

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COMMITTEE OF PRIVILEGES

**POSSIBLE FALSE OR MISLEADING INFORMATION
GIVEN TO ESTIMATES COMMITTEE E OR THE SENATE**

(46TH REPORT)

MARCH 1994

MEMBERS OF THE COMMITTEE

Senator the Honourable Margaret Reynolds (**Chairperson**) (Queensland)

Senator Baden Teague (**Deputy Chairman**) (South Australia)

Senator Bruce Childs (New South Wales)

Senator John Coates (Tasmania)

Senator Christopher Ellison (Western Australia)

Senator Jim McKiernan (Western Australia)

The Senate
Parliament House

CONTENTS

	Page
CHAPTER 1 - INTRODUCTION	1
CHAPTER 2 - CONCLUSIONS, OBSERVATIONS AND FINDING	
MATTERS FOR DETERMINATION	5
(a) Term of reference (1)	5
(b) Term of reference (2)	9
(c) Term of reference (3)	10
CONCLUSIONS	
(a) In respect of term of reference (1)	10
(b) In respect of term of reference (2)	11
(c) In respect of term of reference (3)	11
OBSERVATIONS	12
FINDING	14

CHAPTER ONE

INTRODUCTION

1.1 On 29 September 1993, the following matter was referred to the Committee on the motion of Senator Ferguson:

- (1) Whether false or misleading information was given to Estimates Committee E on 26 August 1993 or to the Senate on 31 August 1993 in relation to the proposed diesel fuel rebate tax.
- (2) Whether that information was known to be false or misleading by persons in attendance at the hearing or in the Senate.
- (3) Whether there was a failure to take appropriate action to correct that false or misleading information.

1.2 In a letter to then President Sibraa on 27 September, Senator Ferguson provided the following summary of the matters of concern to him, which gave rise to the matter of privilege, as follows:

- * On Thursday, 26 August 1993, at the hearing of Estimates Committee E, the Committee was told that legislation was not necessary to introduce the proposed tax, which was then referred to as an administration fee; the hearing of the Committee continued for some considerable time and the statement was repeated and not corrected even after Customs officers left and then returned to the room with further information on the "administration fee".
- * On Tuesday, 31 August 1993, in answer to a question in the Senate, Senator McMullan revealed legislation would be required to introduce the proposed tax and gave some details on the form of the legislation.
- * During the debate on Senator McMullan's answer, Senator Schacht stated that, as a result of the discussion at the Estimates Committee E hearing, his view was that there ought to be legislation; that is, his view had been arrived at as a result of the Estimates Committee E hearing.
- * At a further hearing of Estimates Committee E on Thursday,

2 September 1993, it was stated that instructions to draft the legislation to introduce the proposed tax had been issued on 17 August 1993, the day of the presentation of the budget and that a draft bill existed on 24 August 1993, two days before the first hearing of Estimates Committee E on 26 August 1993.

* At the hearing of Estimates Committee E on 2 September 1993, Senator Schacht indicated that he discovered on Friday, 27 August 1993 that legislation would be necessary to introduce the tax and drafting instructions had already been issued.

* At the hearing on 2 September 1993, Senator Schacht also indicated that Customs officers present at the hearing of Estimates Committee E on Thursday, 26 August 1993 knew that legislation was necessary and was being prepared but they did not inform Senator Schacht of this at the 26 August 1993 hearing.

1.3 A more complete account of the matter was given by Senator Ferguson on 6 September, when moving for the tabling of certain documents on the matter, and this is included in the volume of documents tabled with this report, together with the letter referred to above and President Sibraa's statement giving precedence to the matter of privilege.

1.4 On 6 October 1993 the Committee wrote to the Minister concerned, Senator Chris Schacht, seeking from him any submissions that he considered that he, officers of the Department of Industry, Technology and Regional Development and, in particular, officers of the Australian Customs Service might wish to make in relation to the terms of reference. The Minister responded on 27 October 1993, as indicated in the volume of documents.

1.5 The Committee had before it the relevant extracts from the Estimates Committee E *Hansards* of 26 August and 2 September. The matter was pursued further by Estimates Committee E during supplementary hearings on 4 November 1993, also included in the volume of documents. For the sake of completeness, extracts from Senate *Hansards* of 31 August and 6 September, and documents tabled by the Minister in the Senate on 6 September, together with the relevant extract from the report of Estimates Committee E, are included in the volume of documents.

