Appendix 4

Advice from the Clerk of the Senate received 7 January 2014 and 7 February 2014

AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE
CANBERRA ACT 2600
TEL: (02) 6277 3350
FAX: (02) 6277 3199
E-mail: clerk.sen@aph.gov.au

cladvcomlcarefs_18727

7 January 2014

Ms Sophie Dunstone
Secretary
Legal and Constitutional Affairs References Committee
The Senate
Parliament House
Canberra ACT 2600

Dear Ms Dunstone

DETERMINATION OF PUBLIC INTEREST IMMUNITY CLAIMS

The committee has sought my advice on several matters in connection with its terms of reference to inquire into a claim of public interest immunity advanced by the Minister for Immigration and Border Protection, and related matters.

The claim has arisen in response to a number of orders for production of documents concerning the Government's border protection policies and practices. The Assistant Minister for Immigration and Border Protection, Senator Cash, has provided some documents to the Senate, principally consisting of press releases by the minister, but has resisted greater or full compliance with the orders on various public interest grounds. Against this background, the committee seeks my advice on matters going to the powers, practices and procedures of the Senate.

The source of the Senate's powers to obtain information and documents

To begin at the broadest level, the Australian Constitution mandates a system of parliamentary government under which the executive government established by Chapter II of the Constitution is responsible to the Parliament, established by Chapter I. Until otherwise declared, each House of the Parliament is endowed by section 49 with the same powers, privileges and immunities possessed by the United Kingdom House of Commons at the date of Federation. 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.

The Senate's power to obtain information and documents is one facet of a broader inquiry power that also includes the power to summon witnesses and require answers to questions

asked of them. There is no doubt that the House of Commons possessed broad-ranging and strong inquiry powers in 1901. Contemporary standing orders[1] included rules:

- authorising the House to confer on select committees "power to send for Persons, Papers and Records, and this power carries with it the right to summon Witnesses, in accordance with Rules, Nos. 367-369" (Rule 341);
- providing for Accounts and Papers to be laid before the House, either by order or, where the Royal prerogative was concerned, by address to the Sovereign (Rules 428-429);
- providing a simple procedure for "unopposed returns" (defined as a return to which the Department furnishing the return agrees) (Rule 134).

Contemporary commentaries, such as Erskine May's 10th edition, declared that:

> Parliament is invested with the power of ordering all documents to be laid before it, which are necessary for its information.[2]

Foreign observer, Josef Redlich, went into more detail:

> The House of Commons has long maintained as a principle of its customary law that it is entitled to demand the use of every means of information which may seem needful, and, therefore, to call for documents which it requires. This claim may be enforced without restriction. In its most general form it is displayed in the right of the House to summon any subject of the state as a witness, to put questions to him and to examine any memoranda in his possession. Practically speaking, in its constant thirst for information upon the course of administration and social conditions, the House generally turns to the Government departments as being the organs of the state which are best, in many cases exclusively, able to give particulars as to the actual conditions of the life of the nation and as to administrative action and its results from time to time. ...
>
> Let us remark in passing, that in the unlimited character of the claim for information, which may in principle be made at any time, there lies a fundamental parliamentary right of the highest importance; it is a right which, both constitutionally and practically, is a condition precedent to all English and parliamentary government.[3]

The Journals of the House of Commons from this period are replete with examples of orders or addresses for returns, generally complied with, but both Erskine May and Redlich contain discussions of the types of information that governments were reluctant to provide. Then, as now, the House did not generally exercise its formal powers to obtain information but a political solution was invariably reached. Claims for some particularly sensitive information were often not pressed by the House, although, in other contexts, such as the broad-ranging inquiry into the condition of the army before Sebastopol in the 1860s (i.e., the misconduct of

---

1 House of Commons, *Rules, Orders, and Forms of Procedure Relating to Public Business*, 11th edition, 1896.

2 *Erskine May's Treatise of the Law, Privileges, Proceedings and Usages of Parliament*, 10th edition, edited by R. F. D. Palgrave and Albert Bonham-Carter, 1893, p. 507.

3 Josef Redlich, *Procedure of the House of Commons: A Study of its History and Present Form*, translated from the German with an introduction by the Clerk of the House of Commons, Sir Courtenay Ilbert, 1908, pp. 39-40.

the Crimean War, particularly in terms of supply lines and treatment of wounded soldiers), sensitive information was fully disclosed to the House or its committees.

Apart from the direct conferral of House of Commons powers by section 49 of the Constitution, inquiry powers have another possible source. In the United States it has been found that these powers are inherent in the legislature: "[t]he power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function"[4]. Without such powers, Congress cannot perform its proper oversight of the executive branch or inform itself about matters on which it has a duty to legislate.

A comparable situation has been found to exist in New South Wales where Australia's first legislative body was established at a time when it was not considered necessary to confer House of Commons powers on colonial legislatures. When the New South Wales Legislative Council sought to enforce an order for documents directed to the Treasurer by suspending him from the sittings and having him escorted from the premises, the Treasurer challenged the Council's powers. In *Egan v Willis* (1996) 40 NSWLR 650, the New South Wales Court of Appeal found that the Council had an inherent power to require the production of documents and to impose sanctions on a minister in the event of non-compliance (though it did not have a general power to punish contempts). The High Court rejected an appeal against this judgment (*Egan v Willis* (1998) 195 CLR 424).

The Court of Appeal subsequently found that although the Council did not have the power to order the production of Cabinet documents (a limitation that does not apply to the Commonwealth Houses because of the constitutional basis of their powers), claims of legal professional privilege and public interest immunity could not protect the executive government against the Council's power. With its powers thus clarified and reinforced, the New South Wales Legislative Council now operates the most effective regime for the production of documents of any Australian jurisdiction.

