Chapter 2

Practice and procedure

Reference

2.1 In this chapter the committee makes some observations on matters that have arisen during the inquiry and in correspondence and submissions on the matter. The areas covered are:

- the respective roles of the President and the Senate in dealing with matters of privilege
- matters raised by Senator Brown relating to notification of the matter raised by Senator Kroger
- judicial review of the contempt jurisdiction of the Senate
- the participation of a committee member in this inquiry
- the reimbursement of legal costs.

Dealing with matters of privilege

2.2 On 23 November 2011 the President made a statement to the Senate indicating that he had determined that the matter raised by Senator Kroger should have precedence as a matter of privilege. That determination attracted a level of criticism and commentary, and was the subject of debate in the Senate when Senator Brown moved that the Senate dissent from the President's determination that a matter raised by Senator Brown not be given precedence.

2.3 The committee considers that much of this criticism arises from a misunderstanding of the role of the President. The committee considers that steps could be taken to better explain the role of the President, the limitations inherent in the criteria the President is required to consider, and the questions that are – quite properly – left to the determination of the Senate. The committee also considers that the procedures of the Senate should be reviewed to ensure that the opportunity is available whenever a matter of privilege comes before the Senate for that matter to be debated so it can be properly addressed by senators.

Raising matters of privilege

2.4 Matters of privilege are referred to the committee in accordance with standing order 81, which requires a senator to first raise the matter in writing with the President and await the President's determination whether the matter be accorded 'precedence of other business' before taking any further action.

2.5 It is important to understand the nature of the President's determination in such matters. It is often mischaracterised as endorsing the reference of the matter

raised; assessing the merits of the matter; or determining that a *prima facie* case exists. It is none of these things. It is, rather, an assessment that (according to relevant criteria) the matter should take priority over other items for debate in the Senate.

2.6 Under the current routine of business for the Senate, the practical effect of this determination is of little moment. If a matter is given precedence, the senator raising it is able to give a notice of motion to refer the matter to the Privileges Committee for investigation, and that notice takes precedence over other business at particular times in the Senate's routine of business. If the President determines that a matter ***not*** be given precedence, a senator may nonetheless give a notice to refer the matter, and that notice has precedence in the next category of business. As privilege matters are relatively rare, the distinction is chiefly one of nomenclature: in either case, debate on the matter would be called on in roughly the same position in the Senate's routine of business.

2.7 The committee accepts, however, that the mechanism is not well understood outside of the Senate. The committee is concerned that incorrect perceptions of the President's determination lead to unwarranted criticism.

Current practice

2.8 The current provisions came into effect in 1988 with the adoption of the Privilege Resolutions, which are modelled on the recommendations of the Joint Select Committee on Parliamentary Privilege.[1] An express aim of those recommendations was to remove the requirement that the President had to form the opinion that a *prima facie* case that warranted further investigation existed before granting a matter precedence in debate.[2]

2.9 The notes explaining the proposed Privilege Resolutions, circulated prior to their adoption by the Senate in February 1988, observed:

> **Proposed resolution 4: Matters to be taken into account by the President in determining whether a motion arising from a matter of privilege should be given precedence of other business**
>
> The [Joint Select] Committee did not recommend any specification of the matters to be taken into account in determining whether a motion should have precedence, but it would seem to be desirable to give the President

1 Joint Select Committee on Parliamentary Privilege, *Final Report*, PP219/1984.

2 '...rather than ruling whether or not a prima facie case exists, we propose that the Presiding Officer should instead rule whether or not precedence be accorded to a motion relating to a complaint of a breach of privilege or other contempt.' Joint Select Committee, *Final Report*, paragraph 7.37.

Other recommendations sought to remove the process of making a determination of precedence from the 'heat' of Senate debate, by requiring matters be raised in writing and not referred to in the Senate until the President's determination as to precedence has been given, *see* paragraphs 7.28 – 7.37.