- 1.6 Before reaching its conclusions on the matter, the Committee also viewed the relevant extracts from the video of proceedings. The purpose of doing so was to establish who was present at the time the matter of legislation was raised on 26 August, first by Senator Ferguson and then, some ninety minutes later, by the Leader of the Opposition in the Senate, Senator Hill, after the subject was reopened by the Minister following the provision of further advice to him.
- 1.7 It may be noted that both the then Comptroller-General of the Australian Customs Service, Mr F Kelly, and Ms V Stretton, National Manager, Inland Revenue, of the Australian Customs Service, the person directly responsible for the administration of the program, were present at the table with the Minister when the matter was discussed on both occasions. In the light of the seniority of the people concerned, the Committee did not attempt to identify any other officers who might have had some knowledge of the matter.
- 1.8 The Committee notes, however, from the list of officers at the hearing of 26 August, as recorded in *Hansard*, that Mr M Mulgrew was present. Mr Mulgrew was the ACS officer in whose name a ministerial minute of 19 August, advising of the necessity for legislation, had been signed. It had actually been prepared and signed by Mr S Holloway, who was not present at the 26 August hearing. Mr Holloway was the Customs officer who gave the formal drafting instructions for the legislation to the Office of Parliamentary Counsel.
- 1.9 The documents included in the volume give what the Committee of Privileges regards as a comprehensive account of the circumstances surrounding the matter, and the Committee has decided to refer to details only when necessary to elucidate its report. In the light of the ready availability of the material, the Committee has been able to arrive at its conclusions.

CHAPTER TWO

CONCLUSIONS, OBSERVATIONS AND FINDING

MATTERS FOR DETERMINATION

(a) Term of reference (1)

2.1 The first question for the Committee to consider was whether Senators attending the hearings of Estimates Committee E on 26 August 1993 had been given false or misleading evidence as to the need for legislation to introduce a fee or tax announced on budget night in relation to the diesel fuel rebate scheme.

2.2 The Minister responsible for Customs, Senator Schacht, was asked about the imposition of an "administrative fee" for the diesel rebate scheme as a result of budget deliberations. Having been presented with calculations which indicated that the administrative fee was over and above the likely cost of provision of services, he was asked whether legal advice had been sought about the necessity for taxation legislation. He expressed uncertainty at the time, but indicated that he considered the fee to be an administration fee, not a tax:

I would agree in principle that your position is correct — about the difference between a cost recovery fee and a tax. I do not think anyone here is going to dispute that, but I want to come back to you with information on Thursday of next week.

(Estimates Committee E *Hansard*, 26 August 1993, p. E100)

When the question was again raised later that night, following the Minister's reopening the subject, the Minister made the following statement:

As I understand it, *it has been determined* [emphasis added] that it is not necessary for legislation to have an administrative fee so that, if someone was being paid a rebate of \$1,000, the one per cent figure

would total \$10 and that would be deducted from the payment.
(Estimates Committee E *Hansard*, 26 August 1993, p. E 115)

Senator Hill pursued the question:

So you have satisfied yourselves that it is simply a matter of your announcing that you are going to deduct what you deem to be an administrative fee which you define as one per cent and that there is no further regulatory or legislative process necessary to implement that.

Senator Schacht responded:

As I understand it, yes.

(Estimates Committee E *Hansard*, 26 August 1993, p. E115)

- 2.3 This statement was clearly wrong, as was made known both in the Senate on 31 August by Senator McMullan, as Minister representing the Treasurer, and by Senator Schacht, and at the special hearing of Estimates Committee E on 2 September. It also became clear at that hearing that Mr Holloway, an ACS officer, had given drafting instructions for a taxation bill on Budget Day, 17 August, more than a week before the first Estimates Committee hearing, and that a draft bill was received by the ACS on 24 August, two days before that hearing.
- 2.4 As the then President indicated in his statement, the giving of false or misleading evidence is declared by Senate Privilege Resolution No. 6 to be a matter which the Senate may treat as a contempt. In accordance with its normal practice, the question for the Committee to determine was whether such evidence was known to be false or was intended to mislead. The Committee, in reaching its conclusions on this matter, was concerned to find where the responsibility lay for giving the false and misleading evidence to Estimates Committee E, as this question was crucial in establishing whether a contempt was committed by either the Minister or officers of his department or the Australian Customs Service.
- 2.5 The Committee has concluded from the evidence that the Minister

