

Chapter 5

Procedural issues

5.1 During the course of the inquiry a number of procedural issues arose and are examined briefly in this chapter. They include:

- the status of members of other Houses;
- natural justice;
- unauthorised disclosure of submissions and committee proceedings; and
- publication of certain material submitted to the committee.

The status of members of other Houses

5.2 Notwithstanding that the Leader of the Opposition, the Honourable Malcolm Turnbull, was a participant in some of the events relevant to the committee's terms of reference, the committee chose not to invite him to make a submission to the inquiry. Although members of the House of Representatives, particularly ministers, have been invited on many occasions to give evidence to Senate committees, and have done so, this informal procedure is used only in cases where members are offering their views on matters of policy or administration. Where the conduct of individuals may be examined, adverse findings made against individuals or matters of fact disputed, the formal procedures provided in standing order 178 are employed. Under these procedures, the Senate sends a message to the House of Representatives requesting the House to give permission for its members or officers to appear.

5.3 However, use of these formal procedures does not allow the Senate or its committees to inquire into or adjudge the conduct of a member of another House as a member (other than the conduct of a member as a minister). At least as a matter of courtesy and comity between the Houses, and possibly as a matter of law (although it has not been adjudicated in Australia), one House has no authority over members of the other House (except in the immediate conduct of its own – or its committees' – proceedings). This probable limitation precludes one House from summoning a member of the other House or imposing a penalty on them. There is also a rule that one House does not inquire into the proceedings of the other. This rule has its basis in Article 9 of the Bill of Rights, reaffirmed by section 16 of the *Parliamentary Privileges Act 1987*.¹

¹ See Harry Evans (ed), *Odgers' Australian Senate Practice*, 12th ed., pp. 60–61, 73, 378, 426–30.

5.4 As a consequence of this rule, the committee has not sought to avoid mentioning Mr Turnbull in its narrative and analysis but it has refrained from making any comment on his conduct. It has also refrained from following up certain matters raised in submissions, such as whether Mr Turnbull asked questions in the House of the Prime Minister and the Treasurer based on the document given to him by Mr Grech at the Sydney meeting on 12 June 2009. It has done so on the basis that this would involve examining proceedings of the House of Representatives.

Natural justice

5.5 Procedures binding the operations of Senate committees in general and the Privileges Committee in particular are set out in Senate Privilege Resolutions 1 and 2. These procedures incorporate principles of natural justice in that they require persons to be informed of any allegations against them and to be provided with particulars of any evidence given in respect of the person.² Reasonable opportunity is to be given to the person to respond.

5.6 Mr Grech's continuing hospitalisation and his apparently fragile physical and mental health have made it impossible for the committee to extend to him the full benefit of the principles of natural justice inherent in its procedures. The committee has made the following approaches to Mr Grech:

- an invitation to make a submission in respect of its first terms of reference (returned – see paragraph 1.14);
- an invitation to make a submission in respect of both terms of reference conveyed to Mr Grech via his legal representative (see paragraph 1.15), in which the committee indicated that it would have no objection should Mr Grech wish to provide his response to the Auditor-General as his submission to the committee (to which there was no reference in the response provided on Mr Grech's behalf by his legal representative);
- an invitation to respond in writing to a series of written questions, posed at the suggestion of Mr Grech's legal representative but met with the response that Mr Grech did not wish to put anything further before the committee (see paragraphs 1.18 – 1.19);
- a request for clarification of Mr Grech's capacity to respond to the committee's questions or instruct his representative to respond on his behalf, and an inquiry as to whether he wished to be provided with the adverse evidence and parts of the draft report critical of him;
- a requirement that Mr Grech produce medical evidence of his condition and an undertaking that the committee would maintain the confidentiality of the medical information;

2 Privilege Resolution 2 (1)

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- when the medical evidence was not forthcoming within a reasonable time, the imposition of a deadline on the requirement for medical evidence to be produced;
 - provision of relevant parts of the draft report and evidence to Mr Grech's legal representative.

Although the committee has been somewhat frustrated in its attempts to deal with Mr Grech through his legal representative, the medical report did arrive on 16 November 2009 at a time when drafting and consideration of the report was well advanced. The medical report states that Mr Grech was not medically fit to participate in the committee's inquiry. The report was brief and did not respond specifically to the committee's inquiry as to Mr Grech's capacity to instruct his legal representative to respond on his behalf, but the committee is not in a position to look behind the report and has therefore accepted it at face value, but with reservations as noted. The committee has not published the medical report out of respect for Mr Grech's privacy.

