Chapter 2

Background to the inquiry

2.1 This chapter sets out the background to the issues examined in the inquiry, including the problem sought to be addressed by the proposed Senate resolution, previous attempts to introduce an independent arbitrator to examine public interest immunity claims, and the experiences of independent arbitration in state and territory parliaments.

The Senate's powers to require the giving of evidence

2.2 The Senate has extensive powers to require the giving of evidence and the production of documents. This includes powers to summons witnesses under Standing Order 176, require a witness to answer a question under Privileges resolution 1(10) of 25 February 1988, and order the production of documents under Standing Order 164.

2.3 These powers are frequently used to elicit evidence from government departments and ministers. Requests for information often arise during committee hearings, in particular Estimates hearings, however orders for the production of documents, and decisions that a witness is in contempt of the Senate for failure to answer a question or attend a hearing, can only be made by the Senate.

2.4 While the Senate has extensive powers to require documents and information, it is acknowledged that certain information held by government ought not be disclosed. The types of information which are immune from disclosure by the executive to the Senate were, in the past, referred to as crown immunity or executive privilege, but are now more widely known as public interest immunity.[1]

Public interest immunity grounds

2.5 There is no definitive list of grounds on which public interest immunity may be claimed by executive government. The former Clerk of the Senate, Mr Harry Evans,[2] is of the view that setting out the grounds in a formal document or general resolution:

> …would not be advisable…because whether these grounds are justified in particular cases very much depends on the circumstances of those cases.[3]

2.6 However, a number of informal lists of the grounds on which public interest immunity may be claimed by the executive have been produced and circulated in the

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1 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 468. The terms 'public interest immunity' and 'privilege' were used interchangeably by witnesses, and accordingly both are used throughout this report. Similarly, the terms 'arbitrator' and 'arbiter' are both used in the report as they were also used interchangeably by witnesses.

2 Mr Evans was the Clerk of the Senate at the time he made a submission to the inquiry *(Submission 4)* on 26 November 2009, but had retired when he appeared before the committee on 7 December 2009. In the interests of simplicity, Mr Evans will be referred to as the 'former Clerk of the Senate' throughout this report.

3 Mr Harry Evans, Clerk of the Senate, *Submission 4*, appendix 1.

form of advice to Senate committees in relation to estimates hearings, and advice to government witnesses.[4] It is generally accepted that the grounds are similar to those arising under the *Freedom of Information Act 1982* (FOI Act).

2.7 It should be noted, however, that the exemptions under the FOI Act do not apply to the Senate and the Senate may determine its own grounds and tests for what documents it is in the public interest for government to produce. The FOI Act exemptions simply provide guidance, and are an articulation of the common grounds on which the government claims public interest immunity both in court and in parliament.[5] Paragraph 4 of the Senate's resolution of 16 July 1975:

> …makes it clear that while the Senate may permit claims for public interest immunity to be advanced it reserves the right to determine whether any particular claim will be accepted.[6]

2.8 Ultimately, if the government wishes to claim that a document or information is subject to public interest immunity, it must demonstrate that the public interest in not disclosing the document or information outweighs the public interest in disclosing the document or information.

2.9 A paper entitled *Grounds for Public Interest Immunity Claims*, listing potentially acceptable and unacceptable grounds for claims of public interest immunity, was circulated and tabled by Senator Chris Evans during the Employment, Workplace Relations and Education Legislation Committee and May 2005 Estimates.[7] The paper indicated that the following grounds had attracted some measure of acceptance in the Senate, subject to the circumstances of particular cases:

- 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

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4 See for example: reference in *Odgers'* to a paper circulated by the Employment Workplace Relations and Education Committee during the May 2005 Budget Estimates, *Odgers' Australian Senate Practice*, 12th edition, p. 469; and *Government guidelines for official witnesses before Parliamentary committees and related matters - November 1989*, para. 2.32, www.dpmc.gov.au/guidelines/docs/official_witnesses.pdf (accessed 19 January 2010).

5 Department of the Prime Minister and Cabinet, *Government guidelines for official witnesses before Parliamentary committees and related matters - November 1989*, para. 2.32, p. 9.

6 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 469.

7 Advice from the Clerk of the Senate, *Grounds for Public Interest Immunity Claims*, tabled during Senate Employment, Workplace Relations and Education Legislation Commission Budget Estimates hearing, 30 May 2005.

- prejudice to relations between the Commonwealth and the states.[8]

2.10 The paper listed the following grounds not accepted by the Senate:

- a freedom of information request has been or could be refused
- legal professional privilege
- advice to government
- secrecy provisions in statutes
- working documents
- 'confusing the public debate' and 'prejudicing policy consideration'.[9]

Resolving public interest immunity claims

2.11 The former Clerk of the Senate, Mr Harry Evans, has noted that '[g]overnments generally comply with the requirements of the Senate and its committees for the appearance of witnesses, the giving of evidence and the production of documents'.[10] However, occasionally, public servants[11] and ministers raise public interest immunity claims with respect to documents or information, in essence claiming that it is not in the public interest for the documents or information to be produced.

