

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COMMITTEE OF PRIVILEGES

POSSIBLE IMPROPER INTERFERENCE WITH OR MISLEADING

REPORTS OF PROCEEDINGS OF SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

(44TH REPORT)

DECEMBER 1993

MEMBERS OF THE COMMITTEE

Senator the Honourable Margaret Reynolds (**Chairperson**) (Queensland)
Senator Baden Teague (**Deputy Chairman**) (South Australia)
Senator Brian Archer (Tasmania)
Senator Bruce Childs (New South Wales)
Senator John Coates (Tasmania)
Senator Christopher Ellison (Western Australia)
Senator Jim McKiernan (Western Australia)

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CHAPTER ONE - INTRODUCTION AND BACKGROUND

Introduction

1.1 On 30 August 1993 the following matter was referred to the Committee of Privileges, on the motion of the Chairman of the Legal and Constitutional Affairs Committee, Senator Barney Cooney:

Whether the advertisement placed in various newspapers by the Watchdog Association Incorporated, which refers to the inquiry by the Standing Committee on Legal and Constitutional Affairs into the Australian Securities Commission, constituted an improper interference with the Senate's and the Committee's exercise of their inquiry functions, or a false or misleading report of the proceedings of the Senate or the Committee, and whether any contempt was committed by the placing of the advertisement.

1.2 On 18 August, in indicating the President's acceptance of the matters raised by Senator Cooney as involving a matter of privilege, thereby giving precedence to a motion by Senator Cooney, the Acting Deputy President, Senator Teague, on behalf of the President, made a statement included in the volume of documents presented with this report, and tabled the following documents:

Letter dated 9 August 1993, from Senator Cooney, conveying the terms of a resolution agreed to by the Legal and Constitutional Affairs Committee;

the advertisement in question, placed by The Watchdog Association Incorporated in the newspapers referred to in Senator Cooney's letter; and

advice to the Legal and Constitutional Affairs Committee on the advertisement from the Clerk of the Senate, Mr Harry Evans.

These documents, too, are in the volume of documents.

Background

1.3 On 1 July 1993, the following advertisement appeared in several newspapers throughout Australia:

1.4 The terms of reference of the Committee, which were agreed to by the Senate on 27 May 1993 on the motion of Senator O'Chee, are as follows:

That the following matters be referred to the Standing Committee on Legal and Constitutional Affairs for inquiry and report:

- (1) The exercise of the powers of officers of the Australian Securities Commission (ASC) to interview witnesses including:
 - (a) the manner in which those interviews are conducted;
 - (b) the power to take transcripts of interview and the treatment of those transcripts; and
 - (c) the power to compel production of books and records.
- (2) The exercise of the powers of the ASC to bring applications against corporations and individuals including:

(a)the bringing of applications during the course of an investigation;
and

(b)the process by which the applications are brought.

1.5The advertisement having been drawn to the attention of the Legal and Constitutional Affairs Committee, that Committee sought advice from the Clerk of the Senate as to whether any question of privilege might be involved. Following consideration of the advice, the Committee resolved that the advertisement be referred to the President as a possible matter of privilege and the President gave his determination in the terms outlined in the volume of documents.

Conduct of the Inquiry

1.6 As is customary, the Committee of Privileges wrote both to Senator Cooney and to Mr Andrew Wade, representing The Watchdog Association Incorporated, inviting submissions on the matters raised. Each responded to the Committee's invitation and their submissions are included in the volume of documents.

1.7Senator Cooney provided this Committee with documents relating to the inquiry. In his covering letter he mentioned that a facsimile of the advertisement, dated 3.59 p.m. 28 June 1993, was sent to the secretary of the Legal and Constitutional Affairs Committee by Andrew Wade of The Watchdog Association Incorporated but, owing to the committee secretary's absence from his office attending a committee meeting in Melbourne, the secretary did not read the advertisement until late on 1 July 1993, the day on which the advertisement appeared in newspapers throughout the country.

1.8In his submission to the Committee of Privileges, Mr Wade, on behalf of the Watchdog Association, explained that the advertisement in question was one of a series of advertisements, the first one of which appeared in early December 1992. An advertisement placed in *The Australian* on 4 June 1993 appeared under the same heading as the advertisement referred to the Committee of Privileges, and indicated that a Senate inquiry had been initiated "into the way the [ASC] handles investigations". Mr Wade stated that "The decision to run the final campaign [i.e., incorporating the advertisement of 1 July] was based on our desire to ensure that the Senate Inquiry received as much information as possible and to reinforce the

advertisements that the Senate itself had been running advertising the Inquiry into the Investigative Powers of the ASC".

