

The Senate

Legal and Constitutional Affairs
References Committee

A claim of public interest immunity raised
over documents

March 2014

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Recommendations

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 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.

Recommendation 2

3.27 The committee recommends that the Senate refer the following matter to the Procedure Committee for inquiry and report, as a matter of urgency:

- the process for independent arbitration in the NSW Legislative Council, including that House's standing order 52;
- the applicability of the NSW Legislative Council's model of independent arbitration to the Senate;
- any adaptations or amendments needed to the NSW Legislative Council's model in order to implement a similar model of independent arbitration in the Senate;
- any amendments to Senate practice and procedure required to implement a model of independent arbitration;
- suitable candidates for and / or qualifications required of an independent arbiter;
- in respect of accessing and inspecting documents subject to a disputed claim for public interest immunity, the proposal in the 52nd Report of the Committee of Privileges whereby disputed documents are provided directly to an independent arbiter for evaluation; and

in respect of any such inquiry, the Procedure Committee have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session.

CHAPTER 1

Introduction

1.1 On 10 December 2013, the Senate referred the following matter to the Legal and Constitutional Affairs References Committee (the committee) for inquiry and report by 21 February 2014:

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.¹

1.2 On 21 February 2014, the committee tabled an interim report extending the reporting date until 6 March 2014.

Background to the referral

1.3 On 14 November 2013, the Senate ordered the production of the following documents by the Minister representing the Minister for Immigration and Border Protection (Senator the Hon Michaelia Cash, Assistant Minister for Immigration and Border Protection):

(a) all communications relating to any 'on water operations' that occurred between 7 September 2013 and 14 November 2013 be laid on the table by the Minister representing the Minister for Immigration and Border Protection, by noon on 18 November 2013, including but not limited to:

Any report or briefing to, or email or other correspondence between the Minister or the Minister's office and the Department of Immigration and Border Protection or the Detection, Interception and Transfer Task Group and related agencies which includes information related to any or all of the following:

- (i) the chronology of events,
- (ii) 'illegal maritime arrivals' (unauthorised arrivals),
- (iii) Suspected Irregular Entry Vessels (SIEVs) intercepted at sea,
- (iv) distress calls to and response time by the Australian Maritime Safety Authority,

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

- (v) where the SIEV was detected,
- (vi) nationality of passengers,
- (vii) safety-of-life-at-sea incidents,
- (viii) SIEV turn backs,
- (ix) SIEV tow backs,
- (x) number of people suspected to be on board the SIEVs,
- (xi) the number of children suspected to be on board the SIEVs, and
- (xii) how many people, if any, were subject to 'on water transfers';

(b) no later than 24 hours after an event relating to 'on water operations' all communications be laid on the table by the Minister representing the Minister for Immigration and Border Protection, including but not limited to:

Any report or briefing to, or email or other correspondence between the Minister or the Minister's office and the Department of Immigration and Border Protection or the Detection, Interception and Transfer Task Group and related agencies which includes information related to any or all of the following information:

- (i) the chronology of events,
 - (ii) 'illegal maritime arrivals' (unauthorised arrivals),
 - (iii) Suspected Irregular Entry Vessels (SIEVs) intercepted at sea,
 - (iv) distress calls to and response time by the Australian Maritime Safety Authority,
 - (v) where the SIEV was detected,
 - (vi) nationality of passengers,
 - (vii) safety-of-life-at-sea incidents,
 - (viii) SIEV turn backs,
 - (ix) SIEV tow backs,
 - (x) number of people suspected to be on board the SIEVs,
 - (xi) the number of children suspected to be on board the SIEVs, and
 - (xii) how many people, if any, were subject to 'on water transfers';
- and

(c) if the Senate is not sitting within the 24 hours after the event relating to 'on water operations' then the documents are to be presented to the President under standing order 166 on the next working day.²

1.4 The deadline for compliance with the order was set by the Senate as noon on 18 November 2013.³

1.5 On 18 November 2013, the day set by the Senate for compliance with the order, the Minister for Immigration and Border Protection, the Hon Scott Morrison MP, responded by stating:

In answer [to the order for the production of documents], to assist the Senate, the Government is prepared to offer Opposition and Australian Greens Senators a confidential briefing delivered by Lieutenant-General Angus Campbell, Commander Operation Sovereign Borders.⁴

1.6 In addition, the minister attached the following documents to the letter:

- transcripts of Operation Sovereign Borders press conferences on 23 September 2013, 30 September 2013, 4 October 2013, 11 October 2013, 18 October 2013, 25 October 2013, 1 November 2013, 8 November 2013 and 15 November 2013;
- media statements dated 18 October 2013, 21 October 2013, 23 October 2013, 25 October 2013, 29 October 2013, 9 November 2013 and 13 November 2013; and
- weekly operational updates commencing 30 September 2013.⁵

1.7 In the government's response, the minister claimed that provision of the other documents requested would not be in the public interest and cited possible damage to national security, defence, or international relations, and possible prejudice to law enforcement or protection of public safety as the grounds for the claim.⁶

1.8 This response was presented out of sitting and was received by the President of the Senate on 18 November 2013. It was then tabled in the Senate on the next sitting day (2 December 2013) by the Minister representing the Minister for Immigration and Border Protection (Senator Cash).⁷

1.9 On 3 December 2013, the Senate:

- resolved that the Minister representing the Minister for Immigration and Border Protection (Senator Cash) had failed to comply with the order of 14 November 2013;
- again ordered the Minister representing the Minister for Immigration and Border Protection (Senator Cash) to comply with the order by 5.00 pm on 4 December 2013; and

3 *Journals of the Senate*, No. 3—14 November 2013, pp 131–132.

