

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COMMITTEE OF PRIVILEGES

**POSSIBLE MISLEADING EVIDENCE TO
AND IMPROPER INTERFERENCE WITH
WITNESSES BEFORE THE EMPLOYMENT,
WORKPLACE RELATIONS, SMALL BUSINESS
AND EDUCATION LEGISLATION
COMMITTEE**

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POSSIBLE MISLEADING EVIDENCE TO AND IMPROPER INTERFERENCE WITH WITNESSES BEFORE THE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION LEGISLATION COMMITTEE

Introduction

1. On 28 February 2001 the following matter was referred to the Committee of Privileges:

In relation to evidence provided to the Employment, Workplace Relations, Small Business and Education Legislation Committee in the course of its estimates hearings:

- (a) whether false or misleading evidence was given in relation to the proposed provision of copies of Australian Workplace Agreements by the Employment Advocate; and
- (b) whether there was improper interference with witnesses, namely the Employment Advocate and the Acting Employment Advocate, in respect of their evidence.¹

2. The President of the Senate, Senator the Honourable Margaret Reid, made a determination to give the matter precedence on 27 February 2001,² following consideration of a letter from Senator Jacinta Collins.³

Background

(a) Employment Committee budget hearing May 2000

3. On 3 May 2000, Mr Jonathan Hamberger, Employment Advocate, gave evidence to the Employment, Workplace Relations, Small Business and Education Legislation Committee (Employment Committee). In response to a request from Senator Jacinta Collins, a member of the committee, that certain individual Australian Workplace Agreements (AWAs) be made available to the committee, Mr Hamberger having previously replied that he had advice that section 83BS of the Workplace Relations Act, which prevents the disclosure of AWAs without the approval of the parties, did not prevent his disclosing AWAs to a parliamentary committee, undertook to do so.⁴

1 Journals of the Senate No. 171, dated 28 February 2001. Appendix A, p. 2.

2 President's statement, 27 February 2001. Appendix A, p. 1.

3 Letter, dated 7 February 2001, from Senator Collins to the President. Appendix B, pp. 3-6.

4 EWRSBE transcript of evidence, 3 May 2000, pp 84, 85 and 87. Appendix B, pp. 7, 8 and 9.

4. On 9 May 2000 Mr Hamberger wrote to the Employment Committee advising that he was now of the view that it would not be appropriate for him to provide the committee with copies of AWAs. His letter gave four grounds for his coming to this view. These were, in summary, that:

the provision of AWAs would be contrary to the statutory intention of section 83BS of the Workplace Relations Act

parties to AWAs would expect that the agreements would not be disclosed without their permission

disclosure of AWAs could offend privacy principles

a press report suggested that some action might be taken against employers who were disclosed as parties to AWAs.⁵

(b) Employment Committee supplementary budget hearing May 2000

5. On 30 May 2000, the Employment Committee convened for a supplementary hearing on the same matter. In the absence of Mr Hamberger, who was overseas at the time, Mr Peter McIlwain, Acting Employment Advocate, gave evidence to the committee. Mr McIlwain stated that Mr Hamberger's change of view was based partly on legal advice received by the Department of Employment, Workplace Relations and Small Business (EWRSB), after the hearing on 3 May. He also stated that he had not seen this legal advice.⁶

6. Dr Shergold later intervened, saying: 'Senator, he does not go into that legal advice, and the legal advice he has is clearly privileged'.⁷ Mr McIlwain supported this intervention, declaring that 'the legal advice on which I operate, and am operating, is subject, I believe, to legal professional privilege'.⁸ Further on, he responded: 'I believe that such legal advice as I have on that issue is subject to legal professional privilege'.⁹

7. In response to a request from Senator Collins for advice on Mr Hamberger's refusal to produce the AWAs, the Clerk of the Senate provided two advices. The first, preliminary, advice of 30 May 2000 endorsed Mr Hamberger's original view that section 83BS did not prevent his disclosing AWAs to a committee. The Clerk then went on to query what appeared to be a new view raised at the 30 May hearing, purportedly based on legal advice, that Mr Hamberger could not provide the AWAs

5 Summary in letter, dated 6 June 2000, from Clerk of the Senate to Senator Collins. Appendix D, p. 54.

6 EWRSB transcript of evidence, 30 May 2000, p. 99. Appendix B, p. 10. Subsequently it became clear that Dr Peter Shergold, Secretary to the department, had acted on a suggestion that he seek the advice referred to and had also made the advice available to Mr Hamberger – see paragraphs 19 and 20.

