The Senate

Committee of Privileges

Whether there was any improper influence in relation to political donations made by Mr Graeme Wood and questions without notice asked by Senator Bob Brown and Senator Milne

Documents published by the Committee

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Contents

STATEMENT BY THE PRESIDENT

MATTER OF PRIVILEGE RAISED BY SENATOR KROGER

By letter dated 22 November 2011, Senator Kroger has raised a matter of privilege under standing order 81. The matter concerns a possible relationship between Senator Bob Brown and Mr Graham Wood and whether, on the one hand, Senator Brown sought a benefit from Mr Wood in the form of political donations on the understanding that he would act in Mr Wood's interests in the Senate or, on the other hand, whether Mr Wood, through large political donations, improperly influenced Senator Brown and other Australian Greens senators, including Senator Milne, in the discharge of their duties as senators, including by the asking of questions without notice.

Under standing order 81(2), I am required to determine, as soon as practicable, whether a motion relating to the matter should have precedence of other business, having regard to the criteria set out in any relevant resolution of the Senate. The relevant criteria are in Privilege Resolution 4 as follows:

> Notwithstanding anything contained in the standing orders, in determining whether a motion arising from a matter of privilege should have precedence of other business, the President shall have regard only to the following criteria:
>
> (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and
>
> (b) the existence of any remedy other than that power for any act which may be held to be a contempt.

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 and Milne is central to the case put by Senator Kroger. Such actions are "proceedings in parliament" within the meaning of 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.

I therefore determine that a motion relating to this matter shall have precedence of other business and I table the correspondence from Senator Kroger.

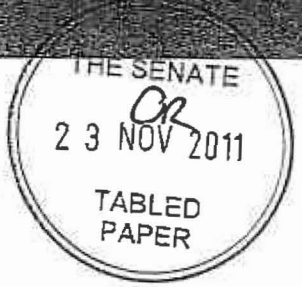
Senator Kroger, you may now give notice of a motion to refer this matter to the Committee of Privileges for inquiry and report.

Senator Helen Kroger

Liberal Senator for **Victoria**

22 November 2011

Senator the Hon John Hogg,
President of the Senate,
Parliament House,
Canberra ACT 2600



Foreshadowing of a privilege motion relating to Senator Bob Brown

Dear Mr President,

In accord with Standing Order 81, I inform you of my intention to raise in the Senate a matter of privilege concerning Senator Bob Brown's relationship with wotif founder and Greens' donor, Mr Graeme Wood, and seek precedence for the same.

My concern goes to matters of *Senators seeking benefits, etc* (and possibly *improper influence of senators*), as laid out in the resolutions on Parliamentary Privilege agreed to by the Senate on 25th February 1988:

> ***Senators seeking benefits etc.***
>
> *(3) A senator shall not ask for, receive or obtain, any property or benefit for the senator, or another person, on any understanding that the senator will be influenced in the discharge of the senator's duties, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the senator's independence or freedom of action as a senator, or pursuant to which the senator is in any way to act as the representative of any outside body in the discharge of the senator's duties.*[1]

Specifically I believe that Senator Brown negotiated the acceptance of a benefit on behalf of the Greens, thus entering into an arrangement with Mr Graeme Wood which had the effect of controlling or limiting his independence, specifically in relation to the sale of the Triabunna woodchip mill, and pursuant to which Senator Brown acted as the representative for Mr Wood. This arrangement also affected the actions of Senator Christine Milne and other Greens senators. My reasons for this belief are detailed below.

I contend that this allegation meets the threshold criteria for determining matters relating to contempt, in that: it is not of a trivial nature; it is worthy of the attention of the Senate; it is not capable of remedy by other means; and it is necessary for the Senate to be protected from the corrupting influence of a senator negotiating a $1.6 million corporate donation for their party, which has led to questions being asked, points of order taken and votes being cast in the interests of the donor.

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[1] Parliamentary Privilege: Resolutions agreed to by the Senate on 25 February 1988

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The evidence:

1. Senator Brown personally discussed with Mr Graeme Wood, Mr Wood's offer of a substantial donation to the Greens, and thereby entered into "an arrangement" with him.

Various accounts of the circumstances whereby Mr Wood discussed making his donation to the Greens with Senator Brown have been published in the media.

An article published in the *Sydney Morning Herald* on 8th January 2011, purports to give Mr Wood's account of a conversation with Senator Bob Brown and his Chief of Staff over dinner at La Scala Italian restaurant in Canberra in late May 2010:

> *He told them the Greens needed to run a professional advertising campaign this time around, and he wanted to help fund it.*
>
> *"I said, 'What are you doing about actually winning this Senate campaign? How are you going to get your message out there? How much funding have you got?' I didn't get many good answers to any of those questions. I said, 'Why don't you consider running a proper television campaign, right up to the election?'*
>
> *"Basically I suggested their current thinking was not a plan to win."*
>
> *Brown was grateful - the party's biggest single donation at the previous election had been about $200,000 and the party had never received a six-figure donation like that before.*

In the same article Mr Wood was quoted as saying that helping the Greens win the balance of power in the Senate, probably for the next six years, was "probably a good return on investment".[2]

An article in *TheAge* published on the January 8, 2011, related how:

> *...in May Mr Wood approached Senator Brown to propose that he help fund a "proper" Greens advertising campaign.*
>
> *In the end, Mr Wood provided the vast bulk of the campaign funding himself.*
>
> *Mr Wood denied either he or wotif had anything to gain from his donation. "There's nothing in it for me financially," he said. "I'm not looking for any favours."*
>
> *Senator Brown told The Age he would be "forever grateful" for Mr Wood's donation, which he said was selfless and hazardous.*[3]

A profile of Mr Wood in the Launceston *Examiner*, published on the 31st of July 2011, for which Mr Wood was interviewed, stated:

> *He is, by his own admission, ruthlessly strategic....*

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[2] "What makes someone give $1.6m to a political party?", *Sydney Morning Herald*, 8 January 2011

[3] "Web millionaire bankrolled Greens", *The Age*, 8 January 2011

...Mr Wood has certainly forged a unique path and his donation to the Greens is hardly typical of Australian corporate philanthropy, but it is not woolly do-gooding either.

He saw the $1.6 million donation as a defensive move that saved him many millions of dollars.

"I was a bit concerned that if the Coalition got in a lot of my investments in environmental causes would have been down the plughole," he says.

"It will hopefully save me a whole lot of money in fighting other environmental wars or battles." For Mr Wood it really is that simple.

With the Greens holding the balance of power, they will force Labor to spend more money preserving the environment, which means he will need to spend less. In the 12 months since the federal election, his investment has delivered handsomely.

Not only is Australia close to putting a price on carbon pollution, but the government has set aside billions of dollars for renewable energy and biodiversity.

In the past week the Commonwealth also announced an $8 million contribution towards the purchase of a cattle station near Alice Springs that will be destocked and regenerated.

Mr Wood says his donation was about putting a spanner in the works.

"I was trying to pull up the two major parties and say there are other ways to run a country," he says. "It gives the Greens the opportunity to prove they are a real third force in Australian politics and it reflected my view that the two main parties were increasingly dysfunctional and the level of political debate was abysmal."

The strategic thinking behind the donation was that support for the Greens usually declines by between 2 and 5 percentage points in the final weeks of a campaign, as the two main parties spend up big on television advertising.

In a tight Senate race, it is the difference between picking up two or three seats.

With a view to countering this late slump, Mr Wood approached Greens leader Bob Brown with his idea and costings for an ad campaign.

Senator Brown was hardly going to say no.

"He came to talk to me about the donation," Senator Brown says.

"He told me there were a lot of people in business who didn't support either of the major parties."[4]

All three articles concur that Mr Wood approached Senator Brown about making a substantial donation to the Greens' advertising campaign for the upcoming election and that he and Senator Brown discussed this. A donation by Mr Wood to the value of $1.6 million ensued.

It is therefore apparent that Senator Brown entered into "an arrangement" with Mr Wood. I note that it is usual practice for political parties to bar their parliamentarians from such dealings with donors, precisely to avoid perceptions of arrangements being made which might benefit donors.

I contend that this donation, not only had the effect of, both influencing and appearing to influence the conduct of Senator Brown in the Senate and elsewhere, it also in turn influenced the conduct of Senator Milne in the Senate and elsewhere, and other Greens senators in the Senate.

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[4] "Bankrolling the Green revolution", *The Examiner*, 31 July 2011

2. This arrangement had the effect, of controlling Senator Brown's independence as a senator, causing him to act as the representative of Mr Wood's company, in that, in the Senate and elsewhere , he repeatedly acted to advantage the bid by Mr Wood's Triabunna Investments Pty Ltd and to damage his competitor's efforts to secure the Triabunna woodchip mill. This had a flow-on effect on the actions of Senator Milne and the other Greens senators.

Summary:

Mr Graeme Wood and the Aprin Consortium were competing to buy the Triabunna woodchip mill from Gunns Ltd. Mr Wood's Triabunna Investments planned to eventually turn the mill into an ecotourism resort, while Aprin wished to continue its milling operations.

Gunns announced a sale (for $16m to Aprin) conditional on being satisfied with progress in the implementation of the Tasmanian forests Statement of Principles.

Senators Brown and Milne then campaigned, in the Senate and in the public arena, to sabotage this sale by seeking to prevent any federal money flowing to Gunns as part of a Forest Agreement or to Aprin.

In Tasmania the Greens threatened to bring a no confidence motion against the State Government if Forestry Tasmania helped finance Aprin's purchase of the mill.

Gunns then announced that, due to delay with Aprin's finance, it would sell the mill to Graeme Wood's Triabunna Investments (for only $10m).

It was widely reported that this sale was also conditional on Gunns being satisfied with the outcome of the Tasmanian Forestry Agreement, and, even more explicitly, on Gunns being satisfied with the amount of compensation for exiting native forest logging.

In an about face, Senator Brown and the Greens then reversed their position on Gunns receiving moneys as part of the Intergovernmental Agreement on Tasmanian Forests (IGA) – allowing that Gunns had a legal entitlement to compensation for giving up its logging contracts and arguing against a large cut of this compensation being diverted to Forestry Tasmania to pay Gunns' debts.

Finally, when it appeared that Gunns might not accept a second, larger compensation offer as part of the IGA (which would jeopardise the sale of the Triabunna woodchip mill to Mr Wood's Triabunna Investments) Senator Brown publicly questioned whether or not Gunns did in fact have an entitlement to compensation at all.

This contradictory pattern of behaviour, including behaviour in the Senate, can only be explained as a serious, continuing, coordinated, and ultimately successful attempt to act as Mr Wood's representative in breach of the resolution on Parliamentary privilege.

The following chronology sets out the case:

CHRONOLGY

1 April 2011 Gunns Ltd announced that it was suspending woodchip operations at its Triabunna woodchip mill for eight weeks and reviewing operations at the mill, due to volatility in demand. [5]

14 May 2011 *The Australian* reported that several industry based consortiums had made bids to purchase the Triabunna woodchip mill, to continue its operations, and that industry was warning it should not be sold for tourism development. There was speculation that wealthy philanthropist, Jan Cameron, had helped finance such a bid, though she claimed no knowledge of any such bid. Forest Industries Association of Tasmania Chief Executive, Terry Edwards, said the loss of the Triabunna mill to tourism development would be a disaster for the entire timber industry. Gunns said the sale would be decided on a commercial basis. *The Australian* confirmed that "players in the environment movement floated the idea of a consortium to buy the Triabunna mill in order to shut it and develop the site for tourism."[6]

7 June 2011 The Hobart *Mercury* reported that Bridgewater Company, Aprin Logging, was holding talks with Gunns about buying the Triabunna woodchip mill.[7]

10 June 2011 *ABC TV* in Tasmania carried a story that Graeme Wood and Jan Cameron were seeking to buy the Triabunna woodchip mill for eventual use as a tourism centre with a deepwater port.[8]

11 June 2011 Senator Bob Brown issued a press release promoting the bid by a consortium, including Mr Graeme Wood, to buy the Triabunna woodchip mill for a tourism venture. He urged local, state and federal governments to support this proposal.[9]

ABC News reported that the Triabunna woodchip mill had been sold to Aprin Pty Ltd for an undisclosed sum.[10]

14 June 2011 Gunns announced that it had entered into an agreement to sell the Triabunna woodchip mill, conditional on satisfactory progress in the implementation of the Tasmanian forests statement of principles.[11]

15 June 2011 Senator Brown asked a question without notice to the Minister for Agriculture, Fisheries and Forestry seeking information on progress with a Tasmanian forest agreement and an assurance that no public money would go to a private enterprise pulp mill in Tasmania from the public purse.[12]

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[5] Triabunna Mill, Media Release from Gunns Ltd, 1 April 2011
[6] **Error! Hyperlink reference not valid.**, *The Australian*, 14 May 2011
[7] Triabunna mill sale close, The *Mercury*, 7 June 2011
[8] Tourism group aims to buy woodchip plant, *ABC TV*, 10 June 2011
[9] Triabunna tourism hub bid welcome: Brown, Media Release, 11 June 2011
[10] Triabunna mill sold, *ABC News*, 11 June 2011
[11] Triabunna Mill, Media Release from Gunns Ltd, 14 June 2011
[12] Senate *Hansard*, 15 June 2011, pp 2856-2858

16 June 2011 Senator Brown asked a question without notice to the Minister for Agriculture, Fisheries and Forestry, seeking an assurance that no money would be given to Gunns in relation to its mill or its business structure, including for severance payments for workers, related to the forest agreement or otherwise.

A supplementary question sought to advantage the purchase of the Triabunna woodchip mill by *"eco resort developers"* over a *"consortium of loggers"* by asking the Government *"to ensure that no money from the forest agreement process flows to the logging entities"*.