> some guidance in exercising this discretion, and to use the same criteria as the Senate itself would adopt to determine whether a contempt has been committed, except those which would involve any judgement of the content of an alleged contempt[emphasis added]. The proposed resolution has been drafted accordingly.[3]

2.10 In its 125th report, the committee noted:

> In making a decision as to whether a matter which a senator has raised should have precedence, the President is bound under resolution 4 to have regard to two criteria only [emphasis added]:
>
> - 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
> - the existence of any remedy other than that power for any act which may be held to be a contempt.[4]

2.11 The President does not have a discretion to take other matters into account, and, in particular, the President is precluded from considering in any inquisitorial way the content of the alleged contempt. In essence, the President's determination goes to the character of the matter, and not to its merits.

The matter raised by Senator Kroger

2.12 Although it is not the role, nor the practice, of the committee to consider or endorse the President's determinations, the committee considers that the criteria, properly understood, were correctly applied in relation to the matter raised by Senator Kroger. The President explained the basis for his decision in the following terms:

> With respect to paragraph (a), there is no question that the matters raised by Senator Kroger are very serious ones. The freedom of individual members of parliament to perform their duties on behalf of the people they represent and the need for them to be seen to be free of any improper external influence are of fundamental importance. Matters such as these go directly to the central purpose of the law of parliamentary privilege, which is to protect the integrity of proceedings in parliament. They meet the test posed in paragraph (a) of the need to provide reasonable protection for the Senate against improper acts tending substantially to obstruct it in the performance of its functions.
>
> With respect to paragraph (b), while there are various criminal offences that may be relevant, the asking of questions without notice by Senators Brown

3 125th report, p. 109.

4 125th report, paragraph 2.12.

> and Milne is central to the case put by Senator Kroger. Such actions are 'proceedings in parliament' within the meaning of a Article 9 of the Bill of Rights 1688 and section 16 of the Parliamentary Privileges Act 1987, and there is therefore no capacity for them to be examined for the purpose of any criminal investigation or proceedings. As a consequence, the only remedy for the alleged conduct lies within the Senate's contempt jurisdiction.[5]

2.13 The second submission questions whether the President, in considering the criteria in Resolution 4(a), should have determined that the matter 'was truly worthy of the attention of the Senate.'[6] The committee considers that contention to be unsustainable. The President may not inquire into the merits of the matter, but must make his assessment only on its character. This committee cannot accept that allegations of this nature made by one senator against another are unworthy of the Senate's attention.

2.14 How the Senate then deals with such matters is appropriately a question for the Senate. A separate decision is required, on different criteria, before a matter can be referred.

2.15 Although the President, in determining precedence, is bound to have regard ***only*** to the criteria in Resolution 4, the Senate – in deciding whether to refer the matter to the Privileges Committee, and ultimately in deciding whether a contempt has been committed – is not so constrained. The Senate must have regard to the above criteria and additionally must consider:

> (c) whether a person who committed any act which may be held to be a contempt:
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> (i) knowingly committed that act, or
>
> (ii) had any reasonable excuse for the commission of that act.[7]

2.16 The Senate may also take other matters into account in making these decisions, including matters going to the merits of the case.

Perception

2.17 As noted above, the committee accepts that the mechanism of granting precedence, and the distinction between the President's determination and the Senate's decision whether or not to refer a matter, is not well understood outside of the Senate. This can give rise to the mischaracterisations referred to above.

2.18 The committee acknowledges the potential for damage to the reputations that can arise where people misunderstand the President's determination as an assessment

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5 *Senate Debates*, 23 November 2011, p. 9380.

6 Second submission, paragraph 74.2.

7 Privilege Resolution 3.

of the matters. Equally, the committee considers there is the potential for damage to reputations arising from a misunderstanding of the reference of a matter by the Senate. The assessment by the Senate that a matter be referred to the Privileges Committee should similarly be seen as an assessment that the Senate considers the matter to require further investigation, but it is often perceived as a judgment of the matter referred.

2.19 It may be beneficial if the President, in making a statement according a matter precedence, gave more emphasis to: the nature and effect of his determination; the limited discretion Presidents have in deciding these matters; and the fact that it remains for the Senate to assess whether or not the matter be referred. The committee **recommends** that the President consider adopting this practice.

