

Chapter 3

Possible adverse actions taken against Mr Godwin Grech

Scope of the inquiry

3.1 The protection of persons providing information to the Senate and, in particular, of witnesses before parliamentary committees, is regarded by the committee as constituting the single most important duty of the Senate (and therefore of the committee as its delegate) in determining possible contempts.¹

3.2 In raising this matter of privilege, Senator Heffernan identified the following possible adverse actions taken against Mr Grech in consequence of his evidence to the Economics Legislation Committee:

- political backgrounding provided to the media for the publication of prejudicial articles; and
- the execution of a search warrant by the AFP on Mr Grech's home.

In the course of the inquiry, the committee identified the following additional possible adverse actions:

- harassment by the media at the conclusion of the hearing;
- the instigation of the AFP inquiry; and
- the instigation of disciplinary action by the Treasury Department for alleged breaches of the Australian Public Service Code of Conduct (including the suspension of Mr Grech from duties without remuneration).

3.3 Each of these actions is considered in this chapter.

Harassment by the media at the conclusion of the hearing

3.4 On the evening of 19 June 2009, many television viewers watched close-up footage of Mr Grech giving evidence to the committee, followed by close-up footage of him (and his supervisor, Mr Martine) leaving the committee room, travelling in a lift and walking along corridors. Mr Grech and Mr Martine were followed out of the building by the cameras. The crush of people in the lift meant that the cameras, lights and sound booms were very close to Mr Grech's face. Still photographs appeared in newspapers and other media over the weekend. These images were repeated many times over the coming days and weeks. Still images from some of this footage (and from the official broadcast) are reproduced at the end of this chapter.

1 Committee of Privileges, 125th Report, *Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966–2005*, p. 46. For an account of the committee's previous experience of such cases, see pp. 46–56.

Rules governing the broadcasting of committee proceedings

3.5 One set of rules applies to the broadcasting of committee proceedings and another to filming and photography in Parliament House generally (considered below). The Senate's resolutions on the broadcasting of Senate and committee proceedings relevantly provide as follows:

2 Radio and television broadcasting of committee proceedings

The following rules apply in relation to radio and television broadcasting, including rebroadcasting, of the proceedings of a committee.

(1) Recording and broadcasting of proceedings of a committee may occur only in accordance with the authorisation of the committee by a deliberate decision of the committee.

...

(3) A committee may determine conditions, not inconsistent with these rules, for the recording and broadcasting of its proceedings, may order that any part of its proceedings not be recorded or broadcast, and may give instructions for the observance of conditions so determined and orders so made. A committee shall report to the Senate any wilful breach of such conditions, orders or instructions.

...

(5) Recording and broadcasting of proceedings of a committee shall not be such as to interfere with the conduct of those proceedings.

(6) Where a committee intends to permit the broadcasting of its proceedings, a witness who is to appear in those proceedings shall be given reasonable opportunity, before appearing in the proceedings, to object to the broadcasting of the proceedings and to state the ground of the objection. The committee shall consider any such objection, having regard to the proper protection of the witness and the public interest in the proceedings, and if the committee decides to permit broadcasting of the proceedings notwithstanding the witness's objection, the witness shall be so informed before appearing in the proceedings.²

When committees authorise the broadcasting of their proceedings, the House Monitoring Service records and transmits the proceedings and media organisations may take a 'feed' from this transmission. In addition, committees by resolution may authorise the presence of additional cameras or sound recorders and may impose conditions on the broadcasting or recording of their proceedings. They may give instructions for the observance of these conditions, and they must report to the Senate any wilful breach of the conditions or instructions. Such broadcasting or recording must not interfere with the conduct of the committees' proceedings.

2 Resolution 2, Broadcasting of Senate and committee proceedings in *Standing Orders and other orders of the Senate*, June 2009, pp. 159–60.

3.6 The committee sought from the Economics Legislation Committee details of its decision to allow additional cameras to film the hearing, the names of the media organisations (or cameramen) it permitted to film and details of the conditions under which filming was permitted. The chair of the committee, Senator Hurley, responded on behalf of the committee on 27 July 2009 with the following information:

As regards the filming of the hearing, no unusual arrangements were made. A press photographer asked before the hearing if it was OK to take photographs and after informally checking with the Committee I agreed. Other photographers and camerapeople came in as the hearing progressed, particularly in the latter stages of Mr Grech's testimony. These did not seek the Committee's approval. At no stage during the hearing did a witness or senator make an objection. As is usual practice, the Secretariat moved away any photographers seeking to take pictures from behind senators that could have included documents or laptop screens. It has never been the Committee's practice to compile lists of media organisations present.

There was objectionable behaviour by the media at the conclusion of the hearing. Photographers and camerapeople surrounded Mr Grech at the conclusion of his evidence and followed him through the corridors and out of Parliament House. One press photographer later apologised to the Secretary, saying words to the effect that "things had gotten out of hand".

