

APPENDICES



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 dark ink, appearing to read 'Michael Tate', with a stylized flourish at the end.

(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.

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.
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- (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

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.

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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 Brieze and Lewington that this would occur.

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.

6.

6.1 The refusal of Mr. Toohey 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.

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.

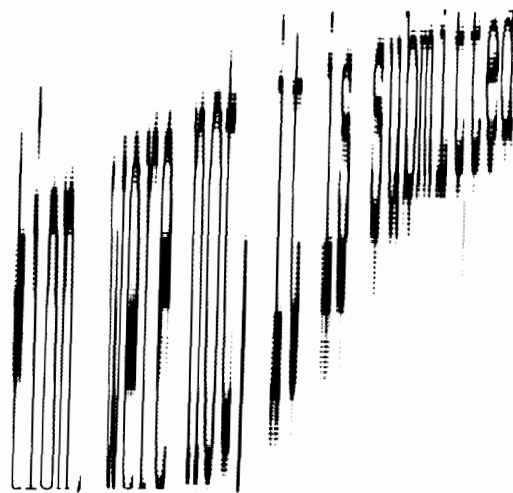
9.5 Having reached a conclusion on these two subjects, the Committee then went on to consider what it described as "two further matters which arose in the course of the Committee's inquiry". The first of these matters related to evidence given by Detective-Sergeant Lewington in which he recalled listening, 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

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
