

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE
COMMITTEE OF PRIVILEGES

POSSIBLE INTERFERENCE WITH WITNESSES
IN CONSEQUENCE OF THEIR GIVING EVIDENCE BEFORE
SENATE SELECT COMMITTEE ON
ADMINISTRATION OF ABORIGINAL AFFAIRS

(18TH REPORT)

JUNE 1989

MEMBERS OF THE COMMITTEE

Senator Patricia Giles (Western Australia), Chair
Senator John Black (Queensland)
Senator Bruce Childs (New South Wales)
Senator John Coates (Tasmania)
Senator the Honourable Peter Durack, Q.C. (Western Australia)
Senator Janet Powell (Victoria)
Senator Baden Teague (South Australia)

The Senate
Parliament House
CANBERRA A.C.T. 2600



REPORT

Introduction

1. On 3 November 1988, the Senate agreed to the following motion moved by the Leader of the Opposition in the Senate (Senator Chaney):

- (1) That the following matters be referred to the Committee of Privileges: Whether any of the following actions constituted a contempt of the Senate in that they involved an improper interference with witnesses:
 - (a) the resolution of the Aboriginal Development Commission of 23 May 1988 relating to public statements by members or officers of the Commission;
 - (b) the resolution of the Commission of 14 October 1988 relating to the presentation of papers and submissions to parliamentary committees;
 - (c) the resolution of no confidence in Mrs S. McPherson passed by the Commission on 10 October 1988; and
 - (d) the transfer of Mr M. O'Brien from the position of General Manager of the Commission.
- (2) That, in inquiring into those matters, the Committee have regard to any relevant material, including the report of the Select Committee on the Administration of Aboriginal Affairs relating to the protection of witnesses.
- (3) That, in inquiring into those matters, the Committee of Privileges have power to send for persons, papers and records, to move from place to place, and to meet notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives, and that a daily Hansard be published of such proceedings of the Committee as take place in public.

2. The Minutes of the meetings of the Aboriginal Development Commission record the resolutions referred to in Senator Chaney's motion as follows:

In relation to paragraph (1)(a):

Confirmation of the Minutes of the 57th Commission Meeting

A/g Commissioner Perkins Moved that the Minutes of the 57th Commission Meeting be APPROVED, following the insertion of the following statement:

Following discussion during an "In Camera" session, the Commission APPROVED that no public statements are to be made by Commissioners or officers of the Commission without prior approval of the Board of Commissioners.

(Extract from Minutes of 58th Meeting of the Commission, held 14-15 June 1988)

In relation to paragraph (1)(b):

12.1.6 Papers or Submissions of Whatever Kind

RESOLUTION

That papers and Submissions of whatever kind shall not be presented to any Parliamentary Committee or other body without prior approval of the Commission.

(Extract from Minutes of 62nd Meeting, 10-14 October 1988)

In relation to paragraph (1)(c):

12.1.8 Motion of No-Confidence

RESOLUTION

The Commission hereby expresses its lack of confidence in the Chairman of the Commission in that:

- (a) the Chairman has lost the confidence of the Aboriginal Housing Associations in Queensland as evidence by the passing of

a motion of no confidence by the Chairman at the ADC Housing Conference in Rockhampton on 15-16 September 1988; and

- (b) the Chairman has persistently failed to communicate (both verbally and in writing) with Commissioners on matters of importance affecting the Commission;
- (c) the Chairman gave directions for a submission to be tendered on behalf of the ADC to the Senate Select Committee on Aboriginal Affairs without clearance from the Commission and,
- (d) notwithstanding a motion passed by the Commission on 23 May 1988, requiring Commissioners to notify the Commission prior to making public statements, the Chairman appeared before the Senate Committee on 2 September 1988 and delivered a speech the Young Labor Lawyers Conference without notifying the Commission;
- (e) the Chairman allowed the lodging of the explanatory notes 1988/89 with the Senate estimates without having submitted them to the Commission for approval.

and as a consequence the Commission hereby calls upon the Chairman to resign her position forthwith.

