopted as a continuing order on 17 September 2007.

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committees about the types of unauthorised disclosures that should and should not be raised.

### ***The 2007 resolution***

1.11 While confirming that *any* disclosure of evidence given to a committee, documents prepared by it or private deliberations may be treated as a contempt, the Senate indicated in the 2007 resolution that the following types of unauthorised disclosures should not be raised as matters of privilege, unless there are particular circumstances involving actual or potential substantial interference with a committee's work:

- (a) disclosure of a committee report in the time between the substantial conclusion of the committee's deliberations on the report and its presentation to the Senate;
- (b) disclosure of other documents prepared by a committee and not published by the committee, where the committee would have published them, or could appropriately have published them, in any event, or where they contain only research or publicly-available material, or where their disclosure is otherwise inconsequential;
- (c) disclosure of documents and evidence submitted to a committee and not published by the committee, where the committee would have published them, or could appropriately have published them, in any event;
- (d) disclosure of private deliberations of a committee where the freedom of the committee to deliberate is unlikely to be significantly affected.

1.12 The resolution also establishes a process for a committee concerned about an unauthorised disclosure to consult with the Privileges Committee prior to raising a matter of privilege. That requirement is based on the possibility that the Privileges Committee would itself initiate the inquiry in sufficiently serious circumstances. The committee's 122<sup>nd</sup> report sets out the principles it will apply in the course of such consultations.<sup>5</sup>

1.13 The effectiveness of the 2007 resolution in establishing a process for dealing with these matters is evidenced by the fact that there have been no referrals to this committee of unauthorised disclosures since 2005, when the sessional order preceding the 2007 resolution was agreed to.<sup>6</sup> On the other hand, there have been several reports from committees of how they have dealt with unauthorised disclosures.

1.14 A practical difficulty arises, however, when a committee affected by an unauthorised disclosure ceases to exist before it is able to undertake the consultation required under the 2007 resolution and complete its deliberations. This was the situation in which the select committee found itself.

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5 Senate Committee of Privileges, 122<sup>nd</sup> report, paragraphs 3.45 – 3.48; 3.51 – 3.52.

6 The committee considered an aspect of the 2007 resolution in its 151<sup>st</sup> report, although unauthorised disclosure was not directly raised in the terms of reference for that inquiry. *See* Senate Committee of Privileges, 151<sup>st</sup> report, PP No. 95/12, paragraphs 1.35–1.46.

## The matter of privilege

1.15 By letter dated 5 November 2012, Senator Thistlethwaite, the former chair of the Select Committee on Electricity Prices, raised a matter of privilege, concerning the unauthorised disclosure of the committee's draft report.<sup>7</sup> The letter described the matter in the following terms:

The committee's report was pre-empted by an article written by Lenore Taylor and published in the *Sydney Morning Herald* online edition on 31 October 2012 and which included video excerpts of Ms Taylor speaking about the contents of the report. At that point the committee became aware of the article, it was yet to have its final meeting to adopt the draft report.

1.16 The commentary in the video appeared to compare some of the recommendations of the unpublished report with a package of measures the government apparently proposed to announce some days later.

1.17 The select committee reported on its investigations into the matter in Chapter 7 of its report.<sup>8</sup> The committee wrote to 'the persons whom the committee understood to have been provided with the Chair's draft prior to its scheduled tabling in the Senate', including committee members and their staff, and the committee secretary and secretariat staff. The committee also wrote to two ministers seeking an explanation of the disclosure, without providing any further context as to why such inquiries were considered necessary.

1.18 The report also refers to commentary by ABC Radio's Fran Kelly on the morning of tabling, but indicates that the committee resolved not to investigate this further unauthorised disclosure because it 'did not wish to delay tabling of its important report on electricity prices'. Thus, there appear to have been concerns about multiple unauthorised disclosures.

1.19 In determining whether a matter should be given precedence as a matter of privilege, the President is required to consider the criteria specified in Privilege Resolution 4, and only those criteria. They are:

- (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and
- (b) the existence of any remedy other than that power for any act which may be held to be a contempt.

1.20 In relation to the first criterion, the President noted:

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7 That letter appears at Appendix 1.

8 Senate Select Committee on Electricity Prices, Report, *Reducing energy bills and improving efficiency*, November 2012, PP No. 407/12, Chapter 7. That chapter appears at Appendix 2.

