

CHAPTER 2

The Senate's authority to determine claims of public interest immunity and the claim before the committee

2.1 In referring the claim of public interest immunity made by the Minister representing the Minister for Immigration and Border Protection (Senator the Hon Michaelia Cash, Assistant Minister for Immigration and Border Protection) on 4 December 2013 to the committee, the Senate requested that the committee inquire into 'the authority of the Senate to determine the application of claims of public interest immunity'.¹ This chapter examines that matter; it then addresses the term of reference relating to the specific grounds of public interest immunity raised by the government in relation to certain immigration documents.

The source of the Senate's authority

2.2 Section 49 of the Australian Constitution provides:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

2.3 As explained in the thirteenth edition of *Odgers' Australian Senate Practice* (*Odgers*), '[t]he effect of this provision is to incorporate into the constitutional law of Australia a branch of the common and statutory law of the United Kingdom as it existed in 1901, and to empower the Commonwealth Parliament to change that law in Australia by statute'.²

2.4 In advice to the committee, the Clerk of the Senate, Dr Rosemary Laing, further explained:

Partial declarations have occurred in the *Parliamentary Papers Act 1908* and the *Parliamentary Privileges Act 1987* but, otherwise, the powers, privileges and immunities of the Senate are as conferred in 1901.³

2.5 Supporting one of the major functions of the Houses, namely to 'inquir[e] into matters of concern as a necessary preliminary to debating those matters and legislating in respect of them',⁴ is the power of the Houses conferred by section 49 of the

1 *Journals of the Senate*, No. 9—10 December 2013, p. 307.

2 Harry Evans, Rosemary Laing, eds., *Odgers' Australian Senate Practice*, thirteenth edition, Department of the Senate 2012, p. 39.

3 Dr Rosemary Laing, Clerk of the Senate, *Advice to the Legal and Constitutional Affairs References Committee*, 7 January 2014, pp 1–2.

4 *Odgers*, p. 75.

Constitution to conduct inquiries by 'compelling the attendance of witnesses, the giving of evidence and the production of documents'.⁵

2.6 Although there are no known legal limitations to the Senate's power to compel evidence and impose penalties for default, there are limitations 'observed as a matter of parliamentary practice' and which correspond to 'some possible legal limitations'.⁶ In particular, the Clerk noted that:

It has been suggested that the inquiry power may be confined to subjects in respect of which the Commonwealth Parliament has power to legislate...The other probable limitation is on the power of the Houses to summon witnesses in relation to members of other Houses, including a house of a state or territory legislature.⁷

2.7 At times, executive governments claim that they have the right to withhold information from the legislature on the basis that disclosure of the information would not be in the public interest.⁸ Such claims are referred to as claims of public interest immunity.⁹ As the Clerk noted, '[i]t has long been recognised that there is information held by government that it would not be in the public interest to disclose'.¹⁰ However, claims of public interest immunity may be contested.

2.8 In advice to the committee, the Clerk noted that the courts have never adjudicated a claim of public interest immunity in respect of parliamentary proceedings and it is unlikely the courts ever would as '[i]t has been accepted that the struggle between competing principles of the executive's claim to confidentiality and the parliament's right to know must be resolved politically'.¹¹ The Clerk explained that:

Developments in the courts and under amendments to freedom of information legislation, both supporting greater disclosure, have not necessarily been echoed in parliamentary practice, but the Senate has continued to assert the right to determine public interest immunity claims,

5 *Odgers*, pp 74–75.

6 Evans, H., *The Senate's Power to Obtain Evidence*, November 2008, p. 2. See pages 2–4 for full explanation of the limitations that have some parliamentary recognition and the possible legal limitations.

7 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, pp 3–4.

8 Evans, H., *The Senate's Power to Obtain Evidence*, November 2008, p. 5.

9 The Clerk explained to the committee that a claim of public interest immunity before a court is a very different thing from a claim of public interest immunity before a parliament: 'It is really only by analogy to a court that we use the term "public interest immunity" in parliamentary contexts. It is not a legal right, or a defined set of legal principles. Before a court, things are very different, because you are talking about matters of law.' Source: Dr Rosemary Laing, Clerk of the Senate, *Proof Committee Hansard*, 31 January 2014, p. 7.

10 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 5.

11 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, 7 January 2014, p. 8. See also, *Odgers*, pp 596–597.

including in a 1975 resolution agreed to at the height of the overseas loans affair.¹²

2.9 The 1975 resolution referred to by the Clerk stated that it is for the Senate to determine claims of public interest immunity made by the executive:

(1) That the Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.

(2) That, subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.

(3) That the fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.