In the same supplementary question Senator Brown asked if the Government had had any discussions about the consortium and whether the government would *"ensure that no money goes, through the forest agreement or in any other way from the public purse, into facilitating the purchase of that Triabunna woodchip mill"*.[13]

27 June 2011 The Hobart *Mercury* published an article reporting concerns about the "cash-poor" state Labor Government loaning money to Fibre Plus, a subsidiary of Aprin, which was trying to buy Gunn's Triabunna woodchip mill.[14]

28 June 2011 Senator Milne tells *ABC* radio it is *"absolutely inappropriate"* for the Tasmanian Government to finance purchase of the mill and that she went to see Minister Ludwig's office (the Minister was called away) to tell him the Government needed to investigate this *"extremely smelly deal"* involving Gunns, Aprin , Forestry Tasmania and the state government, *"before federal money is poured into Tasmania"*.[15]

29 June 2011 At his Press Club address, outlining his plans for Senate power, while praising the Tasmanian Forest Agreement, Senator Brown says, *"...let no public money flow to a Gunns pulp mill, to the huge Malaysian logging company Ta Ann or to the consortium bidding to buy the Triabunna woodchip mill."*[16]

30 June 2011 At a news conference on Foreign Ownership of Australian Farms and Mines, Senator Brown injected this into his statement: *"I might add for you, and I think, for example, if the story is true about the loan going to the purchase of the woodchip mill the Triabunna, you know, the Treasurer needs to rescind that"*.[17]

4 July 2011 Tasmanian Greens MP, Kim Booth, threatened to bring on a no-confidence motion in the minority Tasmanian State Government if it lent money to a company to buy Gunns' Triabunna woodchip mill.[18]

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[13] Senate *Hansard*, 16 June 2011, pp 3106-3109, "eco resort development" incorrectly recorded by Hansard as Eco Resource Development.
[14] Mill loan up in the air, The *Mercury*, 27 June 2011
[15] Senator Milne, interview with Leon Compton, *ABC Northern Tasmania*, 28 June 2011
[16] The Green Dividend, address by Senator Brown to the National Press Club, 29 June 2011
[17] News conference by Senator Brown on Foreign ownership of Australia's Farms and Mines, ABC 24
[18] The World Today, *ABC*, interview with Kim Booth, 4 July 2011

4 July 2011 Senator Milne pressed the Minister for Agriculture, Fisheries and Forestry at Question Time about any knowledge he had of the loan offer from the Tasmanian Government to Aprin and demanded an undertaking that any moneys under the Tasmanian negotiated forest outcome be halted until details of the Tasmanian Government loan to Aprin were made public.

Senator Milne later took note of the answer to her question in the Senate. She disparaged the Aprin consortium and demanded *"the Commonwealth not give Tasmania one cent in a forest deal outcome until Aprin Logging, Fibre Plus, Forestry Tasmania and the Department of Economic Development, Tourism and the Arts and the Premier of Tasmania come clean on their dealings.."*[19]

5 July 2011 A *Finance News Network* report states that the sale of the Triabunna woodchip mill has been delayed due to doubt over Fibre Plus' financing capacity and opposition from the Greens to approve government funding.[20]

6 July 2011 Senator Milne addressed a question without notice of the Minister for Agriculture, Fisheries and asked if Forestry Tasmania's profit sharing deal with Aprin in respect to the Triabunna woodchip mill breached the Forest Principles Agreement. Senator Milne's two supplementary questions paraphrased her primary question. Senator Brown twice took points of order asking that the Minister address the question.

Senators Abetz and Brandis took note of the Minister's answer and drew attention to Senator Brown and the Greens' pattern of intervention to benefit Graeme Wood's purchase of the Triabunna mill. Senator Milne joined the debate, using it to criticise Aprin.[21]

7 July 2011 Senator Milne issued a press release again demanding that *"no Commonwealth funding should flow to Tasmania from any forest agreement until the whole murky deal surrounding the Triabunna woodchip mill is exposed"*.[22]

13 July 2011 Gunns announces that it has entered into an agreement with Triabunna Investments, Graeme Wood and Jan Cameron's company, for the sale of the Triabunna woodchip mill.[23]

14 July 2011 *ABC Radio* in Hobart replayed an interview from 13 July 2011 with Aprin principal, Mr Ron O'Connor who said, in relation to Gunns' sale of the woodchip mill to Triabunna Investments, that he thought there was *"something funny going on here"*. Commenting on Mr O'Connor's remarks, Gunns CEO, Greg L'Estrange explained that the sale to Aprin fell through because Aprin couldn't complete as scheduled by Friday 29 June 2011 because Gunns *"were unable to get a firm commitment that he* (Mr O'Connor from Aprin) *had funding in place"*.[24]

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[19] Senate *Hansard*, 4 July 2011, pp 3860-3861 & 3876-3877
[20] Gunns Triabunna sale hits hurdle, *Finance News Network*, 5 July 2011
[21] Senate *Hansard*, 6 July 2011, pp 4167-4169 & 4180-4186
[22] Triabunna deal needs federal intervention, Media Release, Christine Milne, 7 July 2011
[23] "Triabunna Mill Sale", Gunns Press Release, 13 Jul 2011
[24] Gunns CEO Greg L'Estrange on the sale of the Triabunna woodchip mill, *ABC Radio* Hobart, 14 July 2011

The *Mercury* reported that Wood and Cameron had secured Triabunna mill for $10 million, stunning the rival bidders who said they offered $6 million more, prompting accusations of inappropriate interference by state and federal Greens politicians.[25]

16 July 2011 — Writing in the *Mercury*, Greg L'Estrange said that: *"We gave Aprin time beyond the deadline, and worked hard with them to make it happen. My first obligation is to Gunns' shareholders, and for reasons fair or foul, Aprin could not get their finance in order in time."*[26]

22 July 2011 — The Hobart *Mercury* published extracts from a circular to Forestry Tasmania employees by Forestry Tasmania chief, Bob Gordon. According to the *Mercury*, Mr Gordon railed against Gunns' decision to sell the Triabunna woodchip mill for $6m less than that initially offered by Aprin Logging. Mr Gordon was quoted as saying: *"Gunns may think it is perfectly reasonable to sell an asset for $6 million less than it's worth but I don't."* Significantly, Mr Gordon was also quoted as saying: *"Gunns has placed a condition on the sale of the $10 million Triabunna mill that it must receive compensation under the SOP process before the mill can be reopened by new owners Jan Cameron and Graeme Wood .That, of course, raises the whole question of whether Gunns should be compensated for deciding to get out of native forest."*[27]

25 July 2011 — Prime Minister Gillard and Premier Giddings announced a Heads of Agreement to implement the Statement of Principles forest agreement.[28]

4 Aug 2011 — The Launceston *Examiner* reported that Gunns had initially demanded $250m in compensation for exiting native forest logging but that this had dropped to $106m, and that a *"condition on the sale of the Triabunna woodchip mill to Jan Cameron and Graeme Wood is that Gunns can delay the reopening of the mill for up to 12 months if it does not get the compensation it wants."*[29]

7 Aug 2011 — Prime Minister Gillard and Premier Giddings signed a Tasmanian Forests Intergovernmental Agreement (IGA).[30]

11 Aug 2011 — The *Mercury* reported that the Tasmanian Government had begun negotiations with Gunns, consistent with the IGA, and that Senator Brown said, *"There should be no payment to Gunns unless the governments are legally bound under contractual arrangements. But I will be seeking my own legal advice on the issue."*[31]

17 Aug 2011 — Senator Colbeck asked Senator Conroy, as Minister representing the Minister for the Environment, if Gunns would receive any money flowing from the Intergovernmental agreement on Tasmanian forestry. Senator Conroy did not address much of the question, but he did confirm that *"Gunns Ltd made an independent decision to exit native forests."*[32]

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[25] "$6 million question", the *Mercury*, 14 July 2011
[26] Forests reality swayed Gunns, the *Mercury*, 16 July 2011
[27] FT blasts Gunns compo bid, The *Mercury*, 22 Jul 2011 .
[28] Tasmanian Forest Agreement, Heads of Agreement, 24 July 2011
[29] State ponders $100m Gunns compo, *the Examiner*, 4 August 2011
[30] Tasmanian Forests IGA between the Commonwealth of Australia and the state of Tasmania, 7 August 2011
[31] Greens to query Gunns money, the *Mercury*, 11 August 2011
[32] Senate *Hansard*, 17 August 2011, pp 4673-4675

Senator Colbeck later moved a motion that *"the Senate condemns any payment of moneys to Gunns Ltd for exiting native forest logging flowing from the Tasmanian Forests Intergovernmental Agreement between the Commonwealth of Australia and State of Tasmania."* Significantly, Senator Brown unsuccessfully sought to amend the motion to condemn any payment of moneys to Gunns *"outside of legal requirements"*, before voting with other Greens against Senator Colbeck's motion. Senator Brown's amendment was circulated before 3.30pm. [33]

It is significant that Senators Brown, Milne and the Greens did not vote to condemn money flowing to Gunns from the IGA – something Senators Brown and Milne had previously railed about – and that Senator Brown actually sought to amend Senator Colbeck's motion to allow for such a payment as a "legal requirement". It is important to bear in mind that Gunns' sale of the Triabunna woodchip mill to Graeme Woods' Triabunna Investments was widely reported as having been conditional on Gunns being satisfied with the progress of the forest negotiations, i.e., the level of compensation sought.

18 Aug 2011 Tasmanian Premier, Lara Giddings, announced that she had legal advice that the IGA could not proceed unless Gunns was compensated for voluntarily handing back its native forest contracts. She said the issue of compensation for Gunns would be overseen by an independent probity auditor.[34]

18 Aug 2011 Gunns CEO, Greg L'Estrange, issued a press release in which he claimed Gunns had been misled about the forest negotiations process and that, rather than selling their native forest businesses on the open market, *"we chose to stick with an open collaborative process and now it appears we are being punished for that."* [35]

19 Aug 2011 The *Mercury* reported that the Premier had made it clear the previous day that $23 million was the maximum compensation Gunns could receive for exiting native forest logging, as opposed to the $106 million they had been seeking, and that the probity process would include discussion of a $25 million claim against Gunns from Forestry Tasmania.[36] The *Examiner* quoted Premier Giddings as saying $23 million was the most Gunns could expect.[37]

29 Aug 2011 The Tasmanian Government made a confidential settlement offer to Gunns, which included a proposed resolution of disputed debts between Gunns and Forestry Tasmania.[38]

30 Aug 2011 The *Mercury* reported that setting Forestry Tasmania's $25 million claim against the offer of $23 million for Gunns residual rights, meant that Gunns might receive little or no net compensation for exiting native forest logging.[39]

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[33] Senate *Journals*, 17 August 2011, pp 1262-1263

[34] "Auditor to decide on Gunns compensation," *AAP*, 18 August 2011 and Forest peace hangs on Gunns settlement, ABC News, 18 August 2011, 3:41pm

[35] "Forest Agreement Negotiations", Gunns Press Release, 18 August 2011

[36] Gunns blazing on compo, the *Mercury*, 19 August 2011

[37] Auditor to look at Gunns deal - with cap of $23m, the *Examiner*, 19 August 2011

[38] "Commercial settlement offer made to Gunns, Lara Giddings, MP, Premier, 29 August 2011

[39] Debt may cancel Gunns payout Tasmania News, The *Mercury*, 30 August 2011

2 Sept 2011	The deadline for Gunns' acceptance of the offer from state Government passed with no response from Gunns.[40]
5 Sept 2011	At a media conference Senator Brown defended Gunns from the accusation it was *"holding up the process"* instead disparaging attempts to *"feed public money to Forestry Tasmania".* [41]
6 Sept 2011	The *Mercury* reported that Gunns had rejected the Government's $23 million compensation offer.[42]
6 Sept 2011	Senator Brown repeatedly defends Gunns' efforts to negotiate a better deal with the Tasmanian government and condemns any money going to Forestry Tasmania.[43]
6-7 Sept 2011	The *Examiner, Mercury* and other outlets reported that Premier Giddings said there was *"the $43 million in which there is an envelope for us to be able to work through a number of issues that relate to all of this and that is what we intend to do".*[44]
8 Sept 2011	At a media conference Senator Brown says it should be a condition of the settlement that Gunns pay workers and small businesses to whom it owes any money. Senator Brown rails against Forestry Tasmania receiving any payment from the IGA deal.[45] **This was the third media conference in four days in which Senator Brown did not criticise Gunns and argued against money being channelled to Forestry Tasmania.**
9 Sept 2011	The Tasmanian Government said it had finalised a revised offer to Gunns, which also aimed to resolve Gunns' debt dispute with Forestry Tasmania.[46]
11 Sept 2011	At a media conference Senator Brown again says that Forestry Tasmania should get nothing from the IGA settlement, that Gunns may have a legal right to compensation for residual contractual rights, that the money from the IGA must be used to help forest contractors, and that the Federal Government should vet whether or not Gunns is entitled to payment for its residual contractual rights.[47]
14 Sept 2011	Premier Giddings announced that settlement had been reached with Gunns, which had accepted the offer of $23 million, that the process included a payment of $11.5 million to Forestry Tasmania and that the original offer was for $23 million to be shared between Gunns and Forestry Tasmania.[48] The *Mercury* reported that Gunns would be paid $23 million in cash for all residual rights and that Forestry Tasmanian would accept $11.5 million as settlement for its $25 million claim against Gunns. [49]

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[40] Gunns compo deadline looms, *ABC* News, 2 September 2011
[41] "Greenscast" of Senator Brown's Media Conference, 10:33 – 12:44, 5 September 2011
[42] Gunns snubs compo deal Tasmania News, The *Mercury*, 6 September 2011
[43] "Greenscast" of Senator Brown's Media Conference, 6 September 2011
[44] We will make another offer, the *Examiner*, 6 September 2011, Ante raised in compo impasse, The *Mercury*, 7 September 2011
[45] "Greenscast"of Senator Brown's Media Conference, 8 September 2011
[46] New offer for Gunns, ABC News, 9 September 2011
[47] "Greenscast", of Senator Brown's Media Conference, 11 September 2011
[48] Commercial settlement reached with Gunns Ltd, Lara Giddings, MP, Premier, 14 September 2011
[49] Gunns gets $23m compo, The *Mercury*, 14 September 2011

Senator Brown issued a brief media release, saying that while he was not privy to the legal or probity issues compelling the Tasmanian Government to hand $11.5 million in federal money to Forestry Tasmania, an administrator should be brought in to administer this money.[50]

It is significant that Senator Brown did not criticise the settlement achieved by Gunns or suggest that they may have no legal entitlement to it, instead focussing his criticism on the money earmarked for Forestry Tasmania.