2.12 *Odgers' Guide to Senate Practice* lists several instances in which orders for the production of documents have been made and the government claimed that the documents were privileged.[12] In most instances, the Senate has either accepted that privilege applies, or the government has ultimately responded to an order.

2.13 Recently the government has refused to comply with orders for documents relating to advice that it has received about the Health Insurance Amendment (Revival of Table Items) Bill 2009, data about aged care providers and the National Broadband Network.[13] The government claimed that some or all of the documents subject to the

8 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 469.

9 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, pp 469–70.

10 Mr Harry Evans, Clerk of the Senate, 'Public Interest Immunity Claims in the Senate', (2002) 13 *Public Law Review* 3, at p. 3.

11 It should be noted that all public interest immunity claims should only be made by a minister, see Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, November 1989, para 2.28, p. 8, www.dpmc.gov.au/guidelines/docs/official_witnesses.pdf (accessed 19 January 2010).

12 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, pp 445–6.

13 *Procedural Information Bulletin*, No. 237, for the sitting period 16 November to 2 December 2009, 3 December 2009, pp 4–5.

orders were subject to legal professional privilege, contained personal information, and were commercial-in-confidence respectively.[14]

2.14 In terms of settling disputes between the executive and the Senate regarding privilege claims, there is a fundamental unresolved question about whether the Senate's 'investigatory authority is legally constrained by crown privilege'.[15] This issue and its implications for the implementation of an independent arbitration scheme in the Senate are discussed at paragraph 2.73 below.

2.15 *Odgers'* emphasises that the Senate has a range of options for dealing with the government's refusal to comply with an order for production of documents. The most serious of these involve the treatment of failure to comply with an order as contempt, for which the Senate may impose a penalty of imprisonment or a fine under section 7 of the *Parliamentary Privileges Act 1987*. However *Odgers'* notes that the Senate has been very reluctant to impose any penalties for contempt, and has done so only twice, and even in those instances only ever imposed the penalty of a reprimand.[16] In relation to orders for production of documents, *Odgers'* summarises that:

> It is open to the Senate to treat a refusal to table documents as a contempt of the Senate. In cases of government refusal without due cause, however, the Senate has preferred political remedies. In extreme cases the Senate, to punish the government for not producing a document, could resort to more drastic measures than censure of the government, such as refusing to consider government legislation.[17]

2.16 However, *Odgers'* notes that there are 'practical difficulties' with the Senate's use of its powers to impose a penalty of imprisonment or a fine for failure by the government to produce documents:

> …particularly the probable inability of the Senate to punish a minister who is a member of the House of Representatives, and the unfairness of imposing a penalty on a public servant who acts on the directions of a minister.[18]

2.17 Yet, despite the fact that the Senate has powers to punish failure to comply with its orders for the production of documents, including in situations where the failure to comply rests on a claim of privilege, there are currently no procedures in place for determining whether a claim by the executive for public interest immunity is

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14 Response from the Hon Nicola Roxon MP, Minister for Health and Ageing, to the Order of the Senate relating to legal advice on the Health Insurance Amendment (Revival of Table Items) Bill 2009, tabled 18 November 2009; Response from the Hon Justine Elliot MP, Minister for Ageing, in relation to the Order of the Senate of 17 November 2009, tabled 18 November 2009; Response from the Hon Stephen Conroy MP, Minister for Broadband, Communications and the Digital Economy, to the Order of the Senate on 13 May 2009 relating to the National Broadband Network documents, tabled 26 October 2009.

15 Report of the Royal Commission on Australian Government Administration, 1976, Parliamentary Paper 185/1976, p. 115.

16 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 72.

17 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 446.

18 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 488.

justified. A number of Senate committees have considered the issue in the past and '[a] common thread emerging from the deliberations of those committees is that the question is a political and not a legal or procedural one'.[19] These instances are outlined from paragraph 2.32 below.

2.18 The proposed order, in conjunction with the order of the Senate of 13 May 2009, attempts to establish a process for resolving disagreements on public interest immunity claims made by ministers with respect to documents and information ordered by the Senate.

Senate order of 13 May 2009

2.19 The Senate order of 13 May 2009 'seeks to ensure that unresolved claims of public interest immunity before Senate committees are referred to the Senate.'[20] The order provides that if, during the course of Senate committee hearings, a committee requests information or a document from a department or agency, and the department or agency believes it is not in the public interest to disclose the information, they must:

- state the ground on which it is not in the public interest; and
- specify the harm to the public interest that would result from disclosure.

2.20 If the committee is not satisfied, the matter is referred to the relevant minister, who must provide the committee with the information, or a statement of the grounds on which it is not in the public interest to do so. If the committee does not consider that the minister's statement justifies withholding the information, the committee must report the matter to the Senate.

