



**The Parliament of the  
Commonwealth of Australia**

**THE SENATE  
COMMITTEE OF PRIVILEGES**

**First Report**

**October 1984**

**(7th Report of the Series)**

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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 P. F. S. COOK

SENATOR ROBERT RAY

SENATOR M. J. MACKLIN

SENATOR THE RT HON. R. G. WITHERS

TERMS OF REFERENCE

- 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 be referred to the Committee of Privileges." (Resolution of the Senate of 14 June 1984)
  
- 2) "That 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 be referred to the Committee of Privileges in connection with the matter, referred to the Committee by the Senate on 14 June 1984, relating to the publication in The National Times of 8-14 June 1984 of a purported report of evidence taken by, and documents submitted to, the Select Committee on the Conduct of a Judge." (Resolution of the Senate of 22 August 1984)

FIRST REPORT OF THE COMMITTEE OF PRIVILEGES

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1983-84

THE SENATE

FIRST REPORT OF THE COMMITTEE OF PRIVILEGES

The purpose of the Report of the Committee of Privileges is to advise the Senate of the Committee's conclusions concerning whether a contempt of the Senate has been committed. The Committee proposes to give the persons affected by the findings an opportunity to place before it any submissions they may wish concerning the question of penalty before making any recommendations to the Senate.

INTRODUCTION

1. On 14 June 1984, Senator Michael Tate, the then Chairman of the Select Committee on the Conduct of a Judge, moved the following motion in the Senate:

"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 be referred to the Committee of Privileges."

The Senate agreed to the motion.

2. On 12 June 1984, when foreshadowing the motion, Senator Tate made the following statement to the Senate:

"I rise on a matter of privilege and wish to indicate to the Senate a proposed course of action. In The National Times of 8-14 June 1984 there is an article which purports to report evidence given before the Senate Select Committee on the Conduct of a Judge. The Committee has taken evidence in camera and has not published any of its evidence nor authorised any other person to do so. The publication of evidence taken in camera by a committee, or of documents submitted to a committee, without the authorisation of that committee is one of the well known categories of contempt. If the article accurately reports the evidence given before a committee, it would clearly be a contempt. If, on the other hand, the article is inaccurate in its report of evidence given to the committee it is also one of the established categories of contempt to publish false accounts of proceedings before either House or their committees. Therefore, whatever the accuracy of the article, there is a prima facie case of contempt in the publication of this report. I therefore wish to indicate to the Senate that tomorrow I propose to give notice of a motion to refer the matter to the Privileges Committee."

Hansard pp. 2871-2

#### PROCEDURE OF THE COMMITTEE

3. The Committee first met on 15 June 1984, and on 8 subsequent occasions. Two of the Committee's meetings - on 12 and 26 September 1984, at both of which it took sworn evidence - were held in public.

4. At its first meeting, the Committee agreed to seek from the Senate certain powers to assist it to undertake the task the Senate had referred to it. The motion conferring the powers, moved by the Chairman and agreed to by the Senate on 15 June, was as follows:

- (1) That, for the purpose of the inquiry and report by the Committee of Privileges on the publication of a purported report of evidence taken by and documents submitted to the Select Committee on the Conduct of a Judge:
  - (a) the Committee and any sub-committee have power to send for and examine persons, papers and records, to move from place to place, and to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives;
  - (b) the Committee have power to appoint sub-committees consisting of 3 or more of its members, and to refer to any such sub-committee any of the matters which the Committee is empowered to consider, and that the quorum of a sub-committee be a majority of the Senators appointed to the sub-committee;
  - (c) 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
  - (d) the Senate authorise the Chairman of the Senate Select Committee on the Conduct of a Judge to appear before the Committee of Privileges and to produce such documents and to disclose such information in relation to the Senate Select Committee on the Conduct of a Judge proceedings as he or that Committee thinks fit.
- (2) 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.

5. The Committee sought from Senator Tate written responses to a series of questions (see Appendix A). Following consideration of these responses, the Committee invited the Chairman and members of the Select Committee; Mr C. R. Briese, Chairman of the Bench of Stipendiary Magistrates, New South Wales; Detective Acting Inspector D. J. Lewington; the Principal Parliamentary Reporter; John Fairfax and Sons Limited; Mr Brian Toohey, Editor, The National Times, and Ms Wendy Bacon, the author of the article in The National Times which had been referred to the Committee, to make written submissions to the Committee.

6. In the letters, dated 3 July 1984, to John Fairfax and Sons Limited, Mr Toohey and Ms Bacon (see Transcript of Evidence, 26 September 1984, pp. 79-84), the Chairman of the Committee drew attention, inter alia, to the following:

- . Extract from Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament 20th Edition, pp. 153-4:

"...The publication or disclosure of proceedings of committees conducted with closed doors or of draft reports of committees before they have been reported to the House, will (emphasis added) ... constitute a breach of privilege or a contempt."

- . Senate Standing Order 308:

"The evidence taken by any Select Committee of the Senate and documents presented to such Committee, which have not been reported to the Senate or the Committee, shall not, unless authorized by the Senate or the Committee, be disclosed or published by any member of such Committee, or by any other person."

7. Notwithstanding receipt of these letters by the publisher, editor and author of the article of 8-14 June, on 27 July-2 August, 3-9 August and 10-16 August articles were again published

in The National Times which purported to relate to in camera proceedings of the Select Committee. The Chairman of the Committee of Privileges thereupon wrote again to a representative of John Fairfax and Sons Limited, Mr Toohey and Ms Bacon, indicating the Committee's disquiet at the further publications, asking them to show cause why the publication of the article of 8-14 June should not be regarded as a contempt, indicating that a further reference of the later publications would be sought from the Senate, requesting them to make further submissions and inviting them to appear before the Committee on 14 September 1984 at 10 a.m. (see Transcript of Evidence, 26 September 1984, pp. 88-93).

8. In considering what approach it should take to its terms of reference, the Committee considered whether it should, like its predecessor in 1971, define its terms narrowly, to exclude from consideration the method by which information relating to in camera proceedings of the Select Committee had reached The National Times. Having established, through correspondence with the then Chairman of the Select Committee, that some knowledge of the Select Committee's proceedings was evident, the Committee determined that part of its responsibility clearly extended to an investigation of the source of the information. It therefore decided to invite the following persons to attend a meeting on 12 September 1984, at 8.30 p.m.:

Members of the Select Committee on the Conduct of a Judge

Senator M. C. Tate (Chairman)  
 Senator N. Bolkus  
 Senator the Hon. D. L. Chipp  
 Senator R. A. Crowley  
 Senator the Hon. P. D. Durack, Q.C.  
 Senator A. W. R. Lewis

Mr H. Evans, Clerk-Assistant (Committees), Secretary to the  
 Select Committee

Mr C. R. Briese, Chairman of the Bench of Stipendiary  
 Magistrates, New South Wales

Detective Acting Inspector D. J. Lewington, Australian Federal  
 Police

These people were the principal amongst those whose evidence or receipt of evidence would place them in a position to have provided the material used for The National Times articles. All these persons appeared, as requested, on 12 September, and denied that they, or to the best of their knowledge any member of their staff, had disclosed any information relating to the in camera proceedings of the Select Committee to any unauthorised person.

9. On 22 August 1984, the Senate agreed to the following motion moved by the Chairman of the Committee of Privileges:

"That 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 be referred to the Committee of Privileges in connection with the matter, referred to the Committee by the Senate on 14 June 1984, relating to the publication in The National Times of 8-14 June 1984 of a purported report of evidence taken by, and documents submitted to, the Select Committee on the Conduct of a Judge."

10. At the request of John Fairfax and Sons and Ms Bacon, the Committee postponed its originally scheduled hearing to a date (26 September) on or after 21 September. It further agreed to a request that John Fairfax be represented by Mr Max Suich, Chief Editorial Executive, rather than Mr Ian Arnold, who had responded on behalf of John Fairfax to the letter of 3 July. The Committee had indicated in correspondence that the representative of John Fairfax and Sons Limited, Mr Toohey and Ms Bacon could be accompanied by counsel, if they wished. They availed themselves of this opportunity, and were accompanied by Mr Neil McPhee, Q.C., Mr Terry Tobin, Mr Adrian Deamer, Legal Manager of John Fairfax and Sons Limited, and Mr Graham Bates, of Stephen Jaques Stone James.

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11. The Committee agreed, following a submission from Mr McPhee at the commencement of the proceedings on 26 September, that the witnesses could be heard in the order of their choosing, rather than the order the Committee had determined, and that counsel would be permitted to make both an opening submission and a closing address. Subsequently, the Committee also acceded to a request that a private document be made available to counsel, and that further written submissions be accepted within a reasonable time after the Transcript of Evidence became available.

