

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COMMITTEE OF PRIVILEGES

**POSSIBLE UNAUTHORISED DISCLOSURE
OF A SUBMISSION TO THE
PARLIAMENTARY JOINT COMMITTEE
ON CORPORATIONS AND SECURITIES**

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MEMBERS OF THE COMMITTEE

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Senator Marise Payne (New South Wales)

Senator the Hon. Nick Sherry (Tasmania)

The Senate
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3360
Facsimile: (02) 6277 3199
E-mail: Priv.sen@aph.gov.au
Internet: http://www.aph.gov.au/senate_privileges

CONTENTS

	Page
Introduction	1
Background	1
Conduct of inquiry	2
<i>(a) Written submissions</i>	3
<i>(b) ASIC response</i>	3
<i>(c) Senators' responses</i>	4
<i>(d) Responses on behalf of The Australian</i>	4
<i>(e) Committee's response to The Australian</i>	7
<i>(f) Further ASIC response</i>	8
Question for determination	9
Public hearing	9
<i>(a) Conduct of hearing</i>	9
<i>(b) Limitations on hearing</i>	10
<i>(c) Publication of submission without authority</i>	11
Comment	13
<i>(a) Culpability of information providers</i>	13
<i>(b) Culpability of information recipients</i>	14
Conclusion	16
Notification of findings	17
FINDINGS	17
Penalty	18

POSSIBLE UNAUTHORISED DISCLOSURE OF A SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Introduction

1. On 27 June 2000 the Senate referred the following matter to the Committee of Privileges on the motion of the Chairman of the Parliamentary Joint Committee on Corporations and Securities, Senator Chapman:

Having regard to the letter dated 22 June 2000 to the President from the Chairman of the Parliamentary Joint Committee on Corporations and Securities, whether there was an unauthorised disclosure of a submission to the Parliamentary Joint Committee on Corporations and Securities, and, if so, whether a contempt was committed by any person in relation to that disclosure.¹

Background

2. On 12-13 February 2000, *The Weekend Australian* featured two articles by its national business correspondent on an investigation by the Australian Securities and Investments Commission (ASIC) into a company known as Yannon. No prosecutions had resulted from the long-running investigation, on the ground that the Commonwealth Director of Public Prosecutions (DPP) considered that there was not enough 'admissible, substantial and reliable evidence to support prosecution'.² The DPP had reached this conclusion some time previously. The decision had been announced publicly on 6 January 2000, and had been covered extensively in the media.

3. The Parliamentary Joint Committee on Corporations and Securities (Corporations and Securities Committee) sought and received a confidential briefing on the investigation. The briefing was preceded by a written submission from ASIC, which that committee agreed on 7 February 2000 to receive on a confidential basis. According to evidence received by the Privileges Committee,³ it was this submission which formed the basis of the two articles on 12-13 February, as identified in one of them as follows:

The inside story of the Yannon investigation is revealed in a secret ASIC report, dated early February, to the Joint Parliamentary Committee on Corporations and Securities.⁴

1 Volume of Submissions and Documents, p. 11.

2 *ibid.*, p. 3.

3 *Hansard* transcript (hereinafter 'Transcript'), 25 May 2001, p. 9.

4 Volume of Submissions and Documents, p. 3.

4. In *The Australian* on Monday, 14 February 2000, and as foreshadowed in *The Weekend Australian*, the same journalist in a further column entitled *Boardroom* referred to the submission as a ‘confidential report to the joint parliamentary committee on corporations and securities’.⁵

5. The Chairman of the Corporations and Securities Committee, Senator Chapman, wrote to the President of the Senate on 22 June 2000,⁶ advising that, the disclosure of the submission having been unauthorised, the committee had sought to ascertain the source of the disclosure, but was unable to do so. At a meeting on 21 June 2000, the committee concluded that the disclosure was a potential or actual substantial interference with its work. The Chairman’s letter went on to state that:

The reasons for the conclusion are that the disclosure was calculated and deliberate, that the material was highly sensitive and confidential (relating to possible criminal prosecutions of named high profile individuals) and that the disclosure related to a statutory core function of the committee. The disclosure could affect the credibility of the committee and severely affect its capacity to receive evidence in the future because of a possible loss of confidence by potential witnesses in the committee’s capacity to maintain confidentiality of its documents.⁷

6. In drawing the matter to the President’s attention, the Chairman, on behalf of the committee, advised also that the former editor of the newspaper had not replied to a letter from him about the matter, despite oral assurances from his legal representatives that this would be done, and asked that this matter be specifically addressed.

