



THE SENATE

ENVIRONMENT AND COMMUNICATIONS REFERENCES COMMITTEE

8 September 2023

The Hon Tanya Plibersek MP
Minister for the Environment and Water

*By email: Tanya.Plibersek.MP@aph.gov.au; Minister.Plibersek@dcceew.gov.au
cc: david.fredericks@dcceew.gov.au; ParliamentaryInquiries@dcceew.gov.au*

Dear Minister

Re: Senate Environment and Communications References Committee inquiry into the impacts and management of feral horses in the Australian Alps – provision of legal advice

The Senate Environment and Communications References Committee is currently undertaking an inquiry into the impacts and management of feral horses in the Australian Alps.

During the course of the inquiry, the committee has heard that jurisdictional boundaries between the Commonwealth and NSW are a significant complicating factor for the overall effective management of feral horses in the Australian Alps National Parks and Reserves National Heritage place (Australian Alps National Heritage place).

At a public hearing on 23 August 2023, representatives of the Department of Climate Change, Energy, the Environment and Water (DCCEEW) submitted that there are constitutional limitations on the Commonwealth's regulatory powers with regard to National Heritage listed places.

Questions relating to the existence of legal advice on these matters were taken on notice and responses were received (IQ23-000251 and IQ23-000252) on 5 September 2023 (attached) which declined to provide the information on the grounds that:

It has been long-standing practice not to disclose information about privileged legal advice. Privileged legal advice provided to the Commonwealth should remain confidential.

The Senate has resolved that legal professional privilege is not an acceptable ground for the refusal of information in a parliamentary forum. As set out in *Odgers' Australian Senate Practice*, the Senate has rejected government claims that there is a long-standing practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interest.¹ The committee has written to DCCEEW to request that the legal advice(s) be provided by 13 September 2023. A copy of this correspondence is attached, for reference.

It is clear from the answers to questions on notice that your department has legal advice on the constitutional matters in question, and that your office has been informed about the advice:

¹ *Odgers Australian Senate Practice*, 14th ed, pp. 668–669.

In 2021 legal advice was sought and obtained by the department on the scope of the regulation-making power under the Environment Protection and Biodiversity Conservation Act 1999 and related constitutional matters in relation to the management of feral horses in the Australian Alps National Heritage place. Minister Plibersek's office has been informed about the advice.

As the committee is due to report on 29 September 2023, the committee would be grateful if you could provide the committee with the advice, or have your department provide the advice, on a confidential basis if necessary, by 13 September 2023.

Please contact Mr Stephen Palethorpe, Committee Secretary on 02 6277 3379 if you or your staff would like to discuss the matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sarah Hanson-Young', is enclosed in a light grey rectangular box.

Senator Sarah Hanson-Young

Committee Chair

Environment and Communications References
Answers to questions on notice
Climate Change, Energy, the Environment and Water Portfolio

Inquiry: Impacts and management of feral horses in the Australian Alps
Question No: IQ23-000251
Hearing Date: 23 August 2023
Division/Agency: Heritage Division
Topic: Legal advice
Hansard Page: 37
Question Date: 23 August 2023
Question Type: Spoken

Senator David Pocock asked:

Senator DAVID POCOCK: In terms of levers at your disposal, I note in the letter from the Hon. Sussan Ley she says, 'The government is considering the development of regulations under the act in response to New South Wales's failure.' What could these regulations be?

Mr Barker: I referred to the management principles that are under the act around the development of management plans for national heritage places. Those are principles that are prescribed under the regulations, and there's a capacity in the act for a minister to prescribe more regulations—that is, new principles for the development of management plans. But it's also just important to be aware that that capacity in a direct regulatory sense is also constrained by the Commonwealth's constitutional powers. So there is that capacity, but that is the regulation power that was referenced.

Senator DAVID POCOCK: I'm guessing there would have been legal advice before this letter was sent, so I want to confirm that there is a capacity for the federal environment minister to issue regulation that would override the sort of legislation that is not actually protecting the heritage values of the Alps.

Mr Barker: This gets to the constitutional limitations I think I referenced before. There is a capacity in the act for regulations to be made. However, the extent to which that can restrict a state's own legislative capacity is a more complicated constitutional area. There will be limitations in that sense in how the Commonwealth might intervene vis-a-vis the states.

Senator DAVID POCOCK: Would you be able to take notice any legal advice that was provided in the making of this?

Ms Parry: We'll take that on notice.

