

**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**THE SENATE**

**COMMITTEE OF PRIVILEGES**

**POSSIBLE ADVERSE TREATMENT OF  
A WITNESS BEFORE THE  
CORPORATIONS AND SECURITIES COMMITTEE**

**(42ND REPORT)**

**MAY 1993**

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The Senate  
Parliament House  
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## CHAPTER ONE – INTRODUCTION AND BACKGROUND

### Introduction

- 1.1 On 12 October 1992 the following matters were referred to the Committee of Privileges on the motion of Senator Spindler:

Having regard to the report of the Joint Committee on Corporations and Securities entitled *Privilege – Mr James Gaffey*, presented to the Senate on 14 September 1992:

- (a) the circumstances of the laying of charges under the Public Service Act against Mr Gaffey, an officer of the Australian Securities Commission;
- (b) whether any penalty or injury was inflicted on Mr Gaffey in consequence of his giving evidence to the Joint Committee on Corporations and Securities; and
- (c) whether any contempt of Parliament was committed in respect of those matters.

- 1.2 The Parliamentary Joint Committee on Corporations and Securities (henceforth referred to in this report as the CSC) is a statutory committee of the Parliament, established under Part 14 of the *Australian Securities Commission Act 1989*. As such, the CSC is accorded all the privileges and protections of the Parliament, as indicated in section 3 of the *Parliamentary Privileges Act 1987* where "committee" is defined to mean:

- (a) a committee of a House or of both Houses, including a committee of a whole House and a committee established by an Act [emphasis added]; or
- (b) a sub-committee of a committee referred to in paragraph (a).

- 1.3 The terms of reference of the Committee of Privileges' inquiry derived from letters by Senator Spindler and Senator Reid to the Deputy President of the Senate, raising a matter of privilege under standing order 81, which are included at pages 14 to 16 of the *Hansard* transcript tabled with this report. Both letters drew attention to a report of the CSC which had advised the

Senate that a charge had been laid against Mr James Gaffey, at the time an officer of the Australian Securities Commission (ASC), under the Public Service Act on account of evidence Mr Gaffey had given to the CSC, and which reported its opinion that a contempt had been committed.

- 1.4 The letters indicated that, following the report of the CSC, Mr Gaffey had raised certain matters not covered in the report, and Senators Spindler and Reid asked that precedence be given to the matter of privilege. On 8 October 1992 the Deputy President ruled that precedence should be given to the matter. In so determining, the Deputy President made a statement which is included at appendix A to this report, tabled the letters from Senators Spindler and Reid and also tabled a letter from Mr Gaffey to Senator Kemp outlining the matters of concern to him. This letter is at pages 11 and 12 of the *Hansard* transcript.
- 1.5 The specific charge which gave rise to consideration by the CSC of the question of contempt is as follows:

Public Service Act 1922

CHARGE UNDER SECTION 61

Charge F

I, Ronald Claude Trevethan, Regional Commissioner of the Victorian Regional Office, an officer authorised by the Secretary for the purposes of sub-section 61(2) of the *Public Service Act 1922*, being of the opinion that James Matthew Gaffey, Legal 1, of 46 Toolangi Road, Alphington in the State of Victoria may have failed to fulfil his duty as an officer HEREBY CHARGE James Matthew Gaffey with having failed to fulfil his duty as an officer within the meaning of Paragraph 56(d) in that on the 11th day of October 1991 he engaged in improper conduct as an officer. Particulars of the charge are that he made a submission to the Joint Statutory Committee on Corporations and Securities on Section 68(3) of the Australian Securities Commission Act 1989 which was at variance to the submissions made by the representatives of the Chairman of the Australian Securities Commission to the same Committee thereby compromising the integrity of the submission of the Chairman's representatives.

Dated this 18th day of May 1992.

Ronald Claude Trevethan  
Regional Commissioner  
AUTHORIZED OFFICER FOR THE PURPOSES OF  
SUB-SECTION 61(2)  
Australian Securities Commission  
(Transcript, p. 22)

Also laid at the same time was a series of five further charges, all dealing with various intra-office matters. These charges are set out at pages 29 to 33 of the transcript. On 26 May 1992 the Regional Commissioner for Victoria advised Mr Gaffey that charge C, relating to alleged absence from duty, and charge F, concerning the submission to the CSC, had been withdrawn (Transcript, p. 35). No reasons were given in the letter for the withdrawal of those charges.

- 1.6 The CJC reported that Mr Gaffey, who had raised his concerns about charge F with the Chairman of the CSC, Senator Michael Beahan, had perceived when he first contacted the committee that charges A to E were unrelated to charge F (CSC Report, paragraph 17, Transcript p. 9). Mr Gaffey expanded on this to the Committee of Privileges:

What I had said at the time was that, on paper, the charges did not look as if they were connected .... [W]hilst on paper there was no apparent link-up, it certainly was something that I could not rule out. (Transcript, p. 280)

In response to a question from the Chair as to whether his opinion had changed, he went on to say:

Yes; in the sense that it strengthened from being one in which I could not rule out the possibility to one in which the linkage appeared significantly stronger. This took place after considerable thought. (ibid.)

- 1.7 After discussion with the secretary to the CSC, Mr Gaffey forwarded copies of the charges to the committee. The CSC in its report to the Senate indicated that it was "satisfied that Charges A to E are not related to Mr Gaffey's appearance before the Committee" (CSC Report, op.cit.). The Committee at that stage did not make the charges public, as it considered that "it should not intrude on the legitimate internal management responsibilities of the ASC"



(ibid.). The CSC also drew attention to an alleged interception of a *Hansard* transcript of Mr Gaffey's evidence to it, but suggested that while "[i]t is a matter of concern that Mr Gaffey did not receive the Hansard report and was thus denied the opportunity to make corrections to it or make any comments on the evidence taken by the Committee .... the Committee accepts that its receipt by the Regional General Counsel was a matter of normal office practice" (CSC Report, paragraph 22).

- 1.8 Following the tabling of the CSC's report Mr Gaffey drew attention to matters not covered in the report; these matters led to the reference before this Committee, which enjoined it to consider the circumstances of "the laying of charges [emphasis added]" against Mr Gaffey, and the Committee has thus deemed it necessary to consider the laying of all charges as possible contempts.

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## **Conduct of inquiry**

### **(a) Deliberative meetings of Committee**

- 1.9 The Committee of Privileges first met to consider the matter on 15 October 1992. Following that meeting, it contacted the CSC inviting that committee to make any comments in relation to the terms of reference. On 5 November 1992 the Chairman of the CSC, Senator Beahan, responded to the Committee enclosing, under the authority of a resolution of the CSC, "all documents relevant to the Privileges Committee inquiry into the report of the Joint Committee on Corporations and Securities entitled *Privilege – Mr James Gaffey*, presented to the Senate on 14 September, 1992". The documents included the first letter from Mr Gaffey to the CSC drawing attention to the charge relating to giving evidence to the Committee and Senator Beahan's response, together with correspondence between the CSC and the then Chairman of the Australian Securities Commission, Mr Tony Hartnell.
- 1.10 As in previous matters of this nature, the Committee invited both the ASC and Mr Gaffey to make submissions to it; also as with previous cases of this nature, and in accordance with Privilege Resolution 2, the Committee gave each party access to the submissions forwarded to it. This in turn led to further correspondence and submissions. A complete record of all relevant documentation received before the public hearings of the Committee, including the report of the CSC which originally drew the matters to the

attention of the Senate, has been included in the transcript of evidence of 25 March 1993. Further documents and submissions presented to the Committee between and during the two hearings held by the Committee are included in the transcripts of 25 March and 3 April. Documents received since the Committee's public hearings are included in the volume of documents tabled with this report. The purpose of the Committee's doing so is to make available the complete records relating to the matters which it was required to consider, and to obviate any need to outline more than the most salient points of relevance to the Committee's inquiry.

**(b) Public hearings**

1.11 Following its consideration of the material before it, on 15 December 1992 the Committee determined that it should hold a public hearing in Melbourne on 11 February 1993, in order to assist it in considering the following two questions:

1. Whether the action of the Australian Securities Commission or its officers in laying charge F under section 61 of the *Public Service Act 1922* constituted a contempt in that the laying of the charge inflicted a penalty or injury upon Mr James Matthew Gaffey on account of a submission made to and evidence given before the Joint Statutory Committee on Corporations and Securities on 11 October 1991, notwithstanding the subsequent withdrawal of that charge.
2. Whether the action of the Australian Securities Commission or its officers in laying Charges A to E under section 61 of the *Public Service Act 1922* constituted a contempt in that the laying of the charges inflicted a penalty or injury upon Mr James Matthew Gaffey on account of a submission made to and evidence given before the Joint Statutory Committee on Corporations and Securities on 11 October 1991, notwithstanding the withdrawal of charge C.

1.12 On 27 January 1993, the solicitor acting for the ASC in the privilege matter, and in relation to Mr Gaffey's case generally, sought the advice of the Committee as to whether any negotiations for settlement between Mr Gaffey and the ASC would be regarded by the Committee as jeopardising or

interfering with its inquiry. The solicitor was advised that members of the Committee did not see any interference which could be caused by such negotiations.

- 1.13 On 7 February 1993, a general election for the House of Representatives and half the Senate was announced by the Prime Minister; Parliament was prorogued on 8 February, and the House of Representatives was dissolved on that date. While the Committee is empowered to meet and take evidence following prorogation, practical considerations intervened and it was not until 25 March that the Committee was able to convene for the hearing. The Committee met on that day, and again on Saturday, 3 April, to consider the matters.
- 1.14 Before it met on 25 March 1993, the Committee was advised that all outstanding charges against Mr Gaffey had been withdrawn, that a settlement had been reached between the ASC and Mr Gaffey and that Mr Gaffey had resigned from the ASC on 8 February as a condition of settlement.
- 1.15 All persons who appeared before the Committee were represented by counsel, and the Committee permitted examination of each witness, and the making of statements, by counsel if desired. The proceedings basically followed the indicative procedures advised to witnesses and/or their representative, and incorporated in the transcript at pages 266 to 268. The Committee has met to consider the matter on 26 occasions between 15 October 1992 and the tabling of this report.

## **Background**

- 1.16 While the Committee does not intend to canvass the detail of the charges laid and the operations of the Victorian Regional Office (VRO) of the Australian Securities Commission, a brief chronological background is necessary for an understanding of the issues.

### **(a) Establishment and staffing of ASC**

- 1.17 On 1 January 1991 the Australian Securities Commission came into operation. It replaced the National Companies and Securities Commission (NCSC) and State Corporate Affairs Commissions, as a result of agreement between the Commonwealth and the states to establish a national corporations and securities regimen. Mr Gaffey, along with all other non-

Senior Executive Service officers of the NCSC, was appointed to the ASC, in the Victorian Regional Office, of which Mr Ron Trevethan was Regional Commissioner. Between 1 January 1991 and 8 February 1993, when Mr Gaffey resigned from the ASC, he was supervised by a series of five officers at the Legal 2 level. The Legal 2 officers worked in turn to the Regional General Counsel of the VRO, who from 8 July 1991 was Ms Margot (Mardi) Waters. Between January 1991 and Ms Waters' appointment the position was occupied by an acting Regional General Counsel. Both Mr Trevethan and Ms Waters occupy their respective positions at present. For a period from 1 April 1991 till some time in July of that year Mr Gaffey acted as a Legal 2 officer.