7. The President gave precedence to the matter of privilege on 26 June and the matter was referred to the Committee of Privileges without debate on 27 June 2000.

Conduct of inquiry

(a) *Written submissions*

8. In accordance with normal procedures, the Committee of Privileges wrote to the author of the articles in question, and also forwarded a copy of that letter to the current editor in chief of *The Australian* and *The Weekend Australian*. It also wrote to the then Chairman of ASIC and to all members of the Corporations and Securities Committee. All Senate members of the committee responded to the invitation to comment; the committee did not receive any communications from Members of the House of Representatives, but, because the Senate may not inquire into the conduct of Members of the House of Representatives in their capacity as members, did not pursue the matter further. Furthermore, it became clear from a response received from the

5 *ibid.*, p. 9.

6 *ibid.*, p. 2.

7 *ibid.*

Chairman of ASIC that no House of Representatives members of the Corporations and Securities Committee had received from ASIC a copy of the confidential submission before publication of the articles in *The Weekend Australian* and *The Australian*: only four of the five Senate members, and the secretariat of the Corporations and Securities Committee, had done so. The remaining Senate member and House of Representatives members received their copy of the submission subsequently.

(b) ASIC response

9. The then ASIC Chairman's response went into considerable detail as to the steps ASIC had taken to ensure that the submission remained confidential at all stages. He advised:

The submission was finalised late on 2 February 2001. We decided to prepare 11 copies of the submission on the basis that:

- (a) a copy would be provided to each of Senator Chapman, Senator Conroy, Senator Gibson and Senator Murray;
- (b) two copies would be provided to the Parliamentary Joint Committee Secretariat;
- (c) a copy would be provided to myself, David Knott, Jillian Segal and Joe Longo (each of us intended to appear before the Parliamentary Joint Committee); and
- (d) a copy would be retained for ASIC'S file.⁸

10. The response went on to state four reasons which ASIC regarded as causing concern about the confidentiality of the submission. In summary, they were:

- (1) While ASIC needed to explain to the Corporations and Securities Committee what had caused the investigation, because no criminal charges were laid persons the subject of the investigation were entitled to have their reputations unsullied.
- (2) The submission contained information the subject of a confidentiality obligation owed by ASIC to providers or owners of the information. Unauthorised disclosure might therefore expose ASIC to liability for breach of confidence and breach of statutory duty⁹ and prejudice its capacity to obtain confidential information in the future.

8 *ibid.*, p. 17

9 The Committee of Privileges does not know the reason for ASIC's concern about this element of the document's publication, as no doubt ASIC is aware of the protected status of submissions before parliamentary committees. The committee has not, however, pursued the matter further because it is not relevant to the conclusions and findings in this report.

- (3) The submission contained information about ASIC's processes, procedures and strategies.
- (4) Unauthorised disclosure generally has a tendency to erode the public's confidence in ASIC as an effective regulator.

11. In agreeing with the Corporations and Securities Committee's conclusion that the unauthorised disclosure constituted potential or actual substantial interference with the work of the committee, the Chairman of ASIC reinforced the concern that the unauthorised disclosure had a tendency to damage ASIC's reputation and its capacity to undertake complex activities. It was for these reasons that ASIC took such elaborate precautions in the preparation and distribution of the submission.

