POSSIBLE IMPROPER INTERFERENCE

WITH A WITNESS

AND POSSIBLE MISLEADING EVIDENCE

BEFORE THE

NATIONAL CRIME AUTHORITY COMMITTEE

(36TH REPORT)

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A • Letter, dated 7 November 1990, from the Leader of the Opposition in the Senate, Senator Robert Hill, to Senator the Honourable Kerry W. Sibraa, President of the Senate, raising a matter of privilege relating to material contained in the report of the Parliamentary Joint Committee on the National Crime Authority, "Operation Ark".

B • Statement by the President of the Senate, Senator the Honourable Kerry W. Sibraa, made in the Senate on 8 November 1990, advising that he had determined that a motion relating to the matter of privilege have precedence of all other business on the day for which notice was given.

C • Mark Le Grand: Submission on Matters Referred on 12 November 1990, dated 11 February 1991

CHAPTER ONE - INTRODUCTION AND BACKGROUND

Introduction

1.1 On 12 November 1990 the following matter was referred to the Committee of Privileges on the motion of the Leader of the Opposition in the Senate, Senator Robert Hill, formerly a member of the Parliamentary Joint Committee on the National Crime Authority:

> Having regard to the report of the Parliamentary Joint Committee on the National Crime Authority presented on 17 October 1990:
>
> (a) whether there was improper interference with a person in respect of evidence to be given before that Committee;
>
> (b) whether false or misleading evidence was given to that Committee in respect of directions given by the National Crime Authority or its officers to a person, affecting evidence to be given before the Committee; and
>
> (c) whether contempts were committed in relation to those matters.[1]

1.2 The Parliamentary Joint Committee (henceforth referred to in this report as the PJC) is a statutory committee of the Parliament, established under the *National Crime Authority Act 1984.* As such, the PJC is accorded all the privileges and protections of the Parliament, as indicated in section 3 of the *Parliamentary Privileges Act 1987* where "committee" is defined to mean:

> (a) a committee of a House or of both Houses, including a committee of a whole House and a committee established by an Act [emphasis added]; or
>
> (b) a sub-committee of a committee referred to in paragraph (a).

1.3 The terms of reference of the Committee of Privileges inquiry derived from a letter by Senator Hill to the President of the Senate, raising a matter of privilege under standing order 81, included as Appendix A to this report. In that letter, which led the President to give precedence to a motion to refer the matter to this Committee, Senator Hill identified the following two matters as giving rise to the reference:

> (a) the directions given by the Chairman of the National Crime Authority and by the Authority to Mr Le Grand, a former officer of the Authority, in relation to any evidence to be given to the Committee by Mr Le Grand; and

(b) the answers given to questions asked by me at the hearing of the Committee on 16 February 1990.

The President's statement giving precedence to the matter of privilege is at Appendix B to this report.

1.4 The directions referred to in paragraph (a) were as follows:

(i) **Direction by Mr Peter Faris, QC, Chairman of the Authority, to Mr Mark Le Grand, contained in paragraph 8 of a two-page minute of 6 December 1989, responding to an 85 page minute, dated 1 December 1989, by Mr Le Grand, as follows:**

8. I note your comments in paragraph 24 that you "reserve the right" to use that 1 December Minute. I do not fully understand that comment nor the need for it. So that there is no misunderstanding, I advise you as follows:

(a) I direct you that, in relation to Operation Noah, you are not to make any documents available to or have any discussions with any committee or person outside the Authority without first consulting the Authority. If you consider that I do not have the power to bind you with this direction or if you, for any reason, do not intend to obey it, please advise me forthwith and I will call an Authority Meeting.

(b) I remind you of the secrecy provisions of the Act, which bind you now and after your term ends.[2]

(ii) **Direction of the Authority, contained in the minutes of the Authority meeting held at Melbourne on 12 December 1989, as follows:**

1. The Authority:

- having noted the Chairman's minute of 6 December 1989 to Mr Le Grand, in particular paragraph 8, and Mr Le Grand's response in his minute of 7 December 1989, in particular paragraph 4;

- resolved that Mr Le Grand be directed not to divulge or communicate to any person outside the Authority any information acquired by him by reason of or in the course of the performance of his duties under the National Crime Authority Act unless specifically authorised to do so by the Authority;

- resolved that the Chairman forthwith seek from Mr Le Grand an undertaking to abide by this resolution.

2. The Chairman subsequently informed the meeting that he had communicated the resolution to Mr Le Grand, who had questioned whether the Authority was empowered to prevent him from furnishing information to the PJC, the IGC [Inter-Governmental Committee, consisting of Commonwealth and

> State Ministers, established under section 8 of the National Crime Authority Act] and the Attorney-General for South Australia. The Chairman had asked Mr Le Grand to undertake to abide by the direction. After discussion Mr Le Grand had given such an undertaking until Saturday 16 December 1989 (when a further meeting of the Authority, with Mr Le Grand present, was to take place) so as to enable him to obtain legal advice.[3]

1.5 These directions were supplemented by an agreement reached at an Authority meeting held in Sydney on 16 December 1989, as recorded at paragraph 4.2 of the minutes:

> 4.2 After discussion, it was agreed that if either Committee [that is, either the PJC or the IGC] sought to have Mr Le Grand appear before it, the Authority would decide if the requests were appropriate. If it decided that the requests were appropriate, the Authority would agree to Mr Le Grand appearing and to the necessary documents being provided to him. If the Authority's view was that the request was not appropriate, it would seek advice (at the Authority's expense). If the advice supported the Authority's view, then the Authority would refuse the Committee's request and if necessary have the matter determined by a court. On this basis, Mr Le Grand gave the undertaking sought.[4]

The full texts of the minutes quoted at paragraphs 3 and 4 are included in documents at pp.422-433 of the *Hansard* transcript of this Committee's proceedings.

1.6 The evidence referred to in paragraph (c) of Senator Hill's letter is as follows:

> **Senator Hill** - Has Mr Le Grand ever been directed not to give evidence to this Committee or in any way been restricted on the evidence that he should give to this Committee?
>
> **Mr Dempsey** - No.
>
> **Senator Hill** - That is the view of the Authority as a whole, I take it.
>
> **Mr Cusack** - Yes.
>
> **Senator Hill** - Because that goes beyond South Australia.
>
> **Mr Cusack** - Yes.[5]

Background

1.7 On 30 June 1989, the terms of a number of persons constituting the National Crime Authority, including the then Chairman, Mr Justice Stewart, expired. On 1 July 1989 the National Crime Authority was constituted by the following members:

Mr Peter Faris QC (Chairman)
Mr Gregory Joseph Cusack QC (Member)
Mr Julian Peter Leckie (Member)
Mr Pierre Mark Le Grand (Additional Member)[6]

1.8 Mr Faris and Mr Leckie were located in Melbourne; Mr Cusack in Sydney; and Mr Le Grand in Adelaide. Messrs Faris, Cusack and Leckie were new members. Mr Le Grand was a continuing member who had been appointed, following amendment of the National Crime Authority Act in December 1988, as an additional member of the Authority for the purpose of a special reference, which related to South Australia. His appointment as the South Australian Member was from 1 January to 31 December 1989.[7]

1.9 Early in June 1989, after Mr Faris' appointment had been announced but before he took up his position, Mr Le Grand apparently expressed some disquiet to Mr Faris concerning a possible report,[8] which was in the course of preparation at that time, which became known as the First Interim Report or the Operation Ark Report. The minute from Mr Faris to Mr Le Grand of 6 December indicates[9] that Mr Faris asked that the report be delayed until he took office, although this is denied by Mr Le Grand.[10] In the event, a report on the matter purportedly was agreed to by Mr Justice Stewart, Mr Lionel Robberds QC and Mr Le Grand on 30 June 1989 for transmission to the South Australian Attorney-General. The fourth member of the Authority, as then constituted, was Mr Peter Clark, who did not participate in the deliberations as he was on leave at the time.[11] Whether the report was in fact completed does not affect this Committee's inquiry and thus the Committee does not need to determine the question. Suffice to say that the report had not been physically transmitted to the South Australian Attorney-General by 4 July,[12] on which day Mr Le Grand was instructed not to transmit it until the Authority had an opportunity to discuss the matter.

1.10 During the next few months, a chain of events occurred which is set out in a submission made by Mr Le Grand to the Committee of Privileges on 11 February 1991. In order to avoid unnecessary repetition, the Committee has determined that the submission should be included as Appendix C to this report, but emphasises that the interpretation placed by Mr Le Grand on the events is not necessarily that of the Committee, as will be clear from this report. Certain events are also described in the report of the PJC, tabled in the Senate on 17 October 1990,[13] to which this Committee is required by its terms of reference to have regard. Together, the submission and report appear to give a complete picture of the complex series of events which unfolded at the time. Submissions by other persons involved in this inquiry may be found in the *Hansard* record of the Committee's proceedings and the volume of documents tabled with this report.

1.11 For the purposes of the Committee's inquiry, the relevant actions appear to have been as follows. During the months succeeding the first prohibition on transmission of the report, Mr Le Grand agitated for its transmittal. In

October 1989, Mr Faris, as Chairman of the Authority, received and disseminated to other members of the Authority, and the then Chief Executive Officer, Mr Denis Michael Lenihan, an advice dated 27 October, consisting of a critique of the June report, by Mr Gerald Dempsey, at that time General Counsel to the Authority. Mr Dempsey was based in Sydney. In brief, Mr Dempsey recommended that the report should not be transmitted to the South Australian Attorney-General in the form in which it had been prepared and agreed to by the previous Authority members. Mr Dempsey's critique consisted of 24 pages.[14]

1.12 Mr Le Grand responded on 1 December 1989 in a minute which consisted of 85 pages[15] and concluded with the following paragraph:

> "24. I reserve the right to use this response if the matter of the First Interim Report is raised before the Parliamentary Joint Committee, the Inter-Governmental Committee or by the South Australian Attorney-General".[16]

This statement, at the end of the long minute, was the subject of discussion by telephone between the members of the Authority, and between the Chairman and the Chief Executive of the Authority. As a result of their consultations, the direction at paragraph 1.4(i) above, included in a minute of 6 December 1989 signed by Mr Faris as Chairman of the Authority, was sent to Mr Le Grand.[17]

1.13 It appears that a normal meeting of the Authority was scheduled to be held in Melbourne on 13 December 1989.[18] In the event Mr Faris called a restricted Authority meeting in Melbourne on 12 December, to consider the Operation Ark matter. Because of family reasons, Mr Le Grand was unable to attend the meeting, although evidence given by Mr Faris indicated that the Authority offered to pay for the services of two nurses to look after his ill wife and infant son.[19] Mr Le Grand also made it clear to other members of the Authority that he did not regard it as appropriate that any decision on Operation Ark be made without his being present and they accepted his demand. Thus, the meeting which had been called specifically to consider all the matters related to Operation Ark, including, presumably, the direction which was then in operation, was not capable of resolving the issues confronting the Authority. The minutes of that restricted meeting record the outcome indicated at paragraph 1.4(ii) above.

1.14 The next special meeting of the Authority was held in Sydney on 16 December 1989,[20] which among other things was designed to enable Mr Le Grand to seek legal advice about the power of the NCA to seek, and his right to give, an undertaking in the terms sought. The primary purpose of this meeting was, as indicated, to resolve matters concerning Operation Ark. At the commencement of the discussions about the validity of the undertaking of 12 December 1989[21] Mr Le Grand tabled an advice from Mr David Smith, Counsel Assisting the Adelaide Office of the NCA, which drew attention for what appears to have been the first time to the provisions of the *Parliamentary Privileges Act 1987.* The

agreement reached in respect of dissemination of information on the Operation Ark matter is recorded in the minutes of that meeting, as indicated at paragraph 1.5 above.

1.15 Some matters relating to Operation Ark became known to the PJC, which conducted an initial inquiry into the matter. On 12 February 1990 Mr Peter Faris resigned as Chairman of the Authority.[22] On 16 February, at an *in camera* hearing, Mr Gerald Dempsey, apparently as General Counsel to the Authority, gave the response recorded at paragraph 1.6 above to Senator Hill. It may be noted that Mr Dempsey was appointed an Acting Member of the Authority on that day, and on 19 February also succeeded Mr Le Grand as the Additional Member for South Australia.[23] Mr Cusack endorsed Mr Dempsey's answer as the view of the Authority. Mr Julian Leckie was also present at that meeting. The Operation Ark matter was again considered by the PJC, following its re-establishment after the March 1990 elections, resulting in the report of 17 October 1990 to which this Committee has had regard in accordance with its terms of reference.

Conduct of Inquiry

(a) Meetings of Committee

1.16 The Committee of Privileges first met to consider the reference on 14 November 1990. Its first task was to get in touch with the PJC inviting that Committee to make any comments in relation to the terms of reference. The Chairman of the Committee, Mr E.J. Lindsay, RFD, MP, subsequently advised the Privileges Committee that relevant *Hansard* records would be made available to the Committee and that he would be pleased to appear before it if the Committee wished.

1.17 Following a further meeting, held on 27 November, the Committee wrote to Mr Justice J.H. Phillips, who had been appointed Chairman of the National Crime Authority in August 1990, and Mr Pierre Mark Le Grand, formerly the South Australian member of the Authority, asking whether the Authority, or Mr Le Grand, wished to make any submission on the matter. As is customary, the Committee also sought and received advice from the Clerk of the Senate on the matters before it.

1.18 Following correspondence and discussions between Mr Le Grand, this Committee and the PJC, Mr Le Grand was given access to documents he had previously submitted in confidence to the PJC, and made the written submission, at Appendix C, to this Committee on 11 February 1991. In the meantime, Mr Gregory Joseph Cusack, QC, a member of the National Crime Authority at the relevant time, made a submission to the Committee of Privileges which consisted of his *in camera* evidence before the National Crime Authority Committee on 20 September 1990.

1.19 On 13 February 1991, Mr Justice Phillips advised the Committee that the Chief Executive Officer of the Authority, Mr Denis Lenihan, would forward a submission on behalf of Mr Gerald Dempsey, who was at that time gravely ill and who subsequently died. Mr Justice Phillips advised that Mr Julian Leckie, another member of the Authority at the relevant time, did not consider that the material before the Committee warranted any submission from him. Mr Justice Phillips indicated that, for his part, as the material events occurred long before his appointment as Chairman in August 1990, he was unable to be of any assistance to the Committee.

(b) Documentation

1.20 It may be noted from the above account that by this stage the Committee had available to it a substantial number of documents, including a submission with internal memoranda of the Authority as attachments, *in camera* evidence provided by the PJC and submissions which took the form of *in camera* evidence given to that Committee. The resolutions governing the operations of the Privileges Committee pre-suppose that the Committee should make available relevant material to persons affected by its inquiries, and conduct any hearings which may be required in public, if practicable. For this reason, and before proceeding further, the Committee wrote to the PJC, indicating that it might find the need in future to make public some of the material before it and also indicating its preference that the PJC release any documents needed for the proper consideration of the inquiry.

1.21 In response, on 11 April 1991 the PJC advised the Privileges Committee that it believed that the Privileges Committee should have available to it all material which may be relevant. It therefore made available other documents in its possession, in addition to the *in camera* evidence it had previously provided, and indicated that it had no objection to all or part of the documents being made public by the Committee of Privileges should that prove necessary. In the course of the next few weeks, a significant number of documents was made available to the Committee. In the meantime, the PJC held a public meeting on 10 May 1991; that meeting concerned matters relevant to the Committee of Privileges' terms of reference and the Committee had access to the transcript of those proceedings.

(c) Public hearings of Committee

1.22 Following its consideration of the material before it, on 17 May 1991 the Committee decided to invite Mr Peter Faris QC to make a written submission. On 6 June, the Committee received advice that Mr Faris did not propose to make such a submission. The Committee subsequently decided that, in order to assist its inquiries, it should hold a public hearing on 9 December 1991. It so advised Mr Cusack, Mr Faris and Mr Le Grand, made available to them the material which it regarded as relevant to its terms of reference, and invited them to give evidence to the Committee. In response to a request from Mr Le Grand, the Committee agreed to afford him what he regarded as the protection of a summons, although the Committee itself did not consider it necessary. Both

Mr Cusack and Mr Faris appeared voluntarily at the Committee hearing, although the Committee made it clear it would issue a summons if necessary, and Mr Faris indicated at the hearing that he was attending under protest. Mr Cusack advised the Committee that he proposed to call Mr Lenihan as a witness at the hearing. The Committee advised all persons of the indicative procedures which the Committee expected to follow, which were intended to include an opportunity for persons associated with the inquiry, or their counsel, to examine each other at the hearing. In order to assist it during the hearing, the Committee, with the agreement of the President, appointed Mr Theodore Simos QC as counsel to assist it. Mr Le Grand and Mr Cusack were assisted by counsel; Mr Faris was not.

1.23 On 2 December 1991 Senator B.C. Cooney, a member of the Committee, advised the Chair that he had decided not to take part in the deliberations to begin on 9 December for the following reasons:

(a) his membership of the PJC at the time relevant to the subject of the present inquiry, including his attendance at the meeting of the PJC during which the answers which are the subject of the Committee's inquiry were given; and

(b) two of the members of the Authority are, as Senator Cooney is, members of the Victorian Bar and are quite well known to him.

Senator Cooney has also not taken part in any subsequent deliberations on the matter. Given, however, his participation in the earlier deliberations of the Committee leading up to the public hearing, it was not considered appropriate to seek a replacement for him at such a late stage. In respect of participation of members of the Committee in certain inquiries, the Committee draws attention to paragraphs 42 to 46 of its 35th Report,[24] which covers, in general terms, matters of this nature. In particular, the Committee notes that it is "a matter for the Senator concerned, and ultimately the Senate, whether he or she should sit on an inquiry".[25]

1.24 The purpose of the hearing of 9 December, as was made clear in the Chair's opening statement,[26] was to elicit information necessary to enable the Committee to determine how it should proceed further. Following that statement, questions were raised as to the right which the Committee proposed to accord to all persons, or their counsel, to examine each other in respect of the matters raised.[27] The Committee determined, after discussion at a private meeting, that examination of witnesses by persons other than members of the Committee would not proceed on that day.[28]

1.25 In the event, owing to time constraints on the Committee, it was able to examine only Mr Le Grand and Mr Cusack. It also took evidence from Mr Faris concerning a written submission he had made advising that he would seek a ruling from the Committee as to the application of section 51 of the National Crime Authority Act to the proceedings of the Committee, the power of the Committee to compel answers and "any other matters that may arise".[29] In his submission,

he indicated that if the Committee ruled against his submissions he would apply to the High Court to determine the matter. He further indicated that he would seek an adjournment to enable him to obtain legal representation. The Committee did rule against his submissions. Mr Faris explained that he had put his views too strongly in his statement, and sought and received an adjournment to enable him to seek legal advice. The Committee asked that he let it know of his plans by February 1992.[30]

1.26 Following further deliberations, and correspondence with the various persons concerned, the Committee determined that a further hearing, to complete the taking of evidence which began on 9 December 1991, should be held on 27 April 1992. In addition to hearing Mr Lenihan and Mr Faris, the Committee decided that it would welcome a submission from Mr Julian Leckie, and should invite him to give oral evidence to it on that day. The Committee also wrote to the present Chairman of the National Crime Authority, Mr Tom Sherman, who was appointed in February 1992 following the appointment of Mr Justice Phillips as Chief Justice of the Victorian Supreme Court, apprising him of the Committee's actions on the matter. Mr Sherman advised the Committee that, like his predecessor, he was unable to assist the Committee. Mr Lenihan, Mr Leckie and Mr Faris all appeared before the Committee, as planned, and Mr Le Grand and Mr Cusack also attended the hearing. All were accompanied by counsel. The Committee was again assisted by Mr Theodore Simos QC.

1.27 The Committee, in advising all persons of the proposed hearing, indicated that it intended to follow the same procedures as at the previous hearing, that is, that only members of the Committee would ask questions of the witnesses on that occasion. The Committee foreshadowed that, if a further hearing was required, it was intended that it be held on Thursday, 14 May 1992. Following the hearing of evidence on 27 April, the Committee found itself involved in detailed deliberations on matters arising from the evidence, and subsequently advised all persons that the 14 May meeting was cancelled and that, should a further hearing be required, this would take place on Saturday, 27 June 1992.

(d) Submissions under Privilege Resolution 1(13)

1.28 The Committee had noted, during its proceedings on both 9 December and 27 April, that certain adverse comments had been made concerning a colleague of Mr Le Grand in the Adelaide office, Mr Peter Snopek, and on 27 April Mr Le Grand himself. Under the provisions of Resolution 1(13) the Committee wrote to both persons, inviting them to respond in writing, if they wished, to the comments and to make an appearance before the Committee under that provision. Mr Snopek provided two written submissions to the Committee; the first submission was incorporated in the *Hansard* of 27 April,[31] while the second, which has been circulated to all relevant persons, is included in the volume of documents accompanying this report. Mr Le Grand's response, which has also been circulated, is included in the volume as well. Mr Snopek and Mr Le Grand, while indicating their willingness to appear before the Committee if the Committee wished, decided not to exercise their right to give oral evidence under

the resolution. The Committee, for its part, found their comments comprehensive and useful, and did not, therefore, need to seek further clarification.

(e) Submissions by persons mentioned adversely in report

1.29 The Committee has made certain comments within the report which might be regarded as adverse to the members of the Authority as at December 1989, with the exception of Mr Le Grand. Privilege Resolution 2(10) provides as follows:

> (10) As soon as practicable after the Committee has determined findings to be included in the Committee's report to the Senate, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate.

The Committee considered it appropriate, after taking advice from the Clerk of the Senate,[32] to interpret this paragraph broadly, to enable persons who might reasonably be regarded as adversely affected by certain comments to make submissions in relation to those comments.

1.30 Accordingly, on 8 June 1992 the Committee wrote to the solicitors representing Mr Peter Faris QC and to Mr Julian Leckie and Mr Gregory Cusack QC, drawing their attention to the finding at paragraph 4.15 and enclosing for their consideration a working document which forms the basis of this present report. Under the terms of the resolution, as broadly interpreted by the Committee, the Committee was required to offer to each person the opportunity to make both written and oral submissions to it. In the event, the persons concerned were satisfied to make written submissions, which have been taken into account in the refining of this report. These submissions are included in the volume of documents tabled with the report. The Committee therefore was able to cancel the hearing scheduled for 27 June.

CHAPTER 2 - ISSUES FOR DETERMINATION

Possible contempts involved

2.1 In the present case, the Committee considered that the matters it was required to examine fell within the following categories which may be treated as contempts, as outlined in the non-exhaustive list included as Resolution 6 of the Privilege Resolutions of 25 February 1988:

> **Interference with the Senate**
>
> 6.(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.
>
> **Interference with witnesses**
>
> 6.(10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.
>
> 6.(12) A witness before the Senate or a committee shall not:
>
> .....
> .....
>
> (c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.

Criteria under Privilege Resolutions

2.2. As with all matters which the Committee has been required to consider, the Committee took into account the criteria laid down in Privilege Resolution 3, as follows:

> 3(a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate;

(b) the existence of any remedy other than that power for any act which may be held to be a contempt; and

(c) whether a person who committed any act which may be held to be a contempt:

(i) knowingly committed that act, or

(ii) had any reasonable excuse for the commission of that act.

2.3 The Committee has previously made the point that only in the most exceptional circumstances should it contemplate making a finding of contempt n 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. The Committee emphasises that, in matters of this kind, it is not bound to take a narrow course in the interpretation of these criteria but can exercise generous discretion in applying the criteria to the circumstances of individual cases. In its 18th Report, for example, the Committee indicated that the damage to the Senate and its committees resulting from such acts would need to be of the most serious kind in order for the Committee to find that a contempt had been committed in the absence of intent.

Questions for determination

2.4 In this case, it became apparent to the Committee in the early stages of its inquiry that, as in other matters it has examined, the intention of the persons was relevant and possibly decisive. In order to determine whether the actions described in paragraphs 1.3 to 1.5 above might constitute possible contempts, the Committee decided that the following questions required determination:

(a) Whether the direction by Mr Peter Faris QC, as Chairman of the National Crime Authority, to Mr Pierre Mark Le Grand on 6 December 1989, given after consultation with, and with the agreement of, Mr Gregory Joseph Cusack QC and Mr Julian Peter Leckie, members of the National Crime Authority, restricted Mr Le Grand's appearing before, and providing documents and evidence to, the Parliamentary Joint Committee on the National Crime Authority.

(b) Whether the direction by Mr Peter Faris QC, Mr Gregory Joseph Cusack QC and Mr Julian Peter Leckie, at a meeting held in Melbourne on 12 December 1989, restricted Mr Le Grand's appearing before, and providing documents and evidence to, the Parliamentary Joint Committee on the National Crime Authority.

(c) Whether Mr Peter Faris QC, Mr Gregory Joseph Cusack QC, Mr Julian Peter Leckie and Mr Pierre Mark Le Grand entered into an agreement, at a meeting held in Sydney on 16 December 1989, which restricted Mr Le Grand's appearing before, and providing documents and evidence to,

the Parliamentary Joint Committee on the National Crime Authority.

(d) Whether Mr Gregory Joseph Cusack QC, in the presence of Mr Julian Leckie, both of whom were members of the National Crime Authority on 16 February 1990, confirmed as the view of the Authority the answer "no", given by the late Mr Gerald Dempsey, an officer or member of that Authority on that day, in response to the following question asked by a member of that committee at a hearing of that committee on that day:

> Has Mr Le Grand ever been directed not to give evidence to this committee or in any way been restricted on the evidence that he should give to this committee?