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

5 The Hon Scott Morrison MP, *Letter to the Chair, Senate Legal and Constitutional Affairs Committee*, 18 November 2013, p. 2 (tabled in the Senate on 2 December 2013).

6 The Hon Scott Morrison MP, *Letter to the Chair, Senate Legal and Constitutional Affairs Committee*, 18 November 2013, pp 2–4 (tabled in the Senate on 2 December 2013).

7 *Journals of the Senate*, No. 4—2 December 2013, p. 153.

- rejected the claim of public interest immunity made by the Minister representing the Minister for Immigration and Border Protection (Senator Cash) in respect of the documents and the grounds for making the claim.⁸

1.10 In response, on 4 December 2013, the Minister representing the Minister for Immigration and Border Protection (Senator Cash) tabled the following documents:

- a letter from the Assistant Minister for Immigration and Border Protection (Senator Cash) to the Clerk of the Senate (Dr Laing), dated 4 December 2013.
- a letter from the Minister for Immigration and Border Protection (Mr Morrison) to the Chair of the Legal and Constitutional Affairs Legislation Committee (Senator Macdonald) responding to the order of the Senate of 3 December 2013 and raising public interest immunity claims, dated 4 December 2013.⁹

1.11 During the ensuing debate, the Minister representing the Minister for Immigration and Border Protection (Senator Cash) advised the Senate that the government had complied with the order for the production of the documents by providing 'a substantial amount of information' and had 'clearly articulated in considerable detail' the reasons why it was not in the public interest to table the other documents for which the order called.¹⁰

1.12 The current inquiry was referred to the committee on 10 December 2013.

Conduct of the inquiry

1.13 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders inviting submissions by 14 January 2014. Details of the inquiry were made available on the committee's website at www.aph.gov.au/senate_legalcon.

1.14 The committee received nine submissions, which are listed at Appendix 1. Public hearings were held in Canberra on 31 January 2014 and 11 February 2014, and a list of witnesses who appeared before the committee at the hearings is at Appendix 2. Correspondence received by the committee from the Department of Immigration and Border Protection was published on the committee's website and is attached in Appendix 3.

1.15 The committee also sought advice from the Clerk of the Senate on two occasions. The advice was published on the committee's website and is attached in Appendix 4.

8 *Journals of the Senate*, No. 5—3 December 2013, p. 214.

9 *Journals of the Senate*, No. 6—4 December 2013, p. 226.

10 Senator the Hon Michaelia Cash, Assistant Minister for Immigration and Border Protection, *Senate Hansard*, 4 December 2013, pp 844–845.

Acknowledgment

1.16 The committee thanks all those who made submissions and gave evidence at its public hearings.

Note on references

1.17 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

Structure of the report

1.18 This report is comprised of three chapters. Chapter 2 considers the Senate's authority to determine claims of public interest immunity and examines the claim before the committee. Chapter 3 discusses an option for reform to resolve disputed claims of public interest immunity.

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.

CHAPTER 3

An option for reform

3.1 During the inquiry, the committee was informed that in the 1990s the New South Wales (NSW) Legislative Council had its powers in respect of orders for papers¹ affirmed in the courts, and that this has resulted in that House having what the Clerk of the Senate described as 'the most effective regime for the production of documents of any Australian jurisdiction'.² This chapter examines the model used by the NSW Legislative Council to resolve disputed claims of privilege³ over papers.

The NSW Legislative Council model

3.2 In his submission to the inquiry, the Clerk of the NSW Legislative Council, Mr David Blunt, explained that, unlike the Federal Parliament where powers are constitutionally based, the authority of the NSW Legislative Council to order the production of papers derives from the common law principle of 'reasonable necessity'.⁴ The Council's power to order the production of papers, including documents in respect of which a claim of privilege could be made, was upheld by the courts in the 1990s in the *Egan* decisions.⁵

...in New South Wales as a result of the *Egan* cases, particularly the decision in *Egan v Chadwick*, the executive government is required at law to produce to the Legislative Council all documents despite any claim of privilege, including a claim of public interest immunity, the only exception being certain cabinet documents. Therefore, documents that are subject to a claim of privilege are in fact produced to the Legislative Council. The government has no choice; it has to do that. Standing order 52...then sets out the procedure that the house has put in place to deal with returns to order and to deal with privilege claims.⁶

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- 1 Referred to in the Senate as orders for the production of documents.
 - 2 Dr Rosemary Laing, Clerk of the Senate, *Advice to the Senate Legal and Constitutional Affairs Committee*, 7 January 2014, p. 3.
 - 3 Referred to in the Senate as 'public interest immunity'.
 - 4 Mr David Blunt, Clerk of the New South Wales Legislative Council, *Submission 1*, p. 1.
 - 5 Mr David Blunt, Clerk of the New South Wales Legislative Council, explained in his submission that 'while the High Court in *Egan v Willis* clearly affirmed the power of the Council to order the production of state papers, it did not consider the production of papers subject to a claim of privilege by the executive... [and that t]his was not resolved until the decision in *Egan v Chadwick* in June 1999'. *Submission 1*, p. 3.
 - 6 Mr David Blunt, Clerk of the New South Wales Legislative Council, *Proof Committee Hansard*, 11 February 2014, p. 2.