15 Sept 2011 The *Mercury* confirms that Gunns has reaped a $48 million windfall from taxpayers to quit native timber logging contracts.[51]

20 Sept 2011 Senator Colbeck moved a motion that: *"the Senate calls on the Government to ensure that: (a) Commonwealth funds are not used to resolve the commercial dispute between Gunns and Forestry Tasmania; and (b) assistance to forest contractors is not reduced."* Senator Milne sought leave to amend this motion to read: "That the Senate condemns the Coalition for seeking to deny Tasmania $270 million of assistance for forestry transition". Leave was refused. [52]

Significantly the Greens voted against Senator Colbeck's motion, despite the fact that it encapsulated Senator Brown's position only days before. In the meantime Gunns had accepted the deal offered by the Tasmanian government.

The Greens' and, in particular, Senator Milne's behaviour can only be explained as being directed towards securing the transfer of the Triabunna woodchip mill to Graeme Wood's Triabunna Investments Pty Ltd – this being conditional in Gunns being satisfied with the outcome of the forest negotiations, or, more specifically, the amount received for exiting native forest logging. This transfer had still not occurred as at 1 October 2011.[53]

3. Senator Brown communicated with Mr Graeme Wood while taking action in the Senate and elsewhere which was intended to benefit Mr Wood's bid for the Triabunna woodchip mill and damage Aprin's bid.

The following is an excerpt from an interview with Senator Brown by Leon Compton on Hobart's ABC radio on the 14 July 2011, in which Senator Brown admits speaking to Graeme Wood a number of times during the period he was disparaging the bid by Aprin for the Triabunna woodchip mill:

> **Leon Compton** Were you talking with Graeme Wood throughout the process of this deal being negotiated, as you were standing on the floor of the Senate and running down the alternate bid?

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[50] Brown calls for Forestry Tasmania administrator, Media Release by Senator Brown, 14 September 2011

[51] "Gunns gets its money", The *Mercury*, 15 September 2011

[52] Senate *Journals*, p 1522

[53] A title search of one of the two titles for the Triabunna woodchip mill on 1 October 2011 shows the owner still as Tasmanian Pulp & Forest Holdings Limited, subject to a priority notice lodged on 9 September 2011 reserving priority for 60 days for transfer to Triabunna Investments Pty Ltd.

Bob Brown Ah no, not while I was on the floor of the Senate, but I have spoken to him a couple of times...

Leon Compton In the past few weeks?

Bob Brown Yes. Of course I have.

Leon Compton And so you were aware he was part of an alternate bid while you were criticising the Aprin bid, you were aware he was part of an alternate bid?

Bob Brown I saw it on ABC TV, Leon, and knowing the man I contacted him and said I thought it was a good idea, of course I did and of course one should if you believe in promoting Tasmania...[54]

This admission by Senator Brown reinforces the allegation that his actions and those of Senator Milne and the Greens in the Senate were designed to benefit Mr Wood, and that the arrangement of the $1.6 million donation to the Greens had the effect of causing Senator Brown repeatedly to act as Triabunna Investments' representative.

I maintain that such an arrangement existed, regardless of whether the Greens' aiding of Mr Wood's purchase of the Triabunna mill was intended merely to stymie its reopening for wood chipping or to further Mr Wood's business interests. The two were interlinked. Mr Wood gave interviews about his plans for a deep water marina and tourism venture at the site, while Senate Brown talked up the tourism proposal's prospects.

Regardless of whether or not the Greens and Mr Wood's interests were aligned, there is evidence that there was a benefit and an arrangement which had the effect of controlling Senator Brown's independence and which led him to act as a representative of Mr Wood's Triabunna Investments.

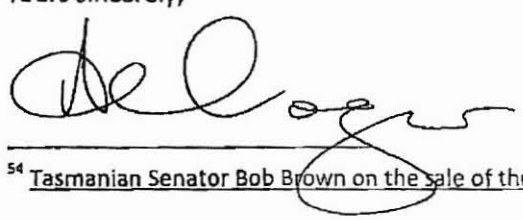
I thus submit that the conduct in question amounts to an improper interference with the free performance by a Senator of his duty – thereby satisfying the essential element of an offence under S.4 of the Parliamentary Privileges Act 1987. The seriousness of this matter is evidenced by the fact that the actions of the Greens Deputy Leader, Senator Milne, and the other Greens Senators were also affected by the arrangement of this donation from Mr Wood – particularly in the Senate where over a period of weeks questions were asked, points of order were taken and votes were cast.

In addition, I submit that the $1.6 million benefit arranged with Mr Wood *"may have the effect"* of controlling or limiting the independence of Senator Brown in other matters in the future (as per the resolutions on Parliamentary Privilege agreed to by the Senate on 25th February 1988).

Accordingly I ask that you give precedence to a motion in the Senate raising this issue as a matter of Privilege.

Thank you for your consideration of this matter.

Yours sincerely,



[54] Tasmanian Senator Bob Brown on the sale of the Triabunna woodchip mill, 936 *ABC* Hobart, 14 Jul 2011

Re: A Referral to the Senate Committee of Privileges of a matter concerning Senators Brown and Milne

Submission on behalf of Senators Brown and Milne on Procedural Fairness

Introduction

1. This submission is provided as the initial response to the letters dated 24 November 2011 from Senator Johnston to Senators Brown and Milne seeking their comments in respect of a matter referred to the Committee of Privileges relating to "political donations made by Mr Graeme Wood, arrangements surrounding the sale of the Triabunna woodchip mill by Gunns Ltd and questions without notice asked by Senator Brown and Senator Milne" (the "**referred matter**"). Comments were sought on the "terms of reference and, in particular, on the matters canvassed in Senator Kroger's letter to the President" (the "**Kroger letter**").

2. As indicated in a letter sent to Senator Johnston on 5 February 2012 on behalf of Senators Brown and Milne, this submission addresses the requirements of procedural fairness in relation to Senator Brandis' proposed participation in the Committee's proceedings in respect of the referred matter. A further submission is being prepared in relation to the substance of the referred matter but, as outlined below, the contention of Senators Brown and Milne is that the Committee of Privileges cannot proceed to deal with the referred matter in accordance with law until the issue of Senator Brandis' participation is resolved in the first instance by him and, if necessary, the Senate, or possibly by the High Court.

3. The process leading to the reference was as follows:

   a) On 6 July 2011, Senators Abetz and Brandis, with the support of Senator Kroger, accused the Greens party, and Senators Brown and Milne in particular, of seeking to advance the commercial interests of Mr Wood and asserted that that alleged endeavour was causally related to a political donation made by Mr Wood to the Greens party (the "**August 2010 donation**").[1]

   b) On 22 November 2011, Senator Kroger notified the President of the Senate of her intention to raise a matter of privilege.

   c) The following day, on 23 November 2011, the President of the Senate, Senator Hogg, made a statement to the Senate in which he communicated his view that Senator Kroger's motion should have precedence. This view was formed and communicated to the Senate without prior notice to Senators Brown or Milne.

4. The task of the Committee is to consider whether the material forming the basis of the referred matter "gives rise to any allegation of contempt" meriting investigation[2] and, if so, to investigate the referred matter and report to the Senate on it. As is the case with any tribunal or other body discharging the functions of the Committee, it is its duty to ensure that any disqualification application to it, or to one of its members, is resolved at the outset (ie before the Committee commences to deal with the substance of the referred matter). Any other course can result in the proceedings of the Committee being vitiated by

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1 Commonwealth, *Parliamentary Debates*, Senate, 6 July 2011, 4180-4183.

2 See letter dated 6 January 2012 from Mr Pye to Mr Browne, p 2; Resolutions Agreed to by the Senate on 25 February 1988 (the "**Privilege Resolutions**"), Resolution 2.

reason of the unlawful participation of a Senator who, as a matter of law, is under a duty not to participate in the matter. That principle was clearly established by the decision of the High Court in *Stollery v Greyhound Racing Control Board*.[3] Further, any failure to resolve any privileges complaint in accordance with the procedural and substantive law applicable to the complaint will undermine and harm the institutional integrity of the Senate.

Senator Brandis must disqualify himself

5. The rules of procedural fairness require that Senator Brandis not participate further in any of the Committee's proceedings concerning the referred matter. The reason for that conclusion is that Senator Brandis stands in the position of accuser vis à vis Senators Brown and Milne and has formed and publically proclaimed conclusions that are clearly adverse to the Senators in relation to the merits of the referred matter. Further, a fair-minded lay observer would, at the least, entertain a reasonable apprehension of bias on the part of Senator Brandis by reason of prejudgment because of his publically proclaimed views about the referred matter and about Senator Brown. If it be necessary to go that far, Senators Brown and Milne contend that Senator Brandis's comments and conduct not only amount to apprehended bias but also to actual bias.

6. The issue of disqualification is required to be addressed at the outset because, if the duty to disqualify arises, it applies from the outset. According to Senate practice, disqualification of a Senator is initially a matter for the Senator

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3 (1972) 128 CLR 509.

concerned and then for the Senate.[4] For the reasons set out below, the failure of Senator Brandis to disqualify himself, or a decision by the Senate not to do so, would be in breach of their duty to accord procedural fairness to Senators Brown and Milne.

The relevant requirements of procedural fairness

7. The Committee and the Senate accept that the Committee's proceedings are governed by the rules of procedural fairness.[5] In any event, as explained below, the rules apply as a matter of law. One consequence of that is that any failure to comply with the rules would, on the submissions of Senators Brown and Milne, be reviewable by the High Court.

8. Procedural fairness requires a hearing by an impartial tribunal. A decision-maker who is, or appears to be, biased in a given case "should disqualify himself [or herself] from hearing, or continuing to hear, the matter".[6]

9. A decision-maker affected by bias, or the apprehension of bias, is disqualified even if he or she is one of a number of persons making up the decision-making body.[7]

10. One form of bias is prejudgment.

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4 Commonwealth, Senate, Committee of Privileges, *Parliamentary Privilege: Precedents, procedure and practice in the Australian Senate 1966-2005*, 125th Report (2005) (the "125th Report") [5.23].

5 See letter dated 6 January 2012 from Mr Pye to Mr Browne, p 2, and also the 24 November letters from Senator Johnston; Privilege Resolution 2.

6 *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 351 (Mason J). See also *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 293-4.

7 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509; *IW v City of Perth* (1997) 191 CLR 1, 50 (Gummow J).

a) The test for determining actual bias in the form of prejudgment is whether the decision-maker has a closed mind to the issues raised and has so prejudged the case, or acted with such partisanship or hostility, as to show that the decision-maker has a mind made up against the party in question and is not open to persuasion in favour of that party.[8] An inquiry about actual bias in the form of prejudgment requires an assessment of the state of mind of the decision-maker in question, on the basis, for the most part, of what the decision-maker has said and done.[9]

b) The test to be applied in Australia in determining whether a decision-maker is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the questions the decision-maker is required to decide.[10]

11. The rules of procedural fairness must, in some cases, "recognise and accommodate differences between court proceedings and other kinds of decision-making".[11] However, the decision-making involved in the exercise of the Senate's power to punish for contempt is not a case in which any modification to those rules would be appropriate, as demonstrated by the following.

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8 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [35]-[36] and [72] (Gleeson CJ and Gummow J).

9 *Michael Wilson & Partners Ltd v Nicholls* [2011] HCA 48 at [33] (Gummow ACJ, Hayne, Crennan and Bell JJ).

10 See, for example, *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Johnson v Johnson* (2000) 201 CLR 488; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Smits v Roach* (2006) 227 CLR 423; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

11 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [4] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, [99]-[100], [187]. See also 125th Report, [5.23].

12. In its First Report of 1999, The United Kingdom Parliament's Joint Committee on Parliamentary Privilege, after emphasising the importance of fairness and expressing the view that, in "dealing with specially serious cases, we consider it is essential that committees of both Houses should follow procedures providing safeguards at least as rigorous as those applied in the courts", stated:[12]

> Further, any person who has a personal interest in the matter under investigation, including a person who made the complaint, should be disqualified from participating in relevant proceedings of the committee or the House, other than as a witness. Again, this is elementary fairness, because those accused are entitled to a hearing by an impartial tribunal: no one should be judge in his own cause.

13. In its Final Report of 1984 (the "**1984 Joint Committee Report**"), the Joint Select Committee on Parliamentary Privilege stated:[13]

> In essence natural justice imports the right to a fair and impartial hearing ... Accordingly, the onus is on the Houses to accord him the fairest of hearings, and the most complete opportunity to defend himself.
>
> ... [P]ersons or organisations whose conduct is being examined by the Privileges Committee are, semantics aside, often in a real sense "persons charged". That the privileges committee cannot itself inflict sanctions is irrelevant. It is the body that reports to the House; it is the body which states in its report the matters it considers material and which recommends, when it sees fit, appropriate action. Characteristically, the House will not conduct a retrial.
>
> ... Nor should it be forgotten that the very fact of having one's conduct investigated by such a committee can seriously damage an individual's reputation.

The Current Legal framework

14. The Senate and the Committee's view that the rules of procedural fairness apply to the entirety of the Committee's proceedings is also the position at law.

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12 United Kingdom, Joint Committee on Parliamentary Privilege, *First Report* (HL 43 – I; HC 214- I, sess 1998-1999, [281] and [283].

13 Commonwealth, *Joint Select Committee on Parliamentary Privilege Final Report*, Parl Paper No 219 (1984), [7.50]-[7.53].

In contrast to the position that prevailed prior to 1987, the *Parliamentary Privileges Act* 1987 (Cth) (the **"1987 Act"**) is now the source of the Senate's punitive powers in respect of offences against it (eg privilege or contempt offences). So much is clear from s 49 of the Constitution (which provides for the powers, privileges and immunities of each House to be "declared by the Parliament") and the full title of the Act: *An Act to declare the powers, privileges and immunities of each House of Parliament and of the members and committees of each House, and for related purposes.* The 1987 Act (in particular, ss 4, 5, 6, 7, 8 and 9) declares the 'powers, privileges and immunities' of the Senate (and the House of Representatives) in accordance with s 49 of the Constitution.[14]

15. The power of the Senate to find, and impose punishment for, an offence against the House is a power to adjudge and punish criminal guilt. In *Witham v Holloway*[15] the High Court held that the power to punish for contempt of court, whether by imprisonment or the imposition of fines, must realistically be seen to be criminal in nature. It is clear that the now statutory power of the Senate to adjudge and punish criminal guilt is judicial in nature,[16] albeit that it is exercised by a House of Parliament, rather than by a court established under Chapter III of the Constitution. As such, the power necessarily entails procedural fairness.[17] It is inconceivable as a matter of law or principle that

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14 See also Constitution, s 51(xxxvi).