7 *ibid.*, p. 100. Appendix B, p. 11.

8 *ibid.*

9 *ibid.*

and pointed out that the claim of legal professional privilege similarly did not prevent the disclosure of information in the course of parliamentary proceedings. The Clerk's advice also made the point that Mr Hamberger had not raised, and could not, any claim of public interest immunity. The Clerk pointed out that this claim could be made only by a minister and was not available to an independent statutory office holder such as Mr Hamberger.¹⁰

8. When the transcript of the hearing became available, and as foreshadowed in his advice of 30 May, the Clerk on 6 June 2000 provided further and more detailed advice on matters raised. The Clerk pointed out:

None of these grounds¹¹ go to the question of law to which Mr Hamberger referred in his evidence of 3 May 2000, namely, whether section 83BS as a matter of law prevents the disclosure of AWAs to a parliamentary committee.¹²

He commented:

Mr Hamberger's letter says only that such disclosure would be contrary to the intention of that provision, not that it would be unlawful under that provision. The other grounds clearly do not refer to that question of law, and do not refer to *any* questions of law.¹³

9. The Clerk emphasised that it was only at the hearing of 30 May that any reference was made to legal advice. The Clerk, having noted that any such legal advice would fly in the face of well-established principles, previously accepted by the Government's own legal advisers, then went on to suggest that five questions needed to be determined.

- (1) Is Mr Hamberger now saying that there is some legal impediment to the provision of AWAs to a committee, or is he simply saying that the intention of section 83BS should persuade a committee not to press a requirement for copies of AWAs?
- (2) If he is not now saying that there is a legal impediment to the provision of the AWAs, to what principle of law is the legal advice referred to at the hearing on 30 May addressed?
- (3) If he is now saying that there is a legal impediment to the provision of the AWAs, does that legal impediment arise from section 83BS?
- (4) If the legal impediment does not arise from section 83BS, from what does it arise?

10 Letter, dated 30 May 2000, from Clerk of the Senate to Senator Collins. Appendix D, pp. 52-53.

11 Clerk's summary of grounds, quoted at paragraph 4 above.

12 Letter, dated 6 June 2000, from Clerk of the Senate to Senator Collins. Appendix D, p. 54.

13 *ibid.*

- (5) If the legal impediment does arise from section 83BS, is he (and/or the government) now saying, contrary to the advice given since 1991, that a statutory secrecy provision like section 83BS, *as a matter of law*, prevents the provision of information to a parliamentary committee?¹⁴

10. Opposition senators' concerns, following the meeting of 30 May 2000 and consideration of the Clerk's advices, were conveyed to the Senate in an addendum to the Employment Committee's report on budget estimates 2000-2001 tabled on 22 June 2000. This addendum foreshadowed that recommendations to the Senate for further action would be made depending on the outcome of further evidence and deliberation.¹⁵

(c) Employment Committee special hearing August 2000

11. The matter was next pursued during a special hearing of the Employment Committee on 14 August 2000, ordered by the Senate on 28 June. At this hearing Mr Hamberger confirmed that his reasons for deciding not to provide copies of AWAs to the committee were not legal reasons but arguments about appropriateness. When asked about the legal advice referred to by Mr McIlwain, Mr Hamberger stated that there was further legal advice that he had become aware of, but it was not significant and did not have a great deal of bearing on the matter. He confirmed that the legal position had not changed since the first hearing, and stated that he did not know why Mr McIlwain claimed legal professional privilege in respect of the advice referred to on 30 May.¹⁶