3.3 Mr Blunt emphasised that as a result of the *Egan v Chadwick* decision of the Court of Appeal, the executive government in NSW is required at law to produce papers to the Legislative Council.⁷ It is this difference which perhaps explains why the non-compliance with orders for the production of documents common to the Senate occurs infrequently in NSW:

Because of the requirement at law under the Egan and Chadwick decision, the government does not really have a choice. Once the order is agreed to by the House and communicated to the Department of Premier and Cabinet they are lawfully obliged to produce the documents.⁸

3.4 In his submission to the committee, Mr Blunt explained that when an order for papers has been agreed to by the NSW Legislative Council, the Director General of the Department of Premier and Cabinet, after coordinating the retrieval of the documents, is required to lodge:

...the return comprising the documents with the Clerk of the Parliaments. If the House is not sitting the Clerk receives the documents out of session and announces receipt of the return on the next sitting day.⁹

3.5 Mr Blunt identified one instance, in 2013, where the Legislative Council became aware of a situation where there had not been full compliance with an order for the production of papers. He explained that non-compliance in that instance 'was treated as a matter that needed to be investigated by the privileges committee, and it was investigated quite seriously':¹⁰

Following its becoming evident about 12 months ago that a 2009 order for papers may not have been fully complied with, that matter was referred to the Legislative Council's Privileges Committee for inquiry, and over much of last year the Privileges Committee conducted a very robust and quite intensive inquiry to get to the bottom of exactly why, who and when things happened to mean that that particular order was not complied with. I think that the way in which the committee undertook that inquiry, and the two reports that it produced as a result, have sent a very powerful signal to the public service in New South Wales that orders for papers by the Legislative Council are very significant and need to be fully complied with.¹¹

3.6 Mr Blunt further explained that although, in the 15 years since the *Egan* cases, sanctions had not been needed:

...it is now routine that non-government members give a contingent notice of motion so that, in the event of a minister failing to table documents in accordance with a resolution of the House, they may move for the

7 *Proof Committee Hansard*, 11 February 2014, p. 5.

8 *Proof Committee Hansard*, 11 February 2014, p. 4.

9 *Submission 1*, p. 4.

10 *Proof Committee Hansard*, 11 February 2014, pp 2–3.

11 *Proof Committee Hansard*, 11 February 2014, p. 2.

suspension of standing orders immediately to allow a motion to be moved forthwith judging the minister guilty of a contempt of the House.¹²

3.7 Having explained the requirement at law for the NSW executive to comply with orders for the production of papers, Mr Blunt outlined the process followed by the NSW Legislative Council in circumstances where privilege was claimed:

Where a claim of privilege is made, documents are kept in the custody of the Clerk and are available for inspection by members only. They are not to be copied or made public, and I can say that in 15 years there has never been a breach of that confidentiality; there has never been a leak in relation to a document that has been lodged subject to a claim of privilege.

If a member feels that a claim of privilege has been spread over too many documents or is not sufficiently strong or not otherwise valid, the member may initiate a process which leads to the appointment of an independent legal arbiter to evaluate and report to the house on the claim of privilege. So the role of the independent legal arbiter in the New South Wales Legislative Council model, whilst very important, does not touch on whether the documents will actually be produced. The documents have already been produced. Rather, the role of the arbiter in our model is about whether or not the documents will stay privileged or whether they will ultimately be made public.

The role of the arbiter in exercising that duty is to consider and report to the house whether or not the claim of privilege made by the executive government is valid and to recommend whether or not that claim should be upheld. The report of the arbiter themselves does not change the status of the document. It is merely a recommendation to the house. Ultimately, it is up to the house itself to decide whether or not to act on the arbiter's recommendation. Whilst in the overwhelming majority of instances the arbiter's recommendations are followed and implemented, it does not always happen. It is always up to the house; it is up to the member who has initiated the dispute to garner majority support in the house to have the arbiter's recommendation implemented.¹³

3.8 The procedure used by the Legislative Council in NSW has evolved over time and was finally incorporated into its standing orders in 2004 (standing order 52).¹⁴ Mr Blunt stated:

Under standing order 52, orders for papers are initiated by resolution of the House. On an order for papers being agreed to, the terms are communicated by the Clerk to the Director General of the Department of Premier and Cabinet, who liaises with the departments or ministerial offices named in the resolution to coordinate the retrieval of the documents requested.

12 *Proof Committee Hansard*, 11 February 2014, pp 2–3.

13 *Proof Committee Hansard*, 11 February 2014, p. 2.

14 *Submission 1*, p. 3.

...Where a claim of privilege is made over documents, the return must also include reasons for the claim of privilege. Documents returned...must be accompanied by an indexed list of all documents tabled, showing the date of creation of each document, a description of the document and the author of the document. Where documents are subject to a claim of privilege, a separate index of those documents is required to be provided.