responsible for Customs, Senator Schacht, who gave the inaccurate evidence to the Committee, did not know at the hearing of 26 August that legislation was required to give effect to the budget decision. Before the Estimates Committee hearing on 26 August the Department of Industry, Technology and Regional Development had provided two briefs on this issue, neither of which mentioned the requirement for legislation. While an ACS ministerial minute dated 19 August, addressed both to the then Minister for Industry, Technology and Regional Development and to Senator Schacht, had detailed the status of budget legislation, Senator Schacht advised the Senate on 6 September that there was no record of the receipt of Senator Schacht's copy in his office (Senate *Hansard*, 6 September 1993, p. 957).

- 2.6 The question then arises as to whether any officer present at that hearing knew of the requirement. The Committee draws attention to the following exchange between Senator Ferguson and the Minister during the supplementary hearings of Estimates Committee E on 4 November 1993:

Senator Ferguson - Have you or your office ascertained who, present at that meeting, actually knew that legislation was being drafted; and have you asked them to explain why they failed to inform you of that fact?

Senator Schacht - On the night before the second estimates committee hearing, at a meeting with the senior officials of Customs, I explained that I was dissatisfied and said that, even if people did not know the exact details but knew generally that legislation would probably be required, they should have come forward. I think it is a classic example of there being four or five stools and everything falling between the stools and someone thinking, 'If the minister is speaking this way, maybe he knows something we don't know'.

Senator Ferguson - Have they explained to you why they did not come forward?

Senator Schacht - Customs provided a minute to me after the meeting on 25 October. This was in preparation of the submission I would be making to the Standing Committee of Privileges. I will read the paragraph that I think is relevant. The minute to me from Mr Kelly, the Comptroller-General, in part said:

As I have told you, I and a number of other officers in the room at the time had read the briefing notes forwarded by Mr Holloway (which you subsequently tabled) which referred

to, "a taxing bill which imposes a 1% administration fee on the claims for diesel fuel rebate." It was either not recalled at the time or they reached a similar conclusion to that which I outlined above.

That 'outlined above' was that they thought I knew something wider that they had not been informed about. It is one of those classics where something fell between two stools in that people made a number of deductions which led to a false conclusion.

(Estimates Committee E *Hansard*, 4 November 1993, p. E417)

2.7 The ACS has suggested, then, that of the officers who should have known about the requirement for legislation, some had no recall and the rest assumed that the Minister must have had superior information. When the Committee began its examination of the matter, it had difficulty understanding the collective lapse in memory among a number of officers. And the Committee was sceptical of the reason given by the Comptroller-General of Customs for the other officers' not drawing the possibility of legislation to the Minister's attention, that they thought the Minister knew something they did not. If ACS officers believed that the Minister had knowledge that was previously unavailable to them during the hearing, they had an hour and a half to check it with him. Rather, it appears that when the Minister reopened the issue later in the meeting, he had consulted officials and had been incorrectly advised by Customs that an administrative fee was involved, and not a tax requiring legislation (Estimates Committee E *Hansard*, 26 August 1993, p. E115).

2.8 The available evidence, however, notably the explanation provided by Senator Schacht on 4 November, suggests that it is reasonable to draw the conclusion that the Estimates Committee was not intentionally misled, certainly not by the Minister in the first place, nor by his officers. While the Committee has established that officers should have known that the information which the Minister gave at the hearing, both initially and when the subject was reopened by the Minister, was wrong, the evidence indicates that some simply did not know, while others may have been too wary to express a doubt as to its accuracy. This appears to the Committee to be a more probable explanation of their continuing silence and inadequate provision of advice than any deliberate intention to mislead or withhold information from either the Minister or the Committee.

2.9 So far as matters raised in the Senate on 31 August 1993 are concerned, the Committee has examined the answer given by the Minister representing the Treasurer, Senator McMullan, and the "interim" comments of the Minister responsible for Customs, Senator Schacht, pending his giving further details on the matter at the Estimates Committee hearing already scheduled for 2 September. Senator McMullan's answer, which was provided at the end of question time following a question without notice and a supplementary question from Senator Ferguson earlier that day, does not appear to the Committee to be false or misleading in any way.

