THE MEDIA AND PARLIAMENT – THE NATIONAL TIMES CASE

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In 1984 the Senate adopted a report of its Committee of Privileges which concluded that the publication of certain articles in *The National Times* constituted a contempt of the Senate. A second report, which recommends that the publisher of *The National Times* should be placed on a good behaviour bond, has yet to be considered by the Senate. This article will examine the finding that the articles constituted contempt, the procedure adopted to reach that decision and the proposed penalty. The case not only exposes unsatisfactory features of the Senate's contempt power and of the manner in which it exercises that power, it also reveals the extent of the Senate's power to restrict the flow of information to the public.

I. THE FACTS

Following the publication of what have come to be known as '*The Age* Tapes', the Senate appointed a Select Committee – "The Senate Select Committee on the Conduct of a Judge" ("the Select Committee") – to examine whether the tapes and transcripts relating to the conduct of a Federal judge were authentic and, if so, whether the judge's conduct justified his removal from office.[1] The Select Committee met in private, but, before it had reported to the Senate, *The National Times* published a series of articles purporting to reveal details of the proceedings of the Select Committee including evidence taken by, and documents submitted to, the Select Committee.[2] The Senate referred the matter to its Committee of Privileges

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1 Aust. Parl., *Debates*, S 28 March 1984, 767-783.

2 The articles appeared in *The National Times* of 8-14 June, 27 July – 2 August, 3-9 August and 10-16 August 1984.

("the first Privileges Committee")[3] which concluded that the publication of this information in *The National Times* constituted a contempt of the Senate.[4] The first Privileges Committee's report was adopted by the Senate.[5] Subsequently, the question what penalty might be appropriate was referred to the Senate's Standing Committee on Privileges ("the second Privileges Committee")[6] which recommended that the Senate should not impose a penalty at this time, but if, during the current session of Parliament, the same or a similar offence were committed by any of the media for which the publisher of *The National Times* is responsible, unless there were extenuating circumstances, a fine should be imposed for this contempt.[7] At the time of writing, the Senate has not considered this report.

II. THE SIGNIFICANCE OF THE SENATE'S POWERS

In 1983-1985 the Australian media entered a new era. The media published material which purported to expose corruption, criminal activity and other forms of wrongdoing, but the information was based not so much on investigations carried out by journalists, as on material 'leaked' to media organisations. The years 1983-1985 were dominated by 'disclosure', rather than 'investigative', journalism. The reports published in *The National Times* were examples of 'disclosure' journalism. Disclosure journalism plays an important role in informing the public of allegations of wrongdoing and bringing pressure to bear on appropriate authorities, such as Parliament, to investigate those allegations. However, from the point of view of the relevant authority, the information is often, at best, published before the authority would like it to be disclosed to the public and, at worst, of a kind which it would prefer not to see published. The serious and often startling nature of the information disclosed in 1983-1985 and the reaction of the relevant authorities highlight the issue of the extent to which authorities, such as Houses of Parliament, should be able to restrict the publication of information. Through its power to determine that conduct constitutes contempt and to punish those responsible, the Senate is able to restrict the publication of information.[8] The Senate's decision regarding *The National Times* articles, the procedure adopted and the penalty proposed, raise doubts

3 Aust. Parl., *Debates*, S 12, 13 and 14 June 1984, 2810-2811, 2871-2872, 2880, 2987 (this related to the article published in *The National Times* of 8-14 June 1984), Aust. Parl., *Debates*, S 21 and 22 August 1984, 6, 105 (this related to the articles published in *The National Times* of 27 July — 2 August, 3-9 August and 10-16 August 1984).

4 Aust. Parl., *The Senate Committee of Privileges First Report October 1984* PP 298 (1984), para. 12.

5 Aust. Parl., *Debates*, S 17 and 24 October 1984, 1877-1878, 2356.

6 Aust. Parl., *Debates*, S 27 February 1985, 213.

7 Aust. Parl., *Senate Standing Committee on Privileges Report on Question of Appropriate Penalties Arising from the Report of Committee of Privileges of 17 October 1984* PP 239 (1985) para. 5.19, 5.20.

8 *The National Times* articles were not the only matters raised as possible contempts of the Senate in 1984: the publication in *The Australian* and *The Age* of what purported to be information about the actions and intentions of members of the Select Committee was also referred to the Senate's Committee of Privileges — Aust. Parl., *Debates*, S 21 and 22 August 1984, 6, 105.

about the appropriateness of the manner in which the Senate exercises its power to find that conduct constitutes contempt and thereby to judge whether information should be published and about the suitability of the Senate's powers to punish those responsible.

III. THE BASIS OF THE SENATE'S POWERS

Section 49 of the Commonwealth Constitution provides that the powers, privileges and immunities of the Senate:

> shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom...at the establishment of the Commonwealth.

Some legislation dealing with matters of privilege has been enacted,[9] but, as this does not deal with "the totality of what the legislature thinks fit to provide...as powers, privileges and immunities",[10] the Senate still enjoys the powers held by the House of Commons at the establishment of the Commonwealth.[11] Thus, in examining *The National Times* case, it is necessary to identify the powers of the House of Commons on 1 January 1901.

IV. JUDICIAL REVIEW?

Can a person found culpable for a contempt of the Senate seek judicial review of the finding, the procedure adopted or the penalty imposed? The jurisdiction of the courts in relation to the contempt power of the House of Commons was described by the High Court in *R.* v. *Richards; ex parte Fitzpatrick and Browne:*

> it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise...the Queen's Bench took the view that it was for the courts to judge of the existence of privileges. But — consistently as they believed with that view — they also took the view that in the practical application of the privilege both upon all questions of fact and upon questions as to whether the facts fell within the scope of the privilege, the resolution of the House and the warrant of the Speaker were conclusive.[12]

One privilege of the House of Commons which has been recognised by the courts is to determine for itself what conduct constitutes contempt of that

9 Parliamentary Papers Act 1908 (Cth) and Parliamentary Proceedings Broadcasting Act 1946 (Cth).

10 *R.* v. *Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 168 (High Court).

11 1 January 1901.

12 Note 10 *supra*, 162 and 166. The Privy Council concluded that the High Court's reasoning in this case was "unimpeachable" — (1955) 92 CLR 171, 172. Authority for these propositions regarding the relationship between the courts and the House of Commons includes: *The Case of Brass Crosby* (1771) 3 Wils. KB 188 (95 ER 1005), 199(1011) *per* Lord Chief Justice de Grey, 203(1013) *per* Gould J., 204(1014) *per* Blackstone J., (Nares J. agreed, 205 (1014)); *Burdett* v. *Abbot* (1811) 14 East., 1 (104 ER 501), 152-153(559) *per* Lord Ellenborough C.J. (with whom Grose J. agreed, 158-159(561)) 160(562) *per* Bayley J.; *Stockdale* v. *Hansard* (1839) 9 Ad. and E. 1 (112 ER 1112), 108-148(1154-1168) *per* Lord Denman C.J., 162(1173-1174), 168-169(1176) *per* Littledale J., 195-197(1186) *per* Patteson J., 218-237(1194-1201) *per* Coleridge J.; *Case of the Sheriff of Middlesex* (1840) 11 Ad. and E. 273 (113 ER 419), 291(426) *per* Lord Denman C.J., 292-293(426) *per* Littledale J., 295(427) *per* Williams J., 296-297(427-428) *per* Coleridge J.

House.[13] Pursuant to section 49 of the Commonwealth Constitution, that privilege is now held by the Senate. If the Senate finds that particular conduct constitutes contempt, that is, if it judges that this is an "occasion" for the exercise of its contempt powers, the courts have no jurisdiction to hear an appeal against the finding. This proposition is subject to one exception. If the House of Commons issued a warrant which specified the cause of the committal, that is, if the warrant were a special rather than a general warrant, the courts could examine whether the specified conduct constituted contempt.[14] The High Court explained that:

> [i]f the warrant specifies the ground of the commitment the court may...determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.[15]

Accordingly, if the Senate decides to exercise its power to imprison a contemnor it is not obliged to issue a special warrant, but, if it does so, the courts can examine whether the specified conduct constitutes contempt. Subject to this exception, it is for the Senate alone to judge whether conduct constitutes contempt of that House and no appeal lies to any court against a finding of contempt.