12. Mr Hamberger also indicated that, in the course of changing his view, he spoke to a number of people in his office and in the Department of EWRSB, as well as the minister, and stated: 'These discussions – in particular, the one with the Minister – were at my instigation'.¹⁷ In answer to a question on notice provided on 1 September, however, Mr Hamberger stated that a conversation he had with Dr Shergold on 4 May was initiated by Dr Shergold.¹⁸

(d) Employment Committee additional estimates hearing December 2000

13. At the hearing of the Employment Committee to examine additional estimates on 7 December 2000, at which Mr Hamberger, Mr McIlwain and Dr Shergold appeared, Senator Collins continued to pursue the matter. Noting what she regarded as the contradictory evidence by all persons at the previous hearing, Senator Collins

14 *ibid.*, p. 56.

15 Opposition Senators' Report. Appendix E, pp. 58-61.

16 EWRSBE transcript of evidence, 14 August 2001, p. 515. Appendix B, p. 23.

17 *ibid.*, p. 508. Appendix B, p. 16.

18 Answer to question no. W135, Appendix B, p. 45.

raised the question of possible concerns regarding Senate privilege.¹⁹ It became clear that Mr Hamberger himself had not sought the legal advice. Dr Shergold stated that he had probably asked for the legal advice, but at first could not say definitely. Mr Hamberger reiterated that his change of mind did not rely on the advice. Mr McIlwain stated that he adopted Mr Hamberger's position, and that he made the claim of legal professional privilege on advice. Dr Shergold did not respond specifically to a question about whether he had seen the legal advice when he claimed privilege for it, but said that he had seen legal advice on file which predated the new advice that Mr Hamberger had received.²⁰ Mr Hamberger and Dr Shergold indicated that they did not object to providing the date of the advice, and undertook to do so.²¹ Dr Shergold confirmed that the legal advice had been sought on the morning of 4 May, before he spoke with Mr Hamberger, and the advice, provided on the same day, was given to Mr Hamberger on 8 May.²²

14. Senator Collins also asked whether Dr Shergold had discussed the matter of the legal advice with the minister or his office before speaking to Mr Hamberger. Dr Shergold responded 'No'.²³ In response to an expanded, written question from Senator Collins about contact with the minister's office, Dr Shergold stated:

It is usual for the Secretary to discuss outcomes from Senate Estimates hearings with staff of the Minister's office in the week following each hearing. This would probably have taken place by telephone in the week beginning 8 May and would have been initiated by the Secretary. ...²⁴

(e) Reasons for raising matter of privilege

15. On 7 February 2001, having considered all previous material, Senator Collins stated in her letter to the President raising a matter of privilege:

(i) In respect of false or misleading evidence:

The evidence given on 30 May 2000 gave a very clear impression that both Mr Hamberger and Mr McIlwain relied on legal advice in the decision not to provide the copies of AWAs. As the subsequent evidence revealed, however, Mr Hamberger had had that advice since 8 May and had decided that it was not a factor in his decision not to provide the AWAs. The answers given at the subsequent hearings were evasive ... There is a strong case that misleading evidence was given on 30 May, and that the false impression which was then given to the committee was not finally corrected until the written answers were received on 31 January 2001.

19 EWRSE transcript of evidence, 7 December 2000, p. 181. Appendix B, p. 32.

20 *ibid.*, p. 183. Appendix B, p. 34.

21 *ibid.*, p. 184. Appendix B, p. 35.

22 Answer to question no. W344. Appendix B, p. 47.

23 EWRSE transcript of evidence, 7 December 2000, p. 189. Appendix B, p. 40.

24 Answer to question no. 358. Appendix B, p. 46.

(ii) In respect of possible improper interference with witnesses:

Under the Workplace Relations Act, the Employment Advocate is an independent statutory officer, appointed by the Governor-General for a fixed term and removable only the Governor-General on stated grounds. The holder of the office is not subject to ministerial direction except as to matters, and in circumstances, limited by the statute.

