

Conclusions

In relation to term of reference (1)(a) (Resolution of 23 May 1988)

33. In determining its position in relation to the resolution of 23 May, as conveyed to all persons affected by the matters before the Committee (see paragraphs 17 and 18), the Committee was mindful of the particular circumstances, and the understanding of the "new" Commissioners, relating to the passage of that resolution. (For definition of "new" Commissioners, see note to paragraph 4 above.) The Committee's finding that the motion of 23 May was intended, and was understood by the "new" Commissioners, to refer only to statements made on behalf of the Commission is based on the minutes and transcripts of various meetings, and on the submissions that the Committee has received since the matters before it were referred by the Senate. The question arises as to whether that requirement for approval to speak on behalf of the Commission might nonetheless constitute a contempt.

34. Mr R.J. Ellicott, Q.C. and Professor J.E. Richardson, counsel for Mr Perkins, put the view in the submission made on behalf of Mr Perkins on 22 February that any statements or evidence by Commissioners or officers, notably by Mrs McPherson and Mr O'Brien, should have received the prior approval of the "new" Commissioners. Counsel argued that the distinction between public and private was artificial, in that the Chairman, and the General Manager, had a duty of trust to the Commission such that it was not proper or appropriate for either of them to make such a distinction.

35. As was pointed out by the Clerk of the Senate in his advice to the Committee on matters raised by Mr Ellicott and Professor Richardson, however, the question for the Committee was not whether the requirement imposed by the resolution of 23 May was lawfully imposed; rather, the question for the Committee was that, regardless of whether that requirement was lawful, whether the imposition of it amounted to a contempt. The Committee has not found it necessary to establish whether the resolution imposing the requirement was itself lawful.

36. The Committee has concluded that, in the particular circumstances of the case, based on the evidence before it, the resolution of 23 May did not constitute a contempt, in that there was no intention to interfere with the rights of individuals to make their views known to a Senate committee. The Committee's reasons for so concluding are based on the following circumstances.

37. The atmosphere of mistrust between Mrs McPherson and certain senior executives of the Commission, on the one hand, and the "new" Commissioners, on the other, was already evident, both from public utterances and from the acrimonious circumstances surrounding the appointment of the "new" Commissioners.

38. Regardless of their justification for their views, it is clear from the evidence before the Committee that the "new" Commissioners were determined to exercise authority over the one person who could not easily be removed from her statutory position, and certain persons in senior executive positions who were perceived by the "new" Commissioners as supporting her in opposition to the government's proposals to restructure the administration and operation of Aboriginal Affairs. The perceived need to exercise authority over the Chairman was given formal force at the 58th Meeting, in June, when the motion of censure quoted at paragraph 4 above was agreed to.

39 Nevertheless, the Committee has concluded that the May resolution was not passed with the intention of interfering with witnesses proposing to give evidence to a Senate committee. It may be noted that the resolution was passed on 23 May 1988, more than a week before the Senate Select Committee on the Administration of Aboriginal Affairs was established by the Senate. It is further to be noted that the meeting of 23 May was the first meeting to be held following the dismissal of the former Commissioners and the appointment of the "new" Commissioners.

In relation to term of reference (1)(b)

(Resolution relating to presentation of papers and submissions)

40. This term of reference presented the Committee with considerable difficulty. On a literal reading of the resolution as agreed to, the resolution would not permit any papers or any submissions to be presented at any time to anybody on any matter without prior approval of the Commission. This would represent the grossest intrusion on the rights of individuals and, in the context of contempt of Parliament, would clearly represent an interference with a witness under resolution 6(10). The submissions considered by this Committee and the Select Committee on the Administration of Aboriginal Affairs, together with the document tabled by the President on 20 October, indicate that the "new" Commissioners did not have this intention. Members of the Commission have emphasised in their submissions that they did not intend, and nor could they have contemplated, that such a prohibition extended to a person acting in a private capacity. (But see comment at paragraph 49.)

41. The Committee notes that the explanations given in the submissions, and in the resolution tabled by the President, are ex post facto justifications for the Commissioners' actions. Nevertheless, the Committee has taken into account the atmosphere in which the resolution was passed, in that the meeting of October represented the culmination of the conflict which had been escalating since May, and considers that the Commissioners were not sufficiently aware of the implications and ramifications of the resolution. It therefore has concluded that, while the drafting and passage of the resolution were inept and unwise, the explanation and apology, contained in the resolution tabled by the President on 20 October, should be accepted.