Under section 49 of the Constitution, the Commonwealth Houses, unlike the New South Wales Houses, enjoy a general power to punish for contempt, a power which complements the inquiry power by providing for its effective enforcement. The US Congress also enjoys an inherent power to punish for contempt (that extends to both coercive and punitive sanctions), although it has been largely superseded by statutory powers for both criminal and civil contempt (the latter applying only to the Senate)[5]

Any known limitations on the Senate's powers in this regard

There are no known limitations on the Senate's powers to order documents but, just as the doctrine of responsible government in the Constitution reinforces the accountability

---

4 *McGrain v Daugherty* 273 US 135 (1927) at 175. See also *Watkins v United States* 354 US 178 (1957), *Eastland v United States Servicemen's Fund* 421 US 491 (1975), *Nixon v Administrator of General Services* 433 US 425 (1977), *House Committee on the Judiciary v Miers* 558 F Supp 2d 53 (DDC 2008) (a case in which the district court upheld the right of the House committee to subpoena former presidential aides, rejecting a presidential assertion that a claim of executive privilege bestowed absolute immunity on current or former presidential aides; the case was settled before an appeal could be heard, the settlement involving the aides testifying and producing documents, and the district court's opinion standing).

5 For the existence and extent of the inherent contempt power, see *Anderson v Dunn* 19 US 204 (1821), *Jurney v MacCracken* 294 US 125 (1947), *McGrain v Daugherty* 273 US 135 (1927). For a description of the various contempt powers, see Morton Rosenberg, *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry*, The Constitution Project, 2009, pp. 14-18.

relationship of the executive to Parliament, the federal nature of the Constitution may imply that there are some limitations on the exercise of the inquiry power.

It has been suggested that the inquiry power may be confined to subjects in respect of which the Commonwealth Parliament has power to legislate. There is judicial authority for the proposition that the Commonwealth and its agencies may not compel the giving of evidence and production of documents except in respect of subjects within the Commonwealth's legislative competence. If litigated, the courts may well find that the same limitation applies to the inquiry powers of Senate committees. The US Supreme Court has made similar decisions in respect of the US Congress.[6]

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. While this limitation reflects a rule of courtesy and comity between houses, it may also have the force of law, based on High Court judgments to the effect that the Commonwealth may not impede the essential functioning of the states.[7] This issue has been explored in several Senate committee inquiries, including the Select Committee on the Australian Loan Council and the Select Committee on the Victorian Casino Inquiry which followed advice from the Clerk and Professor Dennis Pearce in relation to the Senate's inquiry power and did not seek to compel evidence from state members of parliament and other state office-holders.

In the United States, the matter has not been litigated but there are precedents for the summoning of state officials. However, the US Constitution gives the Congress a degree of oversight of state governments not available under the Australian Constitution, so US examples may have little persuasive value in Australia.

The purpose and intent of the order of the Senate of 13 May 2009

A significant point to note about the order of 13 May 2009 is that it did not initiate anything new but was simply a consolidation of existing practices. Probably stemming from a sense of frustration on the part of senators with habitual stonewalling by public servants and ministers at estimates and other committee hearings without raising properly-founded public interest immunity claims[8], the order was initiated by Senator Cormann and was opposed by the government of the day which was concerned that a purported consolidation of existing practice may entrench a particular interpretation. A better solution was "to improve the guidelines, to improve the way the rules operate within the estimates process and the committee process".[9]

At that point, the latest version of the government's guidelines for official witnesses appearing before parliamentary committees was twenty years old. Although an updated and improved

---

6 *Colonial Sugar Refinery Co Ltd v Attorney-General (Cth)* (1912) 15 CLR 182; *Attorney-General (Cth) v Colonial Sugar Refinery Co Ltd* (1913) 17 CLR 644; *Lockwood v Commonwealth* (1954) 90 CLR 177 at 182-3; *Quinn v United States* 349 US 155 (1955); *Eastland v United States Servicemen's Fund* 421 US 491 (1975).

7 The so-called Melbourne Corporation doctrine provides that the Commonwealth may not interfere with the governmental functions of states; see, for example, *Austin v Commonwealth* (2003) 215 CLR 185.

8 See remarks by Senator Cormann, *Senate Debates*, 13 May 2009, pp. 2668-70.

9 See remarks by Senator Ludwig, then Manager of Government Business in the Senate, *Senate Debates*, 13 May 2009, pp. 2665-6.

draft, taking into account the Senate's position on matters of process, was provided to the Committee of Privileges in 2012[10], the revised guidelines have still not been promulgated.

In summing up the debate, Senator Cormann tabled advice from the Clerk on the background and effect of the order (including how it reflected the government guidelines for official witnesses), a copy of which is attached to this advice. The order was agreed to without a division.

Rather than repeating the content of that advice, which includes a historical summary and an enumeration if the principles involved, I draw the committee's attention to it. I also draw the committee's attention to a paper circulated first in 2005, and on numerous occasions since, which describes some of the public interest grounds which have received a degree of acceptance in the past and those which have not. I also attach a copy of that paper. As the 2009 advice notes, the 2009 resolution does not set out recognised grounds for public interest immunity grounds:

> It would not be advisable for the Senate to do so in any general resolution, because whether these grounds are justified in particular cases very much depends on the circumstances of those cases. Also, the public interest in the disclosure of particular information may outweigh the apprehended harm to the public interest from the disclosure of the information.