...

Given the statutory situation of the Employment Advocate ... the Senate could well conclude that any attempt to persuade the Employment Advocate to change his evidence and to refuse documents to a committee would amount to improper influence of a witness.²⁵

(f) Reasons for giving precedence to matter of privilege motion

16. On 27 February 2001 the President gave precedence to a motion to refer the matter to the Committee of Privileges. In giving precedence, the President set out the following analysis:

The matter [Senator Collins] has raised relates to evidence given at estimates hearings, and consists of two elements:

- whether false or misleading evidence was given in relation to a change of evidence on the part of the Employment Advocate
- whether there was improper interference with witnesses, namely the Employment Advocate and the Acting Employment Advocate, in respect of their evidence.

The essence of the first aspect of the matter is that a false impression was given about the change of the Employment Advocate's evidence, the part played by a legal opinion and the origin of that legal opinion. The essence of the second aspect of the matter is that the Employment Advocate and/or the Acting Employment Advocate were influenced to change the evidence in a manner that was improper, having regard to their status as independent statutory officers.²⁶

In turning her attention to the criteria by which she is required to determine whether precedence should be given, the President stated:

The criteria do not provide for me to assess the strength of the case, but only the nature of the matter raised.²⁷

25 Letter, dated 7 February 2001, from Senator Collins to the President of the Senate. Appendix B, p. 5.

26 President's statement, 27 February 2001. Appendix A, p. 1.

27 *ibid.*

She went on:

In relation to the false or misleading evidence aspect of the matter, it is the same in principle as other matters which have been referred by the Senate to the Privileges Committee, investigated by the committee and made the subject of its findings.

In these precedents, both the Senate and the committee have made it clear that false or misleading evidence covers not only cases in which statements are made which are shown to be false, but also cases in which a committee is given a misleading impression of a matter, even where answers are technically correct. ...

In relation to the improper influence aspect of the matter raised, this turns on the status of the Employment Advocate as an independent statutory officer. Senator Collins concedes that it may be permissible for a departmental officer to change evidence at the instigation of a minister or senior officers, but suggests that the special statutory status of the Employment Advocate makes any such influence on him to change his evidence improper. She also suggests that evasive and misleading answers were given partly for the purpose of concealing exactly how the Employment Advocate was influenced.²⁸

The matter was referred to the Committee of Privileges on 28 February.

Conduct of inquiry

17. In accordance with normal practice, the Committee of Privileges wrote to Senator Collins, as the mover of the motion, to Dr Shergold, Mr Hamberger and Mr McIlwain, the persons who had given evidence and additional information to the Employment Committee, and to Senator Tierney as Chair of the Committee.

18. Senator Collins advised that she had nothing further to add to comments previously made²⁹ and Senator Tierney did not respond to the committee's invitation. Dr Shergold, Mr Hamberger and Mr McIlwain have made such complete responses that the committee has been able to make its findings based on the written material before it.³⁰ All these documents, and other documents quoted in this report, are attached as appendices.

(a) Response by Dr Peter Shergold, Secretary, Department of Employment, Workplace Relations and Small Business

19. After briefly denying that he either provided false or misleading evidence to the Employment Committee or improperly interfered with Mr Jonathan Hamberger and

28 *ibid.*

29 Letter, dated 5 April 2001, from Senator Collins. Appendix F, p. 62.

30 Appendices G-I, pp. 63-77.

Mr Peter McIlwain, Dr Shergold has addressed the suggestions that his responses were misleading as follows:

It is true that I intervened on 3[0] May 2000 to note that the legal advice upon which Mr McIlwain was being questioned was privileged. My intervention was not unusual. The record of Committee hearings over the last few years will confirm that I regularly respond thus when questions which are put to me or others in the portfolio stray into the content of policy or legal advice.

