

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS  
OFFICE OF PARLIAMETARY COUNSEL

**Question No. 59**

**Senator Brandis asked the following question at the hearing on 18 October 2011:**

**Senator BRANDIS:** I have only one question for you, Mr Quiggin. Was your office responsible for drafting the Migration Legislation Amendment (Offshore and Other Measures Bill) 2011—that is, the government's bill to deal with the High Court's decision about the Malaysia solution—which was ultimately not proceeded with by the government?

**Mr Quiggin:** Yes.

**Senator BRANDIS:** From whom did you take instructions? Was it from the department of immigration or was it from any other department or agency?

**Mr Quiggin:** The department of immigration was the instructing department for that bill.

...

**Senator BRANDIS:** Can you produce, please—and you may want to take this on notice—a copy of the drafting instructions you were given?

**Mr Quiggin:** I would need to take that on notice.

**Senator BRANDIS:** I might say, Mr Quiggin, in informing your thinking about whether you want to make any objection, that the bill is a public document and copies of the draft of the bill when it was still in an iterative stage were provided to Mr Abbott, Mr Morrison and me on 16 September by your client department. So if there is any privilege issue, your client has waived that privilege by providing—

**Senator Ludwig:** It is a bold claim, Senator Brandis, and Mr Quiggin has taken it on notice. He may have to refer to the primary department which has given him the instructions for determining—

**Senator BRANDIS:** We are not talking about legal advice here.

**Senator Ludwig:** It is still advice to government.

**Senator BRANDIS:** We are not talking about legal advice here. What I am asking about is instructions in relation to the preparation of a legislative instrument which was provided to the opposition at an iterative stage and which is now a public document. That is all.

**Senator Ludwig:** I understand what you are asking for, and I have just said that it will be taken on notice.

**CHAIR:** You are actually asking for the drafting instructions, so Mr Quiggin is going to take that on notice.

**Senator BRANDIS:** Thank you.

**The answer to the honourable senator's question is as follows:**

In 2009, the Federal Court in *State of New South Wales v Betfair Pty Ltd* (2009) 261 ALR 311 found that legal professional privilege attached to documents sent between instructors and drafters in the development of legislation. Consequently, it is considered that the documents requested by the Committee are covered by legal professional privilege. Our instructors, the Department of Immigration and Citizenship, have advised that they do not wish to waive this privilege.

Consequently, we are not in a position to provide the documents sought by the Committee.