- 1.9 Having examined the information provided by Senator Cooney and considered the submission of The Watchdog Association Incorporated, the Committee of Privileges did not consider it necessary to seek further information before reaching conclusions on the matter.

CHAPTER TWO - CONCLUSIONS AND FINDING

Question for determination

2.1 The kernel of the matter which the Committee was required to examine was contained in the statement on behalf of the President, as follows:

[T]he advertisement could be regarded as an interference with the ability of the Senate and the Committee to perform their inquiry functions, and as a false or misleading report of the proceedings of the Senate and the Committee.

2.2 The advertisement referred to the Committee of Privileges was designed to encourage persons who thought themselves adversely affected by the activities of the Australian Securities Commission (ASC) to make submissions to the inquiry by the Legal and Constitutional Affairs Committee. The advice provided to that Committee included the following comments:

A reading of the heading and the first two paragraphs of the advertisement could leave a reader with the impression that the advertisement has been placed by the Senate or by the Standing Committee on Legal and Constitutional Affairs. This is so particularly because of the invitation contained in the second paragraph for submissions to be sent to the secretary of the Committee. A careful reading of the whole advertisement would indicate that *The Watchdog Association* is a private organisation with no connection with the Senate or the Committee, but one cannot be certain that all readers would readily draw that conclusion.

2.3 The advice continued:

Even to a reader who did draw that conclusion, the advertisement could well create the impression that the Committee is interested in receiving only submissions from those who believe that their rights or their clients' rights " have been trampled on by the Commission", or who "know of instances where others have suffered unfairly", or who are concerned about their "individual rights to operate . . . [their] business free from fear of harassment by ASC investigators, and to ensure that the behaviour of the ASC investigators is brought under the public spotlight and within the law". In other words, the advertisement could create an impression of a Senate inquiry intensely hostile to the Australian Securities Commission.

Most seriously, the advertisement could give even the most careful reader the impression that the alleged "alarming picture of harassment, abuses of power and denials of individual rights" has "emerged" from the inquiries of the Committee. In fact, . . . the Committee's inquiry has not yet begun, in that no hearings have been held or evidence published.

2.4 The advice concludes that:

In short, the advertisement could leave its readers with a completely distorted impression of the Committee's reference and its inquiry.

2.5 In response, Mr Wade of the Watchdog Association made the following comments:

(a) Advertisements are meant to be read in full and as Mr Evans points out: 'A careful reading of the whole advertisement would indicate that The Watchdog Association is a private organisation with no connection to the Senate or the Committee'

(b) As to Mr Evans conclusion that the 'advertisement could create an impression of a Senate Inquiry intensely hostile to the Australian Securities Commission' we would point out that in the third paragraph we invite people to join Watchdog and that our logo at the base of the ad is large enough to ensure that no-one is under any misapprehension who placed the ad.

(c) In view of the fact that The Watchdog Association was set up in the first instance to specifically report on the activities of the Australian Securities Commission because of its concern that the rights and individual privileges of Australian citizens were being ignored by its activities it would be extremely foolish of the Association to set out to 'improperly interfere with the free exercise by the Senate of its authority' and certainly there was no intent on the Association's part to 'wilfully publish any false or misleading report of the proceedings of the Senate or of a committee'.

In fact, in the "COMMENT" column of *The Watchdog Reporter* August 1993 (page 2) I wrote:

"The significance and urgency of the Senate Inquiry into the investigative procedures of the ASC cannot be over-emphasised.

"The ASC Act needs a thorough overhaul if we are to bring some sanity and responsibility into corporate regulation.

"Failure to do so could shift this country one step closer to the dictatorship of the bureaucracy."

We view the Senate Inquiry as the best and most appropriate way to find a solution to the behaviour of our corporate regulator and we are looking forward to an outcome that enables the Association to shift its concentration away from the ASC to other matters.

2.6 Having examined the advertisement, the Committee has concluded that it was sufficiently ambiguous as to have given rise to a possible misunderstanding or misinterpretation by a person who was not familiar with the conduct of parliamentary committee inquiries. Furthermore, the Committee agrees that the advertisement may well have given even the most careful reader the impression that "an alarming picture of harassment, abuses of power and denials of individual rights" was derived from evidence already placed before and considered by the Legal and Constitutional Affairs Committee, despite the fact that that committee had not begun its inquiry and no submissions had been published. The Committee notes that the Watchdog Association did not address this question in its response.