Some emphasis is put on the fact that I have twice used the word “probably” in my evidence. The first occasion was when I was asked who had sought legal advice. In response I stated ... that “it would probably have been at my request to ask the chief counsel to ensure that whatever legal advice we had within our department was made available to Mr Hamberger”. The “probably” is not evasive: it simply reflects that at the time of questioning – seven months after the event – I did not know whether I had requested the chief counsel to seek advice and/or to provide it to the Employment Advocate or whether he (or others in the Department) had decided to do so on their own initiative. It does not appear to me of any consequence whether the request for legal advice was my suggestion. However I can now confirm that the counsel’s recollection is that I attended briefly a post-Estimates debriefing where it was suggested to me that legal advice be sought and I agreed. It was I who suggested that I would ask the Employment Advocate if he wished to see it.

The second use of the word “probably” was in a written answer to a question on notice (7 December 2000). I was asked if I had had discussions with the Minister or Minister’s office in relation to the Senate Estimates Hearing on 3 May 2000. I checked my diary and found no record of any meeting but, in order to be cautious in my response, noted that I usually telephoned the Minister’s office in the week following Senate Estimates and, on that basis, indicated that I had probably done so on this occasion. As in the previous instance it is not reasonable to characterise the use of the qualification “probably” as evasive.³¹

20. In addressing the question whether he influenced the Employment Advocate to change his evidence Dr Shergold’s statement is as follows:

I did, later that day,³² telephone the Employment Advocate and have a brief conversation. During that conversation we discussed whether it was appropriate – given s83BS of the Workplace Relations Act – to divulge the identities of the parties to AWAs. I offered him access to the legal advice I had sought, once received. He accepted. I did have that advice provided to him on 8 May 2000.

31 Letter, dated 6 April 2001, from Dr Peter Shergold. Appendix G, p. 64.

32 4 May 2000.

I have never commented on the use Mr Hamberger and Mr McIlwain made of legal advice provided to them because I do not know. Quite simply, the use made of the advice was a matter for them.

There is absolutely nothing in this chain of events that indicates that I was not appreciative of the statutory independence of the Employment Advocate. There is no evidence whatsoever of seeking to influence him in any improper manner. I deny it. As I understand the Employment Advocate denies it also.³³

21. After making comment on the manner of his discovering that the matter had been referred to the committee, Dr Shergold concludes:

... I emphasise that I have not consulted in any manner with the Employment Advocate in the preparation of my response. Nor have I spoken to any Minister or member of a Minister's office on this matter.³⁴

(b) Response from Mr Jonathan Hamberger, Employment Advocate

22. Mr Hamberger's response gives a detailed account of all actions taken both during and subsequent to the hearing of 3 May 2000, and the committee, rather than précis all Mr Hamberger's comments, draws attention to Appendix I to this report.

23. Information which has assisted the committee to make its finding in this matter includes the following:

When I was asked if I could provide individual AWAs I responded:

"I do not believe that from the point of view of 83BS there is anything to prevent us – no, there is nothing to prevent us giving this committee copies of AWAs". ...

I began to reflect upon the answer that I had given shortly afterwards and over the next few days talked to a number of people as to whether it was appropriate to produce the individual AWAs as requested. I was contacted on 4 May 2000 by Dr Shergold and I recall that we briefly discussed the evidence given to the committee the previous day. I do not recall any detail of the conversation, but I do recall that Dr Shergold thought that my interpretation of the legal position regarding the disclosure of individual AWAs may not be correct I also spoke to Mr Reith on 8 May 2000.

As a result of those various conversations and the other considerations set out in my letters to the [Employment] Committee of 9 May 2000 and 11 July 2000 ... and in my evidence to the Committee of 14 August 2000, I began to form the view that, despite the lack of any legal impediment in

33 Letter, dated 6 April 2001, from Dr Peter Shergold. Appendix G, p. 64.

34 *ibid.*, p. 65.

providing the AWAs to the committee, it was, nevertheless, not appropriate to do so.³⁵

Later in his response, Mr Hamberger states:

I also became aware of a further legal advice which had been obtained by the Department of Employment, Workplace Relations and Small Business. I did consider this advice. However it did not in my view alter the legal position.³⁶

The remainder of Mr Hamberger's response on this aspect of the reference gives a more detailed response to Senator Collins' specific concerns.