2.5 Evidence given both to the PJC and to this Committee indicated that, in the first place, directions were in fact given in the terms outlined in paragraphs 1.4 and 1.5 of this report. The accuracy of the transcript of the evidence given to the PJC, as set out at paragraph 1.6 of this report, has also not been challenged.

Analysis of directions and agreement

(a) The first direction

2.6 It may be noted that there was a difference between the first direction given, as a response to the minute of Mr Le Grand, in Mr Faris' minute of 6 December 1989, and the second direction agreed to by members of the Authority on 12 December and on which the agreement of 16 December was based. The first direction forbade Mr Le Grand's communicating with any committee or person without consulting the Authority. In its 18th Report[33] the Committee made comments about the duty of a member of an authority to notify other members that he or she intended, for example, to make a statement on matters relating to or on behalf of an authority. The Committee also considered the question of notification to other authority members that a member intended to appear before a parliamentary committee to discuss authority matters in a private capacity. The Committee has previously accepted in both cases that a requirement to notify an authority of such an intention is not unreasonable, and thus may be regarded as imposing no restriction on a person.[34] The requirement imposed by the minute of 6 December was, however, a requirement to consult members of the Authority. The question then arises whether a requirement to consult constitutes a restriction. This goes to the heart of intention which the Committee will discuss later in this report.

(b) The second direction

2.7 The second direction was of an entirely different order from the first. As the minutes of the Authority meeting of 12 December 1989 quoted at paragraph 1.4 record, the Authority resolved, inter alia,

> "that Mr Le Grand be directed not to divulge or communicate to any person outside the Authority any information acquired by him by reason of or in the course of the performance of his duties under the National Crime Authority Act unless specifically authorised to do so by the Authority; [emphasis added]
>
> that the Chairman forthwith seek from Mr Le Grand an undertaking to abide by this resolution".

2.8 Evidence was given that Mr Faris left the meeting to communicate the resolution to Mr Le Grand by telephone.[35] The effect of this direction was to restrict Mr Le Grand in that permission from the Authority was required before he could divulge any information of any kind to any person or body without authorisation from the Authority. Following discussions between Mr Le Grand and the Chairman, as recorded in the minutes Mr Le Grand gave an undertaking to abide by the direction until Saturday, 16 December 1989.[36]

(c) The agreement

2.9 The agreement reached on Saturday, 16 December 1989, in respect of, specifically, the PJC and the IGC (it may be noted that the South Australian Attorney-General was not mentioned in these minutes), provided that the Authority in each case:

(a) implicitly was to be notified that the Committee had asked Mr Le Grand to appear;

(b) explicitly would "decide whether the requests were appropriate";

(c) if so, would agree to [emphasis added] Mr Le Grand appearing [emphasis added] and to the necessary documents being provided to him;

(d) if not, would first seek advice on its view, and if the advice supported it, the Authority [emphasis added] would refuse the Committee's request and if necessary have the matter determined by a court.

2.10 The relevant paragraph of the minutes concludes:

> "On this basis, Mr Le Grand gave the undertaking sought".[37]

The Committee presumes, and the evidence indicates, that the "undertaking sought" was the same undertaking as that sought at the meeting of 12 December 1989, as recorded in the minutes of that meeting.[38]

Whether directions and agreement constituted restrictions

2.11 The question then arises as to whether any or all of the directions and agreement might be regarded as restrictions. In relation to the first direction, the requirement to consult could be regarded as either benign or threatening, depending on the circumstances of the case. Some members of this Committee took the view that the requirement to consult contained in the direction did constitute a restriction on Mr Le Grand, in that before he was able to communicate with any person or body at all, including the PJC, and whether voluntarily or under summons, he was required to consult the Authority. Given the atmosphere at the time, which will be discussed in more detail later in this report, these members concluded that the direction might be regarded as threatening, and thus constituted a restriction. Other Committee members considered that the requirement to consult other members of the Authority could not be regarded as a restriction on Mr Le Grand, in that they regarded as a reasonable courtesy, and as a condition of membership of a corporate body, that a member of an authority bound by duties and responsibilities of that position might appropriately advise other members of that member's intentions and seek counsel and guidance from them.

2.12 The second direction provided that under no circumstances was Mr Le Grand to communicate anything acquired by him in the course of his duties without authorisation from the Authority. This direction was open-ended, and was limited only when Mr Le Grand reserved his position - and then only in relation to the three statutory bodies mentioned in the National Crime Authority Act - to 16 December 1989. Some members of the Committee have expressed the view that in practice this direction was intended to operate for only four days, until the matter of the Operation Ark Report could be resolved, and that the restriction was so limited as to be not unreasonable in the circumstances. Other members have noted that, on its face, it was open-ended and very restrictive, and was modified and confined to four days only after Mr Faris spoke to Mr Le Grand who laid down the conditions under which he would give the undertaking sought.

2.13 The agreement of 16 December 1989 was intended to bind Mr Le Grand indefinitely. It was confined to two bodies, the PJC and the IGC, and, as indicated at paragraph 2.9 above, set out a methodology for dealing with any proposal for Mr Le Grand's appearance before each of the PJC and the IGC. The Committee has concluded that the agreement could have constituted a restriction on his appearing before the PJC when that Committee asked that he appear before it.

2.14 As a matter of record, and whether intended or not, the agreement in fact had the effect of restricting Mr Le Grand in the giving of evidence to the

PJC, as indicated by his letter of 13 August 1990 responding to an invitation by that Committee to make a submission to it.[39] Such a restriction might appropriately be regarded as constituting interference with the free exercise by a committee of its authority and interference with a witness. The question then arises whether this could be regarded as improper.

Possible improper interference with a witness

2.15 The Clerk of the Senate gave the following advice to the Committee:[40]

> Improper interference with witnesses is one of the well known categories of contempt of Parliament. It is referred to in the resolution of the Senate of 25 February 1988, relating to matters constituting contempts, in the following terms:
>
> > A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.
>
> As the preamble to that resolution indicates, the terms of the resolution do not prevent the Senate from treating as a contempt similar conduct which does not fall within the terms of the resolution, in that the resolution does not derogate from the power of the Senate to determine that particular acts constitute contempts.
>
> The contempt of improper interference with a witness may be constituted by "any interference with a witness's freedom" (Report of the Select Committee of the House of Commons on Witnesses, HC 84 1934-5, p. v).
>
> Conduct falling within this category of contempts clearly meets the criterion specified in section 4 of the *Parliamentary Privileges Act 1987*, which prescribes the essential element of contempts:
>
> > Conduct (including the use of words) does not constitute an offence against a House 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.
>
> A preliminary question which arises in relation to the directions given to Mr Le Grand is whether they were intended to apply to any giving of evidence by him to the Joint Committee. The direction by the then chairman of the Authority forbade Mr Le Grand having any discussions "with any committee" without first consulting the Authority. Mr Le Grand's memorandum to the chairman of 1 December 1989, his discussion with the chairman on 12 December 1989, and the advice by Mr David Smith of 15 December 1989 all referred to the application of the directions to

> the giving of evidence before the Joint Committee. Neither the chairman of the Authority nor the Authority made any disclaimer to the effect that the instructions were not intended to apply to the giving of evidence before the Joint Committee. The arrangement of 16 December 1989 explicitly referred to the giving of evidence before the Joint Committee. It may therefore be concluded that both instructions and the arrangement were made with the intention that they apply to the giving of evidence before the Joint Committee.
>
> The question which arises, then, is whether the directions and the arrangement constituted an improper interference with a parliamentary witness.
>
> The Authority may have thought that the directions and the arrangement were lawful, notwithstanding the advice of Mr David Smith: this conclusion may be drawn from the discussion summarised at page 26 of the submission. The fact that the Authority thought that its actions were lawful, however, does not settle the question of whether the actions constituted improper interference with a witness. Even if it were concluded that the actions of the Authority were otherwise lawful, those actions in their application to the giving of evidence before the Joint Committee could be held to constitute improper interference with a witness.
>
> Improper interference with witnesses is not equivalent to unlawful interference with witnesses. An interference with a witness may be improper and therefore a contempt even where the conduct constituting the interference is otherwise lawful. Thus the bringing of legal proceedings, which is not only lawful but the right of every citizen, has been treated as a contempt of Parliament where it constituted interference with witnesses (Erskine May's *Parliamentary Practice*, 21st ed., 1989, p. 132). The taking of legal proceedings against members or witnesses because of their contributions to proceedings in Parliament is capable of constituting a contempt (Reports of the House of Commons Committee of Privileges, HC 246 1974, HC 233 1981-2). As with contempt of court, "the exercise of a legal right or the threat of exercising it does not excuse interfering with the administration of justice [or the conduct of parliamentary inquiries] by deterring a witness from giving the evidence which he wishes to give" (*R v Kellett* (1976) 1 QB 372 at 391).

2.16 As the Clerk mentioned in his advice, this point was referred to in more detail in the advice dated 6 March 1989 to the Committee of Privileges, which was published with the 18th Report of the Committee in June 1989.[41] The advice in relation to the present reference continued:

> The use of the word "improper" in the resolution (and it has the same significance in section 4 of the Parliamentary Privileges Act) is intended to exclude actions which might be regarded as interference but which by their nature assist rather than hinder a parliamentary inquiry, for example, attempting to persuade (but not by threats or other improper means) a witness to change false evidence. In relation to contempt of court, this principle was discussed in *R. v Kellett* (1976) 1 QB 372 at 388.

> The contempt of improper interference with witnesses covers a wide area of conduct and catches any dealings with witnesses which may be regarded as limiting their freedom to give evidence, deterring them from giving evidence, or improperly influencing them in relation to their evidence.
>
> The question, therefore, may be posed in the following form: Did the directions to Mr Le Grand and the arrangement made with him by the Authority leave him completely free to give evidence before the Joint Committee, or did they limit that freedom, and did they have a tendency to influence him, by deterring him from giving evidence or otherwise?
>
> It could be concluded that the directions given to Mr Le Grand constituted an improper interference with a witness, and therefore a contempt of Parliament, because the directions were intended or likely to have the effect of deterring Mr Le Grand from giving evidence before the Joint Committee, and were an "interference with a witness's freedom" to give evidence.

The Committee found the Clerk's analysis useful in its deliberations.

Evidence given to the PJC

2.17 At a meeting of the PJC on 16 February 1990, when asked by Senator Hill whether Mr Le Grand had in any way (emphasis added) been restricted on the evidence that he should give to this Committee, the late Mr Gerald Dempsey answered "no". Mr Cusack endorsed Mr Dempsey's answer as the view of the Authority and, in a subsequent appearance before the PJC, on 20 September 1990, again denied that any restriction had been placed on Mr Le Grand.[42] In the light of what is now known about the directions and agreement of December 1989, the answers given to the questions at the February hearing of the PJC were not the whole truth. They left the PJC with a misleading impression as to the situation with respect to Mr Le Grand.

2.18 In relation to misleading evidence, the Clerk of the Senate made the following observations:

> The giving of false or misleading evidence to a House of the Parliament or a committee is also one of the well known categories of contempt, and is referred to in the resolution of the Senate of 25 February 1988 [quoted at paragraph 2.1 above].
>
> Such conduct also falls within the test applied by section 4 of the Parliamentary Privileges Act.
>
> It is to be noted that the offence extends to the giving of misleading evidence as well as the giving of false evidence. Misleading evidence is evidence intended or likely to give a false impression of the facts. The inclusion of the word "misleading" in the Senate's resolution was not strictly necessary, as the contempt of giving false evidence has

> long been regarded as extending to any misleading of a house or a committee. For the contempts of "wilfully suppressing the truth" and misleading a committee, the British House of Commons has imprisoned witnesses and expelled a member. The findings of the House in the latter case, in 1947, made it clear that misleading a committee is the equivalent of giving false evidence (HCJ 1828 122, 1947 22).
>
> It may be concluded that the answers given to the questions were misleading in failing to refer to the directions given to Mr Le Grand and the arrangement relating to any evidence to be given by him. Those directions and arrangement could well be regarded as falling within the phrase contained in the question, "in any way.... restricted on the evidence that he should give to this Committee".
>
> Even if the directions and the arrangement are regarded as not falling within the terms of the question, however, it may be argued that the failure to mention the directions to Mr Le Grand and the arrangement gave a misleading impression of the situation in relation to him, and left that misleading impression in the minds of the Joint Committee. It may be contended that a fully truthful answer would have indicated that directions had been given and the arrangement made, but were not regarded by the officers concerned as falling within the terms of the question. Such an answer would have allowed the Joint Committee to inquire further as to the nature of the directions and the arrangement.
>
> Regardless of this contention, any claim that the answers to the questions were technically truthful in the terms of the questions may well be seen as disingenuous. It has been noted that an instruction to a witness not to give evidence without the approval of another person or body is an "interference with a witness's freedom", or, in the terms of the question, a "restriction" on the witness.
>
> The facts disclosed by the [evidence before the Committee], of course, establish that the officers who gave the evidence on 16 February 1990 were aware of the directions given to Mr Le Grand and the arrangement made on 16 December 1989.

2.19 The Committee particularly emphasises the last paragraph of the Clerk's advice, as follows:

> In relation to this matter the Committee of Privileges has also established a relevant recent precedent which casts considerable light upon the contempt of giving false or misleading evidence. In its 15th Report, presented in March 1989, the Committee inquired into an allegation that false or misleading evidence had been given before a Senate committee. In this case, as the Committee noted, the answers given by the witness were technically correct, but by his failure to refer to a significant matter members of the committee were left with a false impression as to the facts.

2.20 As the Clerk indicates, in that case the Privileges Committee found that there was no intention on the part of the witness to mislead the committee, and an

apology tendered by the witness was accepted, but the Committee had cause to comment, with some asperity, that if the witness had been as helpful to the first parliamentary committee as he subsequently was with the Privileges Committee the whole inquiry could have been avoided.[43]

2.21 The Clerk goes on to comment:

> This case demonstrates that withholding relevant information may constitute giving misleading evidence. As with the contempt of interference with witnesses, the intention with which the act was done may or may not be vital in determining whether a contempt was committed.

Again, the Committee found the Clerk's comments of assistance to it.

CHAPTER 3 - ANALYSIS OF ISSUES

Introduction

3.1 As with all previous cases which the Committee has been required to consider, the question of intention has indeed proved vital in the determination of the Committee's findings. The history of the events at the time indicates that an atmosphere of mistrust among the members of the NCA had developed and was at its height by December 1989. The matter of Operation Ark had not been resolved, and Mr Le Grand was due to leave the Authority, and by implication the direct control of the Chairman and other members, on 31 December 1989, the date his term expired.

Chronology of events

3.2 The action by Mr Le Grand which appears from the evidence to have precipitated the series of actions by members of the Authority between 6 and 16 December 1989 was the production of the lengthy and controversial minute of 1 December, the concluding paragraph of which included the statement that he "reserved the right"[44] to use the minute before the PJC, the IGC and the South Australian Attorney-General.

3.3 The other members of the Authority did not wish to take responsibility for a report much of the content of which worried them.[45] Mr Le Grand, the continuing member, considered it inappropriate that the new members should be examining the report at all.[46] Given this conflict of view, it is not surprising that the other Authority members were alarmed when they received his minute, and acted accordingly. They appeared to be particularly concerned that, with Mr Le Grand's departure from the Authority imminent, matters could be taken out of their hands before the questions could be resolved.[47]

3.4 In the course of the new members' telephone conversations and consultations with each other, the perception seems to have developed that, despite the specificity of Mr Le Grand's paragraph, publication was likely to occur to "the world at large"- a phrase that has recurred throughout this inquiry.[48] It is difficult to determine precisely when and how the misapprehension arose.

3.5 The Committee has noted that the first direction reminded Mr Le Grand of his obligations to observe the secrecy provisions of the Act. This reminder could be seen as gratuitous, particularly given his precision in setting out what he proposed to do, that is, reserve the right to use his response if the matter were raised before the PJC, the IGC or the South Australian Attorney-General. Authority members have argued that, in giving the warning, they were endeavouring to protect all Authority members from accusations of irresponsibility in case material was subsequently released.[49] However, the Committee is more inclined to the view that this reminder, particularly in the

context of the apprehension of the other members that "the world at large" might be apprised of the matters raised in the report, was symptomatic of the siege mentality which appeared to have developed within the Authority since the new members had taken office. The pursuit of Mr Le Grand, notably the calling into question of his right to serve as a special member of the Authority, added to the "civil war" atmosphere that appeared endemic at that time.

3.6 That Mr Le Grand, too, considered himself embattled is evident from his own submissions, notably his submission of 24 May 1992, in which he indicated that he kept copies of certain documents to enable the PJC to be properly, truthfully and accurately informed. He then made the following comment:

> The Committee will draw its own conclusions as to the fate of my evidence if I had not been corroborated by documentary evidence.[50]

3.7 Fortunately, this Committee has not had to examine in detail other matters occurring at this time, and uses them as Mr Le Grand did in his submission of 11 February 1991 solely to illustrate the poisonous atmosphere which had built up among the members. It is not surprising, then, that the divisive and suspicious attitudes of all persons impaired their judgment, leading to an overreaction on all sides.

3.8 The perception by the other members that Mr Le Grand would publish to the world was no doubt reinforced by contact made on 11 December 1989 with the Adelaide Office by the 7.30 Report,[51] and an item televised on 12 December,[52] the night of the restricted meeting at which the second direction was given. The Committee does not suggest, and indeed it has not been put to the Committee, that Mr Le Grand was the source of any information gleaned by the media. Nonetheless, the apprehension that something would happen in the "world at large" is likely to have clouded the judgment of those involved in the matter.

Application of *Parliamentary Privileges Act 1987*

3.9 While all members of the Authority are lawyers, and two of the three members who consulted on the question of issuing the Chairman's direction of 6 December 1989 are Queen's Counsel, there is no evidence to suggest that the members realised the possibility that the Parliamentary Privileges Act applied in respect of the PJC, and thus that they were in danger of committing a contempt. This also appears true of the second direction. It may be noted from the minutes that it was in general and absolute terms, and was a "blanket" prohibition on communication to persons and bodies without specific authorisation of the Authority. It may also be noted that, like the first direction, this direction was open-ended in both time and content. Mr Le Grand indicated that he "had no hesitation in giving an undertaking in respect of the world at large, apart from those named in the Act, namely the Attorney-General, the PJC and the IGC".[53]

3.10 It has been put to the Committee that, in the light of the failure to resolve the matters at the 12 December meeting, the direction agreed to in effect extended the time for which the first direction was to be operative until a further special meeting could be held, on Saturday, 16 December 1989.[54] Neither the Chairman's nor the Authority's direction, however, indicates this. It was only when Mr Le Grand made the distinction between "the world at large" and the statutory bodies, and confined the time of his undertaking in respect of the statutory bodies to 16 December, when a special meeting to resolve all matters was called, that the question of any limitation on either direction was raised.[55]

3.11 Furthermore, the agreement of 16 December 1989 was far-reaching. As previously described, it circumscribed any action by Mr Le Grand on matters connected with the Authority indefinitely, without the approval of the Authority. Mr Le Grand claimed in submissions to the Committee, supported by Mr Peter Snopek, that he gave the "undertaking sought" at that meeting under threat of legal proceedings being taken in the Federal Court.[56] One member of the Authority, Mr Cusack, denied that the threat had been made.[57] Neither Mr Faris nor Mr Leckie could specifically recall the threat, but neither denied that the matter was discussed at the meeting. All agreed that the question was on their minds during this period; their recollection was supported by Mr D.M. Lenihan, Chief Executive Officer of the Authority at that time. None could be specific as to when and in what context the matter was raised.[58]

3.12 The Committee believes that mention was made of court proceedings within Mr Le Grand's hearing. It is clear that, whatever the other members of the Authority thought they did or did not do, the effect on Mr Le Grand was decisive. Given his firm intention, as evidenced by his own submissions and those of Mr Snopek, to refuse to give any undertaking, the Committee is persuaded by his statement at page 6 of his submission of 24 May 1992 that:

> what occurred at that meeting which brought about such a fundamental change of position on my part was the threat of immediate Federal Court proceedings made by Mr Faris.

3.13 It may well be that the other Authority members, in mentioning court proceedings, were musing on the implications of their decisions and further courses of action. Whatever their intentions, however, and regardless of the significance they placed on their ruminations, Mr Le Grand perceived the discussion as a threat and predicated his actions upon it.[59] Thus, even while for the other participants the discussion might have meant little, the misunderstandings and antagonisms which were obvious at that stage ensured that, for Mr Le Grand, the mention realised his worst fears. The Committee considers it reasonable and understandable that Mr Le Grand should so have concluded. Whether mention was made of legal proceedings; the nature of such proceedings; the context in which they were mentioned, or whether the mention should have been regarded as a threat need not,

however, deflect attention from the main question which the Committee is required to consider, that is, the motivation for placing a restriction on Mr Le Grand in appearing before and giving evidence to the PJC.

3.14 When the Authority met on 16 December 1989, all members faced, for what appears from the evidence to be the first time, the question of parliamentary privilege. Mr Le Grand produced an opinion on this question, which he had obtained from Mr David Smith. During the meeting, suggestions were made that Mr Smith's opinion had no more validity than that of any other lawyer. Mr Le Grand pointed out, however, that Mr Smith had undertaken research specifically on the question of parliamentary privilege and the *Parliamentary Privileges Act 1987*.[60] Notwithstanding that opinion, Messrs Faris, Cusack and Leckie entered into the agreement with Mr Le Grand that has previously been outlined. It appears to the Committee that the failure to consider the implications for parliamentary privilege might well have derived from their already having been "locked in" to actions previously taken.

Authority members' justification of directions and agreement

(a) Protection of persons

3.15 In evidence before the Committee, members of the Authority advised that their intention was to afford protection to Mr Le Grand, themselves as responsible members of a significant body, with a determination and commitment to upholding the law, and other persons whose names might improperly be revealed if matters contained in Mr Le Grand's minute of 1 December became public.[61] In particular, they expressed grave concern that matters of an operational nature might also improperly become public.[62] As Mr Leckie put it, given their concern to ensure the law was upheld it would have appeared strange had they acquiesced in actions which they regarded as unlawful, without making any attempt to prevent their occurrence.[63] Mr Leckie said that he was "dismayed" that Mr Le Grand should have "breached a professional undertaking" to abide by "what appear[ed] to everyone at that meeting [of 16 December 1989] to be an agreement which everybody was happy with...".[64]

3.16 As Mr Le Grand has pointed out, however, an undertaking not freely given but extracted under threat is a nullity.[65] Mr Le Grand told the Committee that he participated in the agreement solely because he felt threatened by the possibility of court action being taken,[66] particularly as his departure from the Authority to a new position was imminent, and he thus feared that his reputation might be sullied by any such action. He also advised the Committee that, in addition to Mr Smith's opinion put before the Authority on 16 December, he sought and received advice, on 23 January 1990 (after he had left the Authority), from Mr Mark Weinberg, QC, at that time the Commonwealth Director of Public Prosecutions and Mr Le Grand's superior. Mr Le Grand stated that Mr Weinberg had advised him that the first and second directions were invalid, that the undertaking that he had given was

not binding and that he was "under a duty to place relevant information before the PJC notwithstanding the attitude of the Authority" [emphasis included in Mr Le Grand's submission].[67]

3.17 It may be noted that, even with Mr Weinberg's *imprimatur*, Mr Le Grand made no move to volunteer information to the PJC, and departed from his undertaking of 16 December 1989 only when that Committee initially invited him, in July 1990, to attend a hearing and, following his disclosure of the undertaking and anxious consideration of how most appropriately he could respond, summoned him.[68] His declaration to this Committee that he did not intend to volunteer information to the PJC but, in fact, in the words of his 1 December 1989 minute, reserved the right to use his response if the matter of the first interim report were raised [emphasis added] before the PJC is thus supported by his actions at that time.

(b) Provisions of NCA Act

3.18 The justification given by members of the Authority, contemporaneously and subsequently, for their actions was that they were concerned to ensure that there was no question of Mr Le Grand's going beyond the provisions of sections 51 and 55 of the National Crime Authority Act in divulging material, notably to the PJC. These sections are as follows:

> **Secrecy**
>
> **51.** (1) This section applies to:
>
> (a) a member of the Authority; and
>
> (b) a member of the staff of the Authority.
>
> (2) A person to whom this section applies who, either directly or indirectly, except for the purposes of this Act or otherwise in connection with the performance of his duties under this Act, and either while he is or after he ceases to be a person to whom this section applies:
>
> (a) makes a record of any information; or
>
> (b) divulges or communicates to any person any information;
>
> being information acquired by him by reason of, or in the course of, the performance of his duties under this Act, is guilty of an offence punishable on summary conviction by a fine not exceeding $5,000 or imprisonment for a period not exceeding 1 year, or both.
>
> (3) A person to whom this section applies shall not be required to produce in any court any document that has come into his custody or control in the course of, or by reason of, the performance of his duties under this Act, or to divulge or communicate to a court a matter or thing that has come to his notice in the performance of his

duties under this Act, except where the Authority, or a member or acting member in his official capacity, is a party to the relevant proceeding or it is necessary to do so:

(a) for the purpose of carrying into effect the provisions of this Act; or

(b) for the purposes of a prosecution instituted as a result of an investigation carried out by the Authority in the performance of its functions.

(4) In this section:

"court" includes any tribunal, authority or person having power to require the production of documents or the answering of questions;

"member of the staff of the Authority" means:

(a) a person referred to in the definition of "member of the staff of the Authority" in subsection 4(1); or

(b) a person who assists, or performs services for or on behalf of, a legal practitioner appointed under section 50 in the performance of the legal practitioner's duties as counsel to the Authority;

"produce" includes permit access to, and **"production"** has a corresponding meaning.