**(b) ASC's and Young Lawyers' submissions on derivative use immunity**

- 1.18 The public record discloses that the ASC and its predecessor body, the NCSC, had been concerned about derivative use immunity provisions as early as 1989. The Joint Select Committee on Corporations Legislation reported in April 1989 that the NCSC had given evidence that the then proposed provisions would make "the compulsive powers of the ASC virtually useless" (Report, p. 39, Parliamentary Paper No. 117 of 1989). Nonetheless, the provisions were included by Parliament in the *Australian Securities Commission Act 1989*, the legislation establishing the ASC. In a written response to this Committee's questions, the then Chairman of the ASC, Mr Hartnell, advised that concerns about the question of derivative use immunity, following the establishment of the ASC in 1991, "commenced with an early DPP advice (I believe January 1991) and were debated through the following months up to the deliberations of the Parliamentary Committee [i.e., the CJC]" (Transcript, pp. 179-180).
- 1.19 On 2 August 1991 Mr Gaffey sought and received written approval from Mr Ron Trevethan to participate in the preparation of a submission to the CSC by the Professional Development Committee, Young Lawyers Section, Law Institute of Victoria. Because of the crucial nature of this document, the Committee reproduces it in full:

Ron:

I'm a member of the Professional Development Committee of the Young Lawyers Section of the Law Institute.

The Committee has been invited to make a submission, by August 9, to the Joint Parliamentary Committee on C's & Securities on section 68 ASCA & 597 Corps Law.

The Committee wishes to make a submission & would be grateful for input from most, if not all members.

I do not see any conflict of interest or breach of s 127 ASCA arising from my participation in the submission preparation, particularly as participation by me would take place in my personal capacity rather than in my capacity as an ASC employee.

I would be grateful for your approval of my participation, & understand that such approval, if given, would not be seen to necessarily be an endorsement of the Committee's submission.

[Signed] James Gaffey

It was annotated as follows:

JAMES, Yes, I am happy for you to participate.  
R Trevethan 2/8/91.

- 1.20 As the memorandum indicates, Mr Gaffey advised Mr Trevethan that the submission was to be made by 9 August; in fact, it was not forwarded to the CSC, after being placed before the Law Institute of Victoria on 19 September, until 20 September. Receipt of the submission was acknowledged by the secretary of the CSC on 23 September. During September 1991, there was a lively exchange of correspondence in *The Australian Financial Review* between Mr Stephen Menzies, National Coordinator, Enforcement, of the ASC and other correspondents on the question of derivative use immunity. The view expressed by Mr Menzies in that correspondence was contrary to the submission of the Young Lawyers Section.
- 1.21 On 11 October 1991 Mr Gaffey appeared at a public hearing of the CSC. He told that committee that, although he was a staff member of the Victorian Regional Office of the ASC, he was appearing exclusively as a member of the Young Lawyers Section of the Law Institute of Victoria (Transcript. p. 424). He appeared with another member of the Law Institute, who presented, on behalf of the Institute as a whole, an entirely different submission, which did not make any recommendations on the question of derivative use immunity. Mr

Stephen Menzies and another officer, both from the ASC Chairman's Office in Sydney, appeared before the CSC on that day, to speak to the ASC's submission which was contrary to the position taken by the Young Lawyers.

- 1.22 The Secretary to the CSC sent a proof *Hansard* of Mr Gaffey's evidence to him, with a covering letter, at the Law Institute of Victoria on 23 October 1991; the Law Institute received it on 30 October and forwarded it to Mr Gaffey at the VRO. The documents were received in the office of the Regional General Counsel, Ms Waters, on 31 October. At least one copy of both the covering letter and the evidence was made in the office and was disseminated to others within the VRO. Mr Gaffey has indicated, however, that he did not receive the covering letter or the evidence.
- 1.23 The Committee was advised that all mail, personal or otherwise, was opened in the registry and then forwarded to the office of the Regional General Counsel; if a matter were indicated to be personal and confidential it was folded over, stapled and sent to the relevant officer unread (Transcript, p. 478). All other mail was read by the Regional General Counsel. Mr Gaffey discovered the existence of the *Hansard* only on 21 May 1992, when papers associated with the six charges were forwarded to him (Transcript, p. 303).
- 1.24 The CJC report, comprising a majority and a dissenting report, was tabled in November 1991 (Parliamentary Paper No. 483 of 1991). Legislation, based on the cross-party majority report, was introduced in the House of Representatives on 26 February 1992. Amendments based on the dissenting report, which was made by a government and an opposition member of the CJC, were moved unsuccessfully by the opposition in both Houses of Parliament. The bill passed the House of Representatives on 30 March, and the Senate, with an amendment to enable parliamentary monitoring of the operation of the ASC following the repeal of the derivative use immunity provisions, on 5 May 1992. The House agreed to the amendment on 6 May, and the Act was assented to on 14 May 1992.
- 1.25 The purpose of providing these details is two-fold: first, to indicate that the matter was of some complexity, on which differing views were held by a wide cross-section of persons knowledgeable about the subject; and second, to indicate that the matter was of concern to the ASC until the amendment it had sought was agreed to in May 1992, in other words, throughout the entire period during which difficulties were being identified with Mr Gaffey's performance, culminating in the laying of charges A to F on 18 May 1992.

(c) **Disciplinary action relating to Mr Gaffey**

1.26 On 16 September 1991, Ms Waters and Mr Andrew Freadman, Mr Gaffey's direct supervisor at the time, conducted informal counselling of Mr Gaffey. Also present was Mr Peter Warren, an officer of the Executive Support Office of the VRO as "independent observer and scribe" (Transcript, p. 292). The session was held from 10 a.m. to 12 noon. Ms Waters foreshadowed that a formal counselling session would be held on 19 September at 9.30 a.m. The persons involved in the 16 September session were:

- M: Margot [Mardi] Waters, Regional General Counsel, ASC
- P: Peter Warren, independent observer and scribe, ASC
- J: James Gaffey, Legal 1, ASC
- A: Andrew Freadman, Legal 2, Mr Gaffey's immediate supervisor

1.27 The notes of the meeting indicated that the items to be discussed on that day were to be as follows:

- M. (i) Responsibility to immed. Super A. Freadman then to Mardi,
- Spvsn/Responsibility (i)(a) M responsible for permission for Rec/leave thru A/F. if permission refused not entitled. No question of going higher up.
- (b) Law Inst. Committee permission then should have been sought through M.
- Files (ii) Work outstanding/standard of work.
- (a) Quality of work since M has been at the Commission.

(Transcript, p. 93)

1.28 The informal counselling session was precipitated by the question of leave taken by Mr Gaffey between 9 and 13 September 1991, to attend the Australian Legal Convention in Adelaide. Ms Waters advised the Committee

that in August 1991 she advised all members of the Legal Division, of whom Mr Gaffey was one, that the Division's budget would not allow financial support for staff to attend outside legal conferences and conventions (Transcript, p. 209). Mr Gaffey had earlier sought sponsorship to attend the Adelaide conference (Transcript, p. 512). On Friday, 6 September 1991, when Ms Waters was away from Melbourne, Mr Gaffey applied to Mr Trevethan for recreation leave from 9 to 13 September. Mr Trevethan did not sign the leave form. Ms Waters advised the Committee that "Mr Gaffey then left an application for recreation leave with [her] secretary, with a note asking [her] to delay processing it" (Transcript, p. 210). Mr Trevethan, who attended the Legal Convention on 10 September, stated that, on his return to Melbourne on 11 September, he told Ms Waters that Mr Gaffey had gone to the Convention, even though he [Mr Trevethan] had refused Mr Gaffey leave (Transcript, p. 190). Ms Waters stated that she "discovered, on Mr Gaffey's return to duty on 16 September, that he had been attending the Australian Legal Convention in Adelaide" (Transcript, p. 210).

- 1.29 It is clear that Mr Trevethan did not sign the form. The reasons for his not doing so are more obscure: Mr Gaffey has stated that this was because Mr Trevethan was advised by Mr Bob Cafarella, Director, Executive Support, in the Victorian Regional Office, that Mr Andrew Freadman, his immediate supervisor, had the delegation to approve the leave – which in fact he did not (Transcript, p. 524). Ms Waters, on the other hand, was under the impression that the reason for refusal was that the request must go through her (Transcript, p. 210). Mr Trevethan's written statement indicates only that he refused to approve the leave application on Mr Cafarella's advice (Transcript, p. 200) although in oral evidence he advised that Mr Cafarella thought it was most improper for Mr Trevethan to approve leave without its going through the Regional General Counsel (Transcript, p. 352).
- 1.30 Counsel for the ASC introduced into evidence two memoranda, one of which, from Mr Trevethan dated 27 September 1991, appears from the evidence to have been intended as a response to the other (Transcript, pp. 511-513), purporting to deny permission supposedly sought in a memorandum from Mr Gaffey of 18 September retrospectively to attend the Adelaide conference. Mr Trevethan's document, in which he indicates he is responding to Mr Gaffey in the absence of Ms Waters, is headed "APPLICATION TO ATTEND LEGAL CONVENTION ON COMMISSION TIME". The memorandum of that title, from Mr Gaffey to Ms Waters, is dated 19 September. This memorandum seeks retrospective approval of Mr Gaffey's attendance at the



Convention as work related for the purposes of exemption from the requirement for Mr Gaffey to have taken recreation leave for three of the five days he was away from the office.

1.31 The Committee notes that the only question which should have been at issue at the time Mr Gaffey sought leave was whether he should be granted recreation leave, or refused the leave on workload grounds: the purposes for which it was sought were irrelevant to the question of granting and refusing leave. Whatever the complications surrounding the matter, however, Ms Waters clearly had the impression that Mr Gaffey was absent without official leave for the week in question, and the informal counselling session of 16 September 1991 proceeded with the question of absence from work without leave as one of the items discussed (Transcript, pp. 94, 211).

1.32 Following this session, the question of formal counselling on 19 September was not pursued. It appears from the 10 page record of 16 September that the matters of concern at that time were resolved at that meeting. The following two exchanges were recorded:

P. If independent record to be kept, formal procedures.

J. Would be grateful if things could be sorted out informally.

M. Happy for preliminary interview with no record keeping but would prefer record kept that all agreed on.

Would like working relationship to improve.

J. I would like that too. Strategies for the future would like no record kept. If Thursday is not necessary, no record kept.

M. Go ahead now, with no record kept?

J. Agreed.

1.33 The last page includes the following:

J. Appreciates the opportunity to work through Andrew.

M. Do you agree that it is only fair that you give notice when taking R/L and go through the proper channels.

J. Once again emergencies of a private nature. My son ill etc. Like to apologies (sic) for what has arisen over my attendance at the Convention.

Gives undertaking that won't happen in future. Would take peoples feelings into account more.

Welcome Andrew's supervision. Will be working hard on the outstanding files to get them in line. Has worked hard during time with the ASC, without a lot of direction.

