

No. 486

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE COUNCIL

STANDING COMMITTEE ON
PARLIAMENTARY PRIVILEGE AND ETHICS

REPORT

ON

**PERSON REFERRED TO IN
THE LEGISLATIVE COUNCIL**

(MR S. FORBES)

Ordered to be printed 22 November 2000

New South Wales Parliamentary Library cataloguing-in-publication data

New South Wales Parliament. Legislative Council. Standing Committee on Parliamentary Privilege and Ethics

Report on person referred to in the Legislative Council : Mr. S. Forbes / Legislative Council, Standing Committee on Parliamentary Privilege and Ethics. [Sydney, N.S.W.] : The Committee, 2000. – v p. 13; 30 cm. (Parliamentary paper ; no 486)

Chair: Helen Sham-Ho.

“Ordered to be printed 22 November 2000”.

ISBN 0731391349

Forbes, Stephen.

New South Wales. Parliament. Legislative Council.

Right of reply—New South Wales

I. Title

Sham-Ho, Helen.

Series: Parliamentary paper (New South Wales. Parliament) ; no. 486

328.944 (DDC21)

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Terms of Reference

The inquiry was conducted in accordance with a resolution of the Legislative Council of 13 November 1997 which permits citizens who are referred to in the House to seek a right of reply by making a submission in writing to the President of the Legislative Council (*Minutes of the Proceedings of the Legislative Council*, No. 16, Thursday 13 November 1997, Entry No. 2).

The resolution is available on the Committee's page of the Parliament's website www.parliament.nsw.gov.au, or by contacting the Committee Secretariat.

Committee membership

The Hon Helen Sham-Ho MLC Independent, Chair

The Hon Amanda Fazio MLC Australian Labor Party¹

The Hon Patricia Forsythe MLC Liberal Party²

The Hon Jenny Gardiner MLC National Party

The Hon Anthony Kelly MLC Australian Labor Party

Revd the Hon Fred Nile MLC Christian Democratic Party

The Hon Peter Primrose MLC Australian Labor Party

The Hon Janelle Saffin MLC Australian Labor Party

Secretariat:

Clerk to the Committee Lynn Lovelock

Senior Project Officer Velia Mignacca

Committee Officer Janet Williams

¹ Appointed 11 October 2000, replacing the Hon John Johnson MLC.

² Appointed 13 October 2000, replacing the Hon John Hannaford MLC.

Report

- 1.1** On 4 October 2000 the President of the Legislative Council, the Honourable Dr Meredith Burgmann MLC, received a letter from Mr Stephen Forbes, a Member of the Fair Trading Tribunal, requesting the incorporation of a response under the Legislative Council's resolution of 13 November 1997,³ relating to the protection of persons referred to in the Legislative Council. The letter referred to statements made by the Hon John Ryan MLC during debate in the Legislative Council on 28 June 2000.⁴ The President, having accepted the letter as a submission for the purposes of the resolution, referred it to the Standing Committee on Parliamentary Privilege and Ethics on 11 October 2000.
- 1.2** The Committee met in private session on 3 November 2000, and decided, according to paragraph 5 of the resolution, to consider the submission. The Committee, having consulted with Mr Forbes in writing, met again on 22 November 2000 and agreed to the attached response. The response, which the Committee now recommends for incorporation in Hansard, has been agreed to by Mr Forbes and the Committee in accordance with paragraph 5(b) of the resolution.
- 1.3** The Committee recommends:

Recommendation

That a response by Mr Forbes, in the terms specified at Appendix 1, as agreed to by Mr Forbes and the Committee, be incorporated in *Hansard*.

The Hon. Helen Sham-Ho MLC
Chair

³ Minutes No. 16, Thursday 13 November 1997, Entry No. 2.

⁴ Legislative Council Debates (pamphlet), 28/6/2000, pp. 7726 -7730.