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...the Senate has identified the unauthorised disclosure of a report of the private proceedings of a committee as a matter which may be treated by the Senate as a contempt. While the Senate's resolution of 17 September 2007 provides further guidance on the types of unauthorised disclosure for which the contempt jurisdiction should primarily be reserved, the resolution only serves to reinforce the seriousness of unauthorised disclosures and their obstructive potential for the work of Senate committees.<sup>9</sup>

1.21 The second criteria concerns the availability of remedies other than the contempt jurisdiction to deal with the matter. The President again drew the Senate's attention to the 2007 resolution, noting that:

...there would normally be an alternative remedy available in the form of a process established by the Senate for committees to deal with cases of unauthorised disclosure, and for such disclosures not to be raised as matters of privilege until after the committee concerned had consulted the Privileges Committee.

1.22 A select committee does not have the capacity to undertake the inquiries, consultation and deliberation envisaged by the 1996 and 2007 resolutions once it has presented its final report. While the Select Committee on Electricity Prices did make inquiries of its members, staff and two ministers about the unauthorised disclosure, it was unable to consult with this committee or deliberate on any such consultation. As the President concluded:

The Senate's contempt jurisdiction therefore provides the only remedy for cases of unauthorised disclosure involving the final reports of select committees.

1.23 On the basis that those two criteria had been satisfied, the President determined that a motion to refer the matter to the Privileges Committee should have precedence over other business on the day for which it is given.

1.24 Senator Thistlethwaite gave a notice of motion in the following terms:

(1) That the following matter be referred to the Committee of Privileges for inquiry and report:

Whether there was any unauthorised disclosure of the draft report of the Select Committee on Electricity Prices and, if so, whether any contempt was committed in that regard.

(2) That, for the purpose of this inquiry, the Committee of Privileges have power to consider and make use of the minutes of private meetings of the Select Committee on Electricity Prices, correspondence referred to in paragraphs 7.6 to 7.8 of the committee's report and any other document relevant to the question of possible unauthorised disclosure of the committee's draft report.<sup>10</sup>

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9 The President's statement appears at Appendix 3.

10 *Journals of the Senate*, 20 November 2012, p. 3312.

1.25 The Senate agreed to the motion on 21 November 2012.<sup>11</sup>

### **Conduct of the inquiry**

1.26 The Committee's usual processes in relation to contempt matters have been set out on numerous occasions.<sup>12</sup> The role of the committee is primarily inquisitorial. When the Senate refers to the committee a matter giving rise to allegations of contempt, it is the committee's role to establish the facts and to investigate any particular allegations or suspects which emerge.

1.27 The committee is under no illusions, however, about the inherent difficulty of undertaking such a task. One of the principal problems identified in the 122<sup>nd</sup> report is the difficulty for committees – and not least for the Privileges Committee itself – in establishing the facts in unauthorised disclosure matters, and particularly in identifying the sources of leaks.<sup>13</sup> It was this difficulty, and the committee's experience of multiple fruitless investigations into disclosures to the media, which led to the 2005 inquiry and informed the recommendations in the 122<sup>nd</sup> report.

1.28 The committee therefore determined that it should approach the present case by applying, to the extent possible, the principles reflected in the 2007 resolution. Accordingly, the committee resolved to consider whether further investigation of the matter was warranted, having regard to:

- its own assessment of the actual or potential interference with the work of the select committee, and
- the approach it had declared it would apply if consulted by another committee on such a matter.

1.29 The committee undertook preliminary inquiries to enable it to make that assessment.

### ***Material before the committee***

1.30 The motion referring the matter authorised the committee to seek access to relevant records of the select committee, which were in the custody of the Clerk of the Senate.

1.31 Having sought and received these documents, the committee invited submissions on the matter from former members of the select committee; the two ministers to whom the select committee had written; and the two journalists mentioned in chapter 7 of the select committee's report. This correspondence and the responses received are published in Appendix 4.

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11 *Journals of the Senate*, 21 November 2012, p. 3343-4.

12 *See*, for example, Senate Committee of Privileges, 142<sup>nd</sup> report at paragraphs 1.23 – 1.25 and, more generally, Senate Committee of Privileges, 125<sup>th</sup> report, *Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966–2005*, PP No. 3/2006, Chapter 5.

13 *See*, for example, the contribution of the then chair of the Privileges Committee, at Senate Committee of Privileges, 122<sup>nd</sup> report, paragraph 1.20.