Article 9 of the Bill of Rights declares that "freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament".[16] In accordance with this principle, the courts are not competent to inquire into the internal proceedings of the House of Commons.[17] The House of Commons is the sole judge of the lawfulness of its proceedings: "[w]hat is said or done within the walls of Parliament cannot be inquired into in a court of law".[18] Accordingly, the "manner of [the] exercise" of the Senate's contempt powers is a matter for the Senate alone.[19] No court has jurisdiction to review the procedure adopted by the Senate. Most importantly, a person affected by a finding of contempt

13 *The Honourable Alexander Murray's Case* (1751) 1 Wils. KB 299 (95 ER 629); *The Case of Brass Crosby* note 12 *supra*, 198-199(1010-1011), 201(1012) *per* Lord Chief Justice de Grey, 203(1013) *per* Gould J., 204(1014) *per* Blackstone J., (Nares J. agreed, 205(1014)); *Burdett* v. *Abbot* note 12 *supra*, 136-154(553-560) *per* Lord Ellenborough C.J. (with whom Grose J. agreed, 158-159 (561)), 159-162(561-563) *per* Bayley J.; *Case of the Sheriff of Middlesex* note 12 *supra*, 288-292(424-426) *per* Lord Denman C.J., 292-293(426) *per* Littledale J., 294-295(427) *per* Williams J., 296-297(427-428) *per* Coleridge J,. See also *The Speaker of the Legislative Assembly of Victoria* v. *Glass* (1871) LR 3 PC App. 560, 572-573 (Privy Council on appeal from the Supreme Court of Victoria).

14 Authority for this proposition regarding the House of Commons includes: *Burdett* v. *Abbot* note 12 *supra*, 150-151(558-559) *per* Lord Ellenborough C.J.; *Case of the Sheriff of Middlesex* note 12 *supra*, 289-290(425) *per* Lord Denman C.J., 293(426) *per* Littledale J., 294(427) *per* Williams J.

15 Note 10 *supra*, 162.

16 1 William & Mary, Sess 2, c2 (1688).

17 *Stockdale* v. *Hansard* note 12 *supra*, 114(1156) *per* Lord Denman C.J., 162(1173-1174) *per* Littledale J., 209(1191) *per* Patteson J., 233(1199) *per* Coleridge J. This principle was recently applied by the House of Lords in *British Railways Board* v. *Pickin* [1974] 2 WLR 208, 218 *per* Lord Reid, 220 *per* Lord Morris, 226 *per* Lord Wilberforce, 228-229 *per* Lord Simon.

18 *Bradlaugh* v. *Gossett* (1884) 12 QBD 271 *per* Lord Coleridge C.J., 275. (Mathew J. concurred 277). See also Stephen J. 278-279 and 285-286.

19 Note 10 *supra*, 162.

cannot complain that the procedure adopted by the Senate did not comply with the principles of natural justice.

In *R.* v. *Richards; ex parte Fitzpatrick and Browne* the High Court stated that it is for the courts to judge whether a privilege exists.[20] Thus, the courts have jurisdiction to determine whether the Senate may exercise a particular power. A court would ascertain whether the power in question was held by the House of Commons on 1 January 1901. As it is a matter arising under section 49 of the Commonwealth Constitution, the High Court has original jurisdiction to examine this question.[21]

The decision reached

It has been explained that, provided the Senate does not issue a special warrant, it is for the Senate alone to determine whether conduct constitutes contempt of that House.[22] The Senate must reach its decision without the guidance of the courts and it is not 'bound' in the legal meaning of precedent by previous contempt cases.

V. THE BASIS OF THE FINDING OF CONTEMPT IN THIS CASE

In previous cases the publication of the proceedings of a committee of a House of Parliament, of evidence taken by a committee or of its report "prematurely", that is, before these matters have been reported or presented to the House, has been found to constitute contempt. The publication of false reports of parliamentary proceedings has also been found to constitute contempt.[23] This explains why it was said that it was not necessary to establish whether the articles reported information which was in fact before the Select Committee.[24] Nonetheless, the finding of contempt was not based on the ground that the articles constituted a false report of the

20 *Ibid.* Authority for this proposition regarding the privileges of the House of Commons includes: *Stockdale* v. *Hansard* note 12 *supra*, 147(1168) *per* Lord Denman C.J., 162(1174), 166(1175) *per* Littledale J., 194-195(1185) *per* Patteson J., 218-237(1194-1201) *per* Coleridge J; *Bradlaugh* v. *Gossett* note 18 *supra*, 274-275 *per* Lord Coleridge C.J., 286 *per* Stephen J. (Matthew J. concurred 277). See also *Stevenson* v. *The Queen* (1865) 2 WW & A'B [L] 143, 162.

21 Commonwealth Constitution s.76(i); Judiciary Act 1903 (Cth) s.30(a). *R.* v. *Richards; ex parte Fitzpatrick and Browne* was heard by the High Court pursuant to a reference under the Australian Capital Territory Supreme Court Act 1933 — 1950, however, the High Court suggested that an application may have been made directly to the High Court in the first instance — note 10 *supra*, 161.

22 See pages 29-31.

23 Aust. Parl., *The Senate Committee of Privileges Report upon Articles in The Sunday Australian and The Sunday Review of 2 May 1971* PP 163 (1971) para. 4 and Aust. Parl., *Debates*, S (1971) Vol S48, 1864; Aust. Parl., *House of Representatives Committee of Privileges Report relating to an article published in The Sun 18 September 1973* PP 217 (1973) para. 16 and Aust. Parl., *Debates*, H R (1973) Vol H of R 86, 3204-3209 (premature disclosure). Aust. Parl., *House of Representatives Committee of Privileges Report relating to an article published in the Daily Telegraph 27 August 1971* PP 242 (1971) paras 17 and 25 and Aust. Parl., *Debates*, HR (1971) Vol H of R 75, 4342-4378 (false reports).

24 Note 4 *supra*, Appendix A question 3. See also Senator Tate's statement indicating that he intended to give notice of a motion to refer the articles to the Privileges Committee — Aust. Parl., *Debates*, S 12 June 1984, 2871-2872.

Select Committee's proceedings. The first Privileges Committee concluded that the articles were based on knowledge of the *in camera* proceedings of the Select Committee.[25] The complaint was that the articles contained material which, at the time of publication, had not been reported to the Senate.

In concluding that the publication of the material in *The National Times* constituted contempt, the first Privileges Committee had regard to statements and precedents regarding the "premature" publication of a committee's proceedings or of evidence given to a committee.[26] These included Senate Standing Order 308:

> [t]he 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 authorised by the Senate or the Committee, be disclosed or published by any member of such Committee, or by any other person;

Odgers' statement:

> any unauthorised disclosure or publication of a committee's proceedings or the evidence given is a contempt;[27]

and Pettifer's assertion:

> the publication or disclosure of evidence taken in camera, or the publication or disclosure of draft reports of a committee before their presentation to the House, constitutes a...contempt.[28]

The Committee also had regard to findings and comments made by a previous Senate Committee of Privileges. In 1971 that Committee, found that the publication of the contents of a draft report of a Senate Select Committee before its presentation to the Senate, was a contempt. The 1971 Committee's report, which was adopted by the Senate, said:

> [p]remature publication of a report or the contents of a document containing a draft report from a Senate Committee is a breach of privilege, unless the Senate has approved that course or has authorised the Committee to publish the same.[29]

In addition, May states that:

> By the ancient custom of Parliament 'no act done at any committee should be divulged before the same be reported to the House'. Upon this principle the Commons, on 21 April 1837, resolved, 'That the evidence taken by any select committee of this House, and the documents presented to such committee, and which have not been reported to the House, ought not to be published by any member of such committee or by any other person.[30]

Counsel for *The National Times* argued that a finding of contempt should not be made unless the publication of the articles caused, or was likely to

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25 Note 4 *supra*, para. 14.

26 *Ibid.*

27 J.R. Odgers, *Australian Senate Practice* (5th ed. 1976) 505.

28 J.A. Pettifer, (ed.) *House of Representatives Practice* (1981) 660.

29 Aust. Parl., *The Senate Committee of Privileges Report upon Articles in The Sunday Australian and The Sunday Review of 2 May 1971* PP 163 (1971) para. 4 and Aust. Parl., *Debates*, S (1971) Vol S 48, 1864.