Duties of the [Parliamentary Joint] Committee [on the National Crime Authority]

55. (1) The duties of the Committee are:

(a) to monitor and to review the performance by the Authority of its functions;

(b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the Authority or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

(c) to examine each annual report of the Authority and report to the Parliament on any matter appearing in, or arising out of, any such annual report;

(d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the Authority; and

(e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.

(2) Nothing in this Part authorises the Committee:

(a) to investigate a matter relating to a relevant criminal activity; or

(b) to reconsider the findings of the Authority in relation to a particular investigation.

3.19 It may be noted that the question of the PJC's powers under the Act had been a source of conflict between the PJC on the one hand and the Authority on the other since the inception of the Authority under the chairmanship of Mr Justice Stewart. Where the blame lies for the difficulties which have arisen is not clear. Indeed, it may be that the Parliament should share the blame for not making its intentions absolutely clear. Whatever the case, the PJC had cause, even in its first report, presented in 1985, to advise both Houses of the Parliament of the difficulties in establishing an acceptable working relationship between the two bodies.[69] Evidence was given during the hearing that the pattern established by the earlier Authority was continued by the Chairman and members appointed from 1 July 1989.[70]

Authority members' justification of PJC evidence

3.20 The preoccupation with secrecy by the members of the Authority goes some way towards explaining what on its face seems to be an extraordinary case of misleading the PJC. In answering that Mr Le Grand had not been in any way restricted concerning evidence before the PJC, it appears to this Committee that, in answering in the manner they did, Authority members rationalised what they must have known to be misleading evidence by resorting to the legalistic argument that the arrangement with Mr Le Grand was not actually a restriction on his ability to give evidence but merely a mechanism to prevent his giving evidence which would in their view be unlawful.

3.21 The final written submissions have added to the justifications. There appears, however, to be some confusion in the submissions between allegations as to whether a question of contempt was involved, and the Committee's making observations on the conduct of members in the performance of their duties as they perceived them. It was made clear at the public hearing of 9 December 1991[71] that, as with any parliamentary committee conducting an inquiry into a matter, the Committee of Privileges is entitled to make observations and draw conclusions on the matters before it, without entertaining an allegation, or making a finding, that a contempt has been committed. Furthermore, certain final submissions have suggested that if an action is otherwise lawful it cannot constitute a contempt. The Committee

points out, however, that interference with a witness may be improper and therefore a contempt even where the conduct constituting an interference is otherwise lawful.

Secrecy and parliamentary committees

3.22 That members of the Authority held a narrow view of the secrecy provisions of their Act and their applicability to parliamentary committees, and defined narrowly the information to which the PJC was entitled, is evidenced by their attitude both then and subsequently. This attitude was buttressed by the provision of advice to the PJC by the Attorney-General and his Department and the Solicitor-General for the Commonwealth. A contrary view, hitherto the parliamentary view, was put to the PJC by the Clerk of the Senate, and his consistently-propounded view was supported by Mr L.W. Roberts Smith, QC and significantly an earlier advice to the then Department of Community Services and Health, given by the Attorney-General's Department. Further consideration of these matters ultimately led the Solicitor-General to concede as a general principle that secrecy provisions of legislation are not applicable to parliamentary committees unless they are so applicable by express words or "necessary implication".[72]

3.23 The PJC itself, having grappled with the narrow interpretation of sections 51 and 55 of the National Crime Authority Act, has recommended that the situation be clarified,[73] and Senators Crichton-Browne and Spindler - both members of the PJC - have separately introduced bills to amend the NCA Act in an effort to deal with the problem.[74] The Committee also notes that the Government proposes to introduce legislation to clarify the relationship between the NCA and the PJC, based on recommendations of the Inter-Governmental Committee rather than those of the PJC. The Government has indicated, however, that it intends to formulate amendments to the Act "in a manner acceptable to the Government, the States and Territories, the Parliamentary Joint Committee, and the Parliament as a whole", to address the problem.[75] The Committee of Privileges looks forward to the legislative resolution of the difficulties which have arisen.

3.24 In recent times, there seems to have been an attitudinal change within the Authority in respect of the secrecy provisions of the Act. This metamorphosis has no doubt been aided by the Solicitor-General's and the Attorney-General's Department's clarification of their advice about the scope of the provisions. It must be mentioned, however, that throughout the period that the members of the Authority were giving evidence to the PJC - and indeed during a substantial part of the time during which the Committee of Privileges has been examining this matter - the rigid interpretation appeared to be the prevailing wisdom. Given the perceived uncertainty about the scope of the secrecy provisions, this Committee understands that persons bound by the

Act might have considered that they were acting responsibly at the time, however narrow their interpretation of the legislation under which they worked.

3.25 Mr Cusack conceded in evidence that, with the benefit of hindsight, it would have been appropriate to disclose the existence of the directions and agreement to the PJC on 16 February 1990, two months after the agreement had been reached.[76] Similarly, Mr Leckie, while he states that he did not recollect that the matter had arisen at the time, accepts that the information could and should readily have been provided.[77] The Committee ruefully observes that it wishes that the two members had reached this conclusion in February 1990. Both members continue to adhere to their claim that the directions did not inhibit Mr Le Grand in giving evidence to the PJC, and thus that the answers given to that Committee were not misleading, and were justified by their insistence upon what they perceived to be the operational nature of the Operation Ark report and Mr Le Grand's minute of 1 December 1989.[78]

3.26 The Committee commends present attempts by the PJC, the Authority and the Government to remove the ambiguity and conflict that have existed so far. In making this observation, however, the Committee points out that accountability problems are not confined to the National Crime Authority. It is inevitable that the relationship between an authority which depends to a large degree on secrecy and trust, and a body such as a parliamentary committee which is statutorily responsible for proper supervision of that authority and is intrinsically predisposed to openness, can at times be difficult. The problem of potential conflict must be resolved, and the Committee suggests that the Scrutiny of Bills Committee monitor provisions in individual bills to ensure that the two principles are not in conflict and that the Parliament's intentions are made clear.

3.27 More generally in relation to secrecy provisions, the exchanges of advice on this subject, referred to at paragraph 3.22, which were conducted between August 1990 and August 1991, are reproduced in the explanatory memorandum accompanying the Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991 introduced by Senator Crichton-Browne.[79] The purpose of this bill is to declare, for the avoidance of doubt, that the powers, privileges and immunities of each House of Parliament, and of the members and committees of each House, are not affected by a provision of a law other than the Parliamentary Privileges Act except to the extent that the provision expressly provides that those powers, privileges and immunities are affected. Parliament should give urgent and serious priority to considering legislation of this kind.

CHAPTER 4 - CONCLUSIONS, FINDING AND RECOMMENDATIONS

Introduction

4.1 The Committee has noted that, during the period from 1 December to 16 December 1989, conditions were imposed on Mr Le Grand which could reasonably be regarded as constituting limitations on his undertaking certain actions. Indeed, it was generally accepted by all Authority members that the purpose of the directions and agreement was, at the least, to remind him that he was limited by the NCA Act in what he was able to do or say, both during the December period and after he left the Authority. The difference between a reminder of his legal obligations, on the one hand, and the directions and agreement, on the other, was that the latter were prescriptive in making certain demands of him which could be regarded as going beyond the legislative requirements of the NCA Act. Whether some or all of the Authority's actions in December constituted restrictions was the subject of lively discussion in this Committee. Ultimately members of the Committee considered, with varying degrees of intensity, that on the evidence before them some form of restriction was imposed on Mr Le Grand's capacity to appear before, and provide evidence and documents to, the PJC. Whether any such restriction was justifiable or reasonable, and whether or not the limitations amounted to a "restriction", the evidence given at the hearing of the PJC on 16 February 1990 was misleading, even if by omission. The question then arises as to whether the imposition of such restrictions and the concomitant misleading evidence constituted contempt.

4.2 Although deeply disturbing to the Committee, the directions to Mr Le Grand and the agreement of 16 December 1989 to which he was reluctantly a party need to be considered in context. Mr Faris and other Authority members were apparently primarily driven by their interpretation of the Act under which they operated, unfortunately with scant regard for the Parliamentary Privileges Act, even when it was drawn to their attention in the opinion by Mr David Smith, which is Annexure G to Mr Le Grand's submission of 11 February 1991 (Appendix C to this report). The Committee considers that Mr Smith's lucid and constructive opinion was correct, and should have been taken into account by members of the Authority. The Committee's view is supported by the advice which Mr Le Grand has told the Committee was given to him by Mr Weinberg,[80] and also by the other opinions which are now on the public record.

4.3 It is a pity that the other members of the Authority were so set in their views that they did not comprehend the points that Mr Smith raised because, if they had paused to contemplate their position, the enormity of what they were proposing might have become apparent to them. The Committee can but conclude that their judgment regarding action which Mr Le Grand might take was seriously flawed by the alarm engendered by his statement in paragraph 24 of his minute of 1 December 1989, quoted at paragraph 1.12 above.

4.4 It is easy in retrospect to recognise this as overreaction to a situation perceived at the time as urgent and dangerous. Given their rigid interpretation of the provisions of the Act, and their presumed uncertainty about the scope of the secrecy provisions, previously referred to, the Committee acknowledges that the other members might have regarded themselves as trying to act responsibly. This motivation does not, however, absolve them from the consequences of their actions.

Application of criteria in Privilege Resolution 3

4.5 In making judgments about these matters, the Committee first had regard to the criteria it is required by the Privilege Resolutions to take into account in determining its findings. While all the matters set out in Resolution 3, quoted at paragraph 2.2 above, are relevant to its present inquiry, the Committee has concluded that the criterion to which it should give greatest weight in relation to the present inquiry is the first part of criterion 3(a), which as previously indicated provides as follows:

> (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions.

Matters for consideration

4.6 The Committee has been dealing with persons who are used to working within a court system rather than a parliamentary system, with the attendant rules and rituals which are conceived for the fair administration of justice within that court system. The Committee points out to all persons concerned with contempt and privilege that both Houses of this Parliament, after having carefully considered whether matters of this nature should be transferred to the jurisdiction of the courts, consciously determined following consideration of the report of the Joint Select Committee on Parliamentary Privilege, tabled in both Houses in October 1984,[81] that the jurisdiction should be retained within the Parliament. Accordingly, while many protections are given to persons who might be affected by matters involving privilege - some of which, indeed, exceed the protections accorded to persons facing a court - the Parliament by deliberate decision has determined that the powers necessary to ensure the integrity of its proceedings should be exercised by elected representatives rather than judicial appointees. Thus any committee established by a House of the Parliament will bring to bear on these matters the particular skills and outlook associated with parliamentary rather than legal judgments about certain actions.

4.7 As part of making the judgments, the Committee believes that the great powers of a House of the Parliament should not be used without concern for the consequences of exercising them, but should be asserted only after careful

consideration of the facts and circumstances. The principal issue in the present case is whether the use of these powers is warranted.

4.8 Additional matters which the Committee has taken into account in this case include:

(a) The potential seriousness of offences of attempting to restrict a person in giving evidence to a parliamentary committee.

(b) Whether any such attempts had the effect of keeping from a parliamentary committee matters which it was entitled to know.

(c) Whether, if such attempts were made, they were made in good faith, and

(d) Whether a continuation of present investigations would have the effect of shedding further light on the actions and motivations of the persons concerned.

4.9 Taking each of the above additional points in turn:

(a) Any restriction on persons in giving evidence to a parliamentary committee is potentially serious, and may constitute obstruction of a House of the Parliament or a parliamentary committee. Actions which tend to interfere improperly with the work of a Committee may result in a finding of contempt, and the Committee comments with exasperation, as it did in a previous case,[82] that if the members of the Authority had been as open in conveying information to the PJC as they finally were with this Committee any possibility of interference would simply not have arisen.

(b) In this particular case, in fact the PJC was ultimately not thwarted in discovering the truth about the matters.

(c) While the Committee has concluded that the actions of the members of the Authority whose term began on 1 July 1989 were misguided - and indeed some Committee members regard those actions as reprehensible - it acknowledges that they were undertaken in good faith, with the Authority members able to argue that they were protecting, as they saw it, the institution to which they belonged.

(d) The Committee believes that, regardless of further investigations, with the attendant acrimony which would be likely to shed more heat than light on the matter, the conclusions which it would be likely to draw at the end of the process are unlikely to be substantially different from those it has reached. It makes the point, however, that the process undertaken so far, involving persons being called to account for inexplicable ignorance, at the least, must indicate to those concerned, and others, that conduct such as theirs, whether well-meaning and well-motivated or not, is unacceptable.

Motives and contempt

4.10 The persons concerned are members of a body established by Parliament who, perhaps because they concentrated on their responsibilities under the National Crime Authority Act to the exclusion of their responsibilities to Parliament; perhaps because of wrong advice or for wrong reasons, but in accordance with what they believed was required of them, were able to obscure, and perhaps even to conceal from themselves, the real nature and effects of their actions. It appears to the Committee that members of the Authority rationalised a belief that no restriction was placed on Mr Le Grand, and thus they did not intend to mislead, or perceive themselves as having misled, the PJC.

4.11 As a general principle a contempt may be committed even if persons act lawfully and in good faith. Thus, in the present case, it may be that if the Committee were to pursue its inquiries and take further evidence it might find a contempt, regardless of the motives of the persons involved. The Committee has decided, however, not to pursue the matter further and therefore will not make a finding of contempt.

Rights and obligations of witnesses before parliamentary committees

4.12 The Committee is seriously perturbed about an ethos which implies that only the bare minimum of information should be given to a parliamentary committee, more so one which has a direct supervisory role in relation to an authority. In the present case, there has been no dispute that the evidence was given in the terms recorded, and no attempt was made to suggest that the evidence was misunderstood or interrupted by tangential questioning. In any case, in the light of subsequent evidence given both to the PJC and the Committee of Privileges, any excuse that thought processes were interrupted or that a misunderstanding of evidence had occurred would have been regarded by this Committee as somewhat feeble. If a witness before a parliamentary committee is interrupted before completing an answer, he or she is entitled to request that the answer be completed. Mr Leckie did so effectively when he appeared before this Committee. In addition, an option is always open to a witness to make a further written submission to a

Committee to clarify or expand upon oral evidence, as did Mr Lenihan, another witness before this Committee.

4.13 Given the requirements of a House of the Parliament to have the maximum amount of information available to it, subject to proper constraints, the Committee recommends that the Senate record its view that persons dealing with the Houses and their committees should direct their attention to the real effects of their actions. All persons, particularly those who appear before committees such as these, must ask themselves whether their actions may tend to restrict the freedom of inquiry of a House or a committee, and whether their evidence may tend to mislead a House or a committee and leave a misleading impression as to the facts. They should not seek to avoid these questions by taking refuge in semantic and technical rationalisations. Witnesses who are lawyers have a particular obligation not to use the techniques of their craft to avoid such questions. If it is believed that there is a difficulty in presenting certain evidence, that difficulty should be openly stated and not concealed from a parliamentary inquiry.

CONCLUSIONS

4.14 In summary, the Committee has reached the following conclusions which are more fully set out in the paragraphs indicated:

1. That the direction by Mr Peter Faris QC, as Chairman of the National Crime Authority, to Mr Pierre Mark Le Grand on 6 December, given after consultation with, and with the agreement of, Mr Gregory Joseph Cusack QC and Mr Julian Peter Leckie, members of the National Crime Authority, purported to restrict, and may have restricted, Mr Le Grand's appearing before, and providing documents and evidence to, the Parliamentary Joint Committee on the National Crime Authority. [paragraph 2.11]

2. That the direction by Mr Peter Faris QC, Mr Gregory Joseph Cusack QC and Mr Julian Peter Leckie, at a meeting held in Melbourne on 12 December 1989, clearly could have had the effect of restricting Mr Le Grand's appearing before, and providing documents and evidence to, the Parliamentary Joint Committee on the National Crime Authority. [paragraph 2.12]

3. That Mr Peter Faris QC, Mr Gregory Joseph Cusack QC, Mr Julian Peter Leckie and Mr Pierre Mark Le Grand entered into an agreement, at a meeting held in Sydney on 16 December 1989, which, if observed, would have involved a restriction on Mr Le Grand's appearing before,

and providing documents and evidence to, the Parliamentary Joint Committee on the National Crime Authority. [paragraph 2.13]

4. That the answer given by Mr Gregory Joseph Cusack QC, in confirming as the view of the Authority, in the presence of Mr Julian Leckie, the answer "no" given by the late Mr Gerald Dempsey to a question, asked on 16 February 1990 at a meeting of the Parliamentary Joint Committee on the National Crime Authority, as to whether Mr Pierre Mark Le Grand had been restricted in any way on the evidence he should give to that Committee, had the effect of misleading that Committee. [paragraph 2.17]

5. That, in imposing the directions and agreement on Mr Le Grand, other members of the Authority conscientiously believed they were acting responsibly and in accordance with the requirements of the National Crime Authority Act. [paragraphs 3.14, 4.2]

6. That the other members of the Authority did not adequately take into account the *Parliamentary Privileges Act 1987*, despite its being correctly drawn to their attention. [paragraphs 3.14, 4.2]

7. That there is no evidence to substantiate the fears of the other members of the Authority that Mr Le Grand would publish matters to "the world at large" and that Mr Le Grand conscientiously believed that he was fulfilling his responsibility to both the National Crime Authority and the Parliamentary Joint Committee in the actions he took. [paragraph 3.17]

8. That, while certain actions had a tendency to interfere with the operations of the PJC, in fact the PJC was not ultimately prevented from acquiring the information it needed to perform its functions. [paragraph 4.9]

9. That, while the actions of the members of the Authority were unwise, and placed Mr Le Grand under undue pressure, they were undertaken in good faith and were perceived by the members, however misguidedly, to be appropriate. [paragraph 4.9]

FINDING

4.15 ***The Committee has determined that it should not find that a contempt has been committed in respect of any of the matters referred to it by the Senate.***

RECOMMENDATIONS

4.16 The Committee recommends as follows:

1. That the Senate endorse the finding in paragraph 4.15.

2. That, in so far as there may be some imprecision in the terminology of sections 51 and 55 of the *National Crime Authority Act 1984*, appropriate legislative steps should be taken to clarify the matters of concern, as foreshadowed in the Government's response to the PJC's report, "Who is to guard the guards?", tabled in the Senate on 1 June 1992. [paragraph 3.23]

3. That care should be taken, during passage through the Parliament of legislation which may include provisions comparable to those which have caused concern, to resolve any conflict between provisions which lay down guidelines for accountability of bodies to the Parliament and obligations to protect confidential information and privacy. [paragraph 3.26]

4. That it might be appropriate for the Senate Standing Committee for the Scrutiny of Bills to draw such provisions to the attention of members of the Parliament. [paragraph 3.27]

5. That the Parliament should give urgent and serious priority to considering legislation such as the Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991. [paragraph 3.27]

6. That the Senate should warn persons dealing with Houses of Parliament and their committees that they have an obligation to direct their attention to the real effects of their actions, and in particular to ensure that they give answers to committees as fully and frankly as possible, without recourse to legalistic or bureaucratic casuistry. [paragraph 4.13]

Postscript

4.17 The Committee emphasises that all witnesses before parliamentary committees, particularly persons representing statutory authorities with a close relationship with a monitoring committee, are under an obligation to take their responsibilities to such committees seriously. The Committee considers that the resolution of the Senate recommended at paragraph 4.16(6) should serve as a salutary warning of possible consequences for witnesses who do not fulfil their obligations. It also accepts the obligation on Parliament to clarify its intentions statutorily, and has therefore recommended accordingly. If these two actions are taken by the Houses of Parliament, the Senate may consider that the way in which this case has been dealt with has been productive.

Patricia Giles
Chair

ENDNOTES

1. *Journals of the Senate* No. 1990/40, p. 410.

2. *Hansard* transcript, 27 April 1992, p. 423.

3. *ibid.*, p. 428.

4. *ibid.*, p. 433.

5. *Hansard* transcript, PJC, 16 February 1990, pp. 1110-1111.

6. National Crime Authority Annual Report 1989-90, p. 4 (Parliamentary Paper No. 343/1990).

7. *ibid.*, p. 5.

8. Mark Le Grand, Submission to Committee of Privileges, 11 February 1991, Annexure B, p. 4, Filenote of 5 June 1989.

9. *Hansard* transcript, 27 April 1992, p. 422.

10. Mark Le Grand, Submission in response to Adverse Evidence given on 27 April 1992, dated 24 May 1992, p. 6.

11. Le Grand Submission, 11 February 1991, p. 7.

12. *ibid.*

13. Parliamentary Joint Committee on the National Crime Authority Report on *Operation Ark* (Parliamentary Paper No. 430/1990).

14. Document available to Committee of Privileges, referred to in Le Grand Submission, 11 February 1991, p. 15.

15. Document available to Committee of Privileges, referred to in Le Grand Submission, 11 February 1991, p. 16.

16. Le Grand Submission, 11 February 1991, p. 16, Annexure C.

17. *Hansard* transcript, e.g., 9 December 1991, p. 246, 27 April 1992, pp. 368, 470, 490.

18. *Hansard* transcript, 27 April 1992, e.g., pp. 350, 395, 493.

19. *ibid.*, p. 502.

20. Le Grand Submission, 11 February 1991, p. 22.

21. *Hansard* transcript, 27 April 1992, p. 432.

22. National Crime Authority Annual Report 1989-90, p. 4.

23. *ibid.*, p. 5.

24. Committee of Privileges: Report on Committee's work since passage of Privilege Resolutions of 25 February 1988, presented 2 December 1991. (Parliamentary Paper No. 467/1991.

25. *ibid.*, p. 17, para. 45.

26. *Hansard* transcript, 9 December 1991, p. 209.

27. *ibid.*, pp. 212-5.

28. *ibid,*, p. 222.

29. *ibid.*, p. 204.

30. *ibid.*, pp. 285-295.

31. *ibid.*, pp. 349-351.

32. Included in volume of documents tabled with this report.

33. Possible interference with witnesses in consequence of their giving evidence before Senate Select Committee on Administration of Aboriginal Affairs (No.18). (Parliamentary Paper No. 461/1989).

34. *ibid.*, p. 24, paragraphs 47 and 48.

35. *Hansard* transcript, e.g., 27 April 1992, pp. 452, 474, 503-4.

36. *ibid.*, p. 428.

37. *ibid.*, p. 433.

38. *ibid.*, p. 428.

39. *ibid.*, 9 December 1991, pp. 50-52.

40. Full advice included in volume of documents tabled with this report.

41. Volume 3 of documents tabled with the 18th Report on 16 June 1989.

42. *Hansard* transcript, PJC, 20 September 1990, pp. 244-263, included in transcript of evidence of Committee of Privileges, 9 December 1991, pp. 105-124.

43. Possible False or Misleading Evidence before a Senate Estimates Committee - Department of Defence Project Parakeet (No. 15). (Parliamentary Paper No. 461/1989).

44. See paragraph 1.12.

45. *Hansard* transcript, e.g., 9 December 1991, pp. 245-6, 27 April 1992, pp. 448 449, 491.

46. *ibid.*, e.g., 27 April 1992, pp. 446, 459.

47. *ibid.*, e.g., pp. 472, 491.

48. Le Grand Submission, 11 February, 1991, p. 19; *Hansard* transcript, e.g., 9 December 1991, pp. 246, 256, 27 April 1992, pp. 471.

49. *Hansard* transcript, e.g., 27 April 1992, pp. 464, 493, 494.

50. p. 10.

51. Document available to Committee, referred to at p. 10 of Annexure B to Le Grand Submission of 11 February 1991.

52. PJC Report on *Operation Ark*, *op. cit.*, paragraph 9, p. 2.

53. Le Grand Submission, 11 February 1991, Annexure F, paragraph 6.

54. *Hansard* transcript, e.g., 9 December 1991, p. 267, 27 April 1992, pp. 452-3, pp. 503-5.

55. *Hansard* transcript, 27 April 1992, p. 428.

56. See e.g., Le Grand Submission, 11 February 1991, p. 27, *Hansard* transcript, 27 April 1992, pp. 318, 332, Le Grand Submission 24 May 1992, p. 6, Snopek letter of 13 May 1992, p. 1.

57. *Hansard* transcript, 9 December 1991, p. 276.

58. *ibid.*, e.g., 9 December 1991, pp. 275-276, 27 April 1992, pp. 398-9, 455, 509.

59. Le Grand Submission, 11 February 1991, p. 26.

60. *ibid.*

61. *Hansard* transcript, e.g., 9 December 1991, pp. 274, 281, 27 April 1992, pp. 448, 451, 457, 495.

62. *ibid.*, e.g., 9 December 1991, pp. 262-3, 281, 27 April 1992, p. 449.

63. *ibid.*, 27 April 1992, pp. 464, 465. See also comments by Mr Faris at p. 496 of the transcript.

64. *ibid.*, pp. 465, 483.

65. Le Grand Submission, 24 May 1992, p. 6.

66. *Hansard* transcript, 9 December 1991, p. 239.

67. Le Grand Submission, 24 May 1992, pp. 9-10.

68. Le Grand Submission, 11 February 1991, Annexure A, *Hansard* transcript, PJC, 6 September 1990, pp. 133-140, available to Committee of Privileges.

69. Parliamentary Paper No. 501/1985.

70. *Hansard* transcript, 27 April 1992, pp. 451, 466.

71. *ibid.*, 9 December 1991, p. 209.

72. All the opinions referred to in this paragraph are incorporated in the explanatory memorandum attached to the Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991, introduced on 9 September 1991 by Senator Crichton-Browne.

73. "Who is to Guard the Guards? An Evaluation of the National Crime Authority", Parliamentary Paper No. 297/1991, p. 236, paragraph 6.