In relation to term of reference (1)(c)

(Resolution of no confidence in Mrs McPherson)

42. The action of the ADC in passing a motion of no confidence in Mrs McPherson during its 62nd meeting held in Adelaide on 10-14 October squarely raises the question whether a penalty or injury has been inflicted on Mrs McPherson as a result of her giving evidence to a Senate Committee. Uncontradicted evidence has been given to the Committee that the resolution was one of eight resolutions (including the resolution relevant to papers and submissions, discussed at paragraphs 40 and 41, and the resolution relating to the transfer of Mr O'Brien, discussed at paragraphs 58 to 65) prepared in advance of that meeting, and produced to the Commissioners, early in the proceedings at Adelaide. The motion of no confidence includes the following paragraph:

- (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 to the Young Labor Lawyers Conference without notifying the Commission.

43 The chronology of events is significant:

- (i) Mrs McPherson advised during the 60th meeting of the Commission (22 July 1988) that she had "met at length with Senator McMullan", Chairman of the Select Committee, and intended to appear before the Select Committee to give evidence. The minutes of that meeting were confirmed at the 61st meeting, held on 22 to 26 August;
- (ii) Mrs McPherson appeared before the Committee on 2 September, and made it clear in her written submission, and in oral evidence, that she was appearing in a private capacity. She appeared before the Committee with former Commissioners of the ADC;
- (iii) Mr Pat Dodson, Acting Deputy Chairman of the ADC, sought advice both as to the basis on which Mrs McPherson appeared before the Committee, and as to the details of the evidence she had given. He was advised that Mrs McPherson had appeared in a private capacity, that her public evidence was available, but that her in camera evidence was not available without authorisation of the Committee;
- (iv) Mr Dodson sought that advice on 16 September and a response was sent to Mr Dodson by the principal legal adviser to the Commission, Mr Brendan Bailey, on 26 September; and
- (v) It is to be noted that the advice was provided well before the Commission's meeting in Adelaide in October.

44. Much of the evidence before the Committee has centred on a sense of grievance that other members of the Commission were "not notified" "notwithstanding a motion passed by the Commission on 23 May 1988" that Mrs McPherson was to appear before the Select Committee. The facts are as follows: The resolution of 23 May did not refer to notification, but instead to "prior approval" of statements to be made. In view of the Committee's earlier finding in relation to paragraph (1)(a) of the terms of reference, the intention, as reinforced by discussions held at subsequent meetings, was that "prior approval" should be sought for statements made on behalf of the Commission. There was never a requirement, in terms of that resolution, for notification of an intention to make a statement, or give evidence, whether on behalf of the Commission or in a personal capacity (although, of course, the notion of "prior approval" of statements and evidence on behalf of the Commission necessarily entails notification).

45. Thus, the preamble of paragraph (d) of the motion of no confidence, relating to Mrs McPherson's appearance both before the Senate Committee and before a Young Labor Lawyers' Conference, misstated the true position. Mrs McPherson, as evidenced by her focussing upon statements "on behalf of the Commission" in June, and reinforced by subsequent evidence on behalf of all parties, clearly would not have contemplated the possibility of her speaking or producing documents on behalf of the Commission without approval at any forum whatsoever. Further, even though there was no requirement for her to notify the Commission that she intended to give evidence to the Senate Committee in a private capacity, in fact she did so at the July meeting, as confirmed by the minutes of the August meeting. Her actual evidence before the Select Committee was publicly given in a private capacity.

46. The Committee has every reason to be concerned that, given the knowledge that Mr Dodson possessed, as evidenced by his letter and the response from Mr Bailey, at least one member of the Commission had been informed that Mrs McPherson had given evidence in a private capacity. Given, too, that the uncontradicted evidence is that the motions before the Commission at its meeting of 10-14 October had been prepared before the meeting, it is difficult to contemplate that at least some members of the Commission were not aware that the generally understood prohibition relating to making statements on behalf of the Commission without prior approval had not been breached.

47 The Committee accepts that prior notification that statements are to be made on behalf of an organisation is a reasonable requirement and, as indicated in paragraph 44, in this particular case was a necessary pre-condition to the fulfilment of the requirement specified in the resolution of 23 May that no statements were to be made on behalf of the Commission without the Commissioners' prior approval. Indeed, the Committee, in reaching its findings in relation to terms of reference (1)(a) and (1)(b), has taken the view that, under the circumstances, there was justification for the "new" Commissioners' insistence on prior approval of statements made on behalf of the Commission and Commissioners.

