

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COMMITTEE OF PRIVILEGES

**POSSIBLE THREATS TO
SENATE SELECT COMMITTEE OR SENATORS**

(43RD REPORT)

DECEMBER 1993

MEMBERS OF THE COMMITTEE

Senator the Honourable Margaret Reynolds (**Chairperson**) (Queensland)
Senator Baden Teague (**Deputy Chairman**) (South Australia)
Senator Brian Archer (Tasmania)
Senator Bruce Childs (New South Wales)
Senator John Coates (Tasmania)
Senator Christopher Ellison (Western Australia)
Senator Jim McKiernan (Western Australia)

The Senate
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CHAPTER ONE - INTRODUCTION AND BACKGROUND

Introduction

- 1.1 On 5 May 1993, the following matters were referred to the Standing Committee of Privileges on the motions of Senator Reynolds and Senator Walters, respectively:
 - (a) Whether the letter dated 17 December 1992 addressed to the Select Committee on Community Standards Relevant to the Supply of Services Utilising Telecommunications Technologies by Fiona Patten, spokesperson for the Eros Foundation, contained a threat to the Committee or to Senators in relation to the performance of their duties, and, if so, whether the making of that threat constituted a contempt.
 - (b) Whether threats were made by persons associated with the Eros Foundation against Senators in relation to decisions concerning X-rated videos, and, if so, whether the making of those threats constituted a contempt.
- 1.2 The first matter was referred on behalf of the Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Telecommunications Technologies of the previous Parliament, and related to a letter from Ms Fiona Patten, spokesperson for the Eros Foundation. The second matter resulted from a letter by the then Senator Shirley Walters, drawing attention to an alleged threat by the Eros Foundation "to 'out' Liberal party figures if the party adopted what it claimed was a leaked policy document proposing a sex industry crackdown". Senator Walters further drew attention to a specific statement made by Mr Robert Swan of the Eros Foundation, as reported in *The Australian* of 23 January 1993. Both matters were raised with Mr Swan at a hearing of the Select Committee on 20 April 1993. Ms Patten also attended that hearing.
- 1.3 The matters were raised as questions of privilege with the President of the Senate as indicated. On 4 May 1993, the first day of sittings of the new Parliament, the President made a statement giving precedence to both matters, which were referred to the Committee of Privileges, without debate, on 5 May.
- 1.4 On 11 May 1993 the then Chair of the Committee, Senator Patricia Giles, wrote to Senator Reynolds, Senator Walters, Ms Patten and Mr Swan inviting any comments they may wish to make on the questions before the Committee. The letter indicated that, given the change in membership of the Senate and of the Committee, and the workload of the Committee, the matters would not be able to be taken further before August 1993 but invited comments by that time.
- 1.5 Initially, the Committee treated each matter separately, as although both Ms Patten and

Mr Swan indicated that they represented the Eros Foundation the matters involved raised separate questions of contempt. Responses were received from Senator Tierney, as Deputy Chairman of the Select Committee, and former Senator Walters, and a joint response was made by Ms Patten and Mr Swan. All documents referred to in this introduction are tabled in a separate volume accompanying this report, together with several newspaper extracts. Certain comments have been excised from the Patten/Swan submission, as they were not relevant to the Committee's terms of reference.

- 1.6 Senator Reynolds, Chairperson of both this Committee and the Select Committee, had disqualified herself from consideration of the matter raised on behalf of the then Select Committee, now titled The Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies. In the light of the joint response by Ms Patten and Mr Swan, Senator Reynolds disqualified herself for the remainder of the proceedings on this matter.
- 1.7 The remaining members of the Committee of Privileges, having considered all the documents, did not find it necessary to conduct public hearings before reporting to the Senate.

Matters for consideration

- 1.8 The questions of principle were discussed during the proceedings of the Select Committee in April, and the Committee does not intend to discuss them at length in this report. Briefly, the Eros Foundation made a submission to the Select Committee which included a legal opinion, about a proposal by that Committee that some limitation be placed on the accessibility of subscribers to 0055 telephone services, that the proposal had "serious difficulties". In drawing this to the Select Committee's attention in a covering letter, Ms Patten made the following statement:

Please be advised that traders who have been disadvantaged by the Committee's rulings in this area will contemplate damages actions in the courts, unless some reassessment is done.

