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SENATE STANDING COMMITTEE ON PRIVILEGES

Report on Question of Appropriate Penalties Arising from the Report of Committee of Privileges of 17 October 1984

Eighth Report

1985

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THE SENATE

COMMITTEE OF PRIVILEGES

MEMBERS OF THE COMMITTEE

SENATOR B.K. CHILDS (CHAIRMAN)

SENATOR J. COATES	SENATOR PETER RAE
SENATOR F.F.S. COOK	SENATOR ROBERT RAY
SENATOR M.J. MACKLIN	SENATOR THE RT HON R.G. WITHERS

TERMS OF REFERENCE

The question of what penalties, if any, might, in the Committee's opinion, be appropriate with respect to the serious contempts of the Senate constituted by certain publications in The National Times the subject of the Committee's Report, tabled on 17 October 1984 and adopted by the Senate on 24 October 1984.

C O N T E N T S

COMMITTEE OF PRIVILEGES

REPORT ON QUESTION OF APPROPRIATE PENALTIES ARISING FROM THE REPORT OF COMMITTEE OF PRIVILEGES OF 17 OCTOBER 1984

CHAPTER 1 - INTRODUCTION

1.1 On 27 February 1985, the Senate referred the following matter to the Committee of Privileges:

> The question of what penalties, if any, might, in the Committee's opinion, be appropriate with respect to the serious contempts of the Senate constituted by certain publications in The National Times the subject of the Committee's Report, tabled on 17 October 1984 and adopted by the Senate on 24 October 1984.

1.2 As the terms of reference indicate, the Committee of Privileges appointed during the 61st Session of the Parliament reported to the Senate as follows:

(1) That the publication in The National Times of 8-14 June 1984 of a purported report of evidence taken by and documents submitted to the Senate Select Committee on the Conduct of a Judge, and the further publication in The National Times of 27 July - 2 August, 3-9 August and 10-16 August 1984 of purported proceedings of the Senate Select Committee on the Conduct of a Judge, constitute a serious contempt of the Senate.

(2) That the editor and publisher of The National Times admit responsibility, and should be held responsible and culpable, for the publication and thus the contempt referred to in paragraph (1).

(3) That the editor and the publisher of The National Times are, respectively, Mr Brian Toohey and John Fairfax and Sons Limited.

(4) That Ms Wendy Bacon, a journalist with The National Times, is also culpable for the contempt referred to in paragraph (1), in that she was the author of the articles which revealed in camera proceedings of the Select Committee on the Conduct of a Judge.

(5) That the publications were based on unauthorised disclosure, by a person or persons unknown, of in camera proceedings of the Select Committee on the Conduct of a Judge, and that such disclosure, if wilfully and knowingly made, constitutes a serious contempt of the Senate.

On 17 October 1984, the report was tabled in the Senate and on 24 October 1984 it was adopted by the Senate.

1.3 As indicated in the report, that Committee proposed to give the persons affected by the findings an opportunity to place before it any submissions they might wish to make concerning the question of penalty before the Committee made any recommendations to the Senate on that question.

1.4 On 18 October 1984, the Chairman advised the solicitors acting for the persons affected of the Committee's proposal and sought comment from them on or before 31 October 1984. On 24 October 1984, the solicitors requested an extension of time to 30 November 1984 for the preparation of the submission and on 26 October 1984 the solicitors were advised that such permission had been granted.

1.5 On 26 October 1984, the House of Representatives was dissolved, and on 1 December 1984 an election for that House and half of the Senate was held.

1.6 On 3 December 1984, a document entitled "SUBMISSIONS TO THE PRIVILEGES COMMITTEE OF THE AUSTRALIAN SENATE ON BEHALF OF JOHN FAIRFAX & SONS LIMITED, MR. BRIAN TOOHEY AND MS. WENDY BACON - SUBMISSIONS ON PENALTY" was sent to the Secretary for distribution to all members of the Committee. This title was repeated on the index and first pages of the document, and paragraph 1.04 of the "Submissions on Penalty" stated that the Committee had invited the persons affected by its findings to place before it any submissions they wished to make "concerning the question of penalty" before the Committee made any recommendations to the Senate.

1.7 On 22 February 1985, following the opening of Parliament on 21 February 1985, the present Committee was established, with membership identical to that of the previous Committee. On 27 February 1985, the Committee met in private,

and decided that a reference on penalty should be sought from the Senate, to complete the task of the previous Committee. On 27 February 1985, the Senate agreed to the following motion, moved by the Chairman on behalf of the Committee:

(1) That the following matter be referred to the Committee of Privileges: The question of what penalties, if any, might, in the Committee's opinion, be appropriate with respect to the serious contempts of the Senate constituted by certain publications in The National Times the subject of the Committee's Report, tabled on 17 October 1984 and adopted by the Senate on 24 October 1984.

(2) That for the purpose of its inquiry and report -

a) the Committee have power to send for and examine persons, papers and records, to move from place to place, and to sit in public or private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives;

(b) the Committee be empowered to print from day to day such papers and evidence as may be ordered by it, and a daily Hansard be published of such proceedings as take place in public; and

(c) the Committee have power to consider the minutes of evidence and records of the Committee of Privileges of the previous Parliament.

(3) That the foregoing provisions of this Resolution, so far as they are inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

CHAPTER 2 - PROCEEDINGS OF COMMITTEE

Introduction

2.1 The following is a chronological summary of events which occurred after the question of penalty was referred to this Committee:

27 February 1985 -

The Committee held a second meeting, at which it -

- considered papers of the previous Committee, including "Submissions on Penalty" of 3 December 1984;

- decided to hear further submissions, from or on behalf of the persons affected, if they wished, on either 8 or 15 March 1985, whichever was the more suitable for the persons affected and their legal representatives;

- acceded to requests from the solicitors to make available the following documents:

  (i) the legal opinion and supplementary comment from Professor D.C. Pearce, dated 24 January 1985 and 1 February 1985, respectively; and

  (ii) advice from the Clerk of the Senate and from the Secretary to the Attorney-General's Department, dated 11 September 1984 and 13 September 1984, respectively, concerning penalty; and

. decided to postpone consideration of a request from the solicitors that the "Submissions on Penalty" of 3 December 1984 be circulated to all Senators.

Advice of the above decisions was given to the solicitors by telephone. The solicitors requested that the hearing be postponed until a day in the first week of April.

28 February 1985 -

Letter sent on behalf of the Committee, confirming telephone advice, and also agreeing to postpone public hearings until 3 April 1985.

15 March 1985 -

"Submissions on Penalty" sent by solicitors to all members of the Senate without waiting for the Committee's permission to do so.

22 March 1985 -

The Committee, having received no response to its letter of 28 February 1985 concerning the public hearings proposed for 3 April 1985, sought advice by telex from the solicitors as to who would be attending the hearings.

26 March 1985 -

. The solicitors wrote to the Committee, on behalf of their clients, formally applying for an adjournment of the meeting proposed for 3 April 1985 "until such time as the proceedings relating to Mr. Justice Murphy [had] been finally determined".

. The solicitors also wrote to the President of the Senate, seeking an opportunity for counsel to appear before the Bar of the Senate before attending public hearing of Committee on 3 April 1985 (see Appendix A).

27 March 1985 -

. The Committee met to consider the application for adjournment. The letter did not provide a sufficient basis for the Committee to ascertain why it was not possible at that time for submissions to be made in public on the Committee's current reference without referring to the matters raised in the letter. The Committee therefore decided that it would hear submissions in relation to the matter of adjournment at a private meeting on 3 April 1985, before the scheduled public hearing.

Advice of the Committee's decision was conveyed by telex on 27 March 1985 and confirming letter of 28 March 1985.

28 March 1985 -

The President of the Senate responded to the solicitors, advising that no action on their request would be taken by him at that time (see Appendix B).

Proceedings at Meeting of 3 April 1985

2.2 After a brief private meeting, the Committee, as previously arranged, proceeded to hear in camera the formal application for adjournment. However, counsel for the persons affected, Mr Neil McPhee, Q.C., who advised that he would address the Committee on his clients' behalf, withdrew the application. In the course of that meeting, the Committee indicated to counsel that, despite the title "Submissions on Penalty" given by the solicitors to the written submissions, these submissions clearly covered two aspects: first, whether the Senate should find the persons affected guilty of serious contempt, as recommended by the 1984 Committee; and second, submissions on what penalties, if any, should be imposed. The Committee expressed the view that, as a result, significant parts of the written submissions appeared, prima facie, beyond its terms of reference.

2.3 The Committee therefore gave the persons affected the opportunity to recast their submissions to accord with the terms of reference, and offered to adjourn the hearings to enable this course to be followed. The Committee indicated that, alternatively, it would be willing to hear immediately, in private, argument as to the relevance of all the submissions to the question of penalty.

2.4 Counsel indicated, on behalf of his clients:

- that there was no desire to recast the submissions to relate to penalty;
- that no adjournment would be sought;
- that he was under instructions to make all submissions to the Committee in public; and, in the circumstances,
- that he was prepared to proceed immediately to "Submissions on Penalty" in public.

2.5 At the public hearings, however, counsel, on behalf of his clients, consistently attempted to argue relevance, and, when reminded of the Committee's decision, repeatedly refused to accept the Committee's offer to hear the submissions in private.

2.6 It is obvious, from the letter from the solicitors to the President of the Senate (see Appendix A), that the persons affected had some apprehension that certain matters raised in the "Submissions on Penalty" might be regarded by the Committee

as beyond its terms of reference. In seeking the "indulgence of the Senate for Senior Counsel representing our clients to address the Senate as to the recommendations made by the Committee in its Report of October 17, 1984 and as to the methods employed by the Committee in arriving at those recommendations", the solicitors acting for the persons affected stated, as follows:

> "We make this request at this time because of our clients' concern that in their next appearance before the Committee of Privileges in Melbourne on April 3, 1985 the Committee may take the view that it will hear submissions on no subject other than penalty, thus denying our clients the right to have the determination of their guilt or innocence made by a full Senate fully informed of the arguments they advance upon their behalf.".

2.7 Both the Committee and the persons affected had the advantage of legal opinions from Professor D.C. Pearce, Professor of Law, Australian National University (one of Australia's leading authorities on the subject), on all aspects of the 1984 Committee's report and the submissions on behalf of the persons affected which purported to relate to penalty. (Transcript of Evidence, 3 April 1985, pp.15-23.) It was with Professor Pearce's views in mind, and the Committee's own judgments as to what may or may not relate to penalty, that the Committee gave the persons affected an opportunity to recast their submissions or, alternatively, to address the Committee in private on relevance to penalty.

2.8 It is unfortunate that counsel consistently refused that opportunity on his clients' behalf, and that in doing so he appeared to attempt to advance his clients' cause by making unsubstantiated attacks on the bona fides of the Committee. Counsel's inexplicable denial, on behalf of his clients, of the opportunity to argue the relevance of what he claimed were important submissions can only lead to a questioning of the real motive for the resistance.

2.9 The Committee considered it had no alternative but to refuse to make public matters which, as presented in the document "Submissions on Penalty", addressed the question of guilt rather than the question of penalty, until such time as it received argument to support the acceptance of submissions which were, prima facie, irrelevant, the question of guilt having already been determined by the Senate.

2.10 In the meantime, it accepted and made public extracts from "Submissions on Penalty" which related directly to penalty and these appear at pp.43-63 of the Transcript of Evidence of 3 April 1985. Given the solicitors' professed concern, on behalf of their clients, that proceedings of this Committee should not jeopardise court proceedings relating to Mr Justice Murphy, thus leading to their application (subsequently withdrawn) for adjournment of the hearings, it is of interest to note that all matters relating to Mr Justice Murphy were contained in the passages which the Committee considered as, prima facie, going beyond its terms of reference.

2.11 Counsel proceeded to address the Committee in public on those parts of the "Submissions on Penalty" allowed by the Committee, and in addition continually attempted to introduce matters which the Committee considered, prima facie, as going beyond its terms of reference. Counsel's public submissions were not completed on 3 April 1985, because of the time taken by submissions, both in private and in public session on that day, in relation to the question of relevance. The Committee therefore arranged for a further public hearing to be held in Melbourne on 30 April 1985.

Private Meeting of 23 April 1985

2.12 Following further consideration, at a private meeting on 23 April 1985, of the matters raised at the 3 April hearing, and having experienced what it regarded as a deliberate attempt to divert the Committee from its terms of reference, namely, the question of penalty, the Committee decided to:

- seek further advice from Professor Pearce as to the identification and wording of the issues which were the clearly relevant and pertinent issues arising under the terms of reference; and

- give to counsel the opportunity, on behalf of his clients, to address that series of matters which related to the Committee's terms of reference should counsel, his instructing solicitors and their clients, so decide.

The issues, and a summary of counsel's addresses on them, are set out in Chapter 3.

Proceedings at Meeting of 30 April 1985

2.13 In opening the proceedings of 30 April 1985, the Chairman reminded the persons attending that the Committee was willing to hear submissions in public in relation to those matters, contained in the document "Submissions on Penalty" of 3 December 1984, which the Committee had deemed relevant to its terms of reference, and that the Committee would consider in private any submissions in relation to the relevance of other matters contained in "Submissions on Penalty". The Chairman also drew attention to the issues which the Committee had, by telex and confirming letter of 24 April 1985, invited counsel to address, should he so decide.

2.14 Counsel for the persons affected indicated that he was prepared to respond, on behalf of his clients, to the matters raised by the Committee in its telex and letter, with the following caveat:

> "In doing so, the Defendants wish to make it clear that they do not concede that the matters raised in that telex are the only matters relevant for the consideration of the Committee or the Senate, nor that they are the most important matters. The Submissions which the Defendants wish to make on the question of penalty are those in their written Submission of the 3rd December 1984, the whole contents of which they submit are relevant not only to the question of conviction, but of penalty also. In responding nonetheless to the invitation contained in the telex, the Defendants reiterate their position

as set out in that Submission, namely that they maintain they were not guilty of contempt. The Defendants have requested that the question of their conviction be reviewed by the whole Senate for the reasons set out in their Submission.".

2.15 Counsel also reiterated the position, stated at the hearing of 3 April 1985, that all submissions on all questions should be made in public, and thus that he continued to decline the opportunity to make submissions in private as to relevance of certain matters in the written submissions.

CHAPTER 3 - DISCUSSION OF ISSUES RELATING TO PENALTY

Introduction

3.1 At the hearings of 30 April 1985, counsel proceeded to address the issues which had been placed before him by the Committee.