15 (1995) 183 CLR 525 at 534 per Brennan, Deane, Toohey and Gaudron JJ.

16 *Erskine May's Law, Privileges, Proceedings and Usages of Parliament* (19th ed, 1976) 118; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ). See also *Egan v Willis* (1998) 195 CLR 424 at [136] (Kirby J).

17 See, eg: *Nicholas v The Queen* (1998) 193 CLR 173 at [74] (Gaudron J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [42] (Gaudron and Gummow JJ); *Ebner v*

the rules of procedural fairness do not apply to proceedings in the exercise of the Senate's power to adjudge and punish criminal guilt.

16. In any event, the now statutory power of the Senate to punish for offences against the House would require plain words of necessary legislative intendment[18] to exclude the rules of procedural fairness and no such words are to be found in the 1987 Act.

17. It is clearly in the interests of the institutional integrity and soundness of the Senate's processes that bias not be allowed to affect any stage of the Committee's proceedings. Further, the rules of procedural fairness must be applied at each stage of the Committee's processes, because, among other things, of the potential for irremediable damage to reputation to be caused by any decision to proceed to investigation.[19] The potential for such irremediable damage was recognised by the 1984 Joint Committee Report, in which the Select Committee said:[20]

> Nor should it be forgotten that the very fact of having one's conduct investigated by such a committee can seriously damage an individual's reputation.

18. The exercise of the Senate's power to punish under the 1987 Act, and therefore the role of members of the Committee of Privileges in relation to that power, commences with the Committee's role in determining whether the matter

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Official Trustee in Bankruptcy (2000) 205 CLR 337 at [79]-[81] (Gaudron J); *Thomas v Mowbray* (2007) 233 CLR 307 at [111] (Gummow and Crennan JJ).

18 *Annetts v McCann* (1990) 170 CLR 596 at 598.

19 *Rees v Crane* [1994] 2 AC 173. See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Annetts v McCann* (1990) 170 CLR 596.

20 1984 Joint Committee Report, [7.53]. See also [7.32]-[7.33] for a further discussion of the potential for irremediable and unjust harm to be caused to reputations by the mere making public of a complaint of contempt that turns out to be misconceived.

referred gives rise to any allegation of contempt. Cases such as *R v Murphy*[21] and *James v Robinson*[22] establish that the criminal process commences with the bringing of a criminal charge and therefore includes committal proceedings as part of that process. In this respect, the Committee's present task is relevantly analogous to a Committal hearing.

19. Any decision that was the outcome of a process in which there was a failure to accord procedural fairness would be in excess of power.[23] The High Court's jurisdiction would, in the submission of Senators Brown and Milne, include review for such an excess of power.[24] Previous authority that may be viewed as limiting that jurisdiction, such as *R v Richards; Ex Parte Fitzpatrick and Browne*[25], will need to be reconsidered in the context of the 1987 Act, which now places the relevant powers of the Houses in a statutory framework.

20. It follows that any decision of Senator Brandis, or of the Senate, to the effect that the Senator remains a member of the Committee of Privileges in relation to the referred matter is one that may be reviewable by the High Court. Senators Brown and Milne reserve their rights in relation to any such application.

21. It is in that context that we turn to consider the position of Senator Brandis. However, before doing so, it should be noted that these submissions do not directly or indirectly raise any question about the propriety of Senator Brandis's comments or conduct in the Senate. The issues raised relate solely to the

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21 (1985) 158 CLR 596, 618 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

22 (1963) 109 CLR 593.

23 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

24 See E Campbell, *Parliamentary Privilege* (2003) 202-6. See also See *Egan v Willis* (1998) 195 CLR 424.

25 (1955) 92 CLR 157.

propriety of the Senator continuing to participate as a member of the Committee of Privileges in relation to the referred matter because he made the comments and engaged in the conduct in question.

The position of Senator Brandis

22. The respective contentions that:

a) Senator Brandis, together with Senators Abetz and Kroger, must realistically be seen to stand in the position of accusers of Senators Brown and Milne;

b) Senator Brandis's comments demonstrate he has made up his mind about what the result of the proceedings before the Committee should be; and

c) Senator Brandis is affected by a reasonable apprehension of bias,

are based on the matters set out in the following paragraphs.

23. On 6 July 2011, during Questions without Notice, Senators Abetz and Brandis, with the support of Senator Kroger, alleged that Senators Brown and Milne had sought to advance the commercial interests of Mr Wood and that that alleged endeavour was causally related to the August 2010 donation.

24. In particular, Senator Brandis said:

> When Senator Abetz and I in the opposition allege that there is a direct conflict of interest we do not do so lightly, but the facts do not admit of controversy. Of two competing commercial parties Mr Wood and Aprin, one of them, Mr Wood's company, paid $1.6 million to the Australian Greens last year, and in the months since and as recently as question time today a series of questions and statements have come from Greens senators—and in the Tasmanian parliament as well by Greens members of the Tasmanian parliament—seeking to damage the

> interests of Mr Wood's commercial competitor. There is a direct relationship between these events. Senator Brown, if he had any spine, would come into the Senate chamber and explain himself.[26]
>
> There is nothing of itself wrong with a large donation being received by a political party as long as disclosure obligations are met and the other requirements of the Commonwealth Electoral Act are met. But what makes this a particularly serious case, what makes this case approach the borders of corruption[27] is that we now know that in public speeches both beyond parliament and within the Senate chamber Senators Brown and Senator Milne have sought to advance the commercial interests of that particular donor, Mr Graeme Wood.[28]

25. Senator Brandis's opening words at paragraph 24 demonstrate not only his adoption of Senator Abetz's earlier comments but also his joining with the Senator as an accuser. Senator Brandis's statements about a conflict of interest that does not admit of controversy adopted, and will also be seen by the reasonable bystander as adopting, those made earlier by Senator Abetz, who accused the Greens of a "shameful conflict of interest"[29] and said, amongst other things:[30]

> Today we saw the Greens' latest shameful instalment of an unconscionable campaign for gaining a commercial advantage for its multimillionaire mate Mr Wood, a man who donated $1.6 million to the Greens. The Greens have manically pursued the bid by Mr Wood against another commercial player for a particular property in Tasmania and their manic pursuit of this can only be explained in terms of the huge donation that they received.

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26 Commonwealth, Senate, *Parliamentary Debates*, 6 July 2011, 4182-4183. (Emphasis added.)

27 The fact that Senator Brandis does not allege actual corruption is relevant to the criterion, required to be considered by the President under Privilege Resolution 4(b) and the Senate under Privilege Resolution 3(b), as to "the existence of any remedy other than [the Senate's punitive] power for any act which may be held to be a contempt".

28 Commonwealth, Senate, *Parliamentary Debates*, 6 July 2011, 4182. (Emphasis added.)

29 Commonwealth, Senate, *Parliamentary Debates*, 6 July 2011, 4182.

30 Commonwealth, Senate, *Parliamentary Debates*, 6 July 2011, 4180.

26. After Senator Abetz accused the Greens of having put up "democracy for sale", Senator Kroger interjected "Hypocrisy for sale". Senator Abetz then continued:[31]

> It is hypocrisy for sale with the Greens, and I note the $1.6 million donation has not hit their website. The Greens stand condemned for their conflict of interest and they ought to fess up to the Australian people.

27. On 6 July 2011, Senator Abetz issued a media release entitled "Hypocrisy for Sale", the very words used by Senator Kroger in her interjection during question time on 6 July 2011. There was a chronology attached to the media release, the content of which evidently formed the basis of the chronology recited by Senator Abetz during question time on 6 July[32] and the starting point for the chronology in the Kroger letter. With one exception, each of the steps in Senator Abetz's chronology appears in the Kroger letter. In some cases, the wording used is identical; in others, the wording has been altered in minor ways. In one case, relating to statements of Senator Milne made on 4 July 2011, a different quote of Senator Milne is used.

28. On 3 November 2011, during Questions without Notice, Senator Brandis said:[33]

> So, notwithstanding that it is not even the policy of Senator Brown's party that there should be tax deductible status, he seeks through a submission he has lodged with the media inquiry to secure tax deductible status of which the principal beneficiary, indeed the only known beneficiary, will be his own benefactor. If the start-up cost is $2 million to $3 million for this enterprise then the value of the tax deduction will be approximately one-third of that; in other words, up to $1 million.
>
> As I said before, let those who hear this debate or read the Hansard draw the dots for themselves. Senator Brown secures the biggest political donation in Australian history from Mr Graeme Wood and

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31 Commonwealth, Senate, *Parliamentary Debates*, 6 July 2011, 4181. (Emphasis added.)

32 Commonwealth, Senate, *Parliamentary Debates*, 6 July 2011, 4180.

33 Commonwealth, Senate, *Parliamentary Debates* 3 November 2011, 8184. (Emphasis added.)

> now he seeks to favour Mr Graeme Wood by making a submission to the media inquiry which, were it to be approved, were it to be adopted by the government, would be worth up to a million dollars to his own benefactor.
>
> I think next time we hear from Senator Brown about integrity we will listen with an even more cynical ear, just as when we hear from Senator Brown about parliamentary standards and the role of the Senate, after the disgrace of his performance this morning, we will be even more cynical—if it were possible to be more cynical. The one person who cannot speak about integrity is Senator Bob Brown.

29. The inescapable conclusion from the above matters is that Senator Brandis was involved, directly or indirectly, in the complaint leading to the referred matter. The matters set out above also lead to the following conclusions, each of which must lead to disqualification in accordance with well established legal principles:

a) Senator Brandis "is in truth the accuser", or one of the accusers, of Senators Brown and Milne;[34]

b) Senator Brandis has "a personal interest in the proceedings … and ha[s] formed a conclusion, adverse to [Senators Brown and Milne], about what their result should be";[35] and

c) a fair-minded observer would reasonably apprehend that Senator Brandis had made up his mind about the outcome of any proceedings concerning the referred matter.[36]

30. The unequivocal statements of a 'direct conflict of interest' in relation to the $1.6 million donation on the basis of facts that 'do not admit of controversy' and of 'bordering on corruption' reflect a clear conclusion that the donation

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34 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 527 (Gibbs J). See also 516 (Barwick CJ), 520 (McTiernan J), 528 (Stephen J).

35 *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 525 (Menzies J).

36 See authorities cited in paragraph 10(b) above.

placed Senator Brown in a conflict between his interest in relation to the donation and his duty to freely discharge his duties as a Senator ie the charge he is accused of by Senators Brandis, Abetz and Kroger.[37]

31. In accordance with the High Court's decision in *Stollery v Greyhound Racing Control Board*,[38] Senator Brandis is under a duty to disqualify himself from any participation in the Committee proceedings. It also must follow that, in accordance with the *Livesey* test, a fair minded observer might entertain a reasonable apprehension that Senator Brandis might not bring a fair and impartial mind to the resolution of the referred matter.

32. In addition, Senator Brandis has made comments about Senator Brown in another context that would lead a fair-minded lay observer to entertain a reasonable apprehension of bias on the part of Senator Brandis, by reason of prejudgment as to Senator Brown's credit and integrity.[39]

33. In addition to the highly prejudicial and adverse comments made by Senator Brandis set out above, on 28 October 2003, in the Senate, Senator Brandis accused Senator Brown of 'a contempt of parliament' and launched a sustained attack on Senators Brown and Nettle, comparing contemporary Greens politics, values and methods to Nazi politics, values and methods in the 1930s in Germany.[40] Senator Brandis finished his attack with the following:[41]

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37 It is to be noted that, in this context, Senators Abetz and Kroger had referred to a "shameful conflict of interest", "democracy for sale" and "hypocrisy for sale" in the passages set out at paragraphs 25 and 26 above.

38 (1972) 128 CLR 509.

39 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 300 (Mason, Murphy, Brennan, Deane and Dawson JJ).

40 Commonwealth, Senate, *Parliamentary Debates*, 28 October 2003, 16998-17003.

41 Commonwealth, Senate, *Parliamentary Debates*, 28 October 2003, 17003. (Emphasis added.)

> As well—and I will not go too much further into this—we see other common features. We see the very clever use of propaganda. We see the absolute indifference to truth. We see the manipulation of bodgie science in order to maintain political conclusions. We see the hatred of industrialisation. We see the growth of occultism built around a single personality. We see a fundamentalist view of nature in which the integrity of the human person comes second to the whole of the natural system. My point is that the behaviour we saw from Senator Nettle and Senator Brown last Thursday was not just a publicity stunt. It was not just a random event. It was the very mechanical prosecution in this parliament of a profoundly antidemocratic ideology having deeply rooted antidemocratic antecedents.

Senator Brandis concluded by accusing Senators Brown and Nettle of "crypto-fascist politics we do not want in this country." It is difficult to imagine a more serious attack on a member of Parliament's credit and integrity than one associating that member with Nazi politics, values and methods.

34. In *Livesey v New South Wales Bar Association*, [42] the High Court accepted that the previous expression by a decision-maker of adverse views about either a question of fact that constitutes a live and significant issue, or about the credit of a person whose evidence is of significance, gave rise to a reasonable apprehension of bias.

35. On any view, Senator Brown's explanation of the referred matter is critical to any substantive consideration of it. Because a reasonable bystander may reasonably apprehend that Senator Brandis might not bring an open mind to the question of Senator Brown's credit or integrity, it is the duty of Senator Brandis to refrain from participating in any of the Committee's proceedings concerning

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42 (1983) 151 CLR 288 at 300

the referred matter.[43] As the allegations against Senator Milne are premised on those made against Senator Brown the same result must follow.

Further Proceedings in the Senate

36. If Senator Brandis accedes to the disqualification application a question will arise as to whether he should be replaced and, if so, by whom. These are matters for the Senate but subject to one qualification. A charge, or possible charge of an offence against a House, being criminal in nature, should be considered by a fair and impartial Committee and not along any political lines. Indeed, the entire determination process should not be permitted to be politicised, for example, by the Senator's party, rather than the Senate, suggesting a replacement member if there is to be one. The tradition that the Privileges Committee does not act on party lines in contempt matters was acknowledged in the 1984 Joint Committee Report.[44]

37. If Senator Brandis does not accede to the disqualification application, Senators Brown and Milne propose to make the same application to the Senate and wish to be heard further in relation to it.

