

The Senate

Committee of Privileges

Possible false or misleading evidence before the
Environment, Communications, Information
Technology and the Arts Legislation Committee

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POSSIBLE FALSE OR MISLEADING EVIDENCE BEFORE THE ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS LEGISLATION COMMITTEE

Introduction

1.1 On 24 March 2004 the following matter was referred to the Committee of Privileges on the motion of Senator Mackay:

Whether any false or misleading evidence was given by witnesses representing Telstra in relation to the matter of the network fault rate and deterioration of the network, and whether any contempt was committed in that regard.

1.2 The reference to the committee was given precedence by the President of the Senate, Senator the Hon. Paul Calvert, following the raising of the matter by Senator Mackay. In giving precedence to the motion, the President referred to past cases and reports by the Committee of Privileges noting that the committee had indicated that evidence which leaves a committee with a misleading impression of the facts is misleading evidence for the purposes of paragraph 12(c) of Privilege Resolution 6 which provides that:

(12) A witness before the Senate or a committee shall not:

...

(c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.

1.3 The President also noted that the Senate has always acted on matters of privilege which provide any indication that false or misleading evidence has been given and that all such cases which have been raised in the past have been referred to the Committee of Privileges.¹

Background

1.4 On 16 February 2004 at its additional estimates hearings evidence was given to the Environment, Communications, Information Technology and the Arts Legislation Committee (the ECITA Legislation Committee) by officers of Telstra, Mr Bill Scales AO and Mr Anthony Rix, that the high rate of faults in the Telstra network was due largely to recent heavy rain and not to network deterioration. Senator

1 Copies of the President's statement giving precedence to the motion and Senator Mackay's letter raising the matter of privilege are included in Appendix 1 at pp.1 and 3-4.

Mackay referred to a recent article in the *Australian Financial Review* and asked Mr Scales to comment:

Senator Mackay— ... It appears, according to whatever email the *Fin Review* has obtained, that faults are running at an extremely high volume as of 2 February. Sydney, Melbourne and Brisbane seem to be running at very high fault levels and, inter alia, the article also states that it simply cannot be blamed on inclement weather. Can you respond to the allegations?

Mr Scales—It is difficult for me to respond to the particular email, obviously, because I do not know what it is. It has been a very difficult time for Telstra over the last month or so. There is a reference in that same article to what I think it describes as 'inclement weather'.

Senator Mackay—That is my term.

Mr Scales—The largest proportion of the faults, I think, over that period are as a result of the weather. You would be aware, as we all would be, of the incredible rain that has deluged Brisbane. You would also be aware of the very significant rains that affected Melbourne. We were affected by all of that.²

Mr Rix later stated:

The claim that faults rise due to network neglect and the decline in staff numbers is a myth, and we can state some fact on this. The faults have not risen dramatically over the last five years, but Telstra's performance in repairing these faults has risen dramatically over that period.³

1.5 On 10 March 2004 a document claimed to be an internal Telstra briefing was tabled in the House of Representatives by Shadow Minister for Communications, Mr Lindsay Tanner MP. That evening, in the adjournment debate in the Senate, Senator Mackay highlighted apparent contradictions between the evidence given at the estimates hearing and statements made in the internal Telstra document, which included:

Fault rate growth appears to be due to general network deterioration rather than a specific exceptional cause.

and

The current accelerating fault rate can be attributed to a reduced rehabilitation activity in the recent past coupled with an intense focus on providing quick fault restoration driven by performance imperatives and OPEX budget constraints.

2 Environment, Communications, Information Technology and the Arts Legislation Committee, Estimates Hansard, 16 February 2004, p. 110. Included in Appendix 1, p. 20.

3 Environment, Communications, Information Technology and the Arts Legislation Committee, Estimates Hansard, 16 February 2004, pp. 111-112. Included in Appendix 1, pp. 21-22.

