

The Senate

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Legal and Constitutional Affairs  
Legislation Committee

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Additional estimates 2009–10

February 2010

Commonwealth of Australia  
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# Membership of the Committee

## Members

Senator Patricia Crossin, **Chair**, ALP, NT  
Senator Guy Barnett, **Deputy Chair**, LP, TAS  
Senator David Feeney, ALP, VIC  
Senator Mary Jo Fisher, LP, SA  
Senator Scott Ludlam, AG, WA  
Senator Gavin Marshall, ALP, VIC

## Substitute Members

Senator the Hon Jan McLucas, ALP, QLD, replaced Senator Marshall for consideration of the Additional Estimates 2009-10 (8 and 9 February 2010)  
Senator Stephen Parry, LP, TAS, replaced Senator Fisher for consideration of the Additional Estimates 2009-10 (8 and 9 February 2010)

## Senators in attendance

Senator Patricia Crossin, (Chair), Senator Guy Barnett (Deputy Chair), Senator David Feeney, Senator Scott Ludlam, Senator Gavin Marshall, Senator the Hon Eric Abetz, Senator Chris Back, Senator Catryna Bilyk, Senator Mark Bishop, Senator the Hon George Brandis, Senator Steve Fielding, Senator Mitch Fifield, Senator Sarah Hanson-Young, Senator Gary Humphries, Senator Steve Hutchins, Senator Julian McGauran, Senator the Hon Jan McLucas, Senator Stephen Parry, Senator Louise Pratt, Senator Russell Trood, Senator Nick Xenophon

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# PREFACE

On 26 November 2009, the Senate referred to the committee the examination of estimates of proposed additional expenditure for the financial year 2009-10. The committee is responsible for the examination of the Attorney-General's Portfolio and the Immigration and Citizenship Portfolio. The portfolio additional estimates statements were tabled on 26 November 2009. A correction to the *Immigration and Citizenship Portfolio Additional Estimates Statements 2009-2010* was tabled at the committee's hearing on 9 February 2010.

## Reference of documents

The Senate referred to the committee, for examination and report, the following documents:

- Particulars of proposed additional expenditure in respect of the year ending on 30 June 2010 [Appropriation Bill (No. 3) 2009-2010];
- Particulars of certain proposed additional expenditure in respect of the year ending on 30 June 2010 [Appropriation Bill (No. 4) 2009-2010];
- Final budget outcome 2008-09 – Reports by the Treasurer (Mr Swan) and the Minister for Finance and Deregulation (Mr Tanner), September 2009; and
- Issues from the advances under the annual Appropriation Acts – Report for 2008-09.

The committee was required to report on its consideration of the Additional Estimates on or before 23 February 2010.

## Estimates hearings

The committee met in public session on 8 and 9 February 2010.

Over the course of the two days' hearings, totalling over 22 hours, the committee took evidence from the following departments and agencies:

- Administrative Appeals Tribunal;
- Attorney-General's Department;
- Australian Customs and Border Protection Service;
- Australian Federal Police;
- Australian Human Rights Commission;
- Australian Security Intelligence Organisation;
- Classification Board and Classification Review Board;
- Department of Immigration and Citizenship;
- Family Court of Australia;
- Federal Court of Australia;

- Federal Magistrates Court of Australia; and
- High Court of Australia.

Copies of *Hansard* are available on the internet at the following address:  
<http://www.aph.gov.au/hansard/index.htm>.

An index of the Hansard for each portfolio appears at Appendix 3 and Appendix 4.

### **Ministers**

On 8 February 2010, the committee heard evidence from Senator the Hon Penny Wong, Minister for Climate Change and Water, Senator the Hon Joseph Ludwig, Cabinet Secretary and Special Minister of State, and Senator the Hon Mark Arbib, Minister for Employment Participation and Minister Assisting the Prime Minister for Government Service Delivery, representing the Attorney-General and Minister for Home Affairs. On 9 February 2010, the committee heard evidence from Senator the Hon Chris Evans, Minister for Immigration and Citizenship.