30 *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (20th ed. 1983 C. Gordon ed.) 153-154. In July 1971 the House of Commons resolved that "this House will not entertain any complaint of contempt ... in respect of the publication of the ... proceedings ... of its Committees, except when any such ... proceedings shall have been conducted with closed doors or in private, or when such publication shall have been expressly prohibited by the House" (UK Parl., *Debates*, HC (1970-1971) Vol 821, 922-994). This limitation came into effect after 1 January 1901 and therefore cannot affect the powers of the Senate — see page 29.

cause, a substantial interference with the functioning of the Senate or a committee.[31] It might be argued that, because the Select Committee conducted its proceedings *in camera* and, at the time the information was disclosed by *The National Times*, the Select Committee had not made the evidence it had received public, the premature disclosure of the material must have impeded the Select Committee in the performance of its functions:

> the purpose of *in camera* proceedings is to keep confidential certain kinds of evidence. The very fact that a committee has...initiated the use of a closed hearing, is clearly a manifestation of the view that the public interest in disclosure is outweighed by the interest in non-disclosure.[32]

However, it does not necessarily follow from the fact that the Select Committee conducted its proceedings *in camera* that the premature publication of the information by *The National Times* impeded the Select Committee in the performance of its functions. This would only follow as a matter of necessity if it could be demonstrated that Senate committees apply a principle analogous to the common law rule applied by the courts, that is, court proceedings are not conducted *in camera* unless it has been shown that by nothing short of the exclusion of the public can justice be done.[33] The Senate has not indicated that its committees are bound by an analogous principle. Indeed, one inquiry suggested that committee hearings should take place *in camera* where a witness' evidence could affect his character and reputation.[34] This would not justify a court order for a hearing *in camera*.

The first Privileges Committee questioned the Chairman of the Select Committee, Senator Tate, regarding the effect of the first article. Senator Tate was asked why he raised the matter as a possible contempt. He replied:

> [b]ecause 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.[35]

In response to the question whether the first newspaper report in fact impeded or obstructed the inquiry or had potential to impede the inquiry, Senator Tate stated:

> [t]he 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.[36]

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31 Note 4 *supra*, para. 26 (b) and Appendix B para. 1.1; Senate Standing Committee of Privileges, Reference: Publications in The National Times, *Official Hansard Report*, 26 September 1984, 116-119.

32 Ontario Law Reform Commission *Report on Witnesses Before Legislative Committees* (1981) 81.

33 *Scott* v. *Scott* [1913] AC 417; *R* v. *Hamilton* (1930) 30 SR (NSW) 277, 278 *per* Street C.J. (with whom Ferguson and Halse Rogers JJ. agreed 279).

34 Aust. Parl., *Parliamentary Committees Powers over and Protection Afforded to Witnesses — paper prepared by the Attorney-General, Senator the Honourable I.J. Greenwood QC and the Solicitor-General, Mr R.J. Ellicott QC* PP 168 (1972), 74-75.

35 Note 4 *supra*, para 15.

36 *Ibid.*

Senator Tate's main concern appears to have been that the premature publication of the material could obstruct the Select Committee's inquiry, or other committees' inquiries, by discouraging witnesses either from coming forward or from giving evidence candidly.

The first Privileges Committee also questioned another member of the Select Committee, Senator Chipp, regarding the effect of the newspaper reports. Senator Chipp indicated that the articles did not hamper the Select Committee's inquiry, but he suggested that prospective witnesses before other committees could be inhibited from coming forward.[37] Finally, one person whose evidence to the Select Committee was allegedly disclosed in the articles was asked "Do you feel very disappointed that evidence that you may have given is now public, that it has come out in this way, and in the knowledge that it has come out in that way would that inhibit you giving such evidence?" He replied: "Yes. It certainly was a factor in me giving this evidence — the fact that it was supposed to be *in camera*".[38]

The National Times strongly disputed that the premature publication of the information caused, or was likely to cause, any interference with the functions of Senate committees. It was argued that

> [i]t 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...[mentioned in the articles]...that this would occur.[39]

This argument does not answer the contention that the articles might inhibit other witnesses coming forward to give evidence to the Select Committee or to other Senate committees. However, it emerged that witnesses who give evidence *in camera* are informed that their evidence might be published by the Senate.[40] It was argued that, because of this, "[i]t would be a misconception to state that some witnesses only come forward to give evidence...because they have a guarantee of confidentiality".[41] It was suggested that wide publication of the evidence might induce other witnesses to come forward.[42]

The first Privileges Committee's report does not state that the Committee's finding that the publication of the articles constituted contempt was based on the ground that the "premature" publication of the information contained in the articles interfered, or was likely to interfere, with the performance of the functions of the Senate or its committees.[43] The Committee did refer to Senator Tate's replies and it stated that it shared his concern regarding the damage that could be done to Senate committees; the

37 Senate Standing Committee of Privileges, Reference: Publication in The National Times, *Official Hansard Report*, 12 September 1984, 7.
38 *Id.*, 51.
39 Note 4 *supra*, Appendix B para. 2.2.
40 Note 37 *supra*, 22, 24, and 31.
41 Note 4 *supra*, Appendix B para. 2.3. See also, Senate Standing Committee of Privileges, note 31 *supra*, 15-16, 34, 54, 74-76 and 118-123.
42 Note 4 *supra*, Appendix B para. 2.3.
43 *Id.*, para. 14.

report also states that the Committee regarded the obligation of a House to protect witnesses coming before it as fundamental. However, these references and observations were made, not in relation to the first Privileges Committee's finding that the publication of the articles amounted to contempt, but in the context of its finding that the contempt was of a serious nature.[44] Two people whose evidence to the Select Committee was allegedly disclosed in the articles gave evidence to the first Privileges Committee. Only one was questioned regarding the importance to him of his evidence to the Select Committee being heard *in camera*, and the effect on him of the premature publication of his evidence.[45] If the first Privileges Committee had regarded as relevant the question whether the articles interfered with the performance of the functions of the Senate because of their impact on witnesses or potential witnesses, one would have expected members of the Committee to have questioned both witnesses regarding this matter. Moreover, at no point in its report did the Committee address *The National Times*' arguments in support of the assertion that the articles did not, and were not likely to, interfere with the work of the Select Committee or other committees. Thus, while it is clear that the Committee was concerned that the premature publication of the information could obstruct the work of Senate committees because of its impact on witnesses or potential witnesses,[46] it is not clear that the first Privileges Committee's finding that the publication of the articles constituted contempt was based on the ground that the articles interfered, or were likely to interfere, with the performance of the functions of the Senate or its committees. Indeed in an opinion subsequently obtained from Professor Pearce, it is stated that whether the publication of the articles interfered with the function of the Committee has "no relevance to the establishment of the offence itself".[47] Should the Senate have resolved that the offence of contempt of parliament was established in the absence of a specific finding which, having dealt with the contrary arguments, concluded that the publication of the articles impeded, or tended to impede, the Senate (including committees of the Senate), Members or officers of the Senate, in the performance of their respective functions ?

An Australian Joint Select Committee on Parliamentary Privilege has recommended that each Commonwealth House of Parliament

44 *Id.*, para. 15 (contempt was of a serious nature) *cf.* paras 12 and 14 (premature publication of the information constituted contempt).

45 Senate Standing Committee of Privileges, Reference: Publication in The National Times, *Official Hansard Report*, 12 September 1984, 51 (Mr Briese). Mr Lewington was not questioned regarding these matters, 53-59.

46 In addition to the observations and comments made in the first Privileges Committee's report (see note 44 *supra* and accompanying text), see the comments made when it was moved that the report be adopted — Aust. Parl., *Debates*, S 17 October 1984, 1878.

47 Professor Pearce's opinion is incorporated in the transcript of evidence of one of the second Privileges Committee's hearings — Senate Standing Committee on Privileges, Reference: The question of penalties appropriate to the contempts constituted by *The National Times* articles, *Official Hansard Report*, 3 April 1985 15, 16.