Answer:

The department sought and obtained legal advice, before the date of the former Minister's letter referenced by the Senator (10 May 2021), on the Commonwealth's regulation-making powers under the *Environment Protection and Biodiversity Conservation Act 1999* in relation to the management of feral horses in the Australian Alps National Heritage place.

It has been long-standing practice not to disclose information about privileged legal advice. Privileged legal advice provided to the Commonwealth should remain confidential

Environment and Communications References
Answers to questions on notice
Climate Change, Energy, the Environment and Water Portfolio

Inquiry: Impacts and management of feral horses in the Australian Alps

Question No: IQ23-000252

Hearing Date: 23 August 2023

Division/Agency: Heritage Division

Topic: Advice sought by the Minister

Hansard Page: 39

Question Date: 23 August 2023

Question Type: Spoken

Senator David Pockock asked:

Senator DAVID POCOCK: Has the minister or the department sought advice on the constitutional issues when it comes to feral horses, the EPBC Act and the minister's ability to intervene?

Ms Parry: The department seeks a range of advice on a range of policy issues and—

Senator DAVID POCOCK: I'd love to know specifically on that.

Ms Parry: I understand that. We'll take that on notice. We wouldn't normally—

Senator DAVID POCOCK: You don't know?

Ms Parry: I'll take that on notice. It goes to a very specific question about the type of legal advice we would have received, and I would have to go back and take on notice any specific legal advice.

Senator DAVID POCOCK: Ms Parry, I think if you know that you have sought advice on that then you are required to inform the committee.

Ms Parry: I'm answering the question in that I'd like to take the specific question on notice.

Senator DAVID POCOCK: Okay. Sure.

CHAIR: Senator Pockock, what was the exact question?

Senator DAVID POCOCK: Whether or not the department, or the minister, has sought advice when it comes to issues of the Constitution and the minister's ability to intervene using the EPBC Act.

CHAIR: And you're talking about the current minister, Minister Plibersek?

Senator DAVID POCOCK: Or previous.

CHAIR: And specifically in relation to horses?

Senator DAVID POCOCK: Sure.

CHAIR: Ms Parry, I understand that if Senator Pockock wants information in relation to previous ministers you might need to take that on notice and go back and check, but can you honestly not tell us today whether the minister has sought any advice on this issue, considering you've been called in to give evidence to the committee today on this particular issue? Surely you would have that information.

Ms Parry: I'm going to have to take that on notice.

CHAIR: Could you explain to us why you need to take that on notice? Is it because you don't have the answer?

Ms Parry: I genuinely don't have the answer in front of me, and I would need to go to the nature of the question and the type of advice that the minister may or may not have sought. I don't want to provide any misleading evidence—that she sought advice on one thing and it was on something different—so I would like to take that on notice.

CHAIR: Just to be clear, we would like you to take the question on notice in relation to the current minister, Minister Plibersek—has she sought advice on the issues outlined by Senator Pockock? Also, seeing as we know the former environment minister was writing to the former

minister in New South Wales, Minister Matt Kean, I'd also like to know what type of advice was sought by the former minister, Sussan Ley.

Answer:

In 2021 legal advice was sought and obtained by the department on the scope of the regulation-making power under the *Environment Protection and Biodiversity Conservation Act 1999* and related constitutional matters in relation to the management of feral horses in the Australian Alps National Heritage place. Minister Plibersek's office has been informed about the advice.

It has been long-standing practice not to disclose information about privileged legal advice. Privileged legal advice provided to the Commonwealth should remain confidential.



THE SENATE

ENVIRONMENT AND COMMUNICATIONS REFERENCES COMMITTEE

8 September 2023

Ms Rachel Parry
Acting Deputy Secretary
Department of Climate Change, Energy, the Environment and Water

By email: ParliamentaryInquiries@dcceew.gov.au
cc: david.fredericks@dcceew.gov.au

Dear Ms Parry

Re: responses to questions on notice for the inquiry into the impacts and management of feral horses in the Australian Alps – provision of legal advice

At the public hearing on 23 August 2023 for the Senate Environment and Communications References Committee (the committee) inquiry into the above matter, Senator David Pocock asked representatives of the Department of Climate Change, Energy, the Environment and Water (the department) to provide documents relating to legal advice on the Commonwealth's regulation-making powers and constitutional matters under the EPBC Act in relation to feral horses.

These questions were taken on notice and responses were received (IQ23-000251 and IQ23-000252) on 5 September 2023 which declined to provide the information on the grounds that:

It has been long-standing practice not to disclose information about privileged legal advice. Privileged legal advice provided to the Commonwealth should remain confidential.