(4) That, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim.¹³

2.10 By resolution on 13 May 2009, the Senate set out a process to be followed when a claim of public interest immunity is contemplated.¹⁴ The resolution requires that claims of public interest immunity are made by ministers, rather than public servants, and that claims are backed up with some explanation including a statement of the harm to the public interest that could ensue from production of the information.¹⁵ The Clerk explained that the process established by the 2009 resolution is:

...a means to balance competing public interest claims by government on the one hand, that certain information should not be disclosed because disclosure would harm the public interest in some way, and by parliament's claim, as a representative body in a democratic polity, to know particular things about government administration, so that the parliament can perform

12 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 8.

13 Journals of the Senate, No. 87—16 July 1975, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fjournals%2F1975-07-16%2F0005;orderBy= fragment_number.doc_date-rev;page=22;query=Dataset%3Ajournals%20Decade%3A%221970s%22;rec=0;resCount=Default, (accessed 10 February 2014).

14 How contested claims of public interest immunity should be considered has been the subject of debate for many years however, the latest resolution of the Senate is that of 13 May 2009. See *Odgers'*, pp 602–610 for a discussion of early cases and pp 610–623 for more recent cases.

15 Dr Rosemary Laing, Clerk of the Senate, *Proof Committee Hansard*, 31 January 2014, p. 4.

its proper function of scrutinising and ensuring accountability for expenditure and administration of government programs.¹⁶

2.11 Following a review of the operation of the 13 May 2009 order, in its third report of 2009, the Procedure Committee explained:

The order does not specify the public interest grounds on which information might be withheld, as the categories of such grounds, while well known, are not closed, in that it is conceivable that new grounds could arise. The order also does not prejudge any particular circumstance in which a claim may be raised, but leaves the determination of any particular claim to the future judgment of the Senate.¹⁷

2.12 *Odgers* further explains that the Senate has 'not developed agreed procedures or criteria for determining whether a claim for public interest immunity should be granted'.¹⁸

Refusals to provide information and claims of public interest immunity

2.13 The provision of information to parliament 'is a major way in which the executive branch of government demonstrates its accountability to the parliament and by which government performance is measured'.¹⁹ Where there is a contested claim to information in the public interest:

There are parliamentary mechanisms...such as the receipt of evidence *in camera* or the provision of confidential briefings, which balance the right of the body of elected representatives to know against the public interest in that particular information remaining confidential.²⁰

2.14 In cases where the executive refuses to comply with orders for the production of information or documents, under section 49 of the Constitution, the Houses of Parliament have the power to punish for contempt, 'a power which complements the inquiry power by providing for its effective enforcement'.²¹ The Clerk noted, however, that 'the Senate has not used the contempt power in relation to orders for production of documents'²² nor has it sought to enforce claims of public interest immunity with its contempt power. Rather, in the latter case, the Senate has sought remedy via political or procedural means:

16 *Proof Committee Hansard*, 31 January 2014, p. 4.

17 Procedure Committee, *Third report of 2009*, August 2009, p. 1.

18 *Odgers*, pp 596–597.

19 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 5.

20 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, pp 5–6.

21 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 3.

22 *Proof Committee Hansard*, 31 January 2014, p. 2.

The Senate has never conceded that claims of public interest immunity by ministers are anything other than claims, not established prerogatives, but it has not sought to enforce them using its contempt power. Instead, it has applied political or procedural penalties, or has pursued other means of obtaining the information, including by instructions to committees to hold hearings and take evidence from particular witnesses.²³

2.15 Political penalties may include:

- unrelenting political attack;
- censure motions, either directed at a particular minister or the government in general; and
- the extension of question time until a certain number of questions have been asked and answered.²⁴

2.16 Procedural penalties may include:

- requirements for ministers to provide explanations to the Senate, usually with a right for other senators to move motions without notice in relation to the explanation or failure to provide it;
- motions delaying the consideration of specified legislation until the information has been provided (used in 2009 to delay legislation on the national broadband network); and
- other limitations on the ability of a minister to act and be heard in relation to portfolio business.²⁵

2.17 In addition to these procedural penalties, 'other responses have included declaratory resolutions stating that claimed public interest grounds, particularly such novel ones as "confusing the public debate" or "prejudicing policy consideration" are not grounds for acceptable claims'.²⁶ The Clerk also cited additional committee inquiries to pursue sought after information, including the use of *in camera* hearings if necessary as '[p]robably the most effective response over the years' as the 'inherent flexibility of committees often allows an accommodation to be reached between the competing interests of the Government and the Senate'.²⁷

23 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 7.

24 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 7.

25 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 8.

26 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 8.