M. Doesn't want to pursue anything further on Thursday.

J. Would be grateful if nothing further is taken from this interview. Naturally would have preferred for it not to have occurred.

M. Would like to put this behind us and work together in a completely new and different relationship. (M and J shook hands)

Meeting closed approx 12:00.

1.34 Page 7 records the following exchange:

M. Prior to arriving doesn't appear to have been any supervision. Branch suffers. Most times matters should be taken through L2's, should not be side stepped. Raised sitting on Law Institute C/ttee with M in Tea Room. Instructed to see Andrew.

J. Research paper in Tea Room.

M. ...Law Institute C/ttee should have L2 or more senior person should be on the C/ttee. You then went to Ron Trevethan and requested to be on the C/ttee.

- M. Matters extremely political. M. expects flak from Chairman.
- J. Can nominate for whatever Law Institute C/tee he chooses. Doesn't think he should be restricted by the Commission.
- M. Fine if you choose/select with discretion. Told you couldn't sit on the committee.
- J. No response on that matter. That's why he went to Ron. Went to him with a written request seeking his blessing to participate on the C/tee. Clear understanding.
- M. Note from Andrew that you shouldn't attend. To choose to participate on the C/tee showed a lack of judgement on J behalf.
- J. Law Institute has not yet formed an opinion. Surprised.
- M. Big Issue. 1st go to L2 to get blessing, then without checking you went straight to Ron. Andrew then stated not without M. permission. Raised it with Ron.

1.35 The full record of the exchanges between Mr Gaffey and other participants in the informal counselling session is at pp. 93-102 of the transcript. The notes of this informal counselling session were not, however, made available to Mr Gaffey until 27 February 1992 and Mr Gaffey does not accept them as a "perfect transcript of what took place at the meeting" (Transcript, p. 293).

1.36 After another six weeks of working under the supervision of Mr Freadman, Mr Gaffey was transferred to the supervision of Ms Anne Dalton, for whom he worked from 12 November 1991 to either 9 or 12 March 1992 [see later in this paragraph]. On 25 February 1992 Ms Dalton wrote a memorandum to Ms Waters, which was scathing of Mr Gaffey's performance while under her supervision, and which asked that he be removed from her supervision (Transcript, p. 222). Advice on 11 October 1992 to the Committee from the ASC indicated that Mr Gaffey was removed from Ms Dalton's supervision on 9 March, and was transferred to Mr Gotlib's supervision on 10 March. Subsequent statements by Mr Trevethan and Ms Waters indicated that the

transfer was not to take effect until 16 March (Transcript, pp. 191-2, paragraph 10 and p. 212, paragraph 16). On 12 March, an incident occurred, involving Ms Dalton and Mr Gaffey, which resulted in Mr Trevethan's directing Mr Gaffey to leave Ms Dalton's team immediately (Transcript, p. 193, paragraph 16 and p. 213, paragraph 20). When giving this direction, Mr Trevethan told Mr Gaffey that he would be required to attend a formal counselling session under section 61(2)(a) of the Public Service Act on 13 March 1992 (Transcript, p. 213, paragraph 20).

- 1.37 Mr Gaffey was on sick leave from 13 March to 1 April 1992 (Transcript, p. 561) and the formal counselling session was postponed until his return to duty. On 16 April, Mr Trevethan wrote to Mr Gaffey giving notice of a formal counselling session to be held on 11 May. In the succeeding three weeks Mr Gaffey sought statements of reasons under the *Administrative Decisions (Judicial Review) Act 1977* in relation to Mr Trevethan's action. Mr Trevethan rejected the requests. On 7 and 8 May 1992 Mr Trevethan confirmed that he proposed to proceed with the formal counselling scheduled for 11 May. On 11 May, at the scheduled time, Mr Trevethan was advised that Mr Gaffey would not attend the counselling session on that day, as neither of his union representatives was able to attend at that time.
- 1.38 On 14 May, Mr Trevethan determined to lay charges of misconduct and instructed Ms Waters to prepare the charges with advice from the Australian Government Solicitor's Office in Melbourne. Details of the negotiations with the AGS may be found in the transcript at p. 200, paragraph 35 and pp. 215 to 217, paragraphs 27 to 31.
- 1.39 The Committee discusses the charges and their privilege implications in Chapter 2 and states its findings and recommendations in Chapter 3. In accordance with paragraph 2(10) of the Privilege Resolutions, the Committee, having determined on 20 May 1993 the findings in similar terms to those at paragraph 3.7 to be included in its report, acquainted Mr Julian Riekert, of Arthur Robinson and Hedderwicks, as the solicitor representing the ASC, of the findings and made available a background paper which forms the basis of this report. The ASC responded promptly in writing to matters in the report, and its submission, of 24 May 1993, is included at page 101 of the volume of documents tabled with this report. The comments made on behalf of the ASC have been taken into account in the report's finalisation.



## CHAPTER 2 – ISSUES FOR DETERMINATION

### Possible contempts involved

- 2.1 The Committee considered that the matters it was required to examine fell within the following categories which may be treated as contempts, as outlined in the non-exhaustive list included as Resolution 6 of the Privilege Resolutions of 25 February 1988:

#### **Interference with the Senate**

- 6.(1) A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a Senator of the Senator's duties as a Senator.

#### **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.

### **Criteria under Privilege Resolution**

- 2.2. As with all matters which the Committee has been required to consider, the Committee took into account the criteria laid down in Privilege Resolution 3, 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.

2.3 The nature of the possible offences, that is, possible interference with a parliamentary committee and molestation of a witness, was such that the Committee had no difficulty in establishing that criterion 3(a) was met. Similarly, the Committee concluded that there was no other readily available remedy, thereby satisfying itself that criterion 3(b) was fulfilled.

2.4 In respect of criterion 3(c) the Committee has previously made the point that only in the most exceptional circumstances should it contemplate making a finding of contempt in the absence of any intention on the part of a person or persons to commit any act which may be held to be in contempt. As the Committee has done in previous reports, the Committee again emphasises that, in matters of this kind, it is not bound to take a narrow course in the interpretation of these criteria but can exercise discretion in applying the criteria to the circumstances of individual cases.

2.5 As a general principle, the Committee accepts that the damage to the Senate and its committees resulting from such acts would need to be of the most serious kind in order for the Committee to find that a contempt had been committed in the absence of intent. The Committee has judged that serious damage of such magnitude did not occur. Accordingly, as with other cases, it determined that strict liability was not applicable and decided that both paragraphs (i) and (ii) of criterion 3(c) should be applied in the present circumstances.

2.6 In the course of its hearings on 25 March and 3 April 1993, the Committee asked the lawyers representing the ASC and Mr Gaffey to make submissions on the question whether intention means intention to perform the act which may be a contempt, or intention to commit a contempt; the Committee has taken these submissions into account in the preparation of this report.

- 2.7 Briefly, submissions from both the ASC and Mr Gaffey acknowledged that the matter for determination was intention to commit the act, rather than to commit a contempt, a conclusion which the Committee had reached as the result of deliberations during its first major inquiry under the Privilege Resolutions, as reported in its 18th Report (Parliamentary Paper No. 461 of 1989) and associated documents.
- 2.8 The Committee appreciated the assistance provided by the commentary in the submissions on a number of legal matters. These submissions are published at pp. 27, 67, 99 and 101 in the accompanying volume of documents. The Committee acknowledges that the comments on the question of contempt are useful additions to the body of knowledge on the subject, and specifically draws the attention of the Senate to the four documents.

### **Questions for determination**

- 2.9 The essential element of any possible offences of contempt is stated in section 4 of the *Parliamentary Privileges Act 1987*, as follows:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

- 2.10 Because parliamentary committees are dependent upon their capacity to receive evidence freely, without any attempts at prevention of, or recrimination against, a witness in respect of evidence given or to be given, any interference with witnesses, or injury or penalty inflicted, on account of their giving evidence is always taken seriously by a House of the Parliament. It is not necessary to demonstrate in these cases that any damage to a particular committee resulted from attempted interference, injury or penalty inflicted upon a witness in a given case. Rather, it is the tendency to affect the operations of all committees of the Parliament which is at issue, because if interference, penalty or injury is imposed with impunity the capacity of all committees to exercise their authority or functions would be seriously undermined. It is the duty of a House of Parliament to give protection to its witnesses, and thus any possibility of interference with or molestation of witnesses must be examined and determined.



2.11 In the present case, all six charges, that is charges A to F, were based on Mr Gaffey's alleged failure to fulfil his duty as an officer under various paragraphs of section 56 of the Public Service Act. The question for the Committee was whether the laying of any or all of the charges could be regarded as constituting contempt in that such actions penalised or injured Mr Gaffey on account of evidence he gave before the CJC. If so, this could constitute interference with the authority of committees and molestation of a witness under paragraphs 6(1) and 6(11) of the Privilege Resolutions. Charge F, quoted at paragraph 1.5, clearly asserted that there was a causal relationship between Mr Gaffey's giving evidence and the laying of the charge. Charges A to E, on the other hand, did not provide evidence of such a direct connection. The Committee's task in this case, therefore, was to establish whether the charges were laid as a consequence of his giving evidence to the CSC. Accordingly, the Committee formulated the two questions specified in paragraph 1.11.

2.12 The matters for the Committee to determine were thus grave, and the exhaustive inquiry it has undertaken indicates the Committee's commitment to ensuring that any possible improper interference with or molestation of witnesses is appropriately investigated and, if necessary, punished.

### **Responsibility for actions**

2.13 Before making a finding on whether any offences had occurred, the Committee decided to establish where the responsibility lay for the actions which led to its consideration of the matters. The Committee was assisted considerably in this task by the present Chairman of the Australian Securities Commission, Mr Alan Cameron, who on behalf of the Commission accepted responsibility for the actions of Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional General Counsel, Victorian Regional Office, as "the senior officers of the Commission who were directly involved in the laying of charge F" (Transcript. p. 187).

2.14 In its final submission of 24 May 1993 in response to the Committee's findings determined on 20 May, the ASC submitted that, if a contempt were to be found by the Committee, the contempt should be laid at the feet of the Australian Securities Commission alone. The reasons for this view are set out at paragraphs 17 to 23 of that submission (volume of documents, pp. 104-6). They include:

- (a) the corporate responsibility of the ASC for the actions of its officers;
- (b) that several senior officers "contributed to the decision to lay the charge"; and
- (c) the failure of the ASC to "develop among its senior management, an understanding of parliamentary privilege and the position of witnesses before committees of Parliament".

2.15 The Committee of Privileges has had cause in the past to consider the question of corporate and individual responsibility when determining matters before it. This is the first time, however, when it has made a decision, at least partly on the basis of submissions put before it, to join an authority in the responsibility for the actions of its officers. Its conclusions about where the responsibility lies are expressed in its conclusions at paragraphs 2.34 and 2.35, and its findings at paragraph 3.7. These conclusions take into account the final submissions of the ASC on the Commission's behalf and on behalf of the two officers "directly involved in the laying of the charges" (Transcript, p. 187), Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional General Counsel, Victorian Regional Office.