2.21 The order does not provide any process for resolution of privilege matters beyond this.

2.22 The Senate Procedure Committee has tabled two reports examining the effectiveness of the process set out in the 13 May 2009 order.

2.23 In its report, tabled on 20 August 2009, the Procedure Committee considered the use of the order in the Estimates hearings from 25 May to 5 June 2009. The committee found that:

> As with all estimates hearings, the questions which gave rise to possible invocations of the order amounted to only a very small percentage of the proceedings, and the vast majority of questions were answered, with a great amount of otherwise unavailable information disclosed.[21]

2.24 However, the committee also found that of the few claims that were made, many simply implied or referred to categories of exempt documents as opposed to considering the public interest in disclosure versus non-disclosure in each case. For example, the Procedure Committee stated that:

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19 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 469.

20 Mr Harry Evans, Clerk of the Senate, *Submission 4*, p. 2.

21 Senate Procedure Committee, *Third Report of 2009*, August 2009, p. 2.

> On several occasions ministers and officers claimed that advice to government is not disclosed, without raising a public interest ground as required by paragraph (7) of the Senate's order.[22]

2.25 Furthermore, the committee found that some claims of immunity were made based on grounds which did not correspond with recognised public interest grounds, such as 'privacy of remuneration'.[23]

2.26 The Procedure Committee concluded that there needed to be greater familiarity with public interest immunity grounds amongst government witnesses, and that:

> It should be appreciated that the term 'public interest immunity claim' is simply a generic term for every claim by a witness that a question should not be answered or information not supplied; it is not some special category of claims, over and above which there is an executive discretion to withhold information.[24]

2.27 Accordingly witnesses, and ultimately ministers to whom disputes are referred, are obliged to consider the public interests in disclosure versus non-disclosure of the specific information requested by the Senate in each instance.

2.28 The Procedure Committee's subsequent report, tabled in November 2009, considered the use of the order at supplementary Estimates hearings from 19 to 23 October 2009. Despite a statement by the Special Minister of State to the effect that the order would be complied with, the Procedure Committee identified similar problems as it had in its previous report regarding witnesses arguing that certain categories of information are never disclosed, without giving thought to the weighting of competing public interests:

> There was a repetition of the claim that advice to government is never disclosed, which is not correct…and is explicitly stated by the Senate's order not to be a reason in itself for refusing information. When pressed on this point, the minister took the question on notice. The claim that advice to government is never disclosed was repeated in at least one other committee.[25]

2.29 The Procedure Committee also found a lack of understanding amongst government witnesses about the procedure and legitimate grounds of withholding information from the Senate. For example, the report stated that:

> In the Foreign Affairs, Defence and Trade Committee hearing, 'sensitivities' were raised on several occasions as reasons for not answering questions, with a failure to articulate the appropriate public interest grounds of prejudice to foreign relations and national security.[26]

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22 Senate Procedure Committee, *Third Report of 2009*, August 2009, p. 2.

23 Senate Procedure Committee, *Third Report of 2009*, August 2009, p. 2.

24 Senate Procedure Committee, *Third Report of 2009*, August 2009, p. 3.

25 Senate Procedure Committee, *Fourth report of 2009*, November 2009, p. 2.

26 Senate Procedure Committee, *Fourth report of 2009*, November 2009, p. 2.

2.30 The Procedure Committee reiterated its conclusions from its previous report that there 'is not a general discretion to withhold information without a statement of a public interest ground'.[27]

2.31 The government's long standing guidelines also make clear that even if a public interest immunity ground is established, it may nevertheless be overridden by the public interest to disclose the document. The *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, published by the Department of the Prime Minister and Cabinet, make it clear to government witnesses that the competing public interest in the disclosure of documents so ordered by the Senate versus the particular ground for not making a document public must be weighed. Paragraph 2.32 of the Guidelines, states that:

> [T]he public interest in providing information to a parliamentary inquiry may override any particular ground for not disclosing information.[28]

Previous attempts to introduce independent arbitration

2.32 The idea of independent arbitration of public interest immunity claims made by the executive in respect of information requested by the Senate has been raised on a number of previous occasions. Former Clerk of the Senate, Mr Harry Evans' submission states that there have been at least three attempts to introduce a process for independent arbitration of public interest immunity claims into the Senate which include:

- an attempt in 1982 in response to the 'bottom of the harbour' tax evasion affair;
- a recommendation by the Senate Privileges Committee in 1995 in response to the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994; and
- a recommendation by the Finance and Public Administration References Committee in 1998.[29]

Bottom of the harbour affair

2.33 The first attempt to introduce an independent arbitration process was in 1982 in response to the 'bottom of the harbour' tax evasion affair.[30] 'Bottom of the harbour' tax evasion techniques emerged in Australia in the 1970s and involved stripping a company of its assets and profits before its tax became payable, or using another

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27 Senate Procedure Committee, *Fourth Report of 2009*, November 2009, p. 3.