Public Interest

3.2 "The legal basis for the submission that public interest is a factor which the Committee should take into account in assessing whether any penalty should, in the Committee's opinion, be imposed by the Senate. If there be such a legal basis, what weight, if any, in mitigation of penalty should be given to any view of public interest where the finding of the Senate indicates that view to be irrelevant to the question of the commission of the offence?"

Counsel's addresses on this issue may be found at pp.79-95 of the Transcript of Evidence of 30 April 1985.

3.3 The document "Submissions on Penalty" contained a substantial section on the question of public interest. However, the section as drafted related to the question of guilt rather than penalty. As indicated at paragraph 2.4 above, counsel, on behalf of his clients, refused the opportunity to

make appropriate changes to the submission, or to argue the relevance of the section to the question of penalty in private. Nonetheless, the Committee regarded public interest as a matter which it should take into account when considering penalty, and the purpose of the invitation to counsel was to enable him to address the question in the context of the Committee's terms of reference.

3.4 The Committee was buttressed in its view that the matter could be relevant to the question of penalty by the opinion from Professor Pearce, which stated as follows:

> "... the issues of freedom of speech, editorial discretion, public interest, ... impinge on the question of penalty ...".
>
> "The matters raised on behalf of the persons whose conduct has been investigated in the Submission to the Senate on Penalty are, in my view, matters to which the Senate can properly have regard in determining an appropriate penalty. The weight to be given to any of those matters is, of course, for the Senate to determine.".
>
> (Transcript of Evidence, 3 April 1985, p.18 (paragraph 10) and p.19 (paragraph 13).)

3.5 In discussing the public interest matter on 30 April 1985, counsel related the question primarily to contempts in the form of defamation of the Parliament (see Transcript,

30 April 1985, pp.79-82). When it was pointed out to him on a number of occasions that the question of public interest had to be considered against the Senate's obligation to protect its witnesses, counsel indicated that he would address this question when he separately addressed that issue (see paragraphs 3.20 and 3.21 below).

Conduct

3.6 "The question whether the conduct before the Privileges Committee of the persons who were responsible for the publications in The National Times, the subject of the Committee's report, tabled on 17 October 1984, is a factor which the Committee should take into account in assessing whether any penalty should, in the Committee's opinion, be imposed by the Senate, and/or which mitigates the severity of any penalty the Committee may recommend that the Senate impose."

Counsel's addresses on this issue may be found at pp.120-132 of the Transcript of Evidence of 30 April 1985.

3.7 Counsel submitted, as follows:

"The principle of law applied by the courts in sentencing is that a court ought not to take into consideration the conduct of the defence ... [T]he penalty which this Committee recommends, should be directed to the offence." (Transcript, 30 April 1985, p.121.)

3.8 In answer to the following question:

"Senator Robert Ray - I take it you are saying that we take no notice not only of any adverse impressions we may have had of the witnesses but also of any other impressions in mitigation.",

counsel's response was:

"Mr McPhee - I would say that one matter you really ought to take into account is the motive that they had for publishing this material. I am speaking in particular of Ms Bacon."

(Transcript, 30 April 1985, p.125.)

3.9 And further:

"Senator Withers - What this really says is that bad behaviour ought not be taken into account, does it not that is, if there were bad behaviour. Is the corollary that good behaviour should also be ignored in assessing a penalty?

"Mr McPhee - It is a question of whether you are speaking about what I will call behaviour generally, or attitude, or the way people answer questions and that sort of thing, as against the behaviour that is relevant to the contempt. That is the distinction one must draw.

"Senator Withers - I can understand these cases you have cited. Virtually it means that no matter how badly a person may behave in the normal behavioural sense, it ought not to be taken into account. All I am asking is that the corollary regarding very good behaviour should also not be taken into account.

"Mr McPhee - Yes, that would be a corollary in that sense.

"Senator Withers - Do you not think that tribunals do take that into account?

"Mr McPhee - No, not judicial tribunals."

(Transcript, 30 April 1985, pp.128-9.)

3.10 In answer to the following question:

"Senator Withers - ... I do occasionally see where counsel is making some plea of mitigation on sentence. They do go into the fact that their client is full of remorse. ... So remorse is taken into account - or is it not? ...",

counsel commented:

"... I think there is a difference between what counsel might say in a plea and what might move a judge."

(Transcript, 30 April 1985, p.131.)

. Conduct as a Possible Contempt

3.11 One basis of counsel's submissions on contempt was that, should any conduct in the course of the proceedings of a Committee examining a possible contempt give rise to a possible further contempt, such conduct should be the subject of separate proceedings for contempt. As Senators will be aware, the Senate has always been most reluctant to place matters before the Committee of Privileges unless such matters have impinged upon the work of the Senate, or its Committees, and the obligation of a House of the Parliament to protect its witnesses.

3.12 To illustrate this comment, the following is a list of matters on which the Committee of Privileges has reported since its establishment in 1966:

- Report upon Articles in The Sunday Australian and The Sunday Review of 2 May 1971 (premature publication of a draft report of a Senate Select Committee) - Parliamentary Paper No. 163 of 1971; tabled 13 May 1971;

- Report on Matters referred by Senate Resolution of 17 July 1975 (relating to Executive directions to claim privilege given to public servants summoned before the Senate) - Parliamentary Paper No. 215 of 1975; tabled 7 October 1975;

- Report on the Appropriate Means of Ensuring the Security of Parliament House - Parliamentary Paper No. 22 of 1978; tabled 30 May 1978;

- Quotation of Unparliamentary Language in Debate - Parliamentary Paper No. 214 of 1979; tabled 20 September 1979;

- Imprisonment of a Senator - Parliamentary Paper No. 273 of 1979; tabled 25 October 1979;

- Sixth Report (relating to harassment of a Senator by repeated offensive telephone calls) - Parliamentary Paper No. 137 of 1981; tabled 10 June 1981; and

- First Report of 1984 (relating to premature publication of in camera proceedings of a Senate Select Committee) - Parliamentary Paper No. 298 of 1984; tabled 17 October 1984.

3.13 In the light, however, of counsel's comments, with which the Committee does not disagree, that matters arising in one proceeding should be the subject of separate consideration as possible contempts, the Committee considers it necessary to bring to the Senate's attention matters which have occurred in the course of proceedings of both the 1984 Committee, and this Committee, which might be regarded at least prima facie as contempts. It does so in detail in Appendix C. The Committee draws particular attention to its comments in the Appendix concerning imputations against the 1984 Committee, and a further transgression of Standing Order 308 by the premature release to all Senators of "Submissions on Penalty".

3.14 In keeping with the Senate's reluctance, which the Committee endorses, to take action on defamatory contempts, the Committee is of the view that no action should be taken on any of the matters listed.

Expressi‹n of Regret

3.15 "Whether the persons affected by the finding that a serious contempt of the Senate has been committed wish to express any regret or other mitigating factors in their actions in publishing the initial report in The National Times of 8-14 June 1984 and the subsequent reports which were referred to the Committee of Privileges in August 1984. Should the answer to this question be a factor which the Committee should take into account in assessing whether any penalty should, in the Committee's opinion, be imposed by the Senate, and/or which mitigates the severity of any penalty the Committee may recommend that the Senate impose?"

This issue was not directly addressed by counsel, but see pp.129-132 of Transcript of Evidence of 30 April 1985.

3.16 The Committee draws attention to the only analogous case in the Senate, as outlined in the Committee of Privileges report of 1971 (Parliamentary Paper No. 163).

3.17 The persons who came before that Committee indicated to the Committee before it made its findings and the Senate considered the Committee's report:

(a) that they did not advert to the possibility of a breach of Parliamentary Privilege;

(b) that no disrespect of the Senate was intended; and

(c) that, if a breach of privilege was involved, they would be ready to apologize.

3.18 The Committee notes that in the present case, despite the findings of both the 1984 Committee and the Senate, the persons have at all times been, and remain, of the view that they are not guilty of contempt and were justified, in the public interest, in publishing the in camera proceedings of the Senate Select Committee on the Conduct of a Judge.

3.19 The Committee has further noted, however, the following paragraphs contained in the conclusion to "Submissions on Penalty":

"13.01 The defendants accept the supremacy of Parliament. At no time have they wished to, or have they believed that they can put newspapers above Parliament. They accept without equivocation that newspapers are subject to the laws of the land and they acknowledge that Parliament has the right to make those laws. They also acknowledge that Parliament has the power and should have the power to control and protect its own proceedings.

"13.02 Whilst the defendants believe that there has been no contempt, they accept that this is for the Senate to determine and that they are subject to the authority of Parliament in the same way and to the same degree as every other person or organisation in the community."

Obligation to Protect Witnesses

3.20 "To what extent, in counsel's view, has the Senate an obligation -

(a) legal, and
(b) moral

to protect its witnesses before the House or its Committees? To what extent is the Senate under an obligation to impose a penalty that will act as a deterrent to others who may act in such a way as to expose witnesses to prejudice?"

Counsel's addresses on this issue may be found at pp.98-109 and 116 of the Transcript of Evidence of 30 April 1985.

3.21 Counsel submitted on behalf of his clients that the Senate is not under any legal obligation to its witnesses. In relation to moral obligation, he stated that the Senate "may have a moral obligation in the limited sense". He continued that "the obligation is limited to what is within the Senate's power and by what is in the public interest." (Transcript, 30 April 1985, pp.98-99). In this context, counsel drew attention to the question of natural justice which is discussed in more detail in Chapter 4.

Prejudice to Witnesses

3.22 "Should the potential for prejudice to a witness or a third party as a result of injudicious remarks made by persons before a Committee, and the potential for prejudice to a specific Senate Committee, other Senate Committees, and to the

> Senate itself as a result of the disclosure of confidential information be factors which the Committee should take into account in assessing whether any penalty should, in the Committee's opinion, be imposed by the Senate, and/or which mitigates the severity of any penalty the Committee may recommend that the Senate impose? Any submission in relation to this would be assisted by comment which recognises Senate Standing Order 390, and also the power of the Senate and its Committees to compel a witness to answer questions, as well as the need of the legislature to be supported by a capacity for Committee inquiries to be undertaken both in public and in camera."

Counsel addressed this issue at pp.135-136, 155-157 and 168 of the Transcript of Evidence of 30 April 1985.

3.23 Counsel indicated that he had two difficulties in addressing question 5, in that firstly, he had difficulty in understanding the question and secondly, he could not address it without referring to matters which the Committee had indicated could not be discussed in public until it heard argument in private as to their relevance to the question of penalty. In response, however, to questions which related to the effect on other Committees, counsel stated, as follows:

> "I cannot deal with that without dealing in detail with what we say was the non-effect on this Committee [i.e. the Select Committee on the Conduct of a Judge] and the non-potential effect on this Committee. That is the important question here.". (Transcript, 30 April 1985, p.155.)

3.24 In response to the following further comment from a member of the Committee:

> "Senator Coates - ... I hope you would acknowledge that there are other parliamentary committees which, for one reason or other, have to take evidence in camera and would be concerned about publication, maybe even involving matters of much greater importance than this one." (Transcript, pp.156-157),

counsel stated:

> "I think I can only respond by saying you have to take each case as you come to it, and we say there are very good reasons in this case why the Senate should not find this a punishable contempt." (Transcript, p.157.)

Previous Record and Character

3.25 "Are the previous record and character of any of the persons found guilty of contempt relevant in any, and if so what, way to the question of penalty?"

Counsel addressed this issue at p.168 of the Transcript of Evidence of 30 April 1985.

3.26 Counsel submitted that the only relevant behaviour would be behaviour in relation to contempt of Parliament. He indicated that neither Ms Bacon nor Mr Toohey had ever been accused of contempt of Parliament and that there was no record of there having ever been any contempt proceedings against John Fairfax & Sons Limited in the Senate.

Relative Weight of Factors

3.27 "What relative weight one to another should be given to the foregoing factors?"

Counsel addressed this issue at p.169 of the Transcript of Evidence of 30 April 1985.

3.28 Counsel declined to make any submissions in relation to the relative weight of the matters raised by the Committee, on the ground that his clients did not consider that these were the only matters to be brought into the balance.

CHAPTER 4 - NATURAL JUSTICE

Introduction

4.1 As indicated at paragraph 3.21 above, counsel addressed the question of the applicability of natural justice principles to the 1984 Committee's proceedings, in the context of the Senate's obligation to protect its witnesses.

4.2 As in the case of the public interest argument, both the Committee and the solicitors for the persons affected had available the opinion of Professor Pearce that the natural justice question may be a matter which the Senate may wish to take into account in determining the appropriate penalty.

4.3 It will be recalled that counsel for the persons affected declined to accept the Committee's offer to recast "Submissions on Penalty" of 3 December 1984, and refused to address the Committee in private as to the relevance of a number of matters to penalty. Thus, the Committee was unable to pursue with counsel all of the points on natural justice which it might have wished to consider in the context of penalty.

4.4 For example, the Committee might have wished to include in its consideration of penalty paragraph 1.10 of the written submissions and any or all of chapter 5, both of which relate to the question of fair hearings. (In making reference

to these passages, it is emphasised that this report is made to the Senate, and the full written submissions were published to all Senators by the solicitors before the Committee made a decision on the question of release.)

4.5 As it was, the Committee included in the public transcript, without hearing argument from counsel, paragraphs 6.01 to 6.10 - Right to Representation - despite ambiguities as to their relationship to penalty, on the grounds that paragraph 6.12 and part of 6.13 addressed penalty, and the Committee considered that the argument leading to the conclusions contained in the latter paragraphs should also be presented.

4.6 The Committee might also have benefited from an argument from counsel as to why, despite the opinion of Professor Pearce and its own inclinations, any part at all of the natural justice question should be relevant to penalty, rather than to the antecedent question, addressed in part in "Submissions on Penalty" but which the Committee considered, prima facie, as being beyond its terms of reference, whether the Senate should conclude that serious contempts had been committed.

4.7 Before turning to the matters addressed by counsel, the Committee makes two points:

(i) There is no legal requirement for a Committee, or the Senate itself, to conduct proceedings in accordance with the principles of natural justice. This view is supported

by an opinion by Professor D.C. Pearce, Professor of Law, Australian National University. The opinion, which has been referred to earlier in this report, is set out in full at pp.15-23 of the Transcript of Evidence of 3 April 1985. It is important to note that the 1984 Committee, in seeking the opinion, did not bind Professor Pearce to questions which the Committee wished to have answered. Having read the documents in connection with that Committee's proceedings, Professor Pearce himself formulated, inter alia, a question relating to natural justice, as follows:

> "Do the rules of natural justice apply to proceedings of the Senate or the Committee of Privileges when considering an alleged breach of privilege - No."

