

Senate Select Committee on Covid-19
Answers to questions on notice
Agriculture, Water and the Environment Portfolio

Committee: Senate Select Committee on Covid-19
Inquiry: Australian Government's response to the COVID-19 pandemic
Question No: 1
Hearing Date: 18 August 2020
Division/Agency: Department of Agriculture, Water and the Environment
Topic: Granting of pratique
Hansard Page: 13
Question Date: 18 August 2020
Question Type: Spoken

Senator Keneally asked:

Senator KENEALLY: By whom? What I'm trying to get to, Mr Metcalfe, is that you can't tell me, from a human biosecurity standpoint, who said, 'Yes, it's okay for people to leave this ship'?

Mr Metcalfe: I'm saying that I had two officers on the ship.

Senator KENEALLY: Okay, which one of them did it?

Mr Metcalfe: One of those officers indicated—

Senator KENEALLY: When?

Mr Metcalfe: Sometime around 6.30, 6.45.

Senator KENEALLY: But there is no evidence that suggests that happened?

Mr Metcalfe: That's what I understand, Senator. I will take that on notice—

Senator KENEALLY: But there is no evidence that can suggest that happened. What I am trying to get to is—

Mr Metcalfe: Well, it's very clear that the passengers—

Senator KENEALLY: Is it possible that vessel operator thought that the ABF had that authority?

Mr Metcalfe: Oh, I see.

Senator KENEALLY: Is it possible that this whole thing is a giant misunderstanding over who has what responsibility? No fault on the ABF—they were acting in accordance with their act. Who said, from a human biosecurity standpoint, 'It is okay for passengers,' in the middle of a global pandemic, 'to leave this ship'?

Mr Metcalfe: I would just repeat that the practical pratique was granted, and one way that it was granted was by my officers not seeking to prevent the departure. So they were on the vessel—

Senator KENEALLY: So it was a sin of omission, not a sin of commission; they failed to do something.

Mr Metcalfe: There was a dynamic situation. There were thousands of people waiting to get off a ship. There were lots of things happening. Our officers were there together. I'm not in any way resiling from the fact that the decision about pratique was a matter for my officers, that my officers were on the ship and that, according to the statement that the Commonwealth made to the commission, practical pratique was granted by the department.

Senator KENEALLY: The submission from the Commonwealth assumes it was granted, because of the fact that people got off the ship. But it doesn't say it happened, it doesn't say when and it doesn't say who authorised it.

Mr Metcalfe: It says:

In that sense, there was a practical granting of pratique to allow passengers to depart ...
The sentence is very clear.

Senator KENEALLY: I get that, but it still doesn't tell me who did it.

CHAIR: Mr Metcalfe, could your officers not have known and people had left the ship? Is that a circumstance that could have occurred? I think that is what—

Senator KENEALLY: Based on the fact that they were given clearance from a customs and migration standpoint.

Mr Metcalfe: I will take the precise question on notice because I understand where you're coming from and I will need to get people to go back and check the precise record. But I still don't think it changes the situation that the Commonwealth has made clear—that there was a practical granting of pratique, that there were biosecurity officers on the vessel and they did not prevent people from disembarking.

Answer:

At 7:37am a biosecurity officer updated the Maritime Arrivals Reporting System which then automatically issued a Biosecurity Status Document to the ship's operator, thereby formally communicating that grant of pratique at 7:39am. Prior to this, practical pratique was granted in that there were biosecurity officers on the vessel and they did not prevent people from disembarking. The context around the grant of pratique will be provided in *Additional written QoNs – Australian Government's response to COVID-19 pandemic*.

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Answers to questions on notice
Agriculture, Water and the Environment Portfolio

Committee: Senate Select Committee on Covid-19
Inquiry: Australian Government's response to the COVID-19 pandemic
Question No: 2
Hearing Date: 18 August 2020
Division/Agency: Department of Agriculture, Water and the Environment
Topic: Minister Littleproud's interview on ABC Radio National
Hansard Page: 29
Question Date: 18 August 2020
Question Type: Spoken

Senator Keneally asked:

Senator KENEALLY: That's not what he said in the interview. If a minister made that same statement in parliament, would the department advise him that he had misled the parliament and he ought to correct the record?

Mr Metcalfe: I'd need to see the totality of what the minister said, so it is hypothetical from that point of view. But I'm very comfortable that the minister absolutely understands the many functions of the department.

Senator KENEALLY: Are you taking that on notice then?

Mr Metcalfe: I think it's a hypothetical question that you've asked me, and I can't really respond to that.

CHAIR: Does your department monitor the minister's media performances? I'm sure you have an entire unit that does that?

Mr Metcalfe: We monitor not only his but others as well.

CHAIR: Indeed, but not that one.

Senator KENEALLY: Can you please take on notice: When was the minister last briefed on the Biosecurity Act? Have you advised, or will you advise, the minister that the Biosecurity Act deals with human health? And will you take on notice to review his transcript and provide clarification of what he meant when he said:

Well let me make this clear, that federal agricultural agency only looks after plants and animals; they don't look after human health.

Mr Metcalfe: I'll take all of that on notice.