Once the documents have been tabled in the House or received out of session by the Clerk, they are deemed to have been published by authority of the House, unless a claim of privilege has been made...Documents over which a claim of privilege has been made are kept confidential to members of the Legislative Council only in the Office of the Clerk and may not be copied or published without an order of the House.¹⁵

When documents are produced, or returned, as we say, from the executive government, if they are subject to a claim of privilege then the documents themselves remain in my custody, remain confidential. The index to those documents and the claim of privilege themselves are not privileged. So, the index will be published on our tabled-papers database, as will the claim of privilege. So, there is a degree of transparency there. Then, at the end of the process, if an arbiter is appointed and they report on the matter, then, once the report has been received, on the next sitting day the house will be advised that there is an arbiter's report. It remains confidential, though, until a member gives a notice of motion and moves a motion for the arbiter's report to be tabled and made public.¹⁶

There is a register kept in relation to both public documents returned to order and there is a separate register in relation to documents subject to a claim of privilege. Any member coming to inspect those documents signs in.¹⁷

3.9 Where a claim of privilege by the executive over some or all of the documents returned is disputed by a member of the Legislative Council, the Clerk is authorised to release the disputed document or documents 'to an independent legal arbiter appointed by the President'.¹⁸ Mr Blunt informed the committee that '[t]he appointment of the arbiter has never been a partisan matter. There has never been any disputation or disquiet amongst members that I am aware of'.¹⁹

3.10 The committee sought to understand how the use of an independent arbiter assisted with the resolution of contested claims of privilege over papers. Mr Blunt explained:

15 *Submission 1*, pp 3–4.

16 *Proof Committee Hansard*, 11 February 2014, p. 7.

17 *Proof Committee Hansard*, 11 February 2014, p. 5.

18 *Submission 1*, p. 4.

19 *Proof Committee Hansard*, 11 February 2014, p. 4.

In considering the validity of a claim of privilege, the arbiter is not bound to merely consider whether or not a document is privileged at law, including as declared in *Egan v Chadwick*, as a judge would do. Ultimately, the arbiters evaluating claims of privilege do so in a different manner to a judge. They do, however, do it in a way which has developed consistently over a number of years and in a way which the house has found to be satisfactory. Put most simply, this has involved the arbiter ultimately weighing two competing interests: on the one hand, the public interest in accountability and transparency of the executive government, and, on the other hand, the interest in confidentiality for the reasons articulated by the government in the privilege claim.²⁰

3.11 The independent arbiter must present a report to the NSW Legislative Council with a recommendation whether or not a claim of privilege should be upheld. Mr Blunt informed the committee that in most cases the member responsible for disputing the government's claim of privilege, will, on receipt of the arbiter's report, move that it be tabled and made public.²¹ He further explained that in circumstances where the arbiter's report is tabled and the arbiter has recommended that the claim of privilege be denied, a member will usually 'give notice of a motion requiring the Clerk to lay the documents considered not to be privileged on the table of the House and to authorise them to be published'.²² If the arbiter's report upholds the claim of privilege, the papers remain restricted to members only.²³

3.12 Mr Blunt emphasised, however, that the independent arbiter makes a recommendation to the House and that the House is not bound to accept the arbiter's recommendation:

...the House, as the final arbiter on any claim of privilege, may vote to make the documents public at any time, notwithstanding the recommendation of the arbiter.²⁴

3.13 Whilst appearing before the committee, Dr Rosemary Laing, Clerk of the Senate, described the NSW model as 'the best system around at the moment for adjudicating these matters':

[NSW has] chosen a system of adjudication and the council has a process whereby if there is a claim like a public interest immunity claim made in response to an order for production of documents, the process nonetheless involves the documents being handed into the custody of the Clerk and if there is a contested subset of those documents then an independent arbiter is

20 *Proof Committee Hansard*, 11 February 2014, p. 2.

21 *Submission 1*, p. 4.

22 *Submission 1*, p. 4.

23 *Submission 1*, p. 4.

24 *Submission 1*, p. 4.

appointed to assess the documents in light of the claim of public interest immunity that is made and then to provide a report.²⁵

3.14 The Clerk remarked that 'it is a system that...from this distance appears to have worked well'.²⁶

3.15 The Clerk explained that the use of an independent arbiter to resolve disputes had been considered by the Senate in the past:

We should not ignore the fact that the Senate, although not having a systematic process for arbitration, has also used this idea in the past. In the early 1990s, for example, in the context of a disputed claim to information about government leasing of commercial buildings in Melbourne and claims of commercial-in-confidence, the Senate ordered the Auditor-General to conduct an inquiry and the Auditor-General, using his powers, did conduct an inquiry and present a report to the Senate which appeared to be satisfactory to the Senate at the time²⁷...It is certainly a method that has been commended by the Senate's Privileges Committee and the Privileges Committee itself has used an independent arbiter in certain situations. It is something that the Finance and Public Administration Committee looked into in 2009, early 2010 but it concluded that it was not an appropriate mechanism at that stage. The next appearance of the idea was in the agreements for parliamentary reform in the last parliament, but again there was no outcome from those agreements in terms of a tangible process.²⁸