1.6 Following the speech Senator Mackay raised possible false or misleading evidence at the estimates hearing as a matter of privilege with the President under Standing Order 81.

Conduct of inquiry

1.7 After the Senate's agreement to the reference to this committee on 24 March 2004, Senator Mackay wrote to the chair of the committee, providing the committee with a copy of the internal Telstra document together with extracts from several Senate committee transcripts and other documentation relating to evidence given recently by Telstra officials in other contexts.⁴ Senator Mackay said that she provided this material to the committee "to make the point that Telstra has a long history of giving false evidence which leaves a misleading picture of the facts" and referring also to the past so-called Casualties of Telstra cases.

1.8 The committee subsequently wrote to Mr Scales and Mr Rix on 1 April 2004 and provided them with particulars of the allegations and copies of the material available to the committee, including the transcript of the ECITA Legislation Committee hearing on 16 February 2004, Senator Mackay's adjournment speech on 10 March 2004, the internal Telstra document, Senator Mackay's letter to the President of the Senate, dated 10 March 2004, and the statement made by the President in giving precedence to the matter on 23 March 2004.

1.9 The committee also provided Mr Scales and Mr Rix with copies of the additional material provided by Senator Mackay on 24 March 2004, but emphasised that the focus of the committee's inquiry was the evidence given to the ECITA Legislation Committee on 16 February 2004. In inviting Mr Scales and Mr Rix to respond to the particulars of the allegations made, the committee also invited them to respond to the additional material if they chose to do so, but stated that it did not propose to draw any conclusions from the material if Mr Scales and Mr Rix chose otherwise.

1.10 Mr Scales provided a response to the committee, also on behalf of Mr Rix, on 7 May 2004. The response gave a detailed explanation of fault types, their incidence and action taken by Telstra to resolve them, distinguishing between network deterioration and neglect. It drew attention to the context in which the evidence was given at the estimates hearing and was accompanied by several charts analysing fault rates, causes and capital expenditure on the Consumer Access Network. Mr Scales stressed that his own evidence about the effect of bad weather on fault rates had been qualified by "I think" and that he was responding to a question about fault rates at a particular time, whereas the internal Telstra document referred to a more extensive period of time.

4 Appendix 1, p. 5-25.

1.11 Mr Scales declined to respond to the additional material provided by Senator Mackay other than to reject "in the strongest terms" the allegation that Telstra has a "history of giving evidence which leaves a misleading picture of the facts". In concluding, Mr Scales submitted that, taken in the context of the surrounding evidence and the further technical and contextual information provided in the response to explain the internal Telstra document, the evidence given by himself and Mr Rix was not false or misleading. A copy of the response is included in Appendix 1.

1.12 In accordance with its usual practices, the committee forwarded Mr Scales' submission in confidence to Senator Mackay for any response. Senator Mackay responded on 11 June 2004. A copy is also included in Appendix 1. Senator Mackay continued to draw attention to the apparent contradiction between the statement by Mr Rix, quoted above in paragraph 1.4, and statements from the internal Telstra document, quoted above in paragraph 1.5 and maintained that both could not be correct. She did not challenge the submission that Mr Scales' evidence was qualified and could not, therefore, be found conclusively to be misleading.

Analysis

1.13 The committee has previously indicated that evidence which leaves a committee with a misleading impression of the facts is misleading evidence for the purposes of paragraph 12(c) of Privileges Resolution quoted in paragraph 1.2 above. The committee accepts that Senator Mackay, in her response of 11 June 2004 to Mr Scales' submission of 7 May, continues to find the evidence of Mr Rix, in particular, to be in direct contradiction of the information contained in the internal Telstra document and, therefore, misleading. The question for the committee, however, is whether the giving of this evidence amounted to a contempt of the Senate.