Answer:

The Minister was sworn in as Minister for Agriculture, Drought and Emergency Management on 6 February 2020 and was provided a briefing on all department responsibilities at this time.

The department provides regular briefings to the Minister and his staff on all department matters including biosecurity. As the response to COVID-19 progressed, the department provided more detailed briefings and updates on hot issues relating to COVID-19 and biosecurity.

The Minister is focused on the principal functions of the department's biosecurity officers being plant and animal risk management. He is aware of biosecurity officers' roles in performing human health functions for other agencies such as the Department of Health.

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Committee: Senate Select Committee on Covid-19
Inquiry: Australian Government's response to the COVID-19 pandemic
Question No: 3
Hearing Date: 18 August 2020
Division/Agency: Department of Agriculture, Water and the Environment
Topic: Managing human health risks and human biosecurity risks
Hansard Page: 30
Question Date: 18 August 2020
Question Type: Spoken

Senator Keneally asked:

Senator KENEALLY: Thank you, Mr Metcalfe. In your last appearance here I asked you what value the Department of Agriculture adds in relation to managing human health risks and human biosecurity risks. At the time, you said:

I'd say we're a little bit more than a postbox, but only a little bit.

Given that Commissioner Walker's report paints a picture of a 'scheme (if it deserves that label)' that represents an overlapping and at times confused set of responsibilities and authority, has the department prepared any advice for government as to whether or not Agriculture remains the best placed agency to continue to hold responsibility for human health inspections and granting pratique in relation to human biosecurity?

Mr Metcalfe: Not to my knowledge, but I'll take that on notice to check, absolutely. But, as far as I know, the view is that the current arrangements, where we effectively provide information to health authorities and receive advice from them, will continue to remain. I did indicate in my opening statement today—and we've made it plain, and I think it's picked up in the commissioner's report; it's picked up in our submissions—that the department has undertaken a number of arrangements in consultation with the Department of Health and, through them, with the AHPPC with the states and territories. Ms Canning mentioned the new arrangements that have been in place since the end of July.

Answer:

No.

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Committee: Senate Select Committee on Covid-19
Inquiry: Australian Government's response to the COVID-19 pandemic
Question No: 4
Hearing Date: 18 August 2020
Division/Agency: Biosecurity Operations Division
Topic: Commonwealth's position with Commissioner Walker
Hansard Page: 30/31
Question Date: 18 August 2020
Question Type: Spoken

Senator Keneally asked:

Senator KENEALLY: Thank you for that. I refer to a transcript of a media conference published on the Prime Minister's website on 21 April. The Prime Minister was asked if the Commonwealth would guarantee to provide full cooperation and not take efforts to stymie Commissioner Walker getting evidence from Commonwealth agencies, and the Prime Minister replied, 'We always cooperate with royal commissions.' When asked if the Commonwealth would rule out going to the High Court to try to stop this, the Prime Minister responded, 'We are always cooperating with royal commissions.' I note that on 1 July Commissioner Walker requested a federal Department of Agriculture official to attend the inquiry. That was refused on 3 July by the Australian Government Solicitor. On 7 July, Commissioner Walker issued a legal summons for Ms Joseph. On 8 July, the Australian Government Solicitor rejected the summons. On 10 and 11 July, the Australian Government Solicitor wrote to the special commission of inquiry threatening to take legal proceedings in the High Court of Australia to oppose the legal summons for Ms Joseph, a federal Department of Agriculture employee. All up, there were 17 letters in total exchanged between the Australian Government Solicitor and the special commission of inquiry. The commissioner referred to it as a 'waste of time and resources'. I won't ask you your opinion, unless you want to offer it, of Commissioner Walker's comments in that paragraph. He goes on to say:

The one fly in the ointment so far as assistance to this Commission goes, is the stance of the Commonwealth ... Quite how this met the Prime Minister's early assurance of full co-operation with the Commission escapes me.

Mr Metcalfe, at any point since 21 August, has the Department of Agriculture provided written or verbal advice to the minister for agriculture or his office, or any other minister, office or department in the government, about the decisions to refuse a request, refuse a summons and threaten legal action in the High Court in relation to the federal Department of Agriculture employee Ms Joseph?

Mr Metcalfe: I think you said 21 August, but it's 21 April.

Senator KENEALLY: 21 April—sorry.

Mr Metcalfe: Yes, we obviously worked very closely with the Australian Government Solicitor, who was representing the interests of the Commonwealth agencies involved—notably us, Border Force and Home Affairs, and the Department of Health. So of course there was engagement with the Australian Government Solicitor through that period.

Senator KENEALLY: Can that advice be tabled, please.

Mr Metcalfe: I suspect that there would be legal professional privilege associated with it, but I will take that on notice.

Senator KENEALLY: Thank you. Who made the decision to refuse the request, to refuse the

summons and to threaten to take legal proceedings in the High Court of Australia to oppose the legal summons issued by Commissioner Walker.

Mr Metcalfe: The Commonwealth's position, I think, has been made clear in correspondence between the Attorney-General and the shadow Attorney-General, which talks about the longstanding principle of the approach that the Commonwealth has taken in relation to state inquiries.