38. In relation to procedure, Senators Brown and Milne indicate that they are represented by Ron Merkel QC and Frances Gordon of Counsel in this matter and that their counsel has settled these submissions. If Senator Brandis or the Senate would be assisted by submissions from Counsel, the Senators would ensure that that assistance will be provided.

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43 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 294, 300 (Mason, Murphy, Brennan, Deane and Dawson JJ).

44 1984 Joint Committee Report, [7.44].

39. There is also an issue about this application and the resolution of it being heard or determined in private. While Senators Brown and Milne accept the Committee's powers to keep some matters before it confidential, the present matter, having been aired in the media and raising a matter of procedural fairness in what is essentially a criminal reference, is not a matter that falls into that category. There is every reason that such an application ought be dealt with transparently and, accordingly, it is contended that these submissions should be published by the Committee.

40. Further, although the application in the first instance is to Senator Brandis it is clear that the other Committee members and the other alleged contemnor, Mr Wood, have an interest in it and should be provided with copies of these submissions.

41. Finally, for the assistance of the Committee, copies of the following key materials are enclosed with this submission: the Hansard extracts referred to and the decisions of the High Court in *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 and *Livesey v New South Wales Bar Association* (1983) 151 CLR 288. Although Senators Brown and Milne have set out the Hansard extracts upon which they particularly rely, they rely on the whole of the relevant speeches.

Bleand Browne

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Solicitors for Senators Brown and Milne

8 February 2012

Re: The Referral to the Senate Committee of Privileges of a matter concerning Senators Brown and Milne

Second Submission on behalf of Senators Brown and Milne in relation to Senator Kroger's allegations

Introduction

1. This submission, which has also been settled by Ron Merkel QC and Frances Gordon of counsel, is the second submission[1] provided in response to the letters dated 24 November 2011 from Senator Johnston to Senators Brown and Milne seeking their comments in respect of a matter referred to the Committee of Privileges relating to "political donations made by Mr Graeme Wood, arrangements surrounding the sale of the Triabunna woodchip mill by Gunns Ltd and questions without notice asked by Senators Brown and Senator Milne" (the "**referred matter**"). Comments were sought on the "terms of reference and, in particular, on the matters canvassed in Senator Kroger's letter to the President" (the "**Kroger letter**").

2. This submission is provided in the context of the following explanation of the present process, provided by the Secretary to the Committee, Mr Pye, in a letter dated 6 January 2012:

> It is important to note that in this initial stage the committee is not investigating any particular allegations; rather it is seeking to establish the facts of the matters referred…
>
> Should the committee consider that any particular allegations arise against any person which require investigation, the committee is bound to pursue those allegations in accordance with the Senate Privilege Resolutions, which include provisions directed at procedural fairness or natural justice.

3. Accordingly, Senators Brown and Milne understand that the present task of the Committee is to consider whether the matter referred to it "gives rise to any

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[1] The first submission, provided to the Committee on 8 February 2012, addressed the requirements of procedural fairness.

allegation of contempt"[2] and not to make findings as to any alleged contempt.[3] These submissions are directed to assisting the Committee in the former task, and Senators Brown and Milne understand that they will be provided by the Committee with opportunities to be heard on the following additional occasions, should those occasions arise:

3.1. If the Committee decides that there are allegations that require investigation, they will be afforded procedural fairness in responding to those allegations.[4] At that time, Senators Brown and Milne would be informed of "any allegations known to the Committee" and "of the particulars of any evidence which has been given in respect of" the Senators.[5]

3.2. If the Committee "determines findings to be included in the Committee's report, a person affected by those findings shall be acquainted with those findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate."[6]

4. In summary, this submission is to the following effect:

4.1. The material before the Committee[7] does not give rise to any bona fide or reasonably arguable allegation against Senator Brown or Senator Milne of a privilege or contempt offence, which can satisfy the pre-

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2 Resolutions Agreed to by the Senate on 25 February 1988 ("**Senate Resolutions**"), Resolution 2.

3 It is for this reason that the Committee did not, when asked, supply any particulars of the "contract, understanding or arrangement" referred to in the 24 November letters. See letter from Mr Pye dated 6 January 2010, second page. See also the letter dated 16 December 2011 from FitzGerald and Browne Lawyers to Senator Johnston, in which particulars were sought.

4 Letter from Mr Pye dated 6 January 2010, second page. See also Senate Resolutions, Resolution 2.

5 Senate Resolutions, Res. 2(1).

6 Senate Resolutions, Res. 2(10).

7 See paragraph 19 below.

conditions in s 4 of the *Parliamentary Privileges Act 1987* (Cth) (the **"1987 Act**").[8]

4.2. In those circumstances, the Committee should determine that the evidence and other material before it does not justify the allegations of contempt or breach of privilege made against Senators Brown and Milne in the Kroger letter and that those allegations do not require any further investigation.

4.3. The Committee should also recommend that the legal costs incurred by Senators Brown and Milne in responding to the referred matter be reimbursed.

4.4. In order to prevent any further misuse of the Senate's privilege powers, the Committee should conduct an urgent review of the Senate's procedures to take into account the consequences of the 1987 Act and the criminal nature of the power and jurisdiction it is exercising under that Act. The review is necessary because there appears to be an inadequate recognition in the current procedures of the effect of the Act, which is that the investigation and determination of a matter of contempt of the Senate is no longer a matter solely for the Senate. In particular, the exercise of the powers of the Senate are criminal in nature, are subject to the supervision of the High Court and must be exercised in accordance with law, rather than in accordance with the discretionary powers of the Senate.

4.5. The Committee ought to meet to resolve the present matter without delay.

The referred matter

5. On 24 November 2011, the matter that was referred to the Senate Committee of Privileges was described in the following terms (the "**Kroger motion**"):[9]

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8 Although in those submissions we employ the terms 'offence against a House', 'contempt' or 'privilege' those terms are interchangeable for the purposes of the 1987 Act, which is the source of the Senate's power in contempt or breach of privilege matters.

9 Commonwealth, *Parliamentary Debates*, Senate, 24 November 2011, 9507-9508.

Having regard to matters raised by Senator Kroger relating to political donations made by Mr Graeme Wood, arrangements surrounding the sale of the Triabunna woodchip mill by Gunns Ltd and questions without notice asked by Senator Bob Brown and Senator Milne:

(a) whether any person, by the offer or promise of an inducement or benefit, or by other improper means, attempted to influence a senator in the senator's conduct as a senator, and whether any contempt was committed in that regard; and

(b) whether Senator Bob Brown received any benefit for himself or another person on the understanding that he would be influenced in the discharge of his duties as a senator, or whether he entered into any contract, understanding or arrangement having the effect, or possibly having the effect, of controlling or limiting his independence or freedom of action as a senator or pursuant to which he or any other senator acted as the representative of an outside body in the discharge of their duties as senators, and whether any contempt was committed in those regards.

Legal Framework

Section 4 of the 1987 Act

6. Section 4 of the 1987 Act, which governs the Committee's task, provides:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, 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.

7. The Kroger letter and the Kroger motion travel well beyond the mandatory preconditions imposed by s 4 and to that extent fall outside the ambit of conduct capable of constituting a privilege or contempt offence. For example, the Kroger motion refers to "an understanding or arrangement … possibly having the effect … of controlling or limiting his independence" and the Kroger letter uses the expressions "may have the effect of controlling or limiting the independence of Senator Brown"[10] and "appearing to influence the conduct of Senator Brown".[11]

8. Those expressions cannot properly, or in accordance with law, be regarded as part of the matter referred and should be disregarded by the Committee. The short point is that, as a matter of law, any allegation of a privilege or contempt

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10 Kroger letter, p. 12.

11 Kroger letter, p. 3.

offence cannot allege conduct that does not satisfy the criteria in s 4. Also, to the extent that the Kroger letter canvasses matters that do not fall within the referred matter (defined in the Kroger Motion as the political donation,[12] the sale of the mill and the questions without notice) those matters should also be disregarded by the Committee.

9. Under s 4 of the 1987 Act, "improper interference" is a necessary element in any offence. The facts of this case do not disclose any interference, let alone improper interference, with the free performance of Senator Brown's or Senator Milne's duties as Senators, or those of any other Greens Senator.

10. In *Meissner v The Queen*,[13] the High Court considered the role of 'improper influence' in relation to the offence of perverting the course of justice. Brennan, Toohey and McHugh JJ made it clear that the mere putting of advice or argument is not "improper". They said that, "as long as the argument or advice does not constitute harassment or other improper pressure and leaves the accused free to make the choice, no interference with the administration of justice occurs".[14] They went on to say:[15]

> Conduct is likely to have the tendency to interfere with a person's free choice to plead not guilty, however, when the conduct consists of a promise or benefit that is offered in consideration of the accused pleading guilty. The difficulty in such cases is to draw the line between offers of assistance that improperly impact on the accused's freedom of choice and offers of assistance that are legitimate inducements. In most cases, that difficulty can be resolved by determining whether, in all the circumstances of the case, the offer could reasonably be regarded as intended to protect or advance the legitimate interests of the accused having regard to the threat to those interests that arises from the institution of the criminal prosecution. Thus, to offer to pay an accused person's legal expenses if he or she pleads guilty is not improper conduct for this purpose if the advantages in pleading guilty can reasonably be regarded as outweighing the consequences to the accused that might flow from a conviction after a plea of not guilty and the offer is made only for that reason. On the other hand, to pay the accused's legal expenses in consideration of the accused changing his or her plea to a plea of guilty when the payment is made for the purpose of protecting the interests of the payer or some other person is an interference with the course of justice. Such an offer has the tendency to interfere with the accused's freedom of choice and seeks to serve an interest other than those interests of the accused that are

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12 The Kroger motion incorrectly refers to "donations" (plural).

13 (1995) 184 CLR 132.

14 (1995) 184 CLR 132, 143. (Emphasis added.)

15 (1995) 184 CLR 132, 143.

> threatened by the prosecution. When the offer of assistance is actuated by several purposes, one of which is to protect the interests of the accused, liability must depend on whether or not the latter purpose was the real purpose that actuated the offer.

11. The role of 'improper influence' on an accused person's freedom of choice as to a plea is analogous to the role of 'improper interference' on a parliamentarian's free performance of his or her duties as a member. Thus, the compound expression 'improper interference' would usually require conduct of a kind that involves 'harassment or other improper pressure' that has interfered with, or is likely to interfere with, the free performance by a member of the member's duties as a member. Acceptance of an 'offer of assistance' by way of a lawful political donation, which advances the legitimate political objectives of the member or the member's party, is not capable of constituting improper interference in the absence of some *quid pro quo* on the part of the member that is inconsistent with or contrary to the free performance of the member's duties as a member. There is no evidence whatsoever of any such *quid pro quo* in the present matter. Indeed, the evidence is quite to the contrary (ie the political donation by Mr Wood did not, directly or indirectly, involve any *quid pro quo* on the part of Senators Brown or Milne).

Proper approach to determining whether materials disclose bona fide or reasonably arguable allegations

12. In discharging its duties, the Committee can derive guidance from the analogous task of a Magistrate who is required to determine whether a prima facie case against an accused exists such that the accused should be committed for trial. The test for committal requires a Magistrate to ask whether there is evidence of such weight as to be capable of satisfying the tribunal of fact, beyond reasonable doubt, that the defendant has committed the offence with which he or she has been charged.[16]

13. According to the 125th Report of the Committee of Privileges,[17] the Committee's practice is to do a combination of the following:

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16 *Thorp v Abbotto* (1992) 34 FCR 366, 372 and 382; *Doney v The Queen* (1990) 171 CLR 207, 214-215; *Forsyth v Rodda* (1988) 37 A Crim R 50, 67-69.

17 p. 65.

- to vary the standard of proof in accordance with the gravity of the matter before the committee and the facts to be found; and
- not to adhere to any stated standard of proof or to formulate a standard of proof, but simply to find facts proved or not proved according to the weight of the evidence.

14. This practice, however, does not address the two stage process in which the Committee is presently engaged as outlined at [3] above. Also, for the reasons set out later, to the extent that this practice might permit a departure from the criminal standard of proof in respect of the referred matter, it is submitted that this would be inconsistent with the 1987 Act and the High Court's decision in *Witham v Holloway*.[18] In that case, the High Court held[19] that all contempts had to be proved according to the criminal standard of proof, whether they were civil contempts or criminal contempts. That is, the contempt must be proved beyond reasonable doubt.

15. *Witham v Holloway* was in the context of contempt of court. However, the reasoning of the Court is equally applicable to the present context, particularly when regard is had to the role of the 1987 Act. The High Court's reasoning was that contempt proceedings are brought to punish contemnors and, as a matter of law, in Australia, punishment cannot be imposed on a balance of probabilities standard of proof.[20] The same reasoning applies to the power of a House of Parliament to punish for offences against a House, which is equivalent for present purposes to a contempt of court. In that regard it is noted that the question raised by the referred matter is whether 'a contempt was committed'. As the joint judgment in *Witham* stated:

> Punishment is punishment, whether it is imposed in vindication, or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines, the usual sanctions for contempt, constitute punishment.[21]

16. The source of the Senate's power to imprison or fine is the 1987 Act. Senators Brown and Milne also rely upon the analysis of the 'Current Legal Framework'

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18 (1995) 183 CLR 525.

19 *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ), 545 and 548 (McHugh J).

20 *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ), 545 and 548 (McHugh J).

21 *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ).

set out at [14] to [18] of their 'Procedural Fairness' submission to the Committee dated 8 February 2012 (which paragraphs are attached) to establish that the Committee is exercising its powers in a matter that involves the power to adjudge and punish criminal guilt. That power was stated by the High Court in *Witham v Holloway*[22] as one that 'must realistically be seen as criminal in nature'.

17. An essential attribute of all proceedings of a criminal nature in Australia is that the guilt of the accused person must be proved beyond reasonable doubt.[23] The Senate's criminal jurisdiction conferred under the 1987 Act must be treated as incorporating the fundamental rights of accused persons, including the right to be represented by lawyers and the right not to be found guilty of a criminal offence proved to any lesser standard than beyond reasonable doubt. We doubt whether it is within Parliament's legislative power to create a lesser standard but it is well established that if any such power was to be exercised 'words of necessary intendment' would be required[24] to remove any fundamental rights of an accused person. No such words appear in the 1987 Act.