12. The Chairman of ASIC declared that 'we have no knowledge of the source or sources of the disclosure'.¹⁰

(c) Senators' responses

13. The senators who responded to the committee denied knowledge of the unauthorised disclosure, with the chairman of the committee enclosing a copy of his letter to the then editor in chief of *The Australian* and *The Weekend Australian* to which no response had been received before the matter was referred to the Committee of Privileges.

(d) Responses on behalf of The Australian

14. The Committee of Privileges received a faxed response from legal representatives of *The Australian* on 16 August 2000.¹¹ This response, with which the committee indicated its dissatisfaction on 17 August,¹² was subsumed in a response of 28 August 2000, which summarised the following questions which the committee had posed :

- (a) Address in further detail the concerns expressed by Senator Chapman when raising as a matter of privilege (the published Articles). We assume that these concerns are comprehensively stated in the letter from Senator Chapman to the President of the Senate on 22 June 2000.
- (b) In particular, expand on the reasons why it is submitted that the publication in question did not and does not interfere with the work of a parliamentary committee.

10 Volume of Submissions and Documents, p. 20.

11 *ibid.*, p. 24.

12 *ibid.*, p. 28.

- (c) Respond to your request that you be advised as to how [the journalist] acquired or had access to the document quoted in the articles.¹³

15. The legal representatives prefaced the responses to these questions by declaring support for the work of Senate committees. They advised that, when deciding to publish the articles, ‘the view was taken’¹⁴ that the unauthorised material could be published:

with no prospect at all of any erosion of the capacity of the committees to function effectively and in particular to continue to procure information on a confidential basis.¹⁵

16. The response then apologised for the failure to reply to the letter of 9 March 2000 from Senator Chapman to the previous editor in chief of *The Australian* and *The Weekend Australian* which, according to the legal representatives, arose from ‘a misunderstanding between this office and *The Australian*’.¹⁶ The Committee of Privileges notes that a delay in responding to its own letter of 3 July 2000 to *The Australian* ‘arose from no fault on behalf of either [the editor in chief or the journalist] and has been attributed to an oversight in this office’.¹⁷

17. The response turned to the concerns raised in Senator Chapman’s letter. First, the response denied the implication that the use of the word ‘secret’ in the first article ‘would have conveyed to newspaper readers that publication constituted a breach of the committees undertaking to ASIC to keep its submission confidential’.¹⁸ It then attempted to address the Corporations and Securities Committee’s conclusion that the disclosure of material in the articles was a potential or actual interference with the work of that committee. It did so by comparing the content of the articles with already-existing published material. Finally, it attempted to address the question whether a contempt had been committed. This response gave rise to further questions from the Committee of Privileges, conveyed to the editor in chief of *The Australian* and *The Weekend Australian* on 7 September 2000.¹⁹

18. In the meantime the Committee of Privileges, having considered the ASIC submission, sought advice from the secretary to the Corporations and Securities Committee about the receipt and distribution of the original submission to that committee. That advice included information that, at the meeting of 7 February 2000, the Corporations and Securities Committee agreed:

13 *ibid.*, p. 32.

14 *ibid.* The legal representatives did not divulge who took the view.

15 *ibid.*

16 *ibid.*, p. 33.

17 *ibid.*, p. 24.

18 *ibid.*, p. 33.

19 *ibid.*, pp. 53-55.

that it would be useful to provide the Treasurer and the Minister for Financial Services each with a copy of the submission. On 8 February Senator Chapman wrote to the Chairman of ASIC asking him to do this, on the same basis of confidentiality that the submission was made to the committee.²⁰

19. The Committee of Privileges subsequently ascertained from ASIC that:

in accordance with the [Corporations and Securities] Committee's request, copies of the submission were hand delivered by [an ASIC officer] to the offices of both Ministers on the evening of 8 February 2000. The copy to the Treasurer's office was hand delivered to the Treasurer's Adviser, ... while the copy to Minister Hockey was hand delivered to the Minister's Departmental Liaison Officer ... At the time [the ASIC officer] orally briefed [the two ministerial officers concerned] as to the nature of [the] submission, the reasons copies were being supplied to the Ministers, and the necessity for treating the matter in the strictest confidence.²¹

The Committee of Privileges has decided not to investigate this aspect further.