Political matters

2.20 In the majority of cases, the decision to refer a matter to the committee for investigation is uncontroversial. This should not be surprising, as most matters are raised by Senate committees, which have already undertaken a preliminary investigation. It might therefore be assumed that further investigations of such matters has broad support. In a footnote in its 125th report, the committee notes:

> The procedures adopted in 1988 for dealing with privilege matters were designed to take such matters out of partisan controversy. Except in rare cases, they have generally been successful in doing so.[8]

2.21 It is perhaps notable that, on those occasions the Senate has declined to refer matters after the President has given precedence, the matters proposed to be referred have been matters of partisan controversy[9] or allegations involving senators.[10]

2.22 It is probable that no set of principles or resolutions can entirely assist where matters involve highly political considerations. Questions of a political character are, however, properly determined by the Senate itself and not by the President. The committee considers, however, that the Senate should – so far as is possible – ensure that it has the relevant facts before it prior to deciding whether to refer a matter to this committee, including by ensuring the opportunity to debate these matters is always available.

Debate on privilege matters

2.23 The committee notes that, given the quite contrived routine of business which now applies in the Senate, the effect of determining that a matter have precedence is somewhat blunted. In earlier times, such a matter would be called on as the first

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8 125th report, paragraph 4.116, footnote 102.

9 *Journals of the Senate*, 7 September 2005, p.1050

10 *Journals of the Senate*, 26 March 1998, 3462–63; *Journals of the Senate*, 25 June 2009, pp. 2194–95; *see also* 142nd report, paragraphs 1.3 and 1.5.

debate of a sitting day, ensuring that senators would have an opportunity, should they so wish, to address the matter. On 24 November 2011 – the final ordinary sitting day for the year – it appears that the routine of business would not have allowed the time to debate the matter at hand.

2.24 The committee considers that the opportunity to debate proposed references is important, both in enabling senators to properly put their views on the record and in explaining the processes involved in referring such matters. To that end, it may be appropriate that matters granted precedence be called on at the commencement of the relevant sitting day, rather than as the first item in a category possibly not called on until late in the day. The committee **recommends** that the Procedure Committee consider whether the standing orders should be amended in this regard to ensure that, when a matter such as this is granted precedence, it means precedence over all other business.

Matters raised with the committee by Senator Brown

2.25 Senator Brown wrote to the Chair on 24 November 2011, in the following terms:

> The notice of Senator Kroger's proposal to the President that this matter be referred to the Committee was given to the press before the President made his statement to the Senate.
>
> Neither Senator Milne nor I were notified by the President or his office that he had received Senator Kroger's request or that his statement would be made in the Senate.
>
> Will the Committee make recommendations to prevent this anomalous and unfair process outcome from recurring?

2.26 The President responded to one of these matters in a statement to the Senate on 25 November 2011:

> Senator Bob Brown also wrote to me about the presence of journalists in the gallery when I made my statement on a matter of privilege on Wednesday. I do not know if or why there were journalists in the gallery and, in any case, there is no question of privilege involved. At most it is a question of courtesy to the Senate or lack thereof.

Matters involving senators

2.27 Although it is not provided for in the standing orders, the committee considers that it would be appropriate, where the President makes a statement in the Senate in relation to a matter of privilege which names, or appears to involve, senators, for the President inform those senators that such a statement will be made, and when that will occur. This would be analogous to the convention – no longer consistently observed – that a senator intending to criticise another senator in debate should inform that senator. The committee **recommends** that the President adopt this practice.

Attendance of press in the gallery

2.28 Under standing order 81(3), the President informs the senator who raises a matter of privilege before making a statement about the matter in the Senate. The committee considers that the purpose of that provision is to enable the senator to prepare a notice of motion in relation to the matter and to attend in the Senate chamber to give that notice.

2.29 The standing order prohibits the senator referring to it in the chamber prior to the President making that statement. Although there is no provision prohibiting reference to the matter outside of the Senate during this period, the committee agrees that such an action demonstrates a lack of courtesy to the Senate in relation to matters which ought be reported to the Senate before they are discussed or reported elsewhere.

Matters raised by lawyers to Senator Brown and Senator Milne

2.30 A number of matters of procedure and practice were raised in correspondence with the committee and in the two submissions made on behalf of Senator Brown and Senator Milne. The committee does not intend to dwell on all of them, as for the most part they have no bearing on the outcome of the present matter in which the committee has determined no question of contempt arises.