No allegation of contempt disclosed

18. The material before the Committee does not disclose any allegation that warrants investigation by the Committee. The material does not put forward evidence capable of satisfying the Committee beyond reasonable doubt, or on any lesser standard, that either Senator Brown or Senator Milne have committed an offence within the terms of s 4 of the 1987 Act or otherwise.

    18.1. The Kroger letter is manifestly deficient and does not contain any material that gives rise to any bona fide or reasonably arguable allegation of an offence by Senator Brown or Senator Milne or any other Greens Senator.

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22 At p 534 per Brennan, Deane, Toohey and Gaudron JJ.

23 See *R v Cheikho* (2008) 75 NSWLR 323, [150]-[154] (Spigelman J).

24 See *Annetts v McCann* (1990) 170 CLR 568 at 598. See also *Al-Kateb v Godwin* (2004) 219 CLR 562, [19]; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, [89]; *Coco v R* (1994) 179 CLR 427, 437.

18.2. The evidence before the Committee positively demonstrates that there is no proper basis for any allegation of an offence by Senator Brown or Senator Milne or any other Greens Senator.

The Kroger letter

19. In the 24 November letters, Senator Johnston wrote that "the Committee of Privileges will be examining the documents tabled by the President" on 23 November 2011, being the "correspondence from Senator Kroger".[25] The Senator also asked for comments by Senator Brown and Senator Milne to be directed in particular to the "matters canvassed in Senator Kroger's letter". No other relevant documents have been provided to Senators Brown and Milne.

20. The Kroger letter refers to a number of events that took place outside the Senate. However, the President's decision that Senator Kroger's motion should have precedence was conditional on the premise that "the asking of questions without notice by Senators Brown and Milne is central to the case put by Senator Kroger".[26] It was on this basis that the President concluded that "the only remedy for the alleged conduct lies within the Senate's contempt jurisdiction".[27] Accordingly, the focus of this submission is on the questions without notice and certain other conduct of Senators Brown and Milne in the Senate. For the reasons set out in [8] above these submissions do not seek to address matters that might have been canvassed in the Kroger letter that fall outside the referred matter.

21. The substantial allegation made in the Kroger letter is that there was improper interference with the free performance by a Senator of his or her duty and that Mr Wood, Senator Brown, and perhaps Senator Milne and others, committed offences against the Senate satisfying the pre-conditions in s 4 of the 1987 Act.[28]

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25 Commonwealth, *Parliamentary Debates*, Senate, 23 November 2011, 9381.

26 Ibid.

27 Ibid.

28 Kroger letter, p 12.

22. The basis for the allegation is the mere assertion that the following events were causally related:

- Mr Wood's donation to the Greens party for the purposes of the August 2010 election (the "**August 2010 donation**"); and
- questions asked or statements made in the Senate by Senators Brown and Milne in mid-2011, tending, so it is alleged, to demonstrate support for the acquisition of the Triabunna woodchip mill for use as a eco-tourism resort and opposition to the acquisition by a logging consortium of the mill for continued woodchipping (the "**2011 conduct**").

23. Two sale agreements are central to Senator Kroger's allegation:

- an agreement made on or around 14 June 2011, never completed, for the sale of the Triabunna woodchip mill by Gunns Limited (**"Gunns**") to a consortium involving Aprin Pty Ltd (respectively, the "**failed Aprin sale**" and the "**Aprin consortium**"); and
- an agreement made on or around 13 July 2011, apparently completed on 15 July 2011, for the sale of the Triabunna woodchip mill by Gunns to Triabunna Investments Pty Ltd (the "**Triabunna Investments sale**").

Incomplete, selective and inaccurate version of events

24. The motivation for, and the bona fides of, the Kroger letter and Senator Kroger's motion of 24 November 2011 must be seriously questioned by reason of the incomplete and selective version of events provided by the Senator, described in the following paragraphs.

25. First, the Kroger letter's omission of any reference to the date of the August 2010 donation is significant as it seeks to sidestep the central issue, being the lack of evidence connecting the 2010 and 2011 events asserted by Senator Kroger to be causally linked. The purported conflation of the 2010 donation with the 2011 conduct conveniently ignores the simple and obvious fact that, at the time of the 2010 donation, the events the subject of the questions were not even remotely in prospect or foreseeable, thereby rendering any causal relationship between the two to be fanciful.

26. Second, the "chronology" in the Kroger letter begins in April 2011, which is almost a year after the 2010 donation was first discussed and makes no reference to the public disclosure of that donation in January 2011 or to the date of Gunns' announcement in November 2010 of its intention to sell the mill.

27. Third, the Kroger letter makes highly selective and inaccurate use of the sources relied upon.

    27.1. For example, the account given[29] of an article published in the *Sydney Morning Herald* on 8 January 2011 omits the following explanation given of Mr Wood's motivation for making the August 2010 donation:

> Wood's driving motivation is personal, rather than political. Having stepped back from executive duties at Wotif, he has time to think. A one-year-old grandson, Liam, focuses his mind on what the world will be like in a century.
>
> 'The only agenda is my concern for the environment and what it's going to be like when my grandson is 20 or 40 or 60,' Wood says.

    27.2. Another example appears on page 8 of the Kroger letter, where there is a reference to an article published in the *Mercury* on 14 July 2011, and its reporting of "accusations of inappropriate interference by state and federal Greens politicians". Not only is the accusation unsubstantiated, but the source of the accusation is neither identified nor explained. Yet the chronology puts this forward as if it were a fact. In fact, the only accusations of "inappropriate interference by State and Federal Greens politicians" that can be found are accusations on Senator Abetz's website in the form of media releases on 13 July 2011 and 14 July 2011. As outlined at [22] to [29] of the first submission on procedural fairness, Senators Abetz, Brandis and Kroger must realistically be seen to be joint accusers of Senator Brown and Senator Milne[30]. On the face of it, Senator Kroger is relying on the *bootstraps* allegation of using her co-accuser's allegation as somehow supporting or adding to the strength of her accusation.

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29 Kroger letter, p. 2.

30 See the annexed media statement from Senator Abetz dated 6 July 2011 and attached chronology (Annexure 8)

27.3. A third example is the reference in the chronology to Senator Brown issuing a press release "promoting the bid by a consortium, including Mr Graeme Wood".[31] In fact, in the media release,[32] what Senator Brown said was that he "welcomed" the tourism bid, and to characterise this as "promoting" the purchase is inaccurate.

28. Fourth, Senator Kroger's motion on 24 November 2011 refers to "political donations made by Mr Graeme Wood",[33] in circumstances where only one donation is alleged in the Kroger letter, and where there is no factual basis at all upon which Senator Kroger could allege more than one donation.

29. Fifth, the Kroger allegations are in large part based on the following two flawed factual premises:

29.1. It was a condition of the failed Aprin sale that "federal money [would flow] to Gunns as part of a Forest Agreement or to Aprin".[34]

29.2. It was a condition of the Triabunna Investments sale that Gunns was "satisfied with the outcome of the Tasmanian Forestry Agreement, and, even more explicitly, on Gunns being satisfied with the amount for compensation for exiting native forest logging".[35]

There is no basis for either premise.

30. As to the first premise:

30.1. The media release issued by Gunns on14 June 2011 regarding the failed Aprin sale relevantly stated that the sale was "conditional on satisfactory progress in the implementation of the Tasmanian forests [sic] Statement of Principles".

30.2. The Statement of Forest Principles makes no provision for Gunns to be paid public funds, whether as compensation for contractual rights

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31 Kroger letter, p. 5.

32 Attached as Annexure 7.

33 Emphasis added.

34 Kroger letter, p.4. This premise is implicit in the allegation that Senators Brown and Milne "campaigned … to sabotage this sale by seeking to prevent any federal money flowing to Gunns as part of a Forest Agreement or to Aprin".

35 Kroger letter, p. 4.

foregone by it or otherwise, and would not reasonably have been understood to make such provision.

31. As to the second premise:

    31.1. The Kroger letter asserts that such a condition was "widely reported".[36] This assertion appears to be based on one statement of Mr Bob Gordon quoted in an article in the Hobart *Mercury* and one article in the Launceston *Examiner*.[37] Neither of those sources supports the assertion. Rather, they suggest that there may have been a condition subsequent to the sale relating to the reopening of the mill by the mill's new owners.

    31.2. The media release issued by Gunns on 13 July 2011 regarding the Triabunna Investments sale stated:

> The terms of the sale agreement provide for the facility to be leased to an industry operator as a woodchip export business, to operate on a basis consistent with the Tasmanian Statement of Forest Principles.

    31.3. Therefore, there is no basis for the allegation that the sale to Triabunna Investments was conditional on any compensation being paid to Gunns.

32. The allegation based on these premises is, it seems, that, in the case of the failed Aprin sale, Senators Brown and Milne campaigned to thwart the satisfaction of the alleged condition and then, in the case of the Triabunna Investments sale, campaigned to facilitate the satisfaction of the alleged condition. The Kroger letter refers to this as an "about face", asserted to be explicable only by reference to the 2010 donation. But there is simply no factual basis for the existence of the alleged conditions.[38]

33. The purpose of the Kroger letter was to persuade the President to grant precedence to a motion to the Privileges Committee, a step with grave and potentially irreparable consequences for the persons concerned. The failure of the Kroger letter to present a fair chronology or an objective, accurate and

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36 Kroger letter, p. 4.

37 Kroger letter, p. 8 (entries for 22 July 2011 and 4 August 2011).

38 A further response to the contended "about-face" appears at [57]-[63] below.

complete version of the relevant events undermines the bona fides of the serious allegations it makes.

Unacceptably vague allegations

34. The Kroger letter makes serious allegations against Senator Milne (and unidentified others) in unacceptably vague terms.[39] The complaint made against Senator Brown is likewise vague and unacceptable in that some kind of improper arrangement is alleged, in respect of which no detail or particulars are provided, because neither Senator Kroger, nor her supporters and co-accusers in this endeavour, Senators Abetz and Brandis, have any material upon which to formulate any particulars. Notwithstanding that serious deficiency in their material they nonetheless make the serious and unwarranted allegation that Senator Brown acted in the Senate as 'the representative of Mr Wood' and that that 'affected the actions', or had a 'flow-on effect' on the actions, of Senator Milne and other Greens Senators.

No evidence to support alleged causal connection

35. The Kroger letter does not proffer any evidence or other material that could plausibly support the inference sought to be drawn that the 2011 conduct was causally connected to the August 2010 donation or, more particularly, that the former was intended to be, or was, a *quid pro quo* for the latter; a *quid pro quo* that is alleged to be of a kind that constitutes 'improper interference'.

36. There is a suggestion in the Kroger letter that the Committee should draw an adverse inference from the fact that Mr Wood perceived it to be in his best interests to make the donation. That an *adverse* inference be drawn on that basis is absurd.

    36.1. First, while Mr Wood made his donation as an individual and not as a company director, it would be contrary to the duty of directors in the

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39 "This had a flow-on effect on the actions of Senator Milne and the other Greens Senators: Kroger letter, p 4. "Senator Milne and the other Greens Senators were also affected by the arrangement": Kroger letter, p 12. (Emphasis added.)

case of corporate donors,[40] to suggest that there is any impropriety in persons making political donations because they perceive it to be in the company's best interests to do so; rather such donations are only lawfully made in the usual course by a corporate donor because the donor considers it is in its best interests to do so.

36.2. Second, the motive for any political donation will almost always be perceived to be because the donation helps a party whose policies or election the donor, for its, his or her own reasons, supports;

36.3. Accordingly, for a donor to perceive that the making of a donation will be in the donor's interests is merely to state the *raison d'être* for political donations by donors.

37. Lastly, and tellingly, the Kroger letter expressly asks the Committee to ignore the fact that, in the context of the sale of the Triabunna woodchip mill, Mr Wood's objectives overlapped with the Greens objectives.[41] That is, to the extent that the 2011 conduct advanced Mr Wood's interests, and it is far from clear that it did, the Kroger letter asks the Committee to disregard the obvious, well known and public explanation for that outcome, namely that the 2011 conduct was nothing more than the continuing pursuit of longstanding policy objectives of the Greens concerning the environmental damage that Gunns' mill and woodchipping had caused in Tasmania and of opposing the use of public funds to maintain the woodchip industry.

Facts[42]

38. The general response of Senator Brown and Senator Milne to the Committee's request at this stage is set out in the statements of the Senators annexed to these submissions.

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40 Company directors are under a duty to act in the Company's best interests. Accordingly, for corporate donations to be lawful, they must necessarily be perceived by the company's directors to be in the best interests of the company: See for example, *Corporations Act 2001* (Cth), s 181.

41 Kroger letter, p 12.

42 A statement of Senator Brown made 27 February 2012 is attached as Annexure 1 (the "**Brown statement**"; a statement of Senator Milne made 27 February 2012 is attached as Annexure 2 (the "**Milne statement**").

39. In summary, in May 2010, Senator Brown and his chief of staff met Mr Wood for dinner.

40. Mr Wood made the donation, following a decision by the Greens Party to accept it for the purposes of the forthcoming federal election.

41. At that time, neither the possible sale of the pulp mill nor any possible involvement by Mr Wood in that sale was in prospect or foreseeable.

42. At no time was there any discussion, expectation, arrangement or understanding, whether directly or indirectly, to the effect that Senator Brown or any other Greens Senator would provide anything whatsoever in return for the donation. Nothing said or done at the time is capable, directly or indirectly, of being considered to be an interference, let alone an improper interference, with the free performance by Senator Brown or any other Senator of their duties as a Senator. Further, nothing was said or done that could have the effect of controlling or limiting Senator Brown's (or any other Green Senator's) independence or freedom of action as a Senator.[43] In substance and effect the August 2010 donation did not in any relevant respect differ from any other political donation. The size of the donation alone cannot give rise to any inference of improper interference or any other impropriety. Also, its purpose of funding advertising as part of the Greens election campaign cannot give rise to any such inference.

43. In the lead-up to the 2010 federal election substantial funding of the professional and effective advertising campaign that was undertaken by the Greens was funded from the August 2010 donation.

44. In or around November 2010, Senator Brown learnt for the first time from media reports of a sale or possible sale by Gunns of the woodchip mill.

45. On 11 January 2011, the donation was made public on the Greens website. This was significantly earlier than was required under the applicable electoral law.

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[43] Brown statement at [3]; Milne statement at [2]-[3].

