THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE COMMITTEE OF PRIVILEGES

Possible Improper Interference with a Witness and Possible False or Misleading Answers given to the Senate or a Senate Committee

50th Report

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CHAPTER 1
INTRODUCTION AND BACKGROUND

Introduction

1.1 On 20 May 1993, the following matters were referred to the Committee of Privileges on the motion of Senator Watson:

> (1) Having regard to the letter of 13 May 1993 to the President from the Joint Committee of Public Accounts, whether there was any improper interference with Mr John Richardson as a witness, and, if so, whether any contempt was committed.
>
> (2) Having regard to the submissions made to the Senate on 25 February and 4 May 1992, whether any false or misleading answers were given to the Senate or a Senate committee, and, if so, whether any contempt was committed.

1.2 The first of these two references was initiated by the Joint Committee of Public Accounts (JCPA), which drew to the attention of the President a claim by Mr John Richardson that he had received an anonymous telephone call on 17 April 1991, threatening that:

> "If you say anything bad about Customs or some officers we will put you out of business and make it so bad for you within your industry, you'll be unemployable."
>
> [JCPA *Hansard*, 29 August 1991, p. 288]

1.3 The alleged threat related to an inquiry about the Australian Customs Service ("ACS" or "Customs"), referred to the JCPA by the Senate in December 1990. The case came to be known as the "Midford case". The alleged telephone call was thus made four months after the reference, but well before that committee's first public hearings, which were held on 8 August 1991. Mr Richardson gave evidence on a range of matters before the JCPA at a public hearing on 29 August 1991, and reported the threat in the

course of that hearing. The JCPA has given an account of the alleged threat, indicating its serious concern, at paragraphs 25.13 to 25.21 of its report into the Midford matter, entitled *The Midford Paramount Case and Related Matters* [JCPA Report 325, Parliamentary Paper No. 491/1992]. In that same report (para 24.15, p. 386) the JCPA gave notice of its intention to report the matter to the Senate.

1.4 The second matter arose from detailed submissions by Mr Richardson tabled in the Senate on 25 February and 4 May 1992, concerning evidence given to Senate Estimates Committee A and answers given in the Senate, or in response to questions on notice, by ACS officers and by the then minister as advised by those officers, primarily concerning the administrative penalties scheme under the Customs Act.

1.5 While the references, and the possible contempts, involved different considerations for the Committee, it has considered the matters together in view of the one person being affected. The Committee also noted that, if the second set of allegations were proved, it could be indicative that the threat the subject of the first reference had in fact been carried out. It is the claim of Mr Richardson that Customs officers pursued him in respect of the administrative penalties matter so that ultimately he was driven out of his profession, thereby ensuring that the threat was fulfilled.

Structure of report

1.6 This first chapter gives the background to the references, outlines the Committee's conduct of its inquiry and suggests the context in which difficulties confronting Mr Richardson might have arisen. Before dealing with the alleged threat, which is the subject of the first reference, the Committee decided that the question of false or misleading evidence should be first examined, because it explains the broad context within which the alleged threat was made. Accordingly, Chapter 2 analyses the allegations contained in the two documents tabled in the Senate and referred to the Committee. The third chapter deals with the alleged threat and the possible consequences of that threat having been made. Chapter 4 examines matters, arising in the course of the Committee's inquiry, which do not fit readily within either term of reference. The final chapter reports the Committee's observations, findings and recommendations, and expands upon matters raised in general terms in Chapter 1.

Background

(a)Reference to Joint Committee of Public Accounts

1.7 The first of these references, as indicated, derived from the following reference of 5 December 1990 to the Joint Committee of Public Accounts:

> That the following matters be referred to the Joint Parliamentary Committee of Public Accounts for inquiry and report by 15 May 1991:
>
> (a) the cost to the Commonwealth, amounting to more than $1m, of the actions of the Department of Industry, Technology and Commerce and the Australian Customs Service in fulfilling their administrative responsibilities in the handling of the failed prosecution of Midford Paramount Pty Ltd;
>
> (b) the methods of operation of the Australian Customs Service in preparation and conduct of prosecutions and settlements and, in particular, their actions throughout the preparation, prosecution and settlement of the Midford Paramount Pty Ltd case, including the reasons for the Director of Public Prosecutions' discontinuance of the prosecution;
>
> (c) the practice, propriety and method of the Australian Customs Service of gathering evidence for prosecutions and dealing with the public in the course of such investigations;
>
> (d) the actions of the Minister for Industry, Technology and Commerce and successive Ministers responsible for Customs in addressing the propriety of administrative actions within the Industry, Technology and Commerce portfolio and the Australian Customs Service, in particular; and
>
> (e) the need for effective definition of the lines of ministerial control of the Australian Customs Service and, in particular, the actions of the Minister for Industry, Technology and Commerce in oversighting successive Ministers responsible for Customs in relation to the operations of the Australian Customs Service.
>
> [Journals of the Senate, p. 508]

(b)The Midford Case

1.8 The case before the JCPA involved Midford Paramount Pty Ltd, an Australian shirt manufacturer which had operated successfully for more than 40 years. Full details are set out in the JCPA report (see especially Chapter 2), but the following briefly summarises the Midford matter.

1.9 On 3 December 1987 ACS officers entered Midford's premises and removed a quantity of documents. On 15 June 1988 Midford directors and their tariff adviser were charged under the Crimes Act with alleged misuse of import quotas, allegedly involving a fraud of $4.5 million on the Commonwealth. The charges were subsequently withdrawn, on 30 June 1989, following the discovery of significant flaws in the prosecution case during the committal hearing.

1.10 After the withdrawal of charges concerning quotas, Customs forwarded to the Director of Public Prosecutions (DPP) a brief requesting that charges be laid against Midford and others concerning alleged financial irregularities in respect of what is known in the import business as "financial accommodation". This matter had been under investigation since 1987 but had lost precedence to the quota charges. After initial advice from the DPP that a prima facie case existed on the financial accommodation matter it was decided in September 1989 that charges would not be laid.

1.11 In addition to this legal action, in late 1987 and early 1988 ACS had impounded a large amount of Midford's stock and revoked its import quotas. These actions made it virtually impossible for Midford to trade in a profitable manner and on 1 August 1990 the business was sold.

1.12 At the time that the ACS entered the Midford premises, 3 December 1987, Mr Richardson was an employee of L J Miles & Associates, a firm of customs agents which represented Midford Paramount. Mr Richardson had been employed by the company since 1983. On 7 December 1987 the ACS obtained documents concerning Midford's import quotas from Miles & Associates. On 10 December Customs cancelled Midford's quotas. The following day Mr Richardson rang Customs to explain that Midford had done nothing illegal and that the disputed importation of shirts was covered by a special government agreement [JCPA Report, paras 5.1 — 5.6].

1.13 On 3 February 1988 Customs officers asked Mr Richardson to sign a statement they had prepared concerning the Midford case. He refused to sign the document prepared by ACS but provided a statement he wrote himself. Mr Richardson believed Midford had not acted in contravention of the law and made his views known to the ACS and the Minister's office [JCPA Report, p. 46 and *Hansard*, pp. 352-53]. Mr Richardson was nonetheless scheduled to appear as a Customs witness in the Midford case but did not give evidence as the case was withdrawn before he was due to be called.

1.14 It is worth observing that, if Customs had taken notice of the information provided to it by Mr Richardson, that is, that Midford had authority to import the goods which were the subject of the prosecution, the matter might well have ended there, but the prosecution case ignored the existence of the agreement and consequently foundered when the defence produced copies at the committal hearing [JCPA *Hansard,* p. 1746].

1.15 On 8 February 1990 the magistrate who heard the charges in 1989 awarded costs to the defendants and made a number of strong criticisms of those responsible for the preparation of the prosecution case. These events led to questions being raised in estimates committee hearings, and culminated in the December 1990 reference to the JCPA.

1.16 In the event, the JCPA discovered such a complex web of operations, involving claim and counter-claim between Customs and the former owners, tariff adviser and customs agent of the company affected, that it was unable to report on the reference until December 1992. In its report, the JCPA was scathing of the operations of the ACS, and recommended that compensation be paid to all relevant persons, including Mr Richardson.

1.17 In November 1993, nearly three years after the matter was referred to the JCPA and six years after the matters which were the subject of the inquiry were initiated, compensation of nearly $25m was paid to the persons identified by the JCPA as affected by the actions of Customs. Mr Richardson was awarded nearly $1½m. It may be noted that the JCPA concluded specifically in respect of Mr Richardson that he had "suffered both personally and financially as a result of the Midford Case" [JCPA Report, para 24.15, p. 386].