> 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 it 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 function.[48]

A similar recommendation, made by a House of Commons Select Committee on Parliamentary Privilege, has been adopted by the House of Commons.[49] It could be argued that these recommendations would be unnecessary if it were already part of the law that conduct does not constitute contempt unless the conduct obstructs, or is likely to obstruct, the House, its Members or officers. However, the House of Commons Committee made it clear that its recommendation did not alter the law. It described its recommendation as setting out "the general rule which ... has normally governed and should in future always govern the exercise by the House of its penal jurisdiction".[50] The recommendation was made because the Committee doubted whether on all occasions the House of Commons had strictly applied the principle.[51] The Australian Joint Select Committee expressed similar doubts.[52] When describing the powers presently held by the Commonwealth Houses of Parliament, the Joint Select Committee stated that the essence of the contempt power is to

> punish ... acts which impede or obstruct the operation of the Houses and their committees or which tend to do so, or which impede or obstruct Members in the discharge of their duties, or which tend to do so.[53]

When dealing with the premature disclosure of proceedings of Select Committees, the House of Commons Select Committee on Parliamentary Privilege stated that:

> the penal jurisdiction of the House, in this as in other contexts, extends no further than is necessary to afford reasonable protection from improper obstruction of the House, its Members and Officers in pursuance of their functions and duties. It follows that the reporting of the proceedings of a Committee held in private is not necessarily and of itself a contempt, but may be held to be a contempt if the circumstances bring it within the general definition.[54]

This statement is particularly important. It shows that the requirement that conduct constitutes an obstruction, or is likely to do so, is not merely a prerequisite for punishing a contemmnor, it is a necessary element of the offence of contempt of parliament. The statement makes it clear that a finding that the premature publication of a committee's proceedings obstructs, or is likely to obstruct, the relevant House, its Members or officers in the performance of their functions is essential to the establishment of the

48 Aust. Parl., *Joint Select Committee on Parliamentary Privilege Final Report October 1984* PP 219 (1984) recommendation 14 para. 6.13.

49 UK Parl., *Report from the Select Committee on Parliamentary Privilege* HC Paper 34 (1967-1968), para. 15; see also UK Parl., *Third Report from the Committee of Privileges* HC Paper 417 (1976-1977) para. 4 and UK Parl., *Debates* HC Vol 943, 1198.

50 *Report from the Select Committee*, note 49 *supra*, para. 39.

51 *Id.*, para. 15.

52 Note 48 *supra*, para. 6.12-6.13.

53 *Id.*, para. 6.2.

54 *Report from the Select Committee*, note 49 *supra*, para. 124.

offence, it is not, as it appears to have been suggested,[55] merely a matter relevant to whether the House should, in its discretion, find that the persons responsible for publishing the information are guilty of contempt of parliament.

These reports[56] confirm the view that conduct should not be found to constitute contempt unless it obstructs, or has a tendency to obstruct, a House of Parliament, a Member or an officer of Parliament in the performance of their respective functions.

Professor Pearce argued that there is nothing in the writings or precedents referred to by the first Privileges Committee[57] to suggest that the offence is only made out where the unauthorised publication interferes with the function of the committee.[58] However, May's general definition confirms that, to constitute contempt, conduct must interfere, or have a tendency to interfere, with the functions of the House, a Member or an officer:

> any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt.[59]

May's statement that the "disclosure of proceedings of committees conducted with closed doors or of draft reports of committees before they have been reported to the House will ... constitute ... a contempt"[60] is merely a statement of one of the "principles ... collected from the Journals which ... serve as general declarations of the law of Parliament";[61] it must be read in the light of May's general definition of what may be treated as contempt. In so far as other authorities and precedents do not state that conduct constitutes contempt only if it constitutes, or is likely to constitute, an impediment, they support the doubts expressed by the House of Commons Select Committee and by the Australian Joint Select Committee whether the principle that Houses of Parliament should use their powers to protect themselves, their members and their officers only to the extent absolutely necessary for the due execution of their powers, has been rigorously applied.[62]

The House of Commons Select Committee noted that the terms "contempt" and "breach of privilege" are sometimes confused.[63] This confusion was evident in *The National Times* case. Professor Pearce addressed the question whether a breach of Standing Order 308[64] was itself a

55 Note 47 *supra*, 16.
56 Note 48 *supra*, and *Report from the Select Committee*, note 49 *supra*.
57 See page 32.
58 Note 47 *supra*, 16.
59 *Erskine May* note 30 *supra*, 143.
60 *Id.*, 154.
61 *Id.*, 143.
62 *Report from the Select Committee*, note 49 *supra*, para. 15; note 48 *supra*, para. 6.12-6.13.
63 *Report from the Select Committee*, note 49 *supra*, para. 13.
64 See page 31.

contempt. Under the heading "Breach of Standing Order as Contempt", he concluded that failure to comply with a Standing Order did not in itself constitute a breach of privilege; he doubted "whether the High Court would take the view that, merely by making a Standing Order, the Senate could add to its privileges".[65] If Professor Pearce's opinion suggests that the breach of a Standing Order cannot constitute contempt of parliament unless the Standing Order proscribes conduct that would have been a breach of privilege in 1901, it is respectfully submitted that this is incorrect. The problem arises because although the terms "breach of privilege" and "contempt of parliament" are sometimes used interchangeably they are not synonymous.[66] "Privilege" refers to the "rights enjoyed by each House collectively ... and by members of each House individually, without which they could not discharge their functions".[67] Pursuant to section 49 of the Commonwealth Constitution, the Senate has the same privileges as those of the House of Commons in 1901. One of the privileges of the House of Commons is to find that conduct constitutes contempt of that House.[68] A similar privilege is held by the Senate. "Contempt of parliament" means conduct which obstructs, or tends to obstruct, the performance of the functions of a House of Parliament, a Member or an officer of Parliament. The generality of this definition of contempt of parliament, taken together with the rationale for the existence of privileges, that is, they are necessary, for without them Members of Parliament and Houses of Parliament could not discharge their function,[69] means that a breach of privilege constitutes a contempt of parliament. However, a person may be guilty of contempt of parliament without breaching any parliamentary privilege.[70] One example of conduct which has been found to constitute contempt is a contravention of the Standing Orders of a House.[71] Thus, while conduct cannot constitute a breach of privilege unless it breaches a privilege enjoyed by the House of Commons in 1901, the same cannot be said of conduct which is alleged to constitute contempt of parliament; the categories of contempt are not limited to those recognised in 1901.[72] A finding that conduct which breaches a Standing Order obstructs, or tends to obstruct, the performance of the functions of a House of Parliament, its Members or its officers, and thereby constitutes contempt, does not add to the privileges of the House.

65 Note 47 *supra*, 15, 19.

66 *Report from the Select Committee*, note 49 *supra*, para.13.

67 *Erskine May* note 30 *supra*, 70.

68 See pages 29-30.

69 *Erskine May* note 30 *supra*, 70-71. There is one exception to the principle that privileges are justified on the grounds of necessity: the power of the United Kingdom Houses of Parliament to punish persons for contempt is inherent in those Houses as descendants of the High Court of Parliament and by virtue of the *lex et consuetudo parliamenti* rather than as a necessary incident of their functions — *Kielley* v. *Carson* (1842) 4 Moo. PC 63 (13 ER 225).

70 *Erskine May* note 30 *supra*, 122-123. See also *Report from the Select Committee*, note 49 *supra*, paras 31, 32 and 37.

71 *Erskine May* note 30 *supra*, 145.

72 Interestingly, disobedience to the Standing Orders of a House was recognised by Quick and Garran in 1901 as an instance of breach of privilege — J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) 501.

VI. PUBLIC INTEREST

The National Times argued that the information was published in the public interest. It asserted that, at the time the articles were published, it was reasonable to suppose that the Select Committee might not publish all the allegations made by witnesses who had given evidence to that Committee and that, in fact, one witness' evidence was not released by the Select Committee.[73] It was argued that freedom of speech and the media's responsibility to inform the public were relevant to the question whether the publication of the articles constituted contempt.[74]

With the exception of Senator Crowley, all members of the Select Committee were asked questions by members of the first Privileges Committee regarding the argument that the publication of the articles was necessary, in the public interest, because the Select Committee would not otherwise have published the information. Senator Tate stated that if the justification for publication were that the information would not otherwise have seen the light of day, this was unfounded.[75] In contrast, Senator Bolkus asserted that, if it had not been made public, the Committee would not have published all the information.[76] Senators Durack and Lewis stated that, at the time the articles were published, no decision had been made regarding what information would be published by the Select Committee and that the articles did not affect the Select Committee's decision to publish the information about one witness' evidence.[77] Senator Chipp's evidence is difficult to understand. He said that the Select Committee did not publish the information only because of the publication of the articles, but he said that it was possible and probable that a great amount of what the articles reported would never have seen the light of day.[78]

As a matter of discretion, the Senate might take the question of public interest into account at various stages. For example, the Senate might decide that, because conduct was in the public interest, it will not refer an allegation that the conduct constitutes contempt to its Privileges Committee, or it may decide that it will not impose a penalty for the contempt.[79] Beyond this