#### CONCLUSIONS OF THE COMMITTEE

12. The Committee, having considered relevant documents and the evidence given by all witnesses, has resolved unanimously that the publication in The National Times 8-14 June 1984, and the further publication in The National Times of 27 July-2 August, 3-9 August and 10-16 August 1984, of purported reports of in camera proceedings of the Select Committee on the Conduct of a Judge constitute a contempt of the Senate.

13. Further, the Committee has concluded that information published in The National Times was made available, without authority, by a person or persons, the identity of whom the Committee has been unable to discover, despite taking evidence from persons who could have given such information and from persons who received it. The Committee has resolved unanimously that an unauthorized disclosure also constitutes a contempt of the Senate.

14. In reaching these conclusions, the Committee had regard, inter alia, to the following matters:

- . The well established principle of parliamentary law, expounded in Erskine May and quoted in paragraph 6 above, that "the publication or disclosure of proceedings of committees conducted with closed doors ... will ... constitute a breach of privilege or a contempt".
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This principle finds support in the equivalent Australian manuals of procedure, as follows:

"It is part of the law of Parliamentary privilege that any unauthorised disclosure or publication of a committee's proceedings or the evidence given is a contempt and is punishable by the Senate as such." Australian Senate Practice, J.R. Odgers, 5th Edition, 1975, p. 505.

"...the publication or disclosure of evidence taken in camera ... constitutes a breach of privilege or contempt". House of Representatives Practice, J.A. Pettifer, Ed., 1981, p. 660

- . Senate Standing Order 308, also previously quoted, which provides that "The evidence taken by any Select Committee of the Senate and documents presented to such Committee, which have not been reported to the Senate, shall not, unless authorized by the Senate or the Committee, be disclosed or published by any member of such Committee, or by any other person." It is now clear that the articles were all based on a knowledge of in camera proceedings of the Select Committee.
  - . The statement by the Chairman of the Select Committee on the Conduct of a Judge when foreshadowing the reference to the Committee of Privileges that:
    - (a) the Select Committee had not published any of its in camera evidence, nor had it authorised any other person to do so; and
    - (b) the publication of in camera evidence, or of documents submitted to a committee, without the authorisation of that committee is one of the well known categories of contempt.
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- . The comments and findings of the Senate Committee of Privileges in 1971, when reporting to the Senate on an analogous reference, that premature publication constitutes a breach of the privileges of the Senate.

15. The Committee has further concluded that the contempts, both by the person/s who disclosed the information and by those involved in its publication, were of a serious nature. In reaching these conclusions, the Committee had regard to the following:

- . The response by the then Chairman of the Select Committee to two specific questions asked by the Committee of Privileges, as follows:

"1. Do you wish to expand on the reasons, given in your speech on the Adjournment on 12 June 1984, for proposing to refer the matter of the purported report to the Privileges Committee?

Because of the particular immediate damage which could be done to the Select Committee's work, the persons mentioned in the article as having given evidence, and the judge, and the damage that could be done to the work of other Senate committees, the article was regarded as too serious a matter to be allowed to pass unnoticed.

"2. Has the purported report in fact impeded or obstructed the inquiry of the Select Committee? Does it have the potential to impede or obstruct the inquiry in the future?

The article has great potential to impede the inquiry of the Select Committee in the future. The Committee has been able to proceed so far only on the basis of giving certain undertakings as to the confidentiality of evidence and documents submitted to it. In fact,

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all hearings of the Committee have so far been conducted in camera. The publication of the article could impede the Committee in obtaining evidence from the persons mentioned in the article or in obtaining evidence from other persons."

It is important to note at this point that it is not necessary to conclude whether either the disclosure of information, or the publication of the article, have in fact caused damage to the operations of the Select Committee or to the persons mentioned in the article. The apprehension of the then Chairman of the Select Committee, at a vital stage of that Committee's inquiry, that damage, impediment or obstruction might occur, giving rise to the reference to the Privileges Committee, is, in the Privileges Committee's view, sufficient to establish the serious nature of the contempt.

- . The Committee of Privileges also shares the then Chairman's concern about the damage that could be done to the work of other Senate Committees. All members of the Committee of Privileges are experienced members of other Senate Committees which have dealt with highly sensitive matters on the basis of giving certain commitments and undertakings. Unauthorised disclosure and publication of proceedings of even one Committee could jeopardise the basis of trust under which such commitments are given and received.
  - . The Committee regards the obligation of a House of the Parliament to protect witnesses coming before it as fundamental. While, as indicated above, the Committee did not find it necessary to determine whether in fact damage was occasioned to witnesses, the then Chairman's concern that harm could be caused is sufficient warning of the dangers of unauthorised disclosure and publication. The then Chairman's views accurately
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reflect the basic issues and concerns relating to the giving and receiving of evidence to and by Parliamentary Committees.

16. Regrettably, the Committee has been unable to discover whether the disclosure of the information was deliberate or inadvertent, that is, whether disclosure was wilfully and knowingly undertaken. However, while the Committee is reluctant to conclude that the first, and subsequent, publications were deliberate contempts, it does conclude that they were not inadvertent. At the least, a marked lack of concern as to whether publication would constitute any offence was evident, particularly when the publication was repeated three times, despite communications from the Committee of Privileges. In reaching this conclusion, the Committee took account of the following matters:

- . Unlike the persons who appeared before the 1971 Committee, who indicated that they did not advert to the possibility of a breach of parliamentary privilege being involved, the witnesses before the present Committee made no attempt to plead ignorance of the possibility that a question of contempt was involved.
  - . Despite letters to John Fairfax and Sons, the editor and the author of the original article, drawing their attention to the reference of the matter to the Committee, to the speech by the then Chairman of the Select Committee, to the relevant extract from Erskine May and to Standing Order 308, in camera proceedings of the Select Committee were referred to in a further three issues of The National Times.
  - . Evidence given by the three witnesses shows that they were aware that contempt could be at issue, that the decision to publish was deliberate, and that they were unconcerned about the possibility of any impropriety in publication.
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17. In summary, therefore, the Committee has concluded that serious contempts of the Senate have been committed, and that the commission of the contempt of publishing the proceedings was undertaken with a marked lack of regard for matters which have a centuries-long history of being of fundamental concern to both Parliament and the courts. They are protections, not of the Parliamentarians or the Judges, but of the system of justice.

18. Before turning to the question of what action, if any, the Committee recommends that the Senate take, two further matters require consideration: first, points raised by the witnesses from John Fairfax and Sons and The National Times, and their counsel, and, second, whether there are any mitigating circumstances.

#### MATTERS RAISED BY MR SUICH, MR TOOHEY AND MS BACON

19. At no stage in their written or oral submissions did representatives of John Fairfax and Sons Limited, Mr Toohey or Ms Bacon address the basic issue, that is, to show cause why they should not be regarded as being in contempt of the Senate. In their first joint submission to the Committee (see Transcript of Evidence, pp. 85-6), Mr Toohey and Ms Bacon briefly addressed the particular question of impediment of the Select Committee, but the theme of all matters laid before the Committee by the witnesses was that of publication "in the public interest".

20. In order to give the witnesses maximum opportunity to put their views forward, the Committee permitted the witnesses to speak at length to their submissions. This consideration was constantly and grossly abused by the witnesses, particularly by Mr Toohey who introduced material which was irrelevant to the question whether a contempt had been committed, and took the opportunity of ventilating under privilege accusations against persons who at the time had no redress. (See, for example, Transcript of Evidence, 26 September 1984, at pp. 38, 39 and 43-4. For accusations made against a Committee member, who was in a position to respond, see also Transcript, pp. 72-3.)

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21. The Committee regarded this abuse, both of its tolerance and of the privilege of freedom of speech, so seriously that it made available to a number of people the transcript of evidence, so that they might comment if they wished. Such persons included all members of the "faint-hearted" (Mr Toohey's typically contumacious expression) former Select Committee. The Committee has already received responses from a number of persons affected, and those who have replied have rejected without reservation implications, allegations and innuendoes contained in the evidence. This matter will be discussed in more detail in a later report of the Committee.

22. The Committee asked whether the Fairfax witnesses would reveal their sources of information. Mr Suich indicated that he did not know of the sources. Neither Mr Toohey nor Ms Bacon would answer any questions in relation to sources, although Mr Toohey indicated that he was satisfied as to the accuracy of the matters published in the article because:

"I had some discussions myself with people who had some knowledge of these events and I had lengthy discussions with Wendy Bacon about the article."

Transcript of Evidence, 26 September 1984, p.63

A peculiar facet of the witnesses' attitude to disclosure of their sources is that they saw no incongruity between their refusal to answer any questions in relation to sources, and their denial of the Select Committee's right to protect, so far as it was able, its own sources.

23. One common theme of the evidence of all witnesses was that, in defending their "right" to publish "in the public interest", they relied on an ex post facto rationalisation of a decision to publish at the time they chose (see, for example, Transcript of Evidence, 26 September 1984, pp. 21-2, 28, 58-62, 98).