(Transcript, 3 April 1985, p.15)

(ii) The Committee is of the view that, measured against the present law on the question of natural justice, and against guidelines, suggested by the Joint Select Committee of the Australian Parliament on Parliamentary Privilege, on which submissions on behalf of the persons affected relied, the 1984 Committee did in fact follow the principles of natural justice.

Present Law Relating to Natural Justice

4.8 A recent statement of the law in Australia concerning natural justice in relation to proceedings of a tribunal was given in a judgment (O'Rourke v Miller), as yet unreported, of the High Court of Australia, delivered on 28 March 1985.

4.9 One of the grounds of Mr O'Rourke's appeal against the termination of his appointment as a probationary constable was "whether the appellant was entitled to be treated in accordance with natural justice, and, if so, whether those principles were observed".

4.10 The Chief Justice, with whom Justices Mason, Wilson and Dawson concurred (the dissenting Justice, Mr Justice Deane, did not find it necessary to address himself to the questions), found, as follows:

> "I have no doubt that the principles of natural justice did govern the termination of the appellant's appointment. As Lord Reid said in Ridge v Baldwin [1964] A.C. 40, at p.66, there is 'an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation'.
>
> "... When it is alleged that such a person has been guilty of some misconduct which may warrant refusal of confirmation of his appointment, he is entitled to be dealt with in accordance with the rules of natural justice. As the [case] which I have cited show[s], he must be informed of what is alleged against him and given a fair opportunity to answer those allegations. However, in the present case the appellant was told quite fully what was alleged against him and he was given a full and fair opportunity to state his defence or explanation.

"It was submitted that the appellant should have been given an opportunity to cross-examine or at the very least, to confront, the [persons] who made the complaints. In support of these submissions we were referred to Barrier Reef Broadcasting Corporation Pty. Ltd. v Staley (1978) 52 A.L.J.R. 493; 19 A.L.R. 425 and Reg. v Hull Visitors; Ex parte St. Germain [1979] 1 W.L.R. 1401; [1979] 3 All E.R. 545. Those were cases in which there was a hearing before a tribunal which refused to allow the cross examination of persons who in the one case had given evidence and in the other had made hearsay statements and the decisions depended, as all cases of this kind do, on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal was acting and the subject matter being dealt with: see Russell v Duke of Norfolk [1949] 1 All E.R. 109, at p.118. Even when there is a hearing before a tribunal it does not follow that a person affected necessarily has a right to cross-examine witnesses: see National Companies and Securities Commission v The News Corporation Ltd. (1984) 58 A.L.J.R. 308; 52 A.L.R. 417. **Natural justice does not require the application of fixed or technical rules; it requires fairness in all the circumstances.**". (Emphasis added.)

4.11 This decision is a distillation of a number of previous decisions in relation to natural justice by courts in both Australia and Britain. Of particular interest is the sentence to which emphasis has been added above. Similar words were also used by the High Court in its consideration of an appeal by the National Companies and Securities Commission against a decision of the Federal Court that, at a hearing

before the Commission, News Corporation Limited and others should be permitted to be present throughout, to cross-examine witnesses, to call evidence in reply, and to make submissions. The analogy between the questions arising before the Court and matters raised by counsel and solicitors for John Fairfax & Sons Limited, Mr Max Suich, Mr Brian Toohey and Ms Wendy Bacon is also obvious, and the attention of the Senate is therefore also drawn to the High Court's conclusions in that case.

4.12 When the O'Rourke v Miller case was drawn to the attention of counsel appearing for the persons affected, he was not aware of the particular High Court decision:

> "Mr McPhee - I am not familiar with O'Rourke's case but I am certainly familiar with the other case you mentioned. What the High Court has said repeatedly in these cases is that what constitutes natural justice in one situation may not be necessary in another. That is to say, in the National Securities case all that the National Securities Commission was going to do was write a report. As I recollect that case, the High Court said that what constitutes natural justice in that situation may be something less than what is required in another situation. Just let me say this: When a body is about to set out on the judicial task of deciding to exercise penal powers which involve the liberty of a subject, nothing less than all the characteristics of fair hearing are necessary. I do not need to go past the Spender Committee report for an analysis of what is necessary in that situation. That is why I keep saying to the Committee that this is a judicial hearing of very considerable consequence. What is sufficient for the National

> Se:urities Commission, when it comes to write a re)ort, with the greatest respect, has nothing to do wi.h what is acceptable as regards natural justice in th s situation, with a judicial committee faced with th(awesome responsibility that this Committee can be fa(ed with."
>
> (T) anscript of Evidence, 30 April 1985, pp.131-2.)

The Comr ittee acknowledges that natural justice depends on the circumstances of each case. However, the action of many tribunals, whether "judicial" or "administrative", have a significant effect on the reputation, and often the livelihood, of persons who come before them.

4.13 The procedures of the Privileges Committee are more akin to a domestic or administrative tribunal than to those of a court of law. Consequently, the Committee has found it useful, by way of analogy, to consider procedures of such tribunal . In this regard, the Committee therefore draws attentio) to the definitive Australian work on The Law of Domestic or Private Tribunals by J.R.S. Forbes (The Law Book Company Limited, 1982) and, in particular, parts 4 to 6 of that publicati)n, which cover the question of natural justice in relation to such proceedings. Counsel did not appear to be familiar with this text and was not in a position to assist the Committee in pursuing the analogy.

4.14 More significantly, however, the Committee draws attention to the procedures adopted by other Westminster-based Parliaments when dealing with contempt. For example, as late as March 1985, the Privileges Committee of the House of Commons, in considering a case of premature disclosure of a draft report, did not find it necessary to hold public hearings on the question, much less to allow the persons affected either to attend or to be represented by counsel on the matter. It is of interest to note that the matter was referred to the Committee on 13 March 1985, and that the Committee reported on 27 March 1985.

. Comment

4.15 The Committee points out that the law relating to principles of natural justice depends on circumstances, and takes comfort from the High Court assertion that "natural justice does not require the application of fixed or technical rules; it requires fairness in all the circumstances". On legal dicta alone, therefore, the Committee considers that natural justice requirements have been met.

Conformity with Guidelines Suggested by Australian Joint Select Committee on Parliamentary Privilege

4.16 Nonetheless, counsel for the persons affected has relied heavily on the guidelines contained in the report of the Joint Select Committee of this Parliament on Parliamentary

Privilege. In discussing these guidelines, it should be noted that, between the time the 1984 Senate Committee commenced its proceedings in June 1984 and the completion of its public hearings in September 1984, the guidelines relied on by counsel for the persons affected were contained in an exposure draft report only. The final report, including a dissenting report, was not tabled in the Senate until 3 October 1984. The recommendations contained in the majority report of that Committee have been neither discussed nor adopted by either House of the Parliament even at the date of the present Committee's report on penalty.

4.17 As it happened, and although no decision was made by the Committee to follow the Joint Select Committee guidelines, the procedures adopted by the 1984 Committee as the inquiry evolved were similar in most respects to those suggested by the Joint Select Committee, and, indeed, in some respects went beyond them, most notably in giving the persons affected by its findings an opportunity to make further submissions on penalty before it made any report to the Senate. This delay in making an immediate recommendation as to penalty meant that the 1984 Committee did not complete its proceedings before the House of Representatives was dissolved on 26 October 1984, and thus gave rise to the present Committee's inquiry.

4.18 So far as this Committee has been able to ascertain, no similar opportunity has been given to any other persons in the history of contempt cases of any Parliament.

4.19 So that the Senate may be informed of the 1984 Committee's adherence to the guidelines proposed by the Joint Select Committee, attached as Appendix D to this report is a comparison between the Joint Committee's recommendations, and the procedures followed by the Senate Committee. As a further basis of comparison, Appendix D also includes details of procedures adopted by the Senate Committee of Privileges in 1971. That Committee considered a comparable, although much less serious, issue of premature publication of a Committee report, the only analogous issue in the history of the Australian Senate.

. Notification of Public Hearing

4.20 In addressing the present Committee on 30 April 1985, counsel drew particular attention to two major points which he perceived as contravening natural justice principles. First, he addressed the failure of the 1984 Committee specifically to apprise his clients of a public hearing of evidence which would be held on 12 September 1984. It is clear from counsel's submissions that the persons affected were under the impression that the purpose of the hearing had been to take evidence to establish the "prosecution" case. However, as the report of the 1984 Committee, and a reading of the public transcript (which was made available on 14 September 1984, on the Committee's initiative, to the persons affected) make clear, the purpose of that hearing was to attempt to establish the source of the information published by The National Times.

4.21 The notification of the case which the persons affected were required to answer was made by letter on 3 July 1984, which drew attention to a speech made in the Senate by the then Chairman of the Select Committee on the Conduct of a Judge, and also drew attention to Standing Order 308 and certain other matters relating to contempt. A subsequent letter, of 13 August 1984, specifically asked the persons affected to show cause why the publication of the article originally referred to the Committee should not have been regarded as contempt. (Transcript of Evidence, 26 September 1984, pp 79-84 and 88-93.)

4.22 In terms of the complaint that the persons affected were not present at the hearings, it should be pointed out that, although no specific notification to those persons was given, the hearings were publicly notified in accordance with both normal practice and the requirements of Standing Orders. In relation to the hearing of evidence, Forbes (op.cit.) comments as follows:

> "It has been noted that even at an oral hearing evidence may be taken from witnesses in the defendant's absence. It may consist of evidence given to another tribunal. But the substance of it must be conveyed to the defendant and it may be necessary to identify the sources of information so that the defendant can deal with matters going to credit." (p.15)

Right o[illegible] Cross-Examination

4.23 The second matter of concern, flowing from the fact that th[illegible] persons affected and their legal representatives were not pres[illegible]ent at the hearings of 12 September 1984, was that they were no[illegible] able to cross-examine the persons appearing on that day. Particular reference was made to the recommendation of the Joint [illegible]elect Committee that cross-examination should be permitte[illegible]d.

4.24 The question of the right to cross-examine was not raised [illegible]with the 1984 Committee until counsel addressed that Committe[illegible] at the conclusion of its proceedings of 26 September 1984. Co[illegible]nsel had not taken the opportunity offered to him to address [illegible]he Committee before the proceedings commenced on that day. As [illegible]the Senate will be aware, Standing Orders of the Senate do not [illegible]permit a right of cross-examination, and the 1984 Committee would have needed the permission of the Senate for such cros[illegible]s-examination to occur.

4.25 In any case, this Committee considers that counsel for the [illegible]persons affected has misconceived the duty of the Privilege[illegible] Committee. To adopt the words of the High Court in O'Rourke [illegible] Miller, "[e]ven when there is a hearing before a tribunal [illegible]t does not follow that a person affected necessarily has a righ[illegible]t to cross-examine witnesses". Forbes (op.cit.,p.135) also shar[illegible]s this view. Further, as the High Court has also stated (National Companies and Securities Commission v News Corporatio[illegible] Limited and Others, 52 ALR 417 at p.426):

"... the hearing is designed to discover facts which may or may not lead to further action being taken; no finding of fact or decision of law need be made; and the **procedure is not an adversary one but inquisitorial.**" (Emphasis added.)

. Comment

4.26 Counsel for the persons affected has relied very heavily on both procedures in the courts and the proposals of the Joint Select Committee of this Parliament on Parliamentary Privilege in making a case that the 1984 Committee did not follow the principles of natural justice. This Committee reiterates that other precedents, most notably those of comparable Parliaments, should also be considered. Indeed, it would have been helpful to this Committee if counsel had acknowledged the relevance of, and addressed himself to, the established precedents and procedures and any proposals for procedures to be adopted in comparable Parliaments.

4.27 While accepting counsel's right and obligation to put the case for his clients as persuasively as possible, the Committee regrets that the submissions have been so selective. For example, the question set out in paragraph 3.22, which counsel stated he had difficulty in understanding, was taken, almost verbatim, from part of the recommendations of the Ontario Law Reform Commission Report on Witnesses Before

Legislative Committees (1981). The quote was turned into a form of a question. Counsel did not appear to be familiar with this report nor with the concepts involved in the particular section of it.

4.28 Nor did he appear familiar with virtually any other material on this subject, such as:

- the Report of the (Westminster) House of Commons Select Committee on Parliamentary Privilege (H.C.34, 1967);

- "Inquiries by Senate Committees", by D.C. Pearce (now Professor Pearce, who assisted this Committee), 1971, 45 Australian Law Journal 652;

- Parliamentary Committees - Powers Over and Protection Afforded to Witnesses - paper prepared by the Attorney-General, Senator the Honourable I.J. Greenwood, Q.C. and the Solicitor-General, Mr R.J. Ellicott, Q.C. (Parliamentary Paper No. 168 of 1972); or

- the Third Report of the (Westminster) House of Commons Committee of Privileges (H.C.417, 1976-77).

In addition, all the authoritative works on parliamentary procedure, notably May's Parliamentary Practice, make reference to some or all of these publications. The Ontario Law Reform Commission Report draws them together very adequately.

4.29 This Committee found that counsel's lack of familiarity with authoritative written material on existing procedures and proposals reduced the impact and usefulness of his submissions.

4.30 The Committee reiterates that, after considering a range of material on the question of natural justice, including submissions by counsel for the persons affected, it has no doubt that natural justice principles applicable to an inquiry such as this were, in fact, fully applied.

CHAPTER 5 - RECOMMENDATION OF PENALTY

Introduction

5.1 The Committee, in considering the question which the Senate referred to it on 27 February 1985, was mindful of the following comments contained in paragraphs 29 to 30 of the 1984 Committee's report:

> "In considering what penalty, if any, the Committee should recommend that the Senate impose, the Committee will have regard to the 1971 Report of the Senate Committee of Privileges (Parliamentary Paper No. 163), which was adopted by the Senate on 11 May 1971. Unless otherwise determined by the Senate, the powers affirmed in the Resolution adopting the Report remain.
>
> "The Committee notes in particular the 1971 Committee's conclusion that any comparable breach should, in the future, save in exceptional circumstances, be met by a much heavier penalty, such as a substantial fine, than that Committee recommended be imposed at that time."