73 Senate Standing Committee of Privileges, note 31 *supra*, 6-10, 44, 53, 98 and 106.
74 *Id*, 118-120 and note 4 *supra*, Appendix B paras 3.1, 4.2, 4.4 and 4.6.
75 Note 37 *supra*, 17.
76 *Id*, 35.
77 *Id*, 21-22, 24 (Senator Durack) and 32-33 (Senator Lewis).
78 *Id*, 9-11.
79 In this case the first Privileges Committee considered the public interest argument when deciding whether any mitigating circumstances were present. It concluded that the public interest was outweighed by the competing considerations of: the clear precedents and statements regarding the publication of *in camera* proceedings; the potential impediment to the Select Committee, other committees and the Senate; and the potential damage to the judge and to witnesses — note 4 *supra*, para. 28. The second Privileges Committee also considered this element when deciding what penalty should be imposed-Aust. Parl., *Senate Standing Committee on Privileges Report on Question of Appropriate Penalties Arising from the Report of Committee of Privileges of 17 October 1984* PP 239 (1985) paras 3.2-3.4.

exercise of discretion, there is nothing to suggest that whether conduct was in the public interest is relevant to the question whether it constitutes contempt of parliament. However, *The National Times* argument does reveal an inconsistency which was not addressed by the first Privileges Committee: if the Select Committee intended to publish all the evidence this would answer the argument that the information was published by *The National Times* to inform the public of matters which would otherwise have been suppressed; but, if this were the case, it would be more difficult to justify a conclusion that the premature publication of the evidence by *The National Times* could discourage witnesses from coming forward or from giving evidence candidly and thereby obstruct committees in the performance of their functions.

The procedure adopted

Only the Senate has power to find that conduct constitutes contempt of that House, but, like most Houses of Parliament, the Senate usually refers allegations that conduct constitutes contempt to a committee to inquire into, and report on, the complaint. The Senate referred the newspaper reports to its Privileges Committee[80] which was given power to send for and examine persons.[81] The first Privileges Committee permitted the representatives of *The National Times* whose conduct was under investigation to be heard in the order of their choosing. They were permitted to be accompanied by counsel, who was invited to make an opening submission to the Committee before they were examined and a closing address following their examination.[82] The persons concerned were told that they could take advice from their lawyers at any time during their examination,[83] however, their counsel was not permitted to cross-examine other witnesses.[84]

There is no legally enforceable requirement that the Senate or its committees must comply with the principles of natural justice or apply the rules of evidence applied by courts.[85] Quite apart from the absence of any compulsion to apply them, for reasons that will be discussed later in this article, these principles and rules would generally be unnecessary and unsuitable for investigations conducted by Senate committees.[86] However, when a privileges committee is conducting an inquiry which may result in it reporting to the Senate that a person is guilty of contempt of parliament, the committee is in a position quite different from that of other committees. If a privileges committee reports that a person is culpable for a contempt and the

80 Aust. Parl., *Debates* note 3 *supra*.
81 Aust. Parl., *Debates*, S 15 June, 1984, 3142-3143. Senate committees have no power to summon witnesses, but, pursuant to Standing Order 302, the Senate may give a committee that power.
82 Note 4 *supra*, paras 10-11.
83 Senate Standing Committee of Privileges, note 31 *supra*, 4, 36 and 77.
84 Note 4 *supra*, para. 26 and Minutes of Proceedings of 26 September 1984 item 6.
85 See pages 30-31.
86 See page 44.

report is adopted by the Senate, the Senate may imprison the contemnor.[87] Thus, unlike inquiries conducted by other Senate committees, the result of a privileges committee inquiry may be directly to affect the liberty of an individual. It was this factor which led an Australian Joint Select Committee to conclude that "the onus is on the Houses to accord to ...[anyone whose conduct attracts the attention of the House] ... the fairest of hearings, and the most complete opportunity to defend himself".[88]

The procedures adopted by privileges committees have often been criticised on the ground that they do not accord with the principles of natural justice.[89] However, no analysis has been undertaken to determine what would be required by the principles of natural justice in a particular case, assuming the rules applied. That question will be addressed here.

The principles of natural justice have been developed to ensure fairness in decision making. The rules do not apply to every decision maker and, even if they apply, their content is variable:

> the citizen *should* be entitled to a "hearing" free of prejudice before any decision is taken which will affect his position and expectations in the community. This proposition does not mean that a citizen should, in all circumstances, be entitled to demand a court type hearing but merely that he should be given the opportunity to present his side of the issue in a manner appropriate to the particular exercise of power.[90]

It is not possible to lay down rigid rules concerning the requirements of natural justice:

> [t]he requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.[91]

To assess what would have been required of the first Privileges Committee, if it had been obliged to accord natural justice, regard would be had to:

> whether the ... body is deciding a single isolated case or whether it is required to make a decision of a more general nature ... policy elements, administrative practice and efficiency, the interests of other persons affected and ... "the circumstances of the case".[92]

The following facts suggest that the requirements of natural justice would be substantial: the inquiry dealt with an isolated case rather than a general question and the Senate has power to imprison persons found guilty of

87 S. Walker, *Contempt of Parliament and the Media* (Adelaide Law Review Research Paper No 4) 6 and 38-41.

88 Note 48 *supra*, para. 7.50.

89 E. Campbell, *Parliamentary Privilege in Australia* (1966) 115; E. Campbell and H. Whitmore, *Freedom in Australia* (2nd ed. 1973) 321-323; D.C. Pearce, "Contempt of Parliament — Instrument of Politics or Law?" (1969) 3 *F L Rev* 241, 263, 267-268.

90 H. Whitmore and M. Aronson, *Review of Administrative Action* (1978) 42.

91 *Russell* v. *Duke of Norfolk* [1949] 1 All ER 109, 118 *per* Tucker L.J. This statement has been approved by the High Court in a number of cases including *R.* v. *The Commonwealth Conciliation and Arbitration Commission; ex parte The Angliss Group* (1969) 122 CLR 546, 552-553.

92 Note 90 *supra*, 92.

contempt.[93] However, in some cases rigorous standards have not been applied to bodies which carry out preliminary investigations.[94]

National Companies and Securities Commission v. *News Corporation Ltd*[95] (*"the NCSC case"*) illustrates the High Courts attitude to the requirements of natural justice when a preliminary investigation is conducted. The National Companies and Securities Commission ("the Commission") was to hold a hearing to decide whether an application should be made to the Supreme Court for orders under companies legislation. The question was whether the rules of natural justice obliged the Commission to permit persons suspected of contravening the legislation ("the respondents") and their legal representatives to be present throughout the hearing, to cross-examine witnesses, to call evidence in reply and to make submissions to the Commission. The High Court held that the Commission would discharge its obligation to accord natural justice if it allowed each witness to be legally represented, with freedom for that representative to participate in the examination of the witness, and it provided each witness with a transcript of his or her evidence.[96]

The second Privileges Committee drew attention to *the NCSC case*[97] and it concluded that the "natural justice principles applicable to an inquiry such as this were, in fact, fully applied".[98] Presumably this conclusion was based on the argument that, because only the Senate could make a finding of contempt, by analogy with what the Commission was required to do to accord natural justice, the procedures adopted by the first Privileges Committee were in accordance with the requirements of natural justice. However, there are material differences between the functions of the Commission and the functions of a privileges committee. First, no issue was to be decided at the Commission's hearing; the hearing was designed only to discover facts which might lead to further action.[99] Privileges committees do more than discover facts, they draw conclusions from facts. The first Privileges Committee reported to the Senate that the publication of the newspaper reports constituted contempt, that the editor and publisher were responsible and culpable and that the author was culpable.[100] Secondly, whereas the High Court questioned whether the Commission could publish

93 Note 87 *supra.*
94 *Wiseman* v. *Borneman* [1971] AC 297, 308 *per* Lord Reid, 309-310 *per* Lord Morris, 310-312 *per* Lord Guest, 315-316 *per* Lord Donovan and 318-320 *per* Lord Wilberforce; *Twist* v. *Randwick Municipal Council* (1976) 136 CLR 106, 111-112 *per* Barwick C.J. and 113-117 *per* Mason J.
95 (1984) 52 ALR 417.
96 *Id.*, 429-431 *per* Gibbs C.J. and 439 *per* Mason, Wilson and Dawson JJ.
97 *Ibid.*
98 Note 7 *supra*, para. 4.30. See also paras 4.11 and 4.25.
99 Note 95 *supra*, 426 *per* Gibbs C.J.
100 See pages 43-44.