(c)Customs responses to questions in the Senate and estimates committees

1.18 During the entire period that the JCPA was examining the Midford matter, and the administration of the Australian Customs Service generally, Mr Richardson was also in dispute with Customs about the administration of the administrative penalties scheme, which had come into operation on 1 July 1989, the day after the charges against Midford had been withdrawn. An account of the scheme, and of its importance to Mr Richardson, is given in Chapter 2. In brief, Mr Richardson was so concerned about its operation, and about information being provided by Customs officers to the Senate and, in particular, to Senate estimates committees, that he compiled and forwarded to the Senate two substantial documents setting forth a series of detailed allegations that the ACS had misled the Senate [Letters from John Richardson with attached submissions dated 17 and 19 February 1992, and 30 April 1992]. The then President of the Senate tabled both documents in the Senate, in February and May 1992, and the question whether any false or misleading evidence had been given to the Senate or its Committees was referred to the Committee of Privileges in May 1993, at the same time as the alleged threat was referred.

Conduct of inquiry

1.19 The tasks confronting the JCPA in reaching its conclusions on the Midford case are well described in its report. So far as the Privileges Committee's terms of reference are concerned, one indication of its task is that some 25000 pages of documentation have been examined. In this regard, the Committee wishes to pay particular tribute to Mr Wayne Hooper, Principal Research Officer to the Committee, who undertook extensive evaluation, ordering and cross-checking of the documentation, and prepared the analyses of the material on which much of the Committee's deliberation was based. The purpose of undertaking such detailed work was to refine the broad terms of reference to establish whether any contempt might be involved in either of the matters referred to the Committee, and if so whether it was possible to ascertain who might have been responsible.

1.20 The complexity of this task is best demonstrated by the fact that the Committee has been undertaking the reference since May 1993, which constitutes a record for its deliberations: a record which it is not anxious to challenge in any case in the future. As the Senate is aware, the Committee places the highest priority on the resolution of any question of possible interference with a witness and therefore undertakes such inquiries with as much vigour and expedition as possible. In the particular circumstances of this case, however, the delays have been unavoidable.

1.21 As is its practice in matters such as these, the Committee wrote to Mr John Richardson and to the Comptroller-General of Customs seeking submissions on both terms of reference. It also wrote to the JCPA, seeking all relevant documentation, and, in particular, seeking the approval of the JCPA to publish any documents which, whether received as *in camera* material or as exhibits, had not been authorised for publication, but which the Committee of Privileges might consider necessary to publish for the purposes of its inquiry. The JCPA gave the Privileges Committee access to all the material necessary, with the identities of certain persons obliterated, and indicated that it would be willing for any essential material to be published.

1.22 In the event, given the limited nature of the actual questions of contempt on which the Committee has been required to make findings, it has been able to preserve the confidentiality of the documents made available to it. The Committee has therefore received the documentation provided by the JCPA as *in camera* evidence, and does not propose to release that evidence unless otherwise ordered by the Senate. In addition, the Committee does not intend, unless ordered by the Senate, to release its own documentation, on which the findings which it now reports to the Senate are based, to ensure that the information given to it by the JCPA is not compromised.

1.23 The documents to which the Committee refers in this report are those provided by Mr John Richardson and by his wife, Ms Lesley Lyons, in response to the Committee's invitation to make submissions; the submission of the former Comptroller-General of Customs, Mr Frank Kelly, also in response to the Committee's invitation; a submission by Mr Peter Bennett, President of the Customs Officers Association; and other documents which are on the public record.

1.24 As will be clear from the report, the Committee was assisted by the Richardson/Lyons submissions; cross-checking with JCPA documentation was required only as an independent verification of the information provided. Unfortunately, the Committee was not greatly assisted by the submission from the then Comptroller-General of Customs, which did not address with any precision specific issues which the Committee was required to determine, particularly in relation to term of reference (2), although the Committee found several attachments to the submission of great assistance in reaching its conclusions. The Committee did not perceive the need to seek further information from Mr Kelly, or from the ACS, as it was able to satisfy itself on the information otherwise available

as to what had actually occurred.

1.25 The Committee gave serious consideration to the need to hold public hearings on the matter. The privilege resolutions of 25 February 1988 provide that the opportunity must be given to any persons who may be the subject of adverse findings and wish to take the opportunity to do so to put their views forward at committee hearings, under the special protections provided by privilege resolution 2. In addition, the Committee itself has on some occasions found the need to hold public hearings as part of its investigatory processes. It was under the latter circumstances that the Committee considered whether there was a requirement to test documentary evidence by oral evidence.

1.26 In some ways, such an approach would have been of assistance to the Committee. It was, however, mindful of the state of health of the complainant in this matter. Obviously, if the Committee had regarded it as imperative to reach conclusions or make findings adverse to the Australian Customs Service on the two questions of contempt, the question of Mr Richardson's health would have been overridden by the right of the ACS and its officers to the fair hearing required by the privilege resolutions. On the other hand, given the conclusions of the JCPA that Mr Richardson's health and prospects of employment had been seriously affects by ACS behaviour, and later advice, through Mr Richardson's wife, of his doctors' views that resurrecting the matters would be seriously detrimental to his health, the Committee concluded that this should be avoided if possible.

1.27 The Committee took particular account of a letter from Ms Lyons, dated 15 September 1994, on which more detailed comments will be made in the last chapter of this report, drawing its attention to comments made in the Report of the Senate Select Committee on Public Interest Whistleblowing, *In the Public Interest*, tabled in the Senate on 31 August 1994 [Parliamentary Paper No. 148/94], and to an article by Dr Jean Lennane, published in the *British Medical Journal* [Vol. 307, 11 September 1993, pp. 667-70], on psychological and medical consequences for whistleblowers. Consequently, the Committee has proceeded, as in most of its previous cases, on the basis of written material only.

Customs culture

1.28 Before proceeding to the Committee's analysis of and observations and findings on the matters referred to it, the Committee considered that it would be useful to place the matters before it in the context of what several

external scrutineers, including the Committee itself [see 46th Report, March 1994, paragraph 2.19, Parliamentary Paper No. 43/1994], have described as the "Customs culture".

1.29 The Australian Customs Service has throughout the past decade or so been the subject of a quite extraordinary array of inquiries by a range of parliamentary and non-parliamentary bodies. The Committee has noted from Appendix D to the JCPA Report [pp. 519-523] that since 1975 special inquiries have been conducted by the Administrative Review Council, management consultants, interdepartmental committees, task forces, the Auditor-General, senior public servants and academics, the Australian Law Reform Commission and the House of Representatives Standing Committee on Finance and Public Administration.

1.30 In addition to these inquiries, which were specifically directed to the ACS, the Committee has had access to worrying general comments included in reports of administrative scrutineers such as the Ombudsman (see, for example, Annual Report 1989-90) and the President of the Administrative Appeals Tribunal (see Reasons for Judgement in Collector of Customs v LNC (Wholesale) Pty Ltd of 21 November 1989), quoted in the Ombudsman's Report. Similarly, the Law Council of Australia, in evidence given to the House of Representatives Standing Committee on Finance and Public Administration, drew attention to a culture of defensiveness and resistance to change. Customs has also received the normal and consistent critical scrutiny to which all Commonwealth bodies are subject from committees such as Senate estimates committees, and from the Auditor-General.

1.31 The two most significant inquiries, which have had the most direct influence on the restructuring of the Australian Customs Service, have undoubtedly been the JCPA Midford Inquiry which, as noted at paragraph 1.2 above, has precipitated the first question the Privileges Committee has been required to examine, and the review of the Australian Customs Service conducted by Mr Frank Conroy (Chairman), the Hon. Ian Macphee, AO and the Hon. Susan Ryan, AO. That review, which was established as a result of the JCPA inquiry, was completed in December 1993 and tabled by the Minister responsible for Customs, Senator the Hon. Chris Schacht, on 8 February 1994 [Journals of the Senate, p. 1215]. It was as scathing of the Australian Customs Service as the JCPA had been, and recommended wide-ranging restructuring.

1.32 This Committee in its 46th Report, presented to the Senate a month after

the Conroy review was tabled, expressed the hope that the recommendations of the review would be swiftly implemented so that problems consistently identified within the Service would be overcome. The Privileges Committee's report was also critical of the performance of ACS senior management before Estimates Committee E, and the Committee has had some reason to be concerned at the reaction of officers to its 46th report during their most recent appearance before the Economics Legislation Committee. In respect of this present reference the Committee reaches similar conclusions regarding the quality of ACS evidence before Estimates Committee A in the years 1990 to 1992.