The Committee has previously had significant media attendance at its hearings without undue interference to either Committee members or witnesses. Its processes in dealing with the media do not therefore cater for the extreme circumstances that occurred on 19 June 2009.³

3.7 Senator Hurley also advised the committee that she had written on behalf of the Economics Legislation Committee to the President of the Federal Parliamentary Press Gallery, Mr Phillip Hudson, complaining about the behaviour of the media at and after the hearing. In that letter, a copy of which was provided to the committee, Senator Hurley referred to flagrant breaches of the Presiding Officers' Guidelines for Filming and Photography after the hearing and to the harassment of a witness. She pointed out to Mr Hudson the availability of the official 'feed' and provided him with copies of the guidelines and the Senate's broadcasting resolutions, drawing attention in particular to paragraph (6) of Resolution 2 (reproduced above). Senator Hurley advised Mr Hudson that her committee may be 'more sympathetic in future to any application by a witness for the exclusion of the media at a public hearing'.⁴

3.8 The committee also asked for copies of the minutes of the Economics Legislation Committee showing its decision to authorise the televising of the hearing on 19 June. Like most committees, the Economics Legislation Committee agreed, at

3 Submission by Senator Annette Hurley, Chair, Economics Legislation Committee, dated 27 July 2009.

4 Submission by Senator Annette Hurley, Chair, Economics Legislation Committee, dated 27 July 2009, attachment, letter to Mr Phillip Hudson, undated.

the first meeting after its establishment in May 2009, to a general resolution (to apply to all its public hearings) in the following terms:

That the committee authorises the recording and re-broadcasting of its public proceedings in accordance with the rules contained in the order of the Senate concerning the broadcasting of committee proceedings.

3.9 When providing these minutes to the committee on 21 September 2009, Senator Hurley also commented as follows:

If there are requests from photographers or camera operators on the day of the hearings, the Committee's practice is to have an informal agreement among all senators present at the meeting whether to allow cameras at that hearing. It has not been our practice to require each operator to ask permission or to have a private meeting of the committee.⁵

Inspection of the minutes of the hearing on 19 June confirmed that no formal decisions were taken with respect to the attendance of additional cameras and sound recordists.⁶

3.10 It is incumbent on all Senate committees to apply the relevant parts of the Broadcasting Resolutions, the purpose of which is to ensure proper processes are undertaken for the authorisation of audio, audiovisual and photographic recording of committee proceedings and their broadcasting and rebroadcasting. Failure to apply the resolutions undermines the fundamental principle that the Senate and its committees control their own proceedings. It is also potentially detrimental to witnesses. The protection of witnesses should be a paramount consideration in the operations of all committees. Although the chair has the primary responsibility for the conduct of proceedings, the duty to apply the resolutions rests with the whole committee. Chairs should not permit additional cameras into a hearing room without a decision of the committee and without consulting witnesses. It is not necessary to convene a private meeting for this purpose, but it is necessary for there to be formal, minuted decisions. Had the Economics Legislation Committee made orders in respect of additional cameras and had those orders been breached, there may have been a basis to consider whether any contempt had been committed. In this case, however, there were no such decisions and no effective regulation of the additional camera and sound operators. Without them, this committee cannot consider the actions of the camera operators and photographers during the hearing as a possible contempt.

3.11 If any committee experience substantiates the need for and rationale of these procedures, it is the hearing of the Economics Legislation Committee on 19 June 2009 which was effectively overrun by the media. When there is intense political interest in a matter being examined by a committee, there is perhaps a temptation to relax the

5 Senator Annette Hurley, Chair, Economics Legislation Committee, correspondence dated 21 September 2009.

6 Submission by Senator Annette Hurley, Chair, Economics Legislation Committee, dated 27 July 2009, attachment, minutes of hearing on 19 June 2009.

rules, but it is on these occasions that the clear application of the resolutions is needed most. When the resolutions are applied, there is clarity for all parties: witnesses' rights are protected; reasonable boundaries are set for the media; and the committee concerned remains in control of its proceedings.

3.12 That is not to say that media attention was unwelcome to Mr Grech, although it was probably greater than he expected and, by its overwhelming nature, was an additional source of pressure on the day of the hearing. Nonetheless, it appears to the committee that he may have encouraged the media attention he ultimately received, particularly by providing to journalist, Steve Lewis, a 'teaser' for publication on the morning of the hearing. Mr Grech did not at any time seek the protection of the committee from the encroaching cameras, and it appeared to the committee chair, 'in hindsight that Mr Grech drew out the questioning for maximum theatre and effect'.⁷ However, this does not excuse the conduct of the media at and after the hearing which was excessive, inappropriate and in contravention of the rules.

3.13 The committee has taken the relatively unusual step of including in its report images from the hearing and its aftermath to provide examples of inappropriate conduct. In one example, a still shot taken from near the end of the official recording of the proceedings shows **eight** still or television camera operators lined up alongside the committee table (Plate 2). Another, from a few minutes earlier, shows operators crowding to the end of the witness table where one operator is actually leaning on the table to take close-up shots of Mr Grech and another is about to join him (Plate 1). Further examples are referred to in the next section. The Economics Legislation Committee had an obligation to protect the witnesses against this kind of pressure, by applying the resolutions and setting out appropriate ground rules for the camera and sound operators to observe. It would also have been open to the committee, if the proceedings became disorderly, to insist that any further footage of the hearing be taken from the official 'feed' provided by the Department of Parliamentary Services.

3.14 The committee does not wish to single out the Economics Legislation Committee for criticism. Different committees have had different approaches to the application of the resolutions in the past. There has been no uniformity of application, with some committees having a more relaxed approach than others. For this reason, the committee considers there would be value in the examination by the Chairs' Committee (established under standing order 25(10)) of model practices for handling the media at committee hearings. These practices might include consideration of and guidance on:

- reasonable conditions that committees might apply to media applications;
- uniform procedures for media organisations to apply for permission to film and for consideration of applications;

7 Submission from Senator Hurley, 27 August 2009.

- circumstances in which the Usher of the Black Rod should be notified of potential difficulties with hearings in Parliament House in order to ensure that the appropriate protection can be provided to witnesses;
- inclusion of information on the procedures on the Senate website and provision of information to the Press Gallery.