2.16 The Committee has drawn attention at paragraph 2.14 to the comment in the submission by the ASC of 24 May 1993 that several other senior officers "contributed to the decision to lay the charge". The Committee notes that this, in the final submission to the Committee, following access to the Committee's background paper and its findings of 20 May 1993, was the ASC's first attempt to spread the responsibility for laying the charges further than what the ASC had referred to as the two officers "directly involved" and the Commission itself. The Committee considered that this attempt lacked sufficient weight to change its views on where responsibility lay for the matters before it.

2.17 The Committee takes the opportunity provided by Mr Cameron's acceptance of corporate responsibility for the actions of the two officers to acknowledge the appropriateness of his decision that the battle between Mr Gaffey and his senior supervisors at the Victorian Regional Office could not have continued without resolution any longer. The Committee accepts that, by the time Mr Cameron determined on a settlement with Mr Gaffey which was finally reached on 8 February 1993, too much emotional and monetary capital had been invested by all concerned, and thus that some solution needed to be

found. It is clear that, leaving aside the charge which gave rise to the matter of privilege, officers within the Victorian Regional Office had at least left themselves open to criticism of their inept personnel and management practices and inadequate record-keeping. Under these circumstances, mediation and negotiation between the parties, leading to an ultimate solution of the dispute, was a sensible way out of the impasse. It should always be remembered, however, that these matters involve the use of public resources, and it is thus of concern that no solution had been arrived at before Mr Cameron resolved the issue. The Committee places on record its appreciation of Mr Cameron's appearing personally to speak to his statement and to deliver orally a further corporate apology for actions in which he had not been involved. The Committee is confident, like Mr Cameron, that "there will be no repetition of this unfortunate event" (Transcript, p. 187).

(a) **Charge F**

● **Intent**

2.18 In relation to charge F, the Committee concentrated on the question of the intent of the persons who laid the charges. Several sections of the early ASC submissions turned out to be at variance with what actually occurred. It is clear, for example, that Mr Hartnell, the then Chairman of the ASC, did not know of the existence of the note from Mr Gaffey to Mr Trevethan, and Mr Trevethan's approval (Transcript, p. 444). His letter of 11 June 1992 to Senator Beahan, the Chairman of the CSC, includes the following:

"...[T]he specific aspects of concern to his supervisors had been the fact that he had told no-one in the ASC of his involvement with the submission (emphasis added), his views or his proposed appearance despite the fact that it concerned a matter fundamentally related to his work."  
(Transcript, p. 43)

2.19 A copy of the note quoted at paragraph 1.19 was attached to Mr Gaffey's letter to Senator Kemp, tabled in the Senate on 8 October 1992 when the President gave precedence to the privilege notice of motion. Notwithstanding the availability of the letter at that stage, the ASC in its submission of 17 November 1992 to this Committee included the following statement:

"Mr Gaffey's conduct in making a submission to the Joint Committee, without having the courtesy to inform his

managers of his intention to do so, was wrongly and, with the benefit of hindsight, unjustifiably, seen as a continuation of his prior conduct which led to his unauthorised attendance at the Australian Legal Convention in September 1991. It accepts that, at most, it amounted to a discourtesy."

(Transcript, p. 74)

- 2.20 In relation to the photocopied note tabled on 8 October 1992, the submission included the following:

Mr Trevethan does not deny giving Mr Gaffey permission to work on the Young Lawyers' Group submission but the ASC reserves its position on whether this permission was oral or written until it has sighted the original of this document. There is no copy of the document concerned on the ASC files (Transcript, p. 76).

By the time of the Committee's hearings in March and April 1993, the ASC and its officers seemed to have accepted the note and Mr Trevethan's annotation as genuine. In explaining his belated acknowledgment of the existence of the note Mr Trevethan advised the Committee that he had no recollection of it (Transcript, p. 445).

- 2.21 The Committee acknowledges that the note was informal and handwritten, and that Mr Trevethan apparently did not keep a copy. It points out, however, that, as discussed in paragraph 2.29, permission should not have been necessary unless Mr Gaffey intended to prepare the submission during working hours, or any conflict with statutory requirements was involved.
- 2.22 Both Mr Trevethan and Ms Waters gave evidence that the first time that they became aware that Mr Gaffey had attended the hearing of the CSC to speak to the submission on 11 October 1991 was some time in the week following his appearance, when Mr Stephen Menzies mentioned to Ms Waters the fact of Mr Gaffey's having given such evidence, and indicated that it was in conflict with the ASC's views (Transcript, p. 191, p. 211 paragraphs 13,14 p. 476). When the proof *Hansard* was received in the office of the Regional General Counsel she read it and distributed it to other officers. The *Hansard* reinforced Mr Menzies' account that Mr Gaffey had given evidence which was contrary to the submission of the ASC.

2.23 The charge in relation to his giving evidence was not laid until 18 May 1992. In evidence to the Committee Ms Waters stated that her "particular concern here was his failure to consult with, advise or warn his supervisors before he attended the Joint Statutory Committee's hearing" (Transcript, p. 216, para. 29).

2.24 The matter which the Committee is required to consider in relation to this charge was whether there was an intention on the part of the ASC officers to penalise Mr Gaffey for having given evidence. The particulars of the charge, as set out in paragraph 1.5 (Transcript, p. 22), are that:

"...he [Mr Gaffey] made a submission to the Joint Statutory Committee on Corporations and Securities on Section 68(3) of the Australian Securities Commission Act 1989 which was at variance to the submissions made by the representatives of the Chairman of the Australian Securities Commission to the same Committee thereby compromising the integrity of the submission of the Chairman's representatives."

2.25 Several explanations were given as to the reasons for and purpose of the laying of the charge. These may be summarised as follows:

- That Mr Gaffey was discourteous in proceeding to participate in the Law Institute's activities without the knowledge of his supervisors (Transcript, p. 74)
- That public participation, as distinct from a "behind closed doors" contribution, in a process when the views held are in conflict with those of the organisation of which a person is an officer is inappropriate (Transcript, pp. 342, 348-9).
- That Mr Gaffey had by-passed his immediate supervisors in seeking the approval of the Regional Commissioner to participate in the preparation of the submission (Transcript, p. 209).
- That his participation in the Law Institute Committee might interfere with his fulfilment of his office workload (ibid.).
- Doubts as to his judgment or discretion to "represent the Legal Division" (of the VRO) on a Law Institute Committee (ibid.).

- That this charge was merely an addition to a package of charges relating to general misconduct of Mr Gaffey. This point is discussed in the analysis of the laying of charges A to E below.

2.26 Four of the first five explanations are not compatible with the terms of the charge actually laid, which stresses the content of the evidence, not the act of giving it. As to the second explanation, the Committee points out that the terms of the charge would have been inappropriate regardless of the forum in which Mr Gaffey was expressing his views. The *Guidelines on Official Conduct of Commonwealth Public Servants* to which reference is made in the course of proceedings (see, e.g., Transcript, p. 204) include the following statement:

A democratic society places a high value on open and participative community involvement in political and social issues, and thus the [then Public Service] Board recognises the right of public servants as members of the community to make public comment and enter into public debate on such issues. Reasoned public discussion on the factual technical background to policies and administration can lead to better public understanding of the processes and objectives of government... (Transcript, p. 206)

2.27 The officers concerned have indicated in evidence before this Committee that they were not aware of the details of Mr Gaffey's activities, and nor were they concerned about the content of the submission, until at least the week after his appearance before the CSC on 11 October 1991. Mr Gaffey, too, acknowledges that he had not told Ms Waters about the content (Transcript, p. 277). The Committee draws attention, however, to the following extract from the notes of the informal counselling session held on 16 September:

M. ....Law Institute C/tee should have L2 or more senior person should be on the C/tee. You then went to Ron Trevethan and requested to be on the C/tee.

M. Matters extremely political. M. expects flak from Chairman.

J. Can nominate for whatever Law Institute C/tee he chooses. Doesn't think he should be restricted by the Commission.

M. Fine if you chose/select with discretion.  
Told you couldn't sit on the committee.  
(Transcript, p. 9)

- 2.28 Various explanations of what was understood by the record of that exchange were given in the course of the hearings. The Committee cannot be conclusive about what was intended. Some members have concluded that it is possible that the officers concerned had at least a suspicion that the views proposed by the Young Lawyers Section might not be consonant with the ASC views. Thus, these members considered that the matters discussed at the meeting of 16 September 1991 were likely to have been predicated on such a suspicion, giving rise to concern about Mr Gaffey's participation. Other members have concluded that at the time of that meeting the Young Lawyers' attitude was not known, but that Mr Gaffey's participation in the submission caused some degree of anxiety in view of the Chairman's well-known views on the issue.
- 2.29 The Committee has noted evidence that Mr Gaffey was a member of the Litigation Section of the Law Institute, as well as the Professional Development Committee of the Young Lawyers Section which was dealing with the derivative use immunity question (Transcript, p. 108). It appears that no objections were raised either at the 16 September meeting or subsequently concerning his participation on the Litigation Committee. Nor should there have been, in either case. It must be emphasised that in each case Mr Gaffey was participating in a private capacity in a professional association. Once he had satisfied both himself and, in relation to the derivative use immunity submission, the head of the Victorian Regional Office that there was no conflict between his participation and the Act by which he was bound, any question of approval of his participation should not have arisen. The Committee affirms that all public servants have the civil right to participate in matters of community interest provided that their private participation is not in conflict with statutory obligations.
- 2.30 It is clear that, whatever the state of knowledge of the officers on 16 September, their apprehension that some difficulty might be caused was soon justified. Evidence indicates that the displeasure of the Central Office was conveyed to the Victorian Regional Office, during a telephone call from Mr Stephen Menzies to Ms Waters. Mr Menzies informed her that Mr Gaffey had given oral evidence to the CSC on 11 October, contradicting the ASC's official position. It is equally clear from the evidence that neither Mr Trevethan nor Ms Waters knew of Mr Gaffey's appearance before the CSC

until Mr Menzies' phone call to Ms Waters (Transcript, pp. 191, 476). It is not surprising that, particularly in the light of what was perceived to be a rebuke, both Ms Waters and Mr Trevethan should have been concerned about both the content of the submission and the fact that Mr Gaffey had given public evidence which contradicted the official ASC position without their knowledge, ironically on the same day that ASC officers had appeared. The Committee points out, however, that charge F was not concerned with Mr Gaffey's appearance before the CSC as such, but with the "variance" to the submissions made by the ASC, "thereby compromising the integrity of the submission of the Chairman's representatives".

- **Laying of charge F as penalty**

- 2.31 The final submission of the ASC, relating to the Committee's findings, draws attention to the question whether the laying of a charge in itself inflicts a penalty or injury on a person. The submission reiterates previous evidence that the charge was in place for only eight days, from 18 May to 26 May 1992, when Mr Trevethan withdrew it when apprised by the then Chairman of the ASC, Mr Tony Hartnell, that a question of contempt might be involved. The Committee also notes that the stated intention of Mr Trevethan in laying this and the other charges was to bring an independent person in to attempt resolution of the management problem that Mr Trevethan perceived Mr Gaffey as causing (Transcript, p. 199).
- 2.32 The Committee, while taking these comments into account, believes that even being charged can represent a penalty upon a person. This is because of the personal stress which can arise from being a "charged person", and because the fact of its being laid can be professionally damaging when it becomes known to that person's colleagues and other officers within the organisation for which he or she works. In addition, the process involved in defending a charge causes considerable stress for the person concerned. Regardless of whether a charge is withdrawn soon after being laid, as in the present case, or whether it is subsequently found to be justified or unjustified after the processes of hearing the charge are completed, the consequence is the same: a penalty, of a greater or lesser order, is imposed upon the person. In this context, the Committee notes that the experience undergone by the persons associated with the matter referred to it - both the person against whom charge F was laid, and the ASC officers who were directly involved in laying the charge - has not been pleasant (see, e.g., Transcript, pp 362-3).



