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

hl.let.16465
24 March 2009

Senator Mathias Cormann
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cormann

PUBLIC INTEREST IMMUNITY CLAIMS -
YOUR NOTICE OF MOTION OF 17 MARCH 2009

You asked for a note on the background and effect of the notice of motion you gave on 17 March 2009 setting out a process for determining claims by government to withhold information or documents from Senate committees.

The notice of motion if passed would provide an order of the Senate prescribing the process by which claims for withholding information or documents from Senate committees would be dealt with. The order would not seek to determine in advance the merits of particular claims to withhold information or documents, or of the grounds of such claims, but only provide a process for their resolution.

The notice of motion gives expression to the following principles:

- government officers claiming that information or documents should not be provided to a committee should articulate the grounds for such a claim (paragraph (1))

- any such claim should be based on public interest immunity, that is, that disclosure of the information or documents would be contrary to the public interest on particular recognised grounds (paragraphs (1) and (3))

- ministers should have the responsibility of deciding whether particular information held by government should be withheld from a committee (paragraphs (2) and (3))

- as the apprehended harm to the public interest may or may not be overcome by providing the information or documents as in camera evidence, a minister, in making a decision whether to seek to withhold information or documents from a committee, should indicate whether the harm could be overcome by evidence taken in camera, so that the committee may decide whether to receive evidence in camera (paragraph (4))

- only the Senate, and not a committee or an individual senator, may ultimately decide whether a minister is justified in seeking to withhold information or documents from a committee and whether any further action should be taken in relation to a particular case (paragraph (5))

- any senator may ask the Senate to consider such a matter (paragraph (6))

- mere statements that information or documents are not public, or are confidential, or constitute advice or internal deliberations of government, are not sufficient to establish possible harm to the public interest from disclosure (paragraph (7))

- public bodies that are independent from ministerial direction or control should be similarly obliged to raise, through their highest ranking officers, public interest grounds for any claim to withhold information or documents from a committee (paragraph (8)).

Claims that information should be protected from disclosure because of apprehended harm to the public interest from disclosure are known as public interest immunity claims. They were formerly called claims of privilege, but the terminology was changed to focus on the principle that harm to the public interest is the proper basis of all such claims. This change of terminology was first adopted in the courts of law in relation to claims to withhold information from the courts in civil or criminal cases, and was then also adopted in the parliamentary sphere.

The reference to refusals to provide information as *claims* of public interest immunity recognises the principles that it is for the house concerned in parliamentary cases, and the courts in judicial proceedings, to determine whether a refusal of information is justified and sustainable.

Harm to the public interest also encompasses harm to private interests when it is not in the public interest that such harm should occur. For example, it is not in the public

interest that information should be disclosed that would prejudice the defence in a criminal trial; the apprehended harm would be done to the defendant, but it would also constitute harm to the public interest by interfering with the proper conduct of the trial.

The recognised grounds for public interest immunity claims consist of the following:

- prejudice to legal proceedings
- prejudice to law enforcement investigations
- damage to commercial interests
- unreasonable invasion of privacy
- disclosure of Executive Council or cabinet deliberations
- prejudice to national security or defence
- prejudice to Australia's international relations
- prejudice to relations between the Commonwealth and the states.

The notice of motion does not set out these recognised grounds. It would not be advisable for the Senate to do so in any general resolution, because whether these grounds are justified in particular cases very much depends on the circumstances of those cases. Also, the public interest in the disclosure of particular information may outweigh the apprehended harm to the public interest from the disclosure of the information.

These principles have a long history in the Senate. They have been expounded largely with reference to individual cases rather than by general resolutions, but there have been some general expressions of the principles. The history may be summarised as follows.

Having in several cases asserted its right to require the production of information and documents about public affairs, the Senate, in reaffirming that power in a resolution of 1975, also declared that it would exercise its power "subject to the determination of all just and proper claims of privilege", and that "a claim of privilege based on an established ground" would be considered and determined case by case by the Senate. (This resolution belongs to the period before the change of terminology from "privilege" to "public interest immunity" occurred.)

In a series of resolutions, first passed in 1971 and reaffirmed at various times, most recently in 1998, the Senate, in response to claims of confidentiality advanced by officials in estimates hearings, declared that "there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committees unless the Parliament has expressly provided otherwise".

Resolution 1 of the Senate's Privilege Resolutions, passed in 1988, provides in paragraph (16) that officers are to be given reasonable opportunity to refer questions to superior officers or to a minister. This provision is intended to support the principle that ministers should consider any potential claim of public interest immunity, not officers.

In 1992 the Senate declared by resolution that the fact that particular information is exempt from disclosure under the Freedom of Information Act does not automatically provide a ground for withholding that information from the Senate. The then government accepted this point.

In 1994, during an inquiry by the Senate Privileges Committee into public interest immunity claims, the then government conceded the principle that such claims must be made by a minister and are for the Senate ultimately to resolve.

In 2003 the Senate passed a resolution declaring that any claim of public interest immunity on the basis of commercial confidentiality should be made only by a minister and should be accompanied by a ministerial statement of the basis of the claim, including a statement of the commercial harm which might result from the disclosure of the information in question. The terms of this resolution are applicable to public interest immunity claims in general; the expression of the resolution to apply to claims of commercial confidentiality reflects the fact that commercial confidentiality had become the most common basis for such claims.

The *Government Guidelines for Official Witnesses before Parliamentary Committees*, issued in 1989 and still in force, recognised the principles which had been expounded by the Senate. Paragraph 2.28 of the guidelines confirm that claims of public interest immunity should be made only by ministers:

> Claims that information should be withheld from disclosure on grounds of public interest (public interest immunity) should only be made by Ministers (normally the responsible Minister in consultation with the Attorney-General and the Prime Minister).

Paragraph 2.32 recognises the principle that mere claims of confidentiality are not sufficient for a claim of public interest immunity, but that harm to the public interest must be established. The guidelines refer to:

> Material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government *where disclosure would be contrary to the public interest.*

The guidelines also state in paragraph 2.32:

> It must be emphasised that the provisions of the FOI Act have no actual application as such to parliamentary inquiries, but are merely a general guide to the grounds on which a parliamentary inquiry may be asked not to press for particular information, and that the public interest in providing information to a parliamentary inquiry may override any particular ground for not disclosing information.

The basic principles of the notice of motion have therefore been recognised by successive governments in their own instructions to their public servants.

The principles of the notice of motion also have a long history outside Australia, pre-dating our Parliament. It has been recognised over centuries that it is a major function of a representative assembly to require the production of information by the executive government, so as to assure the public that the country is being properly served by executive office-holders, and to determine the grounds on which such information might be withheld.

The past resolutions of the Senate also express the principle that withholding information about public affairs from the representatives of the public in Parliament is a serious step, not to be taken lightly. As such it is not a matter for public servants, but warrants a deliberate decision at the highest level of politically responsible office-holders. The notice of motion would ensure that such decisions are treated in that way.

Yours sincerely

(Harry Evans)