Appendix 1

Response agreed to by Mr Forbes and the Committee

Appendix 1

It has been brought to my attention that a Member of the Legislative Council has referred to me by name in the House, in respect of my function as a Member of the Fair Trading Tribunal. The reference occurred in the Legislative Council on 28 June 2000, in a speech given by the Hon. J. F. Ryan. I have detailed below the subject paragraph of Mr. Ryan's speech from page 82 of *Hansard*:

“... This type of nonsense goes on all the time at the Fair Trading Tribunal. Recently I spoke to a legal practitioner who told me about **a member who has a reputation for holding hearings unnecessarily**. Honourable members should understand that tribunal members are paid a substantial fee (sic) for each day on which they hear a matter. Apparently **this tribunal member has a reputation for calling the parties together even in relation to matters that are settled**. If matters are settled, there is no need for the tribunal to reconvene but this member reconvenes the tribunal simply to claim the fee even though the hearing is totally unnecessary. **The person to whom I spoke had been told by one of the staff members of the tribunal that that particular tribunal member has a reputation for that practice simply to ensure that he gets paid. I suspect that the tribunal should do something about tribunal member Stephen Forbes.**” (my emphasis).

I wish to place it on record that I repudiate all the accusations made against myself by Mr Ryan.

In the context of a meaningful and transparent rebuttal of the accusations, I will briefly outline the listing policy of the Tribunal and the impact of that policy on the subject of ‘settlements’. It is necessary to have an accurate understanding of that policy in order to comprehend that the accusations are misconceived.

The days for which a part-time Member may properly receive payment include the following:

- days on which hearings are listed to be heard,
- days allocated for case conferences or directions,
- days allocated for the writing of reserved decisions and reasons,
- days allocated for considering re-hearing applications or applications for postponement,
- training days,
- days allocated for attendance of committee meetings,
- days allocated for the writing of other material, for example, preparation of draft practice and procedure guidelines or responses to drafts written by others.

If a listed matter does not proceed on the scheduled hearing day(s), either because it has settled or been discontinued or been adjourned, then the allotted part-time Member is still paid for the day. The Member's listed time is redirected to other tasks, such as writing reserved decisions or considering re-hearing applications.

Consequently, I believe that it is misguided to accuse a part-time Member, of calling parties together to a hearing ‘to ensure that he gets paid.’ There could not be such an improper motive because, even if the hearing was cancelled, the Member's time would be directed to other Tribunal tasks.

For the sake of clarification I would also like to touch briefly on the policy of setting matters to a hearing in circumstances where one party, or both, may claim that the hearing should not, go ahead. In those situations some of the reasons commonly given by parties for seeking an adjournment include:

- that 'settlement discussions are taking place', or
- the matter 'may have settled', or
- that 'the parties have agreed, in writing, to an adjournment and thereby agree that the matter be adjourned by consent.'

By way of background, it is necessary to briefly recount the recent history of this Tribunal and its predecessors.

The Tribunal commenced operation on 1 March 1999. It subsumed much of the jurisdiction of three previous tribunals, being: the Commercial Tribunal; the Consumer Claims Tribunal and the Building Disputes Tribunal.

Those former tribunals apparently had differing policies on the granting of adjournments once the hearing date had been set. I understand that one previous policy was that if both parties consented in writing to an adjournment then the matter would, almost as a matter of course, always be adjourned.

At the outset of the operation of this Tribunal however, it was decided as a matter of administrative policy, that any matter which was listed for hearing would not be simply adjourned 'by consent.' On the contrary, it was decided that matters would only be adjourned if there were persuasive and compelling reasons for doing so.

The intention of this new policy was to enhance the efficiency of the Tribunal's hearing process by ensuring that parties, and more particularly their legal representatives, would not be granted adjournments unless there was good reason for doing so.

This policy change has delivered increased efficiency of hearing times. And although this result brings benefits to both the Tribunal and the parties personally, it has not always pleased their legal representatives. This is particularly so in 'insurance appeal' cases where the parties are generally both legally represented.

In the area of insurance appeals many of the legal representatives had become familiar with, and had apparently to some extent been comforted by, the previous entrenched arrangement whereby adjournments would almost always be granted if sought 'by consent'.

Indeed, there have been to my knowledge a number of occasions where legal representatives have been so confident that a listed matter would, as a matter of course, be adjourned upon request, that they have written to the Tribunal and attached what has been referred to as a draft 'consent order' to the effect that the matter 'has been adjourned by consent.'

Consequently, there have been circumstances in which legal representatives have been disappointed when notified that an already listed matter would not be adjourned, as had been anticipated and presumed, but that it would proceed to hearing on the scheduled day. This result being despite the parties agreement to the contrary.

Sometimes, the request for an adjournment would continue to be pressed and subsequent submissions would be made that an adjournment should still be granted because 'settlement discussions are occurring.'