5.2 It was also aware that the 1971 Committee made land-mark recommendations in relation to premature publication of draft reports of Committees. In this regard, it is important to note that the issues which the 1971 Committee regarded so seriously related to the publication, one day too early, of a report which was agreed to by all members of the Committee. Clearly, such premature publication was significantly less

serious than the selective publication of private proceedings of a Select Committee, in isolation, before that Committee had had the opportunity to evaluate, and make determinations upon, evidence placed before it.

5.3 In 1971, the Committee of Privileges was sufficiently concerned at the effects on the operation of other Senate Committees as to make strong recommendations concerning penalty. It is therefore impossible to over-state the potential of the present serious contempts to affect the operations of other Senate Committees if this matter were to pass unnoticed.

Basis of Committee's Recommendations

5.4 In coming to its conclusions concerning penalty, this Committee was guided by three elements of the 1971 Committee's report:

(a) that Committee's consideration of penalty in relation to the circumstances of the particular case;

(b) that Committee's desire to ensure that a penalty would act as a deterrent to the persons the subject of the complaint; and

(c) that Committee's endeavours to warn others who might be tempted to commit a comparable contempt.

(a) Penalty in circumstances of case

5.5 In considering the present case, the Committee was aware of significant differences between the present proceedings and the 1971 proceedings. For example, as described at paragraph 3.17 above, the persons who came before the 1971 Committee indicated to the Committee before it made its findings and the Senate considered the Committee's report:

(i) that they did not advert to the possibility of a breach of Parliamentary Privilege;

(ii) that no disrespect of the Senate was intended; and

(iii) that, if a breach of privilege was involved, they would be ready to apologize.

5.6 In contrast, the persons affected by the findings of the 1984 Committee, adopted by the Senate:

(i) continue to maintain that they are not guilty of contempt, basically on the ground that publication in the public interest overrides the absolute offence which is notified by Standing Order 308;

(ii) did not, and do not, claim that they did not advert to the possibility that a contempt may be involved, but merely pointed out that difficulties arose in determining whether in any particular case contempt might be an issue; and

(iii) did not, and do not, express regret at the publication, again on the ground that they do not accept that they were and are guilty of serious contempts.

The persons affected do, however, acknowledge the right of the Parliament to control and protect its own proceedings.

. Application of Penalty

5.7 The question then arises who, if any, of the persons affected should be penalised. The 1984 Committee found, inter alia, that the editor and publisher of The National Times should be held responsible and culpable for the contempt, while the journalist with The National Times was also culpable for the contempt. The Committee further found that the publications were based on unauthorised disclosure, by a person or persons unknown, of in camera proceedings of the Select Committee on the Conduct of a Judge, and that such a disclosure, if wilfully and knowingly made, constituted a serious contempt of the Senate.

5.8 In recommending penalty, this Committee is of the view that it is the person or persons who provided the information, and the organisation which permitted the unauthorised publication of information, to whom and to which penalty should be directed.

5.9 As the 1984 Committee indicated, however, it was unable to discover who provided the information. This Committee considers that, should the source of the information ever be discovered, the question whether the information disclosed was

divulged wilfully and knowingly should be referred to the Committee of Privileges, and that a severe penalty would be appropriate if that Committee were to find that the disclosure was deliberate.

5.10 John Fairfax & Sons Limited, the organisation involved in the present serious contempts, has admitted responsibility for the publication.

(b) **Deterrent Penalty**

5.11 As this criterion indicates, the Committee does not regard retributive punishment as an appropriate method of proceeding. It is concerned, rather, that the Senate should have available to it sufficient capacity to protect its own witnesses and its own proceedings by the best available method of deterrence.

5.12 In considering recommendations as to penalty, this Committee has concluded that a substantial fine is appropriate in the case of an organisation responsible for the publication of information. In the case of a person who wilfully divulges such information, a severe penalty would need to be determined at the time that the offence was proved, having regard to the circumstances of the case.

5.13 In considering what might be regarded as a "substantial" fine, the Committee noted the recommendation, contained in the Report of the Joint Select Committee of the Australian Parliament on Parliamentary Privilege, that a fine of not more than $10,000 would be appropriate for organisations found to be in contempt of Parliament.

5.14 This Committee is of the view, however, consonant with its determination that penalty should have a deterrent effect, that, under circumstances such as exist in the present case, a fine of much greater magnitude, say, of the order of up to a maximum of $100,000, would not be unreasonable. Large media organisations enjoy a special position of power and influence within Australia, and particularly in their relationship with the Parliament. Such power brings with it an attendant responsibility, and thus a media organisation of the stature, and with the assets, of a company like Fairfax, which is found to be in serious contempt of a House of the Parliament, should expect a penalty which reflects the gravity of its offence.

5.15 In considering whether to recommend that the Senate impose such a penalty in the present case, and leaving aside the question of the Senate's power to impose a fine (which is separately discussed in Chapter 6), the Committee took into account three matters.

5.16 Firstly, assuming that the fine was imposed and complied with, the question arises whether there would be any guarantee that the same, or a similar, offence would not be repeated.

5.17 Secondly, it is to be acknowledged that, in defending both its actions and those of its employees in the present case, the company has incurred substantial costs, over an extended period, as a result of its being represented in this matter.

5.18 Finally, the Committee has also taken into account the point made by the 1984 Committee that it was difficult to contemplate imposing a penalty on the publishers of the information while the informant remained undetected.

5.19 Bearing all these factors in mind, the Committee therefore proposes some incentive so that John Fairfax & Sons Limited ensures that persons for whom it is responsible do not commit the same or a similar offence again. Accordingly, the Committee **recommends** that the Senate not proceed to the imposition of a penalty **at this time**, but that if the same or a similar offence be committed by any of the media for which John Fairfax & Sons Limited is responsible, the Senate should, unless at that time there are extenuating circumstances, impose an appropriate penalty for the present offence. In effect, the Committee, in this recommendation, is suggesting that the Senate place John Fairfax & Sons Limited on a "good behaviour bond".

5.20 The Committee further **recommends** to the Senate that the period of the "bond" should be for the remainder of the present session of Parliament, that is, until the Parliament is prorogued, the House of Representatives is dissolved or expires, or the Senate and House of Representatives are dissolved simultaneously, whichever is the earliest.

(c) **Warning to Others**

5.21 In keeping with the 1971 Committee's criterion, the declaration as to what penalty is appropriate for the Senate to impose is also intended to serve as a warning to other media which may, like The National Times, be tempted to report in camera proceedings of a Committee.

5.22 The Committee can understand that an editor, once having obtained confidential information from the prime culprit, whether acting deliberately or inadvertently, may wish to publish that information, even knowing that such publication is a contempt, in case a rival does so. The Committee, in giving a fair warning of the likely consequences of such publication, and stressing that the media organisation concerned must take responsibility for it, intends its recommendations to be taken as a serious warning to all media organisations in this country.

5.23 The Committee emphasises that its concern remains with the protection of witnesses, and the operations of all Committees of the Senate, and the Parliament, so that sensitive information such as confidential commercial and national security details, or information relating to relationships between Australia and other countries, may continue to be given to the Parliament on the basis of trust which has been the hallmark of Committee operations.

CHAPTER 5 - POWER TO FINE

6.1 As indicated in paragraph 5.14, this Committee has concluded that a substantial fine is appropriate for major media organisations in cases of contempt concerning premature publication of in camera proceedings of Parliamentary Committees. It will be recalled that the 1971 Committee of Privileges declared, and the Senate at that time agreed, that it was in the capacity of the Senate to impose a fine. As the 1984 Committee of Privileges report pointed out, the resolution of the Senate of 13 May 1971 affirming this power remains until otherwise determined by the Senate. However, the Senate's affirmation has been challenged by:

(i) the Joint Select Committee on Parliamentary Privilege, (Parliamentary Paper No. 219 of 1984, p.96);

(ii) a legal opinion provided to John Fairfax & Sons Limited by Sir Maurice Byers, Q.C. (Transcript of Evidence, 3 April 1985, pp.58-63); and

(iii) the legal opinion by Professor Pearce (Transcript of Evidence, 3 April 1985, p.19, paragraph 14).

6.2 As matters stand, if the Senate asserted, as distinct from declared, its power to fine, persons affected by such a decision may feel it incumbent on them to challenge the Senate in the High Court of Australia. While the Committee is of the

view, fortified by Professor Pearce's opinion expressed at paragraph 14 (Transcript of Evidence, 3 April 1985, p.19), that the High Court would be reluctant to involve itself in the question, it also recognises that it is the Parliament's responsibility to ensure, in accordance with the separation of powers doctrine which permeates the Constitution of Australia, that the High Court is not placed in the invidious position of considering the powers of the Parliament to control and regulate its own proceedings.

6.3 The Committee has also noted, from advice received from the Clerk of the Senate (see Appendix E), and advice provided by the Secretary of the Attorney-General's Department to both the 1984 Committee (see Appendix F) and the Joint Select Committee on Parliamentary Privilege (see Appendix G), that certain matters may need to be resolved concerning the collection of any fines which the Senate may consider imposing.

6.4 The Committee is therefore of the opinion that it would be appropriate for the Parliament to clarify both questions. As the Secretary to the Attorney-General's Department has indicated in his opinion, tabled in the Senate on 3 October 1984 with the report of the Joint Select Committee, "it seems clear that legislation could be passed by the Parliament declaring or providing that each House has the power to fine for contempt". That same opinion sets out a proposed constitutionally valid method for the collection of a fine through normal mechanisms of the courts (see Appendix G, pp.4-5).

6.5 The Committee therefore **recommends** that specific legislation, along the lines suggested in the opinion, be introduced in order to put the power of the Houses of the Parliament beyond doubt.

B.K. CHILDS
Chairman

23 May 1985

APPENDICES

APPENDIX A

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Our Ref. GDB117011 LIT:jb

Your Ref.

March 26, 1985

Senator, The Hon. D. McClelland,
The Senate,
Parliament House,
CANBERRA A.C.T. 2600

Dear Senator McClelland,

We are the solicitors for John Fairfax & Sons Limited, Mr. Brian Toohey and Ms. Wendy Bacon in connection with contempt proceedings which were the subject of a Report from the Committee of Privileges presented to the Senate on October 17, 1984.

On March 15, 1985 we wrote to you and to every Senator enclosing a copy of a Submission made by us on behalf of our clients to the Committee of Privileges. In that letter and Submission we set out certain serious concerns at the conduct of the proceedings and sought to make you fully aware of significant arguments put forward by our clients.

We said it was out clients' fundamental argument that when the Committee of Privileges found our clients guilty and so reported to the full Senate, it did not deal with the substance of our clients' defences and did not adequately set out these defences in its Report to the Senate; and further that the procedures adopted by the Committee denied our clients a fair hearing and were contrary to the recommendations of the Spender Committee on Parliamentary Privilege.

We have been advised now by Sir Maurice Byers QC that it is proper for our clients to seek through you in your capacity as President of the Senate, the indulgence of the Senate for Senior Counsel representing our clients to address the Senate as to the recommendations made by the Committee in its Report of October 17, 1984 and as to the methods employed by the Committee in arriving at those recommendations. On behalf of our clients we formally request that indulgence. In support of that request we urge the consideration that the Senate should, in this respect, set an example of propriety and fairness.

We make this request at this time because of our clients' concern that in their next appearance before the Committee of Privileges in Melbourne on April 3, 1985 the Committee may take the view that it will hear submissions on no subject other than penalty, thus denying our clients the right to have the determination

of their guilt or innocence made by a full Senate fully informed of the arguments they advance upon their behalf.

As you will be aware, our clients assert that the Committee failed to provided a fair hearing in the following respects:-

(a) the defendants were not present at, nor able to take part in, the first hearing on September 12, 1984. This hearing involved taking evidence to establish the "prosecution" case. The defendants were not aware and were given no notice that the first hearing would take place that day;

(b) on September 12, 1984 the Committee received written evidence in a private document (subsequently set out and relied upon in the Report) which it refused to make available to the defendants before their examination on September 26, 1984. That document contained certain questions put to Senator Tate, the Chairman of the Senate Select Committee Inquiring into the conduct of a Judge, and Senator Tate's replies. The defendants are still unaware of whether the whole of the evidence taken prior to September 26, 1984 has been made available to them;

(c) the defendants were not permitted to cross-examine those who gave evidence against them;

(d) the Committee obtained evidence after the hearing of September 26, 1984. The defendants are unaware of the content of the evidence. They have had no opportunity to challenge it;

(e) the defendants were denied the same right of representation by Counsel normally afforded in the courts;

(f) the whole Committee of seven Senators concluded and reported to the Senate that a serious contempt had been committed. But while the whole seven heard the "prosecution" case on September 12, only four heard the case for the defendants on September 26.

In view of these important considerations, our clients urge your favourable consideration of this request. We have today written to the Secretary of the Privileges Committee, Miss Anne Lynch, requesting that the 3 April, 1985 hearing be adjourned until the proceedings concerning Mr. Justice Murphy, now on foot in New South Wales, be concluded, as we believe that any submission made on our clients' behalf would necessarily be prejudicial to those hearings. We would therefore request that any hearing by the full Senate should similarly be delayed.

Yours faithfully,

Stephen Jaques Stone James

c.c. Senator D.K. Childs

APPENDIX B

PRESIDENT OF THE SENATE

PARLIAMENT HOUSE
CANBERRA

28 March 1985

Stephen Jacques Stone James
Attorneys Solicitors & Notaries
AMP Centre
50 Bridge Street
SYDNEY NSW 2000

Dear Sirs,

I acknowledge receipt of your letter, dated 26 March 1985, relating to the proceedings and report of the Committee of Privileges.

The present situation is that the Committee reported to the Senate, on 17 October 1984, on the reference previously given to it, namely the publication of certain material in the National Times newspaper. The Committee reported to the Senate its findings in relation to contempt, and that Report concluded the Committee's consideration of that particular reference. The Committee also reported to the Senate that it would make no recommendation concerning penalty until the persons affected had an opportunity to make submissions on that question.

The Committee's report in fact was adopted by the Senate on 24 October, but the Committee did not have the opportunity to complete its consideration of the matter of penalty before the beginning of the new session of the Parliament.

Following the appointment of a new Committee on 22 February this year, the Senate, on the motion of the Chairman of the Committee of Privileges, referred to that Committee the question of penalty arising from the previous Committee's report. Upon receipt of your letter, I discussed the present stage of the Committee's consideration of its new reference with the Chairman of the Committee this morning. He informs me that you have been advised of the Committee's decisions as to how it proposes to proceed on its current reference. At this stage, therefore, it would not be proper for me to make any further comment on the contents of your letter to me.