3.15 On a related matter, there would also be value in the Chairs' Committee considering what information is provided to witnesses ahead of a hearing. It is a requirement that witnesses be provided with a copy of Privilege Resolution 1 (Procedures to be observed by Senate committees for the protection of witnesses). Because the Broadcasting Resolutions contain additional protections for witnesses, the Chairs' Committee may wish to consider whether prospective witnesses should also be provided with a copy of Broadcasting Resolution 2 as a standard committee practice.

Guidelines issued by the Presiding Officers for filming and photography in Parliament House

3.16 If the committee hearing was an uncomfortable experience for Mr Grech on account of the number of cameras present (apart from any other possible reason), what happened next was worse (see paragraph 3.4).

3.17 The committee sought information from the Usher of the Black Rod on the rules for filming and photography in Parliament House and about any inquiry being conducted into the behaviour of the press at and after the hearing. The committee also asked to see any relevant CCTV footage. The Usher of the Black Rod provided this information on 26 June 2009. Black Rod informed the committee that the President had asked him to investigate the matter on 22 June and that he had subsequently sought an explanation from the President of the Federal Parliamentary Press Gallery, Mr Phillip Hudson.⁸ Black Rod provided to the committee on 23 July a copy of Mr Hudson's response.⁹ Shortly thereafter, the President of the Senate advised the committee that, in view of the committee's inquiry, he would not be pursuing the matter, pending the outcome of the inquiry.¹⁰

3.18 The Presiding Officers have issued *Guidelines for Filming and Photography and General Media Rules in Parliament House and its Precincts*. The guidelines apply to all filming, photography and sound recording in Parliament House, including by members of the Press Gallery and by members of the broadcasting staff of the Department of Parliamentary Services (DPS). Each House has resolutions regarding the broadcasting of its proceedings and separate guidelines for still photography in the chambers.

8 Mr Brien Hallett, Usher of the Black Rod, submission dated 26 June 2009.

9 Mr Brien Hallett, correspondence dated 23 July 2009, attachment. letter from Mr Phillip Hudson, dated 21 July 2009..

10 Senator the Honourable John Hogg, President of the Senate, correspondence dated 28 July 2009.

3.19 For the purpose of this inquiry, relevant provisions of the guidelines are as follows:

4. Filming of parliamentary proceedings

...

Parliamentary committees

- (f) Filming and/or sound recording of a parliamentary committee requires the consent of the individual committee concerned. For approval, contact the committee secretary to the particular committee. Filming and/or sound recording of a parliamentary committee following a suspension or an adjournment of proceedings is not permitted.

...

5. General guidelines for Press Gallery members

Areas "off limits" to the Press

...

- (c) Filming, photography and sound recording is not permitted in any corridor, except the corridor of the Press Gallery itself, without explicit approval from the relevant Presiding Officer.

(emphasis added)

Footage of the hearing and its aftermath from the official DPS coverage, and that of additional camera operators, shows the following acts:

- filming continued after the adjournment of the committee hearing (Plates 3 – 6);
- just before the official coverage ended, the chair, standing, started to speak to the photographers, and asked them to please move out of the way so that the witnesses could ... *(coverage ends)*; (Plate 5)
- camera and sound operators gathered around Mr Martine and Mr Grech, ignored the chair and flanked them out of the committee room (Plates 4 – 6);
- filming occurred in corridors, including in the ministerial wing (Plate 8);
- filming continued in the lift (Plate 7).

3.20 In his explanation to the Usher of the Black Rod, Mr Hudson accepted that members of the Press Gallery breached the rules on 19 June 2009 and he expressed regret that this had happened. Mr Hudson sought to explain the breach by alluding to the extraordinary events of that day and the multiplicity of rules applying to Gallery members:

The events at the hearing of the Economics Legislation Committee hearing on Friday June 19, 2009 were extraordinary by any measure. It is not every day the Prime Minister is effectively accused of misleading the Parliament by a senior officer of The Treasury. This testimony threatened to bring down the Government.

The public and the Parliament could not allow vital questions and answers to be left hanging. The events that followed the testimony in the corridors were exceptional but caused by exceptional events. The media were merely seeking to provide an opportunity for this nationally important matter to be clarified.

We are respectful of the Parliament. We strongly believe we were doing our job as servants of the public and would have been derelict not to have sought to clarify this dramatic testimony.

It brings into stark focus the daily difficulties we face with the multiplicity of rules governing our ability to do our job at Parliament House: different rules for each chamber, different rules for the corridors, different rules for the public areas, different rules for offices.¹¹

3.21 In the committee's view, the guidelines and the relevant resolutions are brief, simple, clear, reasonable and proportionate. Moreover, after two hours of testimony it is difficult to conceive what further clarification the press imagined Mr Grech could have provided, particularly without the benefit of parliamentary privilege.

