

**SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**  
**BUDGET ESTIMATES 2017**

**Attorney General's Department**

**Program: 1.1 AGD Operating Expenses - Civil Justice and Legal Services**

**Question No. BE17-014**

**Senator Waters asked the following question on 24 May 2017:**

Senator WATERS: On its face it is. You asked the court to delay the decision, in your own words.

Senator Brandis: I just read you the argument that the Commonwealth put to the court and you seem to have a copy of it there.

Senator WATERS: I do. It is on the public record.

Senator Brandis: It was not a request for the court to delay anything. It was a request for the court to have regard to the fact that there was legislation before the parliament and to make its decision on this case once the parliament had had the opportunity to consider.

Senator WATERS: Yes. A delay. That is a delay until the law—you attempted to pass it.

Senator Brandis: That is not asking the court to delay a decision. It is saying to a court there is a relevant consideration here to which you ought to have regard in making your decision.

Senator WATERS: A rose by any other name would smell as rotten. You will take on notice how many times you have asked the court to delay until such time as the parliament can reach a decision.

Senator Brandis: I am not accepting your premise that this is a request for the court to delay. It is a request for a court to take into consideration a relevant fact.

Senator WATERS: Whichever way you would like to characterise it, I would like to know how many times you have done this before.

CHAIR: Where there is legislation before the parliament.

Senator WATERS: I would also like to know if any other attorney-general has ever intervened in such a manner with such a request.

Senator Brandis: I do not know. I am the only person who can speak for myself.

Senator WATERS: Perhaps the departmental officials could assist you in checking on that, because it seems to me to be a highly unusual and highly inappropriate intervention.

Senator Brandis: I am advised by Mr Walter that a similar application was made in 2014 in the Jabiru litigation.

Senator WATERS: That is one instance. We are up to two now.

Senator Brandis: That is not the question you asked me.

Senator WATERS: Tell me what I asked you.

Senator Brandis: You have asked me whether I have ever intervened before. I took it on notice because I wanted to check, but I am reminded by my official that there is another example that he can readily think of. The answer to your question is yes, I have.

Senator WATERS: Okay. So you have done it twice.

Senator Brandis: No, I did not say I have done it twice. I said I have done it before and I have given you one example that my officials at the table can call to mind. Whether there are others I do not know. That is why I took the question on notice.

Senator WATERS: I think we are quite clear here. You have cited two instances. You will take

on notice whether there will be further instances. I have also asked the department to take on notice whether previous attorneys have intervened in such a manner. I will await those details, unless you have them to hand.

Mr Walter: No, I do not. Can I just make a couple of brief points, though. At any one time the Commonwealth is usually a party to roughly 100 native title matters before the courts. There are usually about 350 altogether. Roughly 25 per cent of the matters that we are a party to are matters where we have intervened on grounds relating to the operation of the act, not because the Commonwealth has a property interest as such.

Senator WATERS: Yes, I understand that.

Mr Walter: So there are those two grounds in which we have been a party. The exercise you are asking us to undertake is to go back through hundreds of potential interventions to find out on what basis that has been since the act was commenced, which is a very—

Senator WATERS: Well, with respect, there have not been that many native title amendment bills, have there?

Senator Brandis: But that is not the question you asked.

Senator WATERS: My request goes to how many times you have intervened when you have asked the court to delay on parliament's privilege.

CHAIR: It is where there has been legislation before the parliament that affects the decision.

Senator WATERS: Exactly, so that actually would not be too difficult an exercise.

CHAIR: And that, I guess, would be nil.

Senator Brandis: I did say I would take that question on notice, but it may very well be that my answer, on reflection, is to not provide you that information because it is an unreasonable use of the Commonwealth's resources. When every one of these cases is a matter of public record, and you, Senator Waters, are a lawyer with some expertise in this field and with a parliamentary staff, you should do your own research.

Senator WATERS: Well, if you like, Attorney, I can ask the Parliamentary Library, but I thought your department would have the opportunity to—

Senator Brandis: Why don't you do your own research, rather than ask the taxpayer to pay for it?

CHAIR: Can I just intervene? I did not want to there, because, as Senator Waters says, she is on limited time.

Senator WATERS: How about we do estimates via the Parliamentary Library then, if that is your argument?

CHAIR: Her time is finished, but can I just indicate to you, Mr Walter: that is not a question of the budget estimates. What happened 20 years ago has nothing to do with the budget estimates, which is what we are here inquiring about. So you should disregard that part of the question that relates to anything but the expenditure in the current budget estimates round.

Senator Brandis: We have taken the question on notice. I hear what you say, Mr Chairman, and you are, as always, correct. And our response to the question taken on notice will no doubt have regard to your advice.

### **The response to the honourable Senator's question is as follows:**

The Commonwealth has a responsibility to advise the courts of matters it might need to be aware of. This may include, for example, the existence of legislation before the Parliament, related appeals, or settlement negotiations. This responsibility is not restricted to the area of native title.

Whether this occurs as a matter of course (because the Commonwealth is already a party to proceedings) or specifically as a result of intervention is somewhat artificial. The Commonwealth will generally be a party to native title proceedings that affect its property

interests but may also become a party through intervention because the matter raises new, novel or significant legal or policy issues. This follows from the Commonwealth's responsibility for the operation of the *Native Title Act 1993* and is supported by a general right of intervention by the relevant Commonwealth Minister (currently the Attorney-General) contained in section 84A.

There have been 36 Acts which have amended the Native Title Act since its commencement.

Given the range of reasons why the Commonwealth may decide to intervene in native title proceedings, the number of amending Acts, and the number of proceedings that the Commonwealth has been a party to since the commencement of the Native Title Act, it would be an unreasonable diversion of resources to identify instances where the Commonwealth has intervened in proceedings to bring the fact of legislation before the Parliament to the attention of the court.