27 Dr Rosemary Laing, *Advice to the committee*, 7 January 2014, p. 8.

The claim before the committee

2.18 As noted in chapter 1, in response to the Senate's 3 December 2013 order for the production of documents,²⁸ on 4 December 2013 the Minister representing the Minister for Immigration and Border Protection (Senator Cash) tabled letters from both herself and the Minister for Immigration and Border Protection claiming that the government had complied with the order by tabling a substantial amount of information on 18 November 2013, and offering to provide confidential briefings to opposition and Australian Greens senators.²⁹

2.19 The Minister representing the Minister for Immigration and Border Protection (Senator Cash) explained that, in relation to the other documents for which the order called, they should be withheld from the Senate on the grounds of public interest immunity.³⁰ The particular grounds of public interest immunity on which the government's claim relied were outlined as follows:

I advise that the grounds are as follows: material the disclosure of which could reasonably be expected to cause damage to national security, defence or international relations, including disclosure of documents or information obtained in confidence from other governments; and material relating to law enforcement or protection of public safety which would or could reasonably be expected to prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance, endanger the life or physical safety of persons, disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches or evasions of the law the disclosure of which would or would reasonably be likely to prejudice the effectiveness of those methods or procedures or prejudice the maintenance of enforcement of lawful methods for the protection of public safety.³¹

2.20 In evidence before the committee, the Minister for Immigration and Border Protection, the Hon Scott Morrison MP outlined the categories of information covered

28 The order of the Senate of 3 December 2013 resolved that the government had failed to comply with the order for the production of documents of 14 November 2013; again ordered the production of those documents; and rejected the grounds of public interest immunity put forward by the government.

29 Senator the Hon Michaelia Cash, Assistant Minister for Immigration and Border Protection, *Letter to the Clerk of the Senate*, 4 December 2013, p. 1, the Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Letter to the Chair, Senate Legal and Constitutional Affairs Committee*, 4 December 2013, p. 1.

30 Senator the Hon Michaelia Cash, Assistant Minister for Immigration and Border Protection, *Senate Hansard*, 4 December 2013, p. 67.

31 *Senate Hansard*, 4 December 2013, pp 67–68.

by the Senate's order for the production of documents.³² The minister explained the government's position that disclosure of this information:

...would prejudice current and future operations, put people at risk who are involved in our operations and unnecessarily cause damage to Australia's national security, defence and international relations.³³

2.21 The minister further stated:

[I]n the government's view it would not be in our national interest or the public interest to disclose this information that would impede our ability to continue to stop the boats...The way we manage information is an important part of this operation...to comply with the request would impede the continued success of our operations. In my view this would be reckless and irresponsible especially given the significant progress that is being made.³⁴

2.22 During debate following the assistant minister's claim, both the Australian Greens and the opposition acknowledged that there will be 'times when information must not or cannot be fleshed out thoroughly'³⁵ and that there are genuine issues of commercial secrecy and national security that 'require there not be public disclosure'.³⁶ Those circumstances, however, must always be balanced against the rights of both the parliament and the public to know:

There is a fundamental principle at stake here—that is, the legitimate function of this parliament to actually ask questions and have them answered. It is a legitimate function of the parliament.³⁷

2.23 To test the veracity of the government's claim of public interest immunity, the committee sought to determine the nature of the documents being withheld by requesting a schedule of the documents that fell within the scope of the order and which were covered by the claim. In response to this request, the Secretary of the Department of Immigration and Border Protection stated that 'although a schedule could be produced':

32 According to the minister, 'the information sought in the orders for the production of documents covered a broad range of operational information, which includes but is not limited to on-water tactics, training procedures, operational instructions, specific incident reports, intelligence, posturing and deployment of assets, timing and occurrence of operations and the identification of individual attempted voyages, and passenger information including nationalities involved in those voyages'. The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Proof Committee Hansard*, 31 January 2014, p. 11.

33 *Proof Committee Hansard*, 31 January 2014, p. 11.

34 *Proof Committee Hansard*, 31 January 2014, p. 11.