1.33 The most succinct expression of concern about the ACS culture was provided in submissions both to the Midford Inquiry and to the Committee of Privileges by the Customs Officers' Association, a long-established employee organisation, which, while no longer a registered industrial organisation, is an association to which some Customs officers still belong. An extract from the submission by Mr Peter Bennett, President of the Association, to the JCPA [JCPA, S1302-S1310] summarises complaints raised before and by all external evaluators of the ACS performance. In his submission, Mr Bennett made the following observations:

> 1. Constant reviews of the ACS have caused a siege mentality in the Service.
> 2. The ACS is constantly reorganising to create the illusion of development.
> 3. Despite some worthwhile advances the ACS is always in catch-up mode in trying to stay ahead of the next review.
> 4. The Committee should consider the matters of this inquiry simply as symptoms of the basic structural problems facing Customs.
> 5. The Customs culture has developed into an entity which has its own agenda. Criticisms are not tolerated. The "system" demands compliance.
> 6. The fundamental contradiction in Customs is its dual roles of CONTROL and FACILITATION.
> 7. As Customs cannot carry out its functions very effectively, isn't it reasonable to give some other structure or system a try? What could we lose?
>
> [JCPA S1310]

1.34 Two further recommendations specific to the Midford inquiry follow, and Mr Bennett's submission then concludes:

10. Given the excessive criticism of the ACS by various parties, the Committee might question why ACS management think there is nothing wrong with the system or structure.
11. An Inspector General of Customs acting as a standing audit system would seem to be a better alternative than continual reviews.

[ibid., S1310]

1.35 This Committee's only comment is in respect of Mr Bennett's first observation. While recognising that a multiplicity of inquiries can contribute to the development of a siege mentality, the Committee has no doubt that Customs had developed a managerial culture which attracted the attention of external reviewers, culminating in the JCPA Midford report and the resultant Conroy review. That the ACS had resisted change for such a long time before action was taken following the Midford report is a matter of grave concern but gives an explanation of the reasons why this Committee has been required to consider these latest two matters under its contempt powers. This culture of defensiveness also gives an explanation of the conclusions that the Committee of Privileges has reached in both matters.

CHAPTER 2
POSSIBLE FALSE OR MISLEADING EVIDENCE

Introduction

2.1 Although the first matter referred to the Committee, and as previously indicated the matter of most serious concern to it, involves the alleged threat to Mr Richardson, in order to deal coherently with both matters this chapter discusses the second matter referred — the question of false or misleading evidence.

Background

2.2 Mr Richardson produced two documents, both tabled in the Senate, in which he set out detailed claims that false or misleading evidence was given to the Senate and, particularly, Estimates Committee A, in respect of the administrative penalties scheme under the Customs Act.

(a) The administrative penalties scheme of the Australian Customs Service

2.3 On 10 July 1989, Mr Richardson moved from Sydney to Adelaide to take up a position as a Customs agent with a new employer, International Freight Forwarding Pty Ltd. Ten days earlier, amendments to the Customs Act concerning administrative penalties for making false statements came into force. Briefly, these amendments: provided that it was an offence to give false information in a customs entry (import documentation); specified the penalties for breaches; and prescribed the procedures and criteria for remission of the penalties (sections 243T, 243U and 243V).

2.4 Since 1986 ACS has operated a fast-track import entry processing system. Under this system entry documents completed by importers or their customs agents are directed down either a "green line" or a "red line". The House of Representatives Standing Committee on Finance and Public Administration,

in its report entitled *A Tour of Duty*, tabled on 16 May 1991 [Parliamentary Paper No. 114/1991], described the system as follows:

> Under the red/green system . . . 90 per cent of entries are considered low risk and speedily processed down a 'green line', within four hours. The assumption is that the documentation supplied and duty self-assessed by the importer are correct. The remaining entries are termed 'red line' and are directed to an Audit Bay or to another area for further examination.

[Report, p. 20]

2.5 The Law Reform Commission (LRC) expanded on the description as follows:

> . . . The importer must give the Australian Customs Service . . . all the relevant information about the goods, including the identification and classification of the goods for the purpose of the Customs Tariff, and the customs value of the goods, in an entry. The importer must also state the amount of duty payable. Customs examines the supporting documentation only if the entry is selected for the redline. This may be because, on the basis of research, analysis and investigation, a transaction has been identified as a high risk transaction, or it may be random.
>
> . . . *High error rate.* Following the introduction of full self assessment, there was a perception that there was a high rate of error in entries. In June 1987 the Auditor-General reported that as many as 90% of entries checked contained an error and that most errors favoured the importer.

[Law Reform Commission, Report No 61, *Administrative Penalties in Customs and Excise,* September 1992, p. 2]

2.6 When the self-assessment provisions were introduced, the legislation did not provide for a penalty for duty short-paid. All that Customs could do when an importer or agent understated the duty payable was to demand that the proper amount be paid. As result there was no incentive to take care in the completion of entry documents. The 1989 amendments, which introduced the administrative penalties scheme, were intended to remedy this situation. The Minister for Industry, Technology and Commerce, Senator Button, when introducing the amending Bill, quoted figures suggesting that there was a shortfall in duty of $26 million directly attributable to agent or importer error.

2.7 The Law Reform Commission outlined the rationale of this refinement in the following terms:

> When it was introduced, the administrative penalty scheme was justified on the basis that it was necessary to deter 'playing the green line odds'. The odds were said to favour the importer because only 10% of entries were checked and, in the absence of evidence of fraud, there were no effective penalties for error. The scheme was advanced as the only real alternative to returning to the previous system under which each entry had to be individually checked, 'an untenable alternative'.
>
> [ibid., p. 3]

2.8 The main features of the administrative penalties scheme, as summarised in the LRC Report, were:

> * *An administrative penalty may be imposed.* An administrative penalty may be imposed on the owner of goods if a person 'knowingly, recklessly or otherwise' makes a false or misleading statement on the basis of which the amount of duty said to be payable on the goods is less than the amount of duty properly payable. Imposition of the penalty is at the discretion of the Comptroller-General of Customs . . .
>
> * *Amount of the penalty.* If a penalty is imposed, it is twice the amount of duty underpaid or $20, whichever is the greater.
>
> * *Penalty may be remitted.* The Comptroller may, on application, remit the penalty in whole or in part. In considering whether to remit the penalty the Comptroller can take into account four matters only:
>
> —voluntary admission that the statement was false or misleading
> — risk to the revenue
> — capacity to avoid the misstatement
> — the applicant's previous history.
>
> [ibid., p.1]

(b)Mr Richardson's first encounter with triple dipping

2.9 It is the procedures concerning remission which are of principal relevance to the Richardson case. As the LRC summary indicates, where an importer or a customs agent makes an error in a customs entry and a penalty is imposed it is possible to apply to the Comptroller for a remission of the whole or any part of that penalty. In considering such an application the Comptroller can take into account only the four matters listed in the LRC summary (para. 2.8

above). It is the fourth of these matters, the applicant's previous history, with which the Richardson case is concerned.

2.10 Mr Richardson first encountered on 26 September 1990 the practice which Senator Bishop later dubbed "triple dipping", namely, the Customs practice of counting the error histories of *all* parties — the owner of the goods at issue, the individual customs agent and/or the customs agency — when determining remission applications. Mr Richardson believed that only the history of the party responsible for the error should be considered.

2.11 As will be obvious, if the history of all participants could be used by the ACS in determining a penalty, regardless of whether all three were responsible for the error, it would be both administratively convenient and lucrative for the ACS to take the records of all three into account when making decisions as to remission of penalty. If, on the other hand, the ACS were required to establish that the error was made by a previously-blameless importer, agent or firm it might become more difficult to argue before a body such as the Administrative Appeals Tribunal (AAT) that the full or a significant penalty should be imposed.

2.12 In the early operation of the administrative penalties scheme, this question was open to doubt. Then in November 1990 the AAT ruled in a case brought by another agency (the Walker case [AAT S90/33]) that the history of only the error-maker should be used in the determination of penalty. The ACS accepted this decision but was still faced with the dilemma of what to do in remission cases where none of the parties involved admitted responsibility for an error. In such cases the ACS annotated its records to show that responsibility was shared, and encouraged importers and agents to clarify who was responsible for an error when filing claims for remission.

