

Appendix 2

Statement by the Chair

Yesterday, during questions to the department, Senator Abetz asked whether it had sought legal advice about compulsory arbitration. Mr O'Sullivan declined to answer on the basis of legal professional privilege but eventually took the question on notice.

It should be well known to officers attending this committee that there is a clear process for seeking not to answer a question, a process which is referred to at the beginning of every set of hearings. Copies are available from the secretariat.

No witness has an independent discretion to decline to answer a question. An officer has a right under Privilege Resolution 1(16) to refer a question to a senior officer or minister. Alternatively, an officer may state the public interest ground on which he or she believes it may not be in the public interest to disclose the information requested AND specify the harm to the public interest that could result from disclosure of the information. The order of the Senate of 13 May 2009, to which I have already referred, then sets out the process to be followed. There is no other basis on which an answer may be withheld from a committee.

It is very difficult to see how the answer to a question whether legal advice has been sought on a matter could attract legal professional privilege, let alone how it could harm the public interest. The public interest in Commonwealth agencies being accountable to committees of this Parliament for their administration of taxpayers' money must, in most cases, prevail.

It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides a ground for a refusal of information in a parliamentary forum. The first question in response to any such claim is: to whom does the legal advice belong, to the Commonwealth or some other party? Usually it belongs to the Commonwealth. Legal advice to the federal government, however, is often disclosed by the government itself. Therefore, the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought.

I suggest that the department should think very carefully in answering the question on notice about where the public interest actually lies.