- 1.9 As the President stated in giving precedence to the notice of motion, assuming that the threat was intended against the committee or individual members the paragraph:

... would clearly be capable of being held to be a threat made against a Senate committee and its members in the performance of their duty and therefore a contempt. It is well established that a threat to take legal action made with the purpose of influencing a committee or its members, or actually taking legal action for that purpose, can constitute a contempt.

- 1.10 In respect of the second matter, former Senator Walters in a submission to the Committee, in expanding upon her original letter to the President, joined Ms Patten in the original accusation regarding a "potential release of security film of a coalition member

at a sex shop in order to expose moral hypocrisy". Senator Walters states that :

Ms Fiona Patten, a spokeswoman for Eros Foundation also was quoted as saying that Eros would release the footage after the election if the Coalition won Government, "I hate the idea, but if we were really pushed we would do it."

1.11 The President stated in relation to this matter:

The possible contempt of parliament contained in the matter raised by Senator Walters is that of seeking by threats to influence senators in their conduct as senators. This is one of the well-known contempts of parliament, and is referred to in privilege resolution 6 under the heading 'Improper influence of Senators'.

The alleged threat is directed to Opposition members generally and not to any particular person, but it is well established that a threat to unnamed members, or to a group or category of members, or to members in general, can be a contempt just as can a threat to particular members.

The alleged threat as reported is also directed to Opposition members of parliament generally, and does not distinguish between members and senators. If the threat as reported were made, it could be regarded as being directed to senators as well as members of the House of Representatives. This is so particularly having regard to the fact that senators could, and probably would, participate in the formulation of any policies relating to X-rated videos.

The formulation of such a policy by a group of senators clearly falls within their duties as senators and their conduct as senators within the terms of privilege resolution 6. A threat such as the one reported obviously has the potential substantially to obstruct senators in the performance of their functions.

1.12 Before giving a summary of the response by Mr Swan and Ms Patten, the Committee considered that it would be helpful to give some general background to the Eros Foundation, as conveyed in their submission:

The Eros Foundation is a lobby and information organisation for members of the public who wish to see a regulated and legal trade in non violent erotic (adult) goods and services throughout Australia.

It is an incorporated association with a mail-out list of approximately 500,000 associate (non-financial) members (identifiable and regular purchasers of non violent erotica), 350 official (financial) members and 80 trader members.

Fiona Patten and Robert Swan are both public relations consultants contracted by the Eros Foundation. Mr Swan is not a member of the foundation and Ms Patten was voted in as a temporary President in May 1993 after the resignation of the then president.

Both represent other clients as well as Eros.

Eros Foundation's general response

1.13 The Committee has had some difficulty in distilling salient points from the Eros Foundation's public relations consultants' attempts to address the issues. By way of explanation, it draws the Senate's attention to the following reasons given by the authors for the form of the submission:

Whilst trying to write an honest and objective reply to the Committee of Privileges as to intent and to matters of fact, we have no idea whether the Committee wishes to see legal definitions, evidence of statements, lists of witnesses etc.

Whilst having every courtesy extended to us and notwithstanding the information contained in the Privilege Resolutions that were sent with the terms of reference, we have been totally confused as to whether to seek legal advice in this matter. Senator Walters is on record as saying that the legal advice we presented in our initial submission to the Select Committee was potentially as contemptible as the rest of it.

We were unsure as to whether we would consult other members of federal and state parliaments or even friends who we thought could be of help - such was the importance of confidentiality attached to this submission.

In the end we erred on the side of caution and consulted nobody.

We have even revised and deleted many of our initial thoughts on this submission out of a concern that we may have inadvertently uttered something else that may be construed as a contempt.

1.14 So far as each matter is concerned, Mr Swan and Ms Patten have made the following points.

(a) Possible threat to Select Committee and its members

1.15 Mr Swan and Ms Patten have responded as follows:

From the outset we deny the making of any threats to the Committee or to individual Senators in this matter and believe that there has been a total misunderstanding of our intent here.

