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The Parliament of the Commonwealth of Australia

## PRIVILEGE - MR JAMES GAFFEY

JOINT STATUTORY COMMITTEE ON  
CORPORATIONS AND SECURITIES

SEPTEMBER 1992

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CORPORATIONS AND SECURITIES

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Senator Austin W. Lewis, Deputy Chairman

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Mr Derek Abbott  
The Senate  
Parliament House  
CANBERRA ACT 2600

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## Background

1. Mr James Gaffey is employed as a Legal Officer 1 by the Victorian Regional Office of the Australian Securities Commission. He appeared before this committee as a representative of the Young Lawyers section of the Law Institute of Victoria at a public hearing on 11 October 1991 examining use immunity provisions in the Corporations Law. At the beginning of his evidence he stated that he was an employee of the ASC but appeared before the committee in a private capacity.

2. On 25 May 1992 the Chairman of this committee received a facsimile from Mr Gaffey advising him of two matters:

- (i) that Mr Gaffey had been charged under s.61 of the *Public Service Act 1992* with misconduct in that he had:

made a submission to the Joint Statutory Committee on Corporations and Securities ... which was at variance with the submissions [of the ASC] ... thereby compromising the submissions of the Chairman's representatives. (The full text of the charge is appended to Mr Gaffey's letter.)

- (ii) that the copy of the Hansard of the proceedings of 11 October 1991 which had been sent to him by the committee secretariat had been intercepted by the Regional General Council for Victoria and never subsequently forwarded to him.

3. Senator Beahan wrote to Mr Gaffey on the 25 May 1992 advising him of his rights as a witness under both the *Parliamentary Privileges Act 1987* and the Privilege Resolutions of the Senate of 25 February 1988 for the protection of the rights of witnesses. The relevant section of the Act (s.12(2)) reads:

A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of-

- (a) the giving or proposed giving of any evidence; or
- (b) any evidence given or to be given, before a House or a committee.

Penalty:(a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

- (b) in the case of a corporation, \$25,000.

4. Paragraph 6(11) of the Privilege Resolutions is expressed in similar terms to section 12 of the Act and states that such action may constitute a contempt. Paragraph 1(18) requires the committee to investigate a matter if it "...has any reason to believe that any person ... has been subjected to or threatened with any penalty or injury in respect of any evidence given...".

5. The material supplied by Mr Gaffey clearly suggested that by laying charge F against him the ASC had *prima facie* breached the Act and was in contempt of Parliament within the terms of the Privilege Resolutions.

6. Appendices to Mr Gaffey's letter showed that the offending charge was in fact the last of six, listed as charges A to F. However charges A to E were not mentioned in Mr Gaffey's original letter. In subsequent telephone conversations with the secretary to the committee on 25 May 1992 Mr Gaffey indicated that the other charges were unrelated to his appearance before the committee and for that reason he had not provided them to the committee. The secretary advised Mr Gaffey that, to the extent that the other charges might be an indirect means of punishing him for his appearance as a witness, they could also be relevant to the committee. Mr Gaffey was asked to consider providing them to the committee. On 26 May 1992 the secretariat received a copy of charges A to E by facsimile from Mr Gaffey.

7. The letter from Senator Beahan to Mr Gaffey of 25 May 1992 was also sent to the Chairman of the ASC for his information. On receipt of that letter Mr Hartnell contacted the secretariat to advise that charge F against Mr Gaffey had been withdrawn. Mr Hartnell had been unaware of the matter until informed of it by the committee chairman. Mr Gaffey was also advised in writing on 26 May that charge F had been withdrawn. Charge C was withdrawn at the same time for other reasons unrelated to this issue.

8. This committee met on Wednesday 27 May 1992 to consider the matter. The committee agreed that the chairman should write to Mr Hartnell advising him that the laying of charges against Mr Gaffey appeared to constitute a contempt and that the committee was required to investigate all the charges despite the subsequent withdrawal of two of them. Mr Hartnell was asked to provide a report to the committee on the circumstances which led to each of the charges being brought against Mr Gaffey and also on the interception of the Hansard of 11 October 1991. The ASC's response to the committee's request was received on 11 June 1992.

#### Charge F

9. With regard to charge F, which referred specifically to Mr Gaffey's appearance before the committee, Mr Hartnell states that he accepts totally that the charge was inappropriate and he affirms the right of all ASC officers to take part in 'open and participative debate ... within the guidelines laid down by the Australian Public Service'. He also acknowledged that Mr Gaffey had conformed with those guidelines.

10. Mr Hartnell asked that the laying of charge F should be considered in the overall context of Mr Gaffey's performance which, it is claimed by the ASC, was characterised by consistent failure to communicate with, or consult, supervisors. Mr Gaffey:

... had told no-one in the ASC of his involvement with the submission [to this committee], his views or his proposed appearance despite the fact that it concerned a matter fundamentally related to his work.