I am forwarding copies of your letter, and this reply, to the Leader of the Government in the Senate, the Leader of the Opposition in the Senate, the Leader of the Australian Democrats and the Independent Senator, Senator Harradine, for their information. I am also forwarding a copy of this reply to the Chairman of the Committee of Privileges, Senator Childs.

Yours faithfully,

(Douglas McClelland)

APPENDIX C

POSSIBLE PRIMA FACIE CONTEMPTS

- Accusations made against a member of the 1984 Committee of Privileges at hearings of 26 September 1984 (Transcript of Evidence, pp.72-73).

- Imputations against members of the Senate Committee on the Conduct of a Judge (Transcript of Evidence, 26 September 1984, pp.43, 44, 53, 59-61 and 106).

- Imputations against members of the 1984 Committee of Privileges, contained in a letter dated 15 March 1985 to all Senators and the submissions attached therewith, and in remarks by counsel at the hearings of 3 April 1985 (Transcript, p.33).

The Committee draws attention to paragraph 6.08 of "Submissions on Penalty", as follows:

> "The defendants draw attention particularly to the remarks of Senator Peter Rae at p.116 of the transcript [of 26 September 1984] that the lack of an opportunity to cross-examination was 'probably the only relevant point' (going to breach of the rules of natural justice). If the inference from his statement is that this was

unimportant, the defendants respectfully disagree. They also disagree with his statement on page 116 of the transcript in which he equated the right of a defendant to be present as a spectator with the right of a defendant to be fully represented ('It was a public hearing and you and your clients were entitled to be present, if you wished to be'). That Senator Rae was the source of these comments is important because Senator Rae was the only qualified lawyer on the Committee and the only member of the Committee who served on the Joint Select Committee on Parliamentary Privilege. It seems likely to the defendants that the other members may have looked to him for guidance on these issues."

The Committee refers to this particular paragraph because counsel for the persons affected himself raised it, and went on to comment, as follows:

"Mr McPhee ... This question of the inability to cross-examine may, or may not, seem important to the Committee, but what I want to do is to point to some of the areas in which we would----

"Senator Peter Rae - Can I start with the logical inconsistency of saying that I said that the point of relevance was such and such and then turn it around and say that I was inferring that it was unimportant?

"Mr McPhee - If you did not mean to infer that, I withdraw the----

"Se:.ator Peter Rae - It just seems to me to be lo;ically inconsistent. ..."

(Transc:ipt of Evidence, 30 April 1985, p.142.)

When cueried on the other aspects of the paragraph (Transcript, pp.142-3), counsel acknowledged and took respon:ibility for one error, but indicated, at p.144, that he was not conscious of any other error. The follow ng exchange then occurred:

"S:nator Peter Rae - Are there any other mistakes? Is there any other homework that you had not done before you made this submission?

"Mr McPhee - I am not conscious of any other error.

"Senator Peter Rae - You might like to check to see who were the members of the Joint Select Committee on Parliamentary Privilege.

"Mr McPhee - Yes. What I meant was that the only----

"Senator Peter Rae - This is one of the sub-missions----

"Mr McPhee - Do you want me to respond to your question?

"Senator Peter Rae - Yes.

"Mr McPhee - What I was saying was that you were the only one present on that occasion. That must be obvious.

"Senator Peter Rae - 'The only member of the Committee who served on the Joint Select Committee on Parliamentary Privilege' is the statement that is there. It happens to be incorrect and it has nothing to do with who was present on the occasion. I think you are stretching things.

"Mr McPhee - Our address is talking about what was done and said on that occasion. That is what the whole paragraph is talking about. It is obvious.

"Senator Peter Rae - Do you mean that you are suggesting that the other members of the Committee neither read the transcript nor considered the matters unless they were present? No other member of the Committee----

"Mr McPhee - I did not say that at all. I never said it."

t is necessary to point out the errors in the supposedly actual statements to which counsel and Senator Peter Rae eferred. As counsel acknowledged, one other member of the 984 and present Privileges Committee is a qualified awyer. In addition, another member served on the Joint elect Committee from its establishment in March 1982 ntil it tabled its final report in October 1984.

(Senator Peter Rae served on that Committee from March 1983 only.) The Committee is not convinced that when paragraph 6.08 is read as a whole, Mr McPhee's explanation of the second error - that the comments referred to proceedings on 26 September 1984 only - could be accepted.

. the clear transgression of Standing Order 308 in that submissions to the Committee were published on 15 March 1985 by the solicitors for the persons affected, without the Committee's permission, to all members of the Senate, despite the facts that:

- at no stage before the solicitors decided to distribute the submissions did the present Committee reject the request, and the solicitors were so advised on 28 February 1985;

- the meeting at which the Committee proposed to consider the question of release was postponed, at the solicitors' request, from 8 March to 15 March, and then to 3 April 1985, and the premature publication of the submissions to all Senators occurred on a day on which, without the solicitors' intervention, the Committee could reasonably have been expected to meet to consider the request.

. it became clear from the evidence of 30 April 1985 that counsel for the persons affected had spoken to at least one member of the House of Representatives, and had attempted to speak with another.

Counsel also indicated that he believed his clients would have raised the matter with members of the House of Representatives, but when twice offered an adjournment to seek instructions from his clients so that this could be confirmed or denied, declined to do so.

The Committee draws no conclusions from the above, but draws the attention of the Senate to the Transcript of Evidence, 30 April 1985, pp.158-166.

APPENDIX D

Comparison between procedures:

(1) recommended by Joint Select Committee on Parliamentary Privilege	(2) adopted by 1984 Senate Committee of Privileges	(3) adopted by 1971 Senate Committee of Privileges
Public Hearings		
(a) The hearings of the Privileges Committee shall be in public, subject to a discretion in the committee to conduct hearings in camera when it considers that the circumstances are such as to warrant this course.	(a) Both hearings at which evidence was taken were held in public. Date and place of the hearings were notified in the Committee List. Persons asked to appear before the Committee at either hearing were invited by letter.	(a) The Committee resolved that all meetings of the Committee should be held in camera.
Publication of Transcript of Evidence		
(b) The whole of the transcript of evidence shall be published, and shall be presented to its House by the Committee when it makes its report, subject however to a discretion to exclude evidence which has been heard in camera and to prevent the publication of such evidence by any other means.	(b) The proof transcript was made available to all witnesses for correction and also to those who requested it; the proof of the first hearing was sent, on the Committee's initiative, to John Fairfax & Sons Ltd, Mr Toohey and Ms Bacon. The corrected transcript was tabled with the report.	(b) No transcript was published.
Definition of Matters to be Addressed		
(c) Issues before the committee should be adequately defined so that a person or organisation against whom a complaint has been made is reasonably apprised of the nature of the complaint he has to meet.	(c) The Committee, when writing to the persons and organisation against whom the complaint was made, twice (on 3 July and 13 August 1984) spelt out the nature of the complaint.	(c) This is unclear from Minutes: an urgent telegram invited persons to attend a meeting of the Committee.
Reasonable Time for Persons/Organisation to Respond		
(d) A person or organisation against whom a complaint is made should have a reasonable time for the preparation of an answer to that complaint.	(d) The Committee first wrote on 3 July 1984, requesting a response by 31 July. The Committee wrote again on 13 August 1984 asking that persons the subject of the complaint address questions raised by the Committee; foreshadowing further references; and also asking that persons appear before the Committee on 14 September. (At the request of the of the persons affected, the hearing was postponed to a day (26 September) on or after 21 September 1984.) (See also (f) (v) below.)	(d) Attendance was sought following the meeting of 6 May 1971 for either Friday, 7 May or Monday, 10 May.
Right to be Present During Public Proceedings		
(e) A person against whom a complaint is made, and an organisation through its representative should have the right to be present throughout the whole of of the proceedings, save for deliberative proceedings and save where in the opinion of the committee he or she should be excluded from the hearing of proceedings in camera.	(e) The right to be present was not refused; however, formal notification to each of the respondents to the complaint was not specifically made.	(e) Not applicable - all proceedings were held in camera.

Right to Adduce Evidence

(f) A person or organisation against whom a complaint is made should have the right to adduce evidence relevant to the issues.

(f) The Committee gave the persons and organisation the following opportunities to adduce evidence:

(i) two opportunities to make written submissions before the public hearing of 26 September 1984;

(ii) the right to make oral statements;

(iii) the right to have counsel make both opening and closing addresses to the Committee;

(iv) the right to make further written submissions following the hearing;

(v) the right to make written submissions on the question of penalty (extension of time for the presentation of submissions was granted).

NOTE: The present Committee also afforded the persons and organisation,and/or counsel on their behalf, to make further submissions at hearings in relation to the question of penalty.

(f) The Committee gave the persons and organisations involved the opportunity to adduce oral evidence and submissions before it.

Right of Cross Examination

(g) A person or organisation against whom a complaint is made should have the right to cross examine witnesses subject to a discretion in the committee to exclude cross examination on matters it thinks ought fairly to be excluded such as matters of a scandalous, improper, peripheral or prejudicial nature.

(g) The right of cross-examination was not afforded to the persons or organisation.

[It should be noted that cross-examination of witnesses is radically contrary to Senate procedures, and would require a suspension of Standing Orders.]

(g) The right of cross-examination was not afforded to the persons or organisations.

Right to Address Committee

(h) At the conclusion of the evidence, the person or organisation against whom a complaint is made should have the right to address the committee in answer to the charges or in amelioration of his or its conduct.

(h) Such a right was accorded to counsel on behalf of the persons and organisation, and a further right to make written submissions was also accorded.

(See also (f) (iii) to (v) above.)

(h) The Committee gave the persons and organisations, and counsel for one of the parties involved, the opportunity to address the Committee.

Right to Legal Representation

(i) A person or organisation against whom a complaint has been made shall be entitled to full legal representation and to examine or cross-examine witnesses through such representation and to present submissions to the committee through such representation.

(i) The persons and organisation were accorded the right to legal representation and to present submissions through such representation, although examination and cross-examination of witnesses were not permitted.

(See (f) above.)

(i) The persons and organisations were accorded the right to legal representation, although examination and cross-examination of witnesses were not permitted.

Reporting Procedure

(j) In its report the Committee shall set forth its opinion on the matter before it, the reasons for that opinion, and may, if it thinks fit, make recommendations as to what if any action ought to be taken by its House.

(j) The Committee followed this course.

(j) The Committee followed this course.

Committee to Determine Own Procedures

(k) Subject to the foregoing, the procedures to be followed by the committee shall in all places be for the committee to determine.

(k) No comment required.

(k) No comment required.

Reimbursement of Legal Expenses

(l) The committee shall be authorised in appropriate cases and where in its opinion the interests of justice so require, to recommend to the Presiding Officer payment out of parliamentary funds for the legal aid of any person or organisation represented before the committee or reimbursement to such person or organisation for the costs of legal representation incurred by him.	(l) This matter has not been raised before the Committee.	(l) This matter was not raised before the Committee.

Committee to Obtain Appropriate Assistance

(m) The committee shall be entitled to obtain such assistance, legal or otherwise, in the conduct of its proceedings as it may think appropriate.	(m) The Committee obtained the appropriate assistance from the Clerk of the Senate and the Secretary to the Attorney-General's Department, and, with the approval of the President, obtained legal opinions from Professor Dennis Pearce.	(m) The Committee did not seek outside assistance.

APPENDIX E

AUSTRALIAN SENATE
CANBERRA, A C T

11 September 1984

Dear Senator Childs,

I refer again to your letter of 20 August seeking my advice on two questions relating to the possible enforcement of fines imposed by the Senate.

The answers to both questions may be regarded as lacking certainty, because there is a difference of opinion among authorities, most recently outlined in the "Exposure Report" of the Joint Select Committee on Parliamentary Privilege (paras. 7.14 to 7.17), on the question whether the Parliament has the power to impose fines, and, as a corollary, the power to enforce payment. It is my belief, however, that the power to fine does lie in the Senate, as declared in the 1971 Report of your Committee and adopted by the Senate at that time, and my answers to the direct questions are based on that assertion.

The questions I am asked are:-

1) If the Senate were to agree to a recommendation of the Committee that a fine was an appropriate penalty, what steps could be taken to enforce the payment of such a fine?

2) Specifically, would it be possible for the Senate to use the judicial process to enforce the payment?

My answer to the first question, as to the possible enforcement of payment of a fine, is that the Senate would have to rely on the sanctions it currently possesses in respect of contempts. Sanctions available to the Senate range from imprisonment, the imposition of a further fine, reprimand, admonishment, and the requirement to make a public apology, to the exclusion of offenders from parliamentary precincts. The non-payment of a fine would be capable of being judged a contempt only if the capacity to fine is accepted as a valid exercise of the Senate's powers.

.../2

Without making any claim to legal expertise on matters relating to the judicial process, my answer to the second question is that I do not know how there could be any access to that process to enforce payment of a fine imposed by the Senate. The reluctance, and in most cases incapacity, of courts to become involved with anything coming within the ambit of the proceedings of the Parliament would, I believe, render such a course almost certainly beyond reach. In addition, I am sympathetic to the view that, as with other matters relating to privileges, the responsibility rests with the Houses of Parliament themselves to deal with the infringement of their own powers.

In summary, I support the Senate's capacity to fine, I believe the Senate would have to rely on its existing sanctions to enforce payment of any such fine, and I do not think that recourse to the judicial process would be available for that purpose

Yours sincerely,

(A.R. Cumming Thom)
Clerk of the Senate

Senator B.K. Childs,
The Senate,
Parliament House,
CANBERRA, A.C.T. 2600.

APPENDIX F

ATTORNEY-GENERAL'S DEPARTMENT

SECRETARY'S OFFICE

TEL: 71 9000

ROBERT GARRAN OFFICES
NATIONAL CIRCUIT
BARTON A.C.T. 2600

GC. 84/11427

13 September 1984

Miss A. Lynch,
Secretary,
Senate Committee of Privileges,
Parliament House,
CANBERRA ACT 2600

Dear Miss Lynch,

Enforcement of Fines Imposed by the Senate

I refer to your letter dated 20 August 1984 stating that the Senate Committee of Privileges has asked for my advice on the following questions:

(a) If the Senate were to impose on a person a fine as punishment for a breach of the privileges of the Senate, what steps could be taken to enforce the payment of such a fine?

(b) Specifically, would it be possible for the Senate to use the judicial process to enforce the payment?