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24. Another matter on which the witnesses held a common view was in relation to their present attitude to contempt. In response to the specific questions:

"In view of the matters drawn to your attention following the publication of the original article and the reference of the subsequent publications to this Committee, are you now aware that you may be regarded as being in contempt of the Senate? If so, have you any expression of regret you may wish to make in this regard?"

the answers were as follows:

Mr Suich - Mr Chairman, I think in my statement I make clear it would seem to me - and I would have thought on the day it would have seemed to the editor - that we were not in contempt of the Senate. I am afraid, as my statement makes clear, that we believe we were right to publish.

CHAIRMAN - So you have no feeling of regret?

Mr Suich - No. (Transcript, p. 14)

Mr Toohey - I take the view that it was in the public interest that we published and therefore I cannot really regret that. (Transcript, p. 55)

Ms Bacon - No, I have not. (Transcript, p. 107)

They appeared to have a similar cavalier attitude to contempt of court, and of Royal Commissions, indicating that they would treat each case for publication on what they perceived to be its merits, using the notion of "public interest" as their sole criterion.

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The following exchange graphically illustrates this point:

CHAIRMAN - The Committee has received your submissions in which you defend the publication on the grounds of public interest. Do you take the same attitude with publications which would be in contempt of court?

Mr Toohey - My answer is, as Max Suich said, you take these things case by case, and you cannot always judge....

CHAIRMAN - Would you, for example, publish in camera deliberations of a royal commission?

Mr Toohey - It would depend on whether they were interesting or not, essentially, and whether I could get my hands on them - two requirements.

(Transcript of Evidence, 26 September 1984, pp. 52-3)

25. The Committee draws particular attention to the last comment, quoted above, from Mr Toohey. After intensive questioning of all witnesses on the question as to how public interest was to be defined, the Committee obtained from Mr Toohey the two essential criteria which govern his decision to publish, that is, whether documents are interesting and whether he can get his hands on them. Mr Toohey had conceded in evidence that he would be prepared to withhold information from the public if, in his judgment, a person was likely to be threatened with physical harm. That, however, was his only caveat. The Committee suggests that such a dubious definition of "public interest" could equally be translated as a definition of journalistic self-interest. Further, it is clear to the Committee of Privileges that, in taking evidence in camera, the Select Committee on the Conduct of a Judge was responsibly mindful of the public interest, both in protecting its witnesses and in gaining vital information through in camera examination.

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MATTERS RAISED BY COUNSEL

26. The Committee considered the following matters submitted by Mr Neil McPhee, Q.C., in his closing address, most of which were reiterated in the supplementary written submissions, at Appendix B of this Report, on behalf of John Fairfax:

- (a) Procedure adopted by the Committee. Mr McPhee indicated that the "time honoured and traditional procedure" followed by the Committee of Privileges was not in accord with the principles of natural justice.

In the interests of natural justice, the procedure adopted by the Committee instituted quite radical developments, in its handling of the inquiry, of the "time honoured and traditional method" of proceeding in matters of privilege. The procedure is set out in paragraphs 3 to 11 of this Report. For example, the Committee took evidence in public, and, in addition, Mr McPhee was given the opportunity to address the Committee, both before and after his clients were heard. He did not avail himself of the first opportunity, and raised this matter only in his closing address. The Committee also agreed to accept further written submissions. While the Committee withheld from counsel a specific document before public evidence was taken on 26 September, it subsequently made it available to counsel following consideration of his request to do so. The Committee did not, however, permit a right of cross-examination.

- (b) The Committee should not find that a contempt has been committed unless it is satisfied on the particular circumstances of the case that the conduct in question has caused, or is likely to cause, a substantial interference with the functioning of the Parliament, the Senate or, as in this case, with a Committee.

The Committee, noting the submission, has concluded as indicated above in paragraphs 12 to 17.

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- (c) The Senate should exercise its penal jurisdiction as sparingly as possible and only when it is satisfied that to do so is essential in order to provide reasonable protection for the Senate or one of its Committees from improper obstruction, or attempt at or threat of obstruction, as is causing or is likely to cause substantial interference with their respective functions.

The penalty is a matter for the Senate to determine, after considering the recommendations of this Committee, to be made in its next Report. (See paragraph 31.)

- (d) Consideration of competing interests of freedom of speech and contempt, particularly whether the conduct in question had the tendency to have a substantial interference with the work of the Senate Committee.

The Committee, noting the submission, has concluded as indicated at paragraphs 12 to 17.

- (e) The Select Committee did not report to the Senate what was said to be a serious allegation; the Senate could not make a finding in relation to judicial misbehaviour or incapacity under section 72 of the Constitution without the totality of information being in the public domain.

This point is not relevant to the Privileges Committee's inquiry whether a contempt has been committed.

- (f) Discussion of merits of in camera/public taking of evidence.

As above.

- (g) Standing Orders of the Senate neither add to nor subtract from the privileges of the Senate. Thus the question of the Standing Orders is really irrelevant to the question whether there has been a breach of privilege of the Senate or not.
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This point is not disputed. However, Standing Order 308, determined by the Senate pursuant to its powers under section 50 of the Constitution, specifically sets out the particular offence with which this Committee is concerned, and is a public notification that unauthorised disclosure and publication of in camera proceedings is forbidden.

- (h) The sources of the article are irrelevant to any consideration of whether the purported report in The National Times constitutes a contempt.

The Committee, in considering whether a knowledge of the source of the report was relevant under its terms of reference, concluded that, in the interests of justice, it was difficult to contemplate recommending punishment of the publisher without making some attempt to discover the source of the leak. The Committee was unsuccessful in discovering such a source, since:

- (a) the persons with access to the information denied that they had disclosed it to any person; and
- (b) the Fairfax witnesses, who were in the best position to answer the direct questions, refused to do so.

The latter can hardly complain if they are the only ones against whom a direct finding can be made.

- (i) That the Select Committee went beyond its terms of reference.

The Committee is somewhat puzzled as to the reasons why this point was raised. The question whether the Select Committee went beyond its terms of reference is a matter for the Senate, not this Committee, to determine, and, in all the time since the Select Committee has reported, there has been no move to suggest that the Senate should so determine. The point is also totally inconsistent with the allegations, strongly asserted by Mr Toohey, that the Select Committee was "faint-hearted" in pursuing its task.

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27. The Committee proposes to make more detailed comments on the matters raised by counsel in its next report to the Senate.

MITIGATION OF A POSSIBLE OFFENCE OF CONTEMPT

28. The Committee considered whether any mitigating circumstances were present in this particular case. In concluding that no such mitigation was indicated, it had regard, inter alia, to the following matters:

- . Publication in the public interest.

The Committee concluded that the defence was not of sufficient validity to outweigh the competing considerations of:

- (a) the clear precedents and statements relating to the publication of in camera proceedings of committees;
- (b) the potential impediments to the proceedings of the Select Committee, other committees of the Senate, and the Senate itself; and
- (c) the potential damage to the judge, and to witnesses before the Select Committee.

- . Ignorance of the possibility that a contempt might be involved.

This was not relied on by any of the three witnesses.

- . Any expression of regret at the publication.

The witnesses expressed no regret at all. On the contrary, Mr Toohey in particular, when giving evidence, abused the opportunity given to him to make statements under privilege by casting serious aspersions on persons not connected with the inquiry before the Committee. The attitude of Ms Bacon and Mr Toohey, in writing and publishing the first article, and their defiance in repeating the offence despite matters being drawn to

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their attention by the Committee, was supported, both in a written submission and orally, by Mr M. Suich, representing John Fairfax and Sons Limited.

#### RECOMMENDATION OF PENALTY

29. 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 13 May 1971.

Unless otherwise determined by the Senate, the powers affirmed in the Resolution adopting the Report remain.

30. 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.

31. The present Committee has concluded that a serious contempt of the Senate has occurred, and that there are no mitigating circumstances. However, as indicated in the first paragraph of this Report, the Committee proposes to give the persons affected a proper opportunity to make submissions on the question of what penalty, if any, shall be imposed before it contemplates recommending any penalty to the Senate.

#### THE COMMITTEE REPORTS TO THE SENATE -

- (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
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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 unauthorized 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.
- (6) That the Committee will make a further report to the Senate on the question of what penalty, if any, should be imposed after persons affected by the findings are given an opportunity to place before it any submissions they may wish to make.



B. K. CHILDS  
Chairman

17 October 1984

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APPENDICES



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APPENDIX A

**AUSTRALIAN SENATE**  
CANBERRA ACT

SENATE SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

20 June 1984

Senator B.K. Childs  
Chairman of the Committee of Privileges  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Senator Childs,

Attached are responses to the particular questions raised by your Committee in relation to the matter referred to it.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Michael Tate'.

(Michael Tate)  
Chairman



RESPONSES TO MATTERS RAISED BY COMMITTEE OF PRIVILEGES

1. Do you wish to expand on the reasons, given in your speech on the Adjournment on 12 June 1984, for proposing to refer the matter of the purported report to the Privileges Committee?

