

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.