46. In May 2011, Senator Brown became aware for the first time of an interest in the Gunns mill sale on the part of the Aprin consortium, whose objective was to continue the site's use for woodchipping – he was informed of the interest by the Premier of Tasmania. In the second half of May 2011, he became aware for the first time from reports in the media of Mr Wood's interest in purchasing the mill.

47. On 14 June 2011, Gunns announced that it had entered into an agreement for the sale of the Triabunna woodchip export business. (This was widely understood to be to the Aprin Consortium.)

48. On 15 June 2011, in the Senate, Senator Brown asked the following question of the Minister for Agriculture, Fisheries and Forestry (the "**Forestry Minister**"):[44]

> Can the minister tell the chamber if a Tasmanian forest agreement is in the offing and, indeed, may be finalised in the next fortnight? Can the minister reassure the public, who have just seen cuts right across the board, that there will not be any money going to a private enterprise pulp mill in Tasmania from the public purse, either directly or indirectly, or to the Malaysian logging company Ta Ann?

49. On 16 June 2011, in the Senate, Senator Brown asked the following questions of the Forestry Minister:

> Yesterday the minister told the parliament that the government has not received any requests from Gunns for funding support in relation to the mill or its business structure. Can the minister give an assurance to the Senate that no money will be given to Gunns in relation to its mill or its business structure, including for severance payments for the hundreds of workers already facing the loss of their jobs or facing the loss of jobs in the future related to the forest agreement or otherwise?[45]
>
> Is the government entertaining a nine-figure sum in relation to the forest agreement in Tasmania … and can the minister tell the Senate what the outcome is in relation to the request by Ta Ann for a further 22,000 hectares of old growth forest, which is high-conservation forest, in Tasmania?[46]

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44 Commonwealth, *Parliamentary Debates*, Senate, 15 June 2011, 2856.

45 Commonwealth, *Parliamentary Debates*, Senate, 16 June 2011, 3106.

46 Commonwealth, *Parliamentary Debates*, Senate, 16 June 2011, 3107.

> I ask the minister: is he aware of the highly-publicised sale by Gunns of its woodchip mill at Triabunna, the application by a consortium of loggers to buy that mill and an alternative application by Eco Resource Development to buy the mill? Will the minister ensure that no money from the forest agreement process flows to the logging entities —… I ask about that consortium: has the government had any discussions about that? Will the government ensure that no money goes, through the forest agreement or in any other way from the public purse, into facilitating the purchase of that Triabunna woodchip mill?[47]

50. Those questions were consistent with long-held and publically expressed views and policy of the Greens party, and Senator Brown in particular, as set out below at [64] to [66]. In particular, they reflected the opposition of Senator Brown and the Greens party to the continuation of logging for woodchipping in Tasmania and to its public funding. Mr Wood had no involvement, whether direct or indirect, in the asking of those questions, which questions were not causally related in any way to the August 2010 donation.[48]

51. On 29 June 2011, the sale of the Triabunna woodchip mill to the Aprin consortium was unable to be completed because the purchaser had been unable to secure finance in time.[49]

52. On 4 July 2011, in the Senate, Senator Milne asked the following questions of the Forestry Minister:

> Is the minister aware that in its recent report, *The critical decade*, the Climate Commission identified:
>
> > … eliminating harvesting of old-growth forests as perhaps the most important policy measure that can be taken to reduce emissions from land ecosystems.
>
> If so, does the minister agree and what is he doing about it?[50]
>
> Given the minister's answer, does he think there needs to be more done to stop the logging of old-growth forests? Particularly, can he inform the Senate whether he is aware of, or has been part of, any discussions with the Tasmanian government pertaining to an offer of a loan from the Tasmanian government to Aprin logging to purchase the Triabunna woodchip mill in order to keep it operating to woodchip native forests?[51]
>
> I look forward to the minister coming back to me in relation to that

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47 Commonwealth, *Parliamentary Debates*, Senate, 16 June 2011, 3108.

48 Brown statement, [9].

49 See Kroger letter, pp. 7-8.

50 Commonwealth, *Parliamentary Debates*, Senate, 4 July 2011, 3860.

51 Commonwealth, *Parliamentary Debates*, Senate, 4 July 2011, 3860.

> woodchip mill. I want a particular undertaking that the Commonwealth government will not give any funding to Tasmania under any negotiated forest outcome until the full details of the involvement of Forestry Tasmania, the Tasmanian government and Aprin logging in this woodchip mill deal are made public.[52]

53. On 6 July 2011, in the Senate, Senator Milne asked the following questions of the Forestry Minister:

> Is the minister aware that the Tasmanian minister for forestry has confirmed in state parliament today that Forestry Tasmania has entered into a profit-sharing arrangement with Aprin Logging to keep the Triabunna woodchip mill open? Can the minister say whether this is a breach of the forest principles agreement commitment to no new contracts? Does it jeopardise the Tasmanian and Commonwealth negotiations in the forest peace process? [53]
>
> Can the minister say whether the forest principles agreement commitment to no new contracts is breached by Forestry Tasmania entering into a profit-sharing arrangement with Aprin?[54]
>
> I ask the minister whether the forest principles agreement has in it 'no new contracts' and, if so, does Forestry Tasmania entering into a profit-sharing arrangement constitute a new contract?[55]

54. Those questions and the speech given on that day[56] were consistent with long-held and publically expressed views and policy of the Greens party, and Senator Milne in particular, as set out below at [64] to [66]. In particular, Senator Milne's concern about the use of public money to fund the acquisition or operation of a woodchip mill is consistent with her longstanding concerns about the misuse of public funds in the Tasmanian forestry industry and the relationships between the Tasmanian Government, Forestry Tasmania and the forestry industry. Mr Wood had no involvement, whether direct or indirect, in the asking of those questions, which were not causally related in any way to the August 2010 donation.[57] The longstanding nature of this particular concern of Senator Milne is further demonstrated by the following exchange in the Senate on 22 June 2011.

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52 Commonwealth, *Parliamentary Debates*, Senate, 4 July 2011, 3861.

53 Commonwealth, *Parliamentary Debates*, Senate, 6 July 2011, 4167-8.

54 Commonwealth, *Parliamentary Debates*, Senate, 6 July 2011, 4168.

55 Commonwealth, *Parliamentary Debates*, Senate, 6 July 2011, 4169.

56 See also Senator Milne's speech in the Senate on 6 July 2011: Commonwealth, *Parliamentary Debates*, Senate, 6 July 2011, 4185-4186.

57 Milne statement, [5]-[7].

54.1. On 22 June 2011, in the Senate, Senator Milne asked the following questions of the Forestry Minister:[58]

> In relation to the performance audit report of the $252 million in grants provided by the Commonwealth to Tasmania between 2005 and 2010 under the Tasmanian Community Forest Agreement, can the minister indicate when he received the performance audit report and whether he intends to make it public before the Commonwealth allocates any further funding to the forest industry and Forestry Tasmania in particular as part of the latest negotiation?

54.2. In answer to the question, the Minister, Senator Ludwig, noted Senator Milne's longstanding interest in these matters, saying:[59]

> This is an issue that I know Senator Milne has been very interested in throughout the entire process. The government has been working, through Mr Bill Kelty, to facilitate the Tasmanian forest statement of principles, signed by the Tasmanian forestry industry bodies and the conservation groups.
>
> This is an issue that Senator Milne is not asking about specifically, but her concerns clearly were raised during a prior period. My understanding is that it goes back prior to this government, to 2005, during the period - to use a broad term; I am happy to be corrected - that the industry assistance package was provided to the forests. Since that time there has also been a subsequent package, a contractors' package, which I think Senator Milne is not specifically asking about.
>
> The audit report relates to the earlier measure. Certainly it is an area where this government continues to ensure that the programs delivered under either the prior government or the current government continue to be monitored to ensure that they provide value for money and maintain those relevant outcomes. In terms of when that report will be made available, Senator Milne, I will take that on notice. I understand you do have an interest in ensuring that report is made available at the earliest possible time.

55. On 13 July 2011, Gunns made the following announcement to the Australian Securities Exchange:

> Gunns Limited confirms it has entered into an agreement for the sale of the Triabunna woodchip facility to Triabunna Investments Pty Ltd, with the transaction to complete on 15 July 2011. The terms of the sale agreement provide for the facility to be leased to an industry operator as a woodchip export business, to operate on a basis consistent with the Tasmanian Statement of Forest Principles. [Emphasis added.]

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58 Commonwealth, *Parliamentary Debates*, Senate, 22 June 2011, 3545.

59 Ibid.

56. There is no material to suggest that the Triabunna Investments sale was not completed on 15 July 2011. This is reinforced by the references in the Kroger chronology to the announcements made at around the same time that the Aprin sale had fallen through.[60] Therefore, the allegation in the Kroger letter that conduct of Senator Brown or Milne after the completion date for the Triabunna Investments sale was intended to promote that completion is on its face untenable.

57. It was a matter on the public record and Senators Brown and Milne knew that Gunns might have certain contractual entitlements to log high conservation and old growth forests.

58. On 17 August 2011, Senator Colbeck moved:[61]

> That the Senate condemns any payment of monies to Gunns Ltd for exiting native forest logging flowing from the Tasmanian Forests Intergovernmental Agreement between the Commonwealth of Australia and the State of Tasmania.

59. Senator Brown moved as an amendment to the motion that the phrase ", outside of legal requirements" be inserted after "monies". The suggested amendment was rejected, as was Senator Colbeck's motion.[62]

60. The amendment moved by Senator Brown was consistent with long-held and publically expressed views and policy of the Greens party, and Senator Brown in particular, as set out below at [64] to [66]. In particular, the amendment was consistent with the policy of ending the logging of native Tasmanian forests. Given that Gunns had decided to exit native forest logging, when it became apparent that Gunns might have contractual rights to native timber, the Greens took the view that any such contractual rights should be compensated, on the basis that they were legal entitlements standing in the way of Gunns' exit from, and an end to, native forest logging.[63] Had Gunns retained those rights, but still decided to exit native forest logging , it could, for example, have sold them to another company to exploit. Senator Colbeck's motion was aimed at

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60 Kroger letter, pp. 7-8 (entries for 14 and 16 July 2011).

61 Commonwealth, *Parliamentary Debates*, Senate, 17 August 2011, 4699.

62 Commonwealth, *Parliamentary Debates*, Senate, 17 August 2011, 4699-4700.

63 Brown statement, [11]-[12].

undermining the Tasmanian Forests Intergovernmental Agreement, and the conservation provisions in particular, which the Greens supported. Mr Wood had no involvement, whether direct or indirect, in the amendment sought, or the subsequent vote on Senator Colbeck's motion, which were not causally related in any way to the August 2010 donation.[64]

61. On 20 September 2011, Senator Colbeck moved:[65]

> That the Senate calls on the Government to ensure that:
>
> (a) Commonwealth funds are not used to resolve the commercial dispute between Gunns and Forestry Tasmania; and
>
> (b) assistance to forest contractors is not reduced.

62. Senator Milne sought leave to amend the motion to read: "That the Senate condemns the Coalition for seeking to deny Tasmania $270 million of assistance for forestry transition". Leave was refused and Senator Colbeck's motion was negatived.[66]

63. The amendment moved by Senator Milne was consistent with long-held and publically expressed views and policy of the Greens party, and Senator Milne in particular, as set out below at [64] to [66]. In particular, Senator Colbeck's motion was aimed at undermining the Tasmanian Forests Intergovernmental Agreement. For the reasons given above, the Greens supported that Agreement and recognised the need for government funds to support forestry transition and the payment of compensation to Gunns for any contractual rights it had to give up as part of exiting native forest logging. Mr Wood had no involvement, whether direct or indirect, in the amendment sought, or the subsequent vote on Senator Colbeck's motion, which were not causally related in any way to the August 2010 donation.[67]

Greens longstanding policy commitments

64. Any assertion that Senators Brown and Milne and any other Greens Senator asked questions or took points of order or articulated any particular viewpoint

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64 Brown statement, [13].

65 Commonwealth, *Parliamentary Debates*, Senate, 20 September 2011, 6531.

66 Commonwealth, *Parliamentary Debates*, Senate, 20 September 2011, 6531-6532.

67 Milne statement, [5]-[7].

because of the 2010 donation is unsupported by any evidence or other factual material.

65. Senators Brown and Milne have made extensive and detailed statements – most of which is on the public record – about their policies concerning the Triabunna woodchip mill, mismanagement of Forestry Tasmania and woodchipping in Tasmania. Their questions and other conduct in the Senate are entirely consistent with those policies, and their continued pursuit of those policies. The attachments to this submission list extracts of these public statements, and are described below:

    65.1. Annexure 3 collects together public statements by Senator Brown going back to November 1983 in relation to the environmental and economic challenges posed by the woodchipping industry. That table includes a number of statements about the on-going debt problems of the Tasmanian Forestry Commission as it then was (now Forestry Tasmania). The document includes media releases, letters to the editors of various newspapers and contributions by Senator Brown in books he has written or co-authored.

    65.2. Annexure 4 is a compilation of public statements in media releases, correspondence and questions on notice from Senator Brown for the period September 1996 until October 2009 on the topics of the destruction of Tasmanian forests, criticism of the woodchip industry, criticism of public funding for the forest industry and mismanagement of Forestry Tasmania and the desirability of developing eco-tourism in Tasmania as an alternative to woodchipping and the destruction of forests. Of note is the media release on 19 November 2007 where questions were put to the then Minister for Forests, Senator Abetz, about the prospect of the closure of the export woodchip mill at Triabunna and the parlous financial position of Forestry Tasmania. Also of note is the media release dated 9 July 2007 where again a call was made for the end to the woodchipping of native forests.

    65.3. Annexure 5 is the Australian Greens' policies, 2004. Those policies were in force at the time of the 2010 Federal election and, thus, were in

force in May 2010 when Senator Brown met with Mr. Wood. Of note are the following clauses:

- 3.1.1 – this is a policy seeking the immediate end of the export of woodchips from native forests. Clause 3.1.2 also calls for an end of logging of old growth and other high conservation value native forests.
- 2.1.3 – this seeks the implementation of national measures to end the clearing of native vegetation.
- 16.2.1 - this requires the phasing out of tax breaks, subsidies and other government policies that encourage resource waste, pollution and environmental degradation.

65.4. Annexure 6 is a table bringing together statements, comments and actions by Senator Milne since 1986 in relation to protection of forests, an end to woodchipping, the promotion of tourism in Tasmania and the uncovering of mismanagement of funding to the forestry industry etc.