2.33 The Committee observes that charge F was withdrawn, not because of any concern that any penalty or injury might be or was being inflicted on Mr Gaffey, but because of a warning from the CSC that a question of contempt, with the potential attendant penalty on the ASC or officers concerned, might be in issue.

#### **Conclusions in respect of charge F**

2.34 The Committee has pointed out in paragraph 2.10 that inflicting a penalty on a witness on account of evidence given before a parliamentary committee has a tendency to interfere with the free exercise by committees of their authority. The Committee has examined in this light the laying of charge F against Mr James Matthew Gaffey for having given evidence in a private capacity before the Parliamentary Joint Committee on Corporations and Securities which was "at variance to submissions made by the representatives of the Chairman of the Australian Securities Commission". While the operations of the Parliamentary Joint Committee on Corporations and Securities were not affected in the present instance, the Committee is required to secure the integrity of other committee operations. The Committee has concluded that the Australian Securities Commission, as the body responsible for the actions of the two officers directly involved, and these officers, Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional General Counsel, Victorian Regional Office, have taken action which constituted a contempt, in that the laying of charge F could deter other witnesses from appearing before other committees. That the effects of laying the charge are unlikely to be serious is because of the action taken by the Parliamentary Joint Committee on Corporations and Securities, by Senators responding to matters raised by Mr Gaffey after that Committee's report was tabled, by the Senate in referring the matters to this Committee, and by the Committee of Privileges in undertaking this inquiry and reaching the present conclusions.

2.35 The matter of utmost concern to this Committee in this case, however, is its obligation, and that of the Senate, to ensure the protection of Mr Gaffey as a witness before the Parliamentary Joint Committee on Corporations and Securities. The Committee has concluded that the Australian Securities Commission, as the body responsible for the actions of the two officers directly involved in laying charge F, and these officers, Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional

General Counsel, Victorian Regional Office, intended to and did lay a charge against Mr James Matthew Gaffey for having given evidence in a private capacity before the Parliamentary Joint Committee on Corporations and Securities which was "at variance to submissions made by the representatives of the Chairman of the Australian Securities Commission"; and that the charge had the effect of penalising Mr Gaffey for having given evidence in a private capacity to that Committee.

2.36 The Committee of Privileges has therefore concluded that a contempt has been committed by the Australian Securities Commission, as the body responsible for the actions of the two officers in laying charge F, and these officers, Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional General Counsel, Victorian Regional Office, in laying charge F.

**(b) Charges A to E**

● **Charge C**

2.37 Charges A to E were all concerned with internal management matters. Evidence has been given by the ASC and Ms Waters that the first informal counselling session, held on 16 September 1991, which was the first official sign of discontent and was subsequently used as a basis for further attempted formal counselling, was, as indicated in paragraph 1.25, precipitated by a claim that Mr Gaffey had been absent without permission for the week from 9 to 13 September 1991 (Transcript, pp. 40, 210). This absence formed the basis of charge C. As stated at paragraph 1.5, on 26 May 1992 Mr Trevethan advised Mr Gaffey by letter he had withdrawn both this charge and charge F, with no reasons given in the letter for the withdrawal (Transcript, p. 35).

2.38 The ASC advised the Committee that charge C was withdrawn because the officer in the Chairman's office, Mr Ian Cameron, who had been appointed to hear the charges had advised that this charge would not succeed because Mr Gaffey had been granted retrospective leave for the week in question before the charge was laid (Transcript, p. 201). Mr Gaffey gave evidence that he had received such permission prospectively (Transcript, p. 508). The only reason for Mr Trevethan's failure to sign the leave form was, according to Mr Gaffey, that Mr Trevethan was advised by Mr R. Cafarella, Director, Executive Support in the Victorian Regional Office, that Mr Gaffey's supervisor, Mr

Andrew Freadman, a Legal 2 officer, had the delegation to do so. According to Mr Gaffey's evidence Mr Freadman had indicated, accurately as it turned out, that he did not have such a delegation, but that he had no objection to Mr Gaffey's taking leave (Transcript, p. 524). Ms Waters, the officer who had the delegation, was absent from Melbourne on 6 September, the day on which Mr Gaffey sought leave from Mr Trevethan. Also according to Mr Gaffey's evidence, the form was not signed on that day solely because Mr Freadman had been correct in his assumption that he did not have the delegation, and the form, with the oral approval of Mr Trevethan and the written acquiescence of Mr Freadman, was left for Ms Waters (ibid).

2.39 In leaving the form which Mr Freadman had initialled with Ms Waters' secretary, Mr Gaffey attached a note to Ms Waters requesting that she not sign it until his return. The sequence of events which followed is described at paragraphs 1.28 to 1.31. Whatever the truth about the question of leave, Ms Waters' perception, and Mr Trevethan's conviction, that Mr Gaffey had not received approval justified in their minds the laying of the charge.

● **Remaining charges**

2.40 All other charges related to incidents early in 1992, when Mr Gaffey was under the supervision of Ms Dalton, with the exception of charge D which alleged that Mr Gaffey failed to fulfil his duty as an officer

"in that between the dates of 8 July 1991 and 12 March 1992 he was inefficient for reasons or causes within his own control. Particulars of the charge are that he failed to provide work in a timely manner at a level to be expected of a Legal 1 officer of his experience."  
(Transcript, p. 49)

Ms Waters commenced duty as Regional General Counsel of the ASC on 8 July 1991. By the time the charges were laid on 18 May 1992, Mr Gaffey had been working for two months under the supervision of another Legal 2 officer (Transcript, p. 114) who subsequently, in September and December 1992, rated him very highly (a ranking of 4 out of 5) in the formal performance evaluation process (Transcript, p. 253).

2.41 The ASC's original submission to the CSC, and its first submission to this Committee, both included the statement that "Mr Gaffey's performance has been of concern to his supervisors since he joined the ASC on its

establishment on January 1991" (Transcript, p. 40), although no examples of their disquiet at the time were given to either Committee. Each submission also indicated that Mr Gaffey apparently misled Ms Waters in July 1991, subsequently identified by Ms Waters as 23 July, by giving her certain advice which led her to agree to an action in the Family Court which, following her receipt of further information, was subsequently withdrawn (Transcript, p. 208).

- 2.42 In other evidence, Mr Trevethan, and the ASC, suggested that difficulties with Mr Gaffey were long-standing: in evidence to the Committee Mr Trevethan indicated that he had had reason to be wary of Mr Gaffey following an incident in late 1989 or early 1990 (Transcript, p. 189), identified in Mr Trevethan's oral evidence as May and June 1990 (Transcript, p. 341), which led him to have a poor opinion of Mr Gaffey's work. He indicated that he had been disarmed by the high opinion of Mr Gaffey held by the Acting Regional General Counsel, a lawyer in private practice who acted in that position from 1 January to 30 June 1991 (Transcript, p.341) until it was permanently filled by Ms Waters. This opinion appears to have reassured Mr Trevethan, who set aside his misgivings until matters came to a head on 11 and 12 March 1992. Mr Trevethan indicated to the Committee that he felt obliged to act at that stage in order to assert his authority as head of the Victorian Regional Office of the ASC (Transcript, p. 199).
- 2.43 After what was regarded by Mr Trevethan, Ms Waters and Ms Anne Dalton, Mr Gaffey's direct supervisor at the time, as a most unpleasant incident on 12 March (see, e.g., Transcript, pp. 191, 343), it was agreed that action should be taken formally to counsel Mr Gaffey, and in the context of that counselling the matters raised at the informal counselling session in September 1991 were placed on the agenda for discussion. According to the evidence, Mr Gaffey had been placed under the supervision of Ms Dalton in November 1991, following a request from his then supervisor, Mr Freadman, that Mr Gaffey be transferred. Ms Dalton was regarded by senior management as an excellent and sympathetic manager who had the capacity to bring out the best in staff who were perceived as causing difficulty (Transcript, p. 482).
- 2.44 By the time of the incident on 12 March 1992, however, Ms Dalton had already placed on record a complaint concerning Mr Gaffey. This complaint, dated 25 February 1992, was, contrary to normal public service practice, placed on Mr Gaffey's personal file without his knowledge. He discovered its existence for the first time on 21 May 1992, three days after charges A to F were laid (Transcript, pp. 515-6). It is also noteworthy that he discovered the

existence of the written record of the September informal counselling session on 27 February 1992, despite the fact that, according to the independent record of discussion, it had been agreed that no record should be kept of that informal discussion (see paragraph 1.32).

2.45 Mr Gaffey has placed on the record throughout this inquiry his denials of the detail of the all the management-based charges, including charge C which was withdrawn at the same time as charge F. For example, in evidence explaining the discomfiture caused to Ms Waters as a newly arrived officer about the incident on 23 July 1991 which gave rise to Ms Waters' concerns about his reliability and judgment, Mr Gaffey suggested that the difficulties which arose between him and a Legal 2 officer of the ASC who had given contrary advice involved a difference in professional opinion, rather than an incident which would lead to mistrust on the part of Ms Waters (Transcript, pp. 273-4). It is not, however, surprising that, given her perception of what had occurred, Ms Waters would have some degree of diffidence in accepting both Mr Gaffey's judgment and reliability subsequently (Transcript, p. 209). The ASC has in turn denied allegations made by Mr Gaffey in the course of the Committee's inquiry.

2.46 As indicated in paragraph 1.10, the Committee has placed all these papers on the public record. The minutiae of the claims and counter-claims are not the subject of the Committee's reference from the Senate, and thus the Committee has not been required to undertake an investigation of the justification for and validity of the charges. It agrees with the CSC that the subject of the laying of the charges were internal management matters, the merits of which had nothing to do with the deliberations of either the CSC or the Committee of Privileges. This Committee, however, was required by its terms of reference to examine the circumstances of the laying of Charges A to E, on the basis that it was required to establish whether they were laid as a direct result of Mr Gaffey's giving evidence to the CSC.

- **Circumstances of laying charges**

2.47 The Committee noted the following assertions:

- That Mr Gaffey had caused difficulties since the moment of his transfer from the NCSC to the ASC on 1 January 1991.

- That Mr Gaffey had caused concern since 23 July 1991.
- That Mr Gaffey had caused difficulties for his supervisor when he joined the NCSC in 1985.
- That Mr Gaffey had caused Mr Trevethan concern in 1989 or 1990.
- That Mr Gaffey was "inefficient" from 8 July 1991 to 12 March 1992, as asserted in charge D.