Officers from both departments and associated agencies also appeared. The committee thanks ministers and officers for their assistance.

### **Questions on notice**

Further written explanations, and answers to questions on notice, will be tabled as soon as possible after they are received. That information is also available on the committee's internet page at the following address:  
[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/estimates/index](http://www.aph.gov.au/Senate/committee/legcon_ctte/estimates/index).

The committee has resolved that the due date for submitting responses to questions on notice from the Additional Estimates round is 26 March 2010.



# CHAPTER 1

## ATTORNEY-GENERAL'S PORTFOLIO

### Introduction

1.1 This chapter summarises some of the matters raised during the committee's consideration of the Additional Estimates for the Attorney-General's Portfolio for the 2009-10 financial year.

### Australian Human Rights Commission

1.2 The committee welcomed the new Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda, who commenced his five-year term in early February.<sup>1</sup>

1.3 The committee followed up an answer provided by the Australian Human Rights Commission to a question on notice from the supplementary Budget Estimates 2009-10 hearings concerning Australia's anti-terrorism laws.<sup>2</sup> In an answer provided to the committee, the Commission concluded that some provisions of Australia's anti-terrorism laws do not adequately meet Australia's international obligations.<sup>3</sup> The answer stated that the Commission's views were in submissions made to the government in relation to relevant anti-terrorism laws. While the Commissioner would not be drawn on whether a person being dealt with under these laws is likely to have had their human rights violated, she advised the committee that:

Human rights involves a balancing of competing interests on all occasions. It is the case that it is possible for different people to reach different conclusions on that balancing exercise. We have not sought to suggest precise answers to any of the issues raised, but we have sought to raise the issues where we understand, for reasons which are contained in the submissions...that Australia's position should be reviewed to be consistent with international obligations set out in the submissions.<sup>4</sup>

### Classification Board and Classification Review Board

1.4 The committee took a continuing interest in the work of the Classification Board and the Classification Review Board. The Director of the Classification Board

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1 Committee Hansard, 8 February 2010, p. 7.

2 Answers to Question on Notice No. 7, Supplementary Budget Estimates 2009-10.

3 In this context, the Commission specifically identified obligations under the following:

- *International Covenant on Civil and Political Rights (ICCPR)*
- *Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment (CAT)*
- *Convention on the Rights of the Child (CRC)*.

4 *Committee Hansard*, 8 February 2010, p. 10.

advised the committee that, since July 2009, he has 'called in' for classification 440 adult films and 36 adult magazines. However, none of the publishers of the relevant films and magazines complied with these notices. All of the publishers have subsequently been referred to relevant state and territory law enforcement agencies for appropriate action.<sup>5</sup> The Department provided the committee with a list of the films and magazines called in for classification between 1 July and 31 December 2009.<sup>6</sup>

1.5 The Director also explained to the committee that the National Classification Scheme is a cooperative scheme between the Commonwealth and all Australian states and territories.<sup>7</sup> While it is the Classification Board's fundamental role to make classification decisions, it is the states and territories that are primarily responsible for enforcement. The Australian Customs and Border Protection Service regulates the importation of material into Australia. In response to a suggestion from some senators that the current system is inadequate, the Attorney-General's Department conceded that there are shortcomings in the system:

BARNETT—To sum up, the department and the government are overlooking a system that you have confirmed today, and which you confirmed at least in part in October, is in failure, a system that is not working...We are overseeing a system in failure. That seems to be confirmed again today by the opening statement from Mr McDonald and the evidence that we have had before this committee. Is that correct?

Mr Wilkins—I think that overstates the position considerably.

Senator BARNETT—That is how I see it.

Mr Wilkins—There are obviously shortcomings in the system and we are trying to address those. That is undoubtedly the case.

Senator BARNETT—But you have been doing that for years.

Mr Wilkins—There is always room for improvement.

Senator BARNETT—Indeed.