The paragraph from our submission which is under consideration reads as follows:

'Please be advised that traders who have been disadvantaged by the Committee's rulings in this area will contemplate damages actions in the courts, unless some reassessment is done.'

Clearly this is an attempt to read into the future and to assess the future. We are not speaking on behalf of those traders saying, 'you better watch out or else our members will sue you'. We are saying 'Look, in the past, traders in this area have taken bad legislation into the courts to have it defined and determined there and if you make a mistake with some of your recommendations here, the same thing could happen'.

. . . . In effect, *'A trader who was disadvantaged by a government's ruling was contemplating damages (compensation) actions in the courts'*.

Why should we be held to be threatening a Senate Committee for simply re-stating the facts as we observed them in a similar arena?

. . . . In effect we were saying to the Committee that the courts could be used to make a ruling on whether the Committee had made a mistake. The courts are often used to reassess legislation and the recent Mabo case is a good example.

If there is some other tribunal or body that is set up to adjudicate complaints and appeals from those who feel that an injustice has been perpetrated by a Senate Committee, we do not know of it and thinking thus, we automatically assumed that the courts and in particular the High Court, would be the logical place to lodge a protest in this matter.

There is a huge difference between the type of legal action that we said others may contemplate and the Eros Foundation or even Robert Swan and Fiona Patten 'suing Senators'.

(b) Possible threats to Opposition members

1.16 The response made by Mr Swan and Ms Patten to this term of reference includes the following:

In the run up to the last election the Coalition took the view that **non violent** sexually explicit videos (X rated) would be banned if they won government. . .

We felt frustrated and thwarted in our attempt to create meaningful dialogue with the Coalition.

So when a well-known Coalition backbencher and his wife were identified by staff and a security system, shopping in a well-known Canberra adult shop, our frustration turned to moral outrage.

And why wouldn't it?

This person wants the freedom to buy material for himself (and his wife), that through his party's policies he would deny others.

While not constituting a criminal offence, it is a clear case of the sort of moral hypocrisy that members of the public do not expect from anyone in a public position let alone elected members of parliament and as such, when pushed on the issue by an arrogant and impertinent ABC interviewer one morning, and in a fit of pique, Robert Swan made certain **unpremeditated and unauthorised** [emphasis added] statements about evidence concerning the aforementioned activities.

In any analysis of this situation it must be noted that despite repeated prodding by media commentators we never personally identified the 'coalition backbencher'. Had we done so one could have surmised malice or personal vendetta but this was not our objective. We firmly believed in exposing the principle of 'moral hypocrisy' that lay at the heart of this event.

We wish to make the point that there appears to be no parliamentary channel or ombudsman available to members of the public who wish to register their disapproval and protest at hypocritical or other unsuitable (but not illegal) behaviour on the part of their elected representatives.

In the sense that we may have chosen an inappropriate forum to express our concerns which may have offended or embarrassed the Senate, we apologise. This was never our intention and if the Committee could show some avenue or even create one which would be appropriate we believe that many in the public would use it.

CHAPTER TWO - CONCLUSION AND FINDINGS

Matters for determination

- 2.1 The common denominator of both terms of reference is whether the actions of the Eros Foundation and its public relations consultants constituted a threat to the Senate, its members and committees, and if so whether the threat had a tendency to obstruct them in the performance of their duties.
- 2.2 The committee's attitude to dealing with such matters, and its methodology, have been set out in all reports dealing with substantive matters of privilege referred to it by the Senate and will not be repeated here, other than to reemphasise that only under the most extreme circumstances would it consider treating an action as a contempt because of its intrinsic seriousness, regardless of the motivation or intent of the people performing it. Given the material before it, the Committee has no hesitation in discarding any such approach.

Term of reference (a)

- 2.3 So far as the first matter is concerned, it is clear from evidence before the Select Committee and the written submission to the Privileges Committee that Mr Swan and Ms Patten did not intend to make a threat to the Select Committee and its members. In addition there is no indication from the Select Committee or its members that they have been obstructed in their operations, and the Committee of Privileges considers that the actions of Mr Swan and Ms Patten are unlikely to have had any such effect on other committee proceedings.