74. National Crime Authority (Powers of Parliamentary Joint Committee) Amendment Bill 1990, introduced by Senator Crichton-Browne on 8 November 1990; National Crime Authority (Duties and Powers of Parliamentary Joint Committee) Amendment Bill 1990, introduced by Senator Spindler on 21 December 1990.

75. Government response to PJC Report (Parliamentary Paper No. 297/1991), *op. cit.*, tabled 1 June 1992.

76. *Hansard* transcript, 9 December 1991, pp. 278-279.

77. *ibid.*, 27 April 1992, pp. 420, 485.

78. *ibid.*, e.g., 9 December 1991, p. 281, 27 April 1992, pp. 486-7.

79. See footnote 72 above.

80. Le Grand Submission, 24 May 1992, pp. 9-10.

81. Parliamentary Paper No. 219/1984.

82. Report No. 15, *op. cit.*, Chapter 2, Note 43.

APPENDICES

A • Letter, dated 7 November 1990, from the Leader of the Opposition in the Senate, Senator Robert Hill, to Senator the Honourable Kerry W. Sibraa, President of the Senate, raising a matter of privilege relating to material contained in the report of the Parliamentary Joint Committee on the National Crime Authority, "Operation Ark".

B • Statement by the President of the Senate, Senator the Honourable Kerry W. Sibraa, made in the Senate on 8 November 1990, advising that he had determined that a motion relating to the matter of privilege have precedence of fall other business on the day for which notice was given.

C • Mark Le Grand: Submission on Matters Referred on 12 November 1990, dated 11 February 1991

Appendix A

PARLIAMENT OF AUSTRALIA · THE SENATE

THE SENATE
8 NOV 1990
TABLED PAPER

SENATOR ROBERT HILL

RECEIVED
7 NOV 1990
OFFICE

RECEIVED
7 NOV 1990
CLERK'S OFFICE

7 November 1990

Senator the Hon. Kerry W. Sibraa
President of the Senate
Parliament House
CANBERRA ACT 2600

Dear Mr President

MATTER OF PRIVILEGE

Pursuant to standing order 81, I raise a matter of privilege, and I ask that you determine that a motion to refer the matter to the Committee of Privileges should have precedence of all other business for the day for which notice is given, in accordance with that standing order.

The matter to which I refer arises from proceedings of the Parliamentary Joint Committee on the National Crime Authority, as revealed in the Qualifying Statement attached to the report of the Committee, entitled "Operation Ark", presented to the Senate on 17 October 1990.

You will be aware that, by parliamentary custom, matters of privilege arising in relation to a joint committee are investigated by the House which administered the committee when the matter arose. The Joint Committee on the National Crime Authority is administered by the Senate.

The matter to which I refer has two aspects:

(a) the directions given by the Chairman of the National Crime Authority and by the Authority to Mr Le Grand, a former officer of the Authority, in relation to any evidence to be given to the Committee by Mr Le Grand; and

(b) the answers given to questions asked by me at the hearing of the Committee on 16 February 1990.

(a) The directions given to Mr Le Grand

On 6 December 1989 the Chairman of the National Crime Authority sent to Mr Le Grand a direction in writing including the words "you are not to make any documents available to or have any discussions with any committee or person outside the Authority without first consulting the Authority" (emphasis added). On 12 December 1989 the Authority communicated to Mr Le Grand a direction including the words "Mr Le Grand is not to divulge or to communicate to any person outside the Authority any information acquired by him by reason of or in the course of the performance of his duties under the NCA Act unless specifically authorised to do so by the Authority". Other material in the Qualifying Statement makes it clear that the effect of these directions was that Mr Le Grand was not to give evidence before the Joint Committee without the approval of the Authority.

An examination of the relevant precedents and authorities leads me to the conclusion that these directions to Mr Le Grand prima facie constituted an improper interference with a person in respect of evidence which may have been given before a parliamentary committee, and, therefore, may have constituted a contempt of Parliament.

(b) the questions put to the Authority concerning Mr Le Grand

At a hearing of the Joint Committee on 16 February 1990, I asked officers of the Authority whether Mr Le Grand had "ever been directed not to give evidence to this Committee or in any way been restricted on the evidence that he should give to this Committee", and I was answered "No". I further asked whether that was "the view of the Authority as a whole", and I was answered "Yes".

As I have already indicated, the evidence shows that Mr Le Grand had been given instructions to the effect that he was not to give evidence before the Committee without the permission of the Authority.

An examination of the relevant precedents and authorities in relation to this matter leads me to conclude that the answers to my questions prima facie constituted the giving of false or misleading evidence to a committee, and may therefore have constituted a contempt of Parliament.

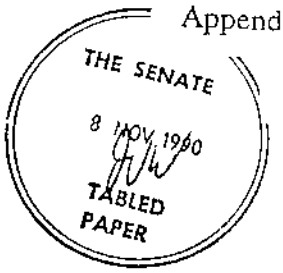
As you would appreciate, and as recent reports of the Senate Committee of Privileges have indicated, not to mention other precedents to which I have referred, interference with witnesses and the giving of false or misleading evidence before a committee are matters of extreme seriousness to this Parliament or to any legislature. They go to the heart of Parliamentary operations, the ability of Parliament, through its inquiry processes, to obtain accurate and truthful information on which to base decisions. Any interference with witnesses or giving of false or misleading evidence constitutes a most serious obstruction of parliamentary operations.

I therefore ask that you give precedence to a motion to refer these matters to the Committee of Privileges. Having regard to your previous determinations on matters of privilege, in accordance with the criteria laid down by the resolution of the Senate of 25 February 1988, I have no doubt that you will conclude that a motion should have precedence.

Yours sincerely

Robert Hill

ph/p/666



MATTER OF PRIVILEGE

STATEMENT BY MR PRESIDENT

In accordance with the procedures laid down by standing order 81, Senator Hill has raised with me a matter of privilege.

Under the standing order, I am required to determine whether a motion to refer the matter to the Committee of Privileges should have precedence over other business on the day for which the notice is given. In making that determination, I am required to have regard only to the following criteria laid down by the Senate:

(a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and

(b) the existence of any remedy other than that power for any act which may be held to be a contempt.

The criteria do not allow me to make any judgment as to whether the facts are as alleged by the Senator, or the strength of the evidence. In a number of determinations made since March 1988, I have indicated how I apply the Senate's criteria. I have given precedence to a motion where the matter raised is such that it is capable of being regarded by the Senate as conforming with criterion (a), and if there is no other readily available remedy. I have given precedence to a number of matters since that time, and I have not given precedence to some matters raised.

The matter raised by Senator Hill refers to material contained in the report of the Joint Committee on the National Crime Authority, presented to the Senate on 17 October 1990. It has two aspects.

Senator Hill states, first, that that material reveals that a person was given directions the effect of which were that the person was not to give evidence before

the Joint Committee without the approval of the National Crime Authority. Having regard to relevant authorities and precedents, he concludes that the directions may have constituted an improper interference with a witness and a contempt of Parliament.

Senator Hill states, secondly, that the material discloses that, at a hearing of the Committee, officers of the Authority were asked whether the person concerned had been restricted in any way in the evidence the person should give to the Committee, and they answered in the negative. Again having regard to relevant authorities and precedents, Senator Hill concludes that this may have constituted the giving of false or misleading evidence to a committee, and a contempt of Parliament.

Having regard to the relevant declarations of the Senate in its resolutions of 25 February 1988, other relevant authorities, and relevant precedents, including recent reports by the Senate Committee of Privileges, it is clear that any allegations that witnesses have been interfered with, or that false or misleading evidence has been given to a committee, have been regarded as matters of great seriousness.

The matter raised by Senator Hill therefore clearly satisfies criterion (a) of the Senate's criteria, and there is no readily-available other remedy.

I have therefore determined that a motion to refer the matter to the Committee of Privileges should have precedence in accordance with standing order 81. I therefore call Senator Hill to give a notice of motion. I present to the Senate the letter from Senator Hill.

THE SENATE COMMITTEE OF PRIVILEGES

SUBMISSION ON MATTERS REFERRED ON

12 NOVEMBER 1990

MARK LE GRAND
BRISBANE
11 FEBRUARY 1991

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THE SENATE COMMITTEE OF PRIVILEGES

S U B M I S S I O N

ON MATTERS REFERRED ON 12 NOVEMBER, 1990

INTRODUCTION

By letter dated 28 November, 1990 the Committee of Privileges (the Committee) of the Australian Senate under the hand of its Chair, Senator Patricia Giles sought from me a submission in relation to the following matters which were referred to the Committee by the Senate on 12 November, 1990 namely:

(a) whether there was improper interference with a person in respect of evidence to be given before that Committee;

(b) whether false or misleading evidence was given to that Committee in respect of directions given by the National Crime Authority or its officers to a person, affecting evidence to be given before the Committee; and

(c) whether contempts were committed in relation to those matters.

ACCESS TO JOINT COMMITTEE DOCUMENTS

By letter dated 4 December, 1990 to Senator Giles I indicated that I was prepared to make a submission but that I would require access to documents produced by me to the Parliamentary Joint Committee on the National Crime Authority (the Joint Committee) at

an in-camera hearing held in Melbourne on 6 September, 1990. After the exchange of further correspondence the Committee suggested by letter dated 12 December, 1990 that I seek access to the requisite documentation by direct approach to the Joint Committee. This was done by letter dated 14 December, 1990 and a reply received from the Joint Committee on 8 January, 1991 agreeing to the requested access at the Office of the Secretariat of the Joint Committee in Parliament House, Canberra.

I reviewed documents in Canberra on 22 and 23 January, 1991 and thereafter compiled this submission. I am grateful to the Committee for its forbearance.

EVIDENCE TO THE JOINT COMMITTEE

The Joint Committee by letter dated 11 July, 1990 invited me to make a submission on its evaluation of the work of the National Crime Authority (the Authority). Due to my absence overseas I was not in a position to reply until 13 August, 1990. In my reply (a copy of which is annexed to this submission - Annexure "A") I informed the Joint Committee of my desire to assist its deliberations but noted that by minute dated 6 December, 1989 the former Chairman of the Authority, Mr. Peter Faris Q.C. had prohibited any communication by me, inter alia, with the Joint Committee without express Authority approval. This prohibition had been confirmed by a resolution of the Authority on 12 December, 1989. I suggested to the Joint Committee that it might approach the Authority with a view to obtaining its sanction to my appearance before, and the provision of evidence to, the Joint Committee.

The Joint Committee responded by summoning me to an in-camera hearing in Melbourne on 6 September, 1990, and requesting my indemnification against prosecution by the Commonwealth and South Australian authorities for possible breaches of the secrecy provisions of the National Crime Authority legislation in giving evidence and producing documents.

On 6 September, 1990 I gave evidence on oath to the Joint Committee and produced several folders of documents. I have annexed to this submission a schedule of the documents produced to the Joint Committee (Annexure "B"). The schedule of documents attempts to succinctly describe each document in chronological order and to summarise its relevant contents. The documents have been grouped into areas of interest.

I understand that the Committee has access to the transcript of my evidence of 6 September, 1990 and many of the documents I produced at that hearing. In compiling this submission I have proceeded on the assumption that the Committee could request and obtain access to all such documents should it so desire.

To close this introduction, I would like to make one final observation. The submission I have compiled is long and detailed. I regret that its consideration will cast a substantial burden on the Committee. I have been conscious throughout its compilation of the need to fully inform the Committee of the context within which these events occurred. In isolation they are almost inexplicable. In the light of the surrounding circumstances their cause and effect more readily can be judged if not explained. I am conscious of the statement of the President of the Senate on 8 November, 1990, a copy of which Senator Giles kindly provided to me under cover of her letter of 28 November, 1990. He said in part:

> "Having regard to the relevant declarations of the Senate in its resolutions of 25 February 1988 and other relevant authorities and relevant precedents, including recent reports by the Senate Committee of Privileges, it is clear that any allegations that witnesses have been interfered with or that false or misleading evidence has been given to a Committee have been regarded as a matter of great seriousness".

I am concerned that I would be acting neither fairly nor responsibly, first to those who might be adversely affected by my statements and, second to the Committee which must adjudicate upon allegations that calculated contempts of the Parliament were committed if

I did not place before the Committee all relevant and appurtenant facts within my knowledge which may bear upon the issues.

BACKGROUND

The Adelaide Office of the National Crime Authority (the Authority) was established at the request of the South Australian Government after extensive investigations undertaken by the Authority in South Australia in 1987 and the early part of 1988, led to an Interim Report to the South Australian Government in July, 1988 identifying matters which, in the Authority's view, required investigation, in particular, allegations of improper conduct by South Australian police officers.

South Australian Reference No. 2 was issued on 24 November, 1988 by the South Australian Minister of Emergency Services. I was appointed the South Australian Member of the Authority pursuant to section 7(8AB) of the National Crime Authority Act 1984 (the Act) for the period 1 January 1989 to 31 December, 1989. A total of 56 persons were identified for the purposes of the Reference as being the subject of allegations of bribery, corruption, illegal gambling, extortion, prostitution, drug trafficking or murder, 25 of whom were serving police officers of the State of South Australia.

THE OPERATION ARK REPORT

Operation NOAH is a national initiative undertaken by the Police Forces of Australia on an annual basis with a view to enlisting public assistance in identifying and investigating those responsible for drug trafficking. The 1989 Operation NOAH was held on Tuesday 7 February, during the course of which the South Australian Police Force (SAPOL), according to its records, received 989 calls from the public, 13 of which alleged corrupt involvement by police. No information about the receipt of these complaints was passed to the Authority. Reports carried in the media one month after Operation NOAH brought the matter to attention. The Commissioner of SAPOL, Mr. David Hunt, maintained when queried by the Authority that only one complaint (involving an allegation against interstate police) had been brought to his attention.

In the light of the media reports and the Commissioner's response, the then Chairman, Mr. Justice Stewart, and the other members of the Authority determined that the Authority should pursue the fact of, and motives behind, the non-disclosure of the alleged police involvement in drug trafficking. One of the complaints related to the activities with another of the former head of the SAPOL Drug Squad Chief Inspector Barry Moyse now convicted of serious drug offences.

The Authority embarked upon a series of hearings during which it called 14 police witnesses, including the Commissioner, Deputy Commissioner and two Assistant Commissioners of SAPOL, received 93 exhibits and took 546 pages of evidence on oath. During the course of conducting its inquiry the Authority became equally concerned (upon viewing the reported allegations and the SAPOL investigative response thereto) with what appeared to be a continuing lack of resolve on the part of many within SAPOL to investigate police corruption despite adverse comment previously made by the Authority in its July 1988 Report.[1]

The Authority therefore determined that it should report its findings both in respect of:

(i) the non-disclosure of allegations received during the 1989 Operation NOAH of police involvement in drug trafficking in South Australia;

(ii) the apparent continuing lack of resolve within SAPOL to pursue allegations of police corruption.

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[1] As the Commissioner of Police had pointed out in a letter to the Authority of 11 April 1989 one possible explanation for the non-disclosure was a "dishonest, wilful concealment" pursuant to a collusive arrangement by corrupt elements within SAPOL.

The Authority commenced inquiries in Operation Ark on 17 March 1989 and continued to conduct hearings until 20 June, 1989. A Report was prepared jointly by Mr. Justice Stewart and myself. It was finalised and approved for presentation as a Report of the Authority pursuant to section 59(5) of the Act on 30 June, 1989 by Mr. Justice Stewart, Mr. Lionel Robberds Q.C. and myself. The other member, Mr. Peter Clark was on leave. Mr. Justice Stewart signed a letter on 30 June, 1989 transmitting the Report to the South Australian Attorney-General, the Honourable C.J. Sumner MLC, a copy of which was produced to the Joint Committee. [2]

The terms of office of Mr. Justice Stewart, Mr. Clark and Mr. Robberds Q.C. ceased on 30 June, 1989. My appointment continued until 31 December, 1989. On 1 July, 1989 Mr. Peter Faris Q.C. replaced Mr. Justice Stewart as the Chairman of the Authority.

Mr. Faris intervened to stop delivery of the Operation Ark Report on 4 July, 1989. My contemporaneous filenote of 4 July, 1989 [3] refers to my telephone conversation with Mr. Faris at 3.30 p.m. on that date. The Report was about to be delivered to the South Australian Attorney-General. The Report was finalised and authorised to delivery in Sydney on 30 June, 1989. It was reprinted in its authorised form in Adelaide on Monday

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[2] The finding by the Joint Committee in its Report of October, 1990 that the process of drafting the report was completed on 4 July, 1990 (presumably the Joint Committee means 1989) is simply incorrect. The only persons who could speak of these matters from their direct knowledge, namely Mr. Justice Stewart, Mr. Robberds Q.C. and myself were not heard on the matter by the Joint Committee.

Although there was no "minuted meeting" recording the Authority's determination to present the Operation Ark Report, there is no requirement either at law or within the National Crime Authority legislation to do so. The decision was taken by a quorum of members of the Authority on 30 June, 1989 and was valid notwithstanding views to the contrary which appear to have been accepted by the Joint Committee (see pages 8 - 9).

[3] This filenote was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "D" contained within the folders of documents produced.

3 and Tuesday 4 July. The minutes of the Authority decision of 4 July, 1989 to stop delivery of the Operation Ark Report [4]record:

> "At 4.15 p.m. per conference telephone it was resolved that the delivery of the report of the Authority on the 'Operation NOAH' hearings be deferred". (My emphasis).

The official contemporaneous record demonstrates the true status of the Report; it was recognised as being at that date, a duly authorised report of the Authority. The fiction that the Report was a "proposed report" or "certain internal documents" did not arise until seven months later, namely in Mr. Faris' letter to the South Australian Attorney-General of 30 January, 1990 [5]. Indeed, in the minutes of the Authority meeting held in July 1989 dealing with the Adelaide matters reference is made at paragraph 5.13 on page 8 to the "First Interim Report on South Australian Reference No. 2". Those minutes read in part:

> "It was agreed that as it represented the concluded judgment of the previous Authority it (the Operation Ark Report) should be forwarded to the South Australian Government but not as a Report from the new Authority". [6] (My emphasis).

On 4 August, 1989 a meeting was held in Adelaide attended by the Commissioner of the South Australian Police, Mr. D. Hunt, the Chairman of the Authority, Mr. Peter Faris

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[4] These minutes were tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "E" contained within the folders of documents produced.

[5] Copy letter of Mr. Peter Faris Q.C. to the South Australian Attorney-General was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "CE" contained within the folders of documents produced.

[6] Extract from the Minutes of the Authority Meeting held in July 1989 was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "S" contained within the folders of documents produced.

Q.C., his Personal Adviser, Mr. Paul Tobin, and myself. Paragraphs 6 and 7 of my filenote of that meeting record discussion about the fate of the Operation Ark Report.[7]

Mr. Faris made the following comment on the status of the Operation Ark Report:

> "He said that the status of the Operation Ark Report was a Report to Government pursuant to Section 59(5) of the National Crime Authority Act . . . he would expect the Report would go forward with the supplementary Report of the new Authority within the next few weeks or as soon as it could be addressed".

Also relevant in this context is an extract from the Minutes of the Authority meeting held in August 1989 where reference is made in paragraph 3.10 to the "First Interim Report on South Australian Reference No. 2". Mr. Faris Q.C. is recorded as having reported to the Authority on discussions he had with the South Australian Attorney-General in July 1989 on the forwarding of the First Interim Report.[8] Further, the Minutes of the Authority meeting held in Melbourne on 18/19 September, 1989 refer in paragraph 2.24 to discussion on "the First Interim Report on the South Australian Reference" and not to a "draft" Report.[9]

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[7] This filenote was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "W" contained within the folders of documents.

[8] Extract from the Minutes of the Authority meeting held in August 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AA" contained within the folders of documents.

[9] Extract from the Minutes of Authority meeting held in Melbourne on 18/19 September, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AL" contained within the folders of documents.

THE DEMPSEY ADVICES

Mr. Gerald Dempsey was appointed as General Counsel to the Authority in Sydney on 6 March, 1989. After 1 July, 1989 he rendered a series of advisings adverse to the operations of the Adelaide Office. He was challenged in respect of these advisings. Contrary opinions were obtained from General Counsel assisting the Adelaide Office, Mr. David Smith, independent Senior Counsel at the Melbourne Bar briefed by the Authority, Mr. Ray Finkelstein Q.C. and the South Australian Solicitor General, Mr. John Doyle Q.C. At one stage Mr. David Smith, private counsel from the South Australian Bar who was appointed pursuant to Section 50 of the Act to assist the Authority in South Australia was moved to comment:

> "It seems to me with respect that the emphasis in opinions which have in recent times emanated from the east is unwarrantedly to confine the additional member's powers and jurisdiction and that in that sense to treat him as an outsider. This attitude is contrary to the letter and spirit of the legislation". [10]

In my view it is incumbent upon me to briefly review these matters for the Committee as reference is either made to them in the papers evidencing the prohibitions placed upon me, or they provide the setting within which the prohibitions were made.

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[10] An advice of Mr. David Smith, Counsel Assisting, dated 30 November, 1989 on the powers and functions of the Adelaide Member tendered to the Joint Committee in Melbourne on 6 September, 1990 as "Annexure BC" contained within the folders of documents.

MY APPOINTMENT INVALID

By telephone call on 14 September, 1989 Mr. Dempsey informed me that my appointment as the South Australian Member was invalid. Further, he said that all actions I had purported to take as the Adelaide Member were invalid.[11]

I immediately sought an opinion of Mr. David Smith, Counsel Assisting the Adelaide Office. Mr. Smith rendered an advice on 18 September, 1989 in which he concluded:

> "Accordingly in my view the appointment of Mr. Le Grand is valid and effectual".[12]

On the basis of Mr. Dempsey's advice and in the face of the advice of Mr. David Smith, I was excluded from participation as a Member at the Authority Meeting held in September 1989. I was granted "observer" status.

Mr. Faris, Q.C. telephoned me on 20 September, 1989 and advised that Mr. Ray Finkelstein Q.C. had given an oral opinion that he "had no doubts as to the validity of my appointment". [13]

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[11] Filenote of a telephone conversation with Mr. G. Dempsey on 14 September, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AJ" contained within the folders of documents.

[12] Opinion of Mr. David Smith dated 18 September, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AM" contained within the folders of documents.

[13] Filenote of a conversation with Mr. Faris Q.C. on 20 September, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AN" contained within the folders of documents.

Despite the advice of Mr. Ray Finkelstein Q.C. to the contrary, Mr. Dempsey on 27 September, 1989, rendered a written advice which, inter alia, again challenged the validity of my appointment as the South Australian Member. [14]

I immediately contacted the Acting Chairman (Mr. Julian Leckie) on 29 September, 1989 concerning this further advice by Mr. Dempsey again calling into question the validity of my appointment. [15]

A written opinion was received from Mr. R. A. Finkelstein Q.C. dated 2 October, 1989 confirming his earlier oral advice that my appointment as a Member of the National Crime Authority was valid. [16]

During the course of a further telephone conversation with the Acting Chairman (Mr. Julian Leckie) of 3 October 1989 I was advised that the full Membership of the Authority were of the view that my appointment was valid and that I should continue to perform the functions of Member. [17]

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[14] An advice rendered by Mr. Dempsey dated 27 September, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AQ" contained within the folders of documents.

[15] Filenote of a conversation with the Acting Chairman (Mr. Julian Leckie) dated 29 September, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AP" contained within the folders of documents.

[16] An opinion of Mr. R. A. Finkelstein Q.C. dated 2 October, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AS" contained within the folders of documents.

[17] Filenote of a conversation with the Acting Chairman (Mr. Julian Leckie) dated 3 October, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AT" contained within the folders of documents.

THE POWERS AND DUTIES OF THE ADELAIDE MEMBER

On 27 September, 1989 Mr. Dempsey rendered an opinion entitled the "Powers and Duties of an Occasional Member", the effect of which was greatly to restrict the powers and functions of the Adelaide Member. [18]

At the Authority Meeting held in October 1989 the Authority agreed to Mr. David Smith, Counsel Assisting the Adelaide office, examining Mr. Dempsey's opinion after I had challenged its validity. [19]

Mr. David Smith provided an advice on 30 November, 1989. Reference is made to page 16 of Mr. Smith's advice where he states "The Commonwealth and State legislative scheme plainly envisages that the additional Member will to all intents and purposes be a fully fledged Member of the Authority, save only that his powers and functions, not however his status, are confined to his brief which is specifically to investigate the matters referred to in S.A. Reference No. 2. The additional Member has at his disposal all the powers of an ordinarily appointed Member". [20]

Mr. Faris, Q.C. by minute to myself dated 7 December, 1989 reacted adversely to the opinion of Mr. David Smith. I refer in particular to paragraph 5: "I do not understand why you have obtained this opinion at this late stage of your membership of the Authority", and paragraph 6: "To avoid any misunderstanding I hereby direct you, under

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[18] An advice rendered by Mr. G. Dempsey dated 27 September, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AO" contained within the folders of documents.

[19] Extract from the Minutes of the Authority Meeting held in October 1989 tendered to the Joint Committee on 6 September, 1990 as Annexure "AY" contained within the folders of documents.

[20] An advice of Mr. David Smith dated 30 November, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "BC" contained within the folders of documents.

section 46A of the Act, not to exercise any of those powers without consulting with either the Authority or myself as Chairman". [21] As you can clearly see [19], Mr. Smith's opinion was obtained with Mr. Faris' agreement, and his response, in my submission, was quite unwarranted.

I forwarded a minute to Mr. Faris, Q.C. dated 7 December, 1989 responding to his Minute of the same date. I refer in particular to paragraph 2 and paragraph 4, in particular my statement "you will appreciate that in my position as a statutory office holder, I cannot be deflected from the proper exercise of the powers, functions and duties conferred upon me by the statute, at least to the extent that there is consistency between the opinions of Messrs. Dempsey and Smith".