3.16 The Clerk expressed the view that the NSW Legislative Council's appointment of retired Supreme Court judges as arbiters was a 'good idea' as:

It has the safeguards of having an independent person who is used to making those kinds of balancing determinations between competing claims.²⁹

3.17 The Clerk suggested that the NSW Legislative Council's system of adjudication 'seems to be preferable to persisting with a stand-off between two potentially irreconcilable claims'.³⁰

3.18 Mr Blunt explained that when the system was first implemented in the NSW Legislative Council 15 years ago, there was 'a degree of nervousness in the

25 Dr Rosemary Laing, Clerk of the Senate, *Proof Committee Hansard*, 31 January 2014, pp 2–3.

26 *Proof Committee Hansard*, 31 January 2014, p. 3.

27 The Clerk noted that '[t]he Senate can no longer order the Auditor-General to do such things because the Auditor-General's legislation was changed in 1997 to guarantee his independence from being directed by anybody, including a house of the parliament'. *Proof Committee Hansard*, 31 January 2014, p. 3.

28 *Proof Committee Hansard*, 31 January 2014, pp 2–3.

29 *Proof Committee Hansard*, 31 January 2014, pp 2–3.

30 *Proof Committee Hansard*, 31 January 2014, p. 3.

parliamentary community' but that from a parliamentary perspective, 'everyone is delighted with the result'.³¹ He further advised the committee that in the NSW Legislative Council's 2013 Privileges Committee inquiry, that committee had an opportunity to reflect on the independent arbitration process and its effectiveness:

...they deliberated at great length. The report that they produced suggested four improvements, but overall the result was, I think, a very firm endorsement of the fundamentals of the system as it operates at the moment.³²

Committee view

3.19 As discussed in chapter 2, the Senate has a right to information and documents, and considerable scope to exercise this right through its inquiry powers. The Senate's committee system is one of 'inherent flexibility'³³ and one mechanism by which the Senate exercises its powers to obtain information. The committee notes that in the past, the ability of committees to take evidence *in camera* or receive evidence in altered form has been used to 'pursue the sought-after information'.³⁴ On this occasion, however, this committee has been unable to garner further information from the government relevant to documents ordered on 14 November and 3 December 2013 and subject to a contested claim of public interest immunity (see chapter 2).

3.20 This committee's experience is symptomatic of an entrenched and ongoing challenge facing the Senate in obtaining information and documents which the executive does not wish to disclose. As noted in chapter 2, there may be valid reasons why certain information should not be publicly released and the committee is sensitive to such claims for public interest immunity where they are made on valid grounds. However, there may also be occasions where a government does not wish to release information on account of it being politically embarrassing or of contestable legality. Withholding such information does not accord with principles of good governance, and prevents the Senate from fulfilling its scrutiny and accountability functions.

31 *Proof Committee Hansard*, 11 February 2014, p. 8.

32 *Proof Committee Hansard*, 11 February 2014, p. 4. 'One of the small number of changes to the system that the Privileges Committee recommended last year was that the standard return period in an order for papers go up to 21 days, so that it not place an inordinate burden on the Public Service. So, 21 days is the average time for documents to be returned. It is up to members how quickly they come and inspect the documents. Once a dispute is lodged in relation to a claim of privilege and an arbiter is appointed, then under the standing order they have seven days to produce their report. In some cases they have been given extensions. Then, once the report is provided, the various procedural steps that have to happen in the house for the status of the documents to change take three sitting days. It is also important to emphasise that those three sitting days provide an opportunity for careful consideration and deliberation on those matters'. *Proof Committee Hansard*, 11 February 2014, p. 9.

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

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

3.21 The committee takes the view that this inquiry has clearly demonstrated the shortcomings in the Senate's current procedures for obtaining documents subject to a contested claim of public interest immunity and subsequently resolving those disputed claims.

3.22 To date, the Senate has not developed procedures or criteria for determining whether a claim for public interest immunity should be granted. The committee believes that the status quo is unsatisfactory and will only ensure that the Senate continues to be frustrated by such disputed claims into the future. In addition to the requirements outlined in the Senate's resolution of 13 May 2009, a clear process is needed to resolve disputed claims of public interest immunity.

3.23 The committee sees merit in the independent arbitration model used by the NSW Legislative Council and acknowledges the high regard in which this process is held. In the committee's view, such a process, or some version of it, may well be adapted to the Senate. Indeed, the committee is aware that the Committee of Privileges has previously supported a process for independent arbitration.³⁵

3.24 The committee therefore proposes that the Senate Procedure Committee consider in detail:

- the process for independent arbitration in the NSW Legislative Council, including that House's standing order 52;
- the applicability of the NSW Legislative Council's model of independent arbitration to the Senate;
- any adaptations or amendments needed to the NSW Legislative Council's model in order to implement a similar model of independent arbitration in the Senate;
- any amendments to Senate practice and procedure required to implement a model of independent arbitration; and
- suitable candidates for and / or qualifications required of an independent arbiter.