Any precedents which may be of relevance and of which the committee should be aware

The current matter before the committee involves a particular set of claims made by, and on behalf of, the Minister for Immigration and Border Protection in relation to the conduct of Operation Sovereign Borders, an operation which implements the present Government's border protection policies and which has been characterised by a reluctance to provide detailed information about the conduct and outcomes of the operation to the public and the Parliament, particularly to the Senate in response to orders for production of the information.

There are numerous precedents for contested claims to information in the public interest. 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. The relationship between the executive and parliament provides a conduit for publication of a great deal of routine information through which ministers account to parliament and by which the public judges the quality of stewardship of any government. From budget papers to annual reports and reports on the operation of particular legislative schemes, the scope of information required by and provided to parliament on a daily basis is extensive.

Difficulty only arises where the information sought is sensitive. It has long been recognised that there is information held by government that it would not be in the public interest to disclose. There are parliamentary mechanisms, however, 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.

On the other hand, if information is sensitive and a cover-up or maladministration is suspected, the contest intensifies and, as in the case of the Watergate scandal in the US, the

---

10 See the 153rd Report of the Committee of Privileges, Guidance for officers giving evidence and providing information, June 2013.

cover-up may inflict worse political damage than the initial error of judgement. So for example, when questions were asked in the late 1960s about who was travelling on RAAF VIP special purpose flights and at what cost, amid suspicions that ministers' families had inappropriate access to the service, it was initially claimed that passenger manifests were not kept. Following an order for production of all relevant documents, initial Cabinet resistance and further pressure in parliament and the press, the Leader of the Government in the Senate, Senator John Gorton, tabled the passenger manifests and flight authorisations, defusing a potential political crisis.[11] This information is now routinely tabled twice a year.

In between these parameters are countless examples of contested information (including the appearance of particular witnesses) and the methods used to pursue it. Chapter 19 of *Odgers' Australian Senate Practice* (13th edition) contains detailed accounts of many of these instances. They include:

- Senate Select Committee on the Canberra Abattoir (1969)
- attendance of ASIO witnesses before the Senate Select Committee on Civil Rights of Migrant Australian (1973)
- overseas loans negotiations (1975)
- tax evasion schemes (1982)
- Senate Select Committee on the Functions, Powers and Operation of the Australian Loan Council (1992)
- draft report on welfare reform (1999)
- purchase of magnetic imaging machines (1999)
- economic modelling on the impact of the GST on petrol prices (2000)
- collapse of HIH insurance (2001)
- collapse of Ansett (2001)
- funding of higher education institutions (2002)
- Australian Wheat Board sales to Iraq (2006)
- Senate Select Committee on Fuel and Energy – climate change modelling (2009).

Options available to the Senate in circumstances where a minister's claim for public interest immunity is not accepted

Each case of contested information has its own particular features which influence the nature and extent of the Senate's response to a claim for public interest immunity. A nil response in itself is sometimes an indication of tacit acceptance of a claim.

A threshold issue involves the determination of such claims. In times past, a minister's claim for public interest immunity, formerly known as Crown or executive privilege, was taken

---

11 See Paula Waring, "'This Is a Procedure on Which We Should Not Lightly Embark': Orders for the Production of Documents in the Australian Senate, 1901 to 1988", *Papers on Parliament*, No. 58, August 2012, p.97.

pretty much at face value. The executive argued that a minister's claim should be regarded as conclusive and that this was consistent with the system of responsible government. The minister should be responsible for balancing the competing public interests involved and if the minister failed to satisfy the House, then the House could withdraw its confidence in him or her.[12]

While the latter theory might be feasible in much larger houses with less rigid party discipline, it has not been a widely-followed practice in Australia. It was, however, consistent with the position taken in the British civil courts and expounded in the leading case of *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624. A certificate from a minister or an authorised senior public servant stating that certain information should not be disclosed to a court in the public interest was accepted as conclusive. Immunity could be claimed for a document either because it contained particular information or because it belonged to a class of documents, such as cabinet documents or advice to ministers, whose disclosure would not be in the public interest.

The position of the courts changed in 1968 when the House of Lords, in *Conway v Rimmer* [1968] AC 910 decided that a minister's certificate was not conclusive in all cases and that it was for the court to decide whether immunity should be granted. The High Court took a similar view in *Sankey v Whitlam* (1978) 142 CLR 1.

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[13]. 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.

The main political penalty, apart from unrelenting political attack (used, for example, in the VIP special flights and overseas loans affairs in 1967 and 1975) is a censure motion directed at the particular minister, or the government in general. For a list of these, see *Odgers*, 13th edition, pp. 590-4. There is no rule against one House censuring a minister from another House. Another political penalty that has been applied on occasion is the extension of question time until a certain number of questions have been asked and answered. (Admittedly, the target of such a penalty is not always clear.)

Procedural penalties include:

---

12 See, for example, letters from Prime Minister Menzies and the Solicitor-General in 1953 and 1956 to the Public Accounts Committee and the Regulations and Ordinances Committee, respectively, quoted on pp. 603-4 of *Odgers*, together with the extract from Senator Greenwood and R.J. Ellicott's paper, *Parliamentary Committees: Powers Over and Protection Afforded to Witnesses* (1972), quoted on p. 606.

13 The use of the contempt power against a minister who is a member of another House raises particular issues. In the UK, this has not prevented the House of Commons Standards and Privileges Committee making findings of contempt against a minister who was a member of the House of Lords (the Lord Chancellor, Lord Falconer); see Fifth Report, Session 2003-04. No action was taken against Lord Falconer, apparently the first Lord Chancellor in 1,400 years to have been found in contempt of Parliament.