Mr Wilkins—For example, the minister has now stiffened the penalties under the customs legislation and regulations to try to ensure that people have appropriate negative incentives to report matters and to make them available. That gives Customs more power. Of course there are problems with this system and it is under considerable strain with the emergenc[e] of new technologies, the burgeoning of publications et cetera. So it is silly to pretend that there are not a whole bunch of questions and some quite radical challenges to the system of classification—for example, with the R-rated games question. That is a whole new genre of material that may or may not come within the classification scheme. Also, there is the federal system—in

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5 *Committee Hansard*, 8 February 2010, p. 14.

6 Tabled document number 6, Attorney-General's Portfolio: Films called in for classification between 1 July and 31 December 2009 and adult magazines called in for classification between 1 July and 31 December 2009.

7 *Committee Hansard*, 8 February 2010, p. 14.

other words, the fact that we rely on the states to basically enforce the law while the standards are made at a national level. All of that needs to be kept under close review, and it is being kept under close review. There are significant challenges for us all in doing that.<sup>8</sup>

1.6 Senators also questioned officers on the consultation process and recently released discussion paper relating to an R18+ Classification for computer games. Officers of the Attorney-General's Department advised the committee that they had received 6,239 submissions to date, and that a majority of those processed tended to support having an R18+ classification for computer games.<sup>9</sup> During questioning on the submission process, including the template for submissions and the information required of submitters, officers assured the committee that submissions would be equally weighted and that advice to the minister would be both qualitative and quantitative.<sup>10</sup>

### **Australian Federal Police (AFP)**

1.7 The committee sought details of the AFP's recent organisational restructure which came into effect on 1 February 2010, following the audit conducted by Mr Roger Beale AO. Commissioner Tony Negus APM provided some background information on the restructure:

This is really a philosophical or cultural change for the AFP in the investigations area. What we are saying is that we should look at organised crime—quite apart from terrorism, which is a specialist and separate portfolio, and quite apart from the international deployment group, again which is a separate portfolio—in the investigations area wholistically. What we are saying is that we need to address these issues in taskforces jointly with our partners. We need to look at the states and territories and the Australian Crime Commission and what they are doing, deconflict in some of those areas about who is investigating what, and bring people in with specialist skills, such as forensic accountants and others, as needs be, but look at criminal syndicates wholistically rather than looking at them as drug traffickers, fraudsters or money launderers. It is a cultural and philosophical change in the way they do their business.<sup>11</sup>

1.8 In response to concerns raised by senators about the impact of the restructure on the AFP's focus and efforts in the area of counter-terrorism, the Commissioner advised the committee that there will be a separate area for counterterrorism and that current resourcing levels will be maintained:

I can assure you that counterterrorism remains an important, if not the most important, thing we do for the Australian community. Resources can be taken from any other portfolio and are taken from other portfolios when there is a requirement to investigate a counterterrorism offence. I look back

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8 *Committee Hansard*, 8 February 2010, p. 23.

9 *Committee Hansard*, 8 February 2010, pp 18-19.

10 *Committee Hansard*, 8 February 2010, p. 20.

11 *Committee Hansard*, 8 February 2010, p. 75.

to Operation Neath, which were the arrests in Melbourne late last year. There were a significant number of resources taken from other portfolios to support that counterterrorism operation. It is one of the strengths of the AFP that we can move flexibly into and out of investigations as required.<sup>12</sup>

1.9 The AFP was also questioned extensively on a range of other issues, including people smuggling, staffing levels, measures to combat organised crime, and regional partnership arrangements.