adverse findings,[101] the results of the first Privileges Committee's inquiry were set out in a report which was published.[102] Thirdly, and most significantly, if, as a result of the Commission's inquiry, proceedings were instituted in the Supreme Court, the respondents would then be able to test the evidence by cross-examination and to call evidence themselves.[103] In contrast, the persons concerned were given no opportunity to defend themselves at the bar of the House before the Senate adopted the first Privileges Committee's report.[104]

It has been said that "the courts are favourable to the observance of natural justice in the making of preliminary investigations and reports which may lead to serious legal consequences to some person" and that

> procedures involving the taking of advice or the receiving of a report may turn upon the stage at which the effective determination is made. The findings of ... [some bodies] are likely to be accepted as definitive and therefore fair procedure is required. But where a report is merely 'a piece of evidence' the situation is different.[105]

In *the NCSC case* [106] the Commission's investigation was truly only a preliminary investigation, the effective determination would be made by the Supreme Court. As the Senate would be most unlikely to allow the persons affected to test evidence by cross-examination or to call evidence when it is considering a report prepared by its privileges committee, a privileges committee's investigation is more than a preliminary investigation. From the point of view of the representatives of *The National Times*, the effective determination was made by the first Privileges Committee.

There is another important difference between the Commission's hearing and a privileges committee's hearing. The statutory framework regarding the Commission's hearing recognised the need for expedition. To allow the persons affected to cross-examine witnesses and to call evidence might protract the hearing.[107] There is nothing to suggest that, in this case, it was necessary that the first Privileges Committee's hearing should be conducted expeditiously.

This analysis shows that there are significant differences between those functions of the Commission which were in question in *the NCSC case*[108] and the functions of the first Privileges Committee. It follows from the analysis that, assuming privileges committees were obliged to accord natural justice, higher standards would be required of the first Privileges Committee than were required of the Commission.

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101 Note 95 *supra*, 428-429 *per* Gibbs C.J. (with whom Brennan J. agreed, 439) who held that, if the Commission decided to institute proceedings in the Supreme Court, it was no part of its function to publish a report; and 439 *per* Mason, Wilson and Dawson JJ. who said that prior publication of a report was "distinctly unwise if not positively unlawful".

102 Note 4 *supra*.

103 Note 95 *supra*, 429 *per* Gibbs C.J.

104 Note 5 *supra*.

105 H.W.R. Wade, *Administrative Law* (5th ed. 1982) 505-506.

106 Note 95 *supra*.

107 *Id.*, 427 and 429 *per* Gibbs C.J.

108 *Ibid.*

VII. THE PROCEDURE ADOPTED BY THE FIRST PRIVILEGES COMMITTEE – THE "ACCUSED" AS "WITNESSES"

The Senate did not define the first Privileges Committee's terms of reference in the form of an allegation that publication of the articles constituted contempt. Instead, it referred the matter of the publication in the articles of a purported report of evidence taken by, and documents submitted to, the Select Committee and a purported report of the Select Committee's proceedings to the first Privileges Committee.[109] It was, however, clear from the outset that the Committee could report that the publication of the articles constituted contempt and that the representatives of *The National Times* responsible for the articles were culpable. This is evidenced by the fact that, while the first Privileges Committee found it necessary to consider whether the investigation of the source of the information was part of its responsibility, no such issue arose concerning the investigation of media liability.[110] In addition, the Privileges Committee's first communication with the media representatives drew attention to authoritative statements which suggested that the publication of the articles could constitute contempt; subsequently they were asked to "show cause" why the publication of the first article should not be regarded as contempt.[111] Although it was obvious that representatives of the media could be directly affected by the inquiry, the persons concerned — Ms W. Bacon, the author of the articles; Mr B. Toohey, the editor of *The National Times;* and John Fairfax and Sons Limited, the publisher of *The National Times*, which was represented by its Chief Editorial executive, Mr M. Suich — were treated as witnesses before the inquiry.

Witnesses before Senate committees have no rights enforceable at law. This is not surprising. Generally, a committee's role is to ascertain information relevant to the functions of government; the rights of individuals are not directly involved. A committee established to report on a matter obtains facts and opinions by calling witnesses to give evidence; witnesses are not in any sense parties and the investigation proceeds harmoniously. When privileges committees inquire whether a contempt has occurred, the position is different: the persons affected by the inquiry are like defendants charged with an offence. *The National Times* representatives found themselves in a position where it was necessary to defend themselves.

Aspects of the procedures adopted by the first Privileges Committee will now be examined to assess whether, assuming the Committee was required to accord natural justice, the requirements of natural justice were satisfied. It will emerge that it was due to treating the representatives of the media as witnesses that there may have been some failure to accord natural justice.

109 Note 3 *supra.*

110 Note 4 *supra*, para. 8.

111 *Id.*, paras 5, 6 and 7 and Senate Standing Committee of Privileges, note 31 *supra*, 79-84, 88-93.

VIII. WRITTEN EVIDENCE

The first Privileges Committee sought from the Chairman of the Select Committee written responses to questions.[112] It has been explained that certain assertions made by Senator Tate in his response formed the basis of the Committee's conclusion that the contempts were of a serious nature.[113] Assertions in documents produced in court when no witness is testifying constitute hearsay evidence and, although there are exceptions, they are generally inadmissible as evidence of the truth of that which is asserted.[114] Did treating Senator Tate's written response as evidence offend the natural justice rules?

In *R.* v. *Deputy Industrial Injuries Commissioner; ex parte Moore*[115] (*"Moore's case"*) the English Court of Appeal held that a decision maker was permitted to treat as evidence medical opinions expressed in two previous decisions.[116] Diplock LJ held that the technical rules of evidence form no part of the rules of natural justice.[117] He held that natural justice requires that a decision is based on evidence, but this

> means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant.[118]

Senator Tate's responses would satisfy this test. Accordingly, treating his responses as evidence would not involve a breach of the rules of natural justice. Whether the first Privileges Committee gave representatives of *The National Times* sufficient opportunity to contradict Senator Tate's assertions is another matter.

IX. OBTAINING EVIDENCE "BEHIND THE BACKS" OF THE CONTEMNORS; NO RIGHT TO CROSS-EXAMINE

Senator Tate's written response was not the only evidence before the first Privileges Committee regarding the possible effect of *The National Times* articles. The Committee examined all members of the Select Committee, the Secretary to that Committee and the persons whose evidence was purportedly reported in the first article.[119] The purpose of this hearing was to determine what was the source of the information published in the articles, but members of the Committee did not confine themselves to that issue. It has been explained that two witnesses were asked questions directed at

112 Note 4 *supra*, para. 5 and Appendix A.
113 See page 44.
114 J.A. Gobbo, D. Byrne and J.D. Heydon, *Cross on Evidence* (2nd Australian ed. 1980) 456.
115 [1965] 1 QB 456.
116 *Id*, 477-478 *per* Willmer L.J., 482-485 *per* Pearson L.J. and 488-491 *per* Diplock L.J.
117 *Id*, 488. This statment has been adopted by the Privy Council — *Mahon* v. *Air New Zealand Ltd* (1983) 50 ALR 193, 207 (Privy Council on appeal from the New Zealand Court of Appeal).
118 *Ibid.*
119 Note 4 *supra*, para. 8 and Minutes of Proceedings of 12 September 1984.

whether the publication of the articles might hamper Senate committee inquiries because of their effect on witnesses or potential witnesses.[120] Questions were also asked regarding the argument that the publication of the articles was necessary, because the Select Committee would not otherwise have published the information.[121] Thus, while the purpose of the hearing may have been to attempt to establish the source of the information published in *The National Times*,[122] it is apparent that members of the first Privileges Committee asked additional questions which were relevant, not to the source of the information, but to the case against *The National Times*.