- 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[14];

- motions delaying the consideration of specified legislation until the information has been provided (used in 2009 to delay legislation on the national broadband network);

- other limitations on the ability of a minister to act and be heard in relation to portfolio business.

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.

Probably the most effective response over the years has been the use of further committee inquiries to pursue the sought-after information, including, if necessary, the use of *in camera* hearings. On one occasion in 1992, for example, a time-sensitive report on Medicare fraud was ordered to be provided to the Community Affairs Committee with an instruction to the committee that it not publish the document before a certain deadline. The motion was moved by the responsible minister. The inherent flexibility of committees often allows an accommodation to be reached between the competing interests of the Government and the Senate.

The existence of the claimed right of public interest immunity in respect of parliamentary proceedings has never been adjudicated by the courts and is not likely to be. It 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. 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, including in a 1975 resolution agreed to at the height of the overseas loans affair:

> (4) 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. (16 July 1975, *Journals of the Senate*, p. 831)

Occasionally it has been suggested that, if the executive and the Senate cannot reach agreement, then perhaps the courts should decide. In 1994, former Senator Kernot introduced a bill to modify the law of parliamentary privilege to provide for failure to comply with a lawful order of either House or a committee to be a criminal offence prosecuted in the Federal Court. The Court could make orders about compliance and, in the case of public servants following ministerial instructions, could make orders for compliance without imposing penalties. It would be a defence to a prosecution that compliance with an order would involve substantial prejudice to the public interest not outweighed by the public interest in the free conduct of parliamentary inquiries. The Court was empowered to examine the disputed documents and therefore to determine any claim of executive privilege. The bill was referred to the Committee of Privileges.

In its 49th Report, the Committee unanimously recommended that the bill not be proceeded with. Ceding power to the courts to determine public interest immunity claims was regarded

---

[14] Standing order 74(5), for example, contains such a mechanism as a standard response to the failure of a minister to answer a question without notice within 30 days.

as undesirable by almost all witnesses, as well as unnecessary, given that the Houses possessed the necessary powers to protect their rights and force governments to comply with their orders should they choose to use them.

An alternative proposal by Senator Kernot for a committee of party leaders to examine disputed documents in confidence and report to the Senate on the adequacy of the confidentiality claims was not considered. However, with the courts out of the picture, the idea of third party arbitration has gained some currency from time to time.

In its 52nd Report, the Committee of Privileges commended the idea to the Senate after it examined a particular instance of refusal to provide apparently commercially sensitive information to the Senate in relation to the costs of leasing a Melbourne office building for government offices. The Senate had ordered the Auditor-General to inquire into the matter.[15] Using his statutory powers to obtain the information, the Auditor-General was able to place sufficient information before the Senate to satisfy its requirements while preserving the confidentiality of genuinely commercially sensitive information. The committee endorsed the use of third party arbitration in suitable circumstances (and, indeed, used it itself in relation to the examination of documents seized from senators under search warrants).

The effectiveness of the procedures adopted by the New South Wales Legislative Council, referred to earlier, for resolution of disputes over state papers, relies on the use of independent third party arbitration to examine the dispute documents. The Council has used a retired Supreme Court judge to carry out the function, with both "sides" agreeing to abide by the recommendation of the arbiter.

In the aftermath of the order of the Senate of 13 May 2009, the Senate referred to the Finance and Public Administration References Committee a process for determining public interest immunity claims. In a somewhat confused report, the committee did not take account of earlier endorsements of third party arbitration by the Privileges Committee, and did not support such a mechanism at that time. Subsequently, the agreements for parliamentary reform entered into at the beginning of the 43rd Parliament after the 2010 election gave renewed support for such a mechanism, using the Australian Information Commissioner as arbiter, but no action was taken to implement them.

The difficulties of using an officer of the executive government in this role were readily apparent in 2010-11 when the Senate sought from the Information Commissioner an assessment of the adequacy of the Government's reasons for not complying with orders on aspects of the proposed mining tax and variations to the GST agreements with the states.[16] Despite a solid history of statutory authorities responding to Senate orders for reports and assessments on a variety of subjects[17], and the principle, inherent in section 49 of the Constitution, that the powers of the Houses may be altered or modified only by express statutory declaration, the Information Commissioner indicated his view that he was not empowered by his statute to perform the function asked of him by the Senate (or by the agreements on parliamentary reform). He went on to query the extent of the Senate's power to

---

15 Changes to the Auditor-General's enabling legislation in 1997 included a provision preserving the independence of the office by providing that it was not subject to direction by anyone, including a minister or House or committee of the Parliament. Subsequently, the Senate has requested the Auditor-General to undertake particular work.

16 For orders, see *Journals of the Senate*, 26/10/2010, pp. 206-8 and 23/11/2010, pp. 395-6; for Information Commissioner's responses, see *Journals*, 15/11/2010, p 280 and 9/2/2011, p. 540.

17 An account of these may be found in an Occasional Note attached to Procedural Information Bulletin No. 249, 28 March 2011.

make such orders.[18] In debate on the response, the Commissioner's position was disputed by non-government senators who put forward contrary arguments. They emphasised, however, the need to find a solution that would not derogate from the Senate's established powers and practices.