2.13 Mr Richardson lodged appeals with the AAT in respect of two cases [S90/235 and S91/52] in which "triple dipped" penalty histories were used. One of the cases was discontinued when the ACS remitted the remainder of the penalty, and in the other the Tribunal refined the Walker case ruling by determining that the error history of an agent's nominee (employee) should not be taken into account. These cases became the vehicles for a crusade by Mr Richardson against the administrative penalties regime and he invested a great deal of his and his employers' time in them.

2.14 Mr Richardson's undoubted expertise in the area, and his commitment to ensuring that the scheme, about which he stated that he had doubts even before the passage of the legislation, was administered fairly, led him to

raise his concerns in a wide variety of forums, and to follow all proceedings on the matter in great detail. Thus it was that, on reading evidence given by Customs officers before Estimates Committee A, he noted discrepancies between his understanding of the operation of the scheme and information given by the officers during committee hearings and, through the Minister, in response to questions in the Senate.

2.15 As a result, he built up two dossiers of matters which he regarded as constituting false or misleading evidence before the Senate and its committees. It was these dossiers which were tabled in the Senate and subsequently referred to this Committee for consideration as to whether Mr Richardson's assertions were correct.

2.16 The question of Customs' alleged misleading of the Senate in respect of the administrative penalties scheme also appears to have become linked in Mr Richardson's mind with the alleged threat, to be discussed in the next chapter, that he would be destroyed if he gave evidence before the JCPA on the Midford matter. It appeared to him that, everywhere he turned, he was being obstructed in his efforts to right a wrong. This may ultimately have cost him both his health and employment (see, for example, his submission to the Senate, dated 30 April 1992, p. 1 and p. 15).

Committee's methodology in determining whether false or misleading answers were given to the Senate or a committee

2.17 As the above brief account indicates, the questions for determination were extremely complex. The Committee needed to determine how much of the convoluted dealings between Mr Richardson and ACS had to do with the question whether the Minister and officers had given false or misleading evidence to the Senate and Estimates Committee A. The first task performed was to break down the statements made in the two documents tabled in the Senate into a series of allegations, of which there were 28. These allegations were further grouped into a series of eight elements, all connected to the administrative penalties scheme.

2.18 The matters examined by the Committee covered details such as whether accurate information had been given by officers on the time Customs officers took to make remission decisions, the two cases brought by Mr Richardson before the Administrative Appeals Tribunal and the relationship between them, and the nature and initiation of legal proceedings. The primary

purpose of such close examination was to evaluate the statements made by Mr Richardson against the source documents quoted in his statements to the Senate. While the Committee does not pretend to the same level of expertise as that displayed by Mr Richardson, the Australian Customs Service or indeed Senators with a special interest in the area, its examination of the claims made by Mr Richardson against the documents on which he based those claims has enabled it to gain sufficient knowledge to make an evaluation of answers to questions in the Senate and estimates committees in terms of the question of contempt.

2.19 Consonant with its previous comments about the defensive culture of the Australian Customs Service, the Committee has concluded that, in respect of the matters raised by Mr Richardson, the then Comptroller-General of Customs, and his officers, were not as forthcoming and helpful as they might have been in respect of answers given during oral evidence to Estimates Committee A. In respect of answers to questions on notice given by the Minister responsible for the Customs Service, the Committee considers that the answers were adequate under the circumstances.

2.20 It is beyond dispute that the detail of the administrative penalties scheme is highly technical, with specialists in the area capable of placing quite different interpretations on questions asked and answers given during an estimates committee hearing. The Committee appreciates that oral answers given to questions by Senators not specialists in Customs processes might well appear to a specialist in the area to constitute either false or misleading evidence. Having examined the allegations by Mr Richardson, however, the Committee has concluded that in no case do the answers in respect of the administrative penalties scheme appear to be false in material particulars. In several cases, however, the perfunctory nature of the answers might well have had the effect of misleading Senators as to the operation of the scheme.

2.21 There is room for doubt as to whether the brevity of answers by officers of the ACS was intended to mislead or was even deliberately unhelpful. From the perspective of those officers, their answers were at least plausible, although as hearings proceeded over a period of a year or more they could have been expected to take into account the developing knowledge of Senators and to provide more comprehensive answers. However, the Committee can understand that, given the stress that some experience in giving oral evidence, officers may consider themselves as fulfilling their obligations to the Parliament by giving the bare minimum of information in

answer to specific questions. The Committee notes that this approach is not confined to officers of the Customs Service.

2.22 So far as the questions on notice were concerned, the answers given by the Customs Service were not unreasonable, depending significantly, as they did, on an interpretation of the questions which accorded with their understanding of the operation of the scheme. The Committee also noted that, on several occasions, answers given by Customs officers were perhaps less complex and strained than alternative explanations postulated by Mr Richardson.

2.23 The Committee therefore considers that, while it is unhappy with the general tenor of oral evidence given to Estimates Committee A, and notes that it was in keeping with ACS performance during other inquiries, notably before the JCPA, it should not make a finding that a contempt of the Senate was involved in the matters raised by Mr Richardson in respect of the administrative penalties scheme administered by the ACS.

2.24 The Committee was mindful that at the time matters were being raised in the Senate and its committees the modifications to the scheme were new, having come into effect only in July 1989, and all persons involved were feeling their way in their operation. Thus, when parties had recourse to the Administrative Appeals Tribunal, there was legitimate room for disagreement as to the interpretation of rulings, and the likely outcome of the cases before the AAT.

2.25 The Committee also observes that the introduction of the administrative penalties scheme in 1986 and the modification of the scheme in 1989 formed part of a pattern of dramatic change to which the Australian Customs Service was accommodating and adjusting during the period when the Midford case arose. As the former Comptroller-General of Customs, Mr Frank Kelly, pointed out to the Joint Committee of Public Accounts in a paper, dated 14 June 1994 and tabled in both Houses on 17 November 1994, responding to that committee's recommendation no. 91 in the Midford report that he review the levels, functions and suitability of ACS officers involved in the Midford case:

> 37.The ACS had just undergone, in September 1987, a major restructuring from a hierarchical regionally based model to a functionally oriented approach, adopting devolved decision making principles. Officers were adjusting to the new organisational

requirements and lines of responsibility and accountability.

38. The case was one of the first Crimes Act prosecutions of a major Customs fraud attempted by either DPP or ACS and for ACS was the biggest fraud case it had ever attempted to handle. It was also the first quota fraud case pursued by the ACS and the legal grounding of the quota arrangements came under question for the first time in a criminal matter.

39. In effect two agencies in the midst of redefining themselves undertook a new and complex task. There were no established procedures governing the relationship between the DPP and ACS. The environment within which individual officers were working was demanding in any event.

[Paper, p. 9]

2.26 Furthermore, as Mr Kelly states later in the paper:

43. There is one very important aspect about this structure which should, with hindsight, be brought out. Many of the key players at the senior management level within Customs were generalist members of the Senior Executive Service. They were officers with appropriate and wide experience in a range of areas and, according to the management concept which underlies the SES, were capable of managing in any area assigned to them. They were not required to be specialists, even though they had to supervise expert officers, such as experienced investigators. I do not believe that situation to be inappropriate for ordinary times. What happened with Midford, however, was that there were newly assigned SES officers, dealing with a major case, relying quite properly on their experienced investigation staff and being guided and directed by outside and independent legal advisers. But the SES officers, during these early stages of the Midford case may not have been well enough equipped themselves to challenge the specialist advice and direction that they were getting from outside.

[ibid., p. 11]

2.27 That Mr Richardson's prediction of likely outcomes in respect of the administrative penalties scheme, and his interpretation of the resultant AAT rulings, proved to be more accurate than those of the ACS says much for his professional competence. From the perspective of the ACS, the level of competency in this complex and technical area, combined with the communications breakdowns which are inevitable in a large, recently restructured, decentralised organisation, might have led to inadequacies of prediction and of outcome at least in the short term. The Committee believes that, while the structural changes do not excuse ACS behaviour, notably at the time of the Midford case but also in subsequent years, they go some way to explaining the lack of technical expertise and inadequate management during this crucial time. The Committee has therefore decided that any misleading of the Senate or an estimates committee under these circumstances was unintentional, and thus has concluded that a finding of contempt should not be made.

CHAPTER 3
POSSIBLE THREAT OR INJURY

Introduction

3.1 Mr John Richardson has claimed that he was driven out of his profession by deliberate actions of the ACS as a result of his giving evidence to the JCPA. This general claim comprised 18 specific allegations, each of which was investigated by the Committee. The principal individual allegation, that a threatening phone call was allegedly made to Mr Richardson in an attempt to deter him from giving evidence to the JCPA, is dealt with in this chapter, which also discusses in general terms whether the threat was carried out.