Power to Impose Fines

2. The questions posed do not call for an expression of opinion on whether the Senate can impose a fine for a breach of privilege or a contempt. This matter is regulated by s.49 of the Constitution, which provides:

> "49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth."

There has been no declaration by the Parliament under s.49 covering the present matters, and the result is that the matter has to be considered by reference to the powers, privileges and immunities of the Commons as at 1901. See R v. Richards; ex parte Fitzpatrick and Browne (1955) 92 CLR 157.

3. May, Parliamentary Practice, 19th ed., points out (p.117) that the Lords have claimed to be a court of record and, as such, to have power not only to imprison but to impose fines, but that the Commons during the last 3 centuries have not imposed fines. It adds that it would be difficult to determine whether the Commons are, in law, a court of record, as this claim, once firmly maintained, has been virtually abandoned, although never distinctly renounced. On the other hand, the Senate in 1971 adopted a Report of the Senate Privileges Committee that the Senate has the power, in the enforcement of its privileges, to fine: Odgers, Australian Senate Practice, 5th ed., p.651. Odgers cites an article which refers to the fact that the New Zealand House of Representatives in 1896-1903, acting under a provision analogous to s.49 of our Constitution, exercised the power to impose fines on offending members of the public on 3 occasions. I should add that the power does not appear to have been exercised in New Zealand since, and its existence was said to be uncertain by the Standing Orders Committee in 1929.

4. In 1955 in the case of the "Bankstown Observer", the Prime Minister (the Rt Hon R.G. Menzies), in moving motions in the Australian House of Representatives for the imprisonment of Fitzpatrick and Browne for contempt of that House, stated: "A fine is not within our power". The Leader of the Opposition (the Rt Hon H.V. Evatt) moved an unsuccessful amendment that the appropriate action was the imposition of substantial fines "and that the amount of the fines, and the procedure for enforcing them, be determined by the House forthwith".

5. I draw attention to these considerations. However, I do not think that, in the absence of a specific request for advice on the point, I should express an opinion on whether indeed the Senate has power to fine. I shall simply proceed, as far as enforcement action that might be taken by the Senate itself is concerned, on the basis that the Senate claims and has power to fine. The attitude to be taken in relation to action in the ordinary courts is a separate matter to which I refer below.

Action by the Senate

6. It seems to me to be clear that disobedience by an individual, by refusing to pay a fine, would itself be punishable by the Senate as a contempt and could be dealt with by the undoubted power of the Senate to commit to imprisonment

for contempt under a general warrant. There seems to be no other enforcement action that the Senate itself could take. Imprisonment of course would not be available in the case of a fine imposed on a company or corporation.

Action by the Courts

7. Your second question is whether it would be possible for the Senate to use "the judicial process" to enforce payment. I take this to be a reference to resorting to the ordinary courts to enforce payment.

8. It seems to me that this course would face a number of difficulties. One is that resort to ordinary courts to enforce a penalty for contempt of Parliament may be inconsistent with the powers, privileges and immunities enjoyed by each House at present under s.49 of the Constitution, on the ground that, under those powers, privileges and immunities, punishment for contempt, including action taken to enforce the punishment, is within the exclusive jurisdiction of the House concerned.

9. Even if the House concerned is able to waive that privilege as far as enforcement action is concerned, the question then arises whether the existing laws and procedures that apply in the ordinary courts are expressed in a way that would enable their use to enforce fines imposed by a House of Parliament. Thus, s.18A of the Crimes Act 1914 provides that the laws of a State or Territory with respect to the enforcement of fines ordered to be paid by "offenders" shall, so far as those laws are applicable and are not inconsistent with the laws of the Commonwealth, apply to persons who are "convicted" in that State or Territory. "Person" would include a corporation or company. Taking the laws of the A.C.T., Division 2 of Part IX of the Court of Petty Sessions Ordinance 1930 provides for warrants of execution in the case of a "conviction" or "order" against a corporate body, and warrants of commitment in the case of a "conviction" or "order" against an individual.

10. I think that it is highly doubtful, to say the least, that such provisions would be regarded as applying to fines imposed by a House of the Australian Parliament. Even if the House in question were regarded as a court of record, which is highly doubtful, the provisions are likely to be regarded as applicable only to convictions and orders by the ordinary courts.

11. I have considered whether the imposition of a fine could be treated as giving rise to a statutory debt which is enforceable in the courts. Where an Act of Parliament creates an obligation on any person to pay a sum of money to another person, the amount due can be recovered as a debt by action where no other remedy is provided and where no provision to the contrary is contained in the Act. It might be argued that

this is the situation in relation to fines imposed by the Senate on a corporate body, on the basis that s.49 of the Constitution creates a statutory obligation in relation to fines imposed under it, and that no remedy is provided for enforcing the fine in the case of such bodies. However, I could not advise with any certainty at all that such arguments would be successful.

12. Finally, I point out that enforcement action in the ordinary courts, whatever its form, would be more likely to lead to a challenge in the courts denying the power of the Senate to impose a fine.

13. In the light of the various difficulties to which I have referred, it seems to me that there is at present no satisfactory basis on which the Senate could use judicial process to enforce payment of fines imposed by it.

Yours sincerely,

P. BRAZIL

APPENDIX G

ATTORNEY-GENERAL'S DEPARTMENT

SECRETARY'S OFFICE

-3 OCT 1759

TEL: 71 9000

ROBERT GARRAN OFFICES
NATIONAL CIRCUIT
BARTON A.C.T. 2600

GC/84/11427

18 September 1984

Mr John Spender QC, MP,
Chairman,
Joint Select Committee on Parliamentary
Privilege,
Parliament House,
CANBERRA ACT 2600

Dear Mr Spender,

I refer to your letter dated 23 August 1984 requesting my advice as to the means by which penalties imposed by one or other of the Houses on a person or corporation for breach of privilege or other contempt might be "collected". I regret the delay in replying.

Your letter states that you have particularly in mind the question of adopting procedures such as registration of a decision to impose a fine - somewhat equivalent to the registration of a judgment - and the collection of that fine through the normal mechanisms of the courts.

A - PRELIMINARY MATTERS

(a) Power to Impose Fines

Your Committee will be aware that there is a question whether, at present, the Houses of the Australian Parliament have power to impose fines for a contempt. It seems that the Senate may take a different view on the matter from that of the House of Representatives. I refer in this regard to the views expressed respectively in Odgers, Australian Senate Practice, 5th ed., (1976) p.651, and in Pettifer, House of Representatives Practice, pp.664-665. However, irrespective of the present position, it seems clear that legislation could be passed by the Parliament declaring or providing that each House has power to fine for a contempt: see s.49 read with s.51(xxxvi) and (xxxix) of the Constitution.

For the purpose of considering your request for advice, I shall however assume that a power to fine either exists, or will have been conferred on the Houses by such legislation.

(b) Houses not Courts of Record

A further preliminary matter to which I should refer is whether each House of Parliament is, in respect of its power to punish for contempt, to be regarded as a court of record. In this connexion, May, Parliamentary Practice, 19th ed, p.117 points out that the Lords have claimed to be a court of record. May adds that it would be difficult to determine whether the Commons are, in law, a court of record, as this claim, once firmly maintained, has been virtually abandoned, although never distinctly renounced.

All that s.49 of the Constitution conferred upon each House of the Australian Parliament were the "powers, privileges and immunities" of the House of Commons as at 1 January 1901. This seems to me to fall distinctly short of conferring the status of a court of record on the Houses of the Australian Parliament. Clearly, neither House is a court within the meaning of Chapter III of the Constitution relating to the Federal Judicature: see The Queen v. Richards; Ex parte Fitzpatrick and Browne (1955) 92 CLR 157.

B - METHODS FOR ENFORCING FINES

Existing legislation dealing with the enforcement of fines and other judicial orders would not, in my view, be interpreted as applying to fines imposed by non-judicial bodies. Special legislation would be required. The question is what form or forms such legislation could take.

(a) Use of the Courts of the Australian Capital Territory

I have considered first the possibility of legislation using the Courts of the Australian Capital Territory for enforcement. Neither the Supreme Court of the Territory (Capital T.V. & Appliances Pty. Ltd. v. Falconer (1971) 125 CLR 591) nor the Court of Petty Sessions of the Territory (Spratt v. Hermes (1965) 114 CLR 226) are federal courts within the meaning of Chapter III of the Constitution, and therefore are not subject to the constitutional limitations that apply in relation to such courts. The relevant legislative power under which the Territory Courts are established is s.122 of the Constitution, which confers a plenary power to makes laws for the government of a Territory.

Notwithstanding this particular advantage, I do not think that use of the Territory Courts would be likely to be a fully satisfactory basis for enforcing penalties imposed by a House of the Parliament. The conduct complained of could occur anywhere within Australia. The offender might have no connexion with the Territory other than the fact that his conduct affects a House of Parliament located in the Territory. Enforcement may require action to be taken outside the Territory. Reliance could be placed on the Service and Execution of Process Act 1901, suitably amended, in order to

overcome some of the difficulties. Dixon CJ indicated in Lamshed v. Lake (1938) 99 CLR 132, at pp.145-6, that the provisions of that Act relating to the process of the Territories may be authorized by s.122 of the Constitution. However, what he precisely said was that they "must" be justified under s.122 - i.e. they can only be justified as a law under s.122. It does not appear to me to be clear beyond argument that the provisions that would be required for present purposes would, in their application outside the Territory, have the character of a law for the government of the Territory. It seems to me to be necessary therefore to consider another possibility, which is the use of process at the federal level.

(b) Use of Courts Exercising Federal Jurisdiction
In considering this possibility it is necessary to focus in more detail on the procedures that would be involved.

I have considered first the suggestion that legislation might be passed adopting a procedure such as registration of a decision to impose a fine - somewhat equivalent to the registration of a judgment - and the collection of that fine through the normal mechanisms of the courts. An example of this kind of mechanism is provided by s.20 of the Service and Execution of Process Act 1901. It provides for the registration of judgments passed in one jurisdiction in Australia in the court of another jurisdiction upon production of an appropriate certificate of such judgment. The section goes on to provide that, from the date of registration, the certificate shall be a record of the court in which it is registered and shall have the same force and effect in all respects as a judgment of that court, and that the like proceedings (including proceedings in bankruptcy or insolvency) may be taken upon the certificate as if the judgment had been a judgment of that court. There are other procedural requirements into which I shall not go in this letter.

I do not think that such a course would be constitutionally valid in the case of courts exercising federal jurisdiction. The direct enforcement of decisions of non-judicial bodies would seem to be neither an exercise of judicial power nor incidental thereto, and hence would not be a function that, in the present state of judicial authorities can be given to a federal court or a court exercising federal jurisdiction (Attorney-General of the Commonwealth v. The Queen (Boilermakers' Case) (1957) 95 CLR 529). The power contained in s.51(xxiv) of the Constitution deals only with the service and execution throughout the Commonwealth of the judgments of the courts of the States, and it would not authorize legislation to execute the process and "judgments" of a non-judicial body.

I have considered whether, alternatively, a fine imposed by a House could be deemed to be a fine imposed by one of the ordinary courts, and made enforceable on that basis. In this connection I refer to s.18A of the Crimes Act 1914, which provides that the laws of a State or Territory with respect to the enforcement of fines ordered to be paid by offenders, shall, so far as those laws are applicable and are not inconsistent with the laws of the Commonwealth, apply and be applied to persons who are convicted in that State or Territory of offences against laws of the Commonwealth. However, I would have the same view in relation to making these procedures directly applicable to fines imposed by a House of Parliament as I have expressed above in relation to enforcing such fines by registration of judgments in the ordinary courts.

It seems to me that some step is required to bring the order of a House to pay a fine into the "stream" of federal jurisdiction. Thus, awards made in commercial or property arbitrations are made by non-judicial bodies, but if made in a matter of federal jurisdiction may be made judicially enforceable by an order of the High Court directing that the award be made a rule of the Court: see s.33A of the Judiciary Act 1903. Such legislation is constitutionally valid on the basis that the award is a decision by which existing rights and duties in a matter are evidenced or ascertained: see Minister for Home and Territories v. Smith (1924) 35 CLR 120, at pp 126-7. Another method of enforcing awards commonly used is to bring an action on the award and in that manner obtain a final judgment.

C - A POSSIBLE SCHEME

This leads me to suggest for consideration legislation providing that an amount ordered by a House to be payable by way of a fine or penalty should be a debt due to the Commonwealth and recoverable in an appropriate jurisdiction on that basis. I point out that proceedings to obtain judgment based on the statutory debt would be necessary. Provision could be made for these proceedings to be of a summary character. Also, provision could be made for imprisonment in default of payment of the fine, and for enforcement by execution or attachment of property and monies.

In my view such legislation would be constitutionally valid.

There would, I should add, be a number of important points of detail to be settled in relation to such a scheme. One important issue would be the court or courts to be used for this purpose. One possibility would be to vest the jurisdiction in the Federal Court of Australia, which has jurisdiction throughout the whole of Australia. Section 53 of the Federal Court of Australia Act 1976 provides that, subject to the Rules of Court, a person in whose favour a judgment of the Court is given is entitled to the same remedies for enforcement of the judgment in a State or Territory, by

execut on or otherwise, as are allowed in like cases by the laws o that State or Territory to persons in whose favour a judgme it of the Supreme Court of that State or Territory is given. In relation to the enforcement of fines imposed by the Federa. Court under the Trade Practices Act 1974, s.18A of the Crimes Act 1914 referred to above has been applied by the Federal Court: see e.g. Wilde v. Menville Pty. Ltd. (1981) 50 FLR 38).

Another point of detail that would have to be dealt with would be designating a person or body as competent to bring such proceedings. One possibility would be to designate the Presiding Officer of the House concerned.

As you will appreciate such legislation would raise questions of policy, and I am not to be taken to be expressing any views in that regard. For example, the use of imprisonment as a method of enforcing fines has been the subject of considerable critical examination recently, and amendments not yet proclaimed have been made to s.18A of the Crimes Act 1914 in this regard.

Yours sincerely,

P. BRAZIL

MINUTES OF PROCEEDINGS

AUSTRALIAN SENATE
CANBERRA A.C.T.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 1

27 FEBRUARY 1985

1. MEETING OF THE COMMITTEE

The Committee met at 8.15 am in Senate Committee Room No. 7.

