

Chapter 1

Introduction

Matters covered by this report

1.1 This report deals with two inquiries referred to the committee by the Senate in June and August 2009, both relating to matters arising out of the hearing of the Economics Legislation Committee on 19 June 2009 into the Car Dealership Financing Guarantee Appropriation Bill 2009 (also known as the OzCar scheme).

Possible adverse action against a witness in consequence of his evidence

1.2 On 24 June 2009, on the motion of Senator Heffernan, the Senate referred the following matter to the Committee of Privileges for inquiry and report:

Whether any adverse action was taken against Mr Godwin Grech in consequence of his evidence before the Economics Legislation Committee on 19 June 2009, and, if so, whether any contempt of the Senate was committed in that regard.¹

In giving precedence to this matter on 23 June, the President of the Senate, Senator the Honourable John Hogg, stated that both the Senate and the Privileges Committee had always taken extremely seriously any suggestion that a witness had been threatened or intimidated in respect of their evidence before a Senate Committee, and that every case raised had been referred to the Committee of Privileges for inquiry.² Some particulars of the alleged adverse actions against Mr Grech were contained in correspondence from Senator Heffernan, tabled in the Senate on 24 June 2009. These actions were described as follows:

I believe the witness, Mr Godwin Grech, a senior Treasury official who appeared at last Friday's Senate Economics hearing in Parliament House has been threatened, and publicly and privately intimidated for his evidence.

I believe the political backgrounding provided to the media is highly prejudicial and this contributes to intimidation of the witness.³

... I note that this morning the Australian Federal Police (AFP) has raided the home of the witness, Mr Godwin Grech, the senior Treasury official

1 *Journals of the Senate*, 24 June 2009, p. 2173.

2 *Senate Debates*, 23 June 2009, p. 4064–65.

3 Letter to the President from Senator the Hon. Bill Heffernan, dated 22 June 2009.

who appeared at last Friday's Senate Economics hearing in Parliament House.

I understand the action by the AFP is clearly a consequence of evidence given by this witness. Regardless of the merit or demerit of the evidence given, this would be a contempt of the Senate and I am of the view, that any witnesses who appear before Senate committees are entitled to protection from intimidation and threats of any nature.⁴

Possible false or misleading evidence to, or improper interference with, a committee hearing

1.3 The second, related matter was referred by the Senate in August 2009 on the motion of the Leader of the Government in the Senate, Senator the Honourable Chris Evans. Similar terms of reference had been proposed earlier by Senator the Honourable Joseph Ludwig, and granted precedence, but were rejected by the Senate on 25 June 2009, only the third such defeat of a motion to refer an allegation of contempt to the committee.⁵

1.4 In the meantime, the Auditor-General had presented a report on the Motor Dealer Financing Assistance scheme, including a lengthy statement by Mr Grech⁶ who also provided a statement to a national newspaper published on the day the Auditor-General's report was presented to the Senate. In these statements, Mr Grech admitted to fabricating the email at the centre of the OzCar controversy, an email already declared by the AFP to be concocted. The email was allegedly from a Prime Ministerial adviser to Mr Grech, seeking assistance for a particular car dealer known to the Prime Minister and the Treasurer. Mr Grech claimed that he had received such an email though no trace of it had been found.

1.5 Subsequently, the Senate agreed to refer the following matters to the committee on 12 August 2009:

In relation to the hearing of the Economics Legislation Committee on 19 June 2009 on the OzCar Program:

(a) whether there was any false or misleading evidence given, particularly by reference to a document that was later admitted to be false;

(b) whether there was any improper interference with the hearing, particularly by any collusive prearrangement of the questions to be asked and the answers to be given for an undisclosed purpose,

and, if so, whether any contempt was committed in that regard.⁷

4 Second letter to the President from Senator the Hon. Bill Heffernan, dated 22 June 2009.

5 *Journals of the Senate*, 25 June 2009, pp. 2194–95.