48. The Committee also acknowledges that prior notification, even if only a short time in advance, that statements on matters relevant to an organisation are to be made by a member of that organisation in a private capacity can be a reasonably expected courtesy. Reasons for this include the possibility that other members of the organisation might be placed in a position of having to make a response to such statements.

49. The facts remain, however, that Mrs McPherson had indeed notified the Commission of her intention to appear before the Select Committee, and that the paragraph of the no confidence motion did not in any case reflect with any accuracy the terms of the May resolution. In the first place, given the Committee's findings, and what, from the evidence, must be assumed to be the "new" Commissioners' understanding of the resolution of 23 May, there was no contemplation that prior approval was required for statements made otherwise than on behalf of the Commission or Commissioners. Secondly, as evidenced by the minutes, notification of Mrs McPherson's intention to give evidence was made, despite the fact there was no such requirement. The Committee acknowledges that Mrs McPherson's notification to the "new" Commissioners was in general terms, and was made some six weeks before her appearance before the Select Committee. Nonetheless, the preamble to the paragraph of the resolution of no confidence is wrong in fact. Further, despite the distinction which has been made between statements on behalf of the Commission and statements in a private capacity, it is by no means clear to the Committee that such a distinction was in the minds of the "new" Commissioners.

50. The "new" Commissioners had before them a motion of no confidence which contained a number of elements. The Committee has gained the impression that the motion of no confidence was intended to be as comprehensive as possible and that every possible grievance was included to add force to the Commissioners' concerns. In other words, the paragraph of the motion relating to the giving of evidence before the Select Committee was not included to penalise Mrs McPherson for her actions in relation to the Committee per se, but rather as a weapon in an arsenal to strengthen the case for dissatisfaction with her as the Chairman of the Commission.

51. In determining whether any contempt has been established in the case, the Committee must be satisfied that those who supported the motion had an intention to inflict a penalty or injury upon her "on account of" her giving evidence to the Select Committee.

52 The Committee is also required to "take into account" when determining any question of contempt "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" (paragraph 3(a), Senate Resolutions of 25 February 1988).

53. In coming to its decision the Committee has had particular regard to the general environment in which all persons involved in this matter had been operating since the turbulent events in May 1988. From then on the "new" Commissioners were determined to change the policy of the AEC towards the ATSIIC proposal and were in conflict with the attitude of the Chairman, Mrs McPherson, and the General Manager, Mr O'Brien. This appears to have led to a constant state of suspicion and antagonism relating to the proposed policy changes. It appears that the motion of no confidence was designed to bring these conflicts to a head. As we have observed, every possible grievance was thrown in to add force to the motion.

54. The majority of the Committee have formed the view that the passage of the "no confidence" motion, including the reference to Mrs McPherson's appearance before the Senate Committee, is not sufficient evidence of the required intention. It is only one of six grounds for the motion. It

is based upon a misunderstanding of a motion passed by the Commission on 23 May 1988 and the Commissioners who supported the motion were obviously confused about the circumstances of Mrs McPherson's appearance before the Senate Committee.

55. A minority of the Committee has formed the view that, although a technical breach of privilege was probably committed by those Commissioners who supported the motion, the circumstances in which they did so and the background of conflict and antagonism which had existed on the Commission since the appointment of the "new" Commissioners raised the question whether the Senate should exercise its power to deal with a contempt in the particular circumstance of this case. These members of the Committee have decided that it is not necessary to do so.

56. It is important to note that, when seeking a response from Mrs McPherson and Mr O'Brien to the submissions from the Commissioners, Acting Commissioners and Mr Perkins, the Committee specifically drew attention to a statement in appendix 33 of the joint submission of Mrs McPherson and Mr O'Brien of 2 December 1988 and asked whether Mrs McPherson wished to make a specific allegation about the motion of no confidence in her (see paragraph 24 above). In response, the solicitors for Mrs McPherson stated, as follows: "Our clients do not assume responsibility of specifying charges, particularising those charges, or proving them. Our clients have simply put the relevant facts, as they believe them to be, before the Committee for its consideration and at its request".

57. In the particular circumstances of the case the Committee has concluded that it should not find that a contempt has been committed, and accordingly recommends that, likewise, the Senate should not so find.