(Extract from Minutes of 62nd Meeting, 10-14 October 1988)

3. The resolution to give effect to the transfer referred to in paragraph (1)(d) is as follows;

12.1.2 Creation of SES Level 3 Position

RESOLUTION

In accordance with the Minister's s.11 Direction of 27 April 1988 requiring the ADC to co-operate with the Minister and portfolio bodies in effecting the transition to ATSIC and pursuant to the Commission having set aside funds to facilitate the negotiation of a Treaty, the Commission directs that:

- (1) a temporary position is established equivalent to that at SES Level 3. This position will have responsibility for liaising with the ATSIC Task Force and generally overseeing the smooth transition to ATSIC as well as responsibility for managing and controlling all aspects of the treaty consultations as well as other duties as directed.
- (2) the current General Manager, Mr M. O'Brien, be placed in the above created position forthwith.
- (3) Mr Cedric Wyatt be transferred to the position of acting General Manager.
- (4) the decision to create a temporary SES Level 2 position taken at the Townsville meeting be revoked; that appropriate job statement for the Level 3 position be drafted and that the Department of Industrial Relations be informed of his revocation and their approval sought for the new position as a matter of urgency.

(Extract from Minutes of the 62nd Meeting on 10-14 October 1988)

4. In addition, an examination of the Minutes of the 58th Meeting of the Commission, held in Canberra on 14-15 June 1988, revealed a further motion relating to Mrs McPherson, passed during in camera discussions, as follows:

12.1 In-Camera Resolution

During an "In-Camera" discussion, A/g Deputy Chairman Dodson Moved a motion of censure against the Chairman on the following grounds:

- (a) the lack of initiative in communicating with the Commissioners on matters that affect the Commission.
- (b) that leaks are occurring from the Commission over communication between the A/g Deputy Chairman and the Chairman over comments made in the Senate by the Leader of the Democrats on 29 May 1988 in respect of the information flow between the Chairman and the A/g Deputy Chairman.

(c) the lack of communication and timing of such communication in the setting up of the Senate Select Committee on Aboriginal Affairs.

(d) the quality of the Chairman's leadership which may or may not be attributable to or responsible for the political processes that have brought about the Senate Committee on Aboriginal Affairs, with the likely delay of a further six months to the implementation of ATSIC.

The motion was Seconded by
A/g Commissioner Yu.

Motion Carried.

(Extract from Minutes of 58th Meeting on 14-15 June 1988)

While this latter resolution was not referred to the Committee, the Committee has taken the view that the resolution is relevant to the matters referred by the Senate, in that it provides evidence of the intentions of the "new" Commissioners¹ in relation to the existing Chairman, Mrs McPherson. The resolution is of particular significance in that it linked her activities with the public and protected forum of the Parliament.

Background

5. On 11 October 1988, Senator Peter Baume asked the President, during question time, a question concerning

1. NOTE: Throughout this Report, the Committee has used the expression "new" Commissioners to encompass the eight Acting Commissioners who were appointed by the Minister for Aboriginal Affairs on 13 May 1988 in place of eight Acting Commissioners whose appointments were terminated on 11 May 1988, and also includes Ms Zona Martin, who had been appointed a Commissioner by the Governor-General for the period to 28 October 1989. The expression excludes Mrs Shirley McPherson, the Chairman of the Commission, who had also been appointed by the Governor-General for the period to 28 October 1989. Mrs McPherson resigned as Chairman of the Commission with effect from 1 June 1989. The term "former Commissioners" is used throughout the Report to refer to the eight Acting Commissioners whose appointments were terminated on 11 May 1988.

protection of witnesses in relation to evidence given to a Senate select committee. Senator Baume referred to reports that a motion of no confidence against the Chairman of the Aboriginal Development Commission had been passed at a Commission meeting and that one ground for censure was her appearance before the Senate Select Committee on the Administration of Aboriginal Affairs. Senator Baume also asked whether any breach of privilege might be involved. On 12 October, the President advised that the Senate Select Committee on Aboriginal Affairs was investigating the matter and that he would therefore not take any further action until the Committee concluded its investigation.

