

Chapter 1

The terms of the inquiry

Background to the inquiry

1.1 On 16 November 2009, the Senate referred to the Finance and Public Administration References Committee for inquiry and report by 2 February 2010, a process for determining public interest claims made by government in response to orders of the Senate or of Senate committees for the production of information and documents.

1.2 Under the terms of reference, the committee was asked to consider whether the following proposed order of the Senate would provide a suitable process for the arbitration of public interest immunity claims:

PROPOSED RESOLUTION OF THE SENATE

- (1) If:
 - (a) the Senate orders that a minister produce documents; and
 - (b) the minister responsible for producing the documents considers that there may be reasons why the documents should not be produced,
a minister shall make a statement to the Senate, on or before the date specified by the Senate for the production of the documents, setting out why it may not be in the public interest for the documents to be produced.
- (2) If:
 - (a) a minister makes a statement under paragraph (1); or
 - (b) a committee makes a report to the Senate under paragraph (5) of the order of the Senate of 13 May 2009,
and the Senate does not, within two sitting days after the statement or the report is made, by resolution accept the reasons given by the minister in the statement or as set out in the report of the committee, the statement or the report shall be referred to the independent arbitrator in accordance with this order.
- (3) Where the reasons set out in the statement or the report consist of, or include, a claim that documents or information are commercially confidential, the independent arbitrator in respect of that claim is the Auditor-General.
- (4) Where other reasons are given the statement or report shall be referred to an independent arbitrator appointed by resolution of the Senate.

- (5) The independent arbitrator shall, as soon as practicable, report to the Senate on whether the reasons given for withholding the documents or information are justified.
- (6) Where the independent arbitrator reports that reasons given for the withholding of information or documents are not justified, the documents or information shall be produced in accordance with the order of the Senate or the requirement of the committee, subject to any further order of the Senate.

Conduct of the inquiry

1.3 The inquiry was advertised in *The Australian* as well as through the internet. The committee invited submissions from the Commonwealth Government, the NSW and Victorian Legislative Councils and other interested organisations and individuals.

1.4 The committee received eleven submissions. A list of the individuals and organisations that made public submissions to the inquiry together with other information authorised for publication is at Appendix 1.

1.5 The committee held a public hearing in Sydney on 7 December 2009. Appendix 2 lists the names and organisations of those who appeared. Submissions and the Hansard transcript of evidence may be accessed through the committee's website at www.aph.gov.au/Senate/committee/fapa_ctte/indep_arbit/index.htm.

Acknowledgments

1.6 The committee thanks those organisations and individuals who appeared at the public hearing and made submissions. In particular, the committee thanks the Clerks of the NSW Parliaments and Victorian Legislative Council, and the former Clerk of the Senate, for all the assistance they provided to the committee during this inquiry.

Structure of the report

1.7 Chapter two of this report outlines the background to the inquiry and explains the existing models for independent arbitration of public interest immunity claims in NSW and Victoria.

1.8 Chapter three considers the general benefits and concerns with independent arbitration of public interest immunity claims.

1.9 Chapter four discusses some of the specific issues relating to the proposed Senate resolution and chapter five outlines the committee's conclusions.