Because of the particular immediate damage which could be done to the Select Committee's work, the persons mentioned in the article as having given evidence, and the judge, and the damage that could be done to the work of other Senate committees, the article was regarded as too serious a matter to be allowed to pass unnoticed.

2. Has the purported report in fact impeded or obstructed the inquiry of the Select Committee? Does it have the potential to impede or obstruct the inquiry in the future?

The article has great potential to impede the inquiry of the Select Committee in the future. The Committee has been able to proceed so far only on the basis of giving certain undertakings as to the confidentiality of evidence and documents submitted to it. In fact, all hearings of the Committee have so far been conducted in camera. The publication of the article could impede the Committee in obtaining evidence from the persons mentioned in the article or in obtaining evidence from other persons.

3. As your statement to the Senate indicates, it is not necessary for the Committee of Privileges to establish whether the article does include matter which has come before your Committee to establish contempt. Nonetheless, are you willing to confirm whether the account of the Committee's proceedings, set out in the article, is accurate in whole or in part?

The article is accurate in part. In particular, it is accurate in referring to three people who have given evidence and in summarising their evidence.

4. What level of knowledge, if any, does the article reveal of proceedings of the Committee? Does the article indicate that the author has had access to any Committee documents, such as the transcript of evidence?

The article indicates that the author knows the identity of three persons who have given evidence and the general outline of their evidence. It does not reveal that the author has had access to any Committee document, including transcripts of evidence. It does reveal a knowledge of the existence of a document submitted by one of the witnesses, and a knowledge of its contents, though whether this is derived from a reading of the document cannot be ascertained, because the report could have been compiled on the basis of a verbal briefing on the evidence taken.

The article purports to reveal the character of the deliberations of the Committee, (eg. strenuous questioning), but once again there is no evidence of whether this is based on a reading of the transcript, a verbal briefing or an educated guess.

5. What categories of persons have had access to relevant Committee documents, particularly transcripts of evidence?

Persons who have had access to  
Committee documents generally

(1) Members of the Committee.

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3.

- (2) Personal staff of members of the Committee, pursuant to a resolution passed by the Committee, for the purpose of assisting members in their work for the Committee.
- (3) Senate officers attached to the Committee (one secretary, one assistant secretary, one research officer and one steno-secretary).
- (4) The legal adviser to the Committee (a leading Queen's Counsel in private practice).
- (5) Senate reproduction staff, for the purpose of copying of documents, but subject to the precautions mentioned below.
- (6) A sound recording expert (who had access only to tape recordings supplied to the Committee).

Persons who have had access only to evidence taken by the Committee

- (1) Hansard staff on duty at meetings of the Committee.
  - (2) Hansard staff involved in the production of transcripts of evidence.
  - (3) Witnesses, who were supplied with transcripts of their own evidence only, for the purpose of submitting corrections to those transcripts.
6. What precautions were taken to ensure that there was no unauthorised access to the Committee's documents or information? Are you able to suggest any ways in which such access could have occurred?

The following are the principal security precautions taken in relation to the Committee:

4.

- (1) Members of the Committee were issued with safes to store Committee documents in their Canberra offices, and were requested to take all possible precautions in using documents in other places. The problem of security was discussed at the first meeting of the Committee, and members were made aware of the need to exercise the utmost caution. It was suggested that Committee documents should be kept only in their Canberra offices and that the Committee should meet only in Canberra, but this was thought to be impracticable because of the heavy commitments of members, which prevented them from coming to Canberra for all meetings.
  - (2) Documents forwarded out of Canberra to members, the legal adviser or witnesses were sent only by courier services which provided receipts and proof of delivery.
  - (3) Documents in the custody of the Committee's staff were stored in two safes. The combinations of these safes were known only to the secretary and assistant secretary. Documents were out of the safes only when in the immediate possession of the staff and in use. No other staff were allowed to retain possession of any Committee documents.
  - (4) Documents in the custody of Committee staff and transported for the purpose of meetings out of Canberra were kept in the immediate possession of the staff, except when they were in the custody of the airlines.
  - (5) The staff of the Committee were reminded that they must not disclose proceedings of the Committee to any other persons without the authorisation of the Committee, and were briefed on the necessary security precautions for documents.
-

- (6) Wherever possible copying of Committee documents was done by Committee staff or by reproduction staff in the presence of Committee staff. Reproduction staff were instructed to keep Committee documents which they were copying in their immediate possession, not to read any documents and to shred all waste copies.
- (7) Hansard staff on duty at Committee meetings were reminded that they must not disclose proceedings of the Committee to any other person. The Principal Parliamentary Reporter was advised of the highly sensitive nature of the Committee's evidence and asked to caution all his staff involved in the production of the transcript of evidence against any disclosure of that evidence. Hansard staff were not given access to Committee documents referred to during the taking of evidence.
- (8) All surplus and unwanted documents, such as drafts of correspondence or of Committee papers, were shredded by the Committee staff.

Unauthorised access to documents is always possible regardless of the level of security precautions. It is considered that the precautions taken were at an appropriate level. Of the possible methods of unauthorised access none appear to be particularly suspect.

7. Assuming that the article does in fact quote accurately from the transcript of evidence, are you able to suggest a possible source of the information?

The article does not quote from the transcript of evidence. As the list given in answer to Question 5 indicates, there are a number of possible sources of

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6.

the information upon which the article was based. It is not possible to indicate at this stage that any possible source is particularly suspect.

8. Assuming that the Committee of Privileges wishes to take up your offer to appear before it, would you prefer to meet with the Committee in public or in private?

I have indicated to the Chairman my willingness to appear before the Committee, if so requested, after the Committee has had the benefit of this written response. Because the inquiry of the Committee of Privileges will inevitably have the effect of confirming the partial accuracy of the article, it is respectfully submitted that the Committee should conduct all of its proceedings in private. Certainly, I would wish to appear in private.

J8/RESPON

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APPENDIX B

SUPPLEMENTARY SUBMISSIONS TO THE PRIVILEGES COMMITTEE OF  
THE AUSTRALIAN SENATE ON BEHALF OF JOHN FAIRFAX & SONS  
LIMITED, MR. BRIAN TOOHEY AND MS. WENDY BACON

The Committee of Privileges heard oral submissions from Mr. N. McPhee QC at the conclusion of the proceedings on September 26, 1984. Pursuant to leave granted by the Committee for the lodging of supplementary written submissions, John Fairfax and Sons Limited, Mr. Brian Toohey and Ms. Wendy Bacon wish to place before the Committee the following supplementary submissions for its consideration:

1.

1.1 The Committee should not find that a contempt of the Senate has been committed unless it is satisfied that the publication by The National Times caused, or was likely to cause, a substantial interference with the function of the Senate Select Committee on the Conduct of a Judge.

1.2 This approach is consistent with the well-established proposition that the Parliament should use its powers only where it is essential to provide necessary protection for of the Senate or one of its Committees.

1.3 The principle has been well summarised as follows in the Report of the Joint Select Committee on Parliamentary Privilege at page 85:

Recommendation 14

That the House should exercise its penal jurisdiction in any event as sparingly as possible and only when

it is satisfied to do so is essential in order to provide reasonable protection for the House, its Members its Committees or its officers from improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with their respective functions. Consequently, the penal jurisdiction should never be exercised in respect of complaints which appear to be of a trivial character or unworthy of the attention of the House; such complaints should be summarily dismissed without the benefit of investigation by the House or its Committees. (The emphasis is ours).

2.

2.1 There is no evidence that the publication did cause a substantial interference with the function of the Senate Committee, or was likely to do so. On the contrary, all of the members of the Senate Select Committee on the Conduct of a Judge have given evidence before this Committee. None has testified that the publication did interfere with the conduct of their Committee, nor that they believed it was likely to do so. They are in the best position to judge this aspect.

2.2 It can always be theoretically postulated that some witnesses might have been inhibited in giving evidence. However, it is unlikely in the extreme with witnesses of the type of Briese and Lewington that this would occur.

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2.3 A Committee of the Senate, of course, could not bind the Senate so as to prevent it from publishing evidence given in private. It is our understanding that witnesses are informed that their evidence given in camera may be published by Order of the Senate. It would be a misconception to state that some witnesses only come forward to give evidence before a Senate Committee because they have a guarantee of confidentiality. There is no such guarantee. On the contrary, wide publication of the evidence of witnesses is likely to induce others who may be possessed of relevant information (perhaps without realising the significance of that information or without knowing what their duty is with respect to it) to come forward. In fact it was publication of material in The Age tapes which induced Mr. Brieze to give his statement to the Senate Committee.

3.

3.1 The Committee should accept that almost any issue involving a contempt of the Senate will inevitably involve competing aspects of public interest. These include the right of free speech and criticism and in this case the discharge of the responsibility of the press to inform the public. While at first sight the decision of the Editor of The National Times to publish in apparent defiance of a decision of a Senate Committee that evidence be heard in private may seem improper, the Committee, in deciding whether the publication does constitute a contempt, must give fair consideration to the competing pressures operating upon an Editor, and in particular whether

the consequence of the decision to publish would in fact result in a real interference with the proceedings of the Select Committee.