3.22 There is no doubt that the guidelines were flagrantly breached. The question for the committee, however, is whether, in breaching the guidelines, the media representatives may also have committed a contempt. As noted in paragraph 3.2, conduct does not constitute a contempt unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member. It could be argued that this type of harassment of a witness immediately after his testimony may not only be harmful to the wellbeing of a witness unused to such attention, but may also have a significant deterrent effect on the willingness of other prospective witnesses to expose themselves to the possibility of similar treatment. In this regard, such acts, which are clearly in consequence of the witness's evidence, may constitute an interference with the free exercise by a committee of its functions. For such acts to be contempts, however, there must be an **improper** interference with the committee. In past cases, the committee has regarded culpable intention as necessary to a finding of contempt.¹² In this case, it does not believe that the zealotry of the camera operators equates to an intention to cause any harm to Mr Grech or the operations of the Economics Legislation Committee, and thus there are no grounds for a finding of contempt.

3.23 The committee recommends that the President of the Senate now consider an appropriate response to the admitted breaches of the guidelines. The committee draws to the President's attention for consideration (along with the Speaker) the following possibilities:

11 Mr Brien Hallett, correspondence dated 23 July 2009, attachment, letter from Mr Phillip Hudson, dated 21 July 2009.

12 See paragraph (c) of Privilege Resolution 3.

- making access to a Parliament House pass by a member of the Press Gallery conditional on an explicit undertaking to comply with the Presiding Officers' Guidelines on filming and photography in Parliament House and its precincts;
- including in tenancy licences for media organisations an explicit requirement for licensees to be responsible for adherence to the guidelines by all their employees or contractors who operate in Parliament House.

The AFP inquiry, including the execution of a search warrant

3.24 Rumours about an alleged email indicating the Prime Minister's office made representations on behalf of John Grant (notwithstanding that the Prime Minister had strongly denied this in the House of Representatives) were circulating in the week before the hearing on 19 June. Several events which suggested a document may exist are described in paragraphs 2.10 to 2.18.

3.25 Searches for the email began in the Prime Minister's office after the incident at the ball (see paragraphs 2.17 and 2.26). General searches, primarily by Mr Grech, had been undertaken the previous week in response to a Freedom of Information request from Senator Abetz to the Department of the Treasury. Following widespread reporting of the incident at the Press Gallery ball and discussion of its implications by senior Treasury officers on the evening of 18 June, systematic searches were done by Treasury IT staff and were widened the following morning. By the time that Mr Martine and Mr Grech gave evidence to the Economics Legislation Committee that afternoon, Mr Martine was able to inform the committee that searches had been conducted 'to the best of our ability' and no trace of the alleged email had been found.¹³

3.26 Finally, having become aware of Mr Grech's evidence, the Secretary of the Department of the Prime Minister and Cabinet, Mr Terry Moran, ordered fresh searches of the email records of his department and the Prime Minister's office. No trace of the alleged email was found.¹⁴

3.27 The committee has examined the train of events leading to the AFP inquiry very carefully. With all searches having found no evidence of the alleged email, and Mr Moran having confidence in his department's IT systems, the Prime Minister concluded at his press conference on the evening of 19 June that the email must be false. Overnight Mr Moran's reflections on the search results led him to conclude that the alleged email could be a fabrication and that there may be criminal offences involved. His initial thought was that Mr Grech was a victim of the fabrication. It was these conclusions that led Mr Moran to contact the Secretary of the Attorney-General's Department, Mr Roger Wilkins, on the morning of Saturday 20 June and set

13 Economics Legislation Committee, *Committee Hansard*, 19 June 2009, p. E16; see chapter 2, paragraphs 2.25–2.29.

14 See chapter 2, paragraph 2.35.

in train the exploration of possible criminal offences that led to Mr Wilkins referring the matter to the AFP.¹⁵

Was the AFP referral an adverse action?

3.28 It appears to the committee that the AFP referral had two elements. The first element was the formal referral by Mr Wilkins following the examination of possible criminal offences by officers of his department. This action occurred at the suggestion of Mr Moran. The second element was the request by Dr Henry, made on the evening of Saturday 20 June, for the AFP to examine suspicious material that had been discovered earlier that day in Mr Grech's Treasury IT account.¹⁶

3.29 Mr Moran's initial thought was that Mr Grech may have been a victim of the fabrication. In this sense, his initiation of processes that led to the AFP inquiry was for Mr Grech's protection. Mr Wilkins confirmed this view in his submission to the committee as follows:

I am aware of the importance of considering questions of collateral or incidental purpose in considering questions of contempt. It is therefore important to reiterate that there was no intention to penalise or intimidate Mr Grech. Indeed, at the time it appeared possible that Mr Grech had been the unwilling recipient of a fabricated document.¹⁷

The initial referral of matters to the AFP cannot, therefore, in the committee's view, be regarded as an action adverse to Mr Grech.

3.30 The suspicious material discovered by Ms Gerathy in Mr Grech's email account on Saturday 20 June raised the possibility of wrongdoing by Mr Grech. This material revealed behaviour that appeared at least to be contrary to the Code of Conduct set out in the *Public Service Act 1999*. It was on the basis of the conduct disclosed by this material that Dr Henry asked the AFP to include the Treasury IT systems in its inquiry. This element of the referral, focusing on possible wrongdoing by Mr Grech, was necessarily an adverse action. Ultimately, it was this element of the referral that led to the location of the material that the AFP used as the basis to apply for a warrant to search Mr Grech's home.

Was the AFP referral in consequence of Mr Grech's evidence?