2.31 However the committee takes the opportunity to make some comments about the limited nature of judicial review of the contempt jurisdiction of the Senate.

Contempt jurisdiction

2.32 The two submissions put forward the thesis that the committee, in investigating matters giving rise to allegations of contempt:

(a) is exercising judicial powers which arise from the statutory definition of contempt contained in section 4 of the *Parliamentary Privileges Act 1987*

(b) must have regard to the 'criminal nature of the power and jurisdiction it is exercising under that Act'[11] and

(c) must apply the criminal standard of proof to its deliberations.[12]

2.33 The line of argument is not new, but in this case it extended to a suggestion that the High Court now supervises the Senate's processes in investigating and adjudging contempt matters and would have a role in considering whether a member of a committee investigating such allegations ought recuse him- or herself from deliberations on the matter.

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11 Second submission, paragraph 4.4.

12 Second submission, paragraphs 13 and 14.

2.34 It has always been the view of this committee that, although aspects of the exercise of the Senate's contempt jurisdiction may appear to be judicial in character, they are, in fact, proper incidents of the legislative function. The committee has long cautioned against drawing too close an analogy between the rules of the courts (in relation to contempt of court) and the powers and practices of the Houses (in relation to contempt of Parliament), notwithstanding that the purposes of those respective contempt powers are closely aligned (that is, they exist to enable each institution to protect the integrity of its own proceedings).

2.35 The committee is of the view that the matters suggested in paragraph 2.32 and 2.33 do not flow from the enactment of the Parliamentary Privileges Act, which instead implements a mechanism for more limited judicial review.

Judicial review of the grounds for contempt

2.36 Pursuant to section 4 of the *Parliamentary Privileges Act 1987*, any conduct may constitute an offence against a House (that is, a contempt) if it amounts to, or is intended or likely to amount to, an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

2.37 This provision restricts the, previously unrestricted, category of acts which may be treated as contempts. It is also subject to judicial interpretation, principally by way of section 9 of the Act. The mechanism in the Act provides for a limited judicial review of the grounds upon which contempt may be found. As noted in *Odgers' Australian Senate Practice*, the provision 'opens the way for a court to determine whether particular acts are improper and harmful to the Houses, their members or committees'.[13]

2.38 It must be doubted how far a court, in reviewing the grounds for a contempt of the Senate, could review the internal processes of the Senate. In *Fitzpatrick and Browne*[14] the High Court observed '...given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.' This is not changed by the Parliamentary Privileges Act. In fact, section 9 of the Act clarifies what the courts may review. The committee notes the assessment of these matters made by the late Emeritus Professor Enid Campbell:

> Section 9 was clearly intended to make it possible for a court of law to adjudge whether the conduct of which an offender has been found guilty is capable of being regarded as in contempt of a house. On the other hand nothing in the Act allows the courts to decide whether it was appropriate for a house to impose a penalty or whether the penalty imposed was excessive. Nor is it open to court to consider whether the house which imposed a penalty has complied with principles of procedural fairness or with internal

13 Harry Evans (ed.), *Odgers' Australian Senate Practice*, 12th edition, p. 64.

14 *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162.

> house rules concerning the manner in which charges of contempt are to be handled.
>
> When called upon to decide whether a house has exceeded its penal jurisdiction, courts may well take the view that the inquiries cannot extend to review of the procedures which were adopted within the house for adjudication of the complaint. The view of the courts may be that such enquiries are prohibited by Article 9 of the English Bill of Rights 1689. This provision applies in all Australian polities.[15]

2.39 The committee considers this to be a sound assessment of the current position, and one which appropriately recognises the traditional relationship between the institutions. In response to the suggestion that the Senate and the committee are exercising judicial powers, the committee also notes and endorses the following passage from *Odgers'*:

> ...it is said that in judging and punishing contempts of Parliament, the Houses are exercising a judicial function, and as political bodies they are unfit to exercise a judicial function. It is clear that the Houses are political bodies and that they are by constitution not adapted to act as courts of law, but the very premise of this criticism is questionable. The question of what acts obstruct the Houses in the performance of their functions may well be seen as essentially a political question requiring a political judgment and political responsibility. As elected bodies, subject to electoral sanction, the Houses may be seen as well fitted to exercise a judgment on the question of improper obstruction of the political processes embodied in the legislature.[16]

2.40 The committee agrees, however, that, were it to recommend that the Senate find that a person had committed a contempt, and further recommend the imposition of a penalty under the Act, both the committee and (should it act on those recommendations) the Senate ought have regard to the possibility of judicial review.