3.2 As has been submitted, in this case the publication did not have this effect.

4.

4.1 Mr. Brian Toohey was the Editor responsible for the publication. He contends that he considered it in the public interest to publish the information.

4.2 Clearly, the material in the publication related to a matter of grave public interest, namely whether there was material which might account to proven misbehaviour or incapacity of a Justice of the High Court of Australia.

4.3 As Mr. Toohey said in his evidence at page 46:

"I wish to emphasise that in making the decision to publish I was not concerned to express an opinion in that article as to the truth or otherwise of the allegations of misbehaviour made against Mr. Justice Murphy. I was concerned only to publish relevant material to the public about the issue involved. It was my view that it was in the public interest that the material should be published."

and again at page 55:

"I make no judgment about whether I am in breach of privilege or not. I have made the judgment that this is in the public interest and that it should be published. Sometimes, in a democratic society, there are competing goods - balancing interests. In this case, I clearly have made the decision that publication is in the national interest."

4.4 It should be emphasised that the material which was published related to unique proceedings in the history of Australia concerning allegations of misbehaviour or incapacity of a Justice of the High Court of Australia. It would be unthinkable if, on a matter of such enormous importance to the Australian public, all of the evidence before the Senate Committee on the Conduct of a Judge did not enter the public domain. Questions of guilt or innocence are decided in the open and before the public, not in secret. The same principles of justice should apply to proceedings as to the conduct of a Justice under section 79 of the Constitution .

4.5 Mr. Toohey has also indicated that an Editor has an obligation to publish material as soon as possible after he receives it. Otherwise he is open to the temptation to manipulate or the charge of manipulating the news by timing its release. As Mr. Toohey says in his evidence at page 54:

"I believe that journalists, when they get hold of information and can prove to their satisfaction that it is correct and that it

is important, should publish it with as little delay as possible. Otherwise they leave themselves open to the accusation that they may be playing politics, that they may be trying to drop the information at some time that would advantage someone whom they like or disadvantage someone else whom they do not like, that they have held up information and waited till an election campaign or that, in some ways, they are being manipulative. I think the best way around those accusations is to be very straightforward - when you get information, when you are certain that you have it correct, as quickly as you can you should publish it."

4.6 This is why publication took place when it did and why Mr. Toohey did not delay pending publication by the Committee of a summary of evidence of the witnesses before it. As events were to prove, the content of Detective-Sergeant Lewington's evidence in fact was not released to the public despite the enormous importance which it might have had as to the conduct of the Justice.

5. The question is not whether the Committee approves of the editorial approach of Mr. Toohey or the journalistic approach of Ms. Bacon or the retrospective approval by Mr. Suich of Mr. Toohey's decision. The question is whether in fact a contempt was committed and had the result indicated in point 1.

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6.

6.1 The refusal of Mr. Toohy and Ms. Bacon to reveal their sources is irrelevant to the question of contempt before the Committee. The question before the Committee relates to the publication of a purported report in The National Times. It is accepted that there was a report in The National Times and the question is whether in all the circumstances that publication constituted a contempt, not the question of whether their refusal to discuss sources constitutes some other and different contempt.

6.2 Nor is the refusal of a journalist to disclose sources in any way a parallel to the refusal of a witness to answer questions to a Committee in a matter relevant to that Committee's inquiry. The practice of a journalist not to disclose sources has been accepted in the courts as involving the public's right to access to information:

"In support of their rights of access, the newspapers should not in general be compelled to disclose their sources of information" per Lord Denning - British Steel v. Granada Television (1980) 3 WLR 774 at 804.

6.3 We respectfully direct the attention of the Privileges Committee to paragraph 2 of the Report of the Committee of Privileges dated May 13, 1971 which says of terms of reference similar to those of this Committee that:

"... the reference did not entitle the Committee to enquire into and report upon the question of how the information contained in the draft report came to the knowledge, of or into the hands of, the newspapers concerned."

6.4 This aside, however, there is an important principle involved. The very point of protecting a journalist's sources from exposure is to ensure that the public is supplied with information through the press and other media. The media protects the source while informing the public. This ensures the flow of information to the public. The refusal by a witness, however, to answer a question relevant to a Committee's Inquiry is to deny the Senate and thus the public the very information which it seeks. It thus prevents the flow of information to the public.

7. A breach of the Senate Standing Orders does not constitute a contempt in itself. The privileges of the Senate as established by section 49 of the Constitution are those of the House of Commons of the United Kingdom as at 1901. They can be varied only by both Houses of Parliament. This has not been done. The Senate Standing Orders may or may not be declaratory of the privileges of the Senate, but they cannot enlarge or detract from those privileges as established by section 49. Therefore, conduct which does not accord with Standing Order 308 is not necessarily a breach of privilege. Whether there has been a breach of privilege depends upon the principles set out in points 1 to 3 above.

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8. A decision by the Committee that there was no contempt involved in the publication in The National Times could not operate as a precedent which could be seen as a "green light" by The National Times or any other newspaper, to publish private proceedings of Senate Committees at will. Each case of alleged contempt needs to be judged on its own merits or its own facts. This case, depending as it does on its very particular facts and circumstances (impossible to reproduce) could not stand as a precedent for anything.

9.

9.1 These proceedings raise an important issue of jurisdiction. It should be said at the outset that John Fairfax & Sons Limited and the journalists who have appeared before the Committee did not take any account of this issue and it did not influence in any way the decision to publish the articles. However, it is raised for the consideration of the Privileges Committee.

9.2 A Select Committee only has those powers which are given to it by the Senate itself. The members of the Select Committee have the power to summons witnesses and conduct an inquiry subject to the resolution of the Senate which sets up the Committee.

9.3 In the case of the Select Committee on the Conduct of a Judge, the terms of reference of the inquiry were quite narrow. They empowered the Committee to inquire into and report upon:

- (a) whether any or all of the tapes and transcripts delivered by The Age newspaper to the Attorney-General on 1 February 1984 and relating to the conduct of a federal judge are authentic and genuine; and
- (b) if the Committee is satisfied that the tapes and transcripts referred to in subparagraph (a) are authentic and genuine in whole or part, whether the conduct of the judge as revealed in the tapes and transcripts ... constituted misbehaviour or incapacity which could amount to sufficient grounds for an address to the Governor-General in Council from both Houses of the Parliament praying for his removal from office pursuant to Section 72(ii) of the Constitution.

9.4 The Select Committee into the Conduct of a Judge reported that it was unable to establish the authenticity of the tapes in question; and further reported that no conduct of the judge was proved such as would constitute misbehaviour within the meaning of s.72 of the Constitution.

9.5 Having reached a conclusion on these two subjects, the Committee then went on to consider what it described as "two further matters which arose in the course of the Committee's inquiry". The first of these matters related to evidence given by Detective-Sergeant Lewington in which he recalled listening, in 1981, to a tape-recording of a conversation between persons he believed to be Mr. Justice Murphy of the High Court and Mr. Morgan Ryan. According to his evidence the subject matter of the

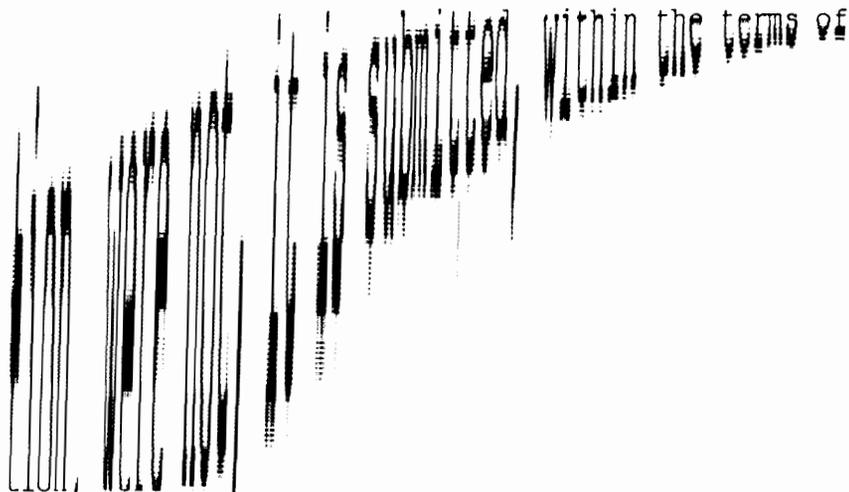
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conversation dealt with the possibility of influencing the investigation being carried on by Detective-Sergeant Lewington into Mr. Morgan Ryan in relation to conspiracy charges.

9.6 The second of the matters inquired into by the Select Committee concerned allegations by Mr. Briese relating to conversations with Mr. Justice Murphy concerning Mr. Morgan Ryan.