3.31 Mr Grech was invited to provide a submission to the committee on both terms of reference. He chose to do so through a legal representative, Mr John Wilson, Willams Love & Nicol, Lawyers. Mr Wilson suggested that the execution of a search warrant by the AFP was an adverse action and that its proximity to Mr Grech's evidence strongly suggested that it was an action taken in consequence of that

15 See chapter 2, paragraphs 2.38–2.42.

16 See chapter 2, paragraphs 2.47–2.50.

17 Mr Roger Wilkins, submission dated 28 August 2009, paragraph 12.

evidence. As Mr Wilson conceded, however, he was not in possession of all the facts leading to the AFP's application for a search warrant and invited the committee to find out '*precisely* what went on, who was involved, what emails, letters or other documents passed between whom, and who said or did what in the goings on between 4.08 p.m. on Friday 19 June 2009 and whatever time it was that the first search warrant was obtained on Sunday 21 June 2009'.¹⁸

3.32 Mr Grech's evidence attracted enormous publicity because, if true, it literally threatened to bring down a Prime Minister. It was not the only evidence of the alleged email but it was the culmination of several days' speculation and it came straight from the person alleged to have received it.

3.33 Although the Prime Minister had declared it to be false the previous evening, the terms of the alleged email were published by Steve Lewis on Saturday 20 June. The terms of the email were now in the public arena, including details of the alleged sender as well as the recipient, although official searches had failed to locate it. Pressure was on to find the truth.

3.34 It may well be that Mr Grech's evidence drew matters to a head and intensified the need for action of some kind to provide answers to the serious questions that had been raised about the integrity of the Prime Minister and Treasurer. That Mr Grech's evidence was foremost in the minds of those researching the possible basis for a referral to the AFP is suggested by the terms of Mr Wilkins' formal referral letter to the AFP which begins as follows:

Dear Commissioner

On 19 June 2009, an official from the Department of the Treasury gave evidence to the Senate Standing Committee on Economics that it was his recollection that a staff member in the Prime Minister's Office had sent him an email about a Queensland car dealership, John Grant Motors, in the context of the OzCar Scheme.¹⁹

However, Mr Wilkins was also aware of media articles quoting the text of the alleged email. In explaining to the committee the terms of his letter to Commissioner Keelty, Mr Wilkins made the following submission:

My decision to refer the matter to the AFP was based on the possibility, raised by the conversation with Mr Moran, that the email may have been a fabrication and the preliminary legal advice that it was possible that offences may have been committed under the Criminal Code.

18 Mr John Wilson, submission on behalf of Mr Godwin Grech, dated 28 August 2009, paragraph 18.

19 AFP submission, dated 10 August 2009, attachment, letter of referral, dated 20 June 2009; Mr Roger Wilkins, submission dated 28 August 2009, attachment, letter of referral, dated 20 June 2009.

Mr Grech's evidence about the email to the Economics Legislation Committee formed a part of the background to the referral, but was not the reason I referred the matter to the AFP. The opening paragraph of my letter to Commissioner Keelty, which made reference to Mr Grech's evidence, was intended to provide context and assist in identifying the email to which the allegations related.²⁰

3.35 The committee accepts Mr Wilkins' submission on this matter but points out that, on the face of it, the letter creates the impression that Mr Grech's evidence was the starting point for the referral. Indeed, it was for this reason that the committee, having received a copy of the referral letter from the AFP, sought a submission from Mr Wilkins.

3.36 Unfortunately, this impression was reinforced by the AFP which, as noted by Mr Wilson on behalf of Mr Grech, cited Mr Grech's evidence to the committee in the information that formed part of the AFP's search warrant application:

- a) On Friday 19 June 2009, Mr Godwin Grech, the Principal Advisor to the General Manager of the Financial System Division of Treasury, appeared before the Senate Standing Committee on Economics. Mr Grech was to give evidence relating to the Commonwealth Government's OzCar Scheme.
- b) Whilst giving evidence, Mr Grech stated that he recalled receiving an email on 19 February 2009 from the Prime Minister's Office. Mr Grech recalled that the email related to a Queensland car dealer, John Grant. The email detailed an interest from the Prime Minister in the assistance of the OzCar Scheme to Mr Grant. These comments and some media interest resulted in calls for the Prime Minister and Federal Treasurer to resign their positions.²¹

3.37 The apparent strong link between Mr Grech's evidence and the referral of the alleged email to the AFP was addressed by Commissioner Keelty in his submission to the committee as follows:

11. At the time of receiving the referral the AFP had a general understanding that:
 - a. there was widespread and intense political, media and public interest in allegations that the Prime Minister and Treasurer had sought to assist John Grant Motors to obtain funding through the OzCar scheme and that they had misled Parliament about these matters;
 - b. News Ltd had published articles which quoted the text of an alleged email from Dr Andrew Charlton to Mr Grech (the email); and

20 Mr Roger Wilkins, submission dated 28 August 2009, paragraphs 5(a), 6 and 7.

21 Mr John Wilson, submission on behalf of Mr Godwin Grech, dated 28 August 2009, paragraph 9; AFP submission, dated 10 August 2009, attachment, search warrant application (not published).

c. Mr Grech had given evidence about the email to the Economics Legislation Committee on 19 June.

12. Against that background, AGD's advice (confirmed in the referral letter) that:

a. there were allegations that the email had not been sent by the individual in the Prime Minister's Office or that a document purporting to be such an email had been concocted; and

b. criminal offences may have been committed in relation to it,

caused the AFP to consider that it was not just appropriate, but clearly in the public interest, to investigate whether any such criminal offences had been committed.