A number of matters concerning these "additional" questions and Senator Tate's written responses are troubling: representatives of *The National Times* were not present at the hearing at which the "additional" questions were asked because they were not specifically informed that the hearing was to be held;[123] Senator Tate's written responses had not been made available to the representatives of *The National Times* or their counsel when they appeared before the first Privileges Committee;[124] counsel was not permitted to cross-examine the witnesses who were asked the "additional" questions, nor was he permitted to cross-examine Senator Tate regarding his written responses.[125] Each of these matters followed from treating the persons responsible for the articles as witnesses. Did these factors amount to a denial of natural justice? The following statement is regarded as specifying the minimum requirements of natural justice:

> [decision makers] must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. ... They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.[126]

Were the persons affected by the first Privileges Committee's inquiry denied a fair opportunity to correct or contradict Senator Tate's assertions and the answers to the additional questions?

The Privy Council has said that:

> [i]f the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them ... the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.[127]

120 See pages 33-34.
121 See page 39.
122 Note 7 *supra*, para. 4.20.
123 *Id.*, paras 4.20 and 4.22.
124 Senate Standing Committee of Privileges, note 31 *supra*, 114-116.
125 Note 4 *supra*, para. 26 and Minutes of Proceedings of 26 September 1984 item 6.
126 *Board of Education* v. *Rice* [1911] AC 179, 182 *per* Lord Loreburn L.C. See also note 115 *supra*, 476 *per* Wilmer L.J. and 488, 490 *per* Diplock L.J.
127 *Kanda* v. *Government of the Federation of Malaya* [1962] AC 322, 337-338 (Privy Council on appeal from the Court of Appeal of the Supreme Court of the Federation of Malaya).

It could be argued that the public notification of the hearing at which the "additional" questions were asked was inadequate to inform the persons affected by the inquiry that the hearing would be held. It would seem unreasonable to require persons liable to be found guilty of contempt to scan public notices to discover whether a hearing is to take place. However, it does not follow that the inadequancy of the notice would amount to a denial of natural justice. A transcript of the evidence given at the hearing was made available to the media witnesses before they were examined.[128] Thus, so far as the answers to the "additional" questions were concerned, the persons affected by the inquiry did "know what evidence [had] ... been given and what statements [had] ... been made affecting [them];"[129] the failure to inform the representatives of *The National Times* of the hearing did not amount to hearing evidence "behind the backs" of the persons affected. Similar reasoning appears to apply to Senator Tate's written responses. Although counsel for *The National Times* had been denied access to the responses when he appeared before the first Privileges Committee, it seems that the document was made available to *The National Times* in time for Senator Tate's assertions to be dealt with in written submissions.[130] Provided this is correct, the persons liable to be found guilty of contempt were given some "opportunity to correct or contradict"[131] both the evidence given in answer to the "additional" questions and Senator Tate's written reply. Indeed, it was not necessary to disclose the entire contents of the transcript and the reply. It would have been enough to disclose the substance of the evidence and the response, that is, to give sufficient information to enable *The National Times* to contradict the assertions which had been made. Whether a "fair opportunity"[132] was given to correct or contradict the statements depends upon whether counsel for the representatives of *The National Times* should have been permitted to cross-examine the witnesses.

In *Moore's case* Diplock L.J. held that natural justice required the relevant decision maker to

> allow each person represented to comment upon any ... [evidence he proposes to take into consideration] and, where the evidence is given orally by witnesses, to put questions to those witnesses.[133]

It has been said that

> the weight of authority in England favours the view that if either party requests to cross-examine a person who has given prejudicial evidence at an oral hearing, it is a denial of natural justice to refuse that request.[134]

The requirement was satisfied in *Moore's case* because the two opinions were put to witnesses for both 'sides'; they were adopted as part of one witness's evidence and the witnesses were cross-examined about them.[135] In contrast,

128 Note 7 *supra*, para. 4.20 and Senate Standing Committee of Privileges, note 31 *supra*, 4, 36 and 77.
129 Note 127 *supra*, and accompanying text.
130 Note 4 *supra*, para. 11.
131 Note 127 *supra*, and accompanying text.
132 Notes 126 and 127 *supra*, and accompanying text.
133 Note 115 *supra*, 490.
134 E.I. Sykes, D.J. Lanham and R.R.S. Tracey, *General Principles of Administrative Law* (1979) 115.
135 Note 115 *supra*, 490 *per* Diplock L.J.

Senator Tate was not cross-examined regarding the assertions contained in his written response to questions put to him by the first Privileges Committee. Senator Tate gave some evidence orally, therefore, the fact that these assertions were not made orally cannot excuse the failure to permit him to be cross-examined. The witnesses who were asked "additional" questions were not cross-examined.

The Australian position regarding cross-examination is unclear. In one case, by a majority, the High Court held that there was no denial of natural justice when a person was refused the right to cross-examine doctors who had made a medical report concerning his condition.[136] However, this decision has been criticised. It has been suggested that, as a matter of policy, "cross-examination should be allowed in all cases where the interests of a party ... are likely to be severely prejudiced by incorrect findings of fact".[137]

The only way representatives of *The National Times* could be given a fair opportunity to contradict the assertions made by Senator Tate and the witnesses who were asked "additional" questions was to permit their counsel to cross-examine Senator Tate and the other witnesses. There was a conflict between counsel for *The National Times*' argument and assertions made by Senator Tate and by the other witnesses.[138] It would surely have assisted the Committee in resolving this conflict to have the evidence tested by cross-examination.[139] Furthermore, while it has been explained that treating the Senator's responses as evidence did not involve a breach of the rules of natural justice,[140] the fact that his responses were in the form of hearsay evidence confirms the need to permit counsel to test them by cross-examination:

> [t]he admission of hearsay evidence may make it all the more necessary to allow it to be tested by cross-examination, and if that is not practicable the right course in some cases may be to exclude the evidence from consideration.[141]

It is suggested that the failure to permit counsel to cross-examine Senator Tate and the other witnesses who were asked "additional" questions involved a departure from the principles of natural justice.[142]

The suggested penalty

The second Privileges Committee recommended that the Senate should not impose a penalty at this stage, but if, during the current session of Parliament, the same or a similar offence were committed by any of the media for which the publisher of *The National Times* is responsible, unless

136 *R.* v. *The War and Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228, 244 *per* Rich, Dixon and McTiernan JJ. and 250 *per* Starke J. Evatt J. dissented, 255-257.

137 Note 90 *supra*, 113.

138 See pages 33-34, 39.

139 Similar reasoning was applied by Goff J. in *In re W.L.W.* [1972] Ch 456, 461.

140 See page 45.

141 Note 105 *supra*, 484. See also *R.* v. *Board of Visitors of Hull Prison; ex parte St. Germain (No 2)* [1979] 1 WLR 1401, 1409-1410.

142 In 1984 a Joint Select Committee on Parliamentary Privilege recommended that privileges committees should permit counsel to cross-examine witnesses — note 48 *supra*, para. 7.59.

there were extenuating circumstances, the Senate should impose a penalty for this contempt. A fine "of the order of up to a maximum of $100,000" was said not to be unreasonable.[143] If this recommendation were adopted the publisher would effectively be placed on a good behaviour bond. Although this report has been presented to the Senate,[144] at the time of writing, the Senate has not considered it.

X. THE POWER TO IMPOSE A FINE

It has been explained that the courts have jurisdiction to determine whether a House of Parliament holds a particular power.[145] To determine whether the Senate has power to impose a fine, the High Court would examine whether the House of Commons held that power on 1 January, 1901.[146] When deciding whether the House of Commons had power to commit for contempt, the courts examined whether any precedents, practice or opinions in the courts recognised the power and whether it was essential for the House of Commons to hold that power.[147] Similar factors would be applied to ascertain whether the House of Commons could impose fines at the relevant date.

So far as judicial pronouncements are concerned, during the course of argument in *R* v. *Pitt*, *R* v. *Mead* [148] counsel is reported to have said — "Thomas Long's case, of Westbury, was adjudged in the House of Commons ... and the mayor was fined and imprisoned ...". The report states that Lord Mansfield then said "[t]hat was for a contempt; in which case the House of Commons had jurisdiction. The latter part cannot be true; there could be no fine set there ...".[149] Lord Mansfield's statement indicates that the House of Commons could not impose fines at the time that case was argued, that is, in 1762.