66. Consequently, the assertion that Senator Brown accepted a large donation in return for either he or Senator Milne:

- criticising the woodchip industry;
- opposing Forestry Tasmania being a player in the export woodchip industry;
- opposing yet more government funding going to the forestry industry; or
- welcoming a tourism venture in place of further entrenchment of the woodchip industry in Tasmania;

is unsupported by any of the evidence or other material before the Committee and is not made bona fide or reasonably, as is the case with the suggestion that the Senators in any other way compromised their freedom and independence as Senators.

Proper outcome

67. It is submitted that the Committee should report to the Senate that no bona fide or reasonably arguable allegation of an offence against the Senate, contempt and/or breach of privilege arises from the relevant material and that there is no allegation that merits further investigation. It is further submitted that since the motion by Senator Kroger was accorded precedence by the President, which has led to media reports of alleged corruption by Senators Brown and Milne, the Committee ought to make a finding that the evidence does not support or justify the allegations made against Senator Brown or Senator Milne. In particular, the Kroger letter alleges a causal connection between the August 2010 donation and the 2011 conduct and no credible or cogent evidence was proffered to support that connection. If, contrary to this submission, there remained any lingering doubt whatsoever on that matter the statements from Senator Brown and Senator Milne provide a complete answer to the allegations.

68. In summary, for the reasons given above, the material before the Committee patently does not support the asserted causal connection, in particular, because:

- as with any other Australian citizen, Mr Wood was entitled to make a donation for reasons he perceived to be in his interest, which, in this case, appears to be an interest in the promotion of environmental causes;
- it was entirely consistent with long-held and publically expressed Greens policy to support the acquisition of the Gunns woodchip mill site for use for an eco-tourism venture and oppose its acquisition for its continued use as a woodchip mill and to accept that Gunns should receive compensation for any contractual rights given up in exiting native forest logging;
- it was entirely consistent with long-held and publically expressed Greens policy to oppose Forestry Tasmania receiving the benefit of federal funds; and
- there is no basis for any finding that the donation amounted, or was likely to amount, to any interference, let alone improper

interference, with free performance by Senator Brown or Senator Milne of their duties as Senators.

69. Further, the statements annexed as Annexures 1 and 2 to this submission not only conclusively contradict the adverse inferences and assertions sought to be made in the Kroger letter, but they positively demonstrate that there is no case to answer of contempt or breach of privilege whatever standard of proof is applied.

70. Importantly, on the material before it, the Committee could not be satisfied beyond reasonable doubt, or otherwise, that there was any prima facie case of a *quid pro quo* for the 2010 donation that could constitute any interference with Senator Brown's and Senator Milne's freedom as Senators or that the 2011 conduct was motivated by anything other than the pursuit of longstanding Greens policies.

71. If the conduct the subject of the referred matter were capable of constituting contempt as is alleged, then the acceptance of any significant donation by a political party in circumstances where a Member asks a question in Parliament that relates to an area of policy in which the donor has an interest could be perceived to be a contempt of the Parliament. This proposition need only be stated to reveal its absurdity.

72. In this submission the bona fides and motivation for the Kroger letter has been called into question. One aspect of the letter that is particularly revealing in that regard is the fact that serious allegations of criminal conduct have also been made against Senator Milne and other unidentified Greens Senators without a shred of evidence to support those allegations. There is no evidence or material whatsoever that she was involved in or a party to the 2010 donation yet it is alleged against her that it somehow improperly interfered with her freedom to discharge her duties as a Senator. The manner in which this complaint has been pursued against both Senators also raises serious questions for the Committee about the inadequacies of the Senate's present procedures in relation to any offence against the House, contempt and/or breach of privilege. This issue is addressed in the last part of this submission.

Costs

73. It is submitted that the Committee should recommend to the President that the legal costs of Senators Brown and Milne of and incidental to responding to the 24 November letters, be reimbursed.[68]

73.1. In the words of the Joint Select Committee's Final Report of 1984 (the "**1984 Joint Committee Report**"), in these circumstances, "it would only be just to make provision for costs".[69] In that report, the Joint Committee also recognised the fundamental importance of legal representation:[70]

> We therefore unreservedly support the view that the practices of the Privileges Committee should be reconstituted to meet basic requirements of natural justice. The case in support may be put in terms of a question. If the question be asked – these days, can the proposition be sustained that a person may be gaoled or fined a substantial sum yet have no opportunity to cross examine or confront witnesses, to adduce evidence on his behalf, or to be represented by lawyers skilled in those matters – we think there can be only one answer.

73.2. In the words of Mason CJ in *Latoudis v Casey*,[71] in the presently analogous context of a defendant who has secured the dismissal of a criminal charge brought against him or her:

> In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself.

73.3. Using the words of Mason CJ in *Latoudis*, the charge of contempt and breach of privilege in the Kroger letter 'should not have been brought'.

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68 Resolution 2(11).

69 Commonwealth, Joint Select Committee on Parliamentary Privilege Final Report, Parl Paper No 219 (1984), [7.64].

70 Commonwealth, Joint Select Committee on Parliamentary Privilege Final Report, Parl Paper No 219 (1984), [7.51].

71 (1990) 170 CLR 534, 542.

73.4. It is proposed that a fair and objective outcome would be for the legal costs reasonably incurred by Senators Brown and Milne to be reimbursed and for the Committee to so direct.

74. It is submitted that the case for the reimbursement of the costs incurred by Senator Brown and Milne is reinforced by the following considerations:

74.1. The decision of the President to accord precedence to a motion arising from a matter of privilege is a very serious step, involving publication of serious allegations which, if these submissions are accepted, will in the result have been proved to be groundless, but which in the meantime caused irreparable harm to the reputation of those affected by the motion. This was why, in the 1984 Joint Committee Report, the Joint Select Committee on Parliamentary Privilege emphasised the danger of hasty decisions in respect of privilege motions.[72]

74.2. In this case, the relevant decision was taken by the President over the course of 24 hours. It may be doubted whether such a period of time enabled the President to assess properly whether the Kroger letter was in truth worthy of the attention of the Senate or whether there existed any remedy other than the Senate's power to adjudge and deal with contempts.[73] Further, it may be doubted whether the President had time to seek independent advice about these issues, which it is submitted ought to have occurred. Taking one very obvious example, it is submitted that the complaint made about Senator Milne is on its face so vague as to indicate a lack of any foundation for the complaint and, consequently, its unworthiness for the attention of the Senate. Other deficiencies on the face of the Kroger letter and Kroger motion were discussed above.

74.3. The claim for reimbursement for legal costs extends to the successful application that Senator Brandis recuse himself from the Committee's investigation of this matter. The application was first made on 22

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72 Commonwealth, Joint Select Committee on Parliamentary Privilege Final Report, Parl Paper No 219 (1984), [7.32]-[7.33].

73 See Senate Resolution 4.

December 2011 and, despite much correspondence seeking a response, Senator Brandis' response was not communicated to Senator Brown and Senator Milne until after their comprehensive recusal submission was lodged with the Chair of the Committee.

Future Procedures in Contempt Matters

75. The speed with which the President deals with requests for precedence may go some way to explaining the otherwise inexplicable treatment of other proposed motions relating to matters of privilege, which were not accorded precedence by the President. The following requests for precedence related to the asking of questions or the making of representations by Senators Boswell, Cash and Joyce where each Senator or their Party had been in receipt of benefits from a corporation, or had an interest in the corporation, and where the questions or representations advanced the interests of the donor corporation or the Senator in question:

    75.1. letter from Senator Brown to the President of the Senate the Hon. John Hogg dated 24 November 2011 regarding Senator Boswell's relationship with Metcash Trading Limited following the donation of $30,000 by Metcash to Senator Boswell's election campaign;

    75.2. letter from Senator Brown to the President of the Senate the Hon. John Hogg dated 30 November 2011 regarding Senator Cash's advocacy for a project undertaken by Woodside Petroleum where Senator Cash was a shareholder in that company, and had been lobbied by company representatives;

    75.3. letter from Senator Brown to the President of the Senate the Hon. John Hogg dated 25 November 2011 regarding Senator Joyce's acceptance of hospitality from the GVK and Hancock Group (a mining and energy company) where Senator Joyce had opposed the Minerals Resource Rent Tax and Clean Energy Bills.

76. The President's negative response to each of those letters does not adequately explain why precedence was denied in those cases, but granted in the present matter.

77. The way in which this matter has proceeded and the contrast drawn with the other matters can undermine the integrity of the Senate's process for dealing with matters of privilege and demonstrates the extent to which the process has been unfair to Senators Brown and Milne. At no point was that unfairness more apparent than when it became clear that journalists, but not Senators Brown or Milne, had had advance warning of the Kroger motion.[74] The Senators await the Committee's findings on this matter. Further, the timing of the Kroger motion meant that, in the two months following the motion, Senators Brown and Milne received no response to many of their legitimate and urgent questions about the process. For example, an extension of time in which to make a response to the 24 November letters was sought on 23 December 2011. No response was received until 14February 2012.

78. It is submitted that these considerations reinforce the submission that the Senate's procedures need to be reviewed.

79. We have outlined above why the process so far adopted in respect of the referred matter has exhibited serious deficiencies, which ought to be remedied in any future matter.

80. Those deficiencies, which are deeply unfair to persons the subject of privilege-related complaints, will be apparent from this submission and from the submission on procedural fairness, lodged on 8 February 2012. For the Committee's ease of reference, those deficiencies, or suggested remedies for them, may be summarised as follows:

    80.1. Given the serious consequences that flow from the President's decision to give precedence to a motion arising from a matter of privilege, the President should take adequate time and receive independent legal advice in the assessment of a request for precedence. In the usual course the President should also seek a response from the persons subject of privilege-related complaints.[75] A motion ought to be found to be unworthy of the attention of the Senate if, on its face or after the

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74 See letter dated 24 November 2011 from Senator Brown to Senator Hogg.

75 It is accepted that there may be exceptional circumstances that might warrant a different course in some cases but there is nothing about the present matter that would make it fall into that category.

response, it appears frivolous, vexatious or does not disclose a reasonably arguable basis for the requisite elements of an offence under s 4 of the 1987 Act.

80.2. Persons affected should be given reasonable notice of the President's intention to communicate his or her decision to the Senate.

80.3. The criteria applied by the President, the Committee and the Senate must reflect the requirements of the 1987 Act. For example, matters should not be referred regarding complaints about conduct that does not meet the conditions for an offence under s 4 of the Act.

80.4. Unreasonable delay in bringing a motion might be a ground for questioning its bona fides. In the present matter there was unexplained, and by inference unreasonable, delay in the bringing of the Kroger complaint. As explained in the submission on procedural fairness at [23] to [27], the accusation was first made in July 2011[76]. Yet, it was not lodged until late November 2011.

81. Further, the President, the Committee and the Senate must ensure that their processes are consistent with the requirements of procedural fairness. To repeat a passage from the 1984 Joint Committee Report cited in the procedural fairness submission:[77]

> In essence natural justice imports the right to a fair and impartial hearing … Accordingly, the onus is on the Houses to accord him the fairest of hearings, and the most complete opportunity to defend himself.
>
> … [P]ersons or organisations whose conduct is being examined by the Privileges Committee are, semantics aside, often in a real sense "persons charged".

82. The opportunity to cross examine witnesses, to adduce evidence and to be represented by lawyers in respect of an investigation by the Committee are critical to a Senator's opportunity to defend himself or herself.

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76 See the annexed media statement from Senator Abetz referred to at note 30.

77 Commonwealth, *Joint Select Committee on Parliamentary Privilege Final Report*, Parl Paper No 219 (1984), [7.50]-[7.53].

83. Lastly, and related to the Joint Committee's use of the expression "persons charged" and to procedural fairness, the President, the Committee and the Senate must approach these proceedings recognising that they are criminal in nature. This has a number of consequences, some of which have been described in this submission and in the procedural fairness submission. Critically, the Committee must approach both its initial inquiry, as to whether a complaint gives rise allegations meriting investigation, and any subsequent steps, on the basis that the offence must be proved beyond reasonable doubt.

84. By reason of the above matters there should be an urgent review of the Senate's procedures in contempt or privilege matters.

DATED: 27 February 2012

FitzGerald and Browne lawyers

Solicitors for Senators Brown and Milne

cc.

Senator Faulkner

Senator Gallacher

Senator Ludlam

Senator Payne

Senator Sherry

Senator Urquhart

Senator David Johnston
Chair
Senate Committee of Privileges
Parliament House
Canberra ACT 2600

9 March 2012

Dear Senator

I refer to your letter of 24 November 2011 advising me that matters raised by Senator Kroger in correspondence to the Senate President had been referred to the Committee of Privileges. I understand that the Committee is examining the material put before it to see whether it raises issues requiring further investigation.

While I am prepared to put my position on these issues to the Committee at this preliminary stage, I would expect to have proper notice and an opportunity to respond in full to any further investigation of any matters involving me.

I completely reject any suggestion that there was any impropriety in the donation I made to the Australian Greens in 2010. I also completely reject any suggestion that I attempted to influence any Senator by offering an inducement or benefit. Any such suggestions or claims are untrue.

In fact I am appalled at the allegations which have been made about my motivations in making this donation, which are an unjustified attack on my personal integrity and character.

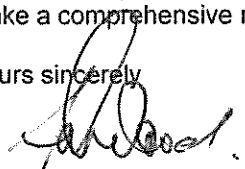
I have examined the material put forward by Senator Kroger. It lacks any evidence of any impropriety on my part, or any evidence that the donation was part of an arrangement. It provides no factual basis for any suggested interference with a Senator's performance of their duties. I believe there are no allegations in that material that warrant investigation, and there is no basis for any further investigation by the Committee.

Indeed the claims in the material do not even pass the basic test of timing. The donation was made in mid-2010. The transaction that was supposedly the reason for the donation was not anticipated then, and first arose many months later.

I expect the Committee would agree that making a legal donation to a political party cannot alone raise an inference of contempt or improper interference with a Senator's performance of their duties. If that were so, every Senator whose party received donations would be compromised.

I believe there can be no basis for investigating these baseless claims any further. If the matter does continue, I expect to be given proper notice of any allegations involving me and an opportunity to make a comprehensive response.

Yours sincerely



Graeme Wood

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