28 Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, November 1989, p. 9, www.dpmc.gov.au/guidelines/docs/official_witnesses.pdf (accessed 19 January 2010).

29 Mr Harry Evans, Clerk of the Senate, *Submission 4*, p. 2. The respective Senate Committee reports mentioned were: Senate Privileges Committee, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994: Casselden Place Reference*, March 1995; Senate Finance and Public Administration References Committee, *Contracting Out of Government Services: Second Report*, May 1998, Chapter 5.

30 Mr Harry Evans, Clerk of the Senate, *Submission 4*, p. 2.

company as the entity which became liable for tax but ensuring that it never had sufficient assets to pay the money owed.

2.34 In 1980 the Fraser government introduced legislation to make involvement in such schemes a criminal offence, however the opposition argued that the legislation came too late, and that ministers in the government had been aware of, and advised to criminalise, such schemes for a number of years prior to introducing the legislation.[31] Accordingly, the opposition in the Senate made three orders for the production of documents relating to the matter.[32]

2.35 The government refused to supply the Senate with the majority of the documents requested, based on advice from the Solicitor General. In response, the Senate passed a motion, moved by Senator Gareth Evans, that all the documents the government had refused to produce be examined by an independent examiner. The Senate moved that Mr Frank Costigan, who had headed a Royal Commission into related matters, be appointed to examine the documents. Senator Evans argued with respect to the arbitration of public interest immunity claims, or 'filtration' of documents, that:

> The filtering job that has been done has not been done in a way with which the Senate can now rest content. We believe that it can be done only by someone who is totally independent of the Executive Government and yet in whose competence and experience to make these kinds of judgments about prejudice the Senate can have full confidence.[33]

2.36 The government again refused to supply the Senate or Mr Costigan with documents containing legal or policy opinions or advice on the basis that it would be harmful to the administration of justice and said:

> In the event that a Senate majority seeks to enforce the directions contained in the resolution of 25 November 1982 [order for the production of documents], the Government intends to put the basic legal and constitutional questions in relation to the Senate's powers before the High Court of Australia.[34]

2.37 A federal election and change of government in 1983 prevented the matter from being resolved.

2.38 The final report in October 1984 of the Joint Select Committee on Parliamentary Privilege noted the trend 'away from ready recognition of claims for Crown privilege and towards examining these claims closely and carefully weighing competing 'public interest' considerations'.[35] The committee continued in its report to

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31 Senator Gareth Evans, *Senate Hansard*, 23 September 1982, p. 104.

32 *Senate Journals*, 23 September 1982, J.1105–7; *Senate Journals*, 14 October 1982, J.1125; *Senate Journals*, 25 November 1982, J.1258–9.

33 Senator Gareth Evans, *Senate Hansard*, 23 September 1982, p. 1238.

34 *Senate Hansard*, 15 December 1982, p. 3581.

35 Joint Select Committee on Parliamentary Privilege, Final Reports, October 1984, Parliamentary Paper 219/1984, p. 153.

state that it did not think 'any procedures involving concession to Executive authority should be adopted' as a means of resolving privilege claims. The committee stated:

> Such a course would amount to a concession the Commonwealth Parliament has never made — namely, that any authority other than the Houses ought to be the ultimate judge of whether or not a document should be produced or information given.[36]

2.39 With respect to the possibility of independent arbitration of public interest immunity claims, the committee found:

> In the nature of things it is impossible to devise any means of eliminating contention between the two [the executive and the parliament] without one making major and unacceptable concessions to the other. It is theoretically possible that some third body could be appointed to adjudicate between the two. But the political reality is that neither would find this acceptable. We therefore think that the wiser course is to leave to Parliament and the Executive the resolution of clashes in this quintessentially political field.[37]

Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994

2.40 The arbitration issue was raised again in 1994 when the Treasurer, the Hon Ralph Willis MP, claimed that certain classes of documents requested by the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media, were subject to public interest immunity.[38] The Clerk of the Senate advised the committee that:

> The question of the existence of executive privilege in relation to parliamentary inquiries has not been settled. Unless it is adjudicated by the courts, which is unlikely, it will continue to be dealt with cases by case as a matter of political dispute and contest between the Senate and the government.[39]

2.41 In response, on 23 March 1994, Senator Cheryl Kernot, then leader of the Australian Democrats, introduced the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994. The bill provided that failure to comply with a lawful order of either house of parliament or a committee would be a criminal offence. It would be a defence to prosecution that production of the evidence would result in substantial prejudice to the public interest not outweighed by the public interest in production. In order to determine the existence of the defence, the Federal Court would be empowered to examine the disputed evidence or documents in camera.

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36 Joint Select Committee on Parliamentary Privilege, Final Reports, October 1984, Parliamentary Paper 219/1984, p. 154.

37 Joint Select Committee on Parliamentary Privilege, Final Reports, October 1984, Parliamentary Paper 219/1984, p. 154.

38 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 480.