6. On 19 October, Senator Boswell raised with the President a question concerning a motion agreed to by the Aboriginal Development Commission to the effect that papers and submissions of whatever kind should not be presented to any Parliamentary committee or any other body without the prior approval of the Commission. Senator Boswell asked whether the Commission was relying on the resolution to decline to provide or to delay the provision of information to Senate Estimates Committee E and to the Select Committee on the Administration of Aboriginal Affairs, particularly in relation to the latter Committee's investigation of the matters raised by Senator Peter Baume. The President, in accordance with his commitment to report back to the Senate as a matter of urgency, made a statement on the same day that he had written to the Chairman of the Commission and had received a response confirming that the motion referred to by Senator Boswell had been passed.

7. On 20 October, the President advised the Senate that he had received a further resolution from the Aboriginal Development Commission. The resolution, which the President tabled on that day, reads as follows:

Meeting No: 63
Date: 20 October 1988
Agenda Item:
File No.:

DISSEMINATION OF INFORMATION

Resolution

In relation to the resolution passed at the 62nd Commission meeting concerning the presentation of papers and submissions, the Board of Commissioners wishes to inform the Senate that this resolution:

1. was not intended to in any way encroach upon or limit the powers of the Senate or any Parliamentary Committee;
2. was not intended to prevent or in any way affect the right of individuals to appear before the Senate or such Committees;
3. was a purely administrative mechanism designed to ensure that papers and submissions presented on behalf of the ADC contained information that was accurate and reflected the views of the Commission;

and that the Board regrets any misunderstanding that may have occurred as a result of the passage of this resolution.

ABORIGINAL DEVELOPMENT COMMISSION
63RD MEETING 20 October 1988
RECOMMENDATION
AS AMENDED

APPROVED
DECLINED
NOTED

Shirley McPherson
(signed)

Patrick Dodson
(signed)

.....

Chairman

Acting Deputy
Chairperson

8. The President also advised the Senate that he had received a letter from the Leader of the Opposition (Senator Chaney), raising a matter of privilege in accordance with the procedures laid down by the resolution of the Senate of 25 February 1988. The President indicated to the Senate that he would make the determination required by the resolution

following consideration of the additional material forwarded to him by the Aboriginal Development Commission, and report the determination to the Senate on the next day of sitting. During a debate on the motion moved by Senator Chaney to take note of the President's statement, the Chairman of the Select Committee on the Administration of Aboriginal Affairs (Senator McMullan) advised the Senate that the Committee would report to the Senate on the matter of privilege as soon as possible.

9. When the Senate resumed on 1 November, the President made a statement advising the Senate that before giving his determination on the matters raised by Senator Chaney he would await the outcome of the deliberations of the Senate Select Committee on the Administration of Aboriginal Affairs. The Committee reported to the Senate on 2 November, recommending that certain questions arising from the appearance of witnesses before that Committee be referred to the Committee of Privileges. Later that day the President, having considered the report, advised the Senate that he had determined that a notice of motion arising from the matters raised by Senator Chaney should be given precedence of all other business on the day for which it was given. Senator Chaney thereupon gave the notice which was moved in the terms set out in paragraph 1 above.

Conduct of inquiry

10. As advised to the Senate on 7 November, the Committee of Privileges wrote individually to the Commissioner and Acting Commissioners, to Mr Charles Perkins who had been Acting Commissioner at the time of the passage of each of the resolutions, to Mrs McPherson and to Mr O'Brien, inviting them to make written submissions to the Committee. The Committee also wrote to Mrs McPherson as Chairman of the Aboriginal Development Commission, asking

that all documents relevant to the Committee's inquiry be available for collection by the secretary to the Committee at 4 p.m. on 7 November. This letter of request was hand delivered to Mrs McPherson on 4 November.