2.10 The Committee notes, however, that Senator Schacht's comments, given the context in which they were made, had the effect of giving Senators with an interest in the subject a misleading impression that the impetus for the introduction of the legislation had derived from matters raised at the hearing of Estimates Committee E on 26 August.

(b) Term of reference (2)

2.11 The Committee has concluded that:

- (a) the Minister responsible for Customs, Senator Chris Schacht, was not aware at the meeting of Estimates Committee E on 26 August 1993 that false or misleading information was given to that Committee in relation to the diesel fuel rebate scheme;
- (b) while at least some officers of the Australian Customs Service and the Department of Industry, Technology and Regional Development had some idea, and indeed might reasonably be expected to have known, that legislation was required to authorise the budget proposal in relation to the scheme, such knowledge as they possessed did not appear to have been sufficiently precise or comprehensive as to constitute knowledge that false or misleading evidence was being given at that hearing; and
- (c) false or misleading information was not given by the Minister representing the Treasurer, Senator McMullan. The statements made by the Minister responsible for Customs, Senator Schacht, had the effect of misleading the Senate on 31 August 1993, but the misleading effect was not intentional.

(c) Term of reference (3)

- 2.12 The Committee's third term of reference involves the question whether there was a failure to take appropriate action to correct the false or misleading information which, it has established, was given at the meeting of 26 August 1993.
- 2.13 On the night of the hearings of Estimates Committee E on 26 August, when the matter was first raised, the Minister indicated that he would examine the matter further and provide information to Senators at the meeting to be held on 2 September. It is clear from the Minister's remarks in the Senate on 31 August that he intended to explain the matter at the 2 September hearing, and to answer fully any questions at that time. He proceeded to do so, and at that meeting told Senators that following the 26 August meeting he sought advice from officers of Customs as to the need for legislation. He informed the Estimates Committee that, as a result of that advice, he made arrangements for relevant officers to appear with him at the 2 September meeting, at which the history of the preparation of the legislation was recounted.
- 2.14 It is the Committee's view that the matters might more appropriately have been clarified in the Senate, either on the first sitting day after the meeting of 26 August was held, that is, Monday, 30 August, or in response to questions asked by Senator Ferguson on 31 August. The Committee notes, however, that the Minister told the Senate on 31 August (*Senate Hansard*, pp. 643, 644) that a tax was involved and that there would have to be legislation. That is, Senator Schacht confirmed the two major issues arising from the 26 August meeting two days earlier than the reconvened Estimates Committee hearing. Furthermore, he foreshadowed during the debate in the Senate that the matters would be canvassed thoroughly at the Estimates Committee hearing of 2 September, as indeed they were.

CONCLUSIONS

- 2.15 In summary, the Committee has drawn the following conclusions:

(a) In respect of term of reference (1)

- (i) False information was given by the Minister responsible for

Customs, Senator Schacht, to Estimates Committee E on 26 August 1993 (paragraph 2.3).

- (ii) Information given to the Senate on 31 August 1993 by the then Minister representing the Treasurer, Senator McMullan, was neither false nor misleading, but information given on that day by Senator Schacht had the effect of giving a misleading impression to the Senate (paragraph 2.10).

(b) In respect of term of reference (2)

- (i) The Minister responsible for Customs, Senator Schacht, did not know at the Estimates Committee hearing of 26 August that he was giving false information to the Committee (paragraph 2.5);
- (ii) The knowledge possessed by officers of the Australian Customs Service and the Department of Industry, Technology and Regional Development was not sufficiently precise or comprehensive as to constitute knowledge that false information was being given at the Estimates Committee hearing of 26 August 1993 (paragraphs 2.8 and 2.11);
- (iii) When responding during debate in the Senate on 31 August on a motion by Senator Ferguson to take note of an answer given by Senator McMullan Senator Schacht was not aware that he was giving information which had the effect of misleading the Senate (paragraph 2.11).

(c) In respect of term of reference (3)

Although the question as to whether legislation was required was answered in the Senate by both the Minister representing the Treasurer and the Minister responsible for Customs on 31 August, and the circumstances surrounding the giving of the false information were clarified comprehensively at the hearings of Estimates Committee E on 2 September 1993, it would have been preferable for the matter to have been corrected in the Senate by the Minister responsible for Customs, Senator Schacht, at the first

available opportunity, that is, on Monday, 30 August 1993 (paragraph 2.14).