ALLEGATIONS THAT THE OPERATION ARK REPORT IS DEFICIENT AND ILLEGAL

On Wednesday 25 October, 1989 I was telephoned by Mr. Faris Q.C. about the Operation Ark Report. He referred to an opinion of Mr. Gerald Dempsey that the whole of the Operation Ark investigation was not within the Reference and therefore illegal and further that the Report's conclusions were not supported by the material nor were its recommendations appropriate. [22] During the course of this conversation reference was made for the first time to the Report not being presented.

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[21] Minute from Mr. Faris Q.C. to myself dated 7 December, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "BL" contained within the folders of documents.

[19] See footnote number 19 above.

[22] Filenote of telephone conversation with Mr. Faris Q.C. on Wednesday 25 October, 1989 was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AU" contained within the folders of documents.

I obtained an opinion from Mr. David Smith that the Operation Ark investigation was valid and within the terms of South Australian Reference No. 2. [23] This opinion was forwarded to Mr. Faris Q.C.

On 27 October, 1989 Mr. Gerald Dempsey rendered the first of two written advices on the First Interim Report to the Government of South Australia (the Operation Ark Report). [24] Mr. Dempsey opined, that the hearings were ultra vires and recommended that the First Interim Report should be abandoned and a totally new Report under Section 59(9) of the Act going solely to some of the recommendations for administrative change in the South Australia Police Department should be prepared and delivered.

A review by the Chief Executive Officer of the Authority, Mr. Denis Lenihan, dated 6 November, 1989 of Mr. Dempsey's advice of 27 October, 1989 led him to characterise the advice as not a proper evaluation of the Operation Ark Report, in particular he cited numerous examples of inaccuracies, misstatements and errors and a failure to read, appreciate or take into account large areas of the Report which forced him to conclude (at paragraph 16):

> "My conclusion is that legal aspects of the matter apart, it is not the Report that needs justifying and explaining: it is the advice".[25]

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[23] The opinion of Mr. David Smith on the validity of the Operation Ark investigation was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AV" contained within the folders of documents.

[24] Mr. Gerald Dempsey's advice of 27 October, 1989 was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AX" contained within the folders of documents.

[25] The memorandum by the Chief Executive Officer, Mr. Denis Lenihan, of 6 November, 1989 was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "AZ" contained within the folders of documents.

On 26 November, 1989 Mr. Dempsey rendered a second or supplementary advice on the First Interim Report.[26] It was in similar vein.

By memorandum to Mr. Faris Q.C. dated 1 December, 1989 I provided a response to the advice rendered by Mr. Dempsey on 27 October, 1989. This response deals with Mr. Dempsey's advice paragraph by paragraph. Mr. Dempsey, in his advice, had attacked the validity of the Operation Ark Report, and my response was a point by point rebuttal of Mr. Dempsey's opinion. Please note, however, that at the Authority meeting held in Sydney on 16 December, 1989 I agreed to delete certain passages from this response. The full response is referred to here as some of the subsequent documentation can only be understood in the context of the original contents of this memorandum.[27] In this regard of particular note is the last paragraph of that memorandum, namely paragraph 24 on page 85 which states:

> "I reserve the right to use this response if the matter of the First Interim Report is raised before the Parliamentary Joint Committee, the Inter-Governmental Committee or by the South Australian Attorney-General".

In my submission paragraph 24 is pivotal to an understanding of what next occurred and, as such, is included as Annexure "C" to this submission.

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[26] The supplementary advice of Mr. Gerald Dempsey dated 26 November, 1989 was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "BA" contained within the folders of documents.

[27] Memorandum to Mr. Faris Q.C. from myself dated 1 December, 1989 was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "BE" contained within the folders of documents.

THE PROHIBITIONS

On Wednesday 6 December, 1989 I received from Mr. Faris Q.C. a minute concerning "Operation NOAH" in response to my minute of 1 December, 1989. In paragraph 8 on page 2 of that minute Mr. Faris gave the following direction:

> "I note your comments in paragraph 24 that you 'reserve the right' to use the 1 December Minute. I do not fully understand that comment nor the need for it. So that there is no misunderstanding, I advise you as follows:
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> (a) I direct you that, in relation to Operation Noah, you are not to make any documents available to or have any discussions with any committee or person outside the Authority without first consulting the Authority. If you consider that I do not have the power to bind you with this direction or if you, for any reason, do not intend to obey it, please advise me forthwith and I will call an Authority Meeting.
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> (b) I remind you of the secrecy provisions of the Act, which bind you now and after your term ends".[28] (My emphasis).

This minute was tendered to the Joint Committee in Melbourne on 6 September, 1990. I have included a copy as Annexure "D" to this submission.

By memorandum dated 7 December, 1989 to myself and the other members of the Authority as well as the Chief Executive Officer and Mr. Dempsey, Mr. Faris Q.C. gave notice of the "final resolution" of the Operation NOAH matter at the Authority meeting to be held "next week". The threat allegedly made by me to sue the Authority referred to in

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[28] Minute from Mr. Faris Q.C. to myself dated 6 December, 1989 was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "BI" contained within the folders of documents.

paragraph 5 relates to a statement contained in my memorandum to Mr. Faris of 1 December, 1989 (see paragraph 20.28) to "consider my position". Despite Mr. Faris Q.C.'s strictures, verbal discussion was not inhibited as can be seen from the Minutes of the Authority meeting held on 16 December, 1989. [34]

On Friday 8 December, 1989 I received a telephone call from Mr. Faris Q.C. in which he arranged a restricted Authority meeting in Melbourne on 12 December, 1989 to consider the Operation Ark Report. [29] Unfortunately I was unable to attend that meeting due to the illness of my wife and our infant son. Mr. Peter Snopek, the Legal Adviser to the Adelaide Office, attended in my stead.

During the course of Monday 11 and Tuesday 12 December, 1989 I was at my home in Adelaide. I kept a running note of telephone calls received by me. The filenotes of my telephone conversations have been tendered to the Joint Committee.[30]

At 11.30 a.m. on Tuesday 12 December, 1989 I received a telephone call from Mr. Faris Q.C. who rang on a conference telephone in the presence of Mr. Greg Cusack Q.C. and others to advise me of an Authority resolution. My notes of that telephone conversation are as follows:

> "Rang to advise me of an Authority resolution. Authority having noted the Chairman's minute of 6 December, 1989 to Mr. Le Grand and, in particular,

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[34] See footnote number 34 below.

[29] Filenote of a telephone conversation with Mr. Faris Q.C. held on Friday 8 December, 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "BO" contained within the folders of documents.

[30] Filenotes of telephone calls received by me during the course of Monday 11 and Tuesday 12 December, 1989 were tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "BR" contained within the folders of documents.

paragraph 8 and Mr. Le Grand's response in his minute of 7 December, 1989 paragraph 4, it is resolved as follows:

'The Authority directs that Mr. Le Grand is not to divulge or communicate to any person outside the Authority any information acquired by him by reason of, or in the course of, the performance of his duties under the NCA Act, unless specifically authorised to do so by the Authority; the Authority further resolves that the Chairman forthwith seek from Mr. Le Grand an undertaking to abide by this resolution.'"

At my request the resolution was dictated to me over the telephone by Mr. Faris while I wrote it down on a piece of paper. A filenote was dictated to my secretary the following day when I returned to the office.

"The Chairman then asked whether I would abide by this resolution. I said that I had no difficulty in respect of the world at large, but I did in respect of those bodies which had review, watchdog or reporting rights under the NCA Act, namely the PJC, IGC and the Attorney-General. I said that it was a complex legal question what right to information members of the PJC, IGC and the Attorney-General had, and whether I could give such an undertaking. I instanced questions by the PJC about the fate of the First Interim Report and whether at some future date if I was called before that body, I could refuse to answer questions about my position in respect of that Report.

The Chairman then asked whether I believed I could take the NCA documents with me when I left the Authority, such as the Dempsey response. I said I was unsure, but probably not, but I would retain a good knowledge of their contents.

He asked me whether I was refusing to give the undertaking. I said that I was not refusing, but wished to receive legal advice on my position.

He asked from whom would I be seeking advice. I said Counsel Assisting in Adelaide, Mr. David Smith. He asked whether I would be in a position by Saturday to advise my attitude to the giving of the undertaking. I said that I hoped that I would be".[31]

These filenotes which were produced to the Joint Committee in Melbourne on 6 September, 1990 were separately exhibited. I have included a copy as Annexure "E" to this submission.

As well as dictating the omnibus list of notes of telephone calls received by me at home during 11 and 12 December, 1989, I made a separate filenote of my conversation with Mr. Faris Q.C. referred to in the previous paragraph because of its clear importance. My filenote reads:

"NOTE FOR FILE – Telephone conversation with the Chairman held on Tuesday, 12 December: OPERATION ARK.

1. The Chairman referred to his minute of 7 December 1989 in which he stated, inter alia:

'To avoid any misunderstanding, I hereby direct you, under section 46A of the Act, not to exercise any of those powers without consulting with either the Authority or myself as Chairman'.

2. He then pointed to my response of 7 December 1989 where I had stated:

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[31] Filenotes of telephone calls received by me during the course of Monday 11 and Tuesday 12 December 1989 were tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "BR" contained within the folders of documents.

' . . . I cannot be deflected from the proper exercise of the powers, functions and duties conferred upon me by the statute . . . '.

3. The Chairman then advised that the Authority, at a meeting held this day, has passed the following resolution:

'Having noted the Chairman's minute of 6 December, 1989 to Mr. Le Grand, in particular paragraph 8, and Mr. Le Grand's response in his minute of 7 December, paragraph 4, it is resolved as follows:

> The Authority directs that Mr. Le Grand is not to divulge or communicate to any person outside the Authority any information acquired by him by reason of or in the course of the performance of his duties under the NCA Act unless specifically authorised to do so by the Authority and that the Chairman forthwith seeks from Mr. Le Grand an undertaking to abide by this resolution'.

4. I said I was not prepared to give an undertaking, at least not at this time, until such time as I had the opportunity of seeking legal advice from Counsel Assisting the Authority in Adelaide, namely Mr. David Smith. I said that I was taking this position on the basis that I was not sure that what they were proposing was in accordance with law, that is, as a Member or former Member of the Authority I could be called before the PJC or the IGC, or required to furnish information to the Attorney-General and I was uncertain as to the Authority's powers to prevent me from responding or to excuse me from responding.

5. I indicated that I would need some time to consider my position. I said that, for instance, if the PJC, IGC or Attorney-General questioned me about the fate of the Operation ARK Report, I would desire to put my position on the record. The Chairman asked me whether I was refusing to give the

undertaking. I said it was not a case of refusing but a case of being sure that I could properly give such an undertaking. I indicated that I considered it a very complex legal question, that is, to what extent those bodies who have been given by the NCA powers of review or powers to request information could be prevented by the Authority from obtaining responses from a particular Member in the exercise of those powers.

6. The Chairman asked when I would be in a position to indicate whether I would give him the undertaking. I said, hopefully by Saturday 16 December, 1989. He then asked me to give him an interim undertaking until Saturday, which I did. I told the Chairman that I had no hesitation in giving an undertaking in respect of the world at large, apart from those named in the Act, namely the Attorney-General the PJC and the IGC".[32]

This document was tendered separately before the Joint Committee in Melbourne on 6 September, 1990. I have included a copy as Annexure "F" to this submission.

During the course of this telephone conversation, Mr. Faris Q.C. had proposed that the Authority's position in respect of the Operation Ark Report be finally resolved at the meeting held in Melbourne on 12 December, 1989 which I was unable to attend. In response I insisted that I was entitled to be present as the member responsible for South Australian Reference No. 2 when the matter was finally resolved. In view of my opposition to the matter being decided in my absence, a special meeting was called for the following Saturday, namely 16 December, 1989 in Sydney.

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[32] Filenote in respect of a telephone conversation with Mr. Faris Q.C. held on 12 December, 1989 re Operation Ark was tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "BU" contained within the folders of documents.

On 15 December, 1989 Mr. David Smith provided a written advice on the validity of the direction from the Authority to me of 12 December, 1989. In dealing with my position before the Parliamentary Joint Committee Mr. Smith opined:

> "Clearly then Mr. Le Grand even now could be required to come before the PJC and be the subject of questions and enquiry concerning the performance of his duties whilst the Adelaide Member.
>
> Even a conditional refusal to disclose information would amount to an 'inference with the free exercise' by the PJC of its authority and its statutory function of reviewing and monitoring the 'performance by the Authority of its functions': (see s. 55(1)(s) of the Commonwealth Act).
>
> To refuse to answer a question would amount to an offence against Parliament. Further, both Mr. Le Grand and the Authority as a whole would be frustrating the clear intent of the National Crime Authority legislation, which requires the Authority to be accountable to inter alia the PJC.
>
> It is no answer for the Authority to assert that it can release Mr. Le Grand from his undertaking. The direction embodied in the resolution is either within power or not. The fact that the prohibition against disclosure is conditional, in the sense that disclosure can be made if authorised, does not alter the character of the directive. Implicit in the directive is a discretion to permit or not permit disclosure. Such a power or unfettered discretion would, when linked to the directive, leave it with the character of a prohibition in the sense asserted in the now outmoded 'freedom of interstate trade cases'. (See Hughes and Vale Pty. Ltd. v. N.S.W. (No. 2) (1955) 93 C.L.R. 127 at pp. 160,161).
>
> In any event the spectre of Mr. Le Grand declining to answer without authorisation or even seeking broad consent to freely discuss the performance of his duties at the

Adelaide Office, would be an affront to the National Crime Authority legislation and offensive to the PJC's brief to ensure that the Authority is fully accountable.

The directive insofar as it forbids Mr. Le Grand from divulging or communicating information concerning the performance of his functions as the Member appointed pursuant to the Reference is ultra vires the Commonwealth Act and to that extent is invalid".

Mr. Smith concluded:

"The resolution and directive of the 12th December, 1989 is, in so far as it applies to communications between Mr. Le Grand and the P.J.C. or the I.G.C. ultra vires the Commonwealth Act and so is invalid.

In so far as the Attorney-General and indeed the 'World at Large' are concerned the directive is unnecessary".[33] (My emphasis).

Mr. Smith's advice was tendered separately before the Joint Committee in Melbourne on 6 September, 1990. I have included a copy as Annexure "G" to this submission.

An Extraordinary Meeting of the Authority was held in Sydney on 16 December, 1989. The draft Minutes of that meeting, which I produced to the Joint Committee in Melbourne on 6 September, 1990, [34] broadly reflect the substance of the discussions held and the decisions made, although there are some notable gaps to which I will refer later. In particular, I would refer to paragraph 4.1 relating to the tabling of the opinion of Mr.

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[33] The advice of Mr. David Smith of 15 December, 1989 was tendered to the Joint Committee in Melbourne on 6 September, 1990 as separate Exhibit "O".

[34] Draft Minutes of the Authority Meeting held in Sydney on 16 December, 1989 were tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "BW" contained within the folders of documents.

David Smith of Counsel dated 15 December, 1989. The relevant parts of these minutes are as follows:

"4. Undertakings by Mr. Le Grand and Mr. Snopek

4.1 Mr. Le Grand tabled an opinion by Mr. David Smith dated 15 December, 1989 on the question of the validity of a direction from the Authority to Mr. Le Grand on 12 December, 1989 (see the minutes of that meeting). The meeting noted that in Mr. Smith's opinion the direction, so far as it concerned the Parliamentary Joint Committee and the Inter-Governmental Committee, was ultra vires and invalid.

4.2 After discussion, it was agreed that if either Committee sought to have Mr. Le Grand appear before it, the Authority would decide if the request were appropriate. If it decided that the request were appropriate, the Authority would agree to Mr. Le Grand appearing and to the necessary documents being provided to him. If the Authority's view was that the request was not appropriate, it would seek advice (at the Authority's expense). If the advice supported the Authority's view, then the Authority would refuse the Committee's request and if necessary have the matter determined by a court. On this basis, Mr. Le Grand gave the undertaking sought.

4.3 Mr. Snopek also gave the undertaking sought. The meeting noted that in any event Mr. Snopek was a member of the staff of the Authority and as such subject to direction by the Chairman pursuant to the relevant provisions of the Public Service Act (C'wealth)."

I produced copies of Mr. Smith's advice for each of the attendees, namely:

Mr. Faris Q.C. (Chairman)

Mr. Cusack Q.C.

Mr. Leckie
Mr. Dempsey
Mr. Lenihan
Mr. Tobin.

Although the draft Minutes do not so record, Mr. Peter Snopek, the Legal Adviser in the Adelaide Office of the Authority, accompanied me to the meeting. What the minutes also do not record, (and it is perhaps not surprising), is the threat made against me to seek an injunction in the Federal Court should I refuse to give the undertaking sought. To the best of my recollection the details of that occurrence are as follows.

In the light of the advice of David Smith of Counsel, I had gone to the Authority meeting determined not to give the undertaking sought. I said that if I could not answer I would be in contempt of Parliament if called before the PJC to answer questions. I said that David Smith had researched the matter and had rendered an advising on the point which confirmed my belief in this regard. I produced and circulated the opinion. The opinion appeared to be read by all members present, Mr. Faris Q.C., Mr. Cusack Q.C., Mr. Leckie and Mr. Gerald Dempsey. Mr. Faris Q.C. commented that it was simply another lawyer's opinion which did not mean that it was right. He said that there were two Queen's Counsel and two senior barristers present who held the contrary view. I said that the difference was that David Smith had carefully researched the matter and taken the provisions of the Parliamentary Privileges Act into account. I reminded them that the same two Queen's Counsel and two senior barristers had opined wrongly in respect of Operation Ark and the extent of the reference power. I was met with the retort that Mr. Ray Finkelstein's opinion on the validity of the Operation Ark hearings was, again, only another opinion. Mr. Cusack said words to the effect that 'Can't this bloke read section 51? There is nothing more to it'. Mr. Faris then said that if I did not give the undertaking sought the Authority would apply to the Federal Court on Monday morning for an injunction against me. I was shaken by this comment which I perceived to be a threat to destroy my reputation and professional standing. Mr. Leckie then took over the conversation and sought to reach a formula whereby I could give the undertaking and still

be protected. The arrangements set forth in the minutes of the meeting roughly accord with my recollection.

I have discussed my recollection of these events with Mr. Peter Snopek whom I took to the meeting at Mr. Faris' suggestion and his recollection is similar to my own. The upshot of the threat to seek an injunction in the Federal Court by application on the following Monday put me in grave fear that my integrity and professional reputation would be irretrievably damaged. The mere spectre of such an application with its accompanying affidavits which would need to provide a recital to the effect that there was imminent concern about my leaking information from the Authority would have attracted widespread adverse publicity. I was concerned that there would be little immediate sympathy with, or understanding of, my position – the impression which the media and the public would gain was that this unprecedented action by the Chairman and members of the National Crime Authority was necessary to control an irresponsible and wayward member. This prospect loomed large in my consideration of the formula proposed by Mr. Leckie to which I eventually and reluctantly agreed.

It is interesting to note that paragraph 2.1 of the draft Minutes of the Meeting record that Mr. Faris Q.C. informed the meeting that Mr. Ray Finkelstein Q.C. had advised that Operation Ark and the associated hearings conducted by the Authority were within the scope of South Australian Reference No. 2 and that the Report was therefore valid !

Mr. Faris, Q.C. at the restricted meeting of the Authority held on 16 December, 1989 suggested that I formally write to him and request that the advices rendered by Mr. Dempsey dated 27 October and 16 November 1989 respectively not be disseminated by the Authority. He said that he would then send a minute to me undertaking to consult and advise me before Mr. Dempsey's opinions were published. This arrangement was meant to protect my position (see paragraph 3.9). I wrote to Mr. Faris as suggested on 19

December, 1989 [35] and I refer in particular to paragraph 2 of that Minute which encapsulates the reasons for my concerns about the publication of Mr. Dempsey's advices. Mr. Faris, Q.C. did not acknowledge my Minute as he had undertaken to do at the meeting nor was any reference made or notice given to me prior to the publication of the gist of those advices by the Authority, in particular, in Mr. Faris' letter to the South Australian Attorney-General of 30 January, 1990 [5] and at a public sitting held in Adelaide on 22 March, 1990. The latter publication may have been a breach of Section 60(5) of the National Crime Authority Act 1984 in that the Authority divulged in the course of that public sitting "matter the disclosure of which to members the public could prejudice the safety or reputation of a person".

The original Operation Ark Report was forwarded to the South Australian Attorney-General (in response to a request that it be provided) under cover of Mr. Faris' letter of 30 January, 1990 wherein it was described as "certain internal documents" and "a proposed report" although the letter, somewhat inconsistently in my view, acknowledges that it was "prepared before July 1". The letter seeks to justify the rejection of the "proposed" report by reference to six points which summarise the criticisms contained in the Dempsey advices. The former Chairman Mr. Justice Stewart wrote to the South Australian Attorney-General on the 8 February, 1990 responding to the letter of Mr. Faris Q.C. of 30 January, 1990 on his own behalf and on behalf of the other members who authorised the original Operation Ark Report, namely Mr. Lionel Robberds Q.C. and myself. [36] I refer in particular to the responses to Mr. Faris' criticisms of the original Operation Ark Report contained at page 2 of that letter. In my submission, any fair and open-minded

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[35] Minute to Mr. Faris Q.C. from myself dated 19 December 1989 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "CB" contained within the folders of documents.

[5] See footnote number 5 above.

[36] Letter from the former Chairman Mr. Justice Stewart to the South Australian Attorney-General dated 8 February, 1990 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "CF" contained within the folders of documents.

consideration of the original Report would demonstrate that the criticisms made of it were nonsense and a patent device to justify the inference with its delivery. Both Mr. Faris' letter and Mr. Justice Stewart's letter were tabled in the South Australian Parliament on 8 February, 1990.

Mr. Gerald Dempsey dealt with the Operation Ark Report at a Public Sitting of the Authority in Adelaide on 22 March, 1990. [37] Reference is made to the section on page 7 and following of his statement entitled "The Ark Report", in particular to this comment on page 8:

"Prior to the 30th of June 1989, a document was commenced as a draft report of the Authority. On the 30th of June 1989, three of the four Members of the National Crime Authority came to the end of their term as Members; these were the then Chairman, Mr. Justice Stewart, Mr. Robberds Q.C., and Mr. Clarke. The draft report, at that stage, had not been completed. It was completed in July". (My emphasis).

This assertion does not fit well with Mr. Faris' admission that the Report was prepared before 1 July, 1989.

I refer to a minute from Mr. Faris, Q.C. to the Authority members, the Chief Executive Officer and Mr. Dempsey dated 20 December, 1989 concerning "the draft Noah Report" and a letter to the Director of the Department of Premier and Cabinet. [38] It is interesting to note that the words "and never became a report of the Authority" in the draft letter to the Director of the Department of Premier and Cabinet enclosing the recast Operation

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[37] The Statement of Mr. Gerald Dempsey at a Public Sitting of the Authority in Adelaide on 22 March, 1990 tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "CG" contained within the folders of documents.

[38] Minute dated 20 December, 1989 from Mr. Faris Q.C. to Authority members, the Chief Executive Officer and Mr. Dempsey concerning "the draft NOAH Report" and a letter to the Director of the Department of Premier and Cabinet tendered to the Joint Committee in Melbourne on 6 September, 1990 as Annexure "CC" contained within the folders of documents.

Noah Report were deleted by the Authority at the suggestion of the Chief Executive Officer. It is my understanding that the draft Report attached to the Mr. Faris, Q.C.'s Minute is basically in the same form in which it went forward to the South Australian Government. It was compiled by Mr. Gerald Dempsey.

THE QUESTIONS

Question (a): **Whether there was improper interference with a person in respect of evidence to be given before that (Joint) Committee ?**

While recognising that the answer to this question and the other two questions is ultimately a matter for the Committee, there are several observations which I desire to make which the Committee may find of assistance in determining this question.

What is meant by "improper interference"?

In my submission, "improper" in this context really means "wrongful". I refer to the judgment of Brett M.R. in The Warkworth 53 LJPD & A 66.

The word "interference" has been judicially considered in Australia in an analogous context, namely interference with the proper administration of justice. Proceedings were brought before the New South Wales Court of Appeal for a declaration that a barrister had been guilty of professional misconduct which amounted to "interference" with the proper administration of justice. His Honour Mr. Justice Priestley made the following observations on that occasion:

> "To my mind it [interference with proper administration of justice] denotes the doing of something which, if successful, would bring about consequences in the working of the system of justice in this State by improper means. It is wrongful behaviour whether or not it is successful. Obvious examples are actual or attempted bribery of someone who has a material part to play in the decision of litigation. Such persons include any of the lawyers concerned in the case, jurors, witnesses and even, in cases with a number of parties, some of the parties themselves. Less obvious examples are where persons material to the decision of litigation are subjected to influences upon their judgement or, if witnesses, their

> evidence, quite external to the particular litigation, as for instance prejudicial media comment. Other examples away from the courtroom are where persons who may have information or potential evidence relevant to projected proceedings whether they be by way of litigation or in these days some form of Royal Commission, are subjected to pressures of various kinds not to make their information or evidence available to relevant authorities". **Prothonotary of Supreme Court of New South Wales v. Costello (1984) 3 NSWLR 201 at 208-209**. (My emphasis).

In my submission the present case is on all fours with the underlined section of Mr. Justice Priestley's comments, namely the application of pressure not to make information or evidence available to "relevant authorities".