39 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 480, quoting a letter from the Clerk to the Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in Relation to the Print Media.

2.42 The Senate Committee of Privileges recommended that the bill not be passed, and concluded that as determining the scope of public interest immunity is ultimately an issue for the Senate, such matters are not appropriate to be adjudicated by the courts.[40] However, in its report, the committee noted favourably the suggestion by Senator Evans in 1982, that public interest immunity issues may be assisted by an independent arbitrator.[41]

2.43 Senator Evans gave evidence to the inquiry in his capacity as Leader of the Government in the Senate, and when questioned about his 1982 suggestion gave 'guarded support' to the idea of independent arbitration.[42] Senator Evans stated:

> Wearing my present hat, I might be reasonably presumed to be less enthusiastic for that particular mode of assistance that I was when wearing a quite different political hat in 1982…provided the ultimate determination of these matters remains one for the parliament, it is difficult to resist the notion that in principle the parliament should be able to inform itself on the matters in issue in the best way it can.[43]

2.44 Other witnesses before the Privileges Committee also supported the suggestion of an independent arbitration process.[44]

2.45 In a report the following year, the Privileges Committee again referred to the Senator Evans' 1982 proposal and recommended the independent arbitration of public interest immunity claims by government.[45]

Senate Finance and Public Administration Committee recommendation 1998

2.46 In 1998, the Finance and Public Administration References Committee again raised the issue of independent arbitration, this time in response to a noted increase in claims of commercial confidentiality as a basis for the government withholding information from the Senate. The committee recommended the use of an independent arbiter, such as the Auditor-General, to examine material claimed to be commercial-in-confidence on behalf of the Senate.[46]

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40 Senate Committee on Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, 49th Report*, September 1994, p. 8.

41 Senate Committee on Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, 49th Report*, September 1994, p. 10.

42 Senate Committee on Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, 49th Report*, September 1994, p. 10.

43 Senator the Hon Gareth Evans, Leader of the Government in the Senate, *Senate Committee on Privileges Hansard*, 18 August 1994, p. 13.

44 Mr Harry Evans, Clerk of the Senate, *Senate Committee on Privileges Hansard*, 18 August 1994, p. 32; Mr Anthony Morris QC, Barrister, *Senate Committee on Privileges Hansard*, 18 August 1994, p. 85.

45 Senate Committee on Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 – Casselden Place Reference*, 52nd Report, March 1995, p. 5.

46 Senate Finance and Public Administration References Committee, *Contracting Out of Government Services Second Report*, May 1998, p. 71.

Senate order relating to publication of a government contracts list

2.47 The recommendation by the Senate Finance and Public Administration References Committee in 1998 led to an order of continuing effect requiring the publication of a list of departmental and agency contracts and a corresponding arbitration process.

2.48 In response to a noted increase in claims by government that contracts, or parts thereof, were confidential, and the limit this places on the Senate's capacity to scrutinise the expenditure of public money, on 20 June 2001 the Senate ordered that the government publish lists of all contracts to the value of $100 000 or more.[47] The order, referred to as the 'Murray Motion' after its mover, Senator Andrew Murray, also requires that the Auditor-General examine claims of confidentiality in the listed contracts and report to the Senate on the appropriateness of confidentiality clauses in used government contracts each year.[48]

2.49 The Auditor-General, Mr Ian McPhee, gave evidence to the committee that as a result of its audits, the Australian National Audit Office and the Department of Finance and Deregulation have developed guidelines for government departments regarding what aspects of contracts are appropriate to treat as confidential. Mr McPhee stated that these guidelines had promoted better practices in the use of confidentiality clauses and have resulted in substantial positive changes to contract management within government. Mr McPhee commented that:

> As a result of those developments [the Murray Motion and subsequent guidelines developed by the Department of Finance and Deregulation], since 2001 we have seen quite a significant change in the behaviour of agencies. In the past there was a strong disposition to make most things confidential. These days that is less the case.[49]

Independent arbitration processes in state and territory parliaments

New South Wales Legislative Council[50]

2.50 Since 1999 the NSW Legislative Council has had an independent arbitration process for disputes about the validity of public interest immunity claims, initially through resolution and subsequently in a standing order adopted in May 2004.

2.51 Under Standing Order 52 (at Appendix 3), the NSW Legislative Council may order documents to be tabled by the Clerk. The Clerk communicates the order to the Department of Premier and Cabinet, and the department must provide the Clerk with the documents, and an indexed list of all the documents being provided in response to the order. Once tabled, the documents and the list become public documents.

2.52 If the NSW government makes a privilege claim with respect to a document, the document is made available, through the Clerk's office, to members of the

47 *Senate Journals*, 20 June 2001, pp 4358–9.

48 Senate Order of Continuing Effect of 20 June 2001 as amended, paragraph (5).

49 Mr Ian McPhee, Auditor-General, *Committee Hansard*, 7 December 2009, p. 55.

50 This section is largely drawn from the submission of Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Submission 6*, p. 2.