6 *Representations to the Department of the Treasury in Relation to Motor Dealer Financing Assistance*, Report No. 1 2009–10, presented to the Senate out of sitting on 4 August 2009.

7 *Journals of the Senate*, 12 August 2009, pp. 2278–79.

Correspondence from Senator Evans raising the matter of privilege included the following matters:

... You will be aware of published reports that indicate a highly unusual set of circumstances surrounding this hearing including:

- Various claims surrounding an email purportedly sent from the Prime Minister's office to a senior Treasury official (later admitted by that official to be a false document).
- An agreement between Mr Turnbull, a Senator and a witness to create an inquiry specifically tailored for the purpose of delivering predesigned questions and answers in order to bring about a predetermined outcome.

These circumstances raise the issues of whether false or misleading evidence was given to the committee, and whether the committee, the Senate and the public were misled as to the nature of the hearing.⁸

Background to the inquiries

1.6 These inquiries are amongst the most challenging ever conducted by the committee because of the nature of the allegations and the persons involved in the events giving rise to the references. In the circumstances, a brief account of the background to the inquiries is warranted.

1.7 Late in 2008, as the global financial crisis took hold, two major providers of wholesale floorplan finance to car dealers announced that they would be quitting the Australian market. This action was expected to have a major impact on car dealers who could struggle to secure alternative finance to fund their showroom vehicles. On 5 December 2008, the Prime Minister and Treasurer announced that a Special Purpose Vehicle, also known as OzCar, would be established to assist in restoring confidence to the market. A trust was created in January 2009 and a program manager selected to administer funds provided by the four major banks from the issuing of securities. The Commonwealth Government would provide a guarantee to securities issued by the scheme with less than a AAA credit rating. A bill, the Car Dealership Financing Guarantee Appropriation Bill 2009, was drafted to appropriate money to fund any claims made on the government's guarantee.⁹ Mr Godwin Grech was the Treasury official chosen to oversee the implementation of the policy. He reported to his senior officers in Treasury, Mr David Martine and Mr Jim Murphy.

1.8 Mr Grech subsequently alleged that the Prime Minister and the Treasurer (or their offices) had made representations on behalf of a particular car dealer in Queensland who had lent the Prime Minister an ageing utility to use for electorate

8 Correspondence, dated 10 August 2009, tabled in the Senate on 11 August 2009, *Journals of the Senate*, pp. 2221–22.

9 Economics Legislation Committee, *Car Dealership Financing Guarantee Appropriation Bill 2009*, June 2009, pp. 3–6.

business.¹⁰ Thus the affair became known in the media as 'Utagate' and the Opposition pursued the Prime Minister and Treasurer over allegations of political interference and of misleading Parliament, some of the most serious allegations that can be made against ministers. It later emerged that Mr Grech had provided information to Mr Turnbull and Senator Abetz and had shown them a copy of an email which was subsequently revealed to be fabricated. There is no suggestion that any one other than Mr Grech was aware of this fact at the time. The information was used in questions in the House and in Senate committee hearings. Mr Turnbull and Senator Abetz subsequently admitted to having been misled by Mr Grech.

Conduct of the inquiries

1.9 In these circumstances, the work of the committee was very difficult. Allegations of misconduct had been made against the most senior ministers in the Government and were being prosecuted by the Leader of the Opposition and the Deputy Opposition Leader in the Senate. The second of the committee's terms of reference was initially rejected by the Senate, was opposed on its reappearance in a revised form in August 2009, and was then agreed only on the narrowest of margins. The committee has endeavoured, however, to approach these inquiries in the same non-partisan way that it has approached all of its other inquiries.¹¹ It has attempted to establish the facts of the matters by its usual means and to apply its critical faculties in the interests of protecting and preserving the integrity of the Senate and its processes.