### **Australian Customs and Border Protection Service (Customs)**

1.10 The committee took evidence from Customs on a range of issues. Customs was closely questioned on the rescue of 78 Sri Lankan asylum seekers by the Customs vessel, *Oceanic Viking*, in October last year. Senators also sought details more broadly on the rules of engagement in relation to interception of suspected irregular entry vessels by the Border Protection Command.<sup>13</sup>

1.11 Senators also questioned officials on the frequency of suspected irregular entry vessels over recent years and the ability of Customs to deal with this increased demand while also suffering a decline in staffing numbers. The Chief Executive Officer, Mr Michael Carmody, explained to the committee:

...overall staffing levels have been declining in recent years. However, customs and border protection performs a whole range of roles, and that decline is not reflected in the staff that we have engaged in border protection issues, including people smuggling. You would be aware that the government injected a series of sums of money into customs and border protection both for patrol assets and others. We have increased our capacity within what you might call a central intelligence and operational hub for dealing with maritime people-smuggling. So, while I do not have the figures right in front of me, I am sure you would find that the actual number of staff there has certainly not diminished and, if anything, has increased. We were also given staff for expanding our overseas representation.<sup>14</sup>

1.12 The committee also took evidence during the hearing on the Australian Government's decision to lift anti-dumping duties on toilet paper imports from the People's Republic of China and the Republic of Indonesia. Officials provided details on the processes leading to the decision to remove the duties.<sup>15</sup>

### **Australian Security and Intelligence Organisation (ASIO)**

1.13 The committee questioned ASIO about its officers approaching members of various ethnic, religious or activist communities seeking information. The committee was assured that, if ASIO officers do approach members of the public to obtain

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12 *Committee Hansard*, 8 February 2010, p. 74.

13 *Committee Hansard*, 8 February 2010, pp 102-109.

14 *Committee Hansard*, 8 February 2010, p. 113.

15 *Committee Hansard*, 8 February 2010, pp 88-101.

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information in the course of investigative inquiries, they would identify themselves and seek the support of the person being questioned.<sup>16</sup>

1.14 ASIO was further questioned about its policy and resourcing relating to the tracking of peaceful demonstrations or protest activity. The Director-General of Security addressed this issue in some detail:

ASIO does not devote any resources to constraining legitimate protest. We are specifically prevented from doing so by our act, and we do not do it. Our sole interest—and this is the second point—in protest activity is where that activity may be associated with or have the potential for political violence and, as such, it would come under the ASIO head of security relating to the issue of politically motivated violence. At present, the protest movement—if that is what you want to call it—or the demonstrations that take part in Australia are overwhelmingly peaceful. ASIO would devote only minimal resources to concerns about politically motivated violence related to protest activity. If there were an upswing in the potential for violent protest then ASIO would devote more resources accordingly. But I think the important thing to say is that ASIO's first and foremost priority at the moment is preventing terrorist attacks in Australia and against Australians. The vast majority of our resources are focused on this fact.<sup>17</sup>

1.15 Senators sought details of ASIO's involvement in the processing of Sri Lankan asylum seekers aboard the *Oceanic Viking* and, more broadly, detainees on Christmas Island. The committee heard that ASIO makes security assessments of asylum seekers in order to assess whether the granting of a visa to enter or remain in Australia is consistent with Australia's security interests and that this information is then passed to other departments, including the Department of Immigration and Citizenship.<sup>18</sup> In relation to the processing of asylum seekers on the *Oceanic Viking*, questioning focussed on the timing and prioritising of those assessments.<sup>19</sup>

### **Attorney-General's Department**

1.16 The committee sought an explanation from the Attorney-General's Department on the timing of the release of the Anti-Terrorism White Paper, which was due for publication over one year ago. Officials explained the delay by reference to the evolving character of the anti-terror environment, and the need to amend the document accordingly.<sup>20</sup>

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16 *Committee Hansard*, 8 February 2010, p. 42.

17 *Committee Hansard*, 8 February 2010, p. 43.

18 *Committee Hansard*, 8 February 2010, p. 46; and *Committee Hansard*, 9 February 2010, p. 67.

19 *Committee Hansard*, 8 February 2010, pp 46-48 and pp 53-55.

20 *Committee Hansard*, 8 February 2010, pp 125-126 and pp 130-138.