5.7 Mr Grech's medical unfitness to participate in the inquiry leaves the committee in the unsatisfactory position of being unable to arrive at conclusions on important aspects of its terms of reference. Without being able to hear from Mr Grech in response to particular allegations and assertions made by other parties to the inquiry, the committee cannot be satisfied that the allegations are sufficiently established. It would be a breach of the principles of natural justice to which this committee adheres to conclude that Mr Grech was in contempt of the Senate, without having heard his response to the allegations. Evidence given by Mr Grech to the Economics Legislation Committee was objectively misleading, as discussed in chapter 4, but whether there was any culpable intention on Mr Grech's part cannot be established without questioning him, and this course of action is not open to the committee owing to Mr Grech's medical unfitness.

5.8 However, the committee did make available to Mr Grech's legal representative those parts of the evidence and the draft report which contained adverse reflections on Mr Grech. The response, received late but nonetheless accepted by the committee, is reproduced in Appendix 2. The committee has no further comment on the response and has not changed its findings as a consequence.

Unauthorised disclosure of submissions and committee proceedings

Unauthorised disclosure of committee proceedings

5.9 It is with regret that the committee reports that an unauthorised disclosure of its proceedings occurred shortly after receiving its second terms of reference. A short article by Paul Maley in *The Australian* on 14 August 2009 reported that the committee had agreed to write to a number of identified people seeking submissions on the 'now-infamous OzCar affair' and that it had agreed not to invite Mr Turnbull to appear. Disregarding the latter claim, that the report was otherwise an accurate record of the committee's proceedings indicated that there had been an unauthorised disclosure. The committee discussed the unauthorised disclosure and agreed that it had

damaged the confidence of committee members in each other but that, in view of the sensitivity of much of the material then before the committee, the substance of the unauthorised disclosure was relatively innocuous and the damage could be contained by non-repetition of the incident.

Unauthorised disclosure of submissions

5.10 All persons invited to make submissions to the committee are informed that submissions remain confidential to the committee until it decides to publish them. They are also advised that the committee would expect to make most material public at an appropriate stage of the inquiry.

5.11 Treasury's first submission to the inquiry was copied by Dr Henry to the Prime Minister and the Treasurer. Alert staff in those offices returned the copies to Dr Henry and notified the committee that they had done so. The committee commends their assiduousness and confirms that this was the correct action to take in the circumstances.

5.12 There are circumstances in which it will be appropriate to keep ministers' offices informed of departmental interaction with parliamentary committees. This ground is well covered in the *Government guidelines for official witnesses before Parliamentary committees and related matters* (November 1989). There is a distinction, however, between an inquiry into matters of policy or administration and an inquiry into conduct that may lead to a finding of contempt. The *Government guidelines* are generally directed to the former and acknowledge that there may be special circumstances and procedures applying to committee inquiries dealing with individual conduct.³ For this kind of inquiry, it is the committee's advice to departments and agencies that they should pay particular attention to any instructions given by the committee regarding submissions, and should not regard themselves merely as an extension of the relevant minister's office (let alone the Prime Minister's office), and therefore free to share all relevant information about the inquiry, including submissions, with that entity.⁴

5.13 The committee wrote to Dr Henry about this matter, expressing its regret at his action but noting that a possible contempt had been averted by the quick action of ministerial staff.⁵

3 *Government guidelines for official witnesses before Parliamentary committees and related matters*, November 1989, paragraph 2.5.

4 A similar issue was dealt with by the committee in its 22nd Report, *Possible Unauthorised Disclosure of a Senate Committee Submission*, PP No. 45/1990, See 125th Report, p. 140 for a summary.

5 Letter from the chair of the committee, Senator the Honourable George Brandis SC, to Dr Henry, dated 19 August 2009.

An issue arising from the committee's correspondence with the Treasury Secretary

5.14 This could well have been the end of the matter – although no apology was forthcoming – were it not for a somewhat misconceived submission from the AFP that mentioned the committee chair's letter to the Treasury Secretary:

Consistent with the 'Government guidelines for official witnesses before Parliamentary committees and related matters - November 1989' the AFP propose to consult as appropriate with the Commonwealth Director of Public Prosecutions (CDPP), the Minister for Home Affairs and Treasury in relation to any possible requests for confidentiality. Once that consultation is complete the AFP will advise the Committee whether any requests for confidentiality are to be made.