2.41 This need not entail, as the second submission suggests, the committee and the Senate applying the particular ***practices*** of courts in relation to natural justice, nor the criminal standard of proof, to its determinations. Rather, the committee should apply the essential ***principles*** of natural justice in a manner appropriate to its inquisitorial role. The committee and the Senate should explain their recommendations and decisions in a manner that meets the requirements of the limited judicial review provided for by the Parliamentary Privileges Act. The committee considers that the flexibility of its method of operation and the protections contained in the Privilege Resolutions are sufficient to this task.

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15 Enid Campbell, *Parliamentary Privilege*, Federation Press 2003, p. 201.

16 Harry Evans (ed.), *Odgers' Australian Senate Practice*, 12th edition, p. 69.

Participation of Senator Brandis

2.42 The lawyers representing Senators Brown and Milne raised the matter of the participation in the inquiry of Senator Brandis. This was first raised in a letter to the chair, dated 22 December 2011 and in the first submission. Those documents argued that Senator Brandis must recuse himself, or the Senate must remove him from the committee, on the grounds that he had prejudged the matters before the committee.

2.43 It follows from the arguments in the previous section of this report that the committee is not persuaded by the arguments at paragraph 20 of the first submission, and elsewhere, that a decision of Senator Brandis, or of the Senate, that Senator Brandis remain on the Privileges Committee (and participate in this inquiry) would be reviewable by the High Court. It would be untenable for the High Court to reach into the proceedings of the Senate in such a way and contrary to Article 9 of the Bill of Rights and section 16 of the Parliamentary Privileges Act.

2.44 It is well established that the question whether senators should participate in an inquiry in which they may have a real or apparent conflict of interest, or where there might be an apprehension of bias, is a matter for the senators concerned, having regard to the particular circumstances of the inquiry. There is no general rule or convention on this. The matter is canvassed in *Odgers' Australian Senate Practice,* 12th edition, at pp 376-77. The lawyers representing Senators Brown and Milne were provided this information in a letter dated 6 January, but subsequently lodged with the chair the first submission, cited as a 'recusal application', which was received on 8 February 2012.

2.45 On the same day, prior to the receipt of the first submission, Senator Brandis indicated to the chair that he intended to recuse himself from deliberations on this matter. Senator Brandis wrote to the committee on 10 February setting out his decision and the reasons for it. That letter was received by the committee secretariat on 13 February and a copy provided to the lawyers representing Senator Brown and Senator Milne the following day. On 16 February, in response to a question raised on behalf of those senators as to whether Senators Brandis' decision could be made public, the committee resolved to publish a note on the matter, together with a copy of the letter, on the committee's web pages.

2.46 In that letter, Senator Brandis explained the reasons for his decision:

> As you are aware, the law recognizes two categories of case in which a judicial officer or other relevant decision-maker should stand aside from a hearing: where there is actual bias (for instance, where there is a direct conflict of interests) and apprehended bias (where, although there is no actual bias, a reasonable objective observer might conclude that there could be).
>
> Although the Privileges Committee is not, of course, a court or a quasi-judicial tribunal, it is nevertheless of central importance that it both act with neutrality and be seen to so act. For that reason, I consider the legal

> principles to which I have referred provide useful guidance and should generally be followed in a case such as this.

2.47 Senator Brandis did not participate in the committee's deliberations on the matter.

2.48 The committee endorses the advice it has received from Senate Clerks on the matter of the participation of senators in inquiries, which has informed its approach since 1989.[17] Although there is no general convention, those advices record a number of examples of senators exercising their discretion not to participate in inquiries in which there might be a genuine conflict of interest or the apprehension of bias. The committee considers that Senator Brandis' decision provides another sound example of the application of the practices recorded in those advices.