2.7 In passing, the Committee also notes from the material provided by both the Legal and Constitutional Affairs Committee and the Watchdog Association that its 42nd report, also on the Australian Securities Commission, has been misrepresented or misunderstood by officers of the Association.

2.8 The paragraphs of Privilege Resolution 6 which apply to the matters the Committee is required to consider are as follows:

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

(7) A person shall not wilfully publish any false or misleading report of the proceedings of the Senate or of a committee.

2.9 The Committee has laid down in several reports its well established practice in determining whether questions before it might involve a finding of contempt. Its most recent report, the 42nd report referred to above, set out the criteria prescribed by Privilege Resolution 3 under which it is required to judge such matters (paragraphs 2.2 and 2.3), and re-emphasised at paragraph 2.4 that "only in the most exceptional circumstances should it contemplate making a finding of contempt in the absence of any intention on the part of a person or persons to commit any act which may be held to be in contempt". It also reiterated in that paragraph that "it is not bound to take a

narrow course in the interpretation of these criteria but can exercise discretion in applying the criteria to the circumstances of individual cases". The Committee continues to regard these comments as relevant to its operation and considers them applicable to this case.

2.10 The submission from The Watchdog Association Incorporated indicates that the involvement of the Association in a possible question of contempt "came as a considerable shock to this Association as we had spent around \$20,000 in advertising and were of the impression that the ads would support what the Senate Inquiry was attempting to achieve". The Association accepts that "[i]n hindsight, it is certainly true that the ad could have been worded differently. It also seems our choice of the heading was most unfortunate".

2.11 On behalf of the Association, Mr Wade indicates that it would be "prepared to correct any misunderstanding of this matter if the Committee of Privileges thought this to be desirable".

2.12 The Committee of Privileges accepts that an abundance of enthusiasm has led the Association into its present predicament. All members of this Committee are as a general principle pleased that community organisations assist the Senate in drawing its work to the attention of the general public, and therefore would normally regard such publicity as welcome. It must remind such enthusiastic disseminators, however, that in the interests of fairness any attempt to do so must not distort the purpose or functions of the Senate and its committees, as has occurred in this case.

Conclusion

2.13 The Committee has concluded that the advertisement placed by The Watchdog Association Incorporated in a range of Australian newspapers on 1 July 1993 had the potential to mislead persons in that it could have left them with an inaccurate impression of the inquiry to be undertaken by the Legal and Constitutional Affairs Committee. Thus persons could, on the one hand, have been encouraged to make submissions to that committee or, on the other hand, deterred from doing so, on false premises resulting from their reading of the advertisement. To that extent, therefore, the advertisement could be regarded as an improper interference with the functions of the Committee or as a false or misleading report of the Committee's proceedings.

2.14 The Committee has, however, concluded that a contempt of the Senate should not be found. It is clear from the submission of the Watchdog Association that the possible consequences of its actions were not understood and that

Mr Wade as an officer of the Association acted in what he would no doubt have regarded as a reasonable and careful way in submitting the advertisement to the Secretary of the Committee for approval or confirmation. That the secretary was not empowered to give an imprimatur to the advertisement, and that insufficient time was given to the secretary to communicate any difficulties arising from the placing of the advertisements to Mr Wade, constitute further evidence that Mr Wade had not thought through his actions.

2.15As this report indicates, the Committee has taken the matter seriously because of its concern to ensure that the integrity of committee proceedings is preserved. In this particular case, it has decided not to take matters any further on the basis of the mitigating circumstances outlined in the submission from the Watchdog Association. The Committee's task was made easier by the willingness of Mr Wade, on behalf of the Watchdog Association, to correct any misunderstanding that might have arisen. It expects that, in accordance with his commitment, appropriate action will be taken by the Association to remedy the situation as soon as practicable.

2.16The Committee reminds all persons associated with organisations of this nature of the need to be aware of their obligations in matters such as these, and indicates that any further matters giving rise to the issues discussed here will need to be taken considerably more seriously.

FINDING

2.17 The Committee of Privileges does not find that a contempt of the Senate has been committed by The Watchdog Association Incorporated or its officers, because any improper interference with the Senate's and its Committee's exercise of their inquiry functions, or any false or misleading report of the proceedings of the Senate conveyed by the advertisement, were not intended by the Association or its officers.

RECOMMENDATION

2.18 (a) That the Senate endorse the finding contained in paragraph 2.17, and

(b) That The Watchdog Association Incorporated place an appropriate notification of the matters raised in this report, and the Committee's conclusions, in *The Watchdog Reporter* as soon as possible after the Senate has considered and adopted this recommendation.

Senator Margaret Reynolds
Chairperson