The Committee also noted the following contrasting assertions:

- According to Mr Trevethan's evidence, Mr Gaffey was regarded highly by the Acting Regional General Counsel during the period from 1 January to 30 June 1991.
- Mr Gaffey acted as a Legal 2 officer from 1 April to July 1991, resuming his Legal 1 position at about the time of Ms Waters' arrival in the office.
- Mr Gaffey was rated very highly in his performance evaluation by his supervisor from 16 March to 7 December 1992, that is, during and after the incidents which precipitated the charges laid on 18 May 1992. It may be noted that his supervisor was not consulted before the charges were laid.

2.48 Successive changes in evidence by the ASC, particularly those noted in respect of charge F above, but also in respect of details relating to crucial dates, have not assisted the Committee to arrive at the most likely reasons for certain events having occurred. For example, according to responses of 11 December 1992 by the ASC to specific questions raised by the Committee of Privileges, the ASC provided the following information concerning the names of Mr Gaffey's supervisors and the duration of their supervision:

- Mr E Raymond from 1 January 1991 to 31 July 1991
- Mr A Freadman from 1 August 1991 to 11 November 1991
- Ms A Dalton from 12 November 1991 to 9 March 1992
- Mr I Gotlib from 10 March 1992 to 7 December 1992
- Mr P Hiland from 8 December.

(Transcript, p. 114)

- 2.49 As the Committee's deliberations have progressed, however, advice about some of these dates has been changed by the ASC. It is now accepted by all concerned that Mr Freadman did not take up supervisory responsibility for Mr Gaffey until 5 August 1991 (Transcript, p. 497). This change is significant in that assertions were made by the ASC that Mr Gaffey had sought and had been refused permission by Mr Freadman to participate in the preparation of the Law Institute submission before receiving approval from Mr Trevethan on 2 August. This had been denied by Mr Gaffey (see, e.g., Transcript, pp. 281, 523). It may be noted, too, that during Mr Raymond's nominal period of supervision of Mr Gaffey, Mr Gaffey spent 3½ months, from April to July, acting as a Legal 2 officer. Furthermore, the original ASC advice was that Ms Dalton completed her supervision of Mr Gaffey on 9 March, with Mr Isaac Gotlib taking up supervisory responsibilities on 10 March. It now appears from later, agreed, evidence that the incidents which ultimately precipitated the May 1992 charges occurred on 11 and 12 March, and that Mr Gotlib was not to take up supervisory responsibilities for Mr Gaffey until 16 March.
- 2.50 It is also not clear precisely why Mr Gaffey was transferred from supervisor to supervisor. The first claim in the evidence for removal from Mr Raymond's supervision to that of Mr Freadman was that Mr Raymond's level of supervision was inadequate (Transcript pp. 471, 482). As indicated in paragraph 2.43, he was transferred from Mr Freadman's supervision to that of Ms Dalton, at Mr Freadman's request. The reasons for the move from Ms Dalton to Mr Gotlib are clear, although the actual method of decision making, and the date of the decision, are uncertain. The final move, from the supervision of Mr Gotlib in the Victorian Regional Office to the supervision of Mr Hiland in the Chairman's Melbourne Office, occurred because of Mr Gaffey's transfer without notice or his consent from the Regional Office to the Chairman's Office with effect from 8 December 1992.
- 2.51 These management moves, and the laying of the charges, all appear to have coincided with the occupation of the office of Regional General Counsel by Ms Waters. The Committee suggests that the difficulties which arose are more likely to have dated from 23 July 1991, the day on which Ms Waters signed the document relating to the family law matter, than from 16 September – the date on which Mr Gaffey was informally counselled – or the week following 11 October 1991, that is, the time when Mr Gaffey's supervisors became aware that he had given evidence to the CSC. The Committee has been unable to conclude from the evidence that he had caused significant problems to senior management from 1 January 1991, as stated

in the early ASC submissions, and no explanation has been given for dating charge D from 8 July 1991, the day on which Ms Waters began duty as the Regional General Counsel.

- **Importance of derivative use immunity question**

2.52 The question of derivative use immunity and the ASC's submissions to the CSC were obviously regarded as being of great significance within the office even before Ms Waters joined the office, and it is clear that Mr Gaffey's evidence to the CJC on behalf of the Young Lawyers Section was the subject of disquiet for, at the least, a period of several weeks, dating from some time between 11 October and 18 October, when his senior managers discovered that he had given oral evidence to the CJC, till the CJC reported in November 1991. It may also be surmised that, given the long-standing concern by the ASC about the general question, officers' anxiety about the passage of the legislation was not allayed until the amendments sought by the ASC became law, which happened on 14 May 1992 – the day on which Mr Trevethan decided to lay the charges against Mr Gaffey (Transcript, p. 215).

2.53 The Committee received evidence that Ms Waters' concerns about Mr Gaffey's participating in the Young Lawyers Section pre-dated both 16 September, when the matter was directly raised with him, and 11 October, when he gave oral evidence to the CJC. Mr Gaffey stated in evidence that he first raised the possibility of his participation in the Young Lawyers Section with Ms Waters in about mid July 1991. He went on to say that Ms Waters had responded, 'Leave it with me. I will raise it with Ron'. He continued:

"[B]ut then a number of weeks elapsed and I heard nothing about it. Ms Waters was new in the office at the time and so, not wishing to rock the boat, I then went direct to Mr Trevethan and received his approval for participation." (Transcript, p. 523)

Ms Waters, for her part, acknowledged in her statement to the Committee that Mr Gaffey had asked in July 1991 whether she thought he should take part in a Law Institute committee, although she stated that he did not tell her the name of the committee or its agenda (Transcript p. 209).

2.54 Her statement continued:



On about 9 August 1991, I learned that Mr Gaffey had joined a Law Institute Committee and that the Committee was drafting a submission to the Joint Statutory Committee on Corporations and Securities on the question of abolition of derivative use immunity. I did not take any action, other than to say to Mr A Freadman, Mr Gaffey's supervisor, that I was concerned that Mr Gaffey would be distracted, through his participation in the Committee, from attending to his work responsibilities in the Commission. I believed that there was already a problem with the timely performance of Mr Gaffey's work. I later learned (during my meeting with Mr Gaffey and Mr Freadman on 16 September 1991) that Mr Gaffey had sought approval from Mr Freadman to participate in the Law Institute Committee and been denied that approval; and that he had then approached Mr R Trevethan, the Regional Commissioner, and obtained his approval for participation in the Committee without disclosing to Mr Trevethan his earlier discussion with me or with Mr Freadman. If I had known this on 9 August, I would have been very concerned about Mr Gaffey's action in bypassing supervisors responsible for his work. (Transcript, p. 209)

2.55 While the incidents which brought matters to a head did not occur until March 1992, evidence indicates that the question of derivative use immunity and the CJC's examination of the question had a pervasive influence on the Victorian Regional Office, and the ASC as a whole, during the nine months with which this Committee is primarily concerned, that is, from July 1991 to the week from 9 to 13 March 1992, when the incidents occurred. Management attempts to counsel Mr Gaffey formally, Mr Gaffey's quest for reasons under the *Administrative Decisions (Judicial Review) Act 1977*, and the ultimate laying of the charges on 18 May 1992, were consequential on these incidents.

- **Commitment to ASC**

2.56 It seems to the Committee that there was a perception by officers within the senior management of the VRO that one of the officers whom they supervised had "broken ranks" with the corporate view which they were committed to upholding for reasons of both loyalty and practicality. Ms Waters, for example, told the Committee that acceptance of the ASC view of derivative use immunity was important to the operations of the ASC (Transcript, pp 467, 473). Mr Trevethan, for his part, gave evidence of his concerns at the time about any officer, even acting in a private capacity, giving evidence

contrary to the policy of an organisation for which he or she worked, and illustrated his view by reference to his own principles in relation to a private organisation with which he was associated (Transcript, p. 349).

- 2.57 The Committee suggests that officers might subconsciously have taken Mr Gaffey's giving evidence contrary to ASC policy as being part of a mosaic of concerns which they perceived as causing difficulty for them in attempting to uphold – or even establish – a corporate ideology and identity for the new body formed from such disparate organisations as state corporate affairs commissions and the Commonwealth's NCSC. The Committee considers that the various actions of senior management, culminating in the laying of Charges A to E, constituted attempts to bring what his supervisors regarded as an insubordinate and untrustworthy officer (Transcript, p. 460) into line.
- 2.58 The Committee also finds plausible Mr Trevethan's explanation that the laying of these charges was to assert his authority, which had been challenged by Mr Gaffey (Transcript, p. 199). It accepts Mr Trevethan's view that the laying of charges would have brought an independent person in to attempt resolution of a management problem that was prejudicing the operation of the Legal Section of the Victorian Regional Office (Transcript, pp. 199, 577). The Committee can understand, however, that Mr Gaffey could perceive, after deliberating on what he regarded as persecution, that he was being punished primarily or exclusively for his participation in the Young Lawyers' submission.
- 2.59 As indicated at paragraph 2.11, the laying of charge F was clearly a direct result of Mr Gaffey's having given evidence to the CJC, although the Committee acknowledges Mr Trevethan's statement that it was an addition to the other charges, rather than the focus of the VRO's concerns. The question for the Committee to determine was whether charges A to E were sufficiently linked to his submission of evidence to the CJC as to warrant the laying of the charges being considered as contempts. The Committee is not persuaded that they are so linked, despite its belief that the circumstances leading to charge F coloured subsequent interaction between senior officers and Mr Gaffey.

### **Conclusion in respect of charges A to E**

- 2.60 The evidence before the Committee does not establish that the laying of Charges A to E occurred on account of Mr Gaffey's having given evidence in

a private capacity to the Parliamentary Joint Committee on Corporations and Securities which was "at variance to the submissions made by the representatives of the Chairman of the Australian Securities Commission officers". The Committee has thus determined that neither the Australian Securities Commission, as the body responsible for the actions of the two officers directly involved in the laying of these charges, nor these officers, Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional General Counsel, Victorian Regional Office, laid charges A to E with the intention of penalising Mr James Matthew Gaffey on account of his giving such evidence. Nor did the laying of these charges have such an effect. The Committee has therefore concluded that, on the evidence before it, no contempt was involved in the laying of charges A to E.

### **The question of penalty**

2.61 Given its conclusions in paragraphs 2.34 to 2.36 and 2.60, the Committee has considered the question of penalty in relation to its conclusions on charge F only. In a submission to the Committee before it determined its findings on 20 May [volume of documents, p. 27], the Australian Securities Commission placed the following matters before the Committee in support of its case that no further action should be taken in relation to the contempt:

- (a) The ASC, Mr Trevethan and Ms Waters had no intention, in laying charge F, of challenging the authority of the Joint Statutory Committee or the Parliament.
- (b) The intention behind the laying of charge F was to provide the foundation for an independent inquiry into the conduct of Mr Gaffey and his relations with his supervisors.
- (c) Neither Mr Trevethan nor Ms Waters knew, when the charge was laid, that it might constitute a contempt of Parliament.
- (d) The laying of charge F represented an error of judgment based on legal advice from the Australian Government Solicitor.