3.25 One of the strengths of the NSW Legislative Council model is the legal requirement of the executive to provide documents to that House, as a result of the *Egan* decisions. This differs from the situation that is the subject of this inquiry, where the dispute comprises both a failure to fully comply with orders for the production of documents and a related claim of public interest immunity. It is clear to the committee that without the ability to inspect documents, it is impossible to conduct any

35 Committee of Privileges, *52nd Report*, 1 March 1995, available: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/~media/wopapub/senate/committee/priv_ctte/completed_inquiries/pre1996/report_052/report_pdf.ashx (accessed 18 February 2014).

meaningful process of determining whether a claim of public interest immunity over them is valid.

3.26 Given federal governments have a persistent record of non-compliance with Senate orders for the production of documents where these are considered sensitive in nature, the committee considers it unlikely that agreement could be reached allowing such documents to be provided in a way that enables senators to inspect them, as is the case in the NSW Legislative Council. For this reason, the committee draws attention to the proposal in the 52nd Report of the Committee of Privileges that disputed documents are provided directly to an independent arbiter for evaluation. The committee suggests that the Procedure Committee, in respect of accessing and inspecting documents subject to a disputed claim for public interest immunity, has particular regard to this proposal in the 52nd Report of the Committee of Privileges.

Recommendation 2

3.27 The committee recommends that the Senate refer the following matter to the Procedure Committee for inquiry and report, as a matter of urgency:

- **the process for independent arbitration in the NSW Legislative Council, including that House's standing order 52;**
- **the applicability of the NSW Legislative Council's model of independent arbitration to the Senate;**
- **any adaptations or amendments needed to the NSW Legislative Council's model in order to implement a similar model of independent arbitration in the Senate;**
- **any amendments to Senate practice and procedure required to implement a model of independent arbitration;**
- **suitable candidates for and / or qualifications required of an independent arbiter;**
- **in respect of accessing and inspecting documents subject to a disputed claim for public interest immunity, the proposal in the 52nd Report of the Committee of Privileges whereby disputed documents are provided directly to an independent arbiter for evaluation; and**

in respect of any such inquiry, the Procedure Committee have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session.

**Senator Penny Wright
Chair**

Dissenting Report – Coalition Members of the Committee

Introduction

1.1 The claim of public interest immunity in regard to documents relating to 'on water operations' made by the Assistant Minister for Immigration and Border Protection, Senator Cash, is valid and necessary to protect public interest.

1.2 Substantial information was provided by the Government to the Senate where it was not against the public interest to do so. Significant efforts were also made to provide further information to the Opposition and the Australian Greens to ensure that the Senate's ability to hold the Government to account on this issue was maintained.

1.3 Specific mention should be made of the fact that during the 42nd Parliament, 33 orders for the production of documents were not complied with by the former Government, and 9 were only partially complied with.¹ Further, during the 43rd Parliament, 26 orders for the production of documents were not complied with, and 7 were partially complied with.²

Public interest immunity claim

1.4 Coalition Members note the motion regarding public interest immunity claims moved by Senator Mathias Cormann and tabled by the Senate on the 13th of May, 2009,³ along with the advice received by Senator Cormann on the 24th of March from Mr Harry Evans, then Clerk of the Senate, which stated the following information:

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

1 *Journals of the Senate* – Orders for the Production of Documents – 42nd Parliament No. 129–24 June 2010, pp 1–22.

2 *Journals of the Senate* – Orders for the Production of Documents – 43rd Parliament, No. 155–28 June 2013, pp 1–19.

3 *Journals of the Senate*, No. 68–13 May 2009, p. 1941.

- Prejudice to Australia's international relations
- Prejudice to relations between the Commonwealth and the states.

[...]

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 only be made 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.⁴

1.5 Senator Cash establishes in her response to Dr Rosemary Laing, Clerk of the Senate, on 10 December 2013, the grounds as to why it is not in the public interest to release certain requested information and why public interest immunity is being claimed.

1.6 The response further details how stemming the flow of information available to people smugglers remains a core element of decreasing their tactical advantage and aids the fulfilment of the Coalition Government's election promise of stopping the boats.

1.7 This necessity for confidentiality in this matter is further strengthened by the remarks of Lieutenant General Angus Campbell, Commander of Operation Sovereign Borders and the Joint Agency Taskforce. Lieutenant General Campbell notes that:

1. These documents may reveal the location, capacity, patrol and tactical routines relevant to Navy and Customs vessels and air assets.

- Such information can undermine our tactical advantage over people smugglers, who seek to use this information to avoid or trigger detection, or to precipitate a search and rescue response.

- Information of this type can also undermine our ability to protect Illegal Maritime Arrivals from the practices of people smugglers and other serious criminal activities

- Finally, it can undermine more generally the effectiveness of Australian assets to maintain maritime security awareness in the broad sense.

4 Mr Harry Evans, then Clerk of the Senate, *Advice to Senator Mathias Cormann Regarding Notice of Motion*, 17th March 2009.

2. Secondly, the kinds of documents that are sought, from my perspective, may enable an exploitation of confidential methodologies and procedures used by Navy and Customs vessels and assets. Information about the arrival of ventures, including the timing of the arrival and the composition of passengers can be used by people smugglers, and has been used by people smugglers, to:

- Provide 'proof of arrival' and the basis for payment;
- Provide a basis for further positive marketing of their business; and
- Undermine communications strategies aimed at potential illegal immigrants.