That the Joint Committee is a "relevant authority" entitled to be briefed upon the matters within my knowledge is surely beyond dispute. The Joint Committee has a statutory duty to monitor and review the performance by the Authority of its functions. Pursuant to paragraph 55(1)(b) of the National Crime Authority Act 1984 the Joint Committee has a specific duty:

> "To report to both Houses of Parliament, with such comments as it thinks fit, upon any matter appertaining to the Authority or connected with the performance of its functions to which, in the opinion of the Committee, the attention of Parliament should be directed".

As at the dates I was subjected to the prohibitions referred to above, the Authority operation codenamed "Operation Ark" had already become a matter of public controversy in South Australia.

The Operation Ark Report (or the First Interim Report as it was formally styled) was on any fair view of the evidence a duly completed Report authorised by a quorum of members for transmission to the Government of South Australia. It dealt with serious matters, namely allegations of police involvement in drug trafficking and a continuing lack

of resolve on the part of the South Australian Police Force to pursue those allegations in any meaningful or effective way. The Inquiry which led to the Report had its genesis in controversy, was the subject of substantial media attention during its course and led to the calling and examination on oath of fourteen South Australian police officers, most of whom were senior in rank and among whose number were counted the Commissioner, the Deputy Commissioner, two Assistant Commissioners, the Officer in Charge of the Drug Squad and the Officer in Charge of the Internal Investigation Branch.

The findings of the Report itself paralleled many of the findings of the Fitzgerald Commission of Inquiry in Queensland. It is a Report of substantial interest to the administration of the Police Department and criminal justice in South Australia.

I was profoundly of the view that the non-presentation of the Report would ultimately gravely embarrass the National Crime Authority. In this regard I would refer you to paragraphs 1 to 19 of my memorandum to Mr. Faris Q.C. dated 1 December, 1989. [27] It was, in my submission, naive in the extreme for the Authority to consider that the delivery of a Report of this nature could be frustrated without grave repercussions for the credibility of the Authority. I believed then, as I still believe, that I had not only a right but an obligation to warn of these dangers. In the event what I prophesised in my memorandum of 1 December, 1989 has come to pass. As at the dates that I was subjected to the prohibitions referred to above, I fully expected to be required to account for my actions to the Joint Committee pursuant to its statutory charter under Section 55 of the Act to monitor and review the functioning of the Authority. The prohibitions had the effect of preventing my appearance before the Joint Committee until I was summoned on 6 September, 1990.

It is my submission that as a member of the National Crime Authority regardless of whether I was appointed under Section 7(8AB) or otherwise, I was entitled to come before the Joint Committee and provide information about my stewardship of South Australian

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[27] See footnote 27 above.

Reference No. 2 in particular, and the Adelaide Office in general. I felt strongly about what had occurred in Adelaide since 1 July, 1989. Although Operation Ark was of particular moment, my concerns were not limited to it. As can be seen from the documentation tendered to the Joint Committee in Melbourne on 6 September, 1990 the areas which I desired to canvass before the Committee included the following:

- The banning of any communication by the Adelaide Office with the South Australian Attorney-General and his officers and any other agency of the South Australia Government (with the sole exception of the South Australia Police Force) no matter how trivial the communication - this occurred in July 1989.

- Analysing and prioritising the investigations to be pursued pursuant to South Australian Reference No. 2 (against a background of undertakings having been given to the Premier and Attorney-General on 1 August, 1989 that this work would be undertaken).

- The conducting of so-called "unauthorised investigations" and the restrictive interpretation of the scope of the reference power generally.

- The "shutting down" of six investigations into police corruption in South Australia in July/August, 1989.

- The attacks upon the validity of my appointment as a Member of the Authority.

- The attacks upon the powers and duties of the Adelaide Member etc.

I do not intend to canvass the substance of these matters with the Committee. However, by setting forth the areas which I had desired to canvass with the Joint Committee, it is

hopefully plainly apparent that those matters fell within the Joint Committee's duty to monitor and review the performance by the Authority of its functions.

One does not need to go beyond the report in the Adelaide Advertiser of Tuesday 5 February, 1991 under the banner headline "NCA - 'A disaster in SA'" which alleged that a senior government member of the Joint Committee had described the Authority's South Australian experience as "a disaster" to realise how relevant my information was to the work of the Joint Committee.

A prohibition or a process ?

To maintain, as the Authority members involved have sought to maintain in evidence before the Joint Committee (this is apparent from what is said at Section 2.8 of the Qualifying Statement accompanying the Report of the Joint Committee on Operation Ark) that there was in fact no prohibition placed upon me but merely a process whereby my appearance before the Joint Committee would be authorised by the Authority is, in my respectful submission, a patent nonsense.

Mr. Faris' direction of 6 December, 1989 is referable (by his own introductory comments) to paragraph 24 of my minute to him of 1 December, 1989. Paragraph 24 refers to my intention to use the 1 December, 1989 response if the matter was raised "before the Parliamentary Joint Committee" etc. The direction itself prohibits me from making any documents available to or having any discussions with "any Committee" or person outside the Authority without first consulting the Authority. The expression "any Committee" in the context of my comments in paragraph 24 must mean either the Parliamentary Joint Committee or the Inter-Governmental Committee both of whom are referred to in paragraph 24. The Committee should be aware that the direction still subsists and has not been amended or withdrawn.

On 12 December, 1989 the Authority met and resolved as follows:

> "The Authority directs that Mr. Le Grand is not to divulge or communicate to any person outside the Authority any information acquired by him by reason of, or in the course of, the performance of his duties under the NCA Act unless specifically authorised to do so by the Authority and that the Chairman forthwith seeks from Mr. Le Grand an undertaking to abide by this resolution".

As indicated above, on 12 December, 1989 the above resolution was communicated by telephone to me by Mr. Faris Q.C. I immediately questioned whether the Authority was empowered to prevent me from furnishing information to the Parliamentary Joint Committee, the Inter-Governmental Committee and the Attorney-General for the State of South Australia, the Minister charged with the administration of the National Crime Authority (State Provisions) Act 1984. In passing this resolution the Authority noted in particular paragraph 8 of the Chairman's minute of 6 December, 1989. It is pertinent to observe that the direction is couched in much the same terms as the secrecy provisions in Section 51 of the Act, except that the exemption allowing disclosures provided for in the legislation is not referred to. This exemption is in the following terms:

> "Except for the purposes of this Act or otherwise in connection with the performance of his duties under this Act".

In my submission this exemption relates, inter alia, to the duties of the Joint Committee as set forth in Section 55 of the Act, in particular the duties of the Joint Committee to monitor and review the performance by the Authority of its functions. By specifically deleting this statutory exemption from the Authority's resolution the Authority has acted contrary to the legislation and sought to deny to the Joint Committee information I might have on the performance by the Authority of its functions unless I was granted specific authority to divulge or communicate that information.

This resolution of the Authority remains on foot, and to my knowledge has neither been withdrawn nor modified. If there has been a withdrawal or modification of it, then it has never been communicated to me. I regard myself as still subject to that resolution and indeed, I so advised the Joint Committee by letter dated 13 August, 1990 (see Annexure "A") in response to the Joint Committee's invitation to me of 11 July, 1990 to make a submission. I advised the Joint Committee that, if it desired to hear from me, it should approach the Authority with a view to obtaining its sanction to my appearance before, and the provision of evidence to, the Joint Committee.

The Joint Committee in response to my letter of 13 August, 1990 served a summons upon me to attend a hearing in Melbourne on 6 September, 1990 and to produce all documents in my possession, custody or control relevant to the matters raised in my letter. I expressed great concern about my position vis-à-vis the Authority's prohibitions and sought the Joint Committee's intervention to obtain my indemnification by the Federal Director of Public Prosecutions and the South Australian Attorney-General. The Joint Committee acknowledged the validity of my concerns and obtained my indemnification at both the State and Federal levels to facilitate my testimony. Further, due to the prohibitions, I considered it necessary to engage Queen's Counsel at a cost of $3,300 to safeguard my interests when summoned to appear before the Joint Committee.

The Authority meeting of 16 December, 1989 did not vary or withdraw either the former Chairman's direction of 6 December, 1989 nor the Authority resolution of 12 December, 1989. I would submit that this is clear from the wording of the draft minutes of that meeting which were produced to the Joint Committee on 6 September, 1990 and incorporated into the transcript of my evidence. [34]

The minutes of the 16 December, 1989 meeting record in paragraph 4.1 that I tabled an opinion by Mr. David Smith that the direction "so far as it concerned the Parliamentary Joint Committee and the Inter-Governmental Committee was ultra vires and invalid". It

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[34] See footnote 34 above.

was against this background that discussion ensued. As I have indicated above, I was determined when entering that meeting that I would not give the undertaking sought to abide by the direction/resolution. It was only in the light of the threat of immediate Federal Court proceedings that I gave the undertaking. The "process" set forth in paragraph 4.2 was in addition to, rather than in substitution for, the resolution of 12 December, 1989. The basic situation remained unchanged, namely "it was agreed that if either Committee sought to have Mr. Le Grand appear before it, the Authority would decide if the request was appropriate". (My emphasis).

I would submit that even a conditional refusal to disclose information would amount to an "interference with the free exercise" by the Joint Committee of its authority and its statutory function of reviewing and monitoring the performance by the Authority of its functions. Mr. Smith of Counsel has made the following observations in this regard:

> "It is no answer for the Authority to assert that it can release Mr. Le Grand from his undertaking. The direction embodied in the resolution is either within power or not. The fact that the prohibition against disclosure is conditional, in the sense that disclosure can be made if authorised, does not alter the character of the directive. Implicit in the directive is a discretion to permit or not permit disclosure. Such a power or unfettered discretion would, when linked to the directive, leave it with the character of a prohibition in the sense asserted in the now outmoded 'freedom of interstate trade cases'. (See Hughes and Vale Pty. Ltd. v. N.S.W. (No. 2) (1955) 93 CLR 127 at pp. 160, 161.
>
> In any event the spectre of Mr. Le Grand declining to answer without authorisation or even seeking broad consent to freely discuss the performance of his duties at the Adelaide Office, would be an affront to the National Crime Authority legislation and offensive to the PJC's brief to ensure that the Authority is fully accountable."

Question (b): **Whether false or misleading evidence was given to that Committee in respect of directions given by the National Crime Authority or its officers to a person affecting evidence to be given before the Committee ?**

I note that the Qualifying Statement to the Operation Ark Report of the Joint Committee makes relevant disclosures in this regard at Section 2.8:

> "Mr. Le Grand has told the Committee that he agreed to abide by the process outlined in the minutes referred to above under the threat of the NCA seeking an immediate injunction in the High Court preventing him from passing on any information. Mr. Le Grand believes that such an injunction regardless of the outcome would have done irretrievable damage to his professional reputation. He believes Mr. Snopek (former Legal Adviser in Adelaide) can corroborate this claim. He further believes that the Executive Officer, Mr. Lenihan, should also be able to do so. Mr. Cusack and Mr. Dempsey deny such a threat was made. The allegation has not been put to Mr. Faris, Mr. Leckie, Mr. Tobin, Mr. Snopek or Mr. Lenihan".

I gave evidence on oath about this matter before the Joint Committee in Melbourne on 6 September, 1990. I have reiterated my recollection above. It is my belief that my evidence can be corroborated by Mr. Peter Snopek, former Legal Adviser in Adelaide, and Mr. Denis Lenihan, the Chief Executive Officer of the Authority. Further, Mr. David Smith, former Counsel assisting the Authority in Adelaide, would most probably recall conversations indicating my state of mind before leaving for the meeting of 16 December, 1989 in Sydney, and my comments and those of Mr. Snopek upon our return to Adelaide. Although not direct evidence of the matters of which I speak, it is testimony which would, in my submission, aid in the search for the truth.

The second matter which is relevant to this question is also referred to in the Qualifying Statement to the Operation Ark Report at paragraph 2.8. The following comment there appears:

> "Presumably out of concern to satisfy himself that no attempts had been made to silence Mr. Le Grand (which, given the public knowledge of Mr. Le Grand's dissent from the Faris report, is in our view an understandable concern) Senator Hill asked a number of questions at the February meeting of the Committee with the NCA.

The relevant questions and answers were as follows:

'SENATOR HILL: Has Mr. Le Grand ever been directed not to give evidence to this Committee or in any way been restricted on the evidence that he should give to this Committee?

MR. DEMPSEY: No.

SENATOR HILL: That is the view of the Authority as a whole, I take it?

MR. CUSACK: Yes

SENATOR HILL: Because that goes beyond South Australia.

MR. CUSACK: Yes.'

(16 February, 1990, Melbourne, in-camera pp.1110-11).

The undersigned are aware of an interpretation or explanation of the matters outlined within parts 2.7 and 2.8 which, in effect, says that the Authority was simply concerned to see that Mr. Le Grand did not breach S. 51 inadvertently or otherwise; and moreover, the Authority was not putting a restriction on Mr. Le Grand in any way, but rather was setting up a process whereby should Mr. Le Grand be called or wish to give evidence the Authority and Mr. Le Grand could

together agree on what information could be passed on, and in the event of a failure to agree seek a resolution of the matter through the Courts."

In my submission these responses simply do not accord with the factual situation set forth above. To my knowledge both Mr. Dempsey and Mr. Cusack attended the Authority meeting in Melbourne of 12 December, 1989 at which the prohibiting resolution was passed. Further, they both attended the Authority meeting held in Sydney on 16 December, 1989 at which there was extensive discussion and debate about the validity and appropriateness of Mr. Faris' direction, the Authority's resolution and the requirement placed upon me by the Authority to give an undertaking to abide by the resolution.

The explanation apparently proffered that "the Authority was simply concerned to see that Mr. Le Grand did not breach Section 51 inadvertently or otherwise" does not, in my submission, hold water. If that was the concern, then a resolution in the terms of Section 51 would be called for. Obviously something further was being sought.

Both Mr. Faris' direction and the Authority's resolution did not refer to the exemption contained in Section 51 which provides, inter alia, for the monitoring and review role of the Joint Committee pursuant to Section 55 of the Act. The spur to the direction of 6 December and the resolution of 12 December was, in terms, my indication in paragraph 24 of my minute to the Chairman of 1 December to use that response if the matter was raised before, inter alia, the Joint Committee and the Inter-Governmental Committee. The implication is clear that the Authority was concerned to prevent the placing of material before the Joint Committee, in particular in respect of the Operation Ark Report which might embarrass it. This view is corroborated by the great pressure which was brought to bear upon me to give an undertaking to abide by the resolution. If it was merely a case of restating Section 51 then such an undertaking was totally unnecessary. If it was a case of preventing any communication by me with the Joint Committee, then the desperate attempts to extract such an undertaking are more explicable. I note that the pursuit of the undertaking commenced with the passing of the resolution on 12 December, 1989 and the

Chairman's telephone call to me shortly thereafter requiring the undertaking to be given. My refusal to do so pending legal advice led to pressure to give an interim undertaking, and the further draconian attempts to extract an undertaking from me during the course of the meeting on 16 December, 1989.

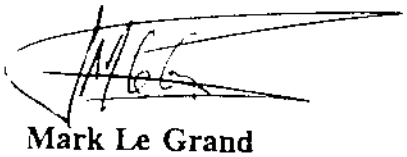
The further Authority explanation referred to in Section 2.8 of the Qualifying Statement to the Operation Ark Report of the Joint Committee is that the "Authority was not putting a restriction on Mr. Le Grand in any way, but rather was setting up a process whereby should Mr. Le Grand be called or wish to give evidence the Authority and Mr. Le Grand could together agree on what information could be passed on, and in the event of a failure to agree seek a resolution of the matter through the Courts". This argument has been dealt with above. Further, when closely considered against the terms of Senator Hill's question it exhibits a fatal flaw. Senator Hill's question has two limbs. Whatever efficacy the "process" argument may exhibit in respect of the first limb, namely "Has Mr. Le Grand ever been directed not to give evidence to this Committee", it cannot explain the answers given to the second limb, namely "or in any way restricted on the evidence that he should give to this Committee?". The fact remains that I was barred from giving evidence to the Joint Committee without the Authority's authorisation. In my submission, it defies logic, commonsense and plain English to maintain that the prohibitions placed no restriction on my access to the Joint Committee.

Question (c): Whether contempts were committed in relation to those matters ?

In my submission, this is a matter for the Committee. The only observation I would make is to refer to and repeat the matters which the Senate has declared may be treated by the Senate as contempts, in particular the following prohibition:

Interference with Witnesses

(10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a Committee, or induce another person to refrain from giving such evidence.



Mark Le Grand

Brisbane, 11 February, 1991

ANNEXURES

A — Letter dated 13 August, 1990 to the Joint Committee on the National Crime Authority.

B — Schedule of the documents produced to the Joint Committee in Melbourne on 6 September, 1990.

C — Response to the advice rendered by Mr. Dempsey on 27 October, 1989 – paragraph 24.

D — Minute from Mr. Faris Q.C. on 6 December, 1989 concerning Operation NOAH in response to my minute of 1 December, 1989.

E — Filenotes of telephone conversation on 12 December, 1989 with Mr. Faris Q.C. advising me of Authority resolution.

F — Filenote of telephone conversation with the Chairman held on Tuesday, 12 December: OPERATION ARK.

G — Written advice of Mr. David Smith, Counsel, dated 15 December, 1989 on the validity of the direction from the Authority to me of 12 December, 1989.

Annexure "A"

P. O. Box 157
NORTH QUAY QLD 4002

13 August 1990

Mr E. L. Lindsay RFD M.P.
Chairman
Joint Committee on the National
Crime Authority
Parliament House
CANBERRA ACT 2600

Dear Mr Lindsay

Thank you for your letter of the 11th July, 1990.

I regret the lateness of this reply, however I have only recently returned from 7 weeks overseas and have not had previous notice of your invitation to make a submission to the Committee.

I am most anxious to assist the Committee in its deliberations, although the matters that I would wish to canvass with you are sensitive and should be dealt with in confidential session. They should not be dealt with by way of written submission because of the security risks involved.

I find myself in a difficult position. By minute dated the 6th December, 1989 the former Chairman of the Authority prohibited any communication by me with the Committee without express Authority approval. The terms of that prohibition are as follows:-

> "I direct you that, in relation to Operation Noah, you are not to make any documents available to or have any discussions with any committee or person outside the Authority without first consulting the Authority. If you consider that I do not have the power to bind you with this direction or if you, for any reason, to not intend to obey it please advise me forthwith and I will call an Authority meeting". (My emphasis).

Upon receiving this communication I expressed concerns to the former Chairman about my position in relation to the Parliamentary Joint Committee, the Inter-Governmental Committee and the Attorney-General for the State of South Australia who is the Minister charged with the administration of the National Crime Authority (State Provisions) Act 1984. On 12th December, 1989 the Authority met and resolved as follows:

> "The Authority directs that Mr Le Grand is not to divulge or communicate to any person outside the Authority any information acquired by him by reason of or in the course of the performance of his duties under the NCA Act unless specifically authorised to do so by the Authority and that the Chairman forthwith seeks from Mr Le Grand an undertaking to abide by this resolution".

With the former Chairman's acquiescence, I requested advice on the validity of the resolution from General Counsel Mr. David W. Smith who, at the time, was holding an appointment under Section 50 of the National Crime Authority Act 1984 to assist the Authority on South Australian Reference No. 2. Mr. Smith concluded:-

> "The resolution and directive of the 12th December, 1989 is, in so far as it applies to communications between Mr. Le Grand and the P.J.C. or the I.G.C., ultra vires the Commonwealth Act and so is invalid.
>
> In so far as the Attorney General and indeed the 'World at large' are concerned the directive is unnecessary".

A copy of Mr. Smith's full opinion is enclosed for your information.

Mr. Smith's opinion was made available to the Authority at an extra-ordinary meeting held in Sydney on 16th December, 1989, at which meeting the Authority confirmed its resolution of 12th December, 1989.

I have received advice consistent with that rendered by Mr. Smith from two eminent Queen's Counsel who are members of the Victorian and Queensland Bars respectively. However, I remain apprehensive that any unilateral action by me contrary to the written direction and the resolution may lead to action by the Authority against me.

In this situation, if you desire to hear from me, I suggest that the Committee approach the Authority as presently constituted with a view to obtaining its sanction to my appearance before, and the provision of evidence to, the Committee.

Yours sincerely

P. M. LE GRAND

PARLIAMENTARY JOINT COMMITTEE

THURSDAY 6TH SEPTEMBER, 1990 AT MELBOURNE

CONFIDENTIAL SESSION

Introductory Comments

The summons served upon me by the Parliamentary Joint Committee (the Committee) calls upon me to produce all documents in my possession, custody or control relevant to the matters raised in my letter to the Committee Chairman dated the 13th August, 1990. I desire to take the opportunity to produce not only documents relating to the specific prohibitions against communicating, inter alia, with the Committee, but also those documents which relate to the matters alluded to in the second paragraph of my letter, namely matters that I would wish to canvass with the Committee in confidential session.

In preparing my response to the summons I have proceeded upon this basis.

As the Committee will see, I have retained possession of a substantial amount of material, the whole of which I now produce. I have done so in the face of a direction to me by the former Chairman of the Authority, Mr. Peter Faris Q.C., which was subsequently confirmed by a resolution of the Authority. The details of the direction and of the resolution are set forth in my letter to the Committee of the 13th August, and are contained within the folders of documentation which are produced.

Further, I was required to give, and eventually gave an undertaking to abide by the resolution of the Authority of the 12th December, 1989 at the Extraordinary Meeting of the Authority held in Sydney on the 16th December, 1989. I did so in order to avoid the threat made by the Chairman at that meeting to immediately commence proceedings in the Federal Court of Australia to obtain an injunction against me if I did not give the undertaking sought. My evidence in this regard can be corroborated by the former Legal

Advisor to the Adelaide Office, Mr. Peter Snopek, and hopefully by the current Chief Executive Officer, Mr. Denis Lenihan, who should be in a position to do so.

I was acutely aware that the mere fact that the threatened proceedings were issued would effectively destroy my reputation and professional standing, in particular against the background of the media reporting of the allegedly "suppressed" Operation Ark Report.

I do not consider myself bound by the direction, resolution nor undertaking for the following reasons:-

- The direction and resolution are invalid. The advice of the former General Counsel, Mr. David Smith, has since been confirmed by the opinions of two eminent Queen's Counsel as referred to in my letter of the 13th August, 1990.

- The undertaking was extorted by threats of legal action which legal action had the capacity to destroy my reputation and professional standing regardless of its outcome.

- I have been served with a summons by the Committee, and my undertaking, even if it were validly given, must give way to the higher duty to the Committee and to Parliament.

Retention of N.C.A. Documentation

I have been confident that eventually I would be called before the Committee to give an account of my stewardship of the Adelaide Office. This confidence has grown as the controversy surrounding the N.C.A. in general, and the Adelaide Office in particular, has grown. I knew that when that time came I would need access to Authority papers to provide an accurate and detailed account to the Committee. In view of the matters, inter alia, canvassed in the attached Schedule, I had no confidence that such access would be granted, or even that the papers produced would continue to exist unless I secured the

material before leaving the Authority. I made the decision to keep certain records in my possession, solely to discharge my responsibility to the Committee in undertaking its role "to monitor and review the performance of the Authority of its functions" (Section 55 National Crime Authority Act 1984). The documents have been kept in the safe deposit at the Commonwealth Bank, King George Square Branch, Brisbane.

I note that I have requested the Committee to obtain my indemnification by both the Federal Director of Public Prosecutions and the South Australian Attorney-General. I was telephoned by the Clerk of the Senate and advised that he was strongly of the view that Section 16 of the Parliamentary Privileges Act clothed me with complete immunity and that no application would be made lest it creat a precedent. I note, however, that the Committee has graciously decided to seek my indemnification regardless. Further, my solicitors have also made application to:

1. The Federal Director of Public Prosecutions for an indemnity against possible prosecution under Section 51 of the National Crime Authority Act 1984; and

2. The Acting South Australia Attorney-General for an indemnity against possible prosecution under Section 31 of the National Crime Authority (State Provisions) Act 1984 of the State of South Australia.

Both applications have met with positive responses.

Document Descriptions

To assist the Committee in its consideration of the tendered documentation, I have attempted to succinctly describe each document in chronological order and to summarise its relevant contents as objectively as I can. To further aid the Committee I have grouped the documents into areas of interest, for example Operation Ark, the prioritisation of South Australian Reference No. 2, or the validity of my appointment.