13. As such, the AFP decided on 20 June 2009 that it would commence a criminal investigation.

14. I emphasise that the AFP's concern was the investigation of possible criminal offences relating to the email, not the investigation of any evidence which Mr Grech may have given to the Economics Legislation Committee. Although Mr Grech's evidence to the Economics Legislation Committee formed part of the relevant factual background, the AFP:

a. did not consider that evidence to be admissible as proof of any element of an alleged criminal offence and was therefore conscious of the limitations of any future use of that evidence during the criminal investigation process; and

b. did not otherwise hold or form a view about the accuracy or appropriateness of Mr Grech's evidence.

As such, the AFP was not influenced in any way by the fact or content of Mr Grech's evidence when making its decision to act upon the referral from AGD and commence a criminal investigation.

15. In this regard I note that the letter of referral stated at the outset that evidence had been given by a Treasury official to the Senate Standing Committee on Economics about his recollection of having received an email about John Grant Motors from the Prime Minister's Office. As noted above, the AFP was generally aware of this from the intense media reporting at the time.

16. As such the AFP understood that this paragraph in the referral letter was an introductory one which was intended to do no more than to outline background information about the email.²²

The committee thanks the AFP for this explanation.

3.38 In previous cases involving possible penalties against a witness on account of their evidence to a Senate committee, this committee has found that a contempt was committed only in those cases where a direct and causal link could be established

22 AFP submission, dated 10 August 2009, paragraphs 11–16.

between the giving of evidence and the imposition of the penalty.²³ Causation has been described in law as a 'central organizing concept' which, in tort law, provides a means of analysing questions of liability and fault.²⁴ In philosophy and the natural sciences, causality also provides a framework for analysis of physical and metaphysical phenomena or relationships. Causation may be strictly linear, or an event may have multiple causes. In either case, causes may be divided into such categories as 'remote' and 'proximate'. The proximate cause in law is regarded as the dominant, principal, substantial or real cause. The proximate cause is not necessarily the link in the chain nearest in time to the outcome. Taking these principles as a guide, the question for the committee is whether Mr Grech's evidence to the Economics Legislation Committee was the proximate or principal cause of the AFP inquiry.

3.39 Taking into account the evidence of the AFP, Mr Moran and Mr Wilkins, about the chain of events that led to the AFP investigation, the committee is satisfied that Mr Grech's evidence to the Economics Legislation Committee on 19 June was part of the sequence of events leading to the investigation, but it was not the principal cause. Public revelations about the alleged email, through reporting of the incident at the Press Gallery ball and through the revelations of Steve Lewis, combined with the failure of intense searches of the relevant IT systems to locate the email, were the principal factors that caused the referral. If the AFP's inquiry was not carried out as a direct consequence of Mr Grech's evidence, then elements of that inquiry, including the execution of search warrants on two occasions, were also not adverse actions **in consequence** of Mr Grech's evidence.

Disciplinary action initiated by the Department of the Treasury

3.40 As has been described in chapter 2, the immediate reaction of Treasury officers when Mr Grech returned from giving evidence was one of concern for his wellbeing after a torrid experience in front of the committee and afterwards at the hands of the media.

3.41 According to Dr Henry, the publication of the alleged email on the morning of Saturday 20 June aroused his suspicions about Steve Lewis's sources. Given that Mr Grech had sent two emails to senior Treasury officers the previous week about his contact with Steve Lewis, Dr Henry, after discussions with senior Treasury officers and members of the Treasurer's staff, decided to investigate Mr Grech's email traffic for evidence of his dealings with Steve Lewis the previous week. As noted in chapter 2, Dr Henry asked Ms Gerathy to carry out the search which yielded incriminating material that, at least, suggested possible breaches of the Public Service Code of Conduct by Mr Grech. On learning that the matter had been referred to the

23 See the committee's 125th Report, *Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966–2005*, PP No. 3/2006, pp. 46–56.

24 For example, by Ernest J Weinrib, 'The Special Morality of Tort Law' (1989) 34 **McGill Law Rev** 403 at 404.

AFP, Dr Henry contacted the AFP to request the inquiry include material found in Treasury IT systems.²⁵

3.42 Evidence that Mr Grech had fabricated the email on his Treasury work station and forwarded it to his personal email address was found on Sunday 21 June, and the AFP continued its investigation accordingly.²⁶

3.43 In the meantime, Treasury had discovered a large amount of incriminating material concerning the provision of information by Mr Grech to members of the Opposition and the pursuit of political interests with persons associated with the Liberal Party. Moreover, Mr Grech made admissions to Dr Henry on 22 June that he had fabricated the email and had read it to Steve Lewis. Later interrogation of Mr Grech's office landline, mobile phone and Blackberry records revealed contact with Opposition members and with Steve Lewis over the relevant period.²⁷

3.44 In order to demonstrate to the committee that there were ample grounds for taking disciplinary action and that Mr Grech's evidence to the committee was not a factor in that decision, the Treasury Department provided the committee with a copy of all the incriminating material it had located on Mr Grech's computer. Treasury also listed possible breaches of the Code of Conduct:

The following represents a broad description of concerns which have arisen to this point in relation to Mr Grech:

- a. whether, on or about 5 June 2009, Mr Grech may have forged an email purporting to be an email from the Prime Minister's adviser Andrew Charlton and forwarded it to his home email, contrary to section(s) 13(1), 13(5), 13(8), and/or 13(11) of the Code;
- b. whether on or about 12 June 2009, Mr Grech may have disclosed the contents of a forged email to the leader of the opposition, Mr Malcolm Turnbull, and expressly or impliedly represented the contents to comprise information contained in an official record, contrary to section(s) 13(1), 13(3) and/or 13(11) of the Code;
- c. whether on or about 12 June 2009, Mr Grech may have used a Treasury Cabcharge to attend a private meeting with Mr Turnbull (and others) during business hours, contrary to section(s) 13(1), 13(8) and/or 13(11) of the Code;
- d. whether, on or about 16 June 2009 Mr Grech may have disclosed to Steve Lewis, confidential information obtained in connection with his employment, contrary to section(s) 13(1), 13(4), 13(6), (11) and 13(13);

25 See chapter 2, paragraph 2.49.

26 See chapter 2, paragraphs 2.50–2.52.

27 Treasury submission, dated 18 August 2009, all attachments; Treasury submission, dated 12 August 2009, paragraph 51; Treasury submission, dated 31 August 2009, attachment, list of numbers called from Mr Grech's office and mobile phones and Blackberry.

e. whether, on or about 16 June 2009, Mr Grech may have disclosed the contents of a forged email (see above) to reporter Steve Lewis, and expressly or impliedly represented the contents to comprise information contained in an official record, contrary to section(s) 13(1), 13(3) and/or 13(11) of the Code;

f. whether, between 19 June and 22 June 2009, Mr Grech gave conflicting accounts of his dealings with Mr Steve Lewis to the Secretary to the Treasury, such that either or both of those accounts may not have been the truth, contrary to section(s) 13(1) and/or 13(11) of the Code;

g. whether, between December 2008 and June 2009, Mr Grech may have dealt with Credit Suisse in a manner inconsistent with his obligations as a public servant by:

– disclosing confidential information to Credit Suisse officials, including on 8 May 2009, giving Credit Suisse advance notice of a tender;

– proposing to enter, or entering, an improper arrangement with Credit Suisse in relation to fees for providing services to the Commonwealth in relation to the Ozcar program; and/or

– inappropriately promoting Credit Suisse and its role in the Ozcar program within Treasury and to the Prime Minister and Treasurer by reason of his personal relationship with a Credit Suisse official,

contrary to section(s) 13(1), 13(7), 13(10) and/or 13(11) of the Code of Conduct and/or Public Service Regulation 2.1;

h. whether, on 13 May 2009, Mr Grech may have dishonestly informed other Treasury staff that an email sent to a Credit Suisse official disclosing the list of invitees to tender to provide services to Treasury had not been received by that official, contrary to section 13(1) of the Code of Conduct;

i. whether, between September 2008 to June 2009, Mr Grech may have disclosed confidential Treasury information and information about his dealings with Ministers to third parties (including to KPMG and Credit Suisse) contrary to Public Service Regulation 2.1 and/or section 13(6) of the Code of Conduct;

j. whether, between September 2008 to June 2009, Mr Grech may have used the Treasury IT system to prepare overtly party political material, contrary to section 13(8) of the Code of Conduct;

k. whether during May 2009, Mr Grech may have provided greater assistance to a Holden car dealer than he provided to other car dealers who sought assistance from, or were referred for assistance to, Treasury; because the principal of the dealership was a significant donor to the Liberal Party, contrary to sections 13(1), (7), (8), (10) or (11) of the Code of Conduct;

l. whether, on 10 November 2008, Mr Grech may have used Treasury letterhead to write a letter to the Western Bulldogs Football Club (a club he

apparently supports) in order to assist the club, contrary to section(s) 13(6), 13(7) and/or 13 (10) of the Code of Conduct.²⁸

On the basis of this material, the committee does not dispute Dr Henry's submission that disciplinary action was not taken against Mr Grech in consequence of his evidence to the Economics Legislation Committee. Some of this material is considered further in the next chapter and the committee's approach to publication of it is described in chapter 5.

3.45 The committee also notes that the Treasury Department took the precaution of obtaining legal advice on the scope of parliamentary privilege to ensure that the taking of disciplinary action would not involve a possible contempt. In outlining the particulars of possible breaches of the Code of Conduct, the Treasury Department's submission also identified matters it did not intend to pursue because of their connection with proceedings in parliament as defined in section 16 of the Parliamentary Privileges Act 1987.²⁹ The committee believes that the Treasury Department has correctly distinguished matters it would not have been appropriate to pursue through the disciplinary process. The committee also notes that disciplinary action ceased because of Mr Grech's resignation.

'Backgrounding' of the media

3.46 The final adverse action examined by the committee was whether background information detrimental to Mr Grech's interests was provided to the media. In the words of Senator Heffernan who raised this as a matter of privilege, 'I believe the political backgrounding provided to the media is highly prejudicial and this contributes to intimidation of a witness'.³⁰

3.47 Although Senator Heffernan did not provide any particulars of this political 'backgrounding',³¹ the committee has assumed that he was referring to 'backgrounding' of journalists that may have led to various articles published in News Ltd papers on the morning of 22 June 200, including:

- 'Public servant "an ill man"', Paul Maley and Siobhain Ryan, *The Australian*, p.1;
- 'Private man at centre of storm', Alison Rehn, *Daily Telegraph*, p.4.