Term of reference (b)

- 2.4 The second matter, however, raises issues of considerable concern. Both Mr Swan, in his oral evidence to the Select Committee, and Mr Swan and Ms Patten in their written submission, make it clear that they intended that their actions influence members of Parliament, justifying the actions on the basis of the "moral hypocrisy" involved in members' visiting shops which sold items which those members proposed to legislate to ban. Their actions were effective to the extent that, in the interests of his party, and to ensure that there could be no further speculation, a coalition member disclosed that he had visited a sex shop once, "to see what it was like".
- 2.5 The member concerned made it clear that he was not a genuine client but that, given the public debate, he wished to inform himself about what his party wanted to ban. He indicated that he had made a purchase "so I didn't look like I was snooping". While

obviously the member has identified himself publicly, the Committee does not regard it as necessary to identify his name in this report, and clearly he did not fall within the category where hypocrisy could legitimately be claimed by the Eros Foundation. The Committee did not consider it necessary to examine whether any other members of the Parliament might similarly have been "captured" on a security video.

- 2.6 Leaving aside for the moment the question of possible contempt, the Committee wishes to draw attention to the privacy implications involved in the threat to reveal the videotape. If the Eros Foundation were an agency to which the *Privacy Act 1988* applied, there is little doubt that the Foundation would have been found to have breached it. Principle 10 of the Act provides that a record-keeper who has possession of a record that contains personal information that was obtained for a particular purpose must not use the information for any other purpose, unless certain stringent requirements are met. Unfortunately, the Privacy Act does not apply to the private sector in these circumstances.
- 2.7 The Committee accepts that there is room for the use of surveillance equipment in a vast array of circumstances today, but points out that there are ethical, if not legal, obligations on those who operate such equipment to use the information obtained in an appropriate manner. Moral obligations were clearly not to the forefront, either of the proprietor of the sex shop who made the video available or to the Eros Foundation consultants.
- 2.8 The committee points out in passing the dangers for the Eros Foundation in allowing such an invasion of privacy to be undertaken by their public relations consultants. We would have thought that the targeting of a member of parliament has an unintended consequence of warning all customers of a trader that they could also be photographed, with the potential of that photographic record being used to identify and embarrass them. Many clients might consider withdrawing their custom when they realise that confidentiality is being jeopardised in that way.
- 2.9 Furthermore, invasion of privacy can work both ways. It is not difficult to imagine that a video of activities of companies represented by the Foundation could become available to a person opposing the views of the Foundation. One could imagine the "outing" of a service provider, supplementing a family income without the knowledge of his or her spouse, by such a person, who might well consider a similar invasion of privacy justified in the public interest.
- 2.10 The question for the committee to determine, however, does not involve the ethics of the behaviour but whether it constituted a contempt. Having examined all the material before it, the Committee has concluded that Mr Swan and Ms Patten were expressing views on behalf of their clients, and lobbying against what they perceived as hypocrisy. While their vigorous methods of doing so could give rise to a perception of a threat, the

Committee has concluded on the evidence that a threat was not involved, and therefore that their actions, while inept and offensive, could not be regarded as having the effect or tendency of substantially obstructing Senators in the performance of their functions. The Committee has noted their apology quoted at paragraph 1.16 above and considers that the apology should be accepted.

- 2.11 Although the Committee has reached this conclusion, it emphasises that it regards the behaviour of Mr Swan and Ms Patten as cavalier and unprofessional, and warns that, in the light of their present knowledge of questions of contempt, it is likely that the Committee would view any future comparable actions with considerable concern. It also warns members of the Eros Foundation, shielded by their public relations consultants in this instance, that they leave themselves open to being joined in investigations such as the Committee has been required to undertake, on the basis that they are responsible for actions undertaken on their behalf.

Findings

2.12 The Committee does not find that a contempt of the Senate has been committed by Mr Robert Swan and Ms Fiona Patten, representing the Eros Foundation, in that:

In respect of term of reference (a) -

They did not intend to utter a threat to the Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies or its members; and

In respect of term of reference (b) -

Their actions did not have the effect or tendency of substantially obstructing Senators in the performance of their functions.

Baden Teague

Acting Chairman