# CHAPTER 2

## IMMIGRATION AND CITIZENSHIP PORTFOLIO

### Introduction

2.1 This chapter summarises some of the matters raised during the committee's consideration of the Additional Estimates for the Immigration and Citizenship Portfolio for the 2009-10 financial year.

### Department of Immigration and Citizenship

#### *Office of the Migration Agents Registration Authority (MARA)*

2.2 The committee questioned officers on a number of matters concerning MARA. These included the figures on registered migration agents and complaints for the period of 1 July to 31 December 2009, an update on MARA's website, the fidelity fund, staffing levels, and the English language requirement for migration agents.<sup>1</sup>

#### *Staffing*

2.3 The committee sought details on the current staffing levels of the Department. The Secretary advised the committee that, at 31 December 2009, the total staffing was 6,857, a reduction from the figure of 7,027 as at 30 June 2009.<sup>2</sup> In response to questioning about the link between staff reductions and the efficiency dividend, the Secretary explained:

It would not be possible to attribute particular changes to staffing numbers to the efficiency dividend of itself but, as I have said, there certainly have been efforts to reduce the size of the department. We have grown very rapidly over the last four or five years. We went through a program of voluntary redundancies last year and the year before, but that is the net result of a whole series of measures, of which the efficiency dividend is but one.<sup>3</sup>

#### *Skilled migration reforms*

2.4 The Department was questioned in depth on the reforms to the skilled migration program which were announced by the Australian Government on the day before the hearing. The minister provided comprehensive information to the committee about the reasons for the changes.

I understand that there are a lot of changes; it is quite a complex package. Effectively, all students who held a student visa as of yesterday's date have, if you like, some grandfathered entitlements. That has not been widely

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1 *Committee Hansard*, 9 February 2010, pp 3-9.

2 *Committee Hansard*, 9 February 2010, p. 11.

3 *Committee Hansard*, 9 February 2010, p. 11.

reported in many of the press articles, which have focused on the new SOL, as if that was the only way currently enrolled students could get access to a pathway to permanent residency in this country. That is not right. That will apply to future students—students enrolling after yesterday. But there is a set of transitional/grand fathering arrangements...for students who are currently enrolled. It certainly tightens the conditions. It makes them meet a range of conditions that more strongly link them to the labour market, and their capacity to seek permanent residency is very much linked to whether they get skilled labour market outcomes. But they do have a range of conditions which give them the opportunity to pursue permanency if they so wish. I make the key point that if you have applied for a student visa to come to Australia then you come here to study. There is no necessary link between that and permanent residency. I will get the officers to take you through that but it is important. We are dealing with two sets of things: the conditions which apply to students who were enrolled as of yesterday's date, they held student visas, and those that come and enrol after yesterday's date.<sup>4</sup>

2.5 The committee sought details of the review of the Migration Occupations in Demand List (MODL) which had resulted in the list being revoked. The committee heard that the review found that MODL had failed to serve its purpose and was not responsive to changing labour market demands:

When the economic downturn hit Australia, the government had to react quickly to meet the changing labour market needs, and a decision was made at the time that the whole focus of skilled migration should be directed to the employer sponsored, so-called demand driven, skilled migration program, which is better placed to quickly adjust to the changing labour market conditions. That opened up the issue of what to do with MODL and, given that general skilled migration is usually not very well placed to target the immediate labour market needs because of the time lag I explained, the view was taken that general skilled migration needed to target prospective medium- to long-term skill needs and target high-value occupations that would suit the economy in the medium to long term. That reflected pretty much the view of the major stakeholders during the consultation.<sup>5</sup>

2.6 The committee was further advised that a new list will be developed by the independent body, Skills Australia, and will focus on the medium- to long-term labour market needs. The new list will be known as the Skilled Occupations List.<sup>6</sup>

2.7 In addressing questions about the impact of the skilled migration program reforms on current student visa holders, Mr Kukoc from the Department summarised the three groups that are impacted by the changes:

The first group are the people who have already lodged an application for permanent residence onshore. They are all protected; they can use the

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4 *Committee Hansard*, 9 February 2010, pp 23-24.