Legislative Council only, and may not be copied or published without an order of the Council.

2.53 Any member of the Legislative Council may dispute the validity of a claim of privilege in writing to the Clerk. On receipt of such a dispute, the Clerk is authorised to release the disputed documents to an independent arbiter for evaluation of the validity of the privilege claim. Within seven days, the arbiter lodges a report assessing the validity of the privilege claim. The report is available only to members of the Legislative Council and cannot be published or copied without an order of the Council.

2.54 The arbiter's report is advisory, not determinative. The determination of whether or not documents are made public remains the responsibility of the Legislative Council.

2.55 The standing order specifies that the arbiter must be a Queen's Counsel, Senior Counsel or retired Supreme Court Judge, and is appointed by the President of the Legislative Council.

2.56 Since 1999, the NSW Legislative Council has agreed to over 220 orders, of which 45 have been subject to independent arbitration.[51] In most instances, Sir Laurence Street, former Chief Justice of the NSW Supreme Court has been appointed as the arbiter in NSW,[52] however Mr Terrence Cole QC and the Hon Matthew Clarke QC have also arbitrated disputes.

2.57 Ms Lynn Lovelock, Clerk of the NSW Parliaments, told the committee that the NSW model of independent arbitration has generally been a success:

> The [arbitration] process itself I think has worked very well. It has developed over the years… In general, I believe the members [of the Legislative Council] are satisfied with the process.[53]

The power of the NSW Legislative Council to receive privileged documents

2.58 The independent arbitration process in NSW developed following a series of High Court and Supreme Court of NSW decisions in the late 1990s which clarified the powers of the NSW Legislative Council to receive privileged documents.

2.59 The decisions in *Egan v Willis*[54] and *Egan v Chadwick*[55] arose from a series of resolutions of the Legislative Council requiring the leader of the government in the Council, the Hon Michael Egan, to produce documents held by the government. Most

51 As at time of research for: Lynn Lovelock, 'The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the *Egan* Decisions Ten Years On, *Australian Parliamentary Review*, Spring 2009, Vol 24(2), p. 202.

52 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard,* 7 December 2009, p. 22.

53 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard,* 7 December 2009, p. 15.

54 (1998) 195 CLR 424.

55 (1999) 46 NSWLR 563.

of the documents were not tabled.[56] Mr Egan argued that the Legislative Council did not have the power to compel the production of documents. As a consequence of the refusal to produce the documents he was suspended from the Legislative Council and subsequently forcibly removed from the chamber.

2.60 Mr Egan sued the President and Black Rod for trespass, and challenged the validity of his suspension and removal from parliament. The NSW Court of Appeal dismissed his case, as did the High Court on appeal, holding that the NSW Legislative Council has the power to order the production of executive documents and to suspend the Minister for non-compliance with the order. The High Court said that the NSW Legislative Council has 'such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions'. The Court found that these functions include reviewing the way executive government is giving effect to existing laws, and that the power to call for documents held by the executive is necessary for the Council to effectively perform that function.[57]

2.61 In *Egan v Chadwick*, the NSW Supreme Court considered the further matter of whether the Council's power extends to ordering documents subject to a claim of privilege. The Court held that the NSW Legislative Council's power does extend to ordering documents for which claims of legal professional privilege and public interest immunity could be made, but that the Council cannot compel the production of cabinet documents.

2.62 In this respect the NSW Legislative Council differs from the Senate, where, as discussed at paragraph 2.73 below, there remain conflicting views regarding whether the Senate or executive government is the ultimate judge of the extent and application of public interest immunity, and accordingly whether the Senate has the power to receive privileged documents.

Victorian Legislative Council

2.63 In March 2007, the Victorian Legislative Council introduced a sessional order, which exists for the life of the current parliament, setting out a procedure for the arbitration of disputes regarding public interest immunity.

2.64 The Victorian Legislative Council's Sessional Order 21 (Appendix 4) is largely based on the NSW Legislative Council's Standing Order 52. The only difference between the orders is that in Victoria, only the member who moved the original order for documents may request the arbitration of an immunity claim with respect to those documents, whereas in NSW any member of the Legislative Council may request the arbitration of such a claim.[58]

2.65 To date, no independent arbiter has been appointed in Victoria, as the government has refused to supply the Legislative Council with documents which it

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56 Lynn Lovelock, 'The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the *Egan* Decisions Ten Years On, *Australian Parliamentary Review*, Spring 2009, Vol 24(2), p. 199.

57 *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ.

58 NSW Legislative Council, Standing Order 52 (6); Victorian Legislative Council, Sessional Order 19 (7).

claims are subject to public interest immunity. The Victorian government has continuously opposed and refused to comply with the sessional order on the basis that:

- the power to view and arbitrate with respect to cabinet documents would breach the principle of cabinet confidentiality and enhance the possibility that cabinet documents would be leaked;
- the delegation of the Legislative Council's capacity to resolve a dispute to an independent arbiter is unacceptable; and
- the Victorian Legislative Council does not have the power to order documents.[59] The basis of this argument and the position in the Senate are discussed below.