9.7 However these two matters, which may be summarised as the Lewington tape and the Briese-Murphy conversa-

tion, within the terms of



reference of the Select Committee. In fact, having found that there was no basis upon which the Committee could authenticate The Age tapes, the Committee was not empowered by the Senate to conduct a further inquiry into whether there was misbehaviour or incapacity on the part of the judge.

9.8 It is our submission that the Select Committee went beyond its terms of reference, and in fact had no power to inquire into misbehaviour or incapacity on the part of Mr. Justice Murphy other than that which might be revealed by The Age tapes if authenticated.

9.9 Therefore, the evidence which it received from Mr. Briese and Detective-Sergeant Lewington was beyond the powers of inquiry granted to it by the Senate.

9.10 John Fairfax & Sons Limited, Mr. Toohey and Ms. Bacon have been asked to show cause why they were not in breach of privilege for the publication of this very evidence. It should be emphasised that all of them

had pressed most strenuously for the widest possible terms of inquiry into The Age tapes and the conduct of the judge. This does not detract from the point that, where parties have been requested to appear before the Senate Privileges Committee to show cause, the Committee itself should be attentive to the legal rights of the parties. It must also be attentive to the question of whether in fact a breach of privilege could occur in circumstances where the publication of evidence given in secret before the Select Committee related solely to evidence which that Select Committee was not empowered by the Senate to obtain for the purposes of its inquiry.

9.11 It is our submission that there could not be a breach of privilege in such circumstances.

Dated October 4, 1984

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MINUTES OF PROCEEDINGS





**AUSTRALIAN SENATE**  
CANBERRA, A.C.T.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

No. 1

15 June 1984

1. MEETING OF THE COMMITTEE:

The Committee met at 12.50 p.m. in Senate Committee Room No. 6.

2. RESOLUTIONS OF APPOINTMENT OF COMMITTEE, APPOINTMENT OF MEMBERS, AND CHANGES IN MEMBERSHIP:

The Secretary to the Committee reported the following Resolutions of the Senate:

(a) 4 May 1983:

(i) Appointment of the Committee; and

(ii) Appointment of the following members:

Senators Bolkus, Button, Childs, Jessop,  
Macklin, Missen and Robert Ray;

(b) 15 June 1984:

Discharge from further attendance on the Committee of Senators Bolkus, Button, Jessop and Missen and appointment of Senators Coates, Cook, Peter Rae and Withers.

3. ELECTION OF CHAIRMAN:

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

4. REFERENCE OF MATTER:

The Chairman reported the following Resolution of the Senate of 14 June 1984:

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 be referred to the Committee of Privileges.

The Chairman thereupon laid upon the Table a copy of The National Times of 8-14 June 1984 which included the purported report.

5. PROPOSED RESOLUTIONS FOR SUBMISSION TO THE SENATE:

Senator Peter Rae proposed that the Chairman of the Committee move that the Senate adopt the following resolutions:

1. That the Committee have the power to send for persons, papers and records.
2. That the Senate authorize the Chairman of the Senate Select Committee on the Conduct of a Judge to appear before the Committee of Privileges and to produce such documents and to disclose such information in relation to the Senate Select Committee on the Conduct of a Judge proceedings as the Privileges Committee directs or requires.
3. That the Senate affirm its acceptance of the Report of the Privileges Committee dated 13 May 1971 including any part of that Report contained in paragraph 4 and the further recommendations.
4. That the Senate note that the Committee propose that witnesses should have the right to Counsel, etc.

6. RESOLUTIONS AGREED TO:

It was agreed, after discussion:

(a) that the Chairman move the following motion in the Senate this day:

"(1) That, for the purpose of the inquiry and report by the Committee of Privileges on the publication of a purported report of evidence taken by and documents submitted to the Select Committee on the Conduct of a Judge:

- (a) the Committee and any sub-committee have power to send for and examine persons, papers and records, to move from place to place, and to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives;
- (b) the Committee have power to appoint sub-committees consisting of three or more of its members, and to refer to any such sub-committee any of the matters which the Committee is empowered to consider, and that the quorum of a sub-committee be a majority of the Senators appointed to the sub-committee;
- (c) 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
- (d) the Senate authorize the Chairman of the Senate Select Committee on the Conduct of a Judge to appear before the Committee of Privileges and to produce such documents and to disclose such information in relation to the Senate Select Committee on the Conduct of a Judge proceedings as he or that Committee thinks fit.

"(2) 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."; and

(b) that the Committee resolve, as follows:

- "(i) That witnesses may be accompanied by their solicitor or counsel and may, with leave, seek advice from their solicitor or counsel during the answering of questions put by the Committee.
- (ii) That any submissions or representations made by witnesses be heard by the Committee.
- (iii) That the right of the solicitor or counsel to make any submissions be considered by the Committee when application therefor be made."

#### 6. NEXT MEETING:

It was agreed, after discussion:

- (a) that the Committee meet in Melbourne on Monday, 25 June 1984, at 2.30 p.m.; and

(b) that the Chairman discuss with the Chairman of the Select Committee on the Conduct of a Judge (Senator Tate) the possibility of his attending that meeting.

7. ADJOURNMENT:

The Committee adjourned at 1.45 p.m.

8. ATTENDANCE:

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



(B.K. Childs)  
Chairman



AUSTRALIAN SENATE  
CANBERRA ACT

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO.2

25 JUNE 1984

1. MEETING OF THE COMMITTEE

The Committee met at 2.50 pm. in Conference Room No.1, 12th Floor, Tivoli Court, Melbourne.

2. MINUTES

On the motion of Senator Rae, the minutes of Meeting No.1 of 15 June 1984 were confirmed.

3. RESOLUTION OF THE SENATE

The Chairman of the Committee reported the following Resolution of the Senate of 15 June 1984:

(1) That, for the purpose of the inquiry and report by the Committee of Privileges on the publication of a purported report of evidence taken by and documents submitted to the Select Committee on the Conduct of a Judge:

- (a) the Committee and any sub-committee have power to send for and examine persons, papers and records, to move from place to place, and to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives;
- (b) the Committee have power to appoint subcommittees consisting of three or more of its members, and to refer to any such sub-committee any of the matters which the Committee is empowered to consider, and that the quorum of a sub-committee be a majority of the senators appointed to the sub-committee;
- (c) 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

- (d) the Senate authorise the Chairman of the Senate Select Committee on the Conduct of a Judge to appear before the Committee of Privileges and to produce such documents and to disclose such information in relation to the Senate Select Committee on the Conduct of a Judge proceedings as he or that Committee thinks fit.

(2) 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.

4. CONSIDERATION OF SUBMISSION

The Chairman drew attention to a response, dated 20 June 1984, from the Chairman of the Select Committee on the Conduct of a Judge (Senator Tate) to draft questions provided to the Select Committee. He indicated that two additional questions had since been added to the list, and that these would be answered shortly.

5. INVITATIONS TO APPEAR BEFORE THE COMMITTEE

It was agreed, after discussion, that:

- (a) the Chairman invite all those individuals designated by Senator Tate as having had access to relevant Select Committee documents, particularly transcripts of evidence, or as having been present during the proceedings of the Committee, to make any written submissions they may desire to the Privileges Committee;
- (b) in particular, the Chairman invite the two witnesses named in the National Times article (Mr Briese and Detective Lewington) to make submissions in the same terms as persons described in paragraph (a); and
- (c) the Chairman request the Chairman of the Select Committee to advise the Privileges Committee of the name of the third witness referred to in the article (an unnamed 'former Federal Police Detective'), so that a similar invitation may be extended to him.

5. CORRESPONDENCE WITH THE NATIONAL TIMES :

It was further agreed, after discussion, that the Chairman write to the journalist who wrote the article and to the editor and publisher of the National Times (Mr Toohey and John Fairfax and Sons Pty. Ltd.), advising them of the Senate's decision to refer the report to the Privileges Committee, and seeking any response they may wish to make.

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7. CIRCULATION OF DRAFT INVITATIONS

It was agreed, after discussion, that the invitations referred to in paragraphs 5-6 be circulated to all members of the Committee for comment before despatch.

8. NEXT MEETING

It was agreed that the Committee meet in Canberra on 13 August 1984.

9. ADJOURNMENT

The Committee adjourned at 3.55 pm.

10. ATTENDANCE

Present:

Senator Childs (Chairman), Senators John Coates and Peter Rae.

Apologies were received from Senators Cook, Robert Ray and Withers.



B.K. CHILDS  
Chairman



AUSTRALIAN SENATE  
CANBERRA, A.C.T.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 3

13 AUGUST 1984

1. MEETING OF THE COMMITTEE

The Committee met at 10.26 a.m. in Senate Committee Room No. 6.

2. MINUTES

On the motion of Senator Peter Rae, the minutes of Meeting No. 2 of 25 June 1984 were confirmed.