In those situations where 'settlement' is given as the justifying reason for a sought adjournment the parties are generally advised by the Tribunal that if a matter is only 'likely' to settle, then it is better that the parties attend the hearing so that the detail of any actual settlement can be confirmed and converted

conclusively into a final Tribunal order. Indeed the express provisions of s. 44 of the *Fair Trading Tribunal Act*, whereby the Tribunal may give effect to any agreed settlement, require firstly, that the settlement be reduced to writing and secondly, that the Tribunal be satisfied that it would have the power to make a decision in terms of the agreed settlement.

Unfortunately, often when 'possible settlement' has been submitted as the reason for a sought adjournment it often transpires at the actual hearing that settlement has not actually been discussed in any great detail, or at all, and the matter has to be heard on the evidence in any case.

Parties are never intentionally called together unnecessarily and I personally deny holding hearings unnecessarily.

S. Forbes
September 2000

Appendix 2

Minutes of the Committee's proceedings

Minutes of the proceedings

Note Asterisks indicate text which has been deleted as it is not relevant to this inquiry.

Meeting No. 3

Friday 3 November 2000

at Parliament House, Sydney at 9.30 am

MEMBERS PRESENT

Ms Sham-Ho (in the Chair)

| | |
|-------------|--------------|
| Ms Fazio | Revd Mr Nile |
| Ms Forsythe | Mr Primrose |
| Mr Kelly | |

In attendance: John Evans, Velia Mignacca, Janet Williams.

Apologies were received from Ms Gardiner and Ms Saffin.

The Chair welcomed the two new members of the Committee, Ms Fazio and Ms Forsythe.

Minutes of Meeting No. 2 were confirmed on motion of Revd Mr Nile.

The Chair tabled the following correspondence:

Correspondence received:

- (i) Letter dated 11 October 2000 from the President of the Legislative Council to the Chair of the Committee referring a citizen's right of reply submission from Mr Stephen Forbes.

Citizen's Right of Reply submission from Mr Stephen Forbes

The Committee deliberated.

Resolved, on motion of Revd Mr Nile: That the Committee agree in principle to recommend publication of Mr Forbes' submission without the shaded sections appearing in the version circulated to the Committee.

The Committee adjourned at 10.30 a.m. until Wednesday 22 November 2000 at 2.15 pm.

Velia Mignacca

Senior Project Officer

Meeting No. 4

Wednesday 22 November 2000
at Parliament House, Sydney at 2.15 pm

MEMBERS PRESENT

Ms Sham-Ho (in the Chair)

| | |
|-------------|--------------|
| Ms Fazio | Revd Mr Nile |
| Ms Forsythe | Mr Primrose |
| Ms Gardiner | Ms Saffin |
| Mr Kelly | |

In attendance: John Evans, Velia Mignacca, Janet Williams.

Minutes of Meeting No. 3 were confirmed on motion of Ms Forsythe.

The Chair tabled the following correspondence:

Correspondence received:

- (i) Letter dated 14 November 2000 to the Senior Project Officer from Mr Stephen Forbes agreeing to the citizen's right of reply response approved by the Committee.

Correspondence sent:

- (i) Letter dated 7 November 2000 from the Chair to Mr Stephen Forbes seeking agreement to changes proposed by the Committee to the right of reply response.

The Committee deliberated.

Resolved, on motion of Ms Saffin: That the Chair prepare and submit a draft report on the request for a Citizen's Right of Reply by Mr S Forbes, recommending that a response by Mr Forbes, in a form of words agreed to by Mr Forbes and the Committee, be incorporated in *Hansard*.

The Committee continued to deliberate.

Resolved, on motion of Ms Forsythe: That the Report be adopted.

The Committee continued to deliberate.

Resolved, on motion of Ms Gardiner: That the Report be signed by the Chair and presented to the House.

The Committee continued to deliberate.

Resolved, on motion of Mr Primrose: That the Clerk advise the citizen and the Member concerned of the proposed tabling of the Report.

The Clerk briefed the Committee on procedural problems with the adoption of reports from the Committee on a citizen's right of reply.

Resolved, on motion of Revd Mr Nile: That the Committee request the Clerk of the Parliaments to write to the Leader of the House suggesting changes to the procedure.

The Committee adjourned at 2.28 p.m. *sine die*.

Velia Mignacca

Senior Project Officer