1.10 The committee was also conscious that there were two parallel inquiries taking place. The first inquiry, by the Auditor-General, was completed before the committee received its second terms of reference and caused no difficulties, procedural or otherwise. The second inquiry, by the AFP, into possible criminal offences, was a different matter. The instigation of the AFP investigation was itself an action potentially quite adverse to Mr Grech and possibly taken against him as a consequence of his evidence to the Economics Legislation Committee, and therefore a focus of this committee's inquiry. This matter is explored in chapter 3, along with the instigation of a code of conduct inquiry by the Department of the Treasury (later discontinued because Mr Grech resigned from his employment). On the other hand, the committee was conscious of the potential difficulty posed by a parliamentary inquiry into matters that may be the subject of an eventual criminal prosecution. It has taken steps to navigate around such matters to avoid placing any relevant material beyond the ability of either the prosecution or defence to use in any legal proceedings. This matter is covered further in chapter 5.

1.11 A third difficulty encountered by the committee was Mr Grech's state of health and his capacity to respond to the allegations made against him. This matter is covered further in paragraphs 1.18 – 1.21 below.

10 Economics Legislation Committee, *Committee Hansard*, 19 June 2009, pp. E37–38

11 This approach is documented in the committee's 125th Report, *Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966–2005*, PP No. 3/2006.

1.12 As is usual in any inquiry into a possible contempt of the Senate, the committee commenced its inquiries by contacting persons who the committee was immediately aware may be affected by the reference, advising them of the terms of reference and inviting written submissions. Thus the committee wrote to the following in respect of its first terms of reference into possible adverse actions taken against Mr Grech in consequence of his evidence to the Economics Legislation Committee:

- Mr Godwin Grech;
- Mr David Martine (Mr Grech's supervisor in Treasury who was the senior Treasury official at the hearing on 19 June 2009);
- Dr Ken Henry, Secretary, Department of the Treasury;
- Mr Mick Keelty, Commissioner, AFP;
- Senator Annette Hurley, Chair, Economics Legislation Committee;
- Senator the Honourable Bill Heffernan (who raised the matter of privilege);
- Mr Alistair Jordan, Chief of Staff to the Prime Minister;
- Mr Chris Barrett, Chief of Staff to the Treasurer;
- Mr Chris Kenny, Chief of Staff to the Leader of the Opposition.

Aware of extensive media coverage of the hearing and its conclusion, including footage of Mr Grech and Mr Martine walking along corridors of Parliament House, catching a lift and leaving the building via the ministerial entrance, the committee also wrote to the Usher of the Black Rod for details of the policy on filming and photography in Parliament House and information about any inquiry being conducted into the behaviour of the press at and after the hearing. The committee also sought from the Economics Legislation Committee details of any decisions taken by the committee in relation to press coverage of the hearing.

1.13 As a result of information provided in the AFP's initial submission, the committee wrote to Mr Roger Wilkins, Secretary, Attorney-General's Department, seeking information about the instigation of the AFP inquiry. On the basis of information provided by Mr Wilkins, the committee then wrote to Mr Terry Moran, Secretary, Department of the Prime Minister and Cabinet, about the same matter.

1.14 The committee's letter to Mr Grech, despatched to him by person to person mail at his workplace, was returned as Mr Grech was on leave from the department and was reported to be in hospital receiving treatment in a psychiatric facility. Unfortunately, although it was marked 'Personal and Confidential', the letter had apparently been opened by Treasury security staff. Senior Treasury officers then took appropriate steps to return it to the committee.

1.15 In relation to its second terms of reference, involving possible false or misleading evidence to, or improper interference with, a committee hearing, the committee wrote again to the Chair of the Economics Legislation Committee, the Commissioner of the AFP and the Secretary to the Department of the Treasury,

seeking any further submissions on the new terms of reference. Given the extensive statements by Mr Grech to the Auditor-General's inquiry and to *The Australian* on 4 August 2009, the committee also decided to approach Mr Grech again. It sought advice from the Treasury Department on a contact address and wrote to Mr Grech through his solicitor, seeking his input on both terms of reference. The committee received a response from Mr Grech's solicitor on his behalf. Finally, the committee also wrote to Senator Abetz and Mr Brad Stansfield (Chief of Staff to Senator Abetz). See chapter 5 for the reasons the committee chose not to write to Mr Turnbull.