In response, the Senate agreed to declaratory resolutions drawing attention to its powers under the Constitution and the lack of any legislative constraint on those powers in the Information Commissioner's enabling statute.[19] The matter remains unresolved but was commented on by the Privileges Committee in its 153rd Report (pp. 35-6):

> **Resolution of disputes**
>
> 5.29 If officers to whom orders for documents are directed are unable or unwilling to comply with a requirement to produce information, they should report that fact to the Senate, providing reasons, and allow the Senate to determine for itself how to respond. This is consistent with the Senate resolution on public interest immunity claims and the principles which support that process. This is also no different in principle than the response expected of a witness before a Senate committee who is unable or unwilling to answer a question.
>
> 5.30 It is for the Senate then to determine how it will respond to a refusal to meet such an order, and that determination necessarily depends on the circumstances of the particular matter. As senators would be aware, the resolution of such disputes is invariably political (rather than judicial), often entailing negotiations about what information may be provided, even if the original order is resisted.
>
> **Committee comment**
>
> 5.31 Whatever the resolution of the particular disputes, it is important (for the purposes of this inquiry) to note that the power sought to be exercised is the inquiry power of the Senate. A statutory office-holder is not immune from the inquiry powers of the Houses and their committees merely because the office is established under statute. To repeat the words of the committee's 144th report:
>
> 2.7 What is required is an express statutory declaration that a provision is intended to affect the powers, privileges and immunities of the Senate and the House of Representatives before it can be effective.
>
> 5.32 That report describes the inclusion by the Parliament in the *Auditor-General Act 1997* of an express limitation on the Houses' inquiry powers as an example of the exceedingly rare use of such provisions. In the absence of such express declaration, statutory officers are subject to the inquiry powers of the Houses, as are other persons.
>
> 5.33 The committee considers it undesirable that the current stand-off be interpreted as imputing any general principle that the Senate's inquiry powers do not apply in respect of independent statutory officers, contrary to settled principles. Equally, it is important to debunk the characterisation of the contentious orders as anything other

---

18 Also queried in advice from the Australian Government Solicitor included in a submission from the Department of the Prime Minister and Cabinet to the Committee of Privileges and published in connection with its 153rd Report.

19 *Journals of the Senate*, 22/11/2010, p. 367 and 10/2/2011, p. 572.

than orders for the production of documents, to be considered and responded to on that basis.

Clearly, successful third party arbitration can only occur with a willing and appropriate arbiter and an agreement by all parties to accept the outcome.

Any other information that might assist the committee in its deliberations

I have attempted to provide the committee with a summary of, and commentary on, the major considerations and developments in relation to the topic of its inquiry. The subject is a large and complex one which admits no easy solutions. I shall be very happy to provide any further advice or information that would be useful to the committee, including by responding to any issues concerning the powers, practices and procedures of the Senate that are raised in submissions to the inquiry.

Yours sincerely

(Rosemary Laing)

ATTACHMENT 1

AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE
CANBERRA A.C.T. 2600
TEL: (02) 6277 3350
FAX: (02) 6277 3199
E-mail: clerk.sen@aph.gov.au

hl.let.16465
24 March 2009

Senator Mathias Cormann
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cormann

PUBLIC INTEREST IMMUNITY CLAIMS -
YOUR NOTICE OF MOTION OF 17 MARCH 2009

You asked for a note on the background and effect of the notice of motion you gave on 17 March 2009 setting out a process for determining claims by government to withhold information or documents from Senate committees.

The notice of motion if passed would provide an order of the Senate prescribing the process by which claims for withholding information or documents from Senate committees would be dealt with. The order would not seek to determine in advance the merits of particular claims to withhold information or documents, or of the grounds of such claims, but only provide a process for their resolution.

The notice of motion gives expression to the following principles:

- government officers claiming that information or documents should not be provided to a committee should articulate the grounds for such a claim (paragraph (1))

- any such claim should be based on public interest immunity, that is, that disclosure of the information or documents would be contrary to the public interest on particular recognised grounds (paragraphs (1) and (3))

- ministers should have the responsibility of deciding whether particular information held by government should be withheld from a committee (paragraphs (2) and (3))

- as the apprehended harm to the public interest may or may not be overcome by providing the information or documents as in camera evidence, a minister, in making a decision whether to seek to withhold information or documents from a committee, should indicate whether the harm could be overcome by evidence taken in camera, so that the committee may decide whether to receive evidence in camera (paragraph (4))

- only the Senate, and not a committee or an individual senator, may ultimately decide whether a minister is justified in seeking to withhold information or documents from a committee and whether any further action should be taken in relation to a particular case (paragraph (5))

- any senator may ask the Senate to consider such a matter (paragraph (6))

- mere statements that information or documents are not public, or are confidential, or constitute advice or internal deliberations of government, are not sufficient to establish possible harm to the public interest from disclosure (paragraph (7))

- public bodies that are independent from ministerial direction or control should be similarly obliged to raise, through their highest ranking officers, public interest grounds for any claim to withhold information or documents from a committee (paragraph (8)).

Claims that information should be protected from disclosure because of apprehended harm to the public interest from disclosure are known as public interest immunity claims. They were formerly called claims of privilege, but the terminology was changed to focus on the principle that harm to the public interest is the proper basis of all such claims. This change of terminology was first adopted in the courts of law in relation to claims to withhold information from the courts in civil or criminal cases, and was then also adopted in the parliamentary sphere.

The reference to refusals to provide information as *claims* of public interest immunity recognises the principles that it is for the house concerned in parliamentary cases, and the courts in judicial proceedings, to determine whether a refusal of information is justified and sustainable.

Harm to the public interest also encompasses harm to private interests when it is not in the public interest that such harm should occur. For example, it is not in the public

interest that information should be disclosed that would prejudice the defence in a criminal trial; the apprehended harm would be done to the defendant, but it would also constitute harm to the public interest by interfering with the proper conduct of the trial.