11. At the appointed time, a significant quantity of documents, including minutes of meetings of the Aboriginal Development Commission, the file relating to Mr O'Brien's transfer, and cassette tapes of a number of Commission meetings (excluding in camera meetings) was provided to the Committee. Subsequently, further minutes and documents were also provided to the Committee.

12. The Committee asked the persons invited to make a submission to respond to the Committee's invitation not later than 18 November. While the Committee was anxious to expedite the inquiry, it was sympathetic to requests for extensions of time to make written submissions. Consequently, an extension to 25 November was initially granted to all persons.

13. In the meantime, the Committee received advice that a number of Commissioners and Acting Commissioners would be legally represented by Minter Ellison, who briefed Mr M. F. Adams, Q.C. and Ms A. Katzmann of the New South Wales Bar. Subsequently, it was established that Minter Ellison was also acting for the Aboriginal Development Commission. Discussions proceeded between the Aboriginal Development Commission and Mr Perkins as to whether a joint submission would be lodged. Mr Perkins was separately represented by Macphillamy Cummins & Gibson. Mrs McPherson and Mr O'Brien were represented by Crossin Power Haslem.

14. On 22 November 1988, three days before the extended deadline for receipt of submissions was due to expire, the Committee received a letter from Minter Ellison, on behalf

of their clients, suggesting that it was not appropriate for the Commissioners to make written submissions at that time. In addition to raising a number of matters concerning the conduct of the Committee's inquiry, Minter Ellison also pointed out that time was required to go through all the extensive material held by the Aboriginal Development Commission, and sought an extension of time, to 2 December, to provide the information. The Committee was advised on that day that more time would be required to examine the documents. Mr Perkins was ill during this period, and, as indicated, discussions were being held as to whether a joint submission would be made on behalf of all Commissioners (other than Mrs McPherson) and Mr Perkins. Mrs McPherson and Mr O'Brien had been granted an extension of time, until 2 December, to make their submission and their joint submission was received on that day.

15. On 9 December, the Committee was advised by Minter Ellison that their clients, on legal advice, declined to make submissions in response to its original invitation "except to the extent that the written submissions so far fall within that description".

16. On 12 December, the President of the Senate forwarded to the Committee a letter he had received from Minter Ellison. The letter raised with the President the participation by Senator Durack as a member of the Privileges Committee in its examination of this matter. (A similar letter from Macphillamy Cummins & Gibson was received from the President on 12 January 1989.) On 15 December, the Committee sought the advice of the Clerk of the Senate concerning the participation by members of the Committee in a number of inquiries before it. In the meantime, the Committee awaited specific documents promised to it by Minter Ellison in a further letter of 9 December. Most were received on 3 January, while the last of the documents was delivered to the Committee on 30 January 1989.

17. The Committee met on 25 January 1989 and considered and discussed the documents before it, in particular the tape recordings of the meeting held on 14 and 15 June 1988. Having done so, the Committee satisfied itself that the circumstances relating to the passage of the resolution of 23 May did not amount to a contempt of the Senate. The Committee's reason for drawing this conclusion was that, despite the wording of the resolution (see paragraph 2), it was evident from the Commission's discussions that the intention of the resolution was that prior approval must be sought for statements to be made on behalf of the Commission. This point was made on a number of occasions during those discussions. The Committee's conclusion is elaborated at paragraphs 33 to 39.

18. On 3 February, the Committee's finding was conveyed, on a confidential basis, to the legal representatives of the "new" Commissioners and Mr Perkins, and to Mrs McPherson and Mr O'Brien. At the same time, the Committee asked all persons concerned to direct their attention specifically to the remaining terms of reference, and asked the legal representatives of the "new" Commissioners and Mr Perkins to make written submissions, precisely directed to the three outstanding terms of reference, not later than 20 February. In relation to Mrs McPherson and Mr O'Brien, the Committee asked whether either person would be able to or willing to provide any further evidence to support any allegation of contempt in relation to the remaining terms of reference.