Reimbursement of legal costs

2.49 On 24 November 2011, the committee wrote to Senator Brown and to Senator Milne inviting comments on the matter before it. In December 2011, Senators Brown and Milne engaged counsel to represent them in the matter. All subsequent dealings with those senators was undertaken through their representatives. Correspondence received by the committee and the second submission indicated that Senators Brown and Milne would be seeking reimbursement of their legal costs under Privilege Resolution 2(11). The committee does not have before it an application for reimbursement of those costs, but makes the following comments.

2.50 In its 125th report the committee makes the following observations about the reimbursement of costs of legal representation:

> 5.12 Under Privilege Resolution 2(11), the committee is empowered to recommend to the President reimbursement of costs of legal representation to witnesses before the committee, as follows:
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> > The Committee may recommend to the President the reimbursement of costs of representation of witnesses before the Committee. Where the President is satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation of the person before the Committee, the President may make reimbursement of all or part of such costs as the President considers reasonable.
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> 5.13 The committee continues to reaffirm the view taken in its 35th report that, as a general principle, it is disinclined to exercise its power to recommend reimbursement of costs of representation of witnesses before

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17 Advices from the Clerk of the Senate, published on the committee's web pages. Advice No. 2, *Participation of members of Committee of Privileges in certain inquiries*, 18 January 1989. Advice No. 44, *Potential conflicts of interest*, 20 October 2010.

> the committee,[18] and in fact has recommended reimbursement only once since the Senate adopted the provision.[19]

2.51 The committee again reaffirms that view. The committee's role here is to make recommendations in relation to the criteria cited in the resolution.

Criteria in Resolution 2(11)

2.52 The criteria which the President must take into account in making a decision under Resolution 2(11) relate to 'hardship due to liability to pay the costs of representation' and to the reasonableness of the costs sought. The committee has previously noted that Resolution 2(11):

> ...requires the President to be strict in administering the reimbursement provision, and the committee regards itself as obliged to assist the President in making the determination. The committee accepts the right of all witnesses to be assisted by counsel, and acknowledges that such a right is rendered nugatory if persons are unable to afford to exercise it. The committee emphasises, however, that only in the exceptional circumstances provided in resolution 2(11) can reimbursement of legal costs be agreed to and, in determining whether to make a recommendation to the President, will apply strictly the prescribed criteria.[20]

2.53 The provision was introduced by then Senator Durack, as an amendment to the resolutions originally proposed. In introducing it, Senator Durack observed that the provision sets out the principle 'about the right of legal aid only in relation to need.'[21] The committee does not consider this criterion is met in the current case.

2.54 On the requirement of reasonableness, the committee has previously noted 'that persons who might be the subject of a contempt finding could feel the need to have early access to legal advice', but went on to 'express its concern that persons affected by its inquiries have incurred unnecessary expenditure on legal representation.'[22]

2.55 It seems to the committee that much of the material submitted, particularly the material referred to at paragraphs 1.30 to 1.48 above, was unconnected to the committee's invitation to provide statements to inform the initial stages of the inquiry. It is difficult to see how costs involved in the development of that material could be considered reasonable under the terms of the resolution.

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18 Senate Committee of Privileges, *35th report*, PP. 467/1991.

19 Senate Committee of Privileges, *21st report*, PP. 461/1989.

20 125th Report, paragraph 5.11.

21 *Senate Debates*, 25 February 1988, p. 628.

22 125th Report, paragraph 5.11.

2.56 The committee also notes that one consequence of the approach taken in this case was that a response to the substantive matters before the committee was not provided until 27 February 2012, delaying the resolution of the case. The provision of statements, such as those contained in Annexures 1 and 2 of the second submission may well have met the committee's requirements in the initial stages of the inquiry, and enabled the matter to have been dealt with more quickly without the need for such costs to be incurred.

Conclusion

2.57 As the committee does not consider that the hardship criterion has been met, the committee, by majority decision, will not be recommending the reimbursement of costs incurred should a specific application be made.

Senator the Hon David Johnston

Chair