1.16 A list of submissions to the committee's inquiries is in Appendix One.

1.17 The committee thanks all those who provided submissions, several of them very detailed and requiring considerable resources to produce. These efforts to assist the committee are appreciated. The committee's usual practice is to make public all material submitted to it, at an appropriate stage of an inquiry, unless there are compelling reasons not to publish the material in whole or in part. Persons making submissions are advised of this and have the opportunity to submit any claims for particular material not to be published. All material provided to the committee that has been referred to in the body of the report or in footnotes has been published in volumes tabled in the Senate accompanying the report, unless otherwise indicated. Many of the documents provided to the committee with submissions were highly contentious. The committee's approach to publication of this material is outlined in chapter 5.

1.18 As the committee gathered information, it became clear that there were several matters that it wished to raise with Mr Grech directly. In relation to the first terms of reference, there was a question of whether Mr Grech had been the subject of any pressure from other persons in relation to his evidence to the Economics Legislation Committee, either following its estimates hearing on 4 June 2009 or in relation to its hearing on the OzCar bill on 19 June 2009. In relation to the second terms of reference, there was evidence that misleading evidence had been given and that there may have been improper interference with the operations of the Economics Legislation Committee. These were matters that, in the interests of natural justice, needed to be put to Mr Grech to enable him to give his version of events.

1.19 In normal circumstances, the committee would have held a public hearing and proceeded to call witnesses, including Mr Grech, to give sworn evidence. The committee's procedures for public hearings¹² would also have allowed witnesses, or their legal representatives, to examine one another. Mr Grech remained in hospital throughout the inquiry and, according to his solicitor, was declining in health.¹³ In these circumstances, the committee did not consider it appropriate to subject Mr

12 Published in Appendix F to the committee's 125th Report, *Parliamentary privilege: Precedents, procedures and practice in the Australian Senate 1966–2005*, PP No. 3/2006.

13 Submission by John Wilson, Williams Love & Nicol, on behalf of Mr Grech, dated 28 August 2009.

Grech to a public hearing, and determined instead to put a series of written questions to him. The committee did so in October 2009, being careful to confine its questions to matters relating to proceedings in parliament and therefore within its exclusive jurisdiction.¹⁴ Mr Grech's solicitor responded that Mr Grech did not wish to put anything further to the committee in relation to this matter, that he remained seriously ill and that it was distressing for him to revisit these matters, such distress in turn having a negative impact on his health. It was also claimed that several of the matters raised by the committee were relevant to inquiries by the AFP and, in the circumstances, Mr Grech preferred not to say anything further.¹⁵

1.20 Aware by this stage that Mr Grech had resigned from his employment and was therefore no longer subject to disciplinary proceedings under the *Public Service Act 1999*, and also aware of Mr Grech's extensive statements to the Auditor-General and *The Australian*, the committee resolved to seek evidence of Mr Grech's medical condition, indicating to his legal representative that the committee intended to proceed with its report whether or not the medical evidence was forthcoming and could make adverse comment on any failure to support the claim of incapacity made on Mr Grech's behalf by his legal representative.¹⁶

1.21 The committee had also indicated to Mr Grech's legal representative that it intended to make available to him any adverse evidence and any parts of the draft report referring to that evidence or drawing conclusions from it. Two weeks after the committee's request for evidence of Mr Grech's medical condition, nothing had been provided so the committee then set a deadline for receipt of the report.¹⁷ The report was provided on 16 November 2009. This was within the deadline but by this time the committee's report was at an advanced stage of preparation. The report stated that Mr Grech was not medically fit to participate in the inquiry.