5 *Committee Hansard*, 9 February 2010, p. 21.

6 *Committee Hansard*, 9 February 2010, p. 22.



MODL points as previously and nothing will change for them. There is a second group: all people who are currently holders of 485 or have applied for 485, which is a temporary skilled graduate visa for 18 months. They are also protected and they can use the MODL points. All current students who have not applied for 485 or are not former students on 485 or have not applied for permanent residence—so we are talking about students who still have not had a chance to apply for 485 or permanent residence—will still be eligible to apply for 485 under the old list, get 18 months work experience in Australia, try to find an employer sponsorship or state sponsorship and have that pathway to permanent residence. And that grandfathering will continue until the end of 2012.<sup>7</sup>

### ***Permanent residency for certain retirees***

2.8 The committee was updated on progress with the proposal to 'provide retirees with a pathway to permanent residency'.<sup>8</sup> The minister explained that he was sympathetic to the circumstances of a group of 410 relevant visa holders, but was constrained by budgetary considerations. He indicated that the Australian Government has brought in interim changes, including increased work rights and a 10-year visa and that this 'was the best [he] could do'. He further advised:

The hurdle for them is the cost of moving to permanent residency. They are an older group and when you talk to Treasury about the costing of their moving though to permanent residency there are issues of potential access to health care and social security benefits. The numbers are quite high. I have indicated a policy desire to make some progress. I brought in those interim changes. I have always been clear with them that it is a budgetary consideration. I have been frank with them that in the current budgetary context we are unlikely to be able to do anything.<sup>9</sup>

### ***Oceanic Viking***

2.9 The committee heard detailed evidence on the Department's involvement in October 2009 with the Sri Lankan asylum seekers aboard the *Oceanic Viking*. This included the Department's involvement in the discussions leading to the decision by the asylum seekers to disembark, and their subsequent processing in Indonesia.

2.10 The Minister advised that the Border Protection Committee (BPC) of Cabinet had provided the 'authority' of the government's agreement with Indonesia in managing the *Oceanic Viking* incident.<sup>10</sup> The minister subsequently declined to provide information about meetings of the BPC, including dates, venues and the people present, and indicated that it was his understanding that the government does not reveal details about meetings of cabinet committees:

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7 *Committee Hansard*, 9 February 2010, p. 24.

8 Answer to Question on Notice No. 84, Budget Estimates 2009-10.

9 *Committee Hansard*, 9 February 2010, p. 39.

10 *Committee Hansard*, 9 February 2010, p. 49.

...I am happy to be as helpful as I can, but we do not, as I understand it—this is over many years—reveal information about the meetings, the times, the agendas or the attendees of cabinet committees. It is a longstanding practice. What I have said to you, though, is that the BPC met and authorised the key factors involved in the incident and that a working group of ministers and officials worked through the issues and managed the issues. They varied from ensuring that there was fresh water made available on the boat to the negotiations with the Indonesians.<sup>11</sup>

2.11 Senator Barnett later advised the committee that he had requested and obtained advice from the Clerk of the Senate in relation to:

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).<sup>12</sup>

2.12 The Clerk's advice stated that:

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 date of the meetings in question. By the order of the Senator 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.

...

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 [2009], or to pursue the matter yourself in the Senate by, for example, giving notice of a motion ordering the production of the information.<sup>13</sup>

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11 *Committee Hansard*, 9 February 2010, p. 52.

12 Tabled document number 3: Letter from the Clerk of the Senate to Senator Barnett dated 9 February 2010, regarding claims of public interest immunity (cabinet deliberations); *Committee Hansard*, 9 February 2010, p. 76.

13 Tabled document number 3: Letter from the Clerk of the Senate to Senator Barnett dated 9 February 2010, regarding claims of public interest immunity (cabinet deliberations).