2.66 The Legislative Council received legal advice from Mr Bret Walker QC to the contrary, advising that the Council does have a general power to order documents from the government, and has the power to punish members of the government with contempt should they fail to comply with such an order.[60]

2.67 On two occasions, the Victorian government's refusal to comply with orders for documents has resulted in the leader of the government in the Legislative Council being suspended from the remainder of the day's sitting.[61]

2.68 Mr Tunnecliffe, Clerk of the Victorian Legislative Council, described the position in Victoria as a 'stalemate',[62] and stated that:

> I think [the procedures] would work better if the government complied with the terms of the sessional order and produced the documents so that they could then be independently arbitrated…I do not think suspension is a terribly satisfactory way of enforcing the order at all.[63]

2.69 However, despite the current stalemate in Victoria, Mr Tunnecliffe remains in favour of independent arbitration procedures, arguing that:

> …it seems to me that it is better to have a mechanism for at least attempting to resolve a dispute than not have one at all and that is why I come down on the side of having an independent arbiter rather than not having one.[64]

Australian Capital Territory Legislative Assembly

2.70 The ACT Legislative Assembly adopted a temporary order on 12 February 2009 based on the NSW and Victorian models for arbitration of public interest immunity claims (Appendix 5).

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59 Legislative Council of Victoria, *Submission 5*, p. 2.

60 Legislative Council of Victoria, *Submission 5*, Attachment 3.

61 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Victoria, *Committee Hansard*, 7 December 2009, p. 3.

62 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Victoria, *Committee Hansard*, 7 December 2009, p. 3.

63 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Victoria, *Committee Hansard*, 7 December 2009, p. 7.

64 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Victoria, *Committee Hansard*, 7 December 2009, p. 13.

2.71 The first and only use of the order to date in the ACT Legislative Assembly was in May 2009. In this instance the ACT government provided the documents to the arbiter who upheld the government's claim of privilege with respect to the document.[65]

2.72 Following the release of the arbiter's report, members of the Legislative Assembly raised concerns that the process had been more adversarial than expected, that it had failed in this instance, and that amendments to the process would be sought in future.[66]

The Senate's power to receive privileged documents

2.73 A number of witnesses before the committee raised the fact that there remains a level of uncertainty about the Senate's power to receive privileged documents. Associate Professor Anne Twomey, summarised the conflicting views of the Senate and the executive as to which has the power to determine whether privilege applies to documents:

> The Senate says it has the right to any of the government documents that it wishes except for the fact that the Senate quite rightly also accepts that there are some reasons why it would not be in the public interest to reveal documents. I think that is a very sensible position. The government, on the other hand, has never accepted that the Senate has the right to access all the documents that it seeks.[67]

2.74 The same uncertainty exists in state legislatures, with the exception of NSW which, as outlined above, has had its powers clarified by the courts' decisions in the Egan cases. Associate Professor Twomey explained in her submission that the Egan cases apply only in NSW, and are not necessarily indicative of the Senate's powers to order documents. Associate Professor Twomey submitted that:

> The full extent of [the Senate's] powers has never been the subject of a ruling by the High Court. While one may draw analogies from *Egan v Willis* and *Egan v Chadwick*, there is no certainty that the Commonwealth Government is legally obliged to produce privileged documents to the Senate, as ordered by the Senate. It may be that all privileged documents are excluded, or it may be that only some of them (such as Cabinet documents) are excluded, or it may be that none are excluded.[68]

2.75 The reason that the Egan decisions do not directly apply to the Senate, or indeed any other Australian jurisdiction, is because each jurisdiction's constitution sets the respective parliament's powers at a particular point in time, by reference to the powers and privileges of the United Kingdom House of Commons at that time. For example, section 49 of the Commonwealth Constitution states that the powers and privileges of the Senate are the same as those of the House of Commons at Federation,

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65 Mr Shane Rattenbury, *ACT Legislative Assembly Hansard*, 7 May 2009, p. 2042.

66 Mr Shane Rattenbury, *ACT Legislative Assembly Hansard*, 7 May 2009, p. 2043.

67 Associate Professor Anne Twomey, private capacity, *Committee Hansard*, 7 December 2009, pp 33–34.

68 Associate Professor Anne Twomey, private capacity, *Submission 2*, pp 1–3.

until otherwise defined by the parliament. Similarly, section 19 of the Victorian *Constitution Act 1975* states that the Victorian Legislative Council has the powers of the House of Commons in 1855. Conversely, the powers and privileges of the NSW parliament have never been comprehensively codified, and are therefore extrapolated from the common law as it has evolved over time.[69]

2.76 Accordingly, the Victorian government has argued that the Victorian Legislative Council does not have the authority to order documents on the basis that:

> …applying the powers of the House of Commons in 1855 actually restricted the Council's capacity to call for a document because at that time the convention was that if a Minister claimed privilege the document was excluded.[70]

2.77 In the Commonwealth context, in 1901 the powers of the House of Commons to call for documents were restricted by a convention that it was not in the public interest to require the production of documents in all cases, including on most of the grounds listed at paragraph 2.9. However, it is also important to note that section 49 of the Commonwealth Constitution ultimately gives the Senate the power to declare its own powers, setting the House of Commons' 1901 powers as a fallback position only.