In relation to the two questions taken on notice, if the department is refusing to provide information to the committee it must adhere to the Senate's resolutions ([Procedural Order 10](#)). If the department believes that it may not be in the public interest to disclose the information or document to the committee, then the department shall state the *ground* on which the department believes that it may not be in the public interest to disclose the information or document to the committee, and specify the *harm* to the public interest that could result from the disclosure of the information or document.

The Senate has resolved that legal professional privilege is not an acceptable ground for the refusal of information in a parliamentary forum. As set out in *Odgers' Australian Senate Practice*, the Senate has rejected government claims that there is a long-standing practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interest.¹

Under Procedure Order 10, the committee may refer the question of the disclosure to the responsible minister.

¹ *Odgers Australian Senate Practice*, 14th ed, pp. 668–669.

The committee requests that the department provide the legal advice (or advices) which are referred to in the answers to questions on notice, either as public documents or confidentially, by 13 September 2023, or provide a properly formulated public interest immunity claim. The committee will also write to the Minister for the Environment and Water regarding this matter.

Please contact Mr Stephen Palethorpe, Committee Secretary on 02 6277 3379 if you would like to discuss the matter. A copy of the Senate's Procedure Order 10 is included below for your information.

Yours sincerely

Senator Sarah Hanson-Young

Committee Chair

10 Public interest immunity claims

That the Senate—

- a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;
- b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;
- c) orders that the following operate as an order of continuing effect:
 1. If:
 - a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and
 - b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee,

the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

2. If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.
3. If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.
4. A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.
5. If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.
6. A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.
7. A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).
8. If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3)...



THE HON TANYA PLIBERSEK MP

MINISTER FOR THE ENVIRONMENT AND WATER

MC23-030380

Senator Sarah Hanson-Young
Committee Chair
Senate Environment and Communications References Committee
ec.sen@aph.gov.au

Dear Senator

Thank you for your letter of 8 September 2023 to my department, requesting a copy of the legal advice referred to in the department's responses to questions taken on notice at the 23 August 2023 public hearing for the Senate Environment and Communications References Committee inquiry into the impacts and management of feral horses in the Australian Alps.

My department received legal advice about the Commonwealth's regulation making powers under the *Environment Protection and Biodiversity Conservation Act 1999* in relation to feral horses and associated constitutional issues.

While I am not personally opposed to providing the requested information to the Environment and Communications References Committee, doing so would be against the public interest and breach established convention, even in a confidential hearing. This is because the requested information contains privileged legal advice.

It has been the long-standing practice of successive Australian Governments not to disclose legal advice. This practice has previously been outlined by the Hon Gareth Evans KC:

...[n]or is it the practice or has it been the practice over the years for any government to make available legal advice from its legal advisers made in the course of the normal decision making process of government, for good practical reasons associated with good government and also as a matter of fundamental principle... (Senate Hansard, 28 August 1995, page 466);

Then Senator, the Hon Joe Ludwig, put the position as follows:

To the extent that we are now going to go to the content of the advice, can I say that it has been a longstanding practice of both this government and successive governments not to disclose the content of advice. (Senate Legal and Constitutional Affairs Legislation Committee, Hansard of Estimates hearing, 26 May 2011, page 161); and

Similarly, the Hon Philip Ruddock MP stated:

...It is not the practice of the Attorney to comment on matters of legal advice to the Government. Any advice given, if it is given, is given to the Government... (House of Representatives Hansard, 29 March 2004, page 27405).

It undermines the public interest to depart from this established position. It is integral that privileged legal advice provided to the Commonwealth remains confidential. Access by Government to such confidential advice is, in practical terms, critical to the development of sound Commonwealth policy and robust law-making.

The specific harm that the doctrine of legal professional privilege seeks to prevent is the harm to the administration of justice that would result from the disclosure of confidential interactions between lawyer and client. Both the High Court of Australia and Federal Court of Australia have confirmed that legal professional privilege promotes the public interest by enhancing the administration of justice, facilitating freedom of consultation and encouraging full and frank disclosure between clients and their legal advisers.

It is essential then that, where real harm may flow from the waiving of privilege, legal advice provided to the Commonwealth remains confidential.

Accordingly, I claim public interest immunity over the confidential legal advice referred to above.