2. RESOLUTION OF RE-APPOINTMENT OF THE COMMITTEE AND ITS MEMBERS

The Secretary reported the following Resolution of the Senate:

22 February 1985

> Re-appointment of the Committee and of the following members:
>
> Senators Childs, Coates, Cook, Macklin, Peter Rae, Robert Ray and Withers.

3. RE-ELECTION OF CHAIRMAN

On the motion of Senator Withers, Senator Childs was re-elected Chairman of the Committee.

4. DISCUSSION OF DRAFT TERMS OF REFERENCE

The Committee discussed the draft Terms of Reference relating to the question of penalty circulated by the Secretary prior to the meeting, together with the amendments proposed thereto by Senator Peter Rae in his letter to the Secretary of 13 February 1985.

It was agreed that a reference be sought, by leave, this day from the Senate in the terms specified in the circulated draft Terms of Reference.

5. OTHER BUSINESS

Discussion ensued on matters the Committee may need to consider if the Senate were to agree to the proposed reference.

6. NEXT MEETING

It was agreed that, subject to the passage of a resolution of the Senate referring the question of penalty to the Committee, the Committee meet this day at 1.45 pm in Senate Committee Room No. 7.

7. ADJOURNMENT

The Committee adjourned at 8.52 am.

8. ATTENDANCE

Present: Senator Childs (Chairman), Senators Cook, Macklin, Robert Ray and Withers.

Apologies were received from Senators Coates and Peter Rae.

B.K. CHILDS
Chairman

AUSTRALIAN SENATE
CANBERRA A C T

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 2

27 FEBRUARY 1985

1. MEETING OF THE COMMITTEE

The Committee met at 1.45 pm in Senate Committee Room No. 7.

2. RESOLUTION OF THE SENATE

The Chairman of the Committee reported the following Resolution of the Senate of 27 February 1985:

(1) That the following matter be referred to the Committee of Privileges: The question of what penalties, if any, might, in the Committee's opinion, be appropriate with respect to the serious contempts of the Senate constituted by certain publications in The National Times the subject of the Committee's Report, tabled on 17 October 1984 and adopted by the Senate on 24 October 1984.

(2) That for the purpose of its inquiry and report -

(a) the Committee have power to send for and examine persons, papers and records, to move from place to place, and to sit in public or private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives;

(b) the Committee be empowered to print from day to day such papers and evidence as may be ordered by it, and a daily Hansard be published of such proceedings as take place in public; and

(c) the Committee have power to consider the minutes of evidence and records of the Committee of Privileges of the previous session.

(3) That the foregoing provisions of this Resolution, so far as they are inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

3. RECEIPT OF MINUTES OF EVIDENCE AND RECORDS

In accordance with the resolution of the Senate of 27 February 1985, the Chairman laid on the table all minutes of evidence and records (4 volumes) of the Committee of Privileges of 1984.

4. RECEIPT OF SUBMISSIONS AND CONSIDERATION OF REQUESTS

The Committee formally received submissions dated 30 October 1984 from D.J. Fischer and Associates and from Stephen Jaques Stone James of 3 December 1984. The Committee also considered requests contained in the letters from Stephen Jaques Stone James of 24 October 1984 and 3 December 1984. It was agreed, after discussion, that:

(a) the legal opinion and supplementary comment from Professor D.C. Pearce, dated 24 January 1985 and 1 February 1985, respectively, be made available;

(b) advice from the Clerk of the Senate and from the Secretary to the Attorney-General's Department dated 11 September 1984 and 13 September 1984, respectively, concerning penalty also be made available; and

(c) requests that submissions from other persons be made available and that the submissions of 3 December 1984 be circulated to all members of the Senate be considered by the Committee at a later time.

5. FURTHER SUBMISSIONS FROM JOHN FAIRFAX, ETC

It was agreed, after discussion, that the Committee hear further submissions from a representative of John Fairfax and Sons Limited, Mr Toohey and Ms Bacon at its next meeting.

It was further agreed that the above persons be invited to make such submissions either through counsel or in person.

6. NEXT MEETING

It was agreed that the Committee meet in Melbourne on 8 or 15 March 1985, at 9.45 am (private) and 10.45 am (public).

7. ADJOURNMENT

The Committee adjourned at 1.54 pm.

AUSTRALIAN SENATE
CANBERRA A C T

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 4

27 MARCH 1985

1. MEETING OF THE COMMITTEE

The Committee met at 12.55 pm in Senate Committee Room No. 7.

2. MINUTES

On the motion of Senator Robert Ray, the minutes of Meeting No. 3 of 22 March 1985 were confirmed.

3. CONSIDERATION OF LETTER FROM STEPHEN JAQUES STONE JAMES

The Committee considered a letter, dated 26 March 1985, from Stephen Jaques Stone James formally applying for an adjournment of the hearings proposed for 3 April 1985 until such time as the proceedings relating to Mr Justice Murphy have been finally determined.

The Committee, after having considered the terms of the letter, considered that it was unable to make a decision concerning the formal application for adjournment, in that the letter did not provide a sufficient basis for the Committee to ascertain why it was not possible at this time for submissions to be made in public on behalf of John Fairfax and Sons Limited, Mr Brian Toohey and Ms Wendy Bacon on the Committee's current reference without referring to the matters raised in that letter.

It was therefore agreed, after discussion, that:

(a) the Committee hear oral submissions in relation to the matter of adjournment at 10 am on 3 April 1985 during the private meeting previously scheduled for 9.45 am, before the public hearing at present scheduled for 10.45 am on that day; and

The press statement would further indicate that the above persons have been invited to make such submissions either through counsel or in person.

5. DRAFT PAPER ON PARAGRAPH 1.12 OF SUBMISSIONS FROM STEPHEN JAQUES STONE JAMES

It was agreed that the Secretary prepare a draft paper in relation to paragraph 1.12 of the submissions from Stephen Jaques Stone James of 3 December 1984.

Paragraph 1.12 reads as follows:

"1.12 If, notwithstanding this submission, the full Senate determines that the defendants are guilty of contempt, the defendants would seek the opportunity to be heard by the full Senate on the question of penalty.".

The draft paper is to be circulated for consideration by the Committee.

6. NEXT MEETING

It was agreed that the Committee meet in Melbourne on 3 April 1985, at 9.45 am (private) and 10.45 am (public).

7. ADJOURNMENT

The Committee adjourned at 1.54 pm.

8. ATTENDANCE

Present: Senator Childs (Chairman), Senators Coates, Cook, Macklin, Peter Rae, Robert Ray and Withers.

B.K. CHILDS
Chairman

AUSTRALIAN SENATE

CANBERRA A.C.T.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 3

22 MARCH 1985

1. MEETING OF THE COMMITTEE

The Committee met at 1.09 pm in Senate Committee Room No. 5.

2. MINUTES

On the motion of Senator Cook, the minutes of Meetings Nos 1 and 2 of 27 February 1985 were confirmed.

The Committee formally noted that the proposed meeting dates, 8 March and 15 March 1985, included in minutes of Meeting No. 2, had, with the agreement of all members, following a request from the solicitor acting for John Fairfax and Sons, Mr Toohey and Ms Bacon to postpone the meeting to the week beginning 1 April 1985, been changed to Wednesday, 3 April 1985.

3. CONTACT WITH COUNSEL

The question was raised concerning the attendance by Ms Wendy Bacon, Mr Brian Toohey and a representative of John Fairfax and Sons Limited, and/or their counsel, at a public hearing scheduled to be held at approximately 10.45 am on 3 April 1985, in Melbourne.

It was agreed, after discussion, that the Secretary contact Mr G. Bates of Stephen Jaques Stone James by telex to ascertain who would be attending the public hearing.

4. PRESS STATEMENT ON PUBLIC HEARING

It was agreed, after discussion, that the Committee should issue a press statement, indicating that Ms Bacon, Mr Toohey and John Fairfax and Sons Limited had been invited to make further submissions at the public hearing on 3 April 1985.

8. ATTENDANCE

Present: Senator Childs (Chairman), Senators Cook and Macklin.

Apologies were received from Senators Coates, Peter Rae, Robert Ray and Withers.

B.K. CHILDS
Chairman

AUSTRALIAN SENATE

CANBERRA, A.C.T.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 5

3 APRIL 1985

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met in deliberative session at 9.45 am in Conference Room 101, Commonwealth Parliament Offices, Melbourne.

2. PERMISSION TO TELEVISE MEETING

It was agreed that the Committee permit the televising of the first few minutes of the public proceedings, on the condition that no sound recording be made.

3. MINUTES

On the motion of Senator Withers, the minutes of Meeting No. 4 of 27 March 1985 were confirmed.

4. CONSIDERATION OF OUSTANDING REQUESTS BY STEPHEN JAQUES STONE JAMES

It was agreed that the consideration of the following matters be postponed:

(a) permission to distribute to all Senators submissions to the Privileges Committee of the Australian Senate on behalf of John Fairfax and Sons Limited, Mr Brian Toohey and Ms Wendy Bacon: submissions on Penalty, of 3 December 1984 (see letter from Stephen Jaques Stone James of 3 December 1984);

(b) release of Submissions from the following (see letter from Stephen Jaques Stone James of 24 October 1984);

- Mr M.H. McHugh, Q.C. (now Mr Justice McHugh), dated 3 October 1984;

- Mr J. Ducker, dated 3 and 23 October 1984;

b) the present arrangements for a public hearing remain and that, if the application for adjournment is successful, this be announced at the public hearing and, in the event that the application for adjournment is not successful, the Committee then proceed to consider submissions on penalty.

It was agreed that the Committee's decision to hear oral submissions, and its reasons for so deciding, be conveyed to Stephen Jaques Stone James by the Secretary by telex, and that an air express letter in the same terms be despatched as soon as possible thereafter.

4. DRAFT PRESS RELEASE

The Committee considered the draft press release and agreed to its being issued, as amended.

It was further agreed that the press release be communicated to Stephen Jaques Stone James by telex before being issued, and that a copy be attached to the letter specified in Item 3 above.

5. NEXT MEETING

It was agreed that the meeting proposed for Melbourne on 3 April 1985, at 9.45 am (private) and 10.45 am (public), remain as scheduled, subject to decisions on matters to be raised at 10.00 am.

6. ADJOURNMENT

The Committee adjourned at 1.19 pm.

7. ATTENDANCE

Present: Senator Childs (Chairman), Senators Coates, Cook, Peter Rae, Robert Ray and Withers.

Apology: Senator Macklin.

B.K. CHILDS
Chairman

- D.J. Fischer and Associates on behalf of Mr M. Farquhar, dated 6 and 30 October 1984.

5. C)MMENCEMENT OF PRIVATE PROCEEDINGS R: ADJOURNMENT OF PUBLIC HEARING

The private proceedings of the Committee to hear oral submissions concerning an application for adjournment of the public proceedings commenced at 10.04 am.

It was agreed that submissions be heard through Mr Neil McPhee, Q.C., on behalf of Mr Brian Toohey, Editor of The National Times, Ms Wendy Bacon, Journalist with The National Times, and Mr Max Suich, Chief Editorial Executive of John Fairfax and Sons Limited.

Mr McPhee was accompanied by Mr Terry Tobin of counsel; Mr Adrian Deamer, Legal Manager, John Fairfax and Sons Limited; and Mr Graham Bates of Stephen Jaques Stone James. Mr Suich and Mr Toohey were present at the commencement of the hearings; Ms Bacon appeared at 10.10 am.

6. INCORPORATION OF CORRESPONDENCE IN TRANSCRIPT

It was agreed that the following correspondence be incorporated in the transcript of the private proceedings:

- letter, dated 26 March 1985, from Stephen Jaques Stone James;

- letter, dated 28 March 1985, from the Secretary of the Committee to Stephen Jaques Stone James.

7. WITHDRAWAL OF APPLICATION FOR ADJOURNMENT OF HEARINGS

Counsel advised the Committee that the application for adjournment of hearings requested in the letter, dated 26 March 1985, from Stephen Jaques Stone James, was withdrawn.

8. REFERENCES IN SUBMISSIONS ON PENALTY TO MR JUSTICE MURPHY

It was agreed that the Committee hear submissions from counsel concerning paragraphs in the submissions on penalty, forwarded to the Committee by Stephen Jaques Stone James on behalf of their clients under cover of a letter dated 3 December 1984, which included references to Mr Justice Murphy.

9. **SHORT ADJOURNMENT**

A short adjournment was granted to enable counsel to consult their clients.

10. **RESUMPTION OF PRIVATE PROCEEDINGS AND INCORPORATION OF ATTACHMENT 2**

Private proceedings resumed, with the persons named in Item 5 in attendance. It was agreed that the document headed Attachment 2, Outside Terms of Reference, be incorporated in the transcript of the private proceedings.

It was further agreed that the Committee not allow paragraphs listed in Attachment 2 to be included as part of the written submissions from Stephen Jaques Stone James, subject to a further submission to be made in private as to why any of the paragraphs so excluded should in fact be accepted by the Committee.

11. **PRIVATE MEETING**

Private proceedings were adjourned at 11.52 am, and the Committee then met in deliberative session.

12. **ORAL SUBMISSIONS**

It was agreed that the Committee confirm its decision to accept for consideration during the public hearings the submissions from Stephen Jaques Stone James, with the deletions indicated in Attachment 2, and that it also accept paragraphs 6.01 to 6.11.

It was further agreed that the Committee confirm its decision to permit Mr McPhee to make an oral submission solely on those paragraphs deemed relevant, as above. The Committee further confirmed that, if Mr McPhee wished to argue the relevance of the deleted paragraphs, he could then do so in private (see Item 10 above).

13. **COMMENCEMENT OF PUBLIC MEETING**

The public meeting of the Committee commenced at 12.33 pm.

14. **SUBMISSIONS ON PENALTY**

The Committee heard submissions on penalty by Mr McPhee, Q.C. Those persons listed as present during the private proceedings (see Item 5 above) were also in attendance.

15. **INCORPORATION OF LEGAL OPINION AND SUPPLEMENTARY OPINION**

It was agreed that the following documents be incorporated in the transcript of proceedings:

- report of the Senate Committee of Privileges dated 17 October 1984: Opinion by Professor D.C. Pearce, Professor of Law, Australian National University, dated 24 January 1985;

- letter, dated 1 February 1985, from Professor D.C. Pearce: supplementary opinion.

16. **QUESTION OF CONTEMPT OF COMMITTEE AND ADJOURNMENT FOR PRIVATE MEETING**

Following Mr McPhee's statement that "the Committee was not interested in questions of natural justice" in its public hearing of 26 September 1984, it was agreed that the Committee adjourn briefly to consider in private whether this statement constituted a contempt of the Committee.

