

## **Appendix 3**

### **Correspondence regarding disclosure of legal advice**



20. JUN. 2005 17:02

AEC  
AEC

NO. 028 P. 2



**Australian Government**  
**Department of Foreign Affairs and Trade**



17 June 2005

Mr Alistair Sands  
Secretary  
Finance and Public Administration  
References Committee  
Parliament House  
CANBERRA 2600

**Inquiry into Matters Relating to the Gallipoli Peninsula**

Dear Mr Sands

At the hearings of the above inquiry on 17 June 2005, I was asked by Senator Foreshaw to provide, on notice, advice on the precise meaning of the word "free" with respect to article 135 of the Treaty of Lausanne 1923. I am advised that such advice would be an interpretation of the text of the treaty and would therefore amount to legal advice. I am further advised that under Senate Standing Order 73 the department is unable to provide legal advice for the committee.

Yours sincerely

A handwritten signature in black ink that reads "Jeremy Newman".

Jeremy Newman  
First Assistant Secretary  
Americas and Europe Division

17. JUN. 2005 16:41

AEC  
AEC

NO. 017 P. 2



**Australian Government**  
**Department of Foreign Affairs and Trade**



17 June 2005

Mr Alistair Sands  
Secretary  
Finance and Public Administration  
References Committee  
Parliament House  
CANBERRA 2600

**Inquiry into Matters Relating to the Gallipoli Peninsula**

Dear Mr Sands

At the hearings of the above inquiry on 17 June 2005, I was asked by Senator Bishop to table two sets of legal advice concerning the Lausanne Treaty to which I had referred. The legal advice had been prepared by officers of this department. I undertook to seek advice as to whether it was permitted to table such advice. I am advised that under Senate Standing Order 73, the department is unable to provide legal advice for the committee and that therefore it would not be appropriate to table this advice.

Yours sincerely

A handwritten signature in cursive script that reads "Jeremy Newman".

Jeremy Newman  
First Assistant Secretary  
Americas and Europe Division



AUSTRALIAN SENATE

**FINANCE AND PUBLIC ADMINISTRATION**

REFERENCES COMMITTEE

PARLIAMENT HOUSE  
CANBERRA ACT 2600  
Telephone: + 61 2 6277 3530  
Facsimile: + 61 2 6277 5809  
Email: [fpa.sen@aph.gov.au](mailto:fpa.sen@aph.gov.au)

21 June 2005

Mr Jeremy Newman  
First Assistant Secretary  
Americas and Europe Division  
Department of Foreign Affairs and Trade  
R G Casey Building  
BARTON ACT 0221

Dear Mr Newman

**Inquiry into matters relating to the Gallipoli Peninsula**

I refer to your two letters of 17 June 2005 relating to two matters taken on notice at the hearing of that day and your response that under Senate standing order 73 the department is unable to provide legal advice to the committee.

As conveyed to your staff, standing order 73 does not apply to committees but to questions put by senators to ministers and other senators at question time in the Senate. Nor does it prevent a request for the tabling or provision of legal advice in the government's possession. I have attached advice from the Clerk of the Senate that sets out the matter clearly.

I also draw your attention to the Clerk's advice that if the department believes there is a public interest ground for a claim that the legal advices should not be provided to the committee, the department should refer the matter to the minister for a ministerial response.

Accordingly, I ask that you reconsider the committee's request for the department to provide the two sets of legal advice concerning the Lausanne Treaty to which you referred in evidence and advice on the meaning of the word 'free' under that treaty.

Please contact me on 6277 3530 should you wish to discuss this matter further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alistair Sands', written over a horizontal line.

Alistair Sands  
Secretary



AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE  
CANBERRA ACT 2600  
Telephone: (02) 6277 3350  
Facsimile: (02) 6277 3199  
E-mail: [clerk.sen@aph.gov.au](mailto:clerk.sen@aph.gov.au)

hc/let/14666

20 June 2005

Mr Alistair Sands  
Secretary  
Finance and Public Administration  
References Committee  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Mr Sands

**GALLIPOLI PENINSULA INQUIRY — RESPONSE BY DFAT**

You asked for a note on the response by the Department of Foreign Affairs and Trade to a request by the committee for a copy of legal advice provided in relation to the Gallipoli Peninsula matter.

I understand that the department has declined to provide a copy of the advice on the basis that Senate standing order 73 prohibits questions which ask for legal opinions.

Standing orders 72, 73 and 74, as their language makes abundantly clear, apply to questions put by senators to ministers and other senators at question time in the Senate. The suggestion that they apply to questions asked in the course of committee inquiries or to requests by committees for information is bizarre and ridiculous. Even in relation to question time, standing order 73 only prohibits a question asking for a legal opinion; it does not prevent a question which asks for the tabling of a copy of legal advice in the possession of the government

In any event, the application of the standing orders is not a question of law on which legal advice can appropriately be given, but a question of the application and interpretation of the rules of the Senate, which are a matter for the Senate itself.

Questions at committee hearings and requests by committees frequently ask for copies of legal advices available to government, and they are frequently provided, unless the responsible minister thinks that there is some public interest ground for a claim that the advice should not be provided, for example, that disclosure of the advice would prejudice legal proceedings or the Commonwealth's position in legal proceedings.

If the Department of Foreign Affairs and Trade thinks that there is some such ground for declining to provide the advice in question, they should refer the matter to the minister for a ministerial response. As both the procedures of the Senate and the government guidelines for public service witnesses before parliamentary committees make clear, such a claim should be made only by a minister.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

(Harry Evans)



**Australian Government**  
**Department of Foreign Affairs and Trade**



14 July 2005

Mr Alistair Sands  
Secretary  
Finance and Public Administration  
References Committee  
Parliament House  
CANBERRA ACT 2600

Dear Mr Sands

**Inquiry into matters relating to the Gallipoli Peninsula**

I refer to your letter of 21 June 2005 concerning the request of the Finance and Public Administration References Committee for this department to provide legal advice concerning the Treaty of Lausanne.