3. Finally, those documents may impact upon Australia's relations with foreign States and damage those relationships, undermining the potential for international agreements and cooperative behaviours and also the working relationships necessary between operational agencies in relation to safety of life at sea or generally on-water cooperative operations.⁵

1.8 The Hon. Scott Morrison in a statement made to the Committee on the 31st January 2014 further stated:

Prior to the last election the Coalition gave an undertaking that we would take advice from the Joint Agency Task Force to be formed to implement Operation Sovereign Borders, on the public release of information relating to operations.

The Government honoured this commitment and, as a consequence, operational information is not publicly released or subject to public commentary by the Government.

The Government believes that disclosure of such 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, passenger information, including nationalities involved on those voyages, as this would prejudice current and future operations, it would put at risk people who are involved in our operations and unnecessarily cause damage to Australia's national security, defence and international relations.

In short, in 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.⁶

1.9 Furthermore, during the hearings the Opposition and the Greens both acknowledged that there will be 'times when information must not or cannot be

5 Lieutenant General Angus Campbell, *Proof Committee Hansard*, 31 Jan 2014, pp 12–13.

6 The Hon. Scott Morrison, MP, Minister for Immigration and Border Protection, *Proof Committee Hansard*, 31 Jan 2014, pp 10–12.

fleshed out thoroughly'.⁷ Additionally, that there are genuine issues of commercial secrecy and national security that 'require there not be public disclosure'.⁸

1.10 It is worth noting that claims of public interest immunity were regularly made by representatives of the former Labor Government in the 42nd and 43rd Parliaments. These claims related to a number of issues including sports and recreation facilities, environmental issues, the carbon pollution reduction scheme, private health insurance reforms, employment services, chemotherapy treatment and aged care providers.⁹

1.11 In evidence to the Committee, the Clerk of the Senate stated that it was 'not uncommon' for Ministers to refuse to refuse orders for the production of documents, also stating that '[i]t is certainly a fact that there is a degree of noncompliance with orders for the production of documents'.¹⁰

1.12 The Clerk provided evidence that in the 42nd Parliament, 33 orders for the production of documents were not complied with, and in the 43rd Parliament, 26 were not complied with.¹¹

1.13 There was no evidence provided to the Committee that demonstrated there was a genuine public interest in having the categories of information, as detailed below, being released:

- Activity summaries
- Briefings internally and externally, including Minutes and Talking Points as necessary
- Case note entries and taskings, timelines and charts
- Chronology reporting of SIEV, SOLAS and SAAR events
- Coordination messaging
- Electronic External Enquiry forms
- Email correspondence
- Entry reporting including interviews, nomination rolls, screening reports
- Guidelines
- Information and subject reports
- Input into databases and information storage systems (and related reporting outputs)

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

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

9 Senator Zed Seselja, *Proof Committee Hansard*, 31 January 2014, p. 5.

10 Dr Rosemary Laing, Clerk of the Senate, *Proof Committee Hansard*, 31 January 2014, p. 5.

11 Dr Rosemary Laing, Clerk of the Senate, answer to question taken on notice, received 31 January 2014.

-
- Intelligence reporting including requests, plans, interview reports, contacts, recommendations
 - Ministerial and Cabinet correspondence and advice, including related briefing and comments
 - Operation plans, orders, scans, situational reports
 - Records of conversations
 - Reviews and input to reviews
 - Sighting reports including related intelligence, visual contact, interaction, vessel reporting and asset taskings/movements
 - Vessel broadcasts.¹²

Provision of Information

1.14 Dr Rosemary Laing, Clerk of the Senate stated in Advice to the Committee dated 7th January 2014 that:

There are parliamentary mechanisms...such as the receipt of evidence in camera or the provision of confidential briefings to know against the public interest in that particular information remaining confidential.¹³

1.15 Substantive action was undertaken by the Minister and the Assistant Minister to provide the information requested in an altered form to ensure the need to ensure that information remained confidential was adequately balanced against the Senate's need to hold the Government to action.

1.16 Minister Morrison made himself available to the Committee on his own initiative. This occurrence is the first time in 22 years that a House Minister has testified at a Senate Committee Hearing.

1.17 A number of avenues of information have been offered and provided to Members of Parliament, the media and the public by both The Hon. Scott Morrison and Senator Cash in relation to the Government's successful Operation Sovereign Borders policy.

1.18 In addition to testifying before the Senate Committee, the Minister for Immigration and Border Protection has also offered confidential briefings to representatives from Labor and Greens in relation to Operation Sovereign Borders. As yet, it is the understanding of Coalition Members that no Greens representative has taken up the offer by the Minister.

12 Mr Martin Bowles, Secretary of the Department of Immigration and Border Protection, *Correspondence to the Committee*, 29 January 2014.

13 Dr Rosemary Laing, Clerk of the Senate, *Advice to the Legal and Constitutional Affairs References Committee*, 7 January 2014, p. 3.

1.19 Weekly updates have also been provided which detail a number of statistics relating to the programme, including:

- The number of persons who have illegally entered Australia by boat and transferred to immigration authorities
- The number of transfers to offshore processing facilities and the standing population of those facilities as well as at Christmas Island
- The number of voluntary or involuntary returns; and
- The details of any incidents, arrests or significant disruptions as appropriate.¹⁴

1.20 Both the Minister and Assistant Minister continue to make themselves available, conduct interviews, appear at press conferences and respond to media enquiries on a regular basis.