Senator KENEALLY: But was it a government decision? We understand that. Was it a government decision?

Mr Metcalfe: Effectively, the Australian Government Solicitor put into effect the decision of the Commonwealth government.

Senator KENEALLY: And was that decision taken by cabinet or a subcommittee of cabinet?

Mr Metcalfe: I'll take that on notice. It's an issue that I'd need to take advice on.

Senator KENEALLY: While you're taking that on notice—

Mr Metcalfe: I just would point out, though, that there was extensive cooperation with the commission, on a voluntary basis.

Senator KENEALLY: I'm not asking that. I'm reflecting upon—

Mr Metcalfe: There were over 2,400 pages of material provided—

Senator KENEALLY: That's not my question. I've read them.

Mr Metcalfe: But I just wanted to—

Senator KENEALLY: I may be one of the few people, besides Commissioner Walker, in the country who has read them.

Mr Metcalfe: Yes. I just thought it was important to indicate—

Senator KENEALLY: What role—

Mr Metcalfe: that there has been extensive cooperation.

Senator KENEALLY: Can you also take on notice: what role, if any, did the minister for agriculture or his office, the Attorney-General or his office or department, or the Prime Minister or his office or department play in the decisions to refuse the request, refuse the summons and to threaten to take legal action in the High Court?

Mr Metcalfe: I think I could take on notice issues relating to my portfolio, but, in relation to other portfolios, you may need to—

Senator KENEALLY: You just said you outlined discussions you'd had with other agencies.

CHAIR: I can perhaps provide some assistance, Mr Metcalfe. You can take them on notice and refer them to the relevant agencies if you feel that they don't fall within your responsibilities.

Mr Metcalfe: Thank you, Chair. I'll do that.

Answer:

1. *Can that advice be tabled?*

The advice is subject to legal professional privilege. It is a long-standing practice of successive Australian Governments to not disclose privileged legal advice. It is essential that, where real harm may flow from the waiving of privilege, legal advice provided to the Commonwealth remain confidential. The release of this legal advice is both contrary to the public interest and would cause material harm to the Commonwealth.

In keeping with Government's practice, to ensure that privilege is not waived and material harm is not caused to the Commonwealth, we are not in a position to table that advice.

The following relevant information is also provided to the Committee.

It is the Commonwealth's longstanding position that neither it, nor its officers, usually appear as witnesses before such bodies. Notwithstanding this well-established general

position, the Commonwealth voluntarily cooperated with the Commission, noting the significant matters it was inquiring into.

The Commonwealth has actively cooperated with the Commission by providing a detailed Voluntary Statement and three subsequent Voluntary Submissions responding to specific questions and invitations from the.

The Voluntary Statement and Submissions were accompanied by a considerable number of policy and operational documents, and relevant correspondence to assist the Commission, over 2428 pages.

The Commonwealth cooperated with the Commission consistent with historical levels of participation in State and Territory inquiries.

The Commonwealth proceeded on the basis of that position in relation to officers' attendance in response to the request and the summons of the Commission. No legal action was commenced, as the Commission excused attendance of the officer following the provision of a further voluntary submission by the Commonwealth on 16 July 2020.

2. And was that decision taken by cabinet or a subcommittee of cabinet?

Release of information which may have the effect of disclosing the deliberations of Cabinet may compromise the ability to confidentially brief the government. Release of these documents could set a precedent and may materially impact of the functioning of the government, as confidentiality enables frank advice and consequently fully informed decision making.

In these circumstances, the Government considers that the harm that may occur in relation to disclosure of Cabinet deliberations outweighs the public interest in tabling information about any decisions taken by cabinet or a subcommittee of cabinet.

3. Can you also take on notice: what role, if any, did the minister for agriculture or his office, the Attorney-General or his office or department, or the Prime Minister or his office or department play in the decisions to refuse the request, refuse the summons and to threaten to take legal action in the High Court?

Under the *Legal Services Directions 2017* the Attorney-General is required to approve the Commonwealth either submitting to, or objecting to, the jurisdiction of a state tribunal such as the Commission. Approval to object to the jurisdiction of the Commission was granted by the Attorney-General on 8 July 2020. Questions in relation to this should be directed to the Attorney-General's Department.

Minister Littleproud wrote to the Prime Minister on 10 July 2020 indicating support for the understood Commonwealth position on the jurisdiction of state tribunals.

No legal action was commenced, as the Commission excused attendance of the officer following the provision of a further voluntary submission by the Commonwealth on 16 July 2020.

Release of these documents could set a precedent and compromise the ability to confidentially brief the government and may materially impact the functioning of government as confidentiality enables frank advice and consequently fully informed decision making. In these circumstances providing further information and documents would compromise privileged Commonwealth legal advice and is both contrary to the public interest and would cause material harm to the Commonwealth.

4. You just said you outlined discussions you'd had with other agencies.

CHAIR: I can perhaps provide some assistance, Mr Metcalfe. You can take them on notice and refer them to the relevant agencies if you feel that they don't fall within your responsibilities.

Copies of Minister Littleproud's letter on 10 July 2020 were provided to the Attorney General, the Minister for Health and the Minister for Home Affairs.