The recognised grounds for public interest immunity claims consist of the following:

- prejudice to legal proceedings
- prejudice to law enforcement investigations
- damage to commercial interests
- unreasonable invasion of privacy
- disclosure of Executive Council or cabinet deliberations
- prejudice to national security or defence
- prejudice to Australia's international relations
- prejudice to relations between the Commonwealth and the states.

The notice of motion does not set out these recognised grounds. It would not be advisable for the Senate to do so in any general resolution, because whether these grounds are justified in particular cases very much depends on the circumstances of those cases. Also, the public interest in the disclosure of particular information may outweigh the apprehended harm to the public interest from the disclosure of the information.

These principles have a long history in the Senate. They have been expounded largely with reference to individual cases rather than by general resolutions, but there have been some general expressions of the principles. The history may be summarised as follows.

Having in several cases asserted its right to require the production of information and documents about public affairs, the Senate, in reaffirming that power in a resolution of 1975, also declared that it would exercise its power "subject to the determination of all just and proper claims of privilege", and that "a claim of privilege based on an established ground" would be considered and determined case by case by the Senate. (This resolution belongs to the period before the change of terminology from "privilege" to "public interest immunity" occurred.)

In a series of resolutions, first passed in 1971 and reaffirmed at various times, most recently in 1998, the Senate, in response to claims of confidentiality advanced by officials in estimates hearings, declared that "there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committees unless the Parliament has expressly provided otherwise".

Resolution 1 of the Senate's Privilege Resolutions, passed in 1988, provides in paragraph (16) that officers are to be given reasonable opportunity to refer questions to superior officers or to a minister. This provision is intended to support the principle that ministers should consider any potential claim of public interest immunity, not officers.

In 1992 the Senate declared by resolution that the fact that particular information is exempt from disclosure under the Freedom of Information Act does not automatically provide a ground for withholding that information from the Senate. The then government accepted this point.

In 1994, during an inquiry by the Senate Privileges Committee into public interest immunity claims, the then government conceded the principle that such claims must be made by a minister and are for the Senate ultimately to resolve.

In 2003 the Senate passed a resolution declaring that any claim of public interest immunity on the basis of commercial confidentiality should be made only by a minister and should be accompanied by a ministerial statement of the basis of the claim, including a statement of the commercial harm which might result from the disclosure of the information in question. The terms of this resolution are applicable to public interest immunity claims in general; the expression of the resolution to apply to claims of commercial confidentiality reflects the fact that commercial confidentiality had become the most common basis for such claims.

The *Government Guidelines for Official Witnesses before Parliamentary Committees*, issued in 1989 and still in force, recognised the principles which had been expounded by the Senate. Paragraph 2.28 of the guidelines confirm that claims of public interest immunity should be made only by ministers:

> Claims that information should be withheld from disclosure on grounds of public interest (public interest immunity) should only be made by Ministers (normally the responsible Minister in consultation with the Attorney-General and the Prime Minister).

Paragraph 2.32 recognises the principle that mere claims of confidentiality are not sufficient for a claim of public interest immunity, but that harm to the public interest must be established. The guidelines refer to:

> Material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government *where disclosure would be contrary to the public interest.*

The guidelines also state in paragraph 2.32:

> It must be emphasised that the provisions of the FOI Act have no actual application as such to parliamentary inquiries, but are merely a general guide to the grounds on which a parliamentary inquiry may be asked not to press for particular information, and that the public interest in providing information to a parliamentary inquiry may override any particular ground for not disclosing information.

The basic principles of the notice of motion have therefore been recognised by successive governments in their own instructions to their public servants.

The principles of the notice of motion also have a long history outside Australia, pre-dating our Parliament. It has been recognised over centuries that it is a major function of a representative assembly to require the production of information by the executive government, so as to assure the public that the country is being properly served by executive office-holders, and to determine the grounds on which such information might be withheld.

The past resolutions of the Senate also express the principle that withholding information about public affairs from the representatives of the public in Parliament is a serious step, not to be taken lightly. As such it is not a matter for public servants, but warrants a deliberate decision at the highest level of politically responsible office-holders. The notice of motion would ensure that such decisions are treated in that way.

Yours sincerely

(Harry Evans)

ATTACHMENT 2

hc/pap/14613
19 May 2005

THE SENATE

GROUNDS FOR PUBLIC INTEREST IMMUNITY CLAIMS

This is a list of potentially acceptable and unacceptable grounds for claims of public interest immunity, that is, claims that information should not be provided to the Senate or in the course of an inquiry in a Senate committee.

The list is based on precedents of the Senate arising from cases in the Senate and actions and attitudes adopted by the Senate in those cases. The major cases are set out in *Odgers' Australian Senate Practice,* 11th ed, 2004, pp 464-484.

The most significant principle drawn from Senate precedents is that the Senate has insisted that a claim that information should not be produced remains merely a claim unless and until determined by the Senate. Any agreement by a committee to accept a claim is subject to a determination by the Senate, which may be initiated by any senator.

Particular claims must be assessed in their particular circumstances. It is in the nature of the process that, short of the Senate compelling the production of the information concerned, there can never be complete assurance that a particular claim is justified. The scope and basis of a claim may be clarified, however, by appropriate questions. The following list suggests the issues which have to be clarified and the questions which should be asked in relation to particular grounds for claims.

The terminology "public interest immunity" is significant. The Senate has made it clear that a claim that particular information should not be produced must be based on a particular ground that disclosure of the information would be harmful to the public interest in a particular way. A statement that the holder of information does not wish to produce it, or that the information is confidential, is not a proper claim for public interest immunity.

It is open to the Senate to determine that any risk of harm to the public interest by disclosure of information is outweighed by the benefit to the public interest in the provision of the information.