Yours sincerely



TANYA PLIBERSEK

28.9.23



THE SENATE

ENVIRONMENT AND COMMUNICATIONS REFERENCES COMMITTEE

4 October 2023

The Hon Tanya Plibersek MP
Minister for the Environment and Water

By email: Tanya.Plibersek.MP@aph.gov.au; Minister.Plibersek@dcceew.gov.au
cc: david.fredericks@dcceew.gov.au; ParliamentaryInquiries@dcceew.gov.au

Dear Minister

Re: Senate Environment and Communications References Committee inquiry into the impacts and management of feral horses in the Australian Alps – provision of legal advice

Thank you for your response to the committee's correspondence of 8 September 2023, received on 28 September 2023 (MC23-030380 refers), regarding the provision of legal advice on the Commonwealth's regulation-making powers to address the damage caused by feral horses in the Australian Alps National Parks and Reserves National Heritage listed place.

The committee notes your response that, while you are not personally opposed to providing the requested information, to do so would be against the public interest and breach an established convention not to disclose legal advice.

As highlighted in the committee's original correspondence, the Senate has resolved that legal professional privilege is not an acceptable ground for the refusal to provide information in a parliamentary forum. As set out in *Odgers' Australian Senate Practice* (Odgers), the Senate has rejected government claims that there is a long-standing practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interest.¹

The Senate has also rejected advice to government as a claimed ground for refusing to provide information. Odgers refutes the contention of a long-established practice of successive governments by highlighting the many instances where advice to government has been released to the Senate or its committees.²

In light of this, the committee has agreed to extend its inquiry to allow you time to reconsider your response, and in particular invites you to provide the committee with more information on the questions originally posed during the committee's public hearing of 23 August 2023 (see [Committee Hansard](#) pages 37–39, and departmental answers to questions on notice IQ23-000254 and IQ23-000255).

As the committee is due to report on 13 October 2023, the committee requests a response by COB 9 October 2023 at the latest.

¹ Harry Evans, *Odgers Australian Senate Practice*, 14th ed, 2016, pp. 668–669.

² Harry Evans, *Odgers Australian Senate Practice*, 14th ed, 2016, p. 668.

Unless you request otherwise, the committee intends to publish this request and your response.

Please contact Mr Stephen Palethorpe, Committee Secretary on 02 6277 3379 if you or your staff would like to discuss the matter.

Yours sincerely

A handwritten signature in black ink, appearing to read "Sarah Hanson-Young", is enclosed in a light grey rectangular box.

Senator Sarah Hanson-Young

Committee Chair



THE HON TANYA PLIBERSEK MP

MINISTER FOR THE ENVIRONMENT AND WATER

MC23-032020

Senator Sarah Hanson-Young
Committee Chair
Senate Environment and Communications References Committee
ec.sen@aph.gov.au

Dear Senator

I refer to your letters of 8 September 2023 and 4 October 2023 requesting legal advice on the Commonwealth's regulation-making powers to address damage caused by feral horses in the Australian Alps National Parks and Reserves National heritage listed place.

As I stated in my previous correspondence to the Committee, despite my personal attitudes on this matter I am unable to release the legal advice provided to the former Government. I am advised that this would depart from the practice of successive Commonwealth Governments by disclosing privileged legal advice.

My department has advised me that the specific harm that would be caused by the disclosure of the legal advice to the former government is the harm to the administration of justice. Further, my department is of the view that disclosure of the legal advice could prejudice the Commonwealth's position in the event of future legal proceedings. It would, therefore, be against the public interest for the advice to be published, or for the advice to be disclosed to the Committee as in camera evidence.

While I cannot release the legal advice, I would note it is well-established that the Commonwealth is restricted from imposing obligations on states without their consent.

As you know, I want feral horses removed from the Australian Alps as much as anyone. They damage our fragile alpine and sub-alpine ecosystems. That is why the Government supported Senator Pocock referring this topic to the Environment and Communications References Committee in the first place. It is also why on 9 June 2023, I established the Alps Ministerial Council with my state and territory counterparts in New South Wales, Victoria and the Australian Capital Territory. I will continue to work with all the powers of Commonwealth and collaboratively with the states and territories to ensure that the precious plant and animal species within Australian Alps are preserved for our kids and grandkids.

I am sure you agree that the actions of the current Government are more important than legal advice to a former Government. To date, the Government has:

- provided over \$2 million to the states and territory for feral horse control;
- identified the Alps as a priority place under my *Threatened Species Action Plan 2022-2023* to better focus investment efforts going forward; and
- started the important scientific work to work out how best to improve the Alps over the next five years.

I would like to thank the Senate Committee for your work to date on the Inquiry and I look forward to receiving the Committee's advice on what more we can do with the state and territory governments to protect the Alps from the harm done by feral horses.

Yours sincerely



TANYA PLIBERSEK

10-10-23