19. At the same meeting, the Committee, having received advice from the Clerk of the Senate on the question of participation by members in committee inquiries, sought from him further advice on a specific matter raised in the Macphillamy Cummins & Gibson letter received by the Committee on 3 January.

20. On 16 February, the Committee, having considered both papers prepared by the Clerk of the Senate in response to its requests, wrote to the President in the following terms:

Dear Mr President,

The Committee has considered the letters to you, from Minter Ellison of 12 December 1988, and from Macphillamy Cummins and Gibson of 9 December 1988, concerning the position of Senator Durack on the Committee during its inquiry into matters referred to it by the Senate on 3 November 1988.

The Committee sought the views of the Clerk of the Senate on the question and, having received and discussed his response, has concluded as follows:

- (a) The analogy drawn in both letters between proceedings of committees of the Senate in an investigatory mode and judicial proceedings is not appropriate. Restrictions which apply to judges and courts are incompatible with the nature and functions of an elected legislature, the members of which must monitor, and participate in, all matters of public interest and controversy.
- (b) The question whether individual members of the Committee should refrain from participating in certain inquiries, or certain parts of an inquiry, is one for the good judgment of the Senators themselves. The Committee may wish to discuss whether a Senator should participate in a particular inquiry, and accepts that a Senator might in any case decide not to participate. Under present circumstances, however, it is firmly of the view that it has neither the right nor the duty to suggest that any member of the present Committee disqualify himself or herself from participating in any of the matters currently before it.

Yours sincerely,

Patricia Giles
Chair

21. Submissions dated 20 February, by members of the Aboriginal Development Commission, and 22 February, on behalf of Mr Charles Perkins, were considered briefly by the Committee on 1 March. The Committee, at that stage, decided to seek the Clerk of the Senate's comments on the matters raised in the submission made on behalf of Mr Perkins. This submission consisted of a joint legal opinion by Mr R.J. Ellicott, Q.C. and Professor J.E. Richardson. The Committee noted that Minter Ellison advised the Committee on 23 February that, on behalf of their clients, they "adopt[ed] what [was] said in Mr Perkins' submission". The Clerk responded on 6 March and the Committee considered his letter on 9 March. The Committee, at that meeting, determined that all the persons affected should be given access to the relevant submissions, with comments to be received by the Committee by 29 March. The Committee made available, on request, copies of all the cassette tapes it had received on 7 November (see paragraph 11).

22. The Committee also decided, pursuant to paragraph 2(8) of the Privilege Resolutions, to appoint, on terms and conditions approved by the President, counsel to assist it. Thus, on 14 March, the Chair of the Committee sought and received the approval of the Deputy President, in the absence overseas of the President, to appoint Mr Theo Simos, Q.C., instructed by Mallesons Stephen Jaques, to assist it. Having considered all relevant documentation, Mr Simos provided the Committee with advice of his preliminary views on 4 April and with two memoranda, on 2 and 3 May, respectively.

23. The Committee received, on 31 March, a further submission by "counsel for the Commissioners [of the ADC] (except the Chairperson and Mr Perkins)" and "commentary by counsel for Mr Charles Perkins AO on the joint submission by Mrs McPherson and Mr O'Brien to the Senate Committee of Privileges". The commentary was made by Mr Ellicott and Professor Richardson.

21. The solicitors for Mrs McPherson and Mr O'Brien sought an extension of time for the lodgement of their responses to the other submissions, initially, by oral request, to 14 April but subsequently, in writing, to 21 April. In advising its agreement to an extension to 14 April, the Committee requested that the response focus precisely on the terms of reference before the Committee and ignore matters in the submissions previously forwarded which were not relevant. The Committee's letter included the following:

In particular:

(i) In respect of Mr O'Brien:

The Committee asks: Does Mr O'Brien make a specific allegation about the proposal that he be removed from his position as General Manager of the Commission and his having given evidence to the Senate Select Committee on the Administration of Aboriginal Affairs? If so, the Committee would appreciate particulars of the facts and circumstances, including conversations, upon which Mr O'Brien would rely in making such an allegation.