SCHEDULE OF DOCUMENTS PRODUCED

OPERATION ARK [also referred to as Operation Noah and the First Interim Report]

Annexure	Description	Date
A	Filenote dated 5 June, 1989 recording a conversation with the Chairman Designate Mr. Peter Faris Q.C. about the compilation of the Operation Ark Report	5 June 1989
B	Letter of Transmission from the former Chairman of the N.C.A., Mr. Justice Stewart to the South Australian Attorney-General providing the First Interim Report [the Operation Ark Report] to the South Australian Government pursuant to Section 59(5) of the National Crime Authority Act 1984	30 June 1989
C	Part I of the First Interim Report in respect of South Australian Reference No. 2 to the Government of South Australia [the original Operation Ark Report]	30 June 1989
D	Filenote dated 4 July, 1989 concerning a telephone conversation with the former Chairman Mr. Peter Faris Q.C. in which I was instructed not to deliver the First Interim Report to the Government of South Australia	4 July 1989
E	Minutes of a National Crime Authority Meeting held by telephone on 4 July, 1989 recording that the Authority resolved to "defer" the delivery of the Report on the "Operation Noah" hearings	4 July, 1989
F	A memorandum to the former Chairman Mr. Peter Faris Q.C. from myself requesting the immediate delivery of the First Interim Report [the Operation Ark Report] for the reasons set forth therein	6 July 1989

Annexure	Description	Date
S	Extract from the Minutes of the Authority Meeting held in July 1989 dealing with Adelaide matters. Reference is made to paragraph 5.13 on page 8 which deals with "the First Interim Report on South Australian Reference No. 2". Please note that at the date of this meeting the assertion that the report was "a draft report" or "internal working papers" had not been made. It is also interesting to note that the agreement of the full Authority is recorded as follows: "It was agreed that as it represented the concluded judgment of the previous Authority it should be forwarded to the South Australian Government, but not as a report from the new Authority."	July 1989
W	Notes of a meeting held on 4 August 1989 attended by the Commissioner of the South Australian Police, Mr. D. Hunt, the Chairman of the Authority, Mr. Peter Faris Q.C., his personal advisor Mr. Paul Tobin and myself. Paragraphs 6 and 7 of the filenote record discussion about the fate of the Operation Ark Report. Reference is made to the comments of the former Chairman recorded in paragraph 6 as to the status of the Operation Ark Report namely: "He said that the status of the Operation Ark Report was a Report to Government pursuant to Section 59(5) of the N.C.A. Act . . . he would expect the report would go forward with the supplementary report of the new Authority within the next few weeks or as soon as it could be addressed".	4 August 1989
AA	Extract from the Minutes of the Authority Meeting held in August 1989. Reference is made to paragraph 3.10 headed "First Interim Report on South Australian Reference No. 2", recording discussions had between Mr. Faris Q.C. and the South Australian Attorney-General on the forwarding of the First Interim Report.	August 1989

Annexure	Description	Date
AL	Extract from the Minutes of the Authority Meeting held in Melbourne on the 18/19 September, 1989 – reference is made in paragraph 2.4 to discussion on the First Interim Report on the South Australian Reference.	18/19 September 1989
AU	Filenote of telephone conversation with Mr. Faris, Q.C. on Wednesday 25 October, 1989 wherein the Operation Ark Report was discussed. He referred to the opinion of Mr. Gerald Dempsey [then General Counsel to the Authority] that the whole of the Operation Ark investigation was not within the reference and therefore illegal and further that the Report's conclusions were not supported by the material nor were its recommendations appropriate. For the first time reference is made to the Report not being presented.	25 October 1989
AV	An opinion by Mr. David Smith, General Counsel to the N.C.A. in South Australia that the investigation entitled Operation Ark is valid and within the terms of South Australian Reference No. 2.	22 October 1989
AX	The first of two advisings rendered by Mr. Gerald Dempsey, then Counsel Assisting the National Crime Authority in Sydney, on the First Interim Report to the Government of South Australia. Mr. Dempsey opines, inter alia, that the hearings were ultra vires and recommended that the First Interim Report should be abandoned and a totally new report under Section 59(9) of the N.C.A. Act going solely to recommendations for administrative change in the South Australia Police Department should be prepared and delivered.	27 October 1989

Annexure	Description	Date
AZ	A review by the Chief Executive Officer [Mr. Dennis Lenihan] of the N.C.A. of Mr. Dempsey's advice of the 27th October, 1989. Mr. Lenihan concludes (at paragraph 16): "My conclusion is that, legal aspects of the matter apart, it is not the Report which needs justifying and explaining: it is the advice".	6 November 1989
BA	The second or supplementary advice on the First Interim Report by Mr. Gerald Dempsey.	26 November 1989
BE	Memorandum to Mr. Faris, Q.C. from myself dated 1 December, 1989 being a response to the advice rendered by Mr. Dempsey on the 27 October, 1989. This response deals with Mr. Dempsey's advice paragraph by paragraph. Please note that as a result of the Authority meeting held in Sydney on the 16th December, 1989 I agreed to delete certain paragraphs from this response. The matters deleted are referred to in Annexure BW. The full response is provided here as some of the subsequent documentation can only be understood in the context of the original contents of this memorandum.	1 December 1989
BF	A draft letter from Mr. Faris, Q.C. to the Secretary of the Department of Premier and Cabinet referring, inter alia, to the "Operation Noah" investigation on page 2.	5 December 1989
BG	A filenote of a telephone conversation with Mr. Faris, Q.C. held on Wednesday 6 December, 1989. The filenote deals with two matters namely my draft letter to the Secretary of the Department of Premier and Cabinet with which he indicated he was in substantial agreement apart from some "cosmetic" alterations. In respect of the Operation Ark Report he indicated that his personal position was that the Report should not be delivered.	6 December 1989

Annexure	Description	Date
BH	Minute to Mr. Faris, Q.C. from myself forwarding a copy of an Opinion from Counsel Assisting the Authority in Adelaide, Mr. David Smith, on the powers and functions of the additional Member appointed pursuant to Section 7(8AA) of the National Crime Authority Act 1984. Mr. Smith concludes that the Commonwealth and State legislative scheme envisages that the additional member will for all intents and purposes be a fully fledged member of the Authority save only that his powers and functions but not his status are confined to his brief which is specifically to investigate the matters referred to in South Australian Reference No. 2.	6 December 1989
BI	Minute from Mr. Faris, Q.C. to myself concerning Operation Noah in response to my minute of 1 December which canvassed the first advice of Mr. Dempsey of 27 October, 1989. I ask that paragraph 2 be read in conjunction with Annexure BG (paragraph 8), Mr. Faris, Q.C. refers to my comments contained in paragraph 24 of my minute to him of 1 December 1989. I there said in full: "I reserve the right to use this response if the matter of the First Interim Report is raised before the Parliamentary Joint Committee, the Intergovernmental Committee or by the South Australian Attorney-General".	6 December 1989
BJ/BK	Memorandum from Mr. Faris, Q.C. to the other Members of the Authority, the Chief Executive Officer and Mr. Dempsey. The memorandum provides notice of the "final resolution" of the Operation Noah matter at the Authority meeting to be held "next week". The threat allegedly made by me to sue the Authority referred to in paragraph 5 relates to my statement of 1 December [see paragraph 20.28] to "consider my position". Despite Mr. Faris, Q.C.'s strictures, verbal discussion was not inhibited as can be seen from the Minutes of the Authority Meeting held on 16 December, 1989.	7 December 1989

Annexure	Description	Date
BL	Minute from Mr. Faris, Q.C. to myself dated 7 December 1989 in response to my minute to him of 6 December enclosing the Opinion of Mr. David Smith of Counsel in respect of the powers and functions of the additional member. I would refer to paragraph 6 where Mr. Faris, Q.C. directed me pursuant to Section 46A of the National Crime Authority Act: "not to exercise any of those powers without consulting either the Authority or myself as Chairman".	7 December 1989
BM	Minute to Mr. Faris, Q.C. from myself dated 7 December 1989 dealing with his response of 7 December, 1989 concerning Mr. David Smith's opinion on the powers and duties of the additional member. Paragraph 2 of that Minute points out that the Minutes of the Authority Meeting held in Sydney on the 30/31 October 1989 record the Authority's agreement to Mr. David Smith examining Mr. Dempsey's opinion on the matter for consideration at the next Authority meeting. Further, paragraph 4 contains my comments in response to paragraph 9 of Mr. Faris, Q.C.'s Minute: "You will appreciate that in my position as a statutory office holder, I cannot be deflected from the proper exercise of the powers, functions and duties conferred upon me by the statute, at least to the extent that there is consistency between the opinions of Messrs. Dempsey and Smith".	7 December 1989
BN	Minute to Mr. Faris, Q.C. from myself dated 7 December 1989 concerning Operation Noah rejecting Mr. Faris, Q.C.'s assertion that paragraph 2.28 of my Minute of 1 December, 1989 in response to Mr. Dempsey's advice of 27 October, 1989 was a threat to sue the Authority and its members for defamation.	7 December 1989

Annexure	Description	Date
BO	Filenote of a telephone conversation with Mr. Faris, Q.C. held on Friday 8 December, 1989 arranging a restricted Authority meeting on 12 December, 1989 to consider the Operation Ark Report.	8 December 1989
BQ	Minute to Mr. Faris, Q.C. from the Legal Advisor in the Adelaide Office of the Authority, Mr. Peter Snopek, advising him of a telephone call received by the Commissioner of the South Australia Police from television journalist Chris Masters in respect of Operation Ark.	11 December 1989
BR	Filenotes of telephone calls received by me during the course of Monday 11 and Tuesday 12 December 1989. In particular, I refer to a telephone call at 3.16 p.m. on Monday 11 December, 1989 from Mr. Faris, Q.C. where he suggested that the interest in Operation Ark shown by Chris Masters suggested a leak from the Adelaide Office to bring pressure on the Authority to present the Report. I also refer to the entry for 11.30 a.m. on Tuesday 12 December, 1989 where Mr. Faris, Q.C. rang on a conference phone in the presence of Mr. Greg Cusack Q.C. and the other members to advise me of an Authority resolution directing me not to divulge or communicate to any person outside the Authority any N.C.A. information unless specifically authorised to do so by the Authority, and seeking an undertaking from me to abide by the resolution.	11/12 December 1989
BS	Letter from Mr. Faris, Q.C. to the Commissioner of the South Australia Police advising that the Authority's Operation Noah investigation disclosed "no dishonesty or corruption by any member of SAPOL with regard to the reporting of the allegations".	12 December 1989

Annexure	Description	Date
BT	Letter from Mr. Faris, Q.C. to the Director of the Department of the Premier and Cabinet which is couched in similar terms to the letter to the Commissioner of Police of the same date, namely 12 December, 1989.	12 December 1989
BU	Note for file in respect of a telephone conversation with the former Chairman held on 12 December, 1989 re Operation Ark. This is an expanded version of the omnibus filenotes contained in Annexure BR referred to above. It was created on the following day Wednesday 13 December when I returned to the office.	12 December 1989
BV	Filenote of a telephone conversation with Mr. Faris, Q.C. held on Wednesday 13 December 1989 in which he referred to a segment presented by television journalist Chris Masters on the "7.30 Report" dealing with Operation Ark. He proposed instituting "a more independent investigation" into the possibility of a leak of information from the Adelaide Office.	13 December 1989

Annexure	Description	Date
BW	Draft Minutes of the Authority Meeting held in Sydney on 16 December 1989. Reference is made in particular to paragraph 3.9 where Mr. Faris, Q.C. suggested that I should send him a Minute pointing out the possible consequences to my reputation and professional standing should Mr. Dempsey's opinion be published. As therein recorded Mr. Faris, Q.C. indicated that he would send a Minute to me undertaking to consult and advise me before Mr. Dempsey's opinion was published to protect my position. Please note that the gist of Mr. Dempsey's opinion was published without reference or even notice being given to me. I would also refer to paragraph 4.1 relating to the tabling of the opinion of Mr. David Smith of Counsel dated 15 December on the question of the validity of the Authority's direction to me, and paragraph 4.2 relating to the giving by me of an undertaking to abide by the direction. The Minutes [perhaps not surprisingly] do not record the threat made against me to immediately seek an injunction in the Federal Court should I refuse to give such an undertaking. Paragraph 2.1 records Mr. Faris, Q.C. informing the meeting that Mr. Finkelstein Q.C. had advised that Operation Ark and the relevant hearings conducted by the Authority were within the scope of South Australian Reference No. 2.	16 December 1989
BZ	Minute to Mr. Faris, Q.C. from myself dated 15 December, 1989 enclosing my response to Mr. Dempsey's supplementary advice of the 16 November 1989 concerning the Operation Ark Report.	15 December 1989

Annexure	Description	Date
CB	Minute to Mr. Faris, Q.C. from myself dated 19 December, 1989 wherein I formally requested (as suggested by Mr. Faris, Q.C. at the restricted meeting of the Authority held on 16 December,) that the advices rendered by Mr. Dempsey dated 27 October and 16 November 1989 respectively not be disseminated by the Authority. In particular, I refer to paragraph 2 of that Minute which encapsulates the reasons for my concerns about the publication of Mr. Dempsey's advices. Mr. Faris, Q.C. did not acknowledge my Minute as he had undertaken to do at the meeting nor was any reference made or notice given to me prior to the publication of the gist of those advices by the Authority, in particular, at a public sitting held in Adelaide on 22 March, 1990. This of itself was a breach of Section 60(5) of the National Crime Authority Act 1984 in that the Authority divulged in the course of that public sitting "matter the disclosure of which to members the public could prejudice the safety or reputation of a person".	19 December 1989
CE	Letter from Mr. Faris, Q.C. to the South Australian Attorney-General dated 30 January, 1990 in which he encloses the original Operation Ark Report. Please note that in this letter the original Operation Ark Report is variously described as "certain internal documents" and "a proposed report".	30 January, 1990
CF	Letter from the former Chairman Mr. Justice Stewart to the South Australian Attorney-General dated 8 February, 1990 responding to the letter of Mr. Faris Q.C. of 30 January, 1990. I refer in particular to the responses to Mr. Faris' criticisms of the original Operation Ark Report contained at page 2 of that letter. Both Mr. Faris' letter and Mr. Justice Stewart's letter were tabled in the South Australian Parliament on 8 February, 1990.	8 February, 1990

Annexure	Description	Date
CG	The statement of Mr. Gerald Dempsey at a Public Sitting of the Authority in Adelaide on 22 March, 1990. Reference is made to the section on page 7 and following entitled "The Ark Report", in particular to this comment on page 8: "Prior to the 30th of June 1989, a document was commenced as a draft report of the Authority. On the 30th of June 1989, three of the four Members of the National Crime Authority came to the end of their term as Members; these were the then Chairman, Mr. Justice Stewart, Mr. Robberds Q.C., and Mr. Clarke. The draft report, at that stage, had not been completed. It was completed in July".	22 March, 1990
CC	Minute from Mr. Faris, Q.C. to the Authority members, the Chief Executive Officer and Mr. Dempsey concerning "the draft Noah Report" and a letter to the Director of the Department of Premier and Cabinet. It is interesting to note that the words "and never became a report of the Authority" in the draft letter to the Director of the Department of Premier and Cabinet enclosing the recast Operation Noah Report were deleted by the Authority at the suggestion of the Chief Executive Officer. It is my understanding that the draft Report attached to the Mr. Faris, Q.C.'s Minute is basically in the same form in which it went forward to the South Australian Government. It was compiled by Mr. Gerald Dempsey.	20 December 1989

NO CONTACT WITH OR BY ADELAIDE MEMBER

Annexure	Description	Date
H	Filenote of a conversation had with Mr. Kym Kelly, Chief Executive Officer of the Attorney-General's Department of South Australia wherein he was informed that all such further contact between the Attorney-General and his representatives and the Authority should in future be directed to the Chairman rather than the Adelaide Member.	19 July 1989
I	Minute from Mr. Faris, Q.C. to myself dated 19 July 1989 giving me a direction pursuant to Section 46A of the National Crime Authority Act that "all requests from the Attorney-General of South Australia or his officers are to be directed to the Chairman". Further that any similar requests arising in relation to any organ of the South Australian Government are to be similarly referred to the Chairman.	19 July 1989
J	Filenote recording a telephone conversation between Mr. Faris, Q.C. and myself in which Mr. Faris, Q.C. said that his direction "covered all and every communication with the Attorney-General and his officers and any other agency of the South Australian Government . . . no matter how trivial". He exempted communications with the Commissioner of Police.	19 July 1989

ACTING OUTSIDE THE REFERENCE

Annexure	Description	Date
K	Memorandum to Mr. Faris, Q.C. from myself following a late night telephone call after a dinner with the South Australian Attorney-General in Melbourne which I did not attend. In that telephone conversation I was accused of conducting a large number of unauthorised investigations.	20 July 1989
L	Minute from Mr. Faris, Q.C. to myself in the form of interrogatories requiring a "complete report" with relation to inquiries made outside S.A. Reference No. 2. The tone of the request is obvious.	20 July 1989
O	Minute to Mr. Faris, Q.C. from myself concerning N.C.A. inquiries in South Australia in response to his request of 20 July 1989. This response sets out the background to the establishment of an N.C.A. Office in South Australia, in particular at pages 3, 2, 9. Further, I would refer to the material contained at pages 9-11 on the question of what matters are encompassed within the terms of South Australian Reference No. 2 and the reference there to the decided cases. I refer to Annexure R which is an extract from my Report to the Authority Meeting held in Melbourne on the 17/18 July 1989 in particular to Section 1 dealing with the scope of the reference. In this regard it is interesting to note that when the advice of outside counsel was finally obtained almost 6 months later, Mr. Ray Finkelstein Q.C. supported the Adelaide Office's view of the scope of the reference and the reference power generally. The unnecessarily narrow approach in my view substantially hindered the work of the Authority.	24 July 1989

THE INVESTIGATION OF THE SOUTH AUSTRALIAN ATTORNEY-GENERAL

Annexure	Description	Date
M	Filenote of a telephone conversation between Mr. Faris, Q.C. and myself requesting my advice as to whether the Authority was engaged in the investigation of the South Australian Attorney-General himself.	20 July 1989
P	Minute from Mr. Faris, Q.C. to myself asking whether allegations that the Attorney-General was one of the senior public officers being blackmailed had been investigated, and if not, why not. Mr. Faris, Q.C. suggested that Mr. Mengler conduct the investigations and that he would sit at any hearings.	25 July 1989
Q	Minute to Mr. Faris, Q.C. from myself responding to his Minute of 25 July 1989 concerning the investigation of allegations against the South Australian Attorney-General. I refer in particular to page 2 and following where the reasons the matter had not been investigated to that time are canvassed, in particular the section on page 5 entitled "A Possible Morass" where the following observation is made "you may find it a morass into which you can ill afford to sink".	28 July 1990

Annexure	Description	Date
AF	Minute from Mr. Faris, Q.C. to myself dated 7 September, 1989 concerning Operation Hydra (the investigation, inter alia, of allegations against the South Australian Attorney-General). You will note that reference is made in Annexures V, Y, Z, AB, and AC to Mr. Faris, Q.C.'s request for a detailed proposal for the initial investigation of Operation Hydra for his review. In this regard a detailed proposal was submitted to him on 30 August, 1989. I refer to his response contained in paragraphs 2, 3 and 4 couched in terms of a perceived reluctance by me to make operational decisions.	7 September 1989

PRIORITISATION OF THE REFERENCE

Annexure	Description	Date
T	Filenote of a meeting held between the Authority and the Government of South Australia on 1 August, 1989 in Adelaide. Reference is made to paragraphs 12, 13, 17, 21 and 26 wherein the Authority undertook to prioritise all investigations for future attention.	1 August 1989
U	Minute to Mr. Faris, Q.C. from myself dated 4 August, 1989 confirming my understanding of what was expected of the Adelaide Office as a result of the meeting with the South Australian Premier and Attorney-General.	4 August 1989
V	Minute from Mr. Faris, Q.C. to myself responding to my Minute of 4 August, 1989. Reference is made to paragraph 2 subparagraph (ii) concerning "Analysing and prioritising the rest of the Reference".	4 August 1989
X	Minute to Mr. Paul Tobin (Adviser to the Chairman) dated 8 August, 1989 forwarding for Mr. Faris, Q.C.'s consideration filenotes in respect of:- (a) the meeting with the Premier and Attorney-General on 1 August; and (b) the meeting with the South Australia Commissioner of Police on 1 August 1989.	8 August 1989

Annexure	Description	Date
Y	Filenote of a telephone conversation with Mr. Faris, Q.C. on 8 August, 1989. Reference is made to paragraph 5 dealing with a submission in respect of the investigation of the allegations against the South Australian Attorney-General ("should be encapsulated in no more than 4 to 6 pages for the Authority's consideration"), and paragraph 6 dealing with the prioritisation of the Reference.	8 August 1989
AA	Extract from Minutes of the Authority Meeting held in August 1989. Reference is made to subparagraph 4.4(f) "All other matters under the Reference to be prioritised for investigation after the Malvaso investigation (the allegations against the Attorney-General) has been completed".	August 1989
AD	A facsimile transmission to Mr. Faris, Q.C. from myself attaching a draft Minute to Counsel Assisting Mr. David Smith tasking him to review the various allegations with a view to setting priorities.	1 September 1989
AG	Minute from Mr. Faris, Q.C. to myself dated 8 September 1989. Reference is made to paragraph 3 "the issue of analysing and prioritising the rest of the Reference can wait!".	8 September 1989
BD	Letter to Mr. Faris, Q.C. from the South Australian Attorney-General dated 30 November 1989. Reference is made to the final paragraph on page 2, in particular "You agreed that you would list these matters in priority which would be investigated by the Authority, and that (subject to the terms of the Reference and the definition of 'relevant criminal activities') you would refer such other allegations to the Anti Corruption Branch of the South Australian Police for investigation, but under the aegis of the Authority".	30 November 1989
BF	Draft letter from Mr. Faris, Q.C. to the Secretary of the Department of Premier and Cabinet dated 5 December, 1989. Reference is made to paragraphs 3 and 4 on pages 2 and 3.	5 December 1989

Annexure	Description	Date
BG	Filenote of a telephone conversation with Mr. Faris, Q.C. dated 6 December 1989. Reference is made to paragraph 1 where Mr. Faris, Q.C. is recorded as indicating that he was in substantial agreement with the draft letter (referred to in Annexure BF above) and proposed to send it with some "cosmetic" alterations. Please note: I am unaware whether the letter was in fact sent.	6 December 1989
CD	Minute to Mr. Gerald Dempsey from myself headed "Transition Brief". Reference is made to section 7 headed "Prioritisation".	28 December 1989

THE "SHUTTING DOWN" OF INVESTIGATIONS

Annexure	Description	Date
AA	Extract from the Minutes of the Authority Meeting held in August 1989. Reference is made to paragraph 4.4, in particular "The Chairman said that he considered that all of the six current matters being investigated by the Adelaide Office should be shut down and handed over to the South Australian Anti Corruption Bureau . . . He (Mr. Le Grand) said that he was concerned that some current matters, e.g. the Hound Investigation, were not amenable to being handed over to the South Australia Police for investigation". Please note that Mr. Faris, Q.C. and other Members caucused before the Authority meeting – the decision to "shut down" all current investigations was contained within a resolution drafted outside the Authority meeting and was served up as a fait accompli without any substantive consultation with me as the South Australian Member.	August 1989
AG	Minute from Mr. Faris, Q.C. to myself dated 8 September 1989. Reference is made to paragraph 2 subparagraph (iii).	8 September 1989

MY APPOINTMENT INVALID

Annexure	Description	Date
AJ	Filenote of a telephone conversation with Mr. G. Dempsey, Counsel Assisting the Authority in Sydney, on 14 September, 1989 in which he informed me that my appointment as the South Australian Member was invalid. Further, that all actions I had purported to take as the Adelaide Member were invalid.	14 September 1989
AM	An Opinion of Mr. David Smith, Counsel Assisting the Adelaide Office, concerning the validity of my appointment as a Member of the National Crime Authority. Mr. Smith concluded "Accordingly in my view the appointment of Mr. Le Grand is valid and effectual". Please note that on the basis of Mr. Dempsey's advice and in the face of the advice of Mr. David Smith, I was excluded from participation as a Member at the Authority Meeting held in September 1989. I was granted "observer" status.	18 September 1989
AN	Filenote of a conversation with Mr. Faris, Q.C. on 20 September, 1989 wherein I was advised that Mr. Ray Finkelstein Q.C. had given an opinion that he "had no doubts as to the validity of my appointment".	20 September 1989
AP	Filenote of a conversation with the Acting Chairman (Mr. Julian Leckie) dated 29 September, 1989 concerning a further advice by Mr. Dempsey to the same effect, namely again calling into question the validity of my appointment.	29 September 1989
AQ	An Advice rendered by Mr. Dempsey, General Counsel, on 27 September, 1989, inter alia, challenging the validity of my appointment as the South Australian Member.	27 September 1989

Annexure	Description	Date
AS	An Opinion of Mr. R. A. Finkelstein Q.C. dated 2 October, 1989 confirming his earlier oral advice that my appointment as a Member of the National Crime Authority was valid.	2 October 1989
AT	Filenote of a telephone conversation with the Acting Chairman of 3 October 1989 during which I was advised that the full Membership of the Authority were of the view that my appointment was valid and that I should perform the functions of Member.	3 October 1989

THE POWERS AND DUTIES OF THE ADELAIDE MEMBER

Annexure	Description	Date
AO	An Advice rendered by Mr. G. Dempsey dated 27 September, 1989 concerning the Powers and Duties of an Occasional Member the effect of which was to greatly restrict the powers and functions of the Adelaide Member.	27 September 1989
AY	Extract of the Minutes of the Authority Meeting held in October 1989. Reference is made to paragraph 3.1 where the Authority agreed to Mr. David Smith, Counsel Assisting the Adelaide office, examining Mr. Dempsey's opinion on this matter.	October 1989
BC	An Advice of Mr. David Smith, Counsel Assisting, dated 30 November, 1989 on the powers and functions of the Adelaide Member. Reference is made to page 16 of Mr. Smith's advice where he states "The Commonwealth and State legislative scheme plainly envisages that the additional Member will to all intents and purposes be a fully fledged Member of the Authority, save only that his powers and functions, not however his status, are confined to his brief which is specifically to investigate the matters referred to in S.A. Reference No. 2. The additional Member plainly has at his disposal all the powers of an ordinarily appointed Member". Kindly note the following expression of view by Counsel Assisting namely: "It seems to me with respect that the emphasis in opinions which have in recent times emanated from the east is unwarrantedly to confine the additional Member's powers and jurisdiction and that in that sense to treat him as an outsider. This attitude is contrary to the letter and spirit of the legislation".	30 November 1989

Annexure	Description	Date
BL	Minute from Mr. Faris, Q.C. to myself dated 7 December, 1989 in which he reacts to the opinion of Mr. David Smith dated 30 November, 1989. I refer in particular to paragraph 5: "I do not understand why you have obtained this opinion at this late stage of your membership of the Authority" and paragraph 6: "To avoid any misunderstanding I hereby direct you, under section 46A of the Act, not to exercise any of those powers without consulting with either the Authority or myself as Chairman".	7 December 1989
BM	Minute to Mr. Faris, Q.C. from myself dated 7 December, 1989 responding to his Minute of the same date. I refer in particular to paragraph 2 and paragraph 4, in particular my statement "you will appreciate that in my position as a statutory office holder, I cannot be deflected from the proper exercise of the powers, functions and duties conferred upon me by the statute, at least to the extent that there is consistency between the opinions of Messrs. Dempsey and Smith".	7 December 1989

OPERATION HOUND

Annexure	Description	Date
AW	An Advice by Mr. David Smith, Counsel Assisting the Adelaide Office, dated 27 October, 1989 reviewing a previous opinion by Mr. Dempsey, General Counsel in Sydney, of 13 September, 1989 in which he proffered the view that Operation Hound was not justified by the terms of the Reference and to that extent was invalid. Mr. Smith concludes: "The Authority is empowered to look at what it bona fide believes will assist in its inquiry into the matters referred to it by the appropriate State Minister. There is no material relating to the investigation entitled 'Operation Hound' or at all which compels the view that the Authority could not possibly hold such a 'bona fide' belief, and is embarked upon a 'frolic of its own'. Indeed, the material indicates the opposite. Accordingly, the challenge that the said investigation is outside the terms of the Reference is in error".	27 October 1989

CORRESPONDENCE WITH THE VICTORIAN DIRECTOR OF PUBLIC PROSECUTIONS

Annexure	Description	Date
AE	Letter from Mr. Faris, Q.C. to the Victorian Director of Public Prosecutions dated 5 September, 1989 concerning the servicing of N.C.A. Briefs of Evidence.	5 September 1989
AI	Letter from the former chairman to the Victorian Director of Public Prosecutions dated 12 September, 1989 concerning the servicing of the JETCORP trial brief. Please note that similar correspondence was forwarded to the Federal Director of Public Prosecutions.	12 September 1989

Page 24 - *"It is therefore my strong recommendation that the First Interim Report should be abandoned, and a totally new report, being a report under ss 59(9), going solely to recommendations for administrative change in the South Australia Police Department, should be prepared and delivered.*

I refer to the response set forth in section 20.13 above.