- (e) The laying of the charge did not, in fact, interfere with the functions of the Joint Statutory Committee.
- (f) No penalty or injury was inflicted on Mr Gaffey.
- (g) The ASC, Mr Trevethan and Ms Waters have apologised to Mr Gaffey and to the Committee for the laying of the charge.  
(pp 48-49)

In addition, in evidence at the Committee hearings ASC officers have consistently pointed out that the charge was in existence for only eight days before it was withdrawn.

2.62 Although, as is obvious from the report, the Committee does not accept all the propositions put to it on behalf of the ASC, it has decided to recommend that no further action be taken in relation to the contempt finding, for the following reasons:

- (a) The Committee of Privileges acknowledges the stress involved for the Australian Securities Commission and its officers in defending the charges of contempt.
- (b) In the circumstances of this case a finding that a contempt was involved in the laying of charge F is in itself a penalty.
- (c) All persons concerned in the commission of the offence and its aftermath have apologised to the Parliamentary Joint Committee on Corporations and Securities, to the Committee of Privileges, and to Mr James Gaffey for the laying of the charge.
- (d) Action taken by the Parliamentary Joint Committee on Corporations and Securities, Senators and the Committee of Privileges has mitigated any tendency to harm the operations of other parliamentary committees.
- (e) The charge was laid following advice from the Melbourne Office of the Australian

Government Solicitor the relevant officer of which, according to the evidence, "was not aware of and did not turn his mind to the character of the [Corporations and Securities] Committee" (Transcript, p. 227).

- (f) The two Australian Securities Commission officers directly involved in the laying of the charges did not advert to the consequences of their actions in terms of parliamentary privilege and protection of witnesses before committees, and neither the ASC nor the Australian Government Solicitor had drawn their general or particular attention to these matters. The Committee believes that officers at such a senior level of an organisation with a direct relationship with a parliamentary committee should have been aware of parliamentary privilege and contempt. Therefore the Committee would not normally regard lack of knowledge in these circumstances as warranting mitigation of penalty. The Committee considers, however, that the public exposure of the officers' limited understanding of the parliamentary aspects of the legislative framework within which they were operating, and the embarrassing details of the administration of the Victorian Regional Office, is in itself a penalty.
- (g) The cost to the Australian Securities Commission of this whole matter has been considerable.

## CHAPTER THREE – FINDINGS AND RECOMMENDATIONS

### Preliminary comments

- 3.1 There has been a significant increase in the number of matters which the Committee of Privileges has been required to consider since the passage of the *Parliamentary Privileges Act 1987* and the Senate Privilege Resolutions of 25 February 1988. As reported in its General Report (Report No. 35, Parliamentary Paper No. 467 of 1991), from the establishment of the Committee in 1966 until the passage of the resolutions only 10 reports on matters of privilege had been made to the Senate. Since the passage of the resolutions a further 32 reports, including this one, have been produced. Of these, 18 have dealt with right of reply matters which as the Committee has previously commented have been a positive and productive initiative in the development of citizens' rights.
- 3.2 The remaining 14 reports have dealt with issues of possible contempts. Eleven of these, including this present report, have reported on matters arising from the deliberations of other parliamentary committees, of which seven have concerned possible improper interference with witnesses before committees. Four of these reports have involved government officials. As the Committee has stated in all previous reports dealing with protection of witnesses, it views any improper interference with witnesses as potentially among the gravest contempts which could be committed. While formally the Committee has found that a contempt has been committed on only two occasions it has, nevertheless, expressed its concern about a number of features of all but one reference on which it has reported.
- 3.3 Most disturbing for the Committee have been its last two major references. In the present case, the matters referred to it derive from actions of legally trained officers at senior levels of the Australian Securities Commission, a regulatory agency with a direct connection with a joint statutory committee of the Parliament. The matters raised in the course of this inquiry bear unfortunate parallels to the matters raised in the Committee's 36th Report (Parliamentary Paper No. 194 of 1992), concerning actions by the then Chairman and two other members of the National Crime Authority, again all legally trained, and holding office at the highest level of a regulatory agency with a direct connection with a joint statutory committee of the Parliament.

- 3.4 What was clear from the Committee's inquiries in both cases was the astonishing ignorance within both organisations of officers' rights and obligations in respect of Parliament generally and their own parliamentary committees in particular. While in the present case the Committee notes that the Australian Securities Commission officers concerned acted on the advice of the Australian Government Solicitor's Office, this does not absolve them from the responsibility to ensure that their actions accorded with well-established rules governing relations with the Parliament. The Committee emphasises that in this case, as in the case of the National Crime Authority, it was dealing with senior officers of a regulatory agency with a direct relationship with a parliamentary committee who, it is not unreasonable to suppose, would not be prepared to accept ignorance of the law as an excuse for offences against the complex legislation which they administer.
- 3.5 The general question of ignorance of parliamentary law and lore is a matter of particular concern when it involves a relationship between public servants and the Parliament. Given the present requirement for many public service officers, from the most senior to the relatively junior, to give evidence before parliamentary committees it is imperative that the rights and responsibilities of and protection afforded to witnesses, even if they happen to be public servants, should be understood at the most senior levels of departments and authorities. The Committee believes that these officers should be at least aware of the existence, if not the detail, of such governing instruments as the Constitution, the Parliamentary Privileges Act and the Senate Privilege Resolutions.
- 3.6 On a previous occasion, when the Committee was concerned with a matter arising from the unauthorised circulation of a submission to a Senate committee (Parliamentary Paper No. 45 of 1990), it wrote to all Ministers asking that they draw the attention of their senior officers to the observations it had made. The Committee intends to do so again in relation to its 36th Report (Parliamentary Paper No. 194 of 1992), adopted by the Senate on 17 December 1992, and, if the Senate adopts this present report, in respect of the above comments. It is concerned, however, at the possibility – even the likelihood – that issues such as this might arise again and therefore proposes that the Senate pass a resolution in the following terms:

That the Senate is of the opinion that all heads of departments and other agencies, statutory office holders and Senior Executive Service officers should be required,

as part of their duties, to undertake study of the principles governing the operation of Parliament, and the accountability of their departments, agencies and authorities to the Houses of Parliament and their committees, with particular reference to the rights and responsibilities of, and protection afforded to, witnesses before parliamentary committees.

The Committee is aware of the extensive program of public service seminars conducted by the Senate Procedure Office for senior officers of the public service, and believes that such a seminar program could be extended to SES officers and above, both in Canberra and interstate.

## **FINDINGS**

3.7 The Committee of Privileges finds as follows:

**1. In respect of charge F -**

- (a) That the Australian Securities Commission, as the body responsible for the actions of the two officers directly involved, and these officers, Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional General Counsel, Victorian Regional Office, have taken action which constituted a contempt, in that the laying of charge F against Mr James Matthew Gaffey for having given evidence in a private capacity before the Parliamentary Joint Committee on Corporations and Securities which was "at variance to submissions made by the representatives of the Chairman of the Australian Securities Commission" could deter other witnesses from appearing before other committees. (paragraph 2.34)
- (b) That the Australian Securities Commission, as the body responsible for the actions of the two officers directly involved in laying charge F, and these officers, Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional General Counsel, Victorian Regional Office, intended to and did lay a charge against



Mr James Matthew Gaffey for having given evidence in a private capacity before the Parliamentary Joint Committee on Corporations and Securities which was "at variance to submissions made by the representatives of the Chairman of the Australian Securities Commission"; and that the charge had the effect of penalising Mr Gaffey for having given evidence in a private capacity to that Committee. (paragraph 2.35)

- (c) That a contempt has been committed by the Australian Securities Commission, as the body responsible for the actions of the two officers in laying charge F, and these officers, Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional General Counsel, Victorian Regional Office, in laying charge F. (paragraph 2.36)

**2. In respect of Charges A to E –**

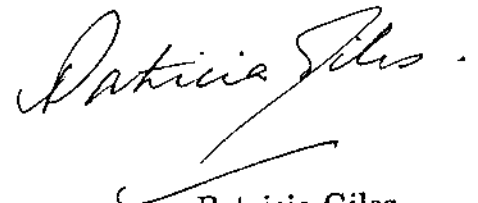
- (a) That neither the Australian Securities Commission, as the body responsible for the actions of the two officers directly involved in the laying of these charges, nor these officers, Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional General Counsel, Victorian Regional Office, laid charges A to E with the intention of penalising Mr James Matthew Gaffey on account of his giving evidence in a private capacity before the Parliamentary Joint Committee on Corporations and Securities which was "at variance to submissions made by the representatives of the Chairman of the Australian Securities Commission". Nor did the laying of these charges have such an effect. (paragraph 2.60)
- (b) That, on the evidence, no contempt was involved in the laying of charges A to E. (paragraph 2.60)

## RECOMMENDATIONS

3.8 The Committee recommends as follows:

1. That the Senate endorse the findings in paragraph 3.7.
2. That, particularly in the light of the apologies offered to the Committee of Privileges and Mr James Gaffey by Mr Tony Hartnell, when Chairman of the Australian Securities Commission, Mr Alan Cameron, the current Chairman of the Australian Securities Commission, and by Mr Ronald Claude Trevethan, Regional Commissioner, and Ms Margot Diana Waters, Regional General Counsel, Victorian Regional Office, Australian Securities Commission, no penalty should be imposed by the Senate in respect of the identified contempts. (paragraph 2.62)
3. That the Senate resolve as follows:

That the Senate is of the opinion that all heads of departments and other agencies, statutory office holders and Senior Executive Service officers should be required, as part of their duties, to undertake study of the principles governing the operation of Parliament, and the accountability of their departments, agencies and authorities to the Houses of Parliament and their committees, with particular reference to the rights and responsibilities of, and protection afforded to, witnesses before parliamentary committees. (paragraph 3.6)



Patricia Giles  
Chair

27-5-95.



EXTRACT FROM SENATE HANSARD  
Thursday, 8 October 1992

PRIVILEGE

Statement by Deputy President

The DEPUTY PRESIDENT—I inform the Senate that, pursuant to standing order 81, Senator Reid and Senator Spindler have each raised with me a matter of privilege and asked that I give precedence to a motion to refer the matter to the Privileges Committee. The matter raised by the senators is that of Mr James Gaffey, which was the subject of the report presented to the Senate on 14 September 1992 by the Joint Committee on Corporations and Securities. The Committee reported that a charge under the Public Service Act was laid against Mr Gaffey in respect of his evidence to the Joint Committee, but was withdrawn when the Committee drew it to the attention of the Chairman of the Commission.

Under the relevant resolution of the Senate, I am required to determine whether a motion to refer the matter to the Privileges Committee should have precedence, having regard to:

(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; and

(b) the existence of any remedy other than that power for any act which may be held to be a contempt.

The matter in question is clearly capable of being held by the Senate to meet criterion (a), and there is no other readily available remedy. Senator Reid and Senator Spindler have indicated that Mr Gaffey may have further evidence to present in relation to the matter. If this is so, it is an additional reason for giving precedence to a motion. I therefore rule that a motion to refer the matter to the Privileges Committee may have precedence under standing order 81.

I table the letters from Senator Reid and Senator Spindler. With the concurrence of Senator Kemp, I also table a letter which Mr Gaffey addressed to him. Senator Reid or Senator Spindler may now give a notice of motion accordingly.