1.32 Chapter 7 of the select committee's report records that that committee's investigations did not reveal the source of the disclosure, and that conclusion is supported by the records of the select committee. In correspondence from this committee former members of the select committee were asked whether they had any role in, or information about, the unauthorised disclosure. No member admitted to any such role. Only one former member – Senator Milne – provided a substantive response, suggesting Executive government intervention in the committee's processes, interference with the committee's freedom to deliberate and damage to the reputation of committees. In correspondence to the committee, the relevant minister denies any knowledge of, or involvement in, the matter.

### *Ms Taylor's response*

1.33 The journalist whose publication led to the investigation raised the shield of journalistic ethics and made no other comment.

1.34 The committee now regards such responses from the media as inevitable, but they are often unsatisfactory. Journalists raising their ethics as a shield are essentially asking the parliament to respect their confidences while wilfully disregarding the right of the parliament to insist on its own; however the committee does not consider it necessary to consider that matter further in the context of this inquiry.

### **Interference with the work of committees**

1.35 The Senate's characterisation of unauthorised disclosures as matters that may be treated as contempts is based on an assessment of the interference such disclosures can cause to the work of committees. As noted in paragraph 1.11, the 2007 resolution provides that the unauthorised disclosure of a draft report should not be raised as a matter of privilege 'unless there are particular circumstances involving actual or potential substantial interference with a committee's work.' The Privileges Committee considers that to be the appropriate test to apply in determining whether the matter warrants further investigation.

1.36 In this case it might be concluded that, because the committee was able to adopt a unanimous report and complete its work on schedule, there was no substantial interference with its work. However, this was not the view set out in the report of the select committee, which concluded that 'the disclosure of the chair's draft was a serious breach of the committee's confidence'<sup>14</sup> and determined to raise the issue as a matter of privilege.

1.37 In his letter to the President, the former chair stated that the article 'pre-empted' the report, and that, in the committee's view, the disclosure of the chair's draft 'not only impeded its freedom to deliberate but reflected adversely on the value of the committee's inquiry'.

1.38 It is on the basis of those views that the President was able to conclude that the matter of privilege met the criterion in Privilege Resolution 4(a).<sup>15</sup>

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14 Senate Select Committee on Electricity Prices, Report, paragraph 7.11.

15 As noted at paragraphs 1.19 – 1.23, above.

1.39 It is apparent, however, that the majority of those members do not now consider that the disclosure actually interfered with the committee. In their responses to this committee, four members of the former committee, including the chair, stated that the disclosure did not interfere, or did not substantially interfere, with the committee's work. Three members and two participating members noted concerns with what might be characterised as the potential for interference, citing process matters and a reduction in the impact of the report, but again did not appear to consider that any actual interference had occurred.

1.40 Only one member – Senator Milne – expressed concerns about actual interference. Her response is dealt with further below.

1.41 This is an echo of the situation which often arose prior to the adoption of the 2007 resolution. As noted in the committee's 125<sup>th</sup> report:

5.35 Particularly frustrating for the committee in recent cases has been its inability to find that unauthorised disclosures have led to substantial interference, or the potential for such, with the work of committees because of widely differing perceptions by the members of those committees.<sup>16</sup>

1.42 One of the aims of the 2007 resolution is to provide additional guidance to committees on assessing these matters. The opportunity to consult the Privileges Committee would ordinarily provide a mechanism for confirming that assessment. While correspondence with former members of the select committee is a poor substitute for that mechanism, it has enabled the committee in this case to conclude that the unauthorised disclosure did not substantially interfere with the select committee's work.

1.43 Absent a finding that the circumstances of the disclosure substantially interfered with the select committee's work, this committee is unable to conclude that the matter warrants further investigation as a possible contempt.

#### ***Potential interference with committees***

1.44 Whatever effect an unauthorised disclosure has on the work of a particular committee, it also has the potential to inflict broader damage on the integrity of committee processes and the authority and credibility of committees more generally. It is for this reason 'potential substantial interference' forms part of the assessment envisaged in the 1996 and 2007 resolutions.

1.45 In assessing the potential for the unauthorised disclosure of draft reports to interfere with inquiry processes, this committee has previously distinguished between the different stages at which such a disclosure might occur: for instance, an early leak is more likely to inhibit a committee's freedom to deliberate. It appears in this case, however, that the select committee had substantially completed its work and was not influenced in its deliberations by the discovery of the disclosure. The committee does not consider that disclosures of this character – however undesirable – are likely to

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16 Senate Committee of Privileges, 125<sup>th</sup> report, paragraph 5.35.