20. Further correspondence continued between the legal representatives of *The Australian* and the Committee of Privileges, culminating in a substantive letter of 31 October 2000 in which the legal representatives, while requesting that their client be informed of precise allegations of contempt against him²², made the following points:

- (a) Within the context of public interest concerns about ASIC's investigatory capacity, the published articles were 'measured and responsible'. The response noted that 'the articles did not report matters beyond those that were already in the public domain, having been disclosed by ASIC itself'.²³
- (b) The letter also claimed that the availability of the material within the public domain challenged the view of the Chairman of the Corporations and Securities Committee that 'the material was highly sensitive and confidential'.²⁴
- (c) The response to concerns, raised by both the Corporations and Securities Committee and the Committee of Privileges, about the effect on actual and potential witnesses was that:

this question assumes that a reasonable observer would attribute any unauthorised disclosure to members of²⁵ staff of the Joint Committee, rather

20 *ibid.*, p. 56.

21 *ibid.*, p. 63.

22 *ibid.*, p. 64.

23 *ibid.*, p. 65.

24 *ibid.*

25 The committee presumes that this should be 'or'.

than to ASIC members or staff. There is no basis for this assumption. A reasonable observer would consider who had a motive to disclose the report.²⁶

21. The legal representatives concluded this element of their response as follows:

In cases where the apparent source of any unauthorised disclosure would be within a parliamentary committee, the primary remedy for any potential damage to the integrity of Parliamentary processes lies with the committee members themselves, and consists of self-restraint. In relation to leaks that do occur, the media and the public will know that the Parliament is committed to maintaining the integrity of its processes when it begins regularly to deploy the sophisticated document examination techniques now available for identifying whether a copy has been made of an original in order to identify, and deal with, members who act in disregard of the terms of confidentiality of documents supplied to them as committee members. Pursuing a media outlet for reporting matters of the clearest public interest will inspire no such confidence.²⁷

22. The response concluded as follows:

[The editor in chief of *The Australian* and *The Weekend Australian*] has asked that we pass on to the committee some observations about the matter:

The Australian is proud of its role as a leader in investigative journalism, a role which it believes is fundamental to press freedom in this country, as a national newspaper can in some circumstances pursue stories which others, because of local pressures, cannot. That role is one which on occasion may involve a tension with the interest in maintaining the confidentiality of material supplied to, or held by, public agencies. A free press in a democracy cannot resolve such conflicts simply by closing its eyes to material which is available to it on topics which are of clear public importance and active public debate.

The Australian has always sought to act responsibly in resolving conflicts. I believe that it acted responsibly in all the circumstances in publishing the articles in question. However, with the benefit of hindsight and having regard to the comments made by Senator Chapman as chair of the Joint Committee, I can see that the articles are perceived as having embarrassed the committee. I sincerely regret any such embarrassment as may have occurred.²⁸

26 Volume of Submissions and Documents, p. 66.

27 *ibid.*

28 *ibid.*, pp. 66-67.

(e) Committee's response to The Australian

23. In replying to the legal representatives' insistence that any allegation of contempt be specified, the Committee of Privileges drew attention to its normal practice, which 'has been to perform as nearly as practicable the functions of an investigatory committee; consequently, it has not been necessary for the committee itself to formulate allegations until this investigatory procedure has been completed'.²⁹ It then went on to state, however:

it appears self-evident – given the terms of reference and the statement from the Chair of the Joint Committee on Corporations and Securities on behalf of that committee – that the Committee of Privileges is required by the Senate to establish whether a document of the Joint Committee has been published without authority and whether such a publication constitutes a contempt.³⁰

24. The committee undertook to contact the legal representatives on other matters raised in due course. This took the form of a committee decision to conduct a public hearing, eventually determined to be held on 25 May 2001. Included in a letter to all relevant persons inviting them to attend the hearing were indicative procedures for the conduct of the hearing, together with documents received and considered by the committee since the inception of its inquiry. The invitation included an opportunity to make any further written submissions.