The AFP has not yet conducted those consultations in relation to the material in Annexure A because the AFP is aware of Senator Brandis' letter dated 19 August 2009 to the Secretary to the Treasury indicating concern, and raising the possibility of contempt of the Senate, in relation to disclosures of Treasury's submission to the Committee. The AFP understand that the Treasury has since passed to the Committee advice by the Australian Government Solicitor that no contempt was committed. The AFP has read that advice and considers that, for the same reasons, its proposed consultations outlined in this paragraph would not be a contempt. However, before undertaking the consultations, the AFP should be grateful to learn whether, in the light of AGS' advice, the Committee has any ongoing concern in relation to them. Once the consultations are complete, the AFP will advise the Committee whether any requests for confidentiality are to be made.⁶

5.15 The AFP had provided a submission to the committee's first terms of reference, including a number of attachments, and had requested that the committee consult it before authorising publication of the submission to ensure that appropriate confidentiality relating to possible future criminal proceedings was maintained.⁷ The committee indicated that it would contact the AFP in relation to any such decision and also requested any further information the AFP may have relating to the second terms of reference. Further information was provided in the form of attachments under cover of a submission including the requests quoted above.

5.16 As the committee pointed out to the AFP:

- the *Government guidelines* refer to consultation for the purpose of potential claims of public interest immunity—in other words, reasons to be advanced *for seeking not to provide documents* to the Senate or its committees;
- what was at issue here was the publication of material *already provided* by the AFP to the committee;

6 AFP submission, dated 11 September 2009.

7 AFP submission, dated 10 August 2009.

- the committee was fully aware of the sensitivities of the material submitted and would be highly unlikely to risk the subversion of any potential criminal proceedings;
- the subject of the committee's correspondence to Dr Henry was completely irrelevant to the question of what material provided by the AFP should not be published in the interests of avoiding prejudice to future criminal proceedings;
- Treasury had not at that stage provided a copy of the legal advice to the committee, allegedly advising that no contempt was committed by Dr Henry—no doubt quite properly in recognition of the fact that it is the Senate's role to determine such matters.

The committee then invited the AFP to provide it with a list of material in respect of which it sought to make confidentiality claims (properly referred to as claims of public interest immunity) and authorised it to consult with whomever it needed to in making such claims.

5.17 At an advanced stage of the inquiry, Dr Henry did provide the committee with a copy of the legal advice referred to by the AFP. Dr Henry assured the committee that 'there was no intent of contempt by this action' and that the submission 'was made available to Ministers because the matter directly concerns them and because they and staff members of their Offices are named in the submission'.⁸ The committee notes that Dr Henry intended no contempt and that he considered there were justifications for the provision of his submission to ministers. However, in the committee's view, the legal advice on which Dr Henry relied was wrong, reflected an ignorance of Senate practice and procedure, and was based on an erroneous view of this committee's function.

5.18 It is apparent to the committee that there continue to be misconceptions about parliamentary privilege in senior government ranks and continuing confusion between measures to protect the integrity of parliamentary proceedings and the permissible use of parliamentary proceedings in places outside Parliament. However, the committee acknowledges that this has been a difficult case for investigating agencies because of the close relationship between the acts investigated and proceedings in parliament within the meaning of section 16 of the *Parliamentary Privileges Act 1987*.

5.19 Further comments on the issue of publication of documents by committees in general and of this committee's approach to publication of documents in this case are provided below.

Publication of certain material submitted to the committee

5.20 It has been the committee's practice to publish as much material submitted to it as possible in the interests of transparency, so that those examining the committee's

8 Letter from Dr Henry, dated 16 November 2009.

findings may also examine the evidence on which those findings were based. There have been occasions, however, when the committee has taken evidence *in camera* or declined to publish material submitted to it, for a range of reasons including to protect the privacy of persons not directly involved in the inquiry or to avoid prejudice to possible legal proceedings.

5.21 In this case, the committee has been particularly conscious of parallel inquiries into possible criminal offences.

5.22 During the inquiry, the committee was presented with a large quantity of documents attached to submissions, most of them not created for the purpose of submission to the committee. However, as noted in paragraphs 3.43 and 3.44, the committee acknowledges that material of this nature provided by Treasury demonstrated that the department had ample basis, quite independent of Mr Grech's evidence to the Economics Legislation Committee, to institute disciplinary proceedings against him. On the other hand, the committee was concerned that other material, particularly that provided by the AFP, could be required as evidence in possible criminal proceedings.