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substantially interfere with committee processes and, again, is unable to conclude that the matter warrants further investigation in this case.

### **Consultations between committees**

1.46 The select committee undertook initial investigations into the apparent disclosure but was unable to discover its source. Because the committee ceased to exist upon the presentation of its report, it was unable to consult with the Privileges Committee as envisaged by the 2007 resolution and to complete its deliberations.

1.47 In its 122<sup>nd</sup> report, this committee set out the approach it intended to take during such consultations.<sup>17</sup> As noted in that report, the basis for proposing such consultations is that:

...the Committee of Privileges has had wide experience in dealing with such matters and may be able to assist other committees in making judgments as to the appropriateness of raising questions which, at first sight, might be considered serious but subsequently may not warrant further investigation.<sup>18</sup>

1.48 Having undertaken the preliminary investigations outlined above, the committee has concluded that this is not a matter on which it would have recommended further action, had it been possible to undertake consultations with the select committee.

1.49 In particular, the committee is not persuaded that it should depart from the following position set out in its 122<sup>nd</sup> report:

#### ***Deliberations and draft reports***

3.51 Unauthorised disclosure and publication of the deliberations and draft reports of a committee, regardless of the stage at which disclosure occurs, should be a matter for internal discipline unless the disclosure and publication of those deliberations or draft reports:

- (a) also discloses actual or identifiable in camera evidence; or
- (b) discloses deliberations which may have an adverse effect on, or raise the expectations of, individuals who are the subject of or may be affected by the observations or recommendations in a committee's report.

3.52 Again, any committee which consults the Committee of Privileges on this matter can assume that, unless the leaker of the information is discovered, the committee will be reluctant to undertake an inquiry unless in camera evidence is involved...<sup>19</sup>

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17 See Senate Committee of Privileges, 122<sup>nd</sup> report, paragraphs 3.43 – 3.52.

18 Senate Committee of Privileges, 122<sup>nd</sup> report, paragraph 3.48.

19 Senate Committee of Privileges, 122<sup>nd</sup> report, paragraphs 3.51 – 3.52.

1.50 The material received by the committee gives it little cause to consider it would have any more success than the select committee in identifying the source of the disclosure.

### ***Intervention in committee processes***

1.51 As has been noted, the response from Senator Milne expressed concerns about government intervention in the select committee's processes. Senator Milne submits that 'It has become the norm for the Executive to involve themselves in the work of committees and to seek to influence the outcome of inquiries' and suggests that this interference 'undermines the integrity of the Senate committee system and reflects a significant cultural shift away from the independence of the Senate's processes'.

1.52 The committee is highly critical of any conduct which impedes the freedom of a committee to deliberate. On the other hand, there is no bar on any member of any committee pressing a party position during a committee's deliberations, however much that may limit the scope of the consensus a committee may be capable of reaching.

1.53 While Senator Milne provides one possible explanation, the committee notes that her conclusions are not supported by other material put before the committee. In those circumstances, and again in the absence of evidence of substantial interference with the select committee's work, this committee does not consider that line of inquiry warrants further investigation in this case.

### **Procedural matters for select committees**

1.54 The case has revealed a gap in relevant procedure, in that the 2007 resolution is not available as a remedy where a committee has ceased to exist. In similar circumstances in the future it might be appropriate for such a committee to seek from the Senate a brief extension of time for the limited purpose of complying with that resolution.

1.55 The committee stops short of proposing this as a recommendation, leaving it to the members of such a committee, and the Senate itself, to determine such matters on a case-by-case basis.

1.56 Should such a matter again come before this committee, the committee intends to follow the process it has undertaken in this case of applying as best it can the procedures and principles of the 2007 resolution before determining whether to further investigate any apparent unauthorised disclosure as a possible contempt.

**Conclusion and recommendation**

1.57 Applying the principles reflected in the resolution of the Senate of 17 September 2007, the committee has concluded that the matter referred does not warrant further investigation. The committee is unable to conclude, on the evidence before it, that a contempt of the Senate has been committed and **recommends** to the Senate that a contempt not be found.

(Senator Gary Humphries)

**Chair**