2.78 Accordingly, the former Clerk of the Senate's view is that the Senate's power to order the production of documents for the purposes of inquiries into government administration and public affairs is 'undoubted'.[71] That view is supported by Mr Bret Walker SC's advice to the Victorian Legislative Council.[72]

2.79 However, Sir Laurence Street explained to the committee that the Senate's position also differs from that articulated in the Egan cases as the states are not restricted by the separation of powers doctrine.[73] In the states:

> Parliament can override the court. Parliament can in effect exercise judicial power…and equivalently, of course, over the administrative branch of government also.[74]

2.80 As Sir Laurence emphasised, the greater powers of executive government in the Commonwealth mean that in order for arbitration to work in the Senate, both executive government and the Senate need to support the process:

> [Agreement] is very important, particularly in the Commonwealth area where you are dealing with equals. You are dealing with executive and legislative areas.[75]

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69 John Evans, *Parliamentary Privilege Order for papers and executive privilege; committee inquiries and statutory secrecy provisions*, paper presented to the Australasian Study of Parliament Group, Victorian Chapter, 2002, Annual Conference, 12 October 2002, p. 3.

70 Legislative Council of Victoria, *Submission 5*, p. 2.

71 Harry Evans, 'Public Interest Immunity Claims in the Senate', (2002) 13 *Public Law Review* 3, at p. 4.

72 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Victoria, *Submission 5*, Attachment 1.

73 Sir Laurence Street, *Committee Hansard*, 7 December 2009, p. 64.

74 Sir Laurence Street, *Committee Hansard*, 7 December 2009, p. 64.

Committee view

2.81 The lack of certainty with respect to this important issue means that any independent arbitration process which requires the government to produce documents to an arbitrator will likely result, at least at some point, in a High Court challenge. Chapter four discusses the pointlessness of any independent arbitration process which does not require the government to produce documents to the arbitrator.

2.82 The committee considers that the government is unlikely to wholeheartedly support a Senate order which removes its ability to make decisions about the public interest in releasing documents without clear law requiring it to submit to that order. Therefore, there is unlikely to be support from executive government for any sensible, workable independent arbitration process, without a High Court decision along the lines of the Egan cases.

2.83 The committee has significant reservations with a situation which requires the Senate's relationship with executive government to be determined by the courts. The committee agrees with the long-held view which has been expressed in numerous Senate committee reports that the question of the resolution of public interest immunity claims 'is a political, and not a legal or procedural, one'.[76] As noted in *Odgers'*:

> There appears to be a consensus that the struggle between the two principles involved, the executive's claim for confidentiality and the Parliament's right to know, must be resolved politically. In practice this means that whether, in any particular case, a government will release information which it would rather keep confidential depends on its political judgment as to whether disclosure of the information will be politically more damaging than not disclosing it, the latter course perhaps involving difficulty in the Senate or public disapprobation.[77]

2.84 When the Senate Privileges Committee considered this issue in its report on the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 it found:

> There was general agreement amongst witnesses that, in the words of the Leader of the Government in the Senate, Senator [Gareth] Evans, a claim of executive privilege or public interest immunity was 'ultimately one for the house of parliament to determine'.[78]

2.85 On the issue of referring privilege matters to the courts, the former Speaker of the Victorian Legislative Assembly explained to the Privileges Committee that:

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75 Sir Laurence Street, *Committee Hansard*, 7 December 2009, p. 70.

76 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 469.

77 Harry Evans ed., *Odgers' Australian Senate Practice*, 12th edition, p. 469.

78 Senate Committee on Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, 49th Report*, September 1994, p. 8.

> To my mind the referral of such matters to the court would undermine the authority of the parliament and politicise the court's proceedings.[79]

2.86 The committee agrees with this longstanding view, and considers that the balance between the Senate and the executive's respective powers is an issue better resolved by those two arms of government, in the interests of reaching the most successful cooperative arrangement possible.

2.87 Accordingly, the committee supports the existing approach of the Senate, described as 'sensible' by Associate Professor Twomey,[80] of acknowledging that there are certain documents which although it may have the power to receive, the Senate ought refrain from demanding.

79 Senate Committee on Privileges, *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994*, *49th Report*, September 1994, p. 9.

80 Associate Professor Anne Twomey, private capacity, *Committee Hansard*, 7 December 2009, pp 33–34.