24. In relation to the second question before the committee, Mr Hamberger's response is:

I wish to state categorically that at no time did any person seek to improperly influence me to change my mind in relation to the production of individual AWAs to the committee. Moreover, the decision to change my mind was mine alone.

As previously stated, I discussed the matter with a number of people, including officers from my office, Dr Shergold and the Minister. ... everyone who I spoke to about the matter acknowledged that the decision as to how I should respond to the committee was mine alone.³⁷

(c) Response by Mr Peter McIlwain, Deputy Employment Advocate

25. Mr McIlwain has provided the Committee of Privileges with a similarly detailed analysis of his response to the Employment Committee. As a prelude to this analysis Mr McIlwain makes the following statement:

I respectfully and strenuously deny these allegations [i.e. that he misled the Employment Committee and that he allowed himself to be interfered with in the giving of his evidence]. My evidence to the Committee on 30 May 2001 – and on all subsequent occasions – was given truthfully and to the best of my ability.³⁸

26. In respect of the question whether he was improperly interfered with, particularly in his claim of legal professional privilege, Mr McIlwain states:

- it was I – and not Dr Shergold – who made the OEA's claim of legal professional privilege ...;

35 Letter, dated 24 April 2001, from Mr Jonathan Hamberger. Appendix I, pp. 71-72.

36 *ibid.*, p. 72.

37 *ibid.*, p. 75.

38 Letter, dated 20 April 2001, from Mr Peter McIlwain. Appendix H, p.66.

- the claim was made on the advice of the OEA's Senior Legal Manager, Mr David Rushton, who accompanied me to the hearing and also gave evidence on that day ...; and
- I asked Mr Rushton for his opinion at the same time Dr Shergold expressed the view that the legal advice was subject to professional privilege ...

My claim of legal professional privilege was made independently, on the advice of the OEA's in-house counsel. Coincidentally, Mr Rushton took the same view on the issue as Dr Shergold.

Lastly, Senator Collins seems to suggest in her letter to the President that there may have been *general* interference by Dr Shergold in my evidence. I wish to state categorically that on no occasion did Dr Shergold attempt to interfere in my evidence to the Committee.³⁹

Conclusion

27. The Committee of Privileges has concluded as follows:

- *In respect of paragraph (a)* — whether false or misleading evidence was given in relation to the proposed provision of copies of Australian Workplace Agreements by the Employment Advocate — the Committee of Privileges has noted that answers delivered by all officers involved, both orally and in written answers to questions taken on notice, to the Employment, Workplace Relations, Small Business and Education Legislation Committee over a period of some nine months were both complex and convoluted. It therefore considers it understandable that senators could have had the impression that false or misleading evidence had been given to them. A careful analysis of the evidence, however, particularly the responses, read together, of Dr Shergold, Mr Hamberger and Mr McIlwain to the committee's invitation to make comment on the matter referred to it, has led the Committee of Privileges to conclude that no such false or misleading evidence was given before the Employment Committee.
- *In respect of paragraph (b)* — whether there was improper interference with witnesses, namely the Employment Advocate and the Acting Employment Advocate, in respect of their evidence — there is no evidence to suggest that any such interference occurred. Their own categorical denials that any interference was attempted and their assertions that they at all times acted independently, together with equally vigorous assertions by the Secretary to the Department of Employment, Workplace Relations and Small Business that no improper interference had occurred, has enabled the committee to reach this conclusion.

39 *ibid*, p. 70.

Finding

Accordingly the Committee of Privileges finds no evidence to support any conclusion that a contempt of the Senate has occurred in respect of the matter referred to it.

Robert Ray
Chair

APPENDICES

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