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Submission to the Senate Legal and Constitutional Affairs Committee
Inquiry into a Claim of Public Interest Immunity Raised over Documents

Terms of Reference

A claim of public interest immunity raised over documents tabled by the Assistant Minister for Immigration and Border Protection (Senator Cash), on 4 December 2013, in response to an order for production of documents and other documents tabled by the same Minister in relation to other orders for production of documents concerning immigration policy, with particular reference to:

a. the specific matters of public interest immunity being claimed by the Minister for Immigration and Border Protection; and
b. the authority of the Senate to determine the application of claims of public interest immunity.

Background

In relation to border protection information, the Minister for Immigration and Border Protection provided a response to the Chair of the Legal and Constitutional Affairs Legislation Committee, rather than to the Senate, providing copies of press releases and transcripts of media conferences and offering a confidential briefing to senators by the operation commander. A claim for other documents not to be provided in the public interest was advanced, citing possible damage to national security, defence, or international relations, and possible prejudice to law enforcement or protection of public safety as the grounds for the claim. (Source: Procedural Information Bulletin No.276)

Further to the response to the order of the Senate of 14 November 2013 (see Bulletin No. 276) Senator Hanson-Young, also on behalf of Senator Carr, moved a motion noting that only publicly available information had been presented and that the order had not been complied with. A further deadline was imposed and the Senate indicated that it did not accept the claims of public interest immunity or the grounds for making them (which included possible damage to national security, defence, international relations and possible prejudice to law enforcement or danger to the physical safety of persons). The same documents were again tabled by the new deadline and the same claims of public interest immunity advanced. (Source: Procedural Information Bulletin No.277)

Enough of Executive Arrogance?: Egan v Chadwick and Others

Harry Evans posed the question above in an article published in the Constitutional Law and Policy Review in May 1999. Quoting Spigelman CJ in *Egan v Chadwick and others* (1999) NSWCA 176 (10 June 1999), the further question was asked:

Is it reasonably necessary for the proper exercise of the functions of the Legislative Council of New South Wales, for its power to require production of documents to extend to documents which, at common law, would be protected from disclosure on the grounds of legal professional privilege or public interest immunity?

The majority judgement, upon a comprehensive study of precedents, thought to impose one restriction upon the council's powers. That is, as responsible government requires the collective responsibility of cabinet and the confidentiality of cabinet deliberations, the council may not require the production of documents which record the deliberations of cabinet. Evans noted however that Ministers cannot simply turn all documents into cabinet documents "by wheeling them through a cabinet meeting".

Furthermore, Evans pointed out by quoting the other Justice Priestley JA that:

Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.… notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no legal right to absolute secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy.

Source: http://www.aph.gov.au/binaries/senate/pubs/pops/pop52/13_enough_of_executive_arrogance.pdf

What has the Federal Court recently said on a Claim of Public Interest Immunity?

In CAMPBELL & ANOR v AUSTRALIAN CRIME COMMISSION [2013] FCCA 2085 *the court on the topic of* public interest immunity said [at para.33] " the Court will not order the production of a document, although relevant and otherwise admissible, if its disclosure would be injurious to the public interest: *Sankey v Whitlam*[1978] HCA 43; (1978) 142 CLR 1 at 38".

Furthermore, [at para.33] referencing *Police Federation of Australia v Nixon* [2011] FCAFC 161; (2011) 198 FCR 267 "the Full Court of the Federal Court described the steps a court should take when deciding a claim for public interest immunity:

... When a claim of public interest immunity is made, the Court must embark upon a three stage process. It must:
1. determine whether there is a public interest in the disclosure of the information in question;
2. determine whether there is a public interest in the non-disclosure of the information in

question; and
3. if there are public interests both for and against disclosure, balance the public interest in disclosure against the public interest in non-disclosure, in order to decide whether or not the information should be disclosed. (at 287 [81])"

Secrecy provisions: Policy and practice

The Hon Justice SC Kenny examined the topic above during a speech given on 24 March 2011, as published (FCA) [2011] FedJSchol 10

Paraphrasing the Hon Justice, "*in order to appreciate the role that these secrecy provisions will play in the foreseeable future, it is instructive to refer to history. There have been three major recent developments.*

Firstly, open government. It is in *"some kind or another, here to stay for the foreseeable future. If openness in government is desirable, however, it cannot be entirely unlimited. Secrecy too is essential to governing in some circumstances. The difficult question is just how to strike the balance".*

Secondly, the widespread use of the Internet. Noting that *"much Commonwealth information is readily available through search engines that locate it in minutes. This makes public access to government information practicable, cheap, and efficient".*

Thirdly, globalisation. Noting that *"article 19 of the International Covenant on Civil and Political Rights apparently requires that secrecy provisions be of a specific kind, made in pursuit of a legitimate end and proportionate to that end, in order to be a justifiable restriction on the right to freedom of expression".* So it is *"clear enough that (this) has the potential to affect domestic attitudes to what is and is not permissible with respect to government secrecy".*

Finally, WikiLeaks. It *"has brought the issue of government secrecy into the limelight; and has galvanized opinions across the generations and sectors of society".* In conclusion, *"secrecy provisions can have an important role to play in effective governance, but that their retention depends upon some principled justification compatible with the contemporary conception of participatory democracy".*

Recent 'On-Water' Developments

As reported in The Australian newspaper (8 – 11 January 2014), two asylum boats were recently either turned back or towed back from Australia's territorial seas near Melville island and Ashmore islands to the edge of the Indonesia's territorial seas near Rote Island.

What certainly invites valid parliamentary discussion with disclosure of documents is the reported towbacks/turnarounds from the edge of Australia's Contiguous Zone, 24 nautical miles (nm) offshore, then across the High Seas right up to the edge of Indonesia's Territorial Sea, 12 nm off Rote Island. A point of clarity: Australia (as does Indonesia) has sovereignty

inside its 12nm Territorial Seas, and may exert immigration control inside its 24nm Contiguous Zone. Beyond that 24nm point, Australia has no jurisdiction over foreign-flagged boats on the High Seas. There is no treaty, no customary law, and no bilateral agreement with Indonesia that gives our Navy any authority over irregular migrants on Indonesian-flagged boats.

From Ashmore (12 degrees South, 123 degrees East) to Rote (11 degrees South, 123 degrees East) is a distance of 60 nm (111 kilometres). From Melville (12 degrees South, 130 degrees East) to Rote is a distance of 416 nm (771 kilometres). So on both occasions, once beyond the 24 nm point from Ashmore/Melville, the Navy has allegedly exerted its force over many ocean miles potentially in breach the international Law of the Sea (LOSC). This issue is separate to any potential issue of *non-refoulement* under the UN Refugee Convention. The Navy's interception, its *right of visit* on these boats under Article 110 LOSC may have ceased to have any legality beyond Australia's Contiguous Zone. On the High Seas, it is Indonesia, the Flag State of the two boats that would have sole maritime jurisdiction.

For hundreds of years the High Seas have furnished a way of passage for navigators. The Parliament has valid interest to examine documents covering the exercise of Executive power in the context of LOSC (to which Australia is a signatory), especially at a time when the Executive is lecturing China on its proclamation of an air navigation zone in the North China Sea area.

Thank you for this opportunity to make a submission.

Yours sincerely

Greg Hogan