(f) Further ASIC response

25. The new Chairman of ASIC responded on 2 February 2001, confirming that:

ASIC has no knowledge of the source or sources of any unauthorised disclosure of the submission. The submission was (and remains) a matter of utmost confidentiality to ASIC. ASIC took a number of steps to ensure the submission was prepared confidentially and, following preparation, was treated confidentially by ASIC and remained confidential. The ASIC copies of the final submission and a small number of relevant working papers that remain have been kept in continual safe custody.³¹

26. This second response also gave further detail of the preparation and distribution of copies of the submission, including, in particular, advice to the initial recipients that the:

submission contains information which is confidential to ASIC and other persons involved in the investigation. Measures have been taken to protect the security of the submission. Only 6 copies have been created for the Committee and 5 for ASIC. There are no other copies in existence. Each

29 *ibid.*, p. 69.

30 *ibid.* pp. 69-70.

31 *ibid.*, p. 74.

version has been individually identified, and copies made from that version are capable of being traced.³²

27. No other persons or organisations took the opportunity to make a substantive response, although further correspondence flowed before the hearing between the Committee of Privileges and the editor in chief of *The Australian* and *The Weekend Australian* and his legal representatives.³³

Question for determination

28. The Committee of Privileges is required by the Senate to establish whether a document of the Corporations and Securities Committee has been published without authority and whether such publication constitutes a contempt. The hearing of 25 May 2001 was devoted solely to that purpose.

Public hearing

(a) *Conduct of hearing*

29. The committee received sworn evidence from the four senators who participated in or had intended to participate in the special briefing of the Corporations and Securities Committee; the secretary to that committee; and the Chairman of ASIC, all of whom swore on behalf of themselves and their staff that they had not disclosed the document in question to any unauthorised person.

30. The opportunity was made available to counsel for both ASIC and *The Australian*, and counsel representing the secretary to the Corporations and Securities Committee, to examine all witnesses. The examination, which was carried out only by counsel for *The Australian*, did not canvass specifically who might have divulged the information. However, counsel suggested in general terms that the disclosure might have come from several sources.

31. Specifically, counsel for *The Australian*, in the words of counsel for ASIC:

...put two contrary propositions: orally, he says, 'We don't know who it was.' In his written submissions, at paragraph 1.10,³⁴ he says, 'Indeed, it is equally or perhaps more likely that they would conclude, rightly or wrongly in this case, that the leak emanated from ASIC.'³⁵

The original document before the Committee of Privileges had gone even further:

32 *ibid.* p. 75.

33 *ibid.*, pp. 73, 78-83.

34 *ibid.*, p. 87.

35 Transcript, p. 70.

Absent some other information, such an observer **would** [emphasis added] conclude that individuals associated with ASIC had a motive to disclose that body's confidential justification of its role in the Yannon inquiry. There is no reason to suppose that anyone associated with the Joint Committee had any motive.³⁶

32. Counsel on behalf of ASIC put in the strongest possible terms a strenuous denial of this assumption, and asked the committee that it specifically find:

that, whatever the source of this document that came into the possession of *The Australian*, it was not ASIC.³⁷

However, he went on to make the point that the committee does not have to make a finding that somebody improperly leaked the information³⁸ in order to find a contempt against *The Australian*.

(b) Limitations on hearing

33. At the hearing of 25 May, the committee was inhibited in pursuing matters it had previously raised with the editor in chief of *The Australian* and *The Weekend Australian*.³⁹ For example, the committee wished to seek a specific response from him on:

- (a) whether the journalist who wrote the article had sought permission to reveal the source of the information from that source and if not, why not?⁴⁰; and
- (b) the motivation for publishing the story, given that one of the defences for its publication was that the story could have been compiled from already-existing public information.

