AUSTRALIAN SENATE

PARLIAMENT HOUSE
CANBERRA ACT 2600

CLERK OF THE SENATE

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20 October 2015

Senator the Hon Bill Heffernan
Chair
Rural and Regional Affairs and Transport Legislation Committee
Parliament House
Canberra ACT 2600

Dear Senator Heffernan

***SUB JUDICE* CONVENTION**

The committee has asked for advice about the application of the *sub judice* convention to its questioning of officers of the Department of Agriculture and Water Resources and Horticulture Innovation Australia Ltd (an industry body established under the *Horticulture Marketing and Research and Development Services Act 2000*).

I understand that the questioning relates to a former employee who is the subject of fraud charges to be heard in the near future. A civil case in the NSW Supreme Court, decided in September, may also be the subject of an appeal.

The *sub judice* convention is a restriction on debate, applied by the chair, which is designed to avoid debate (or questioning) which could involve a substantial danger of prejudice to proceedings before a court, in the absence of an overriding public interest in the Senate discussing the matter. It is a prerequisite for the convention to apply that there are proceedings actually on foot or imminent, which appears to be the case in this instance.

The concept of prejudice to legal proceedings involves an hypothesis that debate or questioning on a matter before a court could influence the court and cause it to make a decision other than on the evidence and submissions before it. Danger of prejudice does not arise from mere reference to such a matter, but from the canvassing of the issues before the court or prejudgement of those issues, where prejudgement is likely to hinder the court in reaching a correct conclusion. Prejudgement or public canvassing may also affect witnesses and the evidence they are to give.

Danger of prejudice is considered greater where matters are before a jury (as in a criminal trial), rather than a judge alone, because juries are considered to be less resistant than judges to external influences. They also lack the training of judges to make decisions only on the basis of the material before the court. In the past, it has also been considered that there may be

a case to regard magistrates as more vulnerable to influence than judges who are trained to resist being influenced in forming their judgements by public or parliamentary debate.

Senate practice has identified three main principles in the application of the *sub judice* convention:

- There should be an assessment of whether there is a real danger of prejudice in the sense that publication would either create an atmosphere where a jury would be unable to deal fairly with the evidence put before it, or that publication would affect a future witness in the giving of evidence.
- The danger of prejudice must be weighed against the public interest in the matter under discussion or questioning.
- The danger of prejudice is greater where the matter is actually before a magistrate or a jury.

These principles are canvassed in much greater detail in *Odgers' Australian Senate Practice*, 13th edition, pages 250–57.

The *sub judice* convention is generally applied by the chair making a ruling that particular material should not be published (or received) or discussed, in the interests of avoiding conduct that may interfere with the operation of the courts. A chair might want to hear arguments on the matter before making a ruling. A ruling may be disputed, in which case the committee should resolve the matter in a private meeting. A committee may take the time it needs to consider the issues before making a decision whether to accept a document or not, or to continue with a line of questioning.

For legislation committees considering estimates, there is the additional consideration that the committees are unable to accept evidence other than in public session. Any document that the committee receives is automatically published under the relevant standing order, and the committee does not have the capacity in that mode to take evidence in private. For other types of committee, taking evidence in private and not publishing it until the risk of prejudice to the court case has passed is sometimes an option in dealing with material of this nature. Similarly, if a trial is to conclude in the near future, it may be appropriate for a committee witness to take questions on notice and provide otherwise potentially prejudicial material after the risk of prejudice has passed.

The committee should be cautious about canvassing matters that the HIA witnesses might subsequently be questioned about in court. This is not only because of the risk that such canvassing might pose to the forthcoming criminal proceedings. There is also a possibility that the committee proceedings could themselves cause difficulties for the legal proceedings. Because of parliamentary privilege, committee proceedings cannot be examined in court proceedings.

It could be argued by parties to the case that they cannot properly conduct their case without access to the parliamentary material. For example, if a parliamentary witness gave evidence in the court case that was inconsistent with their parliamentary testimony, the court would be unable to examine that testimony. As a result, the credibility of the witness, for example, would be unable to be tested, perhaps to the detriment of one or other of the parties to the case.

While this may seem an unlikely prospect in this case, the committee should nonetheless take it into account in determining the extent to which it should permit such areas to be canvassed.

Please let me know if I can be of any further assistance.

Yours sincerely

(Rosemary Laing)