The determination of the privileges of the House of Commons is a question of law not of fact[150] and the privileges of the House of Commons must be taken notice of judicially.[151] It is arguable that regard may be had to the Journals of the House of Commons to ascertain whether the House of Commons asserts that it has the right to impose fines. The House of Commons has not imposed a fine since 1666.[152] In 1967 a House of Commons Select Committee on Parliamentary Privilege referred to the

143 Note 7 *supra*, paras 5.14 and 5.19-5.20.
144 Aust. Parl., *Debates*, S 23 May, 1985 2457.
145 See page 31.
146 See page 29.
147 *Burdett* v. *Abbot*, note 12 *supra*, 136-152 (553-559) *per* Lord Ellenborough C.J. (with whom Grose J. agreed, 158-159 (561)) and 159-160 (561-562) *per* Bayley J.
148 (1762) 3 Burr 1335 (97 ER 861).
149 *Id.*, 1336 (861).
150 *Stevensen*, note 20 *supra*, 160.
151 *Glass*, note 13 *supra*.
152 *Erskine May* note 30 *supra*, 136. The last case was that of Thomas White — UK Parl., *Debates*, HC (1660-1667), 690.

absence of any power in the House of Commons to impose fines.[153] Although the Committee did not specify the date at which the power to impose fines was lost, there is nothing in its report to suggest that this was an event which took place after 1901. In 1977 the House of Commons Committee of Privileges stated that the power to fine "was once exercised by the House [of Commons], but it fell into disuse about 300 years ago".[154]

Although Quick and Garran, writing in 1900, made no reference to the power to impose fines,[155] in 1971 a Senate Committee of Privileges reported that the Senate had power to fine. The Senate adopted this report.[156] The first Privileges Committee stated that: "[u]nless otherwise determined by the Senate, the powers affirmed in the Resolution adopting the [1971] Report remain".[157] If this statement suggests that the adoption of the 1971 Report is enough to entitle the Senate to impose fines, it is incorrect. Unless legislation is enacted giving the Senate power to impose fines, it can only impose a fine if the House of Commons held that power at the establishment of the Commonwealth.[158]

The better view would appear to be that the Senate does not have power to impose fines. This was the conclusion reached by a majority of members of the Commonwealth Joint Select Committee on Parliamentary Privilege.[159] The second Privileges Committee recognised that the Senate's power to impose fines might be challenged; it recommended that legislation be enacted providing that each House has power to impose fines for contempt of parliament.[160] The Commonwealth Parliament could enact such legislation pursuant to sections 49, 51 (xxxvi) and (xxxix) of the Commonwealth Constitution.

XI. THE APPROPRIATENESS OF IMPOSING A FINE

The imposition of a fine, the payment of which is suspended until the contemnor is found guilty of a similar contempt, has a number of attractions. As conduct constitutes contempt if it impedes, or has a tendency to impede, a House of Parliament, a Member of Parliament or an officer of Parliament in the performance of their functions, it is appropriate that the Senate should invoke a measure which aims to protect it from interference, rather than exercise a power directed at punishing the persons who have acted in contempt. The Senate has power to reprimand or admonish contemnors and it also has power to imprison offenders,[161] however, a reprimand or

153 *Report from the Select Committee*, note 49 *supra*, para. 195.
154 *Third Report from the Committee of Privileges*, note 49 *supra*, note to para. 13.
155 Note 72 *supra*, 501.
156 *The Senate Committee of Privileges Report*, note 23 *supra*, para. 10(4); *Debates*, S note 23 *supra*.
157 Note 4 *supra*, para. 29.
158 See page 29.
159 Note 48 *supra*, paras 7.14-7.17. (Two members of the Joint Select Committee — Senators Jessop and Peter Rae — dissented in relation to this aspect of the report, 166-167.)
160 Note 7 *supra*, paras 6.1-6.5.
161 Note 87 *supra*, 5-7 and 38-41.

admonition may be insufficient to ensure that the contempt is not repeated and imprisonment will often be too severe a response. Finally, when a company is involved a fine is an appropriate remedy because a company cannot be imprisoned or reprimanded except through its officers. However, one aspect of the second Privileges Committee's recommendation is troubling. The Committee recommended that,

> if the same or a similar offence be committed by any of the media for which John Fairfax and Sons Limited is responsible, the Senate should, unless at that time there are extenuating circumstances, impose an appropriate penalty for the present offence.[162]

This recommendation fails to take into account that, although the media in Australia are controlled by a small number of organisations, media outlets, that is individual newspapers and broadcasters, generally act independently of other outlets owned by the same organisation. In these circumstances it is not appropriate to make the imposition of a fine in respect of the actions of one outlet dependent upon the future actions not only of that outlet, but also of other outlets simply because they have the same ownership. As *The National Times* and *The Age* act independently, common ownership should not make the question whether a fine should be imposed in respect of a contempt committed by *The National Times* in any way dependent on the action of *The Age*.

XII. CONCLUSION

It is in the public interest that some mechanism should exist to protect Houses of Parliament from conduct which interferes with the performance of their functions. The sensitive nature of the Select Committee's work highlights the need to protect Senate committees. Nevertheless there are limits to the primacy even of Parliament. The free flow of information is another public interest of high importance. It too should be subject to no unnecessary constraint. The Senate's use of its contempt power to prevent evidence taken by Senate committees from being published before it is reported to the Senate is a constraint on the media which is often unnecessary.

The settled definition of contempt of parliament as conduct which obstructs a House of Parliament, a Member or an officer of the House in the performance of their functions, or which has a tendency to do so, sets an acceptable limit to the contempt power which falls short of its present use by the Senate. The flaw in the finding that the publication of *The National Times* articles constituted contempt is that the first Privileges Committee failed to take properly into account the question whether the publication of the information in the articles interfered, or had a tendency to interfere, with the performance of the Senate's functions. Without such a finding of fact on reasonable grounds, the Privileges Committee's conclusion is not supportable in terms of the public interest. The Committee's performance is

162 Note 7 *supra*, para. 5.19.

not assisted by its failure to comply with the principles of natural justice when attempting to obtain evidence of the effect of the publication of the articles.

This is not to say that if the Committee had paid proper attention to the obstruction question it would not have concluded that the premature publication of the information interfered with the Senate in the performance of its functions or had a tendency to do so. Neither is it suggested that the courts have jurisdiction to overturn the decision: it is established that it is for the Senate alone to decide whether conduct constitutes contempt of that House and what procedures it will follow in reaching its decision. The significance of the case is that it illustrates that Houses of Parliament can be insensitive to the value of the principle that their contempt powers should be used only to the extent necessary for the due execution of their functions. As the sole and effectively unsupervised judge of what constitutes contempt of the Senate, the Senate failed to exercise that degree of self restraint which alone can justify the entrusting to any institution of a potentially arbitrary power over others. By this failure the Senate unjustifiably interfered with the public interest in the free flow of information.

This case also demonstrates that Parliament is in need of what is probably the most appropriate power in contempt cases, the power to impose a suspended fine.

Recommendations made in 1984 by the Joint Select Committee on Parliamentary Privilege anticipate the main unsatisfactory features of *The National Times* case. That Committee recommended that the Commonwealth Houses of Parliament adopt resolutions embodying the principle that their contempt powers should be used only to the extent necessary for the due execution of their functions;[163] that privileges committees permit counsel to cross-examine witnesses;[164] and that legislation be enacted empowering the Commonwealth Houses of Parliament to impose fines.[165] Notwithstanding the demonstration given by *The National Times* case that these recommendations are in urgent need of implementation, the Joint Select Committee's recommendations have not, at the time of writing, been accepted by either House of Parliament.[166]

No doubt public cynicism about the Australian political process is influenced by the media's attitude to Parliament. If Parliament is interested in maintaining public respect for it as an institution it should take steps to ensure that *The National Times* case is not repeated.

163 Note 48 *supra.*

164 *Id.*, para. 7.59 and recommendation 21.

165 *Id.*, paras 7.14-7.17, 7.27 and recommendation 19. (Two members of the Joint Select Committee — Senators Jessop and Peter Rae — dissented in relation to this aspect of the report, 166-167).

166 The Joint Select Committee's Report has been noted by the Senate (Aust. Parl., *Debates*, S 3 and 17 October 1984, 1140-1144 and 1883) and presented to the House of Representatives (Aust. Parl., *Debates*, HR 3 October 1984, 1488-1492). Bills dealing with aspects of contempt of parliament have been introduced in both Houses. Both would empower the Houses to impose fines (Parliamentary Powers, Privileges and Immunities Bill 1985 (Senator Macklin) — Aust. Parl., *Debates*, S 22 August 1985, 132-134); Parliament (Powers, Privileges and Immunities Bill 1985 (Mr Spender) — Aust. Parl., *Debates*, HR 21 May 1985, 2846-2848 and 19 March 1986, 1635-1648).