The Committee has concluded that no contempt should be found in respect of any of the matters referred by the Senate for determination.

OBSERVATIONS

- 2.16 As in other cases it has examined, the Committee wishes to make some observations arising from this reference. The Committee has had cause to comment in several of its reports on a misapprehension within the senior levels of the public service of their obligations to the Parliament and its committees, most recently in its 42nd report, tabled in the Senate on 27 May 1993. That report led to a recommendation that training be undertaken at these levels as to public service responsibilities and obligations to the Parliament. The recommendation was endorsed by the Senate on 21 October 1993.
- 2.17 The responsibilities of public servants directly answering questions by members of Senate committees are clear: officers are required to answer fully and honestly all questions which are asked of them, to ensure that Senators are not misled by the provision of incomplete information (see 15th report of Committee, Parliamentary Paper No. 469/1989). This duty is limited by the constraints imposed on committees by Senate Privilege Resolution 1(16), which provides that:

An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister.

The limitations imposed by this resolution are described in more detail in Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters, prepared by the Department of Prime Minister and Cabinet, the most recent guidelines being tabled in both Houses in November 1989.

- 2.18 When a minister is present at a hearing and actively engaged in the proceedings, the primary responsibility for acquiring the appropriate information, compensating for any inadequacies and correcting errors when they become apparent lies with the minister. The Committee points out, however, that public servants are present to provide both the minister and a committee with full and accurate information as required and therefore regards it as the duty of a public servant to his or her minister to make it known to that minister as soon as practicable that wrong, inaccurate or

incomplete information has been given by the minister so that any errors or omissions may be remedied, preferably during the hearing in question. The Committee has also concluded that the person with the responsibility for admonishing or disciplining any officers who have failed in their duty is the minister, who in this instance has publicly rebuked the relevant officers.

2.19 The Committee endorses the Minister's action in rebuking the officers and places on record its own serious concern at their conduct, in placing both the Minister and the Estimates Committee in the position of giving and receiving information which would shortly be known to be false. This is not the first time that parliamentary committees have experienced difficulties with the Australian Customs Service, as evidenced most recently by the report of the Joint Committee of Public Accounts on what has come to be known as the Midford-Paramount affair (Parliamentary Paper 491/1992). That report, which resulted from a reference of matters first raised in Senate Estimates Committee A, described a culture of defensiveness and resistance to the provision of information, and of administrative incompetence, which reached the most senior levels of the Australian Customs Service. These features continued to manifest themselves in relation to this Estimates Committee E matter, some nine months after the presentation of the Public Accounts Committee report. For example:

- * while an ACS ministerial minute dated 19 August set out the relevant legislation, there is no record of its having been provided to or received in Senator Schacht's office. This administrative failure suggests inadequate recording systems within the ACS concerning the inter-office handling of ministerial correspondence;
- * despite the presence of the most senior and specialised officers of the Australian Customs Service, the Minister responsible unwittingly gave wrong information to the Estimates Committee E twice in one evening, although there was ample opportunity available to those officers to check the information and advise the Minister accordingly;
- * in any case, these senior ACS officers should have known the correct information either through their own expertise or through briefings on budget-related matters before the hearing. The Committee is particularly disturbed by this failure of any senior officers to know the answers to the questions, or, following appropriate briefings, to

recall the facts with confidence at the time of the Estimates Committee hearing.

The result of these identified failures has been that both the Estimates Committee and this Committee have been required to spend a considerable amount of time in establishing the factual situation, and in attempting to establish why such inadequate information was given in the first place.

2.20 The Committee is aware of the recent report, *A Review of the Australian Customs Service*, tabled in the Senate on 8 February 1994, and the Minister's in principle acceptance of the report. It trusts that the Minister's commitment to take action will ensure that the report's aim, encapsulated in its optimistic subtitle, "The Turning Point", will be fulfilled, so that the problems identified will be overcome.

FINDING

The Committee has determined that it should not find that a contempt has been committed in respect of any of the matters referred to it by the Senate.

Margaret Reynolds
Chairperson