34. The committee would also like to have canvassed both the journalist's and the editor in chief's understanding of privilege implications of publishing a secret document of this nature. Finally, it would like to have heard directly from the editor in chief his views on:

...the question as to the effect on both actual and potential witnesses who have made or might wish to make submissions or give evidence in camera, if the confidentiality of their participation in parliamentary proceedings cannot be secured.⁴¹

36 Volume of Submissions and Documents, p. 66.

37 Transcript, p. 68.

38 *ibid.*

39 See especially letter of 7 September 2000 - Volume of Submissions and Documents, pp 53-55.

40 The committee had previously advised the editor in chief that it would not pursue directly with the journalist the source of the document - Volume of Submissions and Documents, p. 56.

41 Volume of Submissions and Documents, p. 55.

35. These questions could have been dealt with to the satisfaction of the committee only if the editor in chief had appeared at the hearing. However, the committee received last-minute advice of his inability to attend, and accepted the validity of his reasons for non-attendance.⁴² The committee contemplated reconvening the hearing in order to pursue these matters, but decided not to do so because the omission has not precluded its capacity to make certain findings on the matter. As foreshadowed to the editor in chief and his legal representatives prior to the 25 May hearing, the committee has been able to draw conclusions and make findings based on the material before it.⁴³

(c) Publication of submission without authority

36. What appeared uncontested at the hearing was the fact that extracts from the document in question had been deliberately published without the authority of the Corporations and Securities Committee. All other evidence concentrated on whether the unauthorised publication constituted a contempt in that it improperly interfered with the work of the Senate or a committee.⁴⁴ The Chairman of the Corporations and Securities Committee, on behalf of that committee, was unequivocal, as he had been in all correspondence with the Committee of Privileges, that the release of the specific document had had ‘a detrimental impact on the work of the committee’.⁴⁵ The Chairman then went on to make comment in relation to other matters raised by *The Australian* which, while not germane to the question of contempt as such, made points similar to those of the Committee of Privileges in its letter of 7 September 2000. The Chairman, *inter alia*, expressed his incredulity that *The Australian’s* failure to respond to the committee’s request for information arose from a ‘misunderstanding between [*The Australian’s* legal representatives] and *The Australian*’ – given the Corporations and Securities Committee’s consistent efforts to press for a response.⁴⁶ He then derided what he regarded as the strained definition of ‘secret’ espoused in the submission on behalf of *The Australian* of 28 August 2000.⁴⁷

37. The Chairman of ASIC reinforced the view of the Corporations and Securities Committee Chairman on the damage to that committee.⁴⁸ While making the point that, as a creature of the Parliament, ASIC had a particular obligation to respond to parliamentary demands, and would continue to do so, he expressed concern that if such incidents were to be repeated he would be required to rethink its position, possibly by giving less helpful information in another form.

42 Transcript, p. 4.

43 Volume of Submissions and Documents, p. 78.

44 *Parliamentary Privileges Act 1987*, section 13; Privilege Resolution 6(16).

45 Transcript, pp. 5-6.

46 *ibid.*, p. 6.

47 Volume of Submissions and Documents, p. 33. And see paragraph 17 and transcript, p. 6.

48 Transcript, p. 29.

38. Counsel for *The Australian* took both chairmen through the actual content of the articles published in *The Weekend Australian* and *The Australian*. In focussing on section 4 of the *Parliamentary Privileges Act 1987*, which statutorily declares what constitutes contempt, he emphasised that virtually all the published material had, as substantially acknowledged by each chairman, already been in the public domain. He therefore argued that, since the material was otherwise published, it would be impossible to find that the publication itself was improper. He put the argument as follows:

.... obviously material that has been given to the committee which was supposed to be kept confidential has been published. But if things are already in the public domain, and somebody says, 'I want to keep it confidential,' you just cannot do that. Courts have cases where people have to try and protect secret things—things that ASIO wanted to keep under wraps, for example, or the government or other people. If it is already in the public domain, the courts say, 'There's no confidentiality about it; there's no harm in letting it come out, even if it's in a document that has other parts that are confidential.' If the parts that are confidential are kept under wraps, then no harm is done by discussing material that is in the public domain.⁴⁹

39. Members of the Committee of Privileges invited counsel for *The Australian* to look at the general concept of danger of unauthorised disclosure, not of information as such, but of the knowledge that it was taken from a secret document now presumably known to and perhaps still in the possession of the author of the articles. They suggested that such disclosure potentially offended against section 13 of the *Parliamentary Privileges Act* and *Senate Privilege Resolution 6*.