The telephone threat

3.2 As summarised in Chapter 1, Mr Richardson claimed to receive an anonymous STD phone call on 17 April 1991 at his IFF office in which he was told not to give adverse evidence against Customs in the Midford inquiry. Mr Richardson described the threat before the JCPA as follows:

> Subsequent to the threat, I wrote down the telephone conversation as I remember it; incidentally, it was an STD phone call. The caller said, 'Can I speak to John Richardson, please'? I said, 'Speaking'. The caller said, 'We have never met, but I would like to talk to you about the Midford inquiry'. I said, 'May I ask who you are and what you want to discuss'? The caller said, 'My name doesn't matter, but I want to know if you are going to give evidence before the Midford commission'? I said, 'I have not seen the terms of reference and I have not been approached. Why do you ask'? The caller said, 'This call is just to let you know that if you do make a submission or give evidence you'd better not say anything that will embarrass anyone at Customs'. I said, 'If I am called, I have to say the truth. I will not commit perjury'. The caller said, 'You have to look after yourself. If you say anything bad about Customs or some officers we will put you out of business and make it so bad for you within your industry, you'll be unemployable'. I said,

> 'That is a bloody good attitude. How are you going to do that? What are you frightened of'? The caller said, 'Listen, smart arse, we have ways and means, and if you don't cooperate you've had the dick. You are finished, you are upsetting people'. I said, 'Not my fault if some people do not like the truth. I told Kelly this matter would not go away. I do not like being dragged into this simply because Customs and the DPP fouled up'. The caller said, 'You've been warned. Just be kind; if not, it's your funeral. We've got long memories'. The caller then hung up. [JCPA *Hansard*, pp. 287-88]

3.3 Mr Richardson revealed the threat to his employers shortly after it was made and to a "Customs Minister's adviser, Senior Customs Officer and Customs Brokers Professional Body Executives and IFF prior to 1 May 1991".

3.4 Despite the alleged threat Richardson decided to make contact with the JCPA. On 28 May 1991 he wrote to the JCPA stating that there were references to him in documents provided to Estimates Committee A and the JCPA and offering some explanatory comments. The JCPA invited him to make a written submission, which he forwarded on 14 June 1991 [JCPA, S1243]. He appeared before the JCPA on 29 August 1991 and gave evidence concerning the Midford case, the threat, and administrative penalties matters including the two cases on which he had initiated appeals to the AAT.

Alleged consequences of the threat

3.5 Mr Richardson, having reported the threat to the JCPA early in its inquiry, has subsequently made the general claim that the threat was fulfilled in that his career as a customs agent was deliberately destroyed by the ACS. He has given three reasons for the claim. First, he was actively hostile to the prosecution of the Midford case, even before charges were laid. Second, he gave evidence to the JCPA inquiry into the Midford case despite an anonymous telephone call threatening to destroy his career if he did so. Finally, he campaigned against the administrative penalties scheme and the practice of triple dipping. He claims that, for these reasons, the ACS put pressure on his Adelaide employers to discredit him and to cease to employ him.

3.6 Mr Richardson succumbed to work-related stress on 25 March 1992, a month after his first dossier of allegations was tabled in the Senate and 6 weeks before the second set of allegations was tabled. He returned to work on 1

July 1992 as part of a rehabilitation program but remained for only a week and is now, in his words, "unemployed and unemployable". His health remains very poor and he has had to be hospitalised on at least two occasions. As indicated in Chapter 1, in November 1993, on the recommendation of an inter-departmental committee established in response to the JCPA report, Mr Richardson was awarded $1,490,978 in compensation by the Federal Government.

Was the threat made?

3.7 The first task for the Committee was to determine whether the threat was actually made and, if so, by whom. The primary evidence as to the threat comes solely from Mr Richardson, who took note of the telephone call, as described at paragraph 3.2 above, and mentioned it to several persons at or soon after the time it was made.

3.8 It appears from the evidence that, at that stage, Mr Richardson did not take the matter so seriously that he felt intimidated by it, and this attitude persisted even to the time of his appearance before the JCPA. That committee, of course, regarded the matter with grave concern, as recounted at paragraphs 25.13 to 25.21 of the Midford report [JCPA *Hansard,* p. 287].

3.9 The level of concern by the JCPA was not, however, shared by the Australian Customs Service (ACS). In those paragraphs, the Joint Committee describes its futile efforts to encourage the then Comptroller-General, Mr Frank Kelly, to investigate Mr Richardson's claim:

> In March 1992 the Committee enquired of the Comptroller-General as to what action he had taken to investigate the threat made against the Customs Agent. He said 'In relation to the alleged threat, I have not done anything'. He added that he was expecting the Committee to say it was a serious matter and to request him to conduct an investigation. In relation to an occasion when the Agent mentioned the threat to the junior Minister's Senior Private Secretary, the Comptroller-General said that 'there was no indication at that stage that the threat may have come from Customs, so frankly I have not pursued it.'
>
> [JCPA Report, para 25.14]

3.10 The JCPA took the view that, by March 1992, when it queried Mr Kelly on the matter, it had already made its view known, and concluded as follows:

> The Committee therefore found it difficult to accept the Comptroller-General's claim that he did not conduct an investigation because he was awaiting the Committee to 'come and say that this is a serious matter'.
>
> Up to the time of tabling this Report, the matter had still not been investigated by the ACS. It occurred to the Committee, however, that one reason why an investigation had not been initiated could be that the ACS already knew the source of the threat.
> [JCPA Report, paras 25.20 and 25.21]

3.11 This Committee, too, is concerned at the lack of action by the Australian Customs Service. If the JCPA's views were not made clear to Mr Kelly before March 1992, the transcript of evidence at that time makes it abundantly clear that the JCPA expected some action from him. This Committee notes in passing that Mr Kelly's passive approach to investigating what all parliamentary committees regard potentially as the most serious of all contempts contrasted with his exhaustive and thorough investigation of an allegation, discussed in Chapter 4, that he had made personal remarks about Mr Richardson. It is also noteworthy that, despite the JCPA's terse remarks on the question in the Midford report, which was tabled in December 1992, Mr Kelly did not even then initiate moves to examine what was by any standard the most serious allegation contained in the report.

3.12 It was not until the matter reached the Committee of Privileges in May 1993 that the Comptroller-General directed that an investigation be undertaken. Following an exchange of correspondence between the then Chair of the Committee of Privileges and the Minister, Senator Schacht, in which assurances were sought and given that investigations would not hamper the Committee, the Comptroller-General, on 4 June 1993, asked the Australian Federal Police to conduct an inquiry. The report of the Australian Federal Police, of 9 September 1993, in response to the Comptroller-General's letter, is as follows:

> 9 September 1993
>
> Mr John Drury
> Acting Comptroller-General
> Australian Customs Service
> Customs House
> CANBERRA CITY ACT 2601

Dear Mr Drury

I refer to the Comptroller-General's letter of 4 June 1993 to Commissioner McAulay requesting the Australian Federal Police (AFP) to investigate the alleged telephone threats made against Mr John Richardson, Midford's former Customs Agent, during the course of the Joint Committee of Public Accounts inquiry into the Midford Paramount Case and Related Matters. You may recall that the incident is alleged to have occurred in April 1991.

The AFP has carried out extensive inquiries including conducting an interview with the former Customs Agent and has obtained documentation and information from other sources to assist with the investigation. A difficult impediment has been the length of time since the alleged occurrence. Certain records of telephone calls made at the time are no longer retained by Telecom.

The AFP investigation is now complete. From the information available it is not able to identify the person responsible for making the threatening telephone call to Mr Richardson.

No further action will be taken by the AFP unless additional information becomes available.

Yours sincerely

(Signed)
Brian C Bates
Deputy Commissioner
Operations

3.13 The Committee of Privileges draws particular attention to the following sentence:

> A difficult impediment has been the length of time since the alleged occurrence. Certain records of telephone calls made at the time are no longer retained by Telecom.

3.14 The Committee of Privileges regards this conclusion as almost inevitable and is disturbed that the JCPA's suspicion expressed at paragraph 25.21 of its report (see para. 3.10 above) cannot be proved or disproved. This is unfortunate since, as the JCPA has pointed out, that committee had asked the Comptroller-General as early as March 1992 what action he had taken.