## DISSENTING REPORT BY SENATOR BARNEY COONEY

### SUMMARY

1. There is evidence which if considered in isolation would allow an inference to be made that Ms Margot Diana Waters had committed a contempt (see paragraphs 28, 29, 31 and 35 of her opening statement and page 502 of the *Hansard*).
2. However when I consider all the material put forward in this matter as a whole I am not persuaded that she did so. Accordingly I consider her position to be different to that of the Australian Securities Commission and Mr Ronald Trevethan.

### LIABILITY - PRINCIPLE

3. Bringing proceedings against a person because he or she or it has given evidence to a parliamentary committee is contempt.
4. Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament (Twentieth Edition) contains the following passage at p.166:

#### **"Legal proceedings against witnesses**

Both Houses will treat the bringing of legal proceedings against any person on account of any evidence which he may have given in the course of any proceedings in the House or before one of its committees as a breach of privilege (see p.88).

The House of Commons resolved on 26 May 1818, 'That all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House in respect of anything that may be said by them in their evidence' (CJ(1818) 389).

For instances in which persons have been committed or otherwise punished for bringing actions for slander in respect of evidence given before either House or before committees of either House, or for being concerned, as solicitors, in commencing or continuing such actions, see cases of *Sir George Meggott CJ(1693-97) 591,613*; *Phillips and others CJ (1845) 672,680,696*; *Parl Deb (1845)81, c1436*; and *Harbin and Harlow (1845) LJ(1845) 690,712,729*; *Parl Deb (1845) 82, cc431, 494*.

Moreover, the Courts will not entertain an action for slander based on statements made in evidence before a committee (*Goffin v Donnelly* 6 QBD 307, 50 LJQB 303)."

There is a similar passage in the Twenty First Edition.

5. Cases referred to in the passage quoted from Erskine May are relevant to the matter now before the Committee.
6. Sir George Meggott was found guilty of contempt of Parliament by the House of Commons on the 4th December 1696 for prosecuting witnesses in respect of what they had testified before the Committee of Elections. He did so in ignorance and there was "no arrest". The report reads in part:

"As soon as he was better advised he desisted; and suffered himself to be Nonsuited; and paid them (the witnesses before the Committee) their costs. Counsel who represented Sir George Meggott had "Orders to say.....that he was very sorry if he (had) thereby offended the House."
7. Sir George was found guilty of a breach of privilege and ordered to be taken into custody. (See House of Commons Journal Vol.II 1693-97 p.613)
8. On the 14th July, 1845 the House of Lords found Mr John Harlow guilty of breaching the privileges of the House for bringing an action against a witness who had given evidence before a Committee of the House. On the same day his attorney and solicitor Mr Peter Harbin was found guilty of the same offence for issuing the action.
9. Mr Harbin told the House:

"I would observe that before the action was brought Instructions were laid before an able Counsel to advise upon the subjects before any Proceedings were taken: and the action has been brought under the Opinion that was given upon a case laid before Counsel."
10. Both men were ordered into custody. (See House of Lords Journal Vol.77 1845 p.729).
11. There are obvious features of both cases comparable to the present matter.

12. The matter of Parliamentary Privilege is well dealt with in chapter 19 of the House of Representative Practice Second Edition.
13. On page 709 when dealing with offences against witnesses the authors quote May with approval.

#### **LIABILITY AND THIS MATTER**

14. The two cases from which passages have been quoted are comparable to the present one. For example in that of Sir George Meggott proceedings were taken in ignorance of the fact that a breach of privilege was thereby committed. They were withdrawn as soon as that fact was adverted to which was a period of 8 days. In that of Mr Harlow and Mr Harbin advice was obtained from a supposed expert before proceedings were taken and both the person bringing the action and the person who issued it were guilty of a breach.
15. The proceedings brought against Mr James Gaffey were comparable to legal proceedings. Depending on the findings made against him he was liable to disciplinary action as a result of them.
16. The passage from Erskine May quoted in paragraph 4 says that people are guilty of a breach of privilege "in commencing or continuing" the relevant action. Initiation of proceedings is enough, even though withdrawn before any other steps are taken in them.

#### **AUSTRALIAN SECURITIES COMMISSION**

17. The Australian Securities Commission commenced proceedings against Mr Gaffey. Mr Cameron, Chairman of the Australian Securities Commission, makes this quite clear in his opening and prepared statement to the Committee. The first sentence of paragraph 17 of the facsimile transmission from Arthur Robinson & Hedderwicks the solicitors acting for the A.S.C. to Ms Anne Lynch dated 24th May 1993 reads:

"The A.S.C. has always maintained that the responsibility for laying Charge F was a corporate responsibility of the A.S.C. rather than the responsibility of individual officers"



**Mr TREVETHAN**

18. Arthur Robinson & Hedderwicks in the facsimile transmission maintains that the A.S.C. should alone be found liable for any contempt of Parliament committed.
19. Even if the view of the evidence expressed in the facsimile transmission was correct to do so would not be consistent with the thrust of what the House of Lords did in the case of Mr Harlow and Mr Harbin. There both the person who brought the action and the person who issued it were found liable.
20. In any event the view of the evidence expressed in the facsimile transmission is in my view not correct. That evidence points to Mr Trevethan playing the central role in the proceedings against Mr Gaffey.
21. In his opening statement which was a prepared one made to the Committee Mr Trevethan said at paragraph 33:

"On the 14th May 1992 I told Mr Waters that I had decided to lay charges against Mr Gaffey. I instructed Ms Waters to prepare the charges and to get some advice from the Australian Government Solicitors office."
22. This evidence was reinforced in paragraphs 39(a), 39(b), 39(d), 39(e), 39(g) and 39(h) of that statement.
23. In her opening statement which was a prepared one made to the Committee Ms Waters said:

"On the 14th May 1992 Mr Trevethan told me that he had decided to lay charges against Mr Gaffey under section 61(2)(b) of the Public Service Act and instructed me to prepare those charges (paragraph 27)."
24. In looking at the two opening and prepared statements referred to it is to be remembered that the A.S.C. Mr Trevethan and Ms Waters were at all material times represented by the same lawyers.
25. This evidence makes it clear that it was Mr Trevethan who laid the charges after he had made the decision to do so. It was not described as a "formal decision" until it was called that in paragraph 19 of the facsimile transmission

of 24th May 1993 from the solicitors who were acting for the A.S.C. Mr Trevethan and Ms Waters both at the time the prepared statements referred to above were given to the Committee and at the time the facsimile transmission was sent.

26. Paragraph 19 goes on:

"But that decision was taken after discussion with several other senior officers all of whom contributed to the decision....."

27. This is not the impression given by Mr Trevethan's opening statement. See for example paragraphs 30,31,32,33 and 37 of that statement. Nor is it the impression given by Ms Waters in paragraphs 27, 31 and 33 of hers.

28. Mr Trevethan did lay the charges and in doing so committed a breach of privilege.

#### **PENALTY - PRINCIPLES**

29. Paragraph 6 of the transmission from Arthur Robinson & Hedderwicks raises the issue of whether the laying of Charge F inflicted a penalty or injury within the meaning of the Privileges Resolutions of 25 February 1988.

30. That question is to be answered in the context of the history of breaches of parliamentary privilege. The cases referred to above at paragraphs 6 to 10 and the passage quoted from Erskine May at paragraph 4 make it clear that the bringing of legal proceedings in the relevant circumstances constitutes a breach.

31. A person is penalised when his or her position is altered adversely. Mr Gaffey's position was changed by the laying of charges and to his disadvantage. The commencement of proceedings placed him at risk, although for a short period only, of being found derelict in his duties and of suffering punishment as a consequence. The imposition of this risk was itself a penalty within the meaning of the relevant Resolutions of the Senate.

32. Precedent establishes the proposition that a person is penalised within the meaning of the Resolutions applicable in this matter when some adverse

action is taken against him or her for giving evidence before Parliament or one of its Houses or any of its Committees.

## **MS WATERS**

33. Ms Waters did not lay the charges. She did not work them out. At page 502 of the Hansard the following passage occurs:

Senator Cooney - Who worked out the charges?  
Ms Waters - Mr Dobelsky.

34. At all material times Ms Waters worked under the general instruction of Mr Trevethan. (See paragraph 33 and 35 of his opening statement and paragraph 27 of hers.)

35. On page 468 of the Hansard for the 3 April 1993 Ms Waters said:

"Contrary to the allegations made by Mr Gaffey, I did not draft the charges."

36. In paragraph 20 of the facsimile transmission from Arthur Robinson & Hedderwicks says that no one officer should bear more responsibility than another for the decision to lay charge F. That statement is not supported by the evidence given prior to the transmission being sent. Reference is made to paragraphs 17 to 28 of this report.

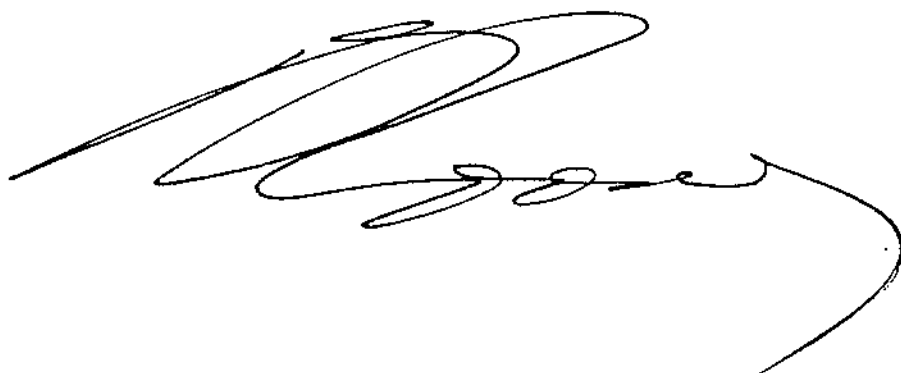
37. Clause 20 of the facsimile transmission was written by solicitors who act for the A.S.C., Mr Trevethan and Ms Waters. No doubt the lawyers would like to see both Mr Trevethan and Ms Waters exculpated but to submit in effect they were in a like position may not have put Ms Water's case in its best light especially where the conclusion drawn is that Mr Trevethan has breached parliamentary privilege.

34. The evidence given to the Committee prior to the sending of its draft report to the solicitors acting for the A.S.C. Mr Trevethan and Ms Waters was that she neither laid the charges against Mr Gaffey nor joined in the decision to commence them.

38. She was certainly part of the culture described in the facsimile transmission. However being part of a culture is not contempt of Parliament. Nor is preparing documents on the orders of a superior. It would be different were Ms Waters to have laid the charges or to have actually commenced them, or having decided to lay them to have ordered their preparation or signing. None of these situations seem to apply in Ms Waters' case especially on the evidence given prior to the facsimile transmission.
39. Ms Waters arranged for the charges to be delivered to Mr Gaffey. But this was on the initiative of Mr Trevethen (See paragraph 35 of his opening statement).

#### FINDING

40. Breach of parliamentary privilege or contempt of Parliament is a grave matter and a decision about its commission should be made with considerable caution.
40. In my view the evidence in this matter is not sufficient to support a finding of contempt of Parliament against Ms Waters. Accordingly I find she did not commit a breach of parliamentary privilege.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long, sweeping tail that curves downwards and to the right.