(ii) In respect of Mrs McPherson:

The Committee notes Mrs McPherson's statement made at page 3 of attachment 33 to the joint submission that:

"The Commissioners conceded that I may have some good points in the area of financial management but they believed that they couldn't 'trust me' particularly because of my appearance before the Senate Select Committee and they found that they couldn't tolerate the current situation any longer."

The Committee asks: Does Mrs McPherson make a specific allegation about the motion of no confidence in her and her having given evidence to the Senate Select Committee on the Administration of Aboriginal Affairs? If so, the Committee would appreciate particulars of the facts and circumstances, including conversations, upon which Mrs McPherson would rely in making such an allegation.

The response on behalf of Mrs McPherson and Mr O'Brien was received by the Committee on 14 April.

Issues for determination

25. It may be noted, as demonstrated by the above account of the proceedings of the Committee in relation to the matter, that the Committee has had great difficulty in focussing the attention of all persons affected by the matters before it on the specific questions the Committee was required to consider. The Committee was placed in the position of first, having to determine whether allegations had been, or warranted being, formulated (see especially paragraph 24), and also engaged in lengthy correspondence with the legal advisers to the "new" Commissioners as to whether they were prepared even to respond to the Committee's invitation to make written submissions (see especially paragraphs 14 and 15).

26. When all the submissions came before the Committee, they discussed at length matters relating to the Aboriginal Development Commission, the proposed Aboriginal and Torres Strait Islander Commission legislation, the dismissal of former Acting Commissioners and the appointment of new Acting Commissioners. It is clear that the matters the Committee was required to consider were part of a much wider problem of the conduct of Aboriginal affairs in the atmosphere which characterised the Commission's operations over the relevant period. The Committee has, therefore, itself had great difficulty in distilling the matters before it, and ensuring that matters irrelevant to its terms of reference have been excluded from consideration.

27. The task of the Committee was to determine whether, under the terms of the resolutions of the Senate relating to matters which may be treated as contempts, offences had been committed under the following headings:

Interference with witnesses

- 6(10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

Molestation of witnesses

- 6(11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

20. The Senate, in passing the Privilege Resolutions of 20 February 1988, declared that it would take into account four criteria when determining, firstly, whether matters possibly involving contempt should be referred to the Committee of Privileges, and, secondly, whether a contempt had been committed. These criteria are as follows:

- 3(a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate;
- (b) the existence of any remedy other than that power for any act which may be held to be a contempt; and
- (c) whether a person who committed any act which may be held to be a contempt:
- (i) knowingly committed that act, or
 - (ii) had any reasonable excuse for the commission of that act.

29. The relevant resolution also requires the Committee to take these criteria into account when inquiring into any matter referred to it. In contrast, the President, under resolution 4, is required merely "to have regard to" the criteria, and to only two of the four criteria. The criteria to which the President is not required to have regard are contained in paragraph 3(c) of the Privilege Resolutions.

30. It should be emphasised that the Committee and the Senate may find a contempt has been committed even in the absence of any intention on the part of the person or persons to commit any act which may be held to be a contempt. The Committee is of the view that such a finding of strict liability would be justified only in exceptional circumstances. The damage to the Senate and its committees resulting from any such acts would need to be of a most serious kind.

31. In the present case no acts of the "new" Commissioners actually had the effect of interfering with the operations of the Senate and its committees. Accordingly the Committee ruled out any consideration of strict liability in this case.

32. In regard to the criteria referred to in paragraph 28 the Committee decided that the criterion in 3(b) was inapplicable in that there was no remedy available other than the Senate's power to deal with contempt. It decided, however, that the other criteria were relevant and took them into consideration in making its findings on this reference.