In relation to paragraph (1)(d)
(Proposed transfer of Mr O'Brien)

58 The Committee has examined all available material relating to the proposed transfer of Mr Michael O'Brien from his position as General Manager of the ADC. There is little doubt that the antagonism between the "new" Commissioners and Mrs McPherson extended to Mr O'Brien, as chief executive of the organisation. He appears to have been perceived by the "new" Commissioners as part of the "old guard" and not to be trusted. So far as this relates to the question of his appearance before the Select Committee, the "new" Commissioners' resentment reached its height at the 60th meeting of the Commission which took place on 22 July, three days after Mr O'Brien had given evidence before the Select Committee. Mr O'Brien appeared before that Committee after forwarding a written submission purporting to be by the Commission. The Acting Deputy Chairman of the Commission, Mr Dodson, contacted the Chairman of the Committee, Senator McMullan, to advise that the submission had been made without the approval of the Commission as a whole. When Mr O'Brien actually appeared before the Committee, it was agreed that he appear in a private capacity, as the following exchange indicates.

59. At the beginning of Mr O'Brien's evidence the Chairman of the Select Committee asked Mr O'Brien (Hansard, page 68): "Is this, in fact, a submission made by the Aboriginal Development Commission?"

Mr O'Brien replied:

To the extent that it has been formally cleared by the full Board of the Commission, no, it is not ... The Chairman of the Commission, Mrs Shirley

McPherson, has carefully read the document and has authorised its submission to the Committee as a factual and objective account of those events. [Note: the events referred to related to the dismissal of previous Acting Commissioners.] That is the status that it has.

60. The Chairman then said to Mr O'Brien:

It just may be that it would best be formally considered ... as a submission from you, that is, that it is not the submission of the Aboriginal Development Commission, it is Mr O'Brien's submission.

Mr O'Brien replied:

I would be happy about that because it does not contain any of my personal opinions or views ... I am quite happy for those to be provided to the Committee under my name as General Manager of the Commission (emphasis added).

The Chairman later stated that the submission would be "incorporated in Hansard as a submission from Mr O'Brien, who is the General Manager of the Aboriginal Development Commission, but it is his personal submission".

61. The concern expressed during the Commission's meeting on 22 July, as evidenced by the transcript of discussions, was twofold: The general lack of communication between the "new" Commissioners and the Commission administration and the Commissioners' disquiet that evidence had been given on behalf of the Commission without the Commissioners having approved or cleared the evidence. The question of Mr O'Brien's transfer from his position as General Manager did not arise formally until almost three months after the discussion about his evidence.

62. Uncontradicted evidence by Mr O'Brien and Mrs McPherson indicates that the following resolution was produced as one of a set of eight motions (two others of which have been discussed at paragraphs 40 to 57 above) which were considered at an in camera meeting of the Commission on 10 October:

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)

63. The Committee notes the close connection in timing and production between the resolution and the resolutions relating to parliamentary matters. However, none of the evidence given to the Committee indicates that the proposed transfer was caused by Mr O'Brien's giving evidence to the Select Committee. Mrs McPherson's evidence (appendix 33 to the joint submission of 2 December) indicates the other Commissioners' concern about lack of communication and lack of trust. Mrs McPherson also recalls an explanation given by the other Commissioners that they were proposing to transfer Mr O'Brien to a new position because they regarded him "as the most suitably qualified ADC officer to discharge effectively the duties of the newly-created position".

64. This explanation might not have been acceptable were it not for the fact that the Committee had asked the solicitors for Mrs McPherson and Mr O'Brien whether either person wished to make a specific allegation relating to the matters before the Committee and that the solicitors advised that their clients declined so to do (see paragraphs 24 and 56). Further, Mr O'Brien has not given any particulars of conversations or conduct on the part of any Commissioners which link their actions with his evidence before the Select Committee. The Committee therefore concludes that the proposal to transfer Mr O'Brien was not formulated in consequence of his having given evidence before the Select Committee, but rather as part of the broader context of a determination by the "new" Commissioners to transfer him from his pivotal position as chief executive of the Commission.

55. The Committee, therefore, finds that no contempt of the Senate has been committed in respect of the transfer of Mr O'Brien, in that any penalty or injury caused to Mr O'Brien was not inflicted in consequence of his giving evidence to the Select Committee.