The Senate has also made it clear that claims in relation to information held by government must be made by ministers. The government's guidelines for public servants appearing before parliamentary committees also emphasise this principle.

Any claim by an officer that information should not be produced should, if contested by any senator, be referred to a minister for a decision on whether to maintain the claim. Where a claim is made by a statutory body which has independence from the government, the decision to raise a claim should be made by the governing authority of that statutory body as a deliberate and properly communicated decision.

Accepted grounds

The following grounds for public interest immunity claims have achieved some measure of acceptance by the Senate in the past.

(1) ***Prejudice to legal proceedings***

This could arise in two forms. There may be a reasonable apprehension that disclosure of some information could prejudice a trial which is in the offing by influencing magistrates, jurors or witnesses in their evidence or decision-making. A case involving only questions of law before superior court judges is not likely to be influenced and therefore is unlikely to provide a basis for this ground. Secondly, production of information to a committee could create material which, by reason that it is unexaminable in court proceedings because of parliamentary privilege, could create difficulties in pending court proceedings. To invoke this ground, there should be set out the nature of the pending proceedings and the relationship of the information sought to those proceedings.

(2) ***Prejudice to law enforcement investigations***

For this ground to be invoked it should be established that there are investigations in progress by a law enforcement agency, such as the police, and the provision of the information sought could interfere with those investigations. As this is a matter for the law enforcement agency concerned to assess, this ground should normally be raised directly by the law enforcement agency, not by some other official who can merely speculate about the relationship of the information to the investigation.

(3) ***Damage to commercial interests***

The provision of some information could damage the commercial interests of commercial traders in the market place, including the Commonwealth. This is the well-known "commercial confidentiality" ground. The most obvious form of this is the disclosure of tenders for a contract before the call for tenders is closed. The Senate has made it clear in its resolution of 30 October 2003 that a claim on this ground must be based on specified potential harm to commercial interests, and in relation to

information held by government must be raised by a minister. Statements that information is commercial and therefore confidential are clearly not acceptable.

(4) ***Unreasonable invasion of privacy***

The disclosure of some information may unreasonably infringe the privacy of individuals who have provided the information. It is in the public interest that private information about individuals not be unreasonably disclosed. It is usually self-evident whether there is a reasonable apprehension of this form of harm. It is also usually possible to overcome the problem by disclosing information in general terms without the identity of those to whom it relates.

On some occasions it has been claimed that fees paid to lawyers or consultants should not be disclosed, usually on the privacy ground but sometimes on the commercial confidentiality ground. The claim has not been consistently raised, and information on such fees has been readily provided in some cases. The Senate has since 1980 asserted its right to inquire into such fees.

It is sometimes claimed that information has been collected on the condition that it would be treated as confidential, and therefore the information cannot be disclosed. This is not in itself a ground for a public interest immunity claim. It must still be established that some particular harm may be apprehended by the disclosure of the information. Those who provided the information may not be concerned about its disclosure, and their approval for the disclosure may be sought.

(5) ***Disclosure of Executive Council or cabinet deliberations***

It is accepted that deliberations of the Executive Council and of the cabinet should be able to be conducted in secrecy so as to preserve the freedom of deliberation of those bodies. This ground, however, relates only to *disclosure of deliberations.* There has been a tendency for governments to claim that anything with a connection to cabinet is confidential. According to a famous story about a state government, trolley loads of documents were wheeled through the cabinet room so that it could be claimed that they were all "cabinet-in-confidence", a story which serves to illustrate the abuse of this ground. A claim that a document is a cabinet document should not be accepted; it has to be established that disclosure of the document would reveal cabinet deliberations. The claim cannot be made simply because a document has the word "cabinet" in or on it.

Neither legislatures nor courts have conceded that internal deliberations of government departments and agencies are entitled to the same protection.

(6) ***Prejudice to national security or defence***

This claim should be raised in the form of a deliberate statement by a minister that disclosure of particular information would be prejudicial to the security or defence of the Commonwealth. It is usually self-evident whether the claim can legitimately be raised. It has not actually been used extensively before Senate committees.

The ground may be extended to internal security matters. For example, disclosure of information about security precautions to be taken at some forthcoming public event could well be resisted on this ground.

(7) ***Prejudice to Australia's international relations***

There are two bases for a claim on this ground. Disclosure of particular information could sour Australia's relations with other countries. The raising of a claim on this basis would seem to cause the harm which it is apprehended disclosure of the information would cause; foreign governments can thereby conclude that something has been said or written that they would not like. Perhaps that is why it is seldom raised. Disclosure of some information could also weaken Australia's bargaining position in international negotiations, and this would seem to be a stronger basis for a claim on this ground. It would have to be established that there are negotiations in prospect for it to be raised.

(8) ***Prejudice to relations between the Commonwealth and the states***

Again, raising this ground, on one basis, would seem to do the apprehended harm. This ground, however, has appeared frequently in recent times in the following form: the information concerned belongs to the states as well as to the Commonwealth, and therefore cannot be disclosed without the approval of the states. The obvious response to this is that the agreement of the states to disclose the information should be sought and they should be invited to give reasons for any objection.

There are also some lesser grounds of very limited scope for legitimate claims. Undermining public revenue or the economy may be apprehended in disclosure of some information. For example, proposed tariff increases cannot be disclosed in advance of their legislative implementation, usually in the annual budget. Some information about interest rates and action to support the dollar also falls into this category. It should be self-evident whether claims on these kinds of grounds are legitimately raised.

Unacceptable grounds

The following grounds have not been accepted by the Senate in the past.