These articles published details of Mr Grech's medical condition and contained interviews with his neighbours. While highly intrusive, the articles are not

28 Treasury submission, 12 August 2009, paragraph 69.

29 Treasury submission, dated 12 August 2009, paragraphs 71–76.

30 Correspondence to the President from Senator the Honourable Bill Heffernan, dated 22 June 2009, tabled in the Senate on 24 June 2009.

31 There were no further details on this matter in Senator Heffernan's submission to the committee, dated 22 July 2009.

unsympathetic to Mr Grech who was depicted as a hard working public servant, devoted to his job despite an apparently serious medical condition.

3.48 Nevertheless, the committee wrote to the Chiefs of Staff of the Prime Minister, the Treasurer and the Opposition Leader to see whether they could cast any light on this issue on behalf of all staff in those offices. According to their replies, staff in the Opposition Leader's office did not have any 'contact with Mr Grech in relation to his evidence' and staff in the offices of the Prime Minister and Treasurer neither 'sought [nor] caused any adverse action to be taken against Mr Grech in consequence of his evidence'.³²

3.49 Dr Henry advised the committee that 'Treasury did not authorise, nor is it aware of, any backgrounding of journalists by its employees on this matter'.³³ Likewise, Commissioner Keelty informed the committee about the nature and extent of the AFP's contact with the media on this matter. In addition to a press release on 22 June 2009 after the execution of the search warrant, and a press conference on 30 June to explain this action, the AFP had made preparations for media contact on 20 June 2005 by formulating brief talking points that were used to respond to 'individual and ad hoc' media inquiries. Commissioner Keelty was not aware of 'any other information having been provided to the media by any person within the AFP and nor did I authorise the provision of any information to the media beyond that described below'. He continued:

41. I note that the comments made by the President of the Senate on 23 June 2009 about the question of 'backgrounding' the media were focussed on the provision of information which was 'prejudicial to Mr Grech' in that it gave rise to reports concerning 'Mr Grech's alleged illness and his reliability as a witness'. I emphasise that I have not provided, or authorised the provision of, any information to the media concerning:

- a. Mr Grech's health; or
- b. Mr Grech's reliability as a witness (whether as a witness before a Senate committee or as a person interviewed by the AFP).³⁴

3.50 Thus the committee was not able to discover any evidence that the alleged 'backgrounding' had indeed occurred.

3.51 By the time the articles referred to above appeared in the press, the Prime Minister had announced two inquiries into these matters, by the Auditor-General and by the AFP, and there had been a great deal of reporting on these developments. While it can be argued that Mr Grech became a public figure only because of his

32 Mr Chris Kenny, Chief of Staff to the Leader of the Opposition, submission dated 30 June 2009; Mr Alister Jordan, Chief of Staff to the Prime Minister, submission dated 29 July 2009; Mr Chris Barrett, Chief of Staff to the Treasurer, undated submission, received 31 July 2009.

33 Treasury submission, dated 12 August 2009, paragraph 5.

34 AFP submission, dated 10 August 2009, paragraphs 40–41.

evidence to the Economics Legislation Committee, the story was already much bigger because of subsequent developments and because the email Mr Grech claimed that he thought he recalled could not be found.

3.52 Consequently, despite its differences with the media in the past, principally over the issue of unauthorised disclosure of committee proceedings,³⁵ the committee on this occasion chose not to approach individual journalists and ask them about their sources for these articles.

3.53 On 5 August 2009 Steve Lewis published details of his contact with Mr Grech in a story entitled 'Snitch the source of his own demise', justifying the revelation of his source as being in the public interest, given that Mr Grech had now admitted to lying to him.³⁶ With this information now on the public record, the committee did not consider it necessary to contact Steve Lewis.

3.54 There is another issue, partly involving the media, and that is the extent to which Mr Grech came under pressure in respect of his evidence, when the possible existence and nature of a document, going to whether the Prime Minister made representations on behalf of John Grant, began to emerge. By the time he gave evidence on 19 June, Mr Grech had already found it necessary on two occasions to try to explain his contact with Steve Lewis to his senior officers. The issue of pressure on Mr Grech in respect of his evidence is dealt with further in chapter 4.

Conclusions

3.55 The committee's conclusions on each of the matters discussed in this chapter are summarised in chapter 6.

35 See the committee's 125th Report, *Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966–2005*, PP No. 3/2006, pp. 40–46.

36 *Daily Telegraph*, 5 August 2009, p. 9.



Plate 1 – Camera operators at the witness table (paragraph 3.12) (DPS)



Plate 2 – At least eight still or television camera operators alongside the committee table (paragraph 3.12) (DPS)



Plate 3 – Filming continues after the adjournment of the committee hearing
(paragraph 3.19) (DPS)



Plate 4 – Filming continues after the adjournment of the committee hearing
(paragraph 3.19) (DPS)



Plate 5 – Just before the end of the official coverage, the Chair asks the media to move out of the way (paragraph 3.19) (DPS)



Plate 6 – Camera operators and sound recordists flank the witnesses out of the committee room (paragraphs 3.4, 3.19) (ABC)



Plate 7 –Filming continues in the lift and bright lights are shone on Mr Grech's face (paragraphs 3.4, 3.19) (TEN)



Plate 8 Filming continues in corridors
(paragraphs 3.4, 3.19) (TEN)