35 Senator Sarah Hanson-Young, *Senate Hansard*, 4 December 2013, p. 69.

36 Senator the Hon Kim Carr, *Senate Hansard*, 4 December 2013, p. 69.

37 Senator the Hon Kim Carr, *Senate Hansard*, 4 December 2013, p. 69.

...the redactions would make it unreadable, effectively, given public interest immunity. So, we do not have an outcome to a schedule. We have gone through a process, and my comment specifically says that we could produce a schedule but under the current arrangements redactions would make it unreadable.³⁸

2.24 The department did, however, set out a list of the categories of information that were the subject of the order,³⁹ which included:

- activity summaries;
- internal and external briefings;
- case notes;
- email correspondence; and
- ministerial and Cabinet correspondence.⁴⁰

2.25 The committee questioned the minister about how it could possibly scrutinise and hold to account Operation Sovereign Borders and the Joint Agency Task Force if information would not be provided. The minister responded:

We have provided everything to the Senate that I believe we can provide that does not conflict with the sensitivity of the information that if it were released would put people at risk and for all the other reasons that are outlined.⁴¹

2.26 The minister argued that such matters could also be explored at Senate estimates hearings through questioning of the relevant agencies⁴² and maintained that the government was providing information to the public concerning Operation Sovereign Borders:

On a weekly basis, whether it is a good week or a bad week, we issue a statement which goes into how many people arrived in that reporting period...and are transferred into Immigration authorities, how many people are transferred from Christmas Island or Nauru or Manus Island. That is done on what the population is of the centres, whether on Nauru, Manus Island or Christmas Island. We detail the number of removals, voluntary or involuntary, that may have taken place. These are the key metrics, at the end of the day, of whether this policy is effective—that is, how many people have turned up and we are paying for in detention centres and going through our processing arrangements with our partners in Nauru and Manus

38 Mr Martin Bowles PSM, Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 31 January 2014, p. 23.

39 A copy of the department's letter is at Appendix 3.

40 Mr Martin Bowles PSM, Secretary, Department of Immigration and Border Protection, *Letter to the Legal and Constitutional Affairs Committee*, 29 January 2014, p. 2.

41 *Proof Committee Hansard*, 31 January 2014, p. 21.

42 *Proof Committee Hansard*, 31 January 2014, pp 20 and 44.

Island...What the committee and the Senate has asked us to do, we believe, compromises that capacity to keep doing that good job. We do not believe that that could ever justify releasing this information, given that that would be the outcome.⁴³

Committee view

2.27 The committee acknowledges that there will be occasions where the executive considers that it is not in the public interest for particular information to be disclosed to the parliament and that, where the basis of such a claim is made on accepted grounds, the Senate will acknowledge this claim. Nevertheless, the committee reiterates in the strongest terms the Senate's right to information and emphasises that a claim of public interest immunity made by a minister remains just that: merely a claim. It is for the Senate to consider and accept or reject each claim having regard to the basis upon which it is made.

2.28 In regard to the claim of public interest immunity made by the Minister representing the Minister for Immigration and Border Protection (Senator Cash) on 4 December 2013, the committee's ability to examine the merits of the claim has been frustrated because the committee was not provided with the relevant documents nor the information contained therein, nor even a schedule listing the documents covered by the claim, as explicitly requested from the Department of Immigration and Border Protection. The government was not forthcoming during the course of the inquiry with information in addition to that already tabled in response to the orders for the production of documents, even on an *in camera* basis⁴⁴ or in altered form.⁴⁵ The committee could not therefore consider the validity of the claim that releasing such information would result in 'possible damage to national security, defence, or international relations, and possible prejudice to law enforcement or protection of public safety'.⁴⁶ The government's unwillingness to engage in a meaningful way with this inquiry only serves to heighten the committee's suspicions and concerns about the information sought.

2.29 The committee was also frustrated by statements made by the Minister for Immigration and Border Protection and the Commander of the Joint Agency Taskforce that they would only answer questions they considered to be relevant to the

43 *Proof Committee Hansard*, 31 January 2014, p. 43.

44 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Proof Committee Hansard*, 31 January 2014, p. 13.

45 Mr Martin Bowles PSM, Secretary, Department of Immigration and Border Protection, *Proof Committee Hansard*, 31 January 2014, p. 23.

46 See also, The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Letter to the Chair, Senate Legal and Constitutional Affairs Committee*, 18 November 2013, pp 2–4 (tabled in the Senate on 2 December 2013).

inquiry's terms of reference.⁴⁷ At the public hearing on 31 January 2014, these witnesses were reminded that relevance was a matter for the committee to determine.⁴⁸ This was confirmed in advice provided at the committee's request by the Clerk of the Senate in response to correspondence from Lieutenant General Campbell.⁴⁹ Relevantly, the Clerk's advice stated:

There is nothing in [the] terms of reference that excludes the committee from pursuing relevant inquiries, including in relation to the basis of the claims for public interest immunity and the circumstances giving rise to them, although it is also directed to have "particular reference to" the matters enumerated in paragraphs (a) and (b).

...