It seems extraordinary to this Committee that, despite what might be described as the acerbic exchanges between the JCPA and the witness, no action at all was taken by the Australian Customs Service until after the matter reached the Privileges Committee more than a year later. The action was to seek, on 4 June 1993, the investigation by the Australian Federal Police referred to in paragraphs 3.12 and 3.13.

3.15 In attempting to determine the question whether a threatening call was made, the Committee examined three hypotheses. The first was that Mr Richardson concocted the story. The second was that there was a call and it was made by a person either within the Customs Service or someone closely connected to the ACS. Finally, as was suggested as a hypothesis by a member of the JCPA at the time the matter was raised before the Joint Committee of Public Accounts [*Hansard*, pp. 310-318], there was a call but it might have been made by someone who wished to encourage Mr Richardson to give evidence against Customs to the JCPA, knowing that a threat would make him even firmer in his resolve to give evidence to that committee.

3.16 While there is no direct evidence that would enable the Committee to conclude that the threat emanated from the ACS, the fact is that a threat to put Mr Richardson out of the customs business could be put into effect only by persons within Customs. Mr Richardson had no reason at the time to invent the story, and it could have been regarded in the interests of Customs to ensure that information was withheld from the inquiry. Accordingly, the most plausible conclusion that the Committee can reach is that a threatening call was made and that it is likely that the call was made by a person within the Australian Customs Service or someone closely connected to the ACS.

3.17 The Committee has come to the reluctant conclusion that the trail is now so cold that it is not possible to take the matter any further. The Committee must accept that, given that the Australian Federal Police, despite extensive inquiries into the matter, have not been able to identify the person responsible for making the threatening phone call to Mr Richardson, it is unlikely that the Committee would have any greater capacity to do so.

3.18 It is unsatisfactory that, as a result of the tardiness in undertaking investigations into the matter, honest and honourable officers of the ACS are in the position of having the finger of suspicion pointed at their activities at that time. The Committee would like to assume that the threatening call, if made, was made by a rogue individual without the knowledge or consent of

anyone from the ACS connected with the Midford inquiry. However, the inaction at the time when investigations might have borne fruit means that the Committee has no alternative but to leave the question hanging. If Mr Kelly had wished to dispel any suspicion that ACS was responsible for the threat, and to seek alternative explanations, the option was open to him to initiate inquiries as soon as he became aware of the claim of the threat, or at the very least by March 1992, when the JCPA's attitude to the matter was so transparent and unambiguous. He did not do so.

Was the threat carried out?

3.19 The Committee now turns to the second element of this matter, whether the threat was in fact carried out. As the discussion in Chapter 2 demonstrates, the relationship between Mr Richardson and the ACS became increasingly acrimonious. The difficult relationship appears to have escalated after Mr Richardson's move to Adelaide and was closely associated with his actions relating to the administrative penalties scheme.

3.20 Mr Richardson acknowledges that he was opposed to the introduction of the administrative penalties scheme and that he committed himself to opposing the manner in which it was implemented by the ACS. He campaigned vigorously against the way the scheme was administered on a wide variety of fronts: in addition to appeals to the AAT and complaints to the Federal Police he lobbied the minister and his staff, pursued the matter through customs agents associations, and wrote critical submissions to parliamentary inquiries and to the Ombudsman.

3.21 It is not surprising, therefore, that his complaints to and allegations about the ACS were greeted less than enthusiastically by that organisation. While the official ACS response to Mr Richardson was, on the whole, civil if somewhat brusquely bureaucratic, Customs management was not always as sensitive to nor as intelligent as it might have been about the wider ramifications of the issues he raised. A less defensive, more cooperative, attitude when these matters were raised, particularly in parliamentary forums, would have led to an earlier, more amicable, and infinitely less traumatic, resolution of the issues.

3.22 Mr Richardson's confrontation with Customs appears to have begun with the Midford investigation in Sydney in 1987, and continued in Adelaide with his appeals to the AAT. In late 1990 and early 1991 these cases were being raised in Estimates Committee A and before the completion of the second

AAT case he had become involved in the JCPA inquiry. During this period relations with his employer became difficult as a result of the amount of time he was devoting to these matters during business hours; his health began to deteriorate; and eventually, in late March 1992, he ceased work.

3.23 It is not surprising that Mr Richardson saw the adverse turn in his fortunes as resulting from these factors and it is also not difficult to see how he could come to believe that they were not random but part of a conspiracy to destroy him. The Committee, however, has reached the conclusion that, while the problems suffered by Mr Richardson may have resulted from his long confrontation with Customs, there is no evidence of any conspiracy by the ACS or its officers to punish him as a result of his giving evidence to the JCPA.

3.24 It must be emphasised that the genuine and understandable differences of opinion between the ACS and Mr Richardson over the administrative penalties scheme might not have developed into a long-running confrontation, with the attendant consequences for his employment and health, if Customs had not been burdened by the defensive culture to which much reference has been made in this and other reports.

CHAPTER 4
MISCELLANEOUS MATTERS

Introduction

4.1 This chapter addresses the remaining series of allegations which, although somewhat at a tangent to the main questions placed before the Committee by its terms of reference, might, if sustained, lead to the conclusion that contempts had been committed.

Alleged derogatory remarks about Mr Richardson

(a) By Comptroller-General

4.2 This matter relates to the allegation by Mr Richardson that Mr Frank Kelly, at a meeting held in Adelaide, made derogatory remarks about him. Mr Kelly has consistently and persistently denied the allegation, most recently in his submission to the Committee of Privileges as follows:

> Mr Richardson has alleged in paragraph 3D(8) of his submission to the Senate dated 17 February 1992 that I made a personal attack on him. He claims that in a meeting held in Adelaide, I made certain remarks which were derogatory in nature. I categorically deny that any such statements were made. These allegations were supported by the evidence provided to the JCPA by a former Customs officer, Mr Liam Hogan.
>
> This issue was raised during the JCPA inquiry into the Midford Paramount Case and at Senate Estimates Committee hearings in 1991 and 1992. In addition, an information was laid with the AFP by Mr Richardson alleging that I had committed a contempt of the AAT.
>
> Following receipt of the complaint, the AFP referred the matter to the Director of Public Prosecutions (DPP) for preliminary advice as to whether an investigation was warranted. The DPP

> examined the issue and advised the AFP that an investigation into the alleged statements was not warranted . . .
>
> I would also draw the Committee's attention to the submissions I made to the JCPA on 23 March 1992 and 19 August 1992 in which I categorically and absolutely denied the allegations made by Mr Richardson. In addition, during Customs appearance before Senate Estimates Committee A on 9 April 1992, I was questioned on this subject by Senator Bishop. Once again, I denied categorically that I had made any remarks about Mr Richardson's capacity to hold a Customs Agents Licence during a general staff meeting in Adelaide. Attachment C contains copies of my statements denying the allegations and an extract from the Estimates Committee transcript of 9 April 1992 for your information.
>
> In the context of the Committee of Privilege's examination of this issue, I maintain that no false or misleading statements were made to the Senate or a Senate Committee by me in relation to this allegation.
>
> [Submission, 16 October 1993, p. 2]

4.3 The Committee wishes to make two points concerning Mr Kelly's submission. First, his reference to the DPP advice to the AFP concerning the alleged remarks might be read as indicating that the DPP had concluded that it was not worth investigating whether the remarks were in fact made. The DPP's remarks related only to the question whether there should be an investigation under section 63 of the *Administrative Appeals Tribunal Act 1975*, which concerns contempts of the Tribunal, and the report, after having given reasons as to why it would be unlikely that a contempt would be found, notes that, given that the alleged statement by Mr Kelly was made more than a year before the DPP's investigation, "any action under section 63 of the AAT [Act was] therefore statute barred" [Attachment B to Mr Kelly's submission].

4.4 The second point relates to Mr Kelly's statement of 19 August 1992 to the JCPA concerning this matter, which he included as an attachment to his submission to the Committee of Privileges. In this statement Mr Kelly describes how he had arranged for statements to be sworn by those who attended the meeting at which the remarks were allegedly made. Thirteen statements were made by ACS officers, including two made by officers who were at Adelaide airport but who did not attend the meeting. Nine of the remaining eleven said that they had not heard any remarks about the AAT

or Mr Richardson while two said they heard some remarks (one at second hand) similar to those alleged by Mr Richardson.