5.23 Persons often provide to committees documents which have a prior existence; in other words, documents that were not created for the purpose of submitting them to a parliamentary inquiry but for some other purpose. The content of such documents is not generally protected by parliamentary privilege although the publication of it to a committee is so protected.

5.24 The submission of such documents to a parliamentary committee does not limit the ability to produce them subsequently to a court or tribunal. The mere submission of a document to a committee does not make it a proceeding in parliament and therefore unexaminable elsewhere.⁹ Nor does the publication of the document mean that it may not be used for any other purpose. The committee is aware, however, that the publication of such documents may potentially be a source of confusion in any subsequent court proceedings. There is a risk that either side in the proceedings may argue that the documents *are* proceedings in parliament because they have been published by a House or committee, whereas it is only that particular publication which is privileged. The level of doubt thereby introduced to the proceedings may be sufficient to create a fatal impediment. It may be argued, for example, that the inability to examine the material at issue could lead to unfairness in the trial.

5.25 A greater concern is that publication of such material by the committee before the commencement of any trial may inappropriately influence participants in those proceedings, including jurors and potential witnesses. Although the Senate has taken a robust view of the *sub judice* convention and has not accepted undue limitation of its right to inquire into and debate matters of public interest, the committee would not want to provide cause for criminal proceedings to miscarry.

9 Harry Evans (ed), *Odgers' Australian Senate Practice*, 12th edition, p. 402

5.26 With a mind to possible future criminal proceedings, the committee sought from the AFP a list of material whose disclosure might prejudice possible future criminal proceedings. The AFP consulted the Commonwealth Director of Public Prosecutions (DPP) on the possible prejudicial effect of publication of the investigative material provided to the committee. Because the investigation had not been finalised and no decision on possible prosecution of criminal offences had been made, the DPP was unable to advise the AFP. Commissioner Negus (who took over from Commissioner Keelty in September 2009) informed the committee that the AFP was not able at that time to identify particular material which, if disclosed, could prejudice future criminal proceedings and therefore did not propose to make any confidentiality claims on the material provided to the committee.¹⁰

5.27 In these somewhat unusual circumstances, the committee has nevertheless resolved to take a cautious approach to the publication of material which, in its view, may have a prejudicial effect on possible criminal proceedings. If, in the future, it becomes apparent that there will be no charges laid against Mr Grech, the committee reserves its position on making a future decision to release further material.

5.28 There remains the issue of the extensive documentation provided to the committee by Treasury. This material caused the committee a great deal of concern because it was, in many ways, so tangential to the terms of reference on the one hand, but critical to Treasury's submission that it did not take adverse action against Mr Grech in consequence of his evidence, on the other. In approaching this material, the committee agreed to apply certain principles to the consideration of whether it should or should not publish individual documents. These principles included the following:

- that in respect of legal advice, the committee would in this case respect any request made by the commissioning agency not to publish the advice for reasons of legal professional privilege;
- that personal email addresses would be protected, along with private telephone numbers;
- that in respect to emails sent by Mr Grech to individuals, their identity would be protected where there was no mutuality of correspondence (in other words, the email does not form part of a course of dealings between Mr Grech and the addressee);
- that the identity of persons not in the public realm would not be disclosed;
- that any information required for possible criminal proceedings would not be disclosed;
- that personal information relating to Mr Grech's medical condition would not be disclosed; and

10 Correspondence from Commissioner Negus, dated 29 October 2009.

- that personal information relating to other identified people would not be disclosed.

The committee also had regard to the business reputation of people seeking assistance under the Car Dealership Financing Guarantee, with whom Mr Grech communicated and has published only those parts of the email 'strings' which disclose inappropriate behaviour by Mr Grech.

5.29 Notwithstanding the application of these principles, the committee was unable to agree on the publication of the documents submitted by the Treasury Department on 18 August 2009. Government members of the committee who comprise the majority of the committee agreed to the publication of most of those documents in whole or in part, while Opposition members of the committee disagreed with the publication of a significant number of those documents on the basis that their provision was gratuitous and unnecessary to the findings of the committee. As those documents were not created for the purpose of submission to the committee, its majority decision does not affect any other use or publication of the documents by their owners.