1.21 The provision of information and the offer of confidential briefings (if taken up) provided significant opportunity for the Committee to determine whether a claim of public interest immunity was valid. The argument that the non-release of a schedule of documents was an obstacle to determining the validity of the claim could have been resolved through the use of confidential briefings as offered by the Minister.

Conclusion

The Coalition Members do not support the majority report. We particularly reject Recommendation 1 of the majority report.

The claim of public interest immunity is valid.

**Senator Zed Seselja, Deputy Chair
Liberal Senator for the ACT**

**Senator the Hon. Ian Macdonald
Liberal Senator for Queensland**

14 The Hon. Scott Morrison MP, Minister for Immigration and Border Protection, *Proof Committee Hansard*, 31 January 2014, pp 10–12.

Appendix 1

Public submissions

- 1 Clerk of the NSW Legislative Council
- 2 Dr Sue Hoffman
- 3 Ms Marg Hutton
- 4 Mr Matt Dickson
- 5 Mr Greg Hogan
- 6 Mr Colin Smith
- 7 Refugee Advice and Casework Service (RACS)
- 8 Ms Marilyn Shepherd
- 9 Department of Immigration and Border Protection

Appendix 2

Witnesses who appeared before the committee

Friday 31 January 2014—Canberra

BOWLES, Mr Martin, Secretary, Department of Immigration and Border Protection

CAMPBELL, Lieutenant General Angus, Commander, Operation Sovereign Borders, Joint Agency Taskforce

HURLEY, General David, AC, DSC, Chief of the Defence Force, Department of Defence

LAING, Dr Rosemary, Clerk of the Senate

MORRISON, Mr Scott, Minister for Immigration and Border Protection

PEZZULLO, Mr Michael, Chief Executive Officer, Australian Customs and Border Protection Service

RICHARDSON, Mr Dennis, AO, Secretary, Department of Defence

Tuesday 11 February 2014—Canberra

BLUNT, Mr David Michael, Clerk of the Parliaments and Clerk of the Legislative Council, Parliament of New South Wales

Appendix 3

**Correspondence from the Department of Immigration
and Border Protection received 29 January 2014**



Australian Government

Department of Immigration and Border Protection

SECRETARY

29 January 2014

Chair
Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to the letter from the Committee Secretary dated 16 December 2013 and your letter of 22 January 2014 requesting:

a schedule of the documents identified as being within scope but not tabled of the Orders for the Production of Documents lodged by Senators Hanson-Young and Carr during the 2013 spring sittings of the 44th Parliament.

I have discussed this request with Lieutenant-General Angus Campbell, Commander, Joint Agency Task Force (JATF). As the requested information includes “the title, source and nature of each document identified,” General Campbell and I agree that providing the requested schedule would of itself divulge much of the information which the Minister and Assistant Minister for Immigration and Border Protection sought to protect on the bases under examination by the Committee.

The Joint Agency Task Force of Operation Sovereign Borders operates in the context of a border security operation involving military, law-enforcement and intelligence activities, in which information is given appropriate levels of national security classification, stored on secure networks and housed within secure facilities. In this context, staff produce documents with titles and subject lines on the basis that these will retain their classification.

The requested schedule could be produced with appropriate redactions, but the redactions would need to be so extensive that the list would be of virtually no use to the Committee in its deliberations. As such, my view is that the considerable imposition on the resources of the JATF and BPC would not be justified by the minimal benefit to the Committee.

In the interests of assisting the members of the Committee, the Immigration and Border Protection portfolio agencies have prepared a list of categories of information which may, subject to the consideration of individual exceptions and the precise requirements of the Order for Production, be provided to the Committee but for the concerns outlined in the Minister’s response to the order.

people our business

- Activity summaries
- Briefings internally and externally, including Minutes and Talking Points as necessary
- Case note entries and taskings, timelines and charts
- Chronology reporting of SIEV, SOLAS and SAR events
- Coordination messaging
- Electronic External Enquiry forms
- Email correspondence
- Entry reporting including interviews, nomination rolls, screening reports
- Guidelines
- Information and subject reports
- Input into databases and information storage systems (and related reporting outputs)
- Intelligence reporting including requests, plans, interview reports, contacts, recommendations
- Ministerial and Cabinet correspondence and advice, including related briefing and comments
- Operational plans, orders, reports, scans, situational reports
- Records of conversations
- Reviews and input to reviews
- Sighting reports including related intelligence, visual contact, interaction, vessel reporting and asset taskings/movement
- Vessel broadcasts

I trust that this information is of assistance to the Committee.

Yours sincerely

~~Martin~~ Bowles PSM

Appendix 4

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



AUSTRALIAN SENATE

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

CLERK OF THE SENATE

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 orders¹ 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 claims⁸, 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 2012¹⁰, 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 of 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 power¹³. 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 it¹⁴;
- 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 subjects¹⁷, 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)



AUSTRALIAN SENATE

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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)

hc/pap/14613
19 May 2005

THE SENATE

GROUNDINGS 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



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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

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