4.5 The evidence is unclear as the what was actually said at the airport. For example, according to one witness, Mr Liam Hogan,

> . . . there was a question asked about an AAT case decision that must have been fairly contemporaneous with the date where Richardson was involved, and Kelly said that the decision had been okayed and then said that Richardson utilised the AAT to his own ends and in his opinion was unfit to be a Customs agent. [JCPA *Hansard,* p. 1999]

4.6 In contrast, another witness, Mr Nathan Sims, said:

> I can remember the AAT finding being raised but have no clear recollection of what was said. I can remember no comments being made in respect to Mr Richardson being a fit and proper person. [JCPA, S10606]

4.7 In his evidence [JCPA *Hansard,* p. 323] Mr Richardson said that he understood that his name had not been mentioned, though those present would have been able to infer that it was he who was being referred to.

4.8 The Committee believes that it would have been more appropriate for the statements to have been obtained from the witnesses by an independent third party rather than by senior Customs officials. This would have ensured a more credible process and one that was seen to be fair and just. This is especially important in light of the fact that there was not unanimity among witnesses as to what was said, or not said, at the meeting.

4.9 The remarks allegedly made about Mr Richardson, as reported by those witnesses who claim to have heard them, were derogatory and, if they had been uttered by the Comptroller-General, would have been most injudicious, given the difficult relationship, already apparent, between the ACS and Mr Richardson. The Committee does not consider, however, that the remarks, by themselves, even if they were made in the terms indicated by Mr Hogan, could lead to any possible finding of contempt by Mr Kelly. The only remaining question for the Committee in such circumstances would therefore be whether, in denying that he had made the comments, Mr Kelly had deliberately given false or misleading evidence on the matter to Senate Estimates Committees over a period of time.

4.10 Faced with the categorical denials by Mr Kelly that he made any derogatory comment at the meeting in Adelaide on either 25 or 26 July 1991, and the ambiguity of the recollections by persons who attended the meetings on both days, the Committee was left with the decision as to whether the matter should be pursued further. If the Committee thought that it could clarify the matter by revisiting the issue more than two years after witnesses' statements were sought and received, and that a finding of contempt on the grounds of Mr Kelly's giving false evidence to a committee might result, it would follow that course.

4.11 Given Mr Kelly's denials, however, the Committee is convinced that, even if what any reasonable person would regard as irrefutable proof were produced to Mr Kelly that he had made such a statement, he would continue to believe that he did not do so at that time. This is suggested by the lengths to which Mr Kelly went to check his memory of the Adelaide events, which, as the Committee has previously commented, was in stark contrast to his inaction in relation to the far more serious accusation that a witness was threatened, possibly by or on behalf of the Australian Customs Service. The Committee has therefore decided that the matter should not be pursued further.

(b)By Mr John Drury, National Manager, ACS Import-Export Control Subprogram

4.12 Mr Richardson has also claimed that Mr John Drury made similarly derogatory remarks about him. In particular, he claimed that:

- at a meeting between ACS official and a customs brokers organisation in Melbourne, Mr John Drury, at that time National Manager of the ACS Import-Export Control Subprogram, made inappropriate comments about him; and

- Mr Drury claimed to have used the Topper case to "Kick Richardson's head in and teach him a lesson".

4.13 In his submission to the Committee, Mr Kelly provided a detailed and convincing rebuttal of the first of these claims. In respect of the second claim, Mr Peter Bennett, President of the Customs Officers Association, states that he heard Mr Drury make critical remarks about Mr Richardson, to whom he later relayed them. In an otherwise trenchantly critical submission on the activities and attitudes of the Australian Customs Service, quoted at length in the next chapter, Mr Bennett is anxious to exonerate Mr Drury from

accusations of intimidation — the only question of relevance to the terms of reference of this Committee — or of bad faith.

4.14 The Committee accepts the defences put forward on Mr Drury's behalf insofar as these actions, even if substantiated, would not by themselves lead the Committee to any finding of contempt in respect of Mr Drury's alleged acts.

(c)By other Customs officers

4.15 Mr Richardson makes a number of further claims that he was ridiculed and unfairly criticised by other ACS officers, both in writing and orally, including that he was portrayed as "an idiot", and as "fair game" to be discredited.

4.16 The Committee emphasises that none of the alleged comments outlined in (a), (b) or (c) was uttered in Mr Richardson's presence, and he often heard about them at second or third hand. Again in the context of whether the alleged comments by other Customs officers would, if proved, constitute contempt in that they could be regarded as penalising him as a result of his giving evidence, the Committee does not so regard them. Given that the ACS regarded him as an antagonist, it is understandable that Mr Richardson was mentioned in reports, at meetings and in conversations. The Committee has found no evidence that links these allegations to any threat or improper intent to punish him on account of his evidence to a parliamentary committee.

Other claims

4.17 Mr Richardson claims that the firm he worked for (IFF) terminated his employment as result of fear by his employer of reprisal from the ACS, and also that his employer was in active collusion with Customs to discredit him. There certainly was a falling out between Mr Richardson and his employer, resulting in his ceasing to work for IFF. The reasons for this parting of the ways are complex, with both parties to the dispute having levelled claim and counterclaim at the other, but include disagreements over Mr Richardson's working methods and the number of working hours he spent on the Midford case and on other matters not directly related to his employer's business. It also appears that Mr Richardson's employer felt some discomfort at having as manager of its customs division someone who seemed to be constantly at loggerheads with the ACS.

4.18 The evidence before the Committee about the termination of Mr Richardson's employment was general and imprecise. While the Committee examined whether it would be possible to pursue the matter further, it reached the conclusion that, in the context of the question of contempt, the various factors which went to the breakdown in the relationship between Mr Richardson and his employer were unlikely to be differentiated with sufficient precision as to enable any finding of contempt safely to be made.

4.19 Another group of allegations consisted of claims by Mr Richardson that the method in which the ACS conducted the AAT cases in which he was involved constituted part of the campaign to discredit and destroy him. For the reasons given in Chapter 2, the Committee reached the conclusion that the conflicts between Mr Richardson and the ACS in respect of the matters he attempted to bring before the AAT did not arise as a result of his giving evidence to the Joint Committee of Public Accounts.

General conclusions

4.20 The Committee can appreciate that from Mr Richardson's perspective the events about which he has made allegations could appear to be part of a deliberate plan by the ACS to destroy him as a result of his evidence before the Joint Committee of Public Accounts. That the ACS might have an attitude which is conducive to a "search and destroy" approach to those who displease it is discussed in the final chapter of this report.

4.21 However, these same matters may also be seen in another, less sinister, light as discrete events having in common only that they involved Mr Richardson to a greater or lesser degree. Much of the evidence adduced by Mr Richardson was circumstantial, involved problematic inferences about motives of others, or was dependent on assumptions which, while understandable within the context of Mr Richardson's dealings with the ACS, the Committee could not always accept as valid. If all the events claimed by Mr Richardson to have been part of the ACS plan to destroy him were indeed so, then the number of individuals who would have needed to have been involved would have been quite large. On the evidence available to it, the Committee did not find that there was a coordinated operation against him as a result of his giving evidence to the JCPA.

4.22 The Committee wishes to emphasise that the defensive Customs culture would be likely to have adverse consequences for any individual, whether from within the ACS or from an organisation which was within the ACS orbit, who did not conform to Customs norms. Mr Richardson, as a dedicated

Customs agent concerned about matters affecting him, his employers and their clients, was persistent in pursuing what he regarded as injustices resulting from ACS administration. The Committee suggests that Mr Richardson's efforts to subject the ACS to external scrutiny led the ACS to resent his intrusions, thereby creating an environment of prejudice against him. When a person is perceived by senior officers of an organisation as a trouble maker, this perception quickly spreads to those who have direct dealings with the "offender". Equally, for the person who precipitates an organisation into a mode of defensive hostility, every act can lead that person to conclude that there is a conspiracy against him. The Committee believes that this occurred in the present case.

CHAPTER 5
OBSERVATIONS, FINDINGS AND RECOMMENDATIONS

The Customs culture revisited

5.1 As will be clear from the previous chapters, the Committee has been seriously disturbed by the culture of defensiveness which, at the time the incidents involving Mr Richardson occurred, appeared to permeate the Australian Customs Service. As noted in Chapter 1, this culture has been the background to all inquiries conducted by the array of review bodies listed by the Joint Committee of Public Accounts. In that chapter, the Committee also quoted at length from a submission to the JCPA by Mr Peter Bennett, Federal President of the Customs Officers Association of Australia, who has had nearly a quarter of a century's experience of the Customs culture.