(1) ***A freedom of information request has been or could be refused***

The Senate comprehensively dealt with this suggestion in 1992, and it was formally established, and conceded by the then government, that the fact that a freedom of information request for the same information has been or could be refused under the Freedom of Information Act is not a legitimate basis for a claim of public interest immunity in a parliamentary forum. Some ground acceptable in such a forum must be independently raised and sustained.

Similarly, the fact that an exemption under the Freedom of Information Act applies to some information is not a legitimate basis for a claim in a parliamentary forum.

(2) ***Legal professional privilege***

It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides a ground for a refusal of information in a parliamentary forum. The first question in response to any such claim is: to whom does the legal advice belong, to the Commonwealth or some other party? Usually it belongs to the Commonwealth. Legal advice to the federal government, however, is often disclosed by the government itself. Therefore, the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought.

(3) ***Advice to government***

As with legal advice, the mere fact that information consists of advice to government is not a ground for refusing to disclose it. Again, some harm to the public interest must be established, such as prejudice to legal proceedings, disclosure of cabinet deliberations or prejudice to the Commonwealth's position in negotiations. Any general claim that advice should not be disclosed is defeated by the frequency with which governments disclose advice when they choose to do so.

(4) ***Secrecy provisions in statutes***

It is now well established that a secrecy provision in a statute prohibiting the disclosure of particular information does not prevent the provision of that information

in a parliamentary forum. Government legal advisers have accepted this position, and most departments and agencies now realise that they cannot raise a claim merely on this basis. Some other ground must be raised for not disclosing the information. That ground may be reflected in the statutory secrecy provision, but must be independently raised.

(5) ***Working documents***

The fact that a document is a "working document" says nothing about its content or status. The great majority of documents in the possession of government could be made out to be working documents. As always, the question is: what is the particular harm to the public interest to be apprehended by its disclosure? The fact that the document may contain something embarrassing to government or its departments or agencies is not a basis for a public interest immunity claim.

(6) ***"Confusing the public debate" and "prejudicing policy consideration"***

The Senate formally resolved in 1999 that this is not an acceptable ground for not producing documents in response to a Senate order for documents.

A coherent formulation of this ground would seem to be as follows: the Senate and the public should not find out about matters which are under consideration by the government because they would then debate those matters to the detriment of the government. This is closely related to the "working document" claim, and indeed appears to be the real basis of that claim in many instances.

Often in committee hearings general indications of reluctance or refusal to provide particular information are given. In response to these sorts of statements the question should be asked: is a minister raising a public interest immunity claim, and, if so, on what particular, known ground?

Only when that question is answered can the basis of a claim be explored and considered. A statement by a minister, for example, that "I am not going to provide that information" is not a claim of public interest immunity.

The grounds for public interest immunity claims which have gained some acceptability in the Senate and comparable legislatures are also those to which the courts have given weight in determining claims for public interest immunity in legal proceedings. Conversely, a claim which would not be entertained in a court should not carry much weight in the legislature.

In relation to all claims it must also be established whether the claim is made against *production* of the information or *publication* of the information. Production of information to

a Senate committee, except in estimates hearings, does not automatically involve publication of the information. It is open to a committee, except in estimates hearings, to avoid any apprehended harm to the public interest by receiving information on an in camera basis. Estimates hearings are required by the rules of the Senate to receive all information in public, but in those hearings the possibility of a committee receiving information other than in estimates hearings can be explored.

Other compromises may be made to allow information to be provided while avoiding the apprehended harm. Reference has been made to the deletion of identifying details where privacy is the issue. Other processes for "sanitising" information have been used.

Harry Evans
Clerk of the Senate

AUSTRALIAN SENATE
CLERK OF THE SENATE

PARLIAMENT HOUSE
CANBERRA ACT 2600
TEL: (02) 6277 3350
FAX: (02) 6277 3199
E-mail: clerk.sen@aph.gov.au

cladvcomlc_18738

7 February 2014

Ms Sophie Dunstone
Secretary
Legal and Constitutional Affairs References Committee

(by email)

Dear Ms Dunstone

RELEVANCE OF QUESTIONS TO A COMMITTEE'S TERMS OF REFERENCE

The committee has asked for advice regarding the question of relevance in the context of comments made by Lieutenant General Campbell in correspondence to the committee and the implication therein that officers of the Joint Agency Task Force will determine what questions taken on notice are relevant to the terms of reference, leaving those that are deemed not relevant to be dealt with at the next estimates hearings should they be asked.

The Senate has given the committee the following 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.

There is nothing in these 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).

As subsidiary bodies, committees are required to comply with the standing and other orders of the Senate, to the extent they are applicable, as well as with their terms of reference. The purpose of such orders is to facilitate the conduct of business of the Senate and its committees and, in the particular case of committees, to set out procedures to be observed by committees for the protection of witnesses.

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.

Privilege Resolution 1 addresses the issue of relevance as follows:

> (9) A chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry. Where a member of a committee requests discussion of a ruling of the chairman on this matter, the committee shall deliberate in private session and determine whether any question which is the subject of the ruling is to be permitted.
>
> (10) Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.

In the first instance, it is the role of the chair to monitor the relevance of questions, but it is ultimately a matter for the committee itself to determine. If a member wishes to dispute a chair's ruling, then the discussion occurs in private session.

Paragraph (10) of Resolution 1 sets out a process for a witness to object to answering a question, including on grounds of relevance.

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 paragraph (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 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."

Please let me know if I can provide any further assistance.

Yours sincerely

Rosemary Laing
Clerk of the Senate

Australian Senate | Parliament House | Canberra ACT 2600