2.13 After the Clerk's advice was tabled (see Appendix 1), the minister and the Secretary of the Department indicated that they would take the matter on notice in order to seek further advice.<sup>14</sup>

***Christmas Island Immigration Detention Centre***

2.14 The committee also questioned officers on a range of matters concerning the Christmas Island Immigration Detention Centre. Areas of interest included additional funding and the estimated increase in the number of arrivals, accommodation capacity and contingency planning, length of detention and processing times, mental health issues, security arrangements, and the impact of the detention centre on local services and infrastructure.

**Senator Trish Crossin**

**Chair**

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14 *Committee Hansard*, 9 February 2010, p. 76.



# APPENDIX 1

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



AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE  
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rm.let.17113

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)

## **APPENDIX 2**

# **DEPARTMENTS AND AGENCIES UNDER THE TWO PORTFOLIOS FOR WHICH THE COMMITTEE HAS OVERSIGHT**

### **Attorney-General's Portfolio**

- Attorney General's Department;
- Administrative Appeals Tribunal;
- Australian Federal Police;
- Australian Customs and Border Protection Service;
- Australian Commission for Law Enforcement Integrity;
- Australian Crime Commission;
- Australian Government Solicitor;
- Australian Human Rights Commission;
- Australian Institute of Criminology and Criminology Research Council;
- Australian Law Reform Commission;
- Australian Security Intelligence Organisation;
- Australian Transaction Reports and Analysis Centre;
- Classification Board;
- Classification Review Board;
- CrimTrac;
- Commonwealth Director of Public Prosecutions;
- Family Court of Australia;
- Family Law Council;
- Federal Court of Australia;
- Federal Magistrates Court of Australia;
- High Court of Australia;
- Insolvency and Trustee Service Australia;
- National Capital Authority;
- National Native Title Tribunal; and
- Office of Parliamentary Counsel.

## **Immigration and Citizenship Portfolio**

- Department of Immigration and Citizenship;
- Migration Review Tribunal; and
- Refugee Review Tribunal.



# **APPENDIX 3**

## **INDEX OF PROOF HANSARD FOR THE ATTORNEY-GENERAL'S PORTFOLIO**

**Monday, 8 February 2010**

	Pages
• Australian Human Rights Commission	7-14
• Classification Board/Classification Review Board	14-24
• Federal Court of Australia	24-28
• High Court of Australia	28-33
• Family Court of Australia	33-40
• Federal Magistrates Court	33-40
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• Australian Federal Police	55-84
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### **TABLED DOCUMENTS**

*Documents tabled at the hearing*

- Letter dated 5 February 2010 from the Attorney-General's Department to the committee regarding the revised answer to Question on Notice No. 51 from Supplementary Budget Estimates 2009-2010
- Opening statement by Mr Donald McDonald AC, Director, Classification Board, Senate L&CA Committee Estimates Hearing, 8 February 2010
- Administrative Appeals Tribunal Workload and Performance Information
- Email from Commissioner Tony Negus to AFP Staff dated 25 January 2010, regarding revised AFP structure
- Details and Process for Council of Australian Governments' Review of Counter-Terrorism Legislation
- Films called in for classification between 1 July and 31 December 2009; Adult magazines called in for classification between 1 July and 31 December 2009



# **APPENDIX 4**

## **INDEX OF PROOF HANSARD FOR THE IMMIGRATION AND CITIZENSHIP PORTFOLIO**

**Tuesday, 9 February 2010**

	Pages
• Department of Immigration and Citizenship	3-124

### **TABLED DOCUMENTS**

*Documents tabled at the hearing*

- Corrected answer to Question on Notice No. 65 from Supplementary Budget Estimates 2009-10
- Corrected pages 15-17, Portfolio Additional Estimates Statements 2009-10, Immigration and Citizenship Portfolio
- Letter from Clerk of the Senate to Senator Barnett dated 9 February 2010, regarding Claims of Public Interest Immunity (Cabinet Deliberations)
- Breakdown by clients, Christmas Island
- Irregular Maritime Arrivals (by sea) – 1 July 2008 to 9 February 2010