The Minister for Foreign Affairs has decided that this department should decline the committee's request to provide the advice, on the grounds that it has been a longstanding practice accepted by successive Australian governments not to disclose legal advice which has been provided to government, unless there are compelling reasons to do so in a particular case.

Accordingly, I will not be in a position to provide the committee with a copy of the advice requested.

Yours sincerely,

Jeremy Newman  
First Assistant Secretary  
Americas and Europe Division





AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE  
CANBERRA A.C.T. 2600  
TEL: (02) 6277 3350  
FAX: (02) 6277 3199  
E-mail: clerk.sen@aph.gov.au

21 July 2005

hc/let/14696

Mr Alistair Sands  
Secretary  
Finance and Public Administration References Committee  
The Senate  
Parliament House  
CANBERRA ACT 2600



Dear Mr Sands

**GALLIPOLI PENINSULA INQUIRY —  
REQUEST FOR LEGAL ADVICE FROM DFAT**

You asked for comments on the response dated 14 July 2005 from the Department of Foreign Affairs and Trade relating to the committee's request for a copy of a legal advice held by the department.

The letter does not contain a claim of public interest immunity, simply a refusal to provide the advice on the basis of an alleged "longstanding practice".

The letter states that the minister has considered and refused the request. Presumably this is so, and the committee can take it as a refusal by the minister. It would have been preferable for the chair of the committee to write directly to the minister and to elicit a response from the minister, but there would seem to be no point in doing that now.

As for the alleged "longstanding practice", it is surprising that there has been such a practice but that it has not been heard of hitherto. I know of no previous occasion of any government stating that legal advice would not be disclosed "unless there are compelling reasons to do so in a particular case". There have been many instances of governments disclosing legal advice without any indication that there were any "compelling reasons to do so", and when the only reason for doing so appeared to be that the advice supported a case being made out by government at the time. The statement in the letter therefore appears to be a completely new declaration in relation to the disclosure of legal advice. The committee should ask the minister whether this declaration now represents government policy on the disclosure of advice. I would be surprised if the minister were to answer in the affirmative. Such an answer would prove to be inconvenient to government in the future when it wished to disclose legal advice simply to support some government position and in the absence of "compelling reasons".

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

(Harry Evans)



AUSTRALIAN SENATE

## FINANCE AND PUBLIC ADMINISTRATION

REFERENCES COMMITTEE

PARLIAMENT HOUSE  
CANBERRA ACT 2600  
Telephone: + 61 2 6277 3530  
Facsimile: + 61 2 6277 5809  
Email: fpa.sen@aph.gov.au

5 August 2005

The Hon Alexander Downer MP  
Minister for Foreign Affairs  
Parliament House  
CANBERRA ACT 2600

Dear Minister

### **Inquiry into matters relating to the Gallipoli Peninsula**

I refer to the letter from your department of 14 July 2005, signed by Mr Jeremy Newman, relating to a Committee request for information to be provided to the above inquiry. Mr Newman indicated that you had decided that the department would not provide legal advice concerning the Treaty of Lausanne.

The Committee has noted that you did not decide to withhold the information by way of a claim on the ground of public interest immunity, but instead "on the grounds that it has been a longstanding practice accepted by successive Australian governments not to disclose legal advice which has been provided to government, unless there are compelling reasons to do so in a particular case".

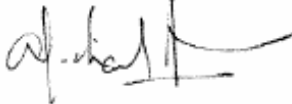
Advice to the Committee casts considerable doubt on the assertion that such an approach has been a "longstanding practice". The many instances of governments disclosing legal advice without any indication that there were "compelling reasons to do so" suggest that such a practice has been, at most, inconsistent and anything but "longstanding".

In view of those precedents, the Committee is concerned that your decision marks a new declaration of government policy in relation to the disclosure of legal advice.

I therefore write on behalf of the Committee to ask you to confirm whether the declaration in your letter represents government policy on the disclosure of advice.

I would be obliged if you provided an answer by no later than 8 August 2005. Should you or your department have any queries in relation to the above please contact the committee secretary, Mr Alistair Sands, on 02 6277 3530.

Yours faithfully

A handwritten signature in black ink, appearing to read 'M. Forshaw', with a long horizontal flourish extending to the right.

Senator Michael Forshaw  
Chair



09 2005 11:35 FAX 61295453119

SENATOR: FORSHAW

001/001

61295453119



THE HON ALEXANDER DOWNER MP

MINISTER FOR FOREIGN AFFAIRS  
PARLIAMENT HOUSE  
CANBERRA ACT 2600

22 SEP 2005

Senator the Hon Michael Forshaw  
Chair  
Finance and Public Administration References Committee  
Parliament House  
CANBERRA ACT 2600



Dear Senator Forshaw

Thank you for your letter dated 5 August 2005 which referred to my decision that my department not provide legal advice to the Committee on the Treaty of Lausanne.

My decision to decline to provide the Committee with a copy of legal advice prepared by my department concerning the Treaty of Lausanne does not mark a new declaration of government policy in relation to the disclosure of legal advice.

It is my understanding that it has indeed been a longstanding practice, accepted by this government and previous governments, not to disclose legal advice which has been provided to government, unless there are compelling reasons to do so in a particular case.

Yours sincerely

Alexander Downer