3. ENDORSEMENT OF DRAFT LETTERS

Draft letters to the journalist who wrote the article in The National Times, Ms W. Bacon, the editor of The National Times, Mr. B. Toohey, and Mr I. Arnold on behalf of the publisher, John Fairfax & Sons, were endorsed.

It was agreed, after discussion, to make additional reference in the letters to the August 10 to 16 edition of The National Times.

4. PRESS STATEMENT ON COMMITTEE'S INQUIRY

It was agreed, after discussion, that the Committee should issue a brief press statement, indicating that it has written to The National Times expressing its concern at the publication of further articles following the Chairman's letter of 3 July 1984, and indicating that it proposed to seek a reference from the Senate of the further publication.

5. CONTACT WITH PRESS COUNCIL

The question was raised concerning the Press Council's attitude to publication of in camera committee proceedings.

It was agreed, after discussion, that the Chairman examine any submission made by the Council to the Joint Committee on Parliamentary Privilege, and, if necessary, seek the Council's views on the specific question at present before the Senate Committee of Privileges.

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6. ENFORCEMENT OF PENALTIES

It was agreed, after discussion, that advice be sought from the Clerk of the Senate and the Attorney-General's Department on the question whether, if the Committee were to recommend to the Senate that a fine be imposed and the Senate were to agree to that recommendation, what steps could be taken to enforce such a payment and, specifically, whether the judicial process could be used to enforce the payment.

7. REQUESTS TO APPEAR BEFORE THE COMMITTEE

It was agreed, after discussion, that the members and secretary of the Select Committee on the Conduct of a Judge, Mr C. Briese and Detective Inspector D.J. Lewington, be invited to appear before the Committee of Privileges at a meeting to be held on Wednesday, 12 September 1984 at 8.30 p.m. to answer questions relating to whether any information on the private proceedings of the Select Committee reached The National Times and if so, how it may have been made available.

It was further agreed that Ms Bacon, Mr Toohey and Mr Arnold be requested, or if necessary summoned, to appear before the Committee on Friday, 14 September 1984, at 10.00 a.m. to respond to questions in relation to the alleged contempt. It was also agreed to issue the invitation in the letters previously endorsed by the Committee (see Item 3.).

It was further agreed that the meetings of both 12 September and 14 September be held in public, and that the Chairman get in touch with members of the Select Committee to explain the purpose of the meeting on 12 September 1984.

It was also agreed that draft questions be prepared and circulated for consideration before representatives of The National Times appear before the Committee.

8. RECEIPT OF SUBMISSIONS

It was agreed to receive submissions from the following: Mr C. R. Briese, Mr S. Spindler, Mr J. Campbell, Detective Acting Inspector D.J. Lewington, Mr B. Toohey and Ms W. Bacon, Mr I. Arnold, Senator P. Durack, and Senator M. Tate.

9. NEXT MEETING

It was agreed that the Committee meet in Canberra on Wednesday, 12 September 1984, at 8.30 p.m., with a possible private meeting if required at an earlier date.

10. AJOURNMENT

The Committee adjourned at 11.52 a.m.

11. ATTENDANCE

Present:

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

Apologies were received from Senators Cook,  
Robert Ray and Withers.



B.K. CHILDS  
Chairman

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AUSTRALIAN SENATE  
CANBERRA, A.C.T.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 4

12 SEPTEMBER 1984

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met at 8.32 pm in Senate Committee Room No. 6.

2. MINUTES

On the motion of Senator Macklin, the minutes of Meeting No. 3 of 13 August 1984 were confirmed.

3. RESOLUTION OF THE SENATE

The Chairman of the Committee reported the following Resolution of the Senate of 22 August 1984:

That 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 be referred to the Committee of Privileges in connection with the matter, referred to the Committee by the Senate on 14 June 1984, relating to the publication in The National Times of 8-14 June 1984 of a purported report of evidence taken by, and documents submitted to, the Select Committee on the Conduct of a Judge.

4. FURTHER RESOLUTION OF THE SENATE

The Chairman of the Committee also reported the following Resolution of the Senate of 22 August 1984:

That -

- (a) the publication on 17 August 1984 in The Age and The Australian of purported information about the actions and intentions of members of the Senate Select Committee on the Conduct of a Judge; and
- (b) the provision of such purported information by 'sources' prior to publication of the Report of the Select Committee,

be referred to the Committee of Privileges.

2.

It was agreed that the matter not receive further consideration by the Committee until the completion of its present inquiry.

5. RECEIPT OF SUBMISSIONS AND OTHER CORRESPONDENCE

It was agreed to receive submissions and other correspondence from the following: Senator the Hon. D L Chipp, Senator R A Crowley, Senator N Bolkus, Mr C R Briese, Mr B Toohey and Ms W Bacon, and the President of the Senate.

6. QUESTIONS

It was agreed that the Committee ask questions of witnesses in the order outlined in the document 'Questions', after which members could ask additional questions as appropriate.

7. COMMENCEMENT OF PUBLIC MEETING

The public meeting of the Committee commenced at 8.35 pm.

8. EXAMINATION OF WITNESSES

The following witnesses, after making an Oath or Affirmation, were examined: Senator the Hon. D L Chipp, Senator Michael Tate, Senator the Hon. P D Durack QC, Senator R A Crowley, Senator A W R Lewis, Senator N Bolkus, Mr H Evans, Clerk-Assistant (Committees) and Secretary of the Select Committee on the Conduct of a Judge.

9. ADJOURNMENT FOR PRIVATE MEETING

The Committee adjourned briefly for in camera discussions with Senator Michael Tate pertaining to the course to be followed by the Committee in its examination of the final two witnesses.

10. RESUMPTION OF PUBLIC MEETING

The following witnesses, after making an Oath or Affirmation, were examined: Mr C R Briese, Chairman, Bench of Stipendiary Magistrates, NSW, and Detective Inspector D J Lewington, Australian Federal Police.

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11. RESUMPTION OF PRIVATE MEETING

The public meeting adjourned at 10.21 pm, with the Committee to continue its deliberations in camera.

12. ACTION TO BE TAKEN BY THE COMMITTEE

It was agreed, after discussion, that the Chairman write to the Chairman of the Select Committee on the Conduct of a Judge, Senator Tate, requesting him to identify matters, included in the reports of The National Times which are at present before this Committee, which:

- (a) could have come only from the transcript of the proceedings of the former Select Committee on the Conduct of a Judge; and
- (b) are an accurate record, whether in whole or in part, of the deliberative proceedings of, or documents submitted to, the former Select Committee.

13. NEXT MEETING

It was agreed, after discussion, that the Committee meet in Canberra on Wednesday, 26 September 1984, at 10.00 am for a private meeting, which will then be followed by a public meeting at approximately 10.15 am.

Apologies were tendered by Senator Coates and Senator Macklin in relation to the next meeting.

14. ADJOURNMENT

The Committee adjourned at 10.32 pm.

15. ATTENDANCE

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



B K CHILDS  
Chairman



AUSTRALIAN SENATE  
CANBERRA ACT

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 5

26 SEPTEMBER 1984

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met at 10.00 am in Senate Committee Room No. 3.

2. MINUTES

On the motion of Senator Peter Rae, the minutes of Meeting No. 4 were confirmed.

3. RECEIPT OF CORRESPONDENCE

It was agreed to receive correspondence from the following: Mr P Brazil, Mr H Evans, Stephen Jaques Stone James on behalf of Mr M Suich, and Senator Michael Tate.

It was further agreed that the letter from Mr Brazil be considered by the Committee at its next private meeting.

4. QUESTIONS

It was agreed to follow the practice adopted by the Committee in its previous meeting, i.e. that the Chairman ask questions of witnesses in the order outlined in the documents entitled "Suggested general questions for representatives of John Fairfax and Sons and The National Times", and "Draft Questions" to Mr Suich, Mr Toohey and Ms Bacon, after which members could ask additional questions as appropriate.

5. ORDER OF EXAMINATION OF WITNESSES

It was agreed, after discussion, that the Committee examine witnesses in the following order: Ms W Bacon, Mr B Toohey, Mr M Suich.

6. RIGHTS OF COUNSEL

It was agreed, after discussion, that the Committee permit counsel representing the three witnesses to participate in the proceedings on a consultative basis only.

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7. INCORPORATION OF LETTERS IN TRANSCRIPT

It was agreed that the Committee seek the concurrence of all three witnesses to a proposal to have incorporated in the transcript the following letters:

- letters dated 3 July 1984 from the Chairman to John Fairfax and Sons Ltd, Mr Toohey and Ms Bacon;
- letter dated 30 July 1984 from Mr B Toohey and Ms W Bacon;
- letter dated 30 July 1984 from Mr I Arnold, Editorial Manager, The National Times;
- letters dated 13 August 1984 from the Chairman to Mr Arnold, Mr Toohey and Ms Bacon;
- letter dated 30 August 1984 from Mr B Toohey and Ms W Bacon;
- letter dated 21 September 1984 from Stephen Jaques Stone James on instructions from Mr M Suich.

