

# APPENDIX 1

## ADVICE PROVIDED BY THE CLERK REGARDING CLAIMS OF PUBLIC INTEREST IMMUNITY



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9 February 2010

Senator Guy Barnett  
The Senate  
Parliament House  
CANBERRA ACT 2600

Senate Legal & Constitutional Affairs Committee  
Additional Estimates 2009-2010  
8-9 February 2010

Tabled Document No 3

By: *Senator Barnett*

Date: *9/2/2010.*

Dear Senator Barnett

### ESTIMATES HEARINGS – CLAIMS OF PUBLIC INTEREST IMMUNITY (CABINET DELIBERATIONS)

You have asked for advice on the following matters:

1. the entitlement (or otherwise) of the Immigration Minister to refuse to disclose the meeting dates of the Border Protection committee of Cabinet (which he Chairs); and
2. the entitlement (or otherwise) of the Secretary of the Department to refuse to disclose the dates of the meetings (at which he was in attendance).

I understand that the minister has stated the ground for refusing to provide this information, as required by the order of the Senate of 13 May 2009. I also understand that the stated ground is that the information is cabinet-in-confidence, although I have not yet had the opportunity to consult a transcript of the proceedings and am therefore not certain of the extent to which the minister has explained the nature of the harm to the public interest that could result from the disclosure of the information about the dates of the meetings in question. By the order of the Senate of 13 May 2009, the minister is also required to indicate whether the harm to the public interest that could result from the disclosure of the information could result only from the publication of the information, or whether it could also result, equally or in part, from the disclosure of the information to the committee as in camera evidence. (To receive the information in camera, the committee would need to reconvene in a non-estimates mode, pursuant to standing order 25(2)(a) which authorises it to conduct inquiries of its own motion into the performance of departments and agencies.)

The process under the order of 13 May is for the committee to consider the minister's stated grounds (and for this purpose a private meeting would be required) and to decide whether the statement justifies the withholding of the information. If the committee does not consider the statement sufficiently justifies the withholding of the information, it must report the matter to the Senate. A decision by the committee not to report the matter does not prevent you using the procedures of the Senate to pursue the matter yourself.

The decision whether you or the committee considers the grounds to be sufficient is a decision for you or the committee, as the case may be. In considering these issues in the past, the point has been made that the ground relates only to the disclosure of the deliberations of cabinet (or of a cabinet committee). It does not apply merely to something connected to a cabinet meeting or the cabinet process. Questions have freely been answered in the past, for example, about the dates that particular matters went to cabinet. As recently as last night, for example, the Secretary of the Attorney-General's Department, in response to questions from Senator Brandis, provided the dates that matters went to cabinet and other officers indicated the dates that they had drafted cabinet submissions.

In the courts, recent judgments have supported the narrower view that only documents which reveal the decisions or deliberations of cabinet are immune. *Odgers' Australian Senate Practice*, 12<sup>th</sup> edition, cites the following cases in support of this view: *Commonwealth v Construction, Forestry, Mining and Energy Union* 2000 171 ALR 379; *NTEIU v the Commonwealth* 2001 111 FCR 583; *Secretary, Department of Infrastructure v Asher* 2007 VSCA 272 (page 472).

Of course, the Senate is not bound by how the issue is treated in the courts but the fact that courts have been taking a narrower view of the scope of the immunity is clearly of interest to the Senate. Also of interest is the courts' unwillingness to allow the executive government to act as judge in its own cause by asserting, or providing conclusive certificates in support of claims, that disclosure of material would be detrimental to the public interest. Courts have determined such claims after examining the documents themselves. The Senate asserted the right to determine claims of public interest immunity for itself in 1975 in connection with the overseas loans affair, but the issue has been a recurring source of disagreement with governments, hence the development of the recent mechanism in the order of 13 May to establish a process for the raising and handling of these claims.

In summary, if you do not consider that the claim has been sufficiently justified, your options are to explore the possibility of the information being provided in camera at another time, to encourage the committee to pursue the matter in accordance with the order of 13 May 2010, or to pursue the matter yourself in the Senate by, for example, giving notice of a motion ordering the production of the information.

I will examine the transcript of the relevant exchanges and write to you again should I have anything to add.

Yours sincerely



(Rosemary Laing)