5.2 In addition to his submission to the JCPA and as mentioned in Chapter 1, Mr Bennett made a submission, in general terms, to the Committee of Privileges. While he explained to this Committee that he would prefer to illustrate the points he made in his submission by giving oral evidence, for reasons explained in the first chapter the Committee determined that, for its purposes, oral evidence was not required.

5.3 Based on its own experience, as illustrated by comments made in its 46th report, the Committee feels justified in drawing attention to comments placed before it by Mr Bennett as follows:

> Finally I would like the Privileges Committee to know that I also have direct evidence of a culture in the ACS which lends itself to intimidation and harassment of parties who challenge ACS management.
>
> . . . there is ample evidence of the ACS management taking deliberate action to harm individuals if it is considered in the interests of management or if it is deemed necessary to silence criticisms of the Customs Service.

The Privileges Committee should not take this matter of Mr Richardson being singled out for unwarranted criticism and harassment as an isolated instance. If this was the only incident then perhaps Mr Richardson would be over-reacting or simply paranoiac. However harassment of individuals is an established part of the Customs culture.

It is very difficult to explain the depth of this cultural practice. Few people have the opportunity to see it in action. Because of my [24] years as an executive officer of a staff association I have had ample opportunity to see the practice in action.

In general terms the system starts by a very senior officer expressing "concerns" or (in the case of Mr Richardson) "disapproval" of an individual. That comment is then carried to a 'branch' meeting where the concerns/disapproval is discussed. A supervisor goes to their work area and tells staff about the matter. The staff are now very aware that the 'system' wants particular attention paid to this individual. The individual suddenly finds that their entries are checked and rechecked, deliveries are delayed repeatedly (or in the case of Officers, they find that their reports are constantly criticised or rejected).

. . .

I am under no illusion that the ACS, particularly at some management levels would, if it considered it necessary, contact persons with the intention of persuading them to stop criticisms of the ACS.

It is my view that this practice should be finally identified and exposed for the intimidation and harassment that it is. The ACS has long recognised the pervasive nature of its cultural practice of intimidation. It uses the practice as a form of staff and/or client control. The practice of intimidation is a polished art form in the informal disciplinary repertoire of the ACS.

. . .

However the ACS has specifically and constantly refused to acknowledge any possibility of suffering caused by intentional or unintentional intimidation. As a result there is no way to stop the practice from continuing.

The only way it seems possible to stop this practice is to hold an act of intimidation to account and made to be an example of

> wrong doing. I strongly suggest that this matter of Richardson be made an example by which the ACS will be forced to introduce a system of stemming intentional or otherwise intimidation of staff or clients.

5.4 The Committee has considered whether it should accept this assessment. Furthermore, in the context of its primary function, that is, to make findings as to whether contempts have been committed, endorsing such general comments might be regarded as extending beyond the Senate's instructions in such matters. The Committee considers, however, that to make sense of the questions raised by Mr Richardson and the conclusions the Committee has reached it is necessary to emphasise the "culture" and the consequent environment of prejudice in which these matters have arisen and to explain the devastating consequences for Mr Richardson following the telephone threat which the Committee has concluded must have been made by someone in or close to the Australian Customs Service.

Consequences for whistleblowers

5.5 That the consequences of the Midford matter for Mr Richardson have been devastating has become increasingly obvious to the Committee as its inquiries have progressed. While the award of monetary compensation should, one would have thought, have provided some solace to Mr Richardson, enabling him to close off that chapter of his life, this has not eventuated. In this context, the Committee points to the delays incurred in reaching a final compensatory determination, with the methodology and process of determining compensation being the subject of trenchant criticism from the Auditor-General [Report No. 25, 1993-94].

5.6 As the Auditor-General points out, despite specific instructions to the contrary from Cabinet, efforts were made to "re-try" the Midford case and it was not until further ministerial intervention occurred that the question of compensation was concluded. The Committee found it astonishing — and indeed a conflict of interest — that officers from the Australian Customs Service and the Department of Industry, Science and Technology were permitted to participate in the deliberations of the inter-departmental committee set up to examine compensation, while similar privileged access was not given to those seeking compensation. The Auditor-General's report suggests that that participation explained at least in part the delays which occurred.

5.7 The Committee regrets that it, too, has been responsible for drawing out the process for Mr Richardson, but considers that, in order to do justice to Mr Richardson and to those about whom he made allegations, extensive and detailed examination of all issues he raised, and of the extensive associated documentation, was imperative.

5.8 In drawing these matters to attention, the Committee has been influenced by the report of the Senate Select Committee on Public Interest Whistleblowing. In particular, it has found Chapters 5 and 6 of that report a valuable and incisive analysis of the "human dimensions" of whistleblowing, as that committee has titled its Chapter 5. It is of interest to note that the Committee of Privileges, given the nature of its work, frequently has dealings with people who might be regarded as whistleblowers and the Committee's own experience gives it reason to accept as accurate the analysis contained in the Public Interest Whistleblowing Committee report.

5.9 It is unsurprising that Ms Lesley Lyons, the wife of Mr Richardson, found in that committee's report an excellent if painful exposition of the consequences of whistleblowing which have led to the transformation of her husband. She made her views known both to that committee and, as mentioned in Chapter 1, to the Committee of Privileges. This Committee has decided to publish her letter as an appendix to this report, in order to illustrate the effects that being caught in a bureaucratic maze can engender in an otherwise committed and capable person. In these terms, it does not matter whether a committee such as the Privileges Committee makes a finding of contempt against an individual or an organisation. A useful function will have been performed if it succeeds in bringing home to public officials the consequences which may result from thoughtless actions and decisions.

Findings

5.10 The Committee now turns to summarise its responses to the specific questions which it has been required to determine, that is:

(1) Having regard to the letter of 13 May 1993 to the President from the Joint Committee of Public Accounts, whether there was any improper interference with Mr John Richardson as a witness, and, if so, whether any contempt was committed.

(2) Having regard to the submissions made to the Senate on 25 February and 4 May 1992, whether any false or misleading answers were given to the Senate or a Senate

committee, and, if so, whether any contempt was committed.

5.11 The Committee finds as follows:

In respect of term of reference (1):

(a) a threatening telephone call was made to Mr John Richardson, in an attempt to prevent his giving evidence to the Joint Committee of Public Accounts in relation to the matter referred to that committee on 5 December 1990 (the Midford/Paramount case);

(b) it is likely that the call was made by a person within the Australian Customs Service or someone closely connected to the ACS;

(c) in the light of previous unsuccessful investigations by the Australian Federal Police and the passage of time since the incident occurred, it is unlikely that the Committee could successfully uncover the source of the call;

(d) that the threatening call constituted a serious contempt, but there is no identifiable individual or organisation who may be held accountable for the contempt; and

(e) Mr Richardson suffered serious penalty and injury as a result of his dealings with the Australian Customs Service, but on the basis of the evidence before it the Committee is unable to conclude that the penalty and injury were incurred as a consequence of his having given evidence to the Joint Committee of Public Accounts.

In respect of term of reference (2):

(f) While questions answered and evidence given to the Senate and estimates committees, as described in Chapters 2 and 4, were at times unhelpful, the answers and evidence could not be regarded as intentionally misleading and thus do not constitute a contempt.

Recommendations

5.12 The Committee draws attention to its observations at pp. 12-14 of its 46th report (Parliamentary Paper No. 43/1994), and, in particular, to its

comments at paragraph 2.20 of that report about the review of the Australian Customs Service tabled in the Senate on 8 February 1994. It notes that a new head of the Australian Customs Service has been appointed and looks forward to the necessary legislative and other changes being introduced and implemented to give full effect to the recommendations of that review.

5.13 The Committee reiterates its optimism, expressed in the 46th report, that the implementation of the Conroy Report recommendations will break down the Customs culture which gave rise to the Committee's three Customs references over the past few years. However it recognises that the necessary attitudinal changes will take some time to effect. In order to assist in this process, the Committee of Privileges **recommends** that the Senate request the Comptroller-General of Customs to circulate copies of this report to all senior officers of the Australian Customs Service.

5.14 Given the extensive and time-consuming inquiries undertaken by so many organisations, in particular by both the Joint Committee of Public Accounts and this Committee over the past five years, and the concerns revealed by each, the Committee considers it appropriate to recommend that a watching brief be maintained over the Australian Customs Service by the appropriate Senate committee. Accordingly, the Committee of **recommends** that the following matter be referred by the Senate to the Senate Economics Legislation Committee:

> Continuing scrutiny of the implementation of recommendations contained in the Conroy Report entitled *Review of the Australian Customs Service*, tabled in the Senate on 8 February 1994.

Baden Teague
Chairman