Concluding Comments

21. I calculate that this response to Mr Dempsey's advice of 27 October 1989 has cost me more than 150 working hours and Mr Snopek 40 hours. It is surely obvious to anybody reading the response that virtually the whole of the material contained therein is available in the Report. When the exercise is completed with a response to Mr Dempsey's advice of 16 November 1989, I would anticipate that the total response may be of greater length than the original report.

    Why?

22. The Dempsey document contains numerous unsupported 'throw away' lines which attempt to impeach the Report and which had to be analysed and the material gathered to compile a response. As has been commented upon on numerous occasions during the making of this response, the Dempsey document appears to have been highly selective in its consideration of the material contained within the Report - for example, I refer to the large amount of material relating to the ACB which seems to have escaped Mr Dempsey's attention.

23. At the conclusion of this exercise, I am concerned that what may well approximate 250 hours of unproductive endeavour would have been better applied to finalising a report on Operation HOUND, advancing Operation HYDRA, or compiling a Transition Brief.

24. I reserve the right to use this response if the matter of the First Interim Report is raised before the Parliamentary Joint Committee, the Inter Governmental Committee, or by the South Australian Attorney-General.

Mark Le Grand

Annexure "D"

MINUTE

Date:

6 December 1989

To: Mr Le Grand

From: Chairman

cc: Mr Cusack QC
Mr Leckie
Mr Lenihan
Mr Dempsey
Mr Tobin

OPERATION NOAH

I have your minute of 1 December.

There are a number of matters, raised by you, which I wish to deal with that do not relate to the central issue, that is, the issue of the disposition of the June Report.

1. I reject your allegations of "pressure has been exerted on (you)" in paragraphs 8 and 9. The Authority is anxious for you to explain to it, in whatever terms you choose, the way in which the Report should be disposed. This has been made clear to you at all times.

2. I reject your allegation that the Authority already holds a view in this matter (paragraph 9): the present process of review is to assist the Authority in coming to a view. I reject the inference that this matter has been prejudged. These matters have also been made very clear to you.

3. I reject your comments about your professional standing (paragraphs 8 and 9). No suggestions were made in the terms alleged by you.

4. I reject your position that you did not know that I was opposed to the Report being delivered (paragraphs 11-13). In a telephone conversation in May or June you told me something about the Report which caused me to reply that I did not want the Report to be delivered without my first seeing it. I asked that you attempt to delay the Report until I took office. I note that neither you nor the (then) Chairman offered to discuss the Report with me nor showed me a draft copy.

IN CAMERA

5. I am not satisfied that you "raised the Report" (whatever that means) with me on 30 June (paragraph 13). I reject the inference that I had approved the Report being delivered.

6. When I spoke to Mr Robberds on 30 June and he agreed that the Report would not be sent (paragraph 13). He undertook to speak to the Chairman and yourself about it. He has subsequently told me that, due to various circumstances, he did not do so. I accept that he acted in good faith at all times.

7. I was entirely dissatisfied with your conduct in attempting to deliver the Report in July (that is, at a time after I had taken office), knowing my opposition to it, and failing to advise me. As I have indicated above, I do not accept that you did not know of my opposition nor that I acquiesced in any way. If I am wrong, and you did not know, I still regard your failure to inform the incoming Authority of the exact position as unsatisfactory.

8. I note your comments in paragraph 24 that you "reserve the right" to use the 1 December Minute. I do not fully understand that comment nor the need for it. So that there is no misunderstanding, I advise you as follows:

   (a) I direct you that, in relation to Operation Noah, you are not to make any documents available to or have any discussions with any committee or person outside the Authority without first consulting the Authority. If you consider that I do not have the power to bind you with this direction or if you, for any reason, do not intend to obey it, please advise me forthwith and I will call an Authority Meeting.

   (b) I remind you of the secrecy provisions of the Act, which bind you now and after your term ends.

9. I note, with great concern, your threat to sue the Authority Members for defamation (paragraph 20-28). Such a threat from one member directed at the other Members can only inhibit the proper working of the Authority. Accordingly, all further communications between yourself and the Authority will need to be considered in the light of any possible Court action you might take, on this issue or on any others.

10. I repeat, I have raised these matters as a direct response to your allegations. I do not want you to believe that my failure to demur in any way means that I agree with you.

Peter Faris QC

IN CAMERA

Tuesday 12 December 1989

at 11.30 a.m.

Chairman rang - on conference phone - said that Greg Cusack and other Members were present.

Rang to advise me of an Authority resolution. Authority having noted the chairman's minute of 6 December 1989 to Mr Le Grand and, in particular, paragraph 8 and Mr Le Grand's response in his minute of 7 December 1989, paragraph 4, it is resolved as follows:

'The Authority directs that Mr Le Grand is not to divulge or communicate to any person outside the Authority any information acquired by him by reason of, or in the course of, the performance of his duties under the NCA Act, unless specifically authorised to do so by the Authority; the Authority further resolves that the Chairman forthwith seek from Mr Le Grand an undertaking to abide by this resolution.'

The Chairman then asked whether I would abide by this resolution. I said that I had no difficulty in respect of the world at large, but I did in respect of those bodies which had a review, watchdog or reporting rights under the NCA Act, namely the PJC, IGC and the Attorney-General. I said that it was a complex legal question what right to information from Members the PJC, IGC and Attorney-General had, and whether I could give such an undertaking. I instanced questions by the PJC about the fate of the First Interim Report and whether at some future date if I was called before that body, I could refuse to answer questions about my position in respect of that report.

The Chairman then asked whether I believed I could take NCA documents with me when I left the Authority, such as the Dempsey response. I said I was unsure, but probably not, but I would retain a good knowledge of their contents.

He asked me whether I was refusing to give the undertaking. I said that I was not refusing, but wished to receive legal advice on my position.

He asked from whom would I be seeking advice. I said Counsel Assisting in Adelaide, Mr David Smith. He asked whether I would be in a position by Saturday to advise my attitude to the giving of the undertaking. I said that I hoped that I would be.

NOTE FOR FILE - Telephone conversation with the Chairman held on Tuesday, 12 December 1989: OPERATION ARK.

1. The Chairman referred to his minute of 7 December 1989 in which he stated, inter alia:

> 'To avoid any misunderstanding, I hereby direct you, under section 46A of the Act, not to exercise any of those powers without consulting with either the Authority or myself as Chairman'.

2. He then pointed to my response of 7 December 1989 where I had stated:

> '... I cannot be deflected from the proper exercise of the powers, functions and duties conferred upon me by the statute ...'.

3. The Chairman then advised that the Authority, at a meeting held this day, has passed the following resolution:

> 'Having noted the Chairman's minute of 6 December 1989 to Mr Le Grand, in particular paragraph 8, and Mr Le Grand's response in his minute of 7 December, paragraph 4, it is resolved as follows:
>
> > The Authority directs that Mr Le Grand is not to divulge or communicate to any person outside the Authority any information acquired by him by reason of or in the course of the performance of his duties under the NCA Act unless specifically authorised to do so by the Authority and that the Chairman forthwith seeks from Mr Le Grand an undertaking to abide by this resolution'.

4. I said I was not prepared to give an undertaking, at least not at this time, until such time as I had the opportunity of seeking legal advice from Counsel Assisting the Authority in Adelaide, namely, Mr David Smith. I said that I was taking this position on the basis that I was not sure that what they were proposing was in accordance with law, that is, as a Member or former Member of the Authority I could be called before the PJC or the IGC, or required to furnish information to the Attorney-General and I was uncertain as to the Authority's powers to prevent me from responding or to excuse me from responding.

5. I indicated that I would need some time to consider my position. I said that, for instance, if the PJC, IGC or Attorney-General questioned me about the fate of the Operation ARK Report, I would desire to put my position on the record. The Chairman asked me whether I was refusing to give the undertaking. I said it was not a case of refusing but a case of being sure that I could properly give such an undertaking. I indicated that I considered it a very complex legal question, that is to what extent those bodies who have been given by the NCA powers of review or powers to request information could be prevented by the Authority from obtaining responses from a particular Member in the exercise of those powers.

6. The Chairman asked when I would be in a position to indicate whether I would give him the undertaking. I said, hopefully by Saturday 16 December, 1989. He then asked me to give him an interim undertaking until Saturday, which I did. I told the Chairman that I had no hestitation in giving an undertaking in respect of the world at large, apart from those named in the Act, namely the Attorney-General, the PJC and the IGC.

Annexure "G"

IN THE MATTER of the National Crime Authority Act, (Commonwealth), 1984

- and -

IN THE MATTER of the validity of the direction from the Authority to Mr P.M. LE GRAND made on 12th December 1989.

O P I N I O N

I have been asked to advise on the validity of a resolution made by the Authority on the 12th of December 1989 directed specifically to Mr. P.M. Le Grand.

The background to the matter is as follows:

(i) By minute dated 7th December 1989, the Chairman directed Mr Le Grand, pursuant to 46A of the National Crime Authority Act (1984) (hereinafter referred to as "the Commonwealth Act") not exercise certain powers, which were the subject of discussion in my opinion of 30th November, 1989, without prior consultation with either the Authority or himself.

(ii) On the same day, namely, 7th December 1989, Mr Le Grand responded in the following terms:

> *". . . I cannot be deflected from the proper exercise of the powers, functions and duties conferred upon me by the statutes. . . ."*

(iii) On 12th December 1989, the Authority met and resolved as follows:

> *"Having noted the Chairman's minute of 6 December 1989 to Mr Le Grand, in particular paragraph 8, and Mr Le Grand's response in his minute of 7 December, paragraph 4, it is resolved as follows:*
>
> > *"The Authority directs that Mr Le Grand is not to divulge or communicate to any person outside the Authority any information acquired by him by reason of or in the course of the performance of his duties under the NCA Act unless specifically authorised to do so by the Authority and that the Chairman forthwith seeks from Mr Le Grand an undertaking to abide by this resolution."*

(iv) On 12th December 1989, the above resolution was communicated by telephone to Mr Le Grand who immediately questioned whether the Authority was empowered to prevent him from furnishing information to the PJC, the IGC, and the Attorney-General for the State of South Australia who is the Minister charged with the administration of the National Crime Authority (State Provisions) Act, 1984 (hereinafter referred to as "the State Act")

The Chairman asked Mr. Le Grand to undertake to abide by the direction. After some discussion Mr. Le Grand gave such an undertaking until Saturday 16th December, 1989 by which time he hoped to have obtained legal advice on the validity of such a direction.

I am asked for my opinion on the validity of the direction of 12th December 1989.

The direction is couched in much the same terms as the secrecy provisions in s. 51 of the Commonwealth Act and s. 31 of the State Act, save that the exemption allowing disclosures provided for in the legislation is not referred to and the direction requires that Mr Le Grand have specific authority before divulging or communicating information.

Section 31 of the State Act provides:

> " (1) This section applies to–
>
> (a) a member or acting member of the Authority;
>
> and
>
> (b) a member of the staff of the Authority.
>
> (2) A person to whom this section applies who, either directly or indirectly, except for the purposes of a relevant Act or otherwise in connection with the performance of the persons' duties under a relevant Act, and either while the person is or after the person ceases to be a person to whom this section applies–
>
> (a) makes a record of any information;
>
> or
>
> (b) divulges or communicates to any person any information,
>
> being information acquired by the person by reason of, or in the course of, the performance of duties under this Act, is guilty of an offence punishable by a fine not exceeding five thousand dollars or imprisonment for a period not exceeding one year, or both."

Section 51 of the Commonwealth Act provides:

> " (1) This section applies to–
>
> (a) a member of the Authority; and
>
> (b) a member of the staff of the Authority.
>
> (2) A person to whom this section applies who, either directly or indirectly, except for the purposes of this Act or otherwise in connection with the performance of the his duties under this Act, and either while he is or after he ceases to be a person to whom this section applies-
>
> (a) makes a record of any information; or
>
> (b) divulges or communicates to any person any information,
>
> being information acquired by the person by reason of, or in the course of, the performance of his duties under this Act, is guilty of an offence punishable on summary conviction by a fine not exceeding $5,000 or imprisonment for a period not exceeding 1 year, or both."

The secrecy provisions do not proscribe disclosure of information which is envisaged by the legislation or which otherwise arises from the performance of the Member's duties under the legislation.

The Authority intends this direction to encompass any disclosures by Mr Le Grand to the PJC, IGC and to the Attorney-General for the State of South Australia.

The wording of the resolution indicates such breadth because it strips out the exemption found in the secrecy provisions. The context of the telephone discussion between Mr Le Grand and the Chairman on 12th December 1989 also confirms it. Further, some early communications between Mr Le Grand and the Chairman make it abundantly clear that the Authority intends the direction to be that wide. In a minute dated 6th December 1989 from the Chairman to Mr Le Grand, the Chairman, in paragraph 8. said:

> *"I note your comments in paragraph 24 that you 'reserve the right' to use the 1 December Minute. I do not fully understand that comment nor the need for it. So that there is no misunderstanding, I advise you as follows:*
>
> *(a) I direct you that, in relation to Operation Noah, you are not to make any documents available to or have any discussions with any committee or person outside the Authority without first consulting the Authority. If you consider that I do not have the power to bind you with this direction or if you, for any reason, do not intend to obey it, please advise me forthwith and I will call an Authority meeting.*
>
> *(b) I remind you of the secrecy provisions of the Act, which bind you now and after your term ends."*

(The emphasis is mine)

So it is clear that the direction to Mr Le Grand of 12th December 1989 is intended to be taken literally and is intended to have the breadth which the language indicates.

Certainly, the Chairman and the Authority, have the power to control and manage the affairs of the Authority (see s. 46A, not s. 19), but that power

must be read in the context of the State and Commonwealth legislation as a whole.

Mr Le Grand expressed concerns to the Chairman in the telephone conversation concerning his position in relation to the PJC and IGC and the S A Attorney-General. In my view his concerns were justified particularly in relation to being even conditionally prohibited from disclosing information to the PJC and the IGC.

THE PARLIAMENTARY JOINT COMMITTEE (PJC)

Part III of the Commonwealth Act establishes the statutory foundation for the PJC.

In broad terms, this Committee was constituted to, inter alia, *"monitor and review"* the Authority. Section 53 constitutes the Committee; section 54 provides:

> *"All matters relating to the powers and proceedings of the Committee shall be determined by resolution of both Houses of the Parliament."*

Indeed, I am instructed that there was a resolution of both Houses of the Federal Parliament which, inter alia, provided as follows:

> "……
>
> (d) *That the committee have power to appoint sub-committees consisting of 3 or more of its members and to refer to such a sub-committee any matter which the committee is empowered to inquire into.*
>
> ……
>
> (k) *That the committee or any sub-committee have power to send for persons, papers and records.*

(l) That the committee or any sub-committee have power to move from place to place.

(m) That a sub-committee have power to adjourn from time to time and to sit during any adjournment of the Senate or of the House of Representatives.

(m) That a sub-committee have the power to authorise publication of any evidence given before it and any document presented to it.

(o) That the committee have leave to report from time to time.

(p) That the committee or any sub-committee have power to consider and make use of the evidence and records of the committee appointed during the 33rd Parliament.

(q) That, in carrying out its duties the committee, or any sub-committee, ensure that the operational methods and results of investigations of law enforcement agencies, as far as possible, be protected from disclosure where that would be gainst the public interest.

(r) That the foregoing provisions of this resolution, so far as they are inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders."

The above resolution is reinforced by the provisions of the Parliamentary Privileges Act, 1987 (Commonwealth) (hereinafter referred to as the "Privileges Act"). That Act declares the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House. An offence against a House includes *"a contempt of a House or of the members or committees"* (see s. 3(3) of the Privileges Act). Conduct will constitute an offence against a House if it is or is likely to amount to *"an improper interference with the free exercise by a House or committee of its authority or functions."* (see s. 4 of the Privileges Act). Section 7 of the above Act then provides for penalties ranging from fines to imprisonment. "Committee" is defined as including a committee of both houses. (see s. 3(1) of the Privileges Act).

I note that the Privileges Act purports to be declaratory. I anticipate that there is a vast residuum of inherent power in the Federal Legislature to ensure the smooth functioning of its Committees and the implementation of its statutory will. There is no need to embark upon an investigation of

this power. The Act makes it clear that Parliament is empowered to punish what it considers to be *"an improper interference with the free exercise by a House or Committee of its authority or functions"*.

Section 55 of the Commonwealth Act particularises the duties of the PJC as follows:

> *(1) The duties of the Committee are-*
>
> *(a) to monitor and review the performance by the Authority of its functions;*
>
> *(b) to report to both Houses of Parliament, with such comments as it thinks fit, upon any matter appertaining to the Authority to connected with the performance of its functions to which, in the option of the Committee, the attention of the Parliament should be directed;*
>
> *(c) to examine each annual report of the Authority and report to the Parliament on any matter appearing in, or arising out of, any such annual report;*
>
> *(d) to examine trends and changes in criminal activities, practices and method s to report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the Authority; and*
>
> *(e) to inquire into any question in connection with its duties which is referred to it by either House of Parliament, and to report to that House upon that question.*

Clearly then Mr. Le Grand even now could be required to come before the PJC and be the subject of questions and enquiry concerning the performance of his duties whilst the Adelaide Member.

Even a conditional refusal to disclose information would amount to an *"interference with the free exercise"* by the PJC of its authority and its statutory function of reviewing and monitoring the *" performance by the Authority of its functions"*. (see s. 55(1)(a) of the Commonwealth Act.)

To refuse to answer a question would amount to an offence against Parliament. Further, both Mr. Le Grand and the Authority as a whole would be frustrating the clear intent of the National Crime Authority legislation, which requires the Authority to be accountable to inter alia

the PJC.

It is no answer for the Authority to assert that it can release Mr. Le Grand from his undertaking. The direction embodied in the resolution is either within power or not. The fact that the prohibition against disclosure is conditional, in the sense that disclosure can be made if authorised, does not alter the character of the directive. Implicit in the directive is a discretion to permit or not permit disclosure. Such a power or unfettered discretion would, when linked to the directive, leave it with the character of a prohibition in the sense asserted in the now outmoded *"freedom of interstate trade cases'."* (see HUGHES and VALE PTY LTD v N.S.W. [No.2] (1955) 93 C 127 of pp. 160, 161.)

In any event the spectre of Mr. Le Grand declining to answer without authorisation or even seeking broad consent to freely discuss the performance of his duties at the Adelaide Office, would be an affront to the National Crime Authority legislation and offensive to the PJC's brief to ensure that the Authority is fully accountable.

The directive insofar as it forbids Mr. Le Grand from divulging or communicating information concerning the performance of his functions as the Member appointed pursuant to the Reference is ultra vires the Commonwealth Act and to that extent is invalid.

INTER GOVERNMENTAL COMMITTEE (IGC)

In view of its national character the States play a part in the monitoring and reviewing of the activities of the Authority and this is in part achieved by the IGC. Again this Committee like the PJC has a watchdog or monitoring role in connection with the work of the Authority. Section 8 of the Commonwealth Act provides for the constitution of the Committee.

Subsection (8) deals with the powers and procedures of the Committee in the following terms:

> *"Subject to the foregoing provisions of this section, the Committee may determine its procedure and for that purpose may make rules of procedure, including rules relating to the convening of meetings and conduct of business at meetings and may from time to time alter rules so made."*

I am instructed that there are no formalised rules of procedure as yet in existence. Section 9 of the Commonwealth Act sets out the functions of the Committee in the following terms:

> *(1) The functions of the Committee are :*
>
> *(a) to create offices of member of the Authority under subsection 7 (BAA) and to recommend persons for appointment to those offices;*
>
> *(b) where the Commonwealth Minister proposes to refer under section 13 a matter relating to a relevant criminal activity to the Authority for investigation - to consult with the Commonwealth Minister in relation to the proposed reference;*
>
> *(c) to consider whether approval should be given for a matter relating to a relevant criminal activity to be referred in accordance with section 14 by a Minister of the Crown of a State, or by Ministers of the Crown of 2 or more States, to the Authority, for investigation;*
>
> *(d) such other functions as are conferred on the Committee by other provisions of this Act;*
>
> *(e) to monitor generally the work of the Authority, and*
>
> *(f) to receive reports furnished to the Committee by the Authority for transmission to the Governments represented on the Committee and to transmit those reports accordingly.*

Section 32 of the State Act envisages that the IGC will have some input into the annual report of the Authority in the sense that it is empowered to make comments on the annual report and these comments will accompany the report when it is tabled before Parliament. Further section 59 of the Commonwealth Act, provides broadly for the furnishing of reports and information and envisages the supply of information to the IGC from the Authority in certain situations.

The procedures adopted for meetings between the Authority and the IGC are, as I understand it, informal and not subject to any specific rules of procedure. So, if upon questioning Mr. Le Grand at one of these

meetings would it be permissible for Mr. Le Grand to decline to answer without authority from the membership of the Authority?

For much the same reasons canvassed by me above in relation to the PJC it would be contrary to the letter and spirit of the National Crime Authority legislation for there to be even a qualified refusal to answer. The IGC is injuncted by statute *"to monitor generally the work of the Authority"*, and to carry out that function effectively it must be able to insist on full, frank and immediate responses to its inquiries. Edited and vetted responses could not be acceptable.

I think the absence of rules of procedure and a sanction for refusal to answer is not germane to the real issue which is whether the Authority is entitled to so direct Mr. Le Grand.

Insofar as the direction of the 12th of December, 1989 purports to forbid Mr. Le Grand from disclosing information pertinent to the performance of his functions and duties in the Adelaide Office of the Authority without permission of the Authority it is ultra vires and invalid.

ATTORNEY GENERAL FOR THE STATE OF SOUTH AUSTRALIA

There are a number of instances apart from IGC meetings where communication with the Attorney General is envisaged by the legislation. (e.g furnishing of reports and information, Section 59 of the Commonwealth Act; furnishing of briefs for prosecution, Section 12(3)(a) of the Commonwealth Act; Annual Report, Section 61 of the Commonwealth Act; Annual Report, Section 32 of the State Act; provision of an undertaking that answer or document will not be used against witness, Section 19(5) of the State Act; protection of witnesses, Section 24 of State Act and Section 34 of the Commonwealth Act).

It seems to me that in most of those cases perhaps with the exception of those operational matters such as seeking undertakings under s.19(5) and the protection of witnesses, the legislation seems to envisage some

formality and therefore the involvement of the Authority as a whole. There is no specific power or function relating to or which involves communication with the Attorney General which is so categorically bestowed on a member that it could not be the subject of the sort of resolution and direction made on the 12th December, 1989.

I have refrained from fully investigating this aspect of the direction but my tentative view is that insofar as the direction forbids communication to the Attorney General without authorisation of information of the proscribed character, (i.e. information acquired by Mr. Le Grand by reason of or in the course of the performance of his duties under the National Crime Authority Act), it is not ultra vires but is unnecessary because such communications without the authorisation of the Authority would be a breach of the secrecy provisions.

So, what point is either a directive in those terms, or an undertaking to comply with it? Because of the secrecy provisions it is the law.

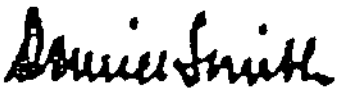
As far as those matters which I have termed "operational" I am instructed that no such operational steps are currently being taken.

CONCLUSION

The resolution and directive of the 12th December, 1989 is, in so far as it applies to communications between Mr. Le Grand and the P.J.C. or the I.G.C., ultra vires the Commonwealth Act and so is invalid.

In so far as the Attorney General and indeed the "World at large" are concerned the directive is unnecessary.

Dated 15th December 1989



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