With regard to the rule of relevance that applies in the Senate, interpreted by Presidents over many decades, and not disputed by the Senate as a whole, considerable latitude is given. This principle also applies to committee inquiries where committees are expected to undertake comprehensive inquiries on behalf of the Senate. Standing and other orders underpin the ability of senators to carry out their functions as senators and as members of committees. Their purpose is not to unduly restrict senators in carrying out their functions.

The source of the Senate's authority to make rules and orders with respect to the conduct of its proceedings is section 50 of the Constitution. That authority is not constrained by any qualifications.

...

If the correspondence from Lieutenant General Campbell is indicating that officers will decide which questions on notice are relevant and which are not, then the committee should disabuse the Lieutenant General of this misapprehension as soon as possible, given the committee's reporting deadline. If the officer is refusing to answer a question on notice, including on grounds of relevance, then the procedures in [Privilege Resolution 1(10)] apply and the officer's attention should be drawn to them. Indeed, these procedures have been devised for the protection of witnesses and it would clearly be in the witness's interests to comply with them and therefore avoid the risk of being perceived as uncooperative. Such a perception would be contrary to the Government's own guidelines to be

47 See the Hon Scott Morrison MP, Minister for Immigration and Border Protection and Lieutenant General Angus Campbell DSC AM, Commander, Joint Agency Taskforce, *Proof Committee Hansard*, 31 January 2014, pp 10 and 12. See also *Letter from Lieutenant General Angus Campbell DSC AM*, received 6 February 2014 (available: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Public_Interest_Immunity/Additional_Documents).

48 Senator Penny Wright, Committee Chair, *Proof Committee Hansard*, 31 January 2014, p. 13.

49 *Letter from Lieutenant General Angus Campbell DSC AM*, received 6 February 2014 (available: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Public_Interest_Immunity/Additional_Documents).

observed by witnesses before parliamentary inquiries whose stated aim is to "[encourage] the freest possible flow of such information between the public service, the Parliament and the public."⁵⁰

2.30 The committee takes this opportunity to again remind senators, government officials and other stakeholders alike of the Senate's right to know so that it can properly fulfil its scrutiny and accountability functions, and legislate in a fully-informed and considered manner.

2.31 The committee does not consider that the situation it encountered during the course of this inquiry is unique to this particular claim of public interest immunity. Contested claims of public interest immunity have frustrated the Senate on various occasions over many years. However, the committee does note that in this instance the Minister for Immigration and Border Protection and the Minister representing the Minister for Immigration and Border Protection were particularly flagrant in regard to the requests of the Senate. The committee notes the political and procedural remedies that have been applied in the past to resolve such impasses, as outlined in paragraphs 2.15 and 2.16. Given the committee's inability to adequately consider the claim of public interest immunity made by Senator Cash on 4 December 2013 because of the government's refusal to impart further information, the committee can only suggest that the Senate consider these remedies.

2.32 The committee was similarly unable to resolve to its satisfaction the extent to which the Minister for Immigration and Border Protection (Mr Morrison) or the Minister representing the Minister for Immigration and Border Protection (Senator Cash) were apprised of the documents prior to making a claim of public interest immunity over them. Assurances by the minister at the public hearing on 31 January 2014, and by Senator Cash at the additional estimates hearing on 25 February 2014, did not assuage the committee's concerns: it remains unclear if Mr Morrison and Senator Cash sighted all of the documents within scope of the claim for public interest immunity prior to making the claim. The committee recommends that the Senate insist that the Minister representing the Minister for Immigration and Border Protection (Senator Cash) be required to explain the process by which the Minister representing the Minister for Immigration and Border Protection considered the relevant documents and reached a decision to claim public interest immunity over them.

Recommendation 1

2.33 The committee recommends that the Senate should:

- **use the political and procedural remedies outlined in paragraphs 2.15 and 2.16 as possible means to resolve non-compliance with the orders for production of documents and the related disputed claim of public interest**

50 Dr Rosemary Laing, *Advice to Legal and Constitutional Affairs References Committee*, 7 February 2014, pp 1–2.

immunity made by the Minister representing the Minister for Immigration and Border Protection (Senator Cash) on 4 December 2013; and

- **insist that the Minister representing the Minister for Immigration and Border Protection (Senator Cash) be required to explain the process by which the Minister representing the Minister for Immigration and Border Protection considered the documents and reached a decision to claim public interest immunity over them.**

2.34 The committee notes that presently the Senate has no agreed procedures or criteria for determining claims of public interest immunity (see paragraph 2.12). The committee believes without doubt that, in the absence of further consideration and possible reform of current procedures, future disputed claims of public interest immunity will continue to frustrate the Senate. The committee considers and recommends a possible option for reform in chapter 3.