1.14 In this case, as in all previous cases, the committee is required to take into account a number of criteria in determining whether a contempt has been committed. These criteria are set out in Privilege Resolution 3 as follows:

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

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

1.15 The committee is satisfied in this case that the allegation of misleading evidence is neither trivial nor unworthy of the Senate's attention and that a full consideration of the allegation is appropriate to ensure adequate protection of the Senate and its committees against an act which is inherently improper and tending substantially to obstruct them in the performance of their functions. The integrity and trustworthiness of evidence are essential for the proper performance of a committee's functions. If evidence given to a committee cannot be relied upon, the basis of that committee's conclusions may be called into question and its ability to carry out its functions may be compromised. This committee therefore takes very seriously any allegation of false or misleading evidence and its potential to harm a committee's operations.

1.16 The committee is also satisfied that there is no other remedy available in this case. The protection of a committee's operations against false or misleading evidence is entirely a matter for the Senate.

1.17 The committee is less satisfied that the criteria enumerated in paragraph (c) of Resolution 3, and subparagraph (i) in particular, can be met. In his submission Mr Scales indicated that the internal Telstra document had been prepared for the purpose of seeking additional funding for maintaining and upgrading the Consumer Access Network (CAN) and was therefore tailored to that purpose. Mr Scales explained that:

Telstra's CAN is a piece of infrastructure like any other large, geographically distributed piece of infrastructure exposed to natural forces. It will constantly deteriorate through normal wear and tear, and needs to be constantly maintained ... A statement in relation to deterioration of the network should not be taken as reflecting neglect ...

From Telstra's perspective, this issue is key. Some deterioration is an inevitable and not blameworthy feature of any physical infrastructure exposed to natural forces.⁵

1.18 The document was designed to demonstrate that investment in the CAN over several years had not kept pace with fault rate growth and that a higher level of investment was therefore required. Mr Scales indicated in his submission that the internal Telstra document had in fact been the basis of the approval of an additional \$20 million investment in CAN maintenance.⁶

1.19 The committee accepts that the evidence of Mr Scales at the estimates hearing was intended to go to the fault rate over a much shorter period and its possible seasonal causes.

1.20 Mr Rix's evidence covered a broader period of time and caused greater concern to Senator Mackay:

5 Submission, p. 3; see Appendix 1, p. 30.

6 Submission, p. 4; see Appendix 1, p. 31.

If the statements in the internal memo are correct, Mr Rix's statement cannot be correct. The submission does not advance any claim of ignorance of the facts referred to in the statements in the internal memo. If Mr Rix was aware of those facts, he must have also been aware that his statement, at the very least, required considerable modification to avoid leaving in the minds of the committee a misleading impression of facts.⁷

1.21 According to Mr Scales' submission, Mr Rix's evidence on pages 110 and 111 of the committee Hansard, when placed in context, was "clearly a discussion of the improved productivity of Telstra's network maintenance workforce" and was "totally consistent with the data shown in the document tabled by Mr Tanner".⁸ It appears to this committee that a great deal of contextual and explanatory material is required to support a thesis that Mr Rix's evidence and the internal Telstra document are not inconsistent. Nevertheless, with regard to the apparent contradiction between Mr Rix's evidence and the internal Telstra document, there is no evidence that Mr Rix was aware of the document, let alone that he chose deliberately to proffer apparently contradictory evidence at the additional estimates hearing.

Conclusion and finding

1.22 The committee is satisfied that Telstra has addressed the primary allegations made by Senator Mackay but notes that it took several pages of technical detail, additional context and numerous statistical attachments to clarify that the evidence of Mr Scales and Mr Rix was about quite specific technical areas that could be distinguished from the situation covered in the internal Telstra document. The committee is concerned that the technical complexity, size and diversity of Telstra's operations is such that the potential for officers of Telstra to leave committees with misleading impressions is high. It is essential that Telstra officers be aware of this potential and take particular care when answering general questions with detailed technical information to distinguish what the answers actually cover.

1.23 In the absence of any evidence of an intention to mislead, the committee concludes that no contempt should be found.