1.22 As discussed in chapter 5, Mr Grech's medical unfitness to participate in the inquiry leaves the committee in the unsatisfactory position of being unable to arrive at conclusions on important aspects of its terms of reference. Without being able to hear from Mr Grech in response to particular allegations and assertions made by other parties to the inquiry, the committee cannot be satisfied that the allegations are sufficiently established. To conclude otherwise would be a breach of the principles of natural justice to which this committee adheres. These matters are discussed further in paragraphs 5.5 – 5.8.

14 Correspondence from the committee secretary on behalf of the committee to Mr Grech, dated 9 October 2009.

15 Correspondence from John Wilson, Williams Love & Nicol, on behalf of Mr Grech, dated 19 October 2009.

16 Correspondence from the committee chair to Mr John Wilson, Williams Love & Nicol, dated 29 October 2009.

17 Correspondence from the committee secretary to Mr James Macken, Williams Love & Nicol, dated 13 November 2009.

Role of the committee

1.23 It has long been recognised that the role of the Committee of Privileges is primarily an inquisitorial one. When the Senate refers a possible contempt for inquiry, it is the committee's role to establish the facts. Initially, it may not be clear whether there are particular suspects or, indeed, particular allegations. In the course of its inquiry the committee may become aware of matters that were not contemplated in the initial documentation raising the matter of privilege, but which are relevant to the terms of reference nonetheless. This is one reason why terms of reference are usually framed in broad terms.

1.24 Over the course of an inquiry, particular allegations or suspects may emerge. These are tested to establish what happened. The final step in the process is to consider whether particular acts (or omissions) may constitute a contempt. In undertaking this task, the committee has regard to the list of possible contempts in Privilege Resolution 6 but is not limited to those particular contempts or to the expression of them in the resolution.¹⁸ Pursuant to section 4 of the *Parliamentary Privileges Act 1987*, any conduct may constitute an offence against a House (that is, a contempt) if 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.

1.25 The committee also has regard to Privilege Resolution 3 (Criteria to be taken into account when determining matters relating to contempt):

The Senate declares that it will take into account the following criteria when determining whether matters possibly involving contempt should be referred to the Committee of Privileges and whether a contempt has been committed, and requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it:

- (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:

18 On this issue, two submissions, probably drawing on the same legal advice, dwelt on differences in expression between the terms of reference and the list of possible contempts in Privilege Resolution 6 but made no substantive point about the differences in expression: Treasury submission, dated 12 August 2009, paragraphs 88–90, 103–104; AFP submission, dated 10 August 2009, paragraphs 56–61.

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- (i) knowingly committed that act, or
 - (ii) had any reasonable excuse for the commission of that act.

Structure of the report

1.26 This report is structured as follows:

- In chapter 2, the committee provides a chronology of relevant events as it has been able to establish them through submissions or through material on the public record.
- In chapter 3, the committee analyses possible adverse actions taken against Mr Grech involving the conduct of the media, the instigation of a criminal investigation by the AFP, and the initiation of disciplinary proceedings by his department, and whether these actions were taken in consequence of Mr Grech's evidence.
- In chapter 4, the committee considers the issues of possible false or misleading evidence to, or improper interference with, the hearing of the Economics Legislation Committee on 19 June 2009. The committee also considers whether there was any attempt to improperly influence Mr Grech in respect of his evidence to the Economics Legislation Committee, or any action (or inaction) by his department in relation to his health that affected his ability properly to give evidence to the committee.¹⁹
- In chapter 5, the committee discusses a number of procedural issues that arose during the inquiry.
- In chapter 6, the committee presents its conclusions.

¹⁹ These matters were raised by Senator Heffernan after the publication of the Auditor-General's report, in correspondence to the President dated 7 August 2009, and were referred to the committee by the President to consider in the context of its existing inquiry. The committee subsequently received further terms of reference and considered that the matters raised by Senator Heffernan were more appropriately considered under those second terms of reference.