40. Counsel declared that section 13 was not relevant. In support of his claim that unauthorised disclosure caused only limited damage, counsel drew attention to a series of what he thought were improper disclosures, published in *The Australian* and other newspapers⁵⁰. He did not, however, address the specific offence, established as a criminal offence under section 13 of the *Parliamentary Privileges Act*, of unauthorised disclosure of evidence and documents which a parliamentary committee had received *in camera*.

41. He suggested that section 4 of the Act was the only section relevant to establishing an offence. He acknowledged that, if other information from the document, for example, names and details of those who had been the subject of the ASIC inquiry, had been disclosed, the case for improper interference might have been stronger. He also acknowledged that the defence against improper interference rested on a narrow interpretation of section 4, and relied on already-existing publication of information in the article. He also called in aid of his argument the High Court's view of the constitutional implications of freedom of political discourse.⁵¹

49 Transcript, p. 48.

50 Section 2 of volume of documents provided by *The Australian*, tabled with this report.

51 Transcript, p. 52.

42. Members of the committee, and counsel on behalf of ASIC, all addressed the question of intrinsic damage to the operations of either House of the Parliament and its committees as a result of unauthorised disclosure. The hearing concluded following completion of counsel's addresses.

Comment

43. As previous reports have stated, the Committee of Privileges has always regarded deliberate and improper disclosure or publication of reports, documents and evidence as among the more serious contempts of the Senate. This is made clear in its 74th report,⁵² quoted by counsel for *The Australian*, which canvassed its general views on the subject, as well as making findings in specific cases then before it. Both the Parliament⁵³ and the committee⁵⁴ regard the unauthorised disclosure of *in camera* documents, evidence and proceedings as particularly heinous.

(a) *Culpability of information providers*

44. Since the passage of the Privileges Act and resolutions, the committee has not pursued to finality contempt proceedings against publishers for unauthorised publication of improperly disclosed documents; it has been concerned rather with the person who has disclosed the material without authority. This latter element of an offence continues to be of primary concern. As its 74th Report, and particularly questioning by Privileges Committee members at the hearing of 25 May, demonstrate, committee members have become increasingly frustrated at the improprieties evidenced by both the unauthorised disclosure and the unauthorised publication of parliamentary committee documents. Experience of all members over many years suggests that all but inadvertent disclosures are likely to come from parliamentary committee members themselves, or perhaps their staff, for short-term political advantage.

45. The committee shares the views of an equally frustrated chair of a parliamentary committee, Senator Ferguson, who as Chairman of the Joint Foreign Affairs, Defence and Trade Committee stated in the Senate recently:

The only people with any motive to leak information about private committee meetings or the work of any ...committee are those who have a political motive. In fact, those who have a political motive are generally the members of parliament who actually work on those committees.⁵⁵

46. Despite its own endeavours, and ASIC's efforts both to take special security precautions to ensure the integrity of each document and to advise initial recipients that ASIC had done so, the committee has been unable to identify the source of the

52 Parliamentary Paper No. 180/1998.

53 Through the creation of a statutory offence under section 13 of the *Parliamentary Privileges Act 1987*.

54 74th report, op. cit. And see also 54th report, PP No. 133/1995.

55 *Senate Official Hansard*, 27 June 2001, p. 25202.

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 2000⁵⁷ 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.

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 Committee⁶⁵ – and at least initially to the Privileges Committee.⁶⁶ The Committee of Privileges has the impression that, until the latter stages of its own

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.

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:

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.