Additional comment

False or misleading evidence – previous cases and their consequences

1.24 The committee has examined allegations of false or misleading evidence being given to the Senate or its committees on at least a dozen occasions, most of which have involved evidence given by public servants or employees of statutory authorities. In previous reports it has concluded that evidence which has the effect of misleading the Senate or its committees is misleading evidence for the purpose of paragraph 12(c) of Privilege Resolution 6. In order for a contempt to be found,

7 Senator Mackay's letter, dated 11 June 2004; see Appendix 1, p. 40.

8 Submission, p. 5; see Appendix 1, p. 32.

however, the committee has consistently held that there should also be evidence that a witness intended to give misleading evidence. The difficulty of establishing that a witness deliberately intended to mislead the Senate or a committee has hitherto prevented the committee from making any findings of contempt on this ground.

1.25 In the course of previous inquiries, the committee has commented on the lack of knowledge of obligations and responsibilities to the Parliament on the part of senior public service and statutory authority employees. Concern with this state of affairs led the committee to recommend in its 42nd report that heads of departments, statutory office holders and SES officers be required to undertake study of the principles governing the operations of Parliament and the accountability of departments, agencies and statutory authorities to Parliament. Adopted by the Senate on 21 October 1993, the resolution was also referred to in the committee's 46th, 64th and 73rd reports, in the last of which the committee also recommended that each department be required to report in a year's time on how the terms of the resolution had been complied with. This recommendation was also adopted by the Senate and responses to the order were published in the committee's 89th report.

1.26 Since then, there have unfortunately been many occasions on which senior public servants and employees of statutory authorities have continued to demonstrate shortcomings in their awareness of parliamentary accountability, notwithstanding the training courses that have become a standard component of the Public Service Commission's training calendar, and which have also been offered regularly by the Department of the Senate. The most recent *State of the Service Report* by the Public Service Commissioner commented that agencies are still not giving enough attention to training their SES on parliamentary accountability and that the focus on training is declining. The Commissioner reported that more agencies should be utilising formal training to ensure SES employees understand their rights and responsibilities.

1.27 Together with drawing attention to the need for improvements in senior public servants' knowledge of parliamentary accountability, the committee has continued to draw attention to resolutions of the Senate dating back to 1971 asserting the accountability of statutory authorities to Parliament. In this context, the committee does not distinguish between the obligations and responsibilities of senior public servants to Parliament, and the corresponding obligations and responsibilities of senior employees of statutory authorities and similar bodies. Both categories of employees have frequent contact with parliamentary committees and both categories should therefore be aware of their obligations.

1.28 Officers of Telstra have previously come to the attention of this committee in the context of allegations of false or misleading evidence. In its 64th report, while concluding that misleading evidence had not intentionally been given, the committee observed that senior officers of Telstra appeared inappropriately equipped to deal with their accountability responsibilities. The partial privatisation of Telstra since the 64th report was presented in 1997 does not affect the committee's expectations that senior officers of the corporation will continue to be aware of their responsibilities to the Parliament.

Recommendation

1.29 In view of the committee's previous focus on public servants and the ongoing monitoring by the Public Service Commissioner through the annual *State of the Service Report* of public service training in accountability to Parliament, the committee believes it would be appropriate for Telstra, a government majority-owned corporation whose officers make regular appearances before Senate committees, to report to the Senate on measures it has implemented to ensure that its senior officers are appropriately trained in their obligations to Parliament.

1.30 Accordingly, the committee **recommends** that there be laid on the table by not later than 1 March 2005 a statement of measures taken by Telstra to ensure that its senior officers are appropriately trained in their obligations to Parliament, including the number and level of officers who have undergone such training and the dates of any such training.

1.31 The committee notes that the Department of the Senate conducts regular seminars on these matters and is also able to assist agencies with customised programs.

Robert Ray
Chair