Mr Hartnell has described the decision to include the matter in counselling procedures as 'appropriate' and '..if anything, restrained'.

11. The committee cannot agree with this view. Mr Gaffey's behaviour with regard to his appearance before the committee may have appeared to be consistent with other aspects of his work performance which were of concern to his supervisors. However the ASC should have distinguished this matter from the other charges and been alert to Mr Gaffey's rights as a witness before a parliamentary committee.

12. It may be desirable for officers to discuss such matters with their supervisors and failure to do so may be considered discourteous. However it is not a breach of the *Public Service Act*. If officers are to exercise their right as private citizens to take part in 'open and participative debate' within the guidelines laid down by the Australian Public Service they must have the freedom to decide how best to do that having considered their own circumstances and their relationship with their supervisors. Nor should they fear being formally counselled because they have done so. Even counselling, to the extent that it appears on a person's employment records or otherwise affects his or her career, may be considered to be an attempt to influence or penalise a witness and thus constitute a contempt of Parliament and a breach of the *Parliamentary Privileges Act*.

13. In deciding to include his appearance before this committee in the charges the ASC seems to have focussed exclusively on its own internal management problems and failed to consider the broader issues involved in making charge F.

14. The Commission is a body with a considerable level of legal expertise in its senior management. The ASC also consulted the Australian Government Solicitor on the making of the charges. If the ASC was unaware of the statutory and other provisions relating to the rights of witness before parliament and its committees and that the making of charge F had implications beyond the disciplinary provisions of the *Public Service Act* then its own consideration of the matter was superficial and the advice provided by the Government Solicitor was woefully inadequate.

15. The prompt withdrawal of charge F by the chairman of the ASC, as soon as he became aware of it, minimises the harm caused to Mr Gaffey. At the same time it suggests that the making of the charge was a product of ill-considered internal management decisions rather than a deliberate challenge to the committee's right to gather evidence.

16. The committee is extremely concerned by this matter not only in terms of the protection of Mr Gaffey's rights but also with regard to the general attitude to, and knowledge of, the powers and privileges of Parliament. It is not a matter of the making of the charge being 'inappropriate' or of any question of a 'slight' to this committee, as Mr Hartnell has described it. The making of charge F *prima facie* constitutes a breach of s.12 of the *Parliamentary Privileges Act* and as such those responsible in the Victorian Regional Office of the ASC could be subject to criminal charges. It also appears to be a blatant contempt of the Parliament.

#### Charges A to E

17. The committee is satisfied that charges A to E are not related to Mr Gaffey's appearance before the committee. In support of this view it appears clear that the disciplinary problems pre-dated that appearance. The first issue, which gave rise to charge C, had arisen in September 1991. It is also apparent that no immediate action was taken in the against Mr Gaffey subsequent to the ASC becoming aware of his appearance. His appearance before the committee is not mentioned as an issue in the counselling sessions held in March 1992 (see annex to the ASC report). Lastly, Mr Gaffey's own perception when he first contacted the committee was that charges A to E were unrelated to charge F.

18. Having formed the view that charges A to E are not related to Mr Gaffey's appearance before this committee, the committee does not wish to canvas the details of these charges publicly. The committee should not intrude on the legitimate internal management responsibilities of the ASC.

#### The Hansard Report

19. The proof Hansard of the committee's hearing on 11 October 1991 was sent to all witnesses who appeared on that day. Mr Gaffey's copy was addressed to him care of the Law Institute of Victoria. It was forwarded to him at the Victorian Regional Office of the ASC. He never received it and indeed was not aware of its existence until 21 May 1992 when he sighted a copy as part of the papers relevant to the disciplinary charges.

20. With regard to the interception of the Hansard sent to Mr Gaffey, the report from the Chairman of the ASC states that it was received by the Regional General Counsel in line with the normal practice that all mail not marked 'private and confidential' is opened by the Counsel's office. The Hansard and its covering letter was, it is claimed, forwarded to Mr Gaffey. No explanation for his failure to receive it is offered.

21. There are no grounds to assume that the Regional General Counsel had any reason, other than that offered, for receiving the Hansard. The Hansard Report of the committee's proceedings was a public document copies of which had been provided to ASC officers who had attended the hearing. It was also freely available from the committee's secretariat.

22. It is a matter of concern that Mr Gaffey did not receive the Hansard report and was thus denied the opportunity to make corrections to it or make any comments on the evidence taken by the committee. However the committee accepts that its receipt by the Regional General Counsel was a matter of normal office practice.

A handwritten signature in black ink, appearing to read "Michael Beahan". The signature is fluid and cursive, with a prominent 'M' at the beginning.

Senator Michael Beahan  
Chairman