8. TELEVISIONING OF MEETING

It was agreed that the Committee permit the filming by television crews of the first few minutes of the proceedings, on the condition that no sound recording be made.

9. FURTHER PRIVATE MEETING

A further private meeting of the Committee commenced at 10.06 am for discussions with counsel.

10. ORDER OF EXAMINATION OF WITNESSES

It was agreed, after discussion, that the Committee accede to the request from counsel to change the order of witnesses to be examined to the following:  
Mr M Suich, Mr B Toohey, Ms W Bacon.

11. RIGHTS OF COUNSEL

It was agreed, after discussion, that the Committee accede to the further request from counsel to clarify their ability to appear at this meeting. It was resolved that counsel could make an opening submission to the Committee before the examination of witnesses, and also a closing address following the examination.

12. COMMENCEMENT OF PUBLIC MEETING

The public meeting of the Committee commenced at 10.32 am.

13. EXAMINATION OF WITNESSES

The following witnesses, after making an Oath or Affirmation, were examined: Mr M Suich, Chief Editorial Executive of John Fairfax and Sons Ltd, and Mr B Toohey, Editor, The National Times.

14. ADJOURNMENT FOR PRIVATE MEETING

During the examination of Mr B Toohey, the Committee acceded to the request of Mr Neil McPhee, QC, representing the witnesses, to adjourn for a brief period to enable Mr McPhee to discuss certain matters with Mr Toohey. The Committee held a brief private meeting to consider Mr Toohey's statement.

15. RESUMPTION OF PUBLIC HEARING

The Committee continued its examination of Mr Toohey, and proceeded then to examine, on Affirmation, Ms Wendy Bacon, Journalist, The National Times.

16. CLOSING ADDRESS BY COUNSEL

A closing address was made by Mr Neil McPhee, QC, on behalf of the witnesses.

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.

17. FURTHER PRIVATE MEETING

The public meeting adjourned at 3.38 pm, with the Committee to continue its deliberations in private.

18. ACTION TO BE TAKEN BY THE COMMITTEE

It was agreed, after discussion, that the Committee send copies of the transcript of proceedings to persons affected by the comments made by witnesses; and the Chairman of the Joint Select Committee on Parliamentary Privilege.

It was also agreed that the Committee would accept written submissions from counsel for Mr Suich, Mr Toohey and Ms Bacon within a reasonable time after the transcripts were made available.

19. NEXT MEETING

It was agreed, after discussion, that the Committee meet in Canberra on Wednesday, 3 October 1984, at 8.30 am for a private meeting. A further private meeting was scheduled for the following Wednesday, 10 October 1984, at 8.30 pm, also in Canberra.

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20. ADJOURNMENT

The Committee adjourned at 3.55 pm.

21. ATTENDANCE

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

Apologies were received from Senators Coates,  
Cook and Macklin.



B K CHILDS  
Chairman



AUSTRALIAN SENATE  
CANBERRA, A.C.T.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 6

3 OCTOBER 1984

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met at 8.39 am in Senate Committee Room No. 5.

2. MINUTES

On the motion of Senator Robert Ray, the minutes of Meeting No. 5 of 26 September 1984 were confirmed.

3. CONSIDERATION OF CORRESPONDENCE FROM COUNSEL

The Committee considered a letter from Stephen Jaques Stone James, dated 27 September 1984.

The Secretary reported that she had received the letter in the afternoon of 28 September 1984. The letter confirmed the request made by Mr Neil McPhee QC at the Committee's last meeting that the Committee accept a further submission from Stephen Jaques Stone James. The Secretary stated that she had despatched a letter acceding to that request earlier on the same date.

The letter also contained a request by counsel for access to written materials which were before the Committee on 12 September 1984. The Secretary reported that the Chairman had written to Senator Tate, requesting his permission to make his response of 20 June 1984 to questions posed by the Committee available to counsel. It was agreed that, subject to the former Select Committee's approval, the response will be sent to counsel.

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4. CONSIDERATION OF OTHER CORRESPONDENCE

The Committee considered correspondence from Mr A R Cumming Thom, Clerk of the Senate, dated 11 September 1984, and Mr P Brazil of the Attorney-General's Department, dated 13 September 1984, regarding the possible enforcement of fines imposed by the Senate.

5. INTERIM REPORT

It was agreed, after discussion, that the Committee prepare an interim report for tabling in the near future.

The Chairman requested that members submit any comments on the interim report to the Secretary by 5 October 1984.

6. NEXT MEETING

It was agreed, after discussion, that the Committee change the time of its next private meeting to 8.30 am, Wednesday, 10 October 1984, in Canberra.

7. ADJOURNMENT

The Committee adjourned at 9.22 am.

8. ATTENDANCE

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

Apologies: Senators Coates and Withers.



B K CHILDS  
Chairman



AUSTRALIAN SENATE  
CANBERRA, A.C.T

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 7

10 OCTOBER 1984

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met at 8.35 am in Senate Committee Room No. 5.

2. MINUTES

On the motion of Senator Cook, the minutes of Meeting No. 6 of 3 October 1984 were confirmed.

3. RECEIPT OF SUBMISSIONS AND OTHER CORRESPONDENCE

It was agreed to receive submissions and other correspondence from the following: Stephen Jaques Stone James on behalf of John Fairfax and Sons Limited, Mr Brian Toohey and Ms Wendy Bacon; Mr M H McHugh, QC; D J Fischer and Associates on behalf of Mr M Farquhar; and Mr J Ducker.

4. RESPONSE TO CORRESPONDENCE

It was agreed that the Committee write in response to D J Fischer and Associates, to advise that it would accept a written submission on behalf of Mr M Farquhar in due course.

It was also agreed that the Committee respond to Mr M H McHugh, QC, and Mr J Ducker, advising that it is taking into consideration matters raised in their correspondence.

5. LEGAL OPINION

It was agreed that the Committee seek the opinion of Professor D C Pearce of the Law Faculty, Australian National University, in relation to matters raised in the written submission from Stephen Jaques Stone James.

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6. INTERIM REPORT

It was agreed, after discussion, that the Committee present an Interim Report before the end of this session.

This Report would mention, in general terms, the responses received by the Committee from Stephen Jaques Stone James, D J Fischer and Associates, Mr M H McHugh, QC, and Mr J Ducker. This would be followed by a final Report which would examine the responses in detail, and outline any action taken by the Committee relating thereto.

7. NEXT MEETING

It was agreed that the Committee meet in Canberra on Tuesday, 16 October 1984, at 11.00 am or midday, subject to the sittings of the Senate.

8. ADJOURNMENT

The Committee adjourned at 9.30 am.

9. ATTENDANCE

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

Apologies: Senator Coates.



B K CHILDS  
Chairman



AUSTRALIAN SENATE  
CANBERRA, A.C.T.

COMMITTEE OF PRIVILEGES  
MINUTES OF PROCEEDINGS

NO. 8

16 OCTOBER 1984

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met at 1.05 pm in Senate Committee Room No. 5.

2. MINUTES

On the motion of Senator Withers, the minutes of Meeting No. 7 of 10 October 1984 were confirmed.

3. LEGAL OPINION

The Secretary reported that, in accordance with the resolution agreed to at the Committee's last meeting, Professor D C Pearce had been asked to supply an opinion on questions of law raised in the written submission from Stephen Jaques Stone James. Professor Pearce has indicated his willingness to provide such an opinion.

It was agreed that the Chairman write to the President of the Senate to seek approval for the Committee to commission the opinion.

4. CONSIDERATION OF DRAFT REPORT

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

It was agreed that the Committee meet again for a final consideration of the Draft Report before tabling.

It was further agreed that, if practicable, the Committee's Report be presented to the Senate on 17 October 1984.

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5. NEXT MEETING

It was agreed that the Committee meet in Canberra on 17 October 1984, at 9.50 am.

6. ADJOURNMENT

The Committee adjourned at 1.59 pm.

7. ATTENDANCE

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

Apology: Senator Cook.



B K CHILDS  
Chairman



AUSTRALIAN SENATE  
CANBERRA, A.C.T.

COMMITTEE OF PRIVILEGES

MINUTES OF PROCEEDINGS

NO. 9

17 OCTOBER 1984

1. PRIVATE MEETING OF THE COMMITTEE

The Committee met at 9.50 am in Senate Committee Room No. 5.

2. MINUTES

On the motion of Senator Withers, the minutes of Meeting No. 8 of 16 October 1984 were confirmed.

3. DRAFT REPORT

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

It was agreed that Appendices A and B, and the Minutes of Proceedings, be included with the Report, and that the Transcript of Evidence be tabled with the Report.

It was further agreed that the Report be tabled in the Senate this day.

4. ADJOURNMENT

The Committee adjourned at 9.54 am.

5. ATTENDANCE

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

Apologies: Senators Cook and Robert Ray.

CERTIFIED CORRECT:

A handwritten signature in cursive script that reads 'B K Childs'.

B K CHILDS  
Chairman