It was agreed that the Committee not pursue the question of contempt at this point of the proceedings.

17. **CONSIDERATION OF ADJOURNMENT TIME**

It was agreed that the Committee adjourn at 2 pm this day, or as soon as possible thereafter.

18. **RESUMPTION OF PUBLIC MEETING**

The public meeting of the Committee then resumed.

19. **INCORPORATION OF DOCUMENT**

It was agreed that the Committee incorporate in the transcript of the public proceedings the document entitled Attachment 1: Submissions to the Privileges Committee of the Australian Senate on behalf of John Fairfax and Sons Limited, Mr Brian Toohey and Ms Wendy Bacon: Submisssions on Penalty, with the deletions indicated in Attachment 2 (see Item 10), but including paragraphs 6.01 to 6.11, and the opinion by Sir Maurice Byers, Q.C., dated 26 November 1984, which appeared as Appendix 2 to the original written submissions.

20. **NEXT MEETING**

It was agreed that the Committee meet in Melbourne on Tuesday, 30 April 1985, at 10 am for a private meeting, and that the Committee meet in public at approximately 10.30 am.

21. **ADJOURNMENT**

The Committee adjourned at 2.04 pm.

22. **ATTENDANCE**

Present: Senator Childs (Chairman), Senators Coates, Macklin, Peter Rae, Robert Ray and Withers.

Apology: Senator Cook.

B.K. CHILDS
Chairman

AUSTRALIAN SENATE

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 6

23 APRIL 1985

1. MEETING OF THE COMMITTEE

The Committee met at 1.13 p.m. in Senate Committee Room No. 6.

2. MINUTES

On the motion of Senator Macklin, the minutes of Meeting No. 5 of 3 April 1985 were confirmed.

3. CORRESPONDENCE

The Chairman reported receipt of correspondence between Mr M. Bolton, Senior Private Secretary to the President of the Senate, and Mr R. Pullan, Chairman of the Free Speech Committee, forwarded to the Committee of Privileges for information.

4. PROCEDURES TO BE FOLLOWED AT MEETING ON 30 APRIL 1985

The Committee discussed procedures to be followed at the public meeting to be held in Melbourne on 30 April 1985.

It was agreed that the previous procedure, that submissions made in public must be relevant to the terms of reference, and that argument as to relevancy of passages deleted by the Committee from the written submissions of 3 December 1984 could be submitted only in private, be continued.

It was further agreed that counsel be invited by telex, and confirming letter, to address himself to specific issues, and that advice be sought from Professor D.C. Pearce concerning the issues which should be drawn to counsel's attention.

5. NEXT MEETING

It was confirmed that the Committee meet at 400 Flinders Street, Melbourne, at 10 a.m. (private) and 10.30 a.m. (public) on Tuesday, 30 April 1985.

6. ADJOURNMENT

The Committee adjourned at 1.50 p.m.

7. ATTENDANCE

Present: Senator Childs (Chairman), Senators Coates, Cook, Macklin, Peter Rae, Robert Ray and Withers.

B.K. CHILDS
CHAIRMAN

AUSTRALIAN SENATE

CANBERRA A.C.T.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 7

30 APRIL 1985

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met in deliberative session at 10.01 am in Conference Room 101, Commonwealth Parliament Offices, Melbourne.

2. PERMISSION TO TELEVISE MEETING

It was agreed that the Committee permit the televising of the first few minutes of the public proceedings, on the condition that no sound recording be made.

3. MINUTES

On the motion of Senator Macklin, the minutes of Meeting No. 6 of 23 April 1985 were confirmed.

4. FURTHER REFERENCE TO COMMITTEE

The Chairman of the Committee reported the following Resolution of the Senate of 23 April 1985:

> That the following matter be referred to the Committee of Privileges: The improper disclosure and misrepresentation by a departmental officer of an amendment prepared for moving in the Senate.

It was resolved, on the motion of Senator Peter Rae, that the above matter not receive further consideration by the Committee until the completion of its present inquiry.

5. COMMENCEMENT OF PUBLIC MEETING

The public meeting of the Committee commenced at 10.40 am.

6. RESUMPTION OF PUBLIC HEARING OF SUBMISSIONS

The Committee resumed its public hearing of oral submissions, commenced on 3 April 1985, on the question of penalty by Mr Neil McPhee, Q.C., on behalf of Mr Brian Toohey, Editor of The National Times, Ms Wendy Bacon, Journalist with The National Times, and Mr Max Suich, Chief Editorial Executive of John Fairfax and Sons Limited.

Mr McPhee was accompanied by Mr Terry Tobin of counsel; Mr Adrian Deamer, Legal Manager, John Fairfax and Sons Limited; and Mr Graham Bates of Stephen Jaques Stone James. Mr Toohey, Ms Bacon and Mr Suich were present throughout the public proceedings.

7. INCORPORATION OF CORRESPONDENCE IN TRANSCRIPT

It was agreed that the following correspondence be incorporated in the transcript of proceedings:

- letter, dated 24 April 1985, from the Secretary of the Committee to Mr G.D. Bates, Stephen Jaques Stone James (first despatched on 24 April 1985 as a telex).

8. CONSIDERATION OF PROPOSED CORRECTIONS AND ALTERATIONS TO TRANSCRIPTS OF PROCEEDINGS 3 April 1985

The Committee considered corrections and alterations proposed by counsel to the transcripts of both private and public meetings of the Committee on 3 April 1985.

9. INCORPORATION OF PRESS RELEASE AND NEWSPAPER ARTICLE

It was agreed that the following documents be incorporated in the transcript of proceedings:

- The Australian Press Council General Press Release No. 64, dated 25 October 1984;

- Press Council critical of privilege law. Article from Mercury of 30 October 1984.

10. WRITTEN SUBMISSIONS BY COUNSEL

The Committee considered a submission by counsel entitled 'Submission or [sic] matters raised by Committee of Privileges in telex of 24th April, 1985", as well as the first three pages of "Submissions why the defendants' submissions on penalty are relevant", both presented in response to the telex of 24 April 1985 from the Committee.

11. **SHORT ADJOURNMENT**

The Committee adjourned at 11.35 am, at the request of counsel, to enable counsel to consult their clients.

12. **RESUMPTION OF PUBLIC MEETING AND HEARING OF SUBMISSIONS**

Public hearings resumed at 11.45 am. Counsel continued to make submissions to the Committee.

13. **ADJOURNMENT**

The Committee adjourned at 12.50 pm, at the request of counsel, to enable counsel to consult their clients.

14. **RESUMPTION OF PUBLIC MEETING AND TABLING OF DOCUMENTS**

The public meeting of the Committee resumed at 2.15 pm, and it was agreed that the following documents be tabled:

- Paper, presented by counsel, on previous publications on matters raised by Brian Toohey in evidence;

- Paper, presented by counsel, relating to legal procedures concerning conduct of persons;

- Newspaper articles presented by counsel, that is:

  . Business Review Weekly, 5-11/9/84. Sinclair under new pressure.

  . Business Review Weekly, 29/8 - 4/9/84. Dairy attack will bruise government.

  . Sydney Morning Herald, 2/11/84. St Ives church's prayers for Wran and Briese.

  . The Australian, 23/11/84. Wran angered by Landa's move to re-appoint Briese.

  . Sydney Morning Herald, 31/10/84. Senators find against Murphy.

  . The Australian, 1/11/84. Wran stands by Briese comment.

  . The Sun, 1/11/84. Way cleared for Briese.

  . Sydney Morning Herald, 31/10/84. The trials of Mr Briese.

  . Daily Telegraph, 1/11/84. Wran cagey on new Briese job.

. Sydney Morning Herald, 7/10/84. Briese: no apologies from Wran.

. Sydney Morning Herald, 15/10/84. The Murphy affair: a history.

. Sydney Morning Herald, 8/10/84. Senate threat to cite Wran on contempt.

. Sunday Telegraph, 7/10/84. Wran moves to axe Briese, SM.

. Sydney Morning Herald, 26/9/84. No pressure from Chief Justice, says Landa.

. Daily Telegraph, 28/9/84. Top magistrate's treatment a scandal: Howard.

. Sydney Morning Herald, 20/8/84. Bottom may have had influence on Briese: Wran.

. Sydney Morning Herald, 11/8/84. Greiner claims attempt to discredit Briese.

. Sydney Morning Herald, 4/8/84. I stand by my claims: Briese.

. Sydney Morning Herald, 8/8/84. Punch accuses Wran of slur.

. Sydney Morning Herald, 8/8/84. Magistrates back Briese.

. Sydney Morning Herald, 9/8/84. Wran refuses to endorse Briese.

. Sun-Herald, 12/8/84. A country boy at heart ...

. Sunday Telegraph, 7/10/84. Axe Briese! Wran: Chief SM's job on the line.

15 **ADJOURNMENT FOR PRIVATE MEETING**

The public meeting of the Committee concluded at 4.05 pm. The Committee then met in private session.

16 **DRAFT REPORT**

It was agreed, after discussion, that the Chairman prepare a draft report for consideration at the next meeting, with a view to tabling a report in the near future, and that Professor Pearce be asked to comment on legal aspects of the report.

17. **ADJOURNMENT**

The Committee adjourned at 4.51 pm.

18. **ATTENDANCE**

Present: Senator Childs (Chairman), Senators Coates, Cook, Macklin, Peter Rae, Robert Ray and Withers.

B.K. CHILDS
Chairman

AUSTRALIAN SENATE

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 8

13 MAY 1985

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met at 7.00 pm in Senate Committee Room No. 8.

2. MINUTES

On the motion of Senator Peter Rae, the minutes of Meeting No. 7 of 30 April 1985 were confirmed.

3. MATTERS ARISING FROM MINUTES

The Chairman advised that Professor Pearce was unable to assist the Committee with legal aspects of the draft report, as he is on leave at present.

It was agreed, after discussion, that no further action be taken in relation to this matter.

4. CONSIDERATION OF DRAFT REPORT

The Committee considered paragraphs 1-16 of the Draft Report, and suggestions were made for amendments relating thereto.

It was agreed that members of the Committee submit further suggested amendments to the Secretary for circulation before the next meeting.

5. NEXT MEETING

It was agreed that the Committee meet in Canberra on Monday, 20 May 1985, at 6.30 pm for the purpose of further considering the Draft Report.

6. ADJOURNMENT

The Committee adjourned at 1.56 p.m. to a day to be fixed.

7. ATTENDANCE

Present: Senator Childs (Chairman), Senators Coates, Cook, Macklin, and Peter Rae.

Apologies: Senators Robert Ray and Withers.

B.K. Childs

CERTIFIED CORRECT

B.K. CHILDS
Chairman

AUSTRALIAN SENATE

CANBERRA A.C.T.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 11

23 MAY 1985

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met at 1.50 p.m. in Senate Committee Room No. 5.

2. MINUTES

On the motion of Senator Macklin, the minutes of Meeting No. 10 of 20 May 1985 were confirmed.

3. PUBLICATION OF IN CAMERA EVIDENCE

The Chairman reported receipt of telexed advice, dated 23 May 1985, from Stephen Jaques Stone James, on behalf of their clients, of their consent to the publication by the Committee to the Senate of the in camera proceedings of 3 April 1985.

4. REPORT OF THE COMMITTEE

On the motion of Senator Macklin, the Report of the Committee of Privileges on the Question of Appropriate Penalties arising from the Report of the Committee of Privileges of 17 October 1984 was adopted.

5. PRESENTATION OF REPORT

On the motion of Senator Peter Rae, the form of the motion proposed to be moved in the Senate by the Chairman,on behalf of the Committee, was agreed to.

It was also agreed that the statement to be made by the Chairman when speaking to the motion on behalf of the Committee be accepted with amendments.

5. ADJOURNMENT

The Committee adjourned at 7.11 pm to a day to be fixed.

6. ATTENDANCE

Present: Senator Childs (Chairman), Senators Coates, Macklin, Peter Rae and Withers.

Apologies: Senators Cook and Robert Ray.

B K CHILDS
Chairman

AUSTRALIAN SENATE

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 10

22 MAY 1985

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met at 7.02 pm in Senate Committee Room No. 4.

2. MINUTES

On the motion of Senator Macklin, the minutes of Meeting No. 9 of 20 May 1985 were confirmed.

3. PUBLICATION OF IN CAMERA EVIDENCE

On the motion of Senator Peter Rae, it was resolved that the transcript of in camera evidence of 3 April 1985 be made public upon presentation of the Committee's Report to the Senate on 23 May 1985, subject to the agreement of the persons affected, through their solicitors.

It was agreed that the Secretary advise the solicitors of the Committee's resolution, requesting telexed agreement, not later than 1.00 pm on Thursday, 23 May 1985, to the proposed publication.

4. DRAFT REPORT

The Committee agreed to the Draft Report, as circulated, with amendments.

It was agreed that Appendices A to G, and the Minutes of Proceedings, be included with the Report, and that the Transcript of Evidence be tabled with the Report (subject to the agreement referred to in Item 3 above).

...2/

AUSTRALIAN SENATE

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 9

20 MAY 1985

1. **PRIVATE MEETING OF THE COMMITTEE**

The Committee met at 6.42pm in Senate Committee Room No. 5.

2. **MINUTES**

On the motion of Senator Coates, the minutes of Meeting No. 8 of 13 May 1985 were confirmed.

3. **CONSIDERATION OF DRAFT REPORT**

The Committee considered the Draft Report, and further suggestions were made for amendments relating thereto.

It was agreed that an amended Draft Report be circulated for the Committee's further consideration.

It was further agreed that, if practicable, the Committee's Report be presented to the Senate on 23 May 1985, and that the solicitors for the persons affected be advised by telex in advance of the presentation.

4. **NEXT MEETING**

It was agreed that the next meeting be held on a day to be fixed.

5. **ADJOURNMENT**

The Committee adjourned at 7.42pm.

6. **ATTENDANCE**

Present: Senator Childs (Chairman), Senators Coates, Macklin, Peter Rae, Robert Ray and Withers.

Apology: Senator Cook.

B. K. CHILDS
Chairman

6. **ADJOURNMENT**

The Committee adjourned at 7.55 pm.

7. **ATTENDANCE**

Present: Senator Childs (Chairman), Senators Coates, Macklin, Peter Rae, Robert Ray and Withers.

Apology: Senator Cook

B.K. CHILDS
Chairman