Chapter 3

Independent arbitration processes—benefits, costs and potential for misuse

3.1 During the committee's inquiry, witnesses and submitters discussed the various advantages and disadvantages of independent arbitration of public interest immunity claims. There was broad agreement amongst all of those who gave evidence about the potential benefits for government accountability of independent arbitration. However, a number of practical barriers have prevented arbitration from being effective in both Victoria and the ACT, as discussed in chapter 2, and the potential for misuse of the process has resulted in some concerns with the NSW model.

3.2 This section discusses the possible benefits, costs and potential for misuse and frustration of independent arbitration models generally. Specific issues with the proposed Senate resolution are discussed in chapter four.

Potential benefits

3.3 All witnesses were ultimately positive about the benefits of an independent arbitration process for public interest immunity claims, although some were more enthusiastic about the likelihood of those benefits coming to fruition than others.

3.4 Ms Lynn Lovelock whose opinion, as Clerk of the only parliament with significant experience in using an arbitration process, carries a great deal of weight with the committee, when asked about the benefits of the independent arbitration process commented that:

> I would have to say it has been overwhelmingly positive, but with a couple of caveats.[1]

3.5 Sir Laurence Street described it as 'essential' that the Senate have a mechanism for resolving disputes over whether documents are subject to public interest immunity.[2]

3.6 Even Associate Professor Twomey, who has raised a number of concerns with the NSW model, concluded:

> Despite all my complaints about the New South Wales system, I think overall in principle it is a good idea; it just has not operated terribly well in New South Wales. I think it could operate better in the Senate. The Senate as a chamber tends to be a bit more on the, shall we say, responsible side

1 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard*, 7 December 2009, p. 28.

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

> than the Legislative Council and it would probably behave better in the way it deals with these things.[3]

3.7 The key benefit of an independent arbitration procedure would be to:

> …overcome the difficulty of the executive government being a judge in its own cause in determining whether information should be made available to the legislature.[4]

3.8 Accordingly, an independent arbitration procedure has the potential to deliver clear accountability benefits and, as Mr Harry Evans explained:

> …would be in accordance with the spirit of recent amendments of the Freedom of Information Act that abolished conclusive certificates.[5]

3.9 However, there are a number of ways in which both executive government and Senators would be able to exploit or undermine an independent arbitration process, which both heighten its cost and diminish its ability to provide accountability benefits. Associate Professor Twomey claimed that such misuses have occurred in NSW and have prevented independent arbitration from being effective there. She cautioned that the key barrier to the Senate adopting a successful arbitration process would be 'trying to get the government to play ball'.[6]

Costs

3.10 The committee is cognisant that an independent arbitration process would have both financial and human resources costs to government and to the Senate. However the extent of these costs and the question of whether they are warranted by the benefits of independent arbitration are unclear.

3.11 In addition to the costs of the arbitrator themselves, the direct costs of independent arbitration include legal costs, the time and resources spent searching for and compiling documents, administrative costs and storage costs.

3.12 The committee was not presented with any evidence as to the exact costs of the NSW independent arbitration model. However, whilst noting that some of the costs involved in an arbitration process are 'unquantifiable', the Clerk of NSW Parliaments, Ms Lynn Lovelock told the committee that 'the practical cost of providing the documents is quite high'.[7] Professor Twomey noted in her submission that:

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3 Associate Professor Anne Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 43.

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

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

6 Associate Professor Anne Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 43.

7 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard*, 7 December 2009, p. 20.

> [G]overnment estimates of the cost of collecting, copying and indexing these documents run into the millions.[8]

3.13 The former Clerk of the Senate, Mr Harry Evans, told the committee that 'the cost of the arbitration process would be added to the appropriations for the Senate department'.[9] However, this does not include the costs that would be borne by government departments in locating and collating all the relevant material. Mr Evans anticipates that, while the initial costs of independent arbitration may be high, the costs would fall as the government and public servants became more familiar with the process and 'think seriously about whether there were any really valid reasons for keeping information secret'.[10] Mr Evans explained:

> A large part of the problem is that Public Service departments have an instinctive reaction to withhold information from disclosure. If a committee or the Senate itself asks for something and there a vague idea that it is sensitive in some way or it is something that has not been published, the instinctive reaction of government departments is to say, 'No, you can't have it,' and then to think up some plausible reasons why you cannot have it. Then it goes to the minister and the minister more or less feels obliged to support the department.[11]

3.14 Sir Laurence Street also emphasised this point, noting that government has to give consideration not only to the availability of a ground for claiming privilege with respect to particular documents, but also of whether or not privilege needs to be claimed over the documents. This involves weighing up the public interest in disclosure against the public harm in disclosure in every case. Sir Laurence said:

> But I am sure the fundamental problem is the same in both [the Commonwealth and NSW], and that is that bureaucracies delight in addressing the question of whether they can claim privilege, and if they are told, 'Yes, you can claim privilege,' the departments do not address the question of 'Do we need to claim privilege?', which of course is very relevant in the state area.[12]

3.15 In terms of the impact that an independent arbitration process would have on the interactions between the Senate and executive government, Mr Evans commented:

> If this system were in place, I hope it would deal with the problem at the source back in the department, where departmental officers would say to themselves: 'If we say they can't have it, it has to go to the minister and the minister has to make a decision and then, if the Senate is not satisfied, it will go off to this arbitration and we will have to make a submission or produce the information to the arbitrator. That is a very time-consuming

8 Associate Professor Anne Twomey, *Submission 2*, p. 16.

9 Mr Harry Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 51.

10 Mr Harry Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 51.

11 Mr Harry Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 51.

12 Sir Laurence Street, private capacity, *Committee Hansard*, 7 December 2009, p. 64.

> and troublesome process. Let's think more carefully about whether we can really let them have it in the first place.'[13]

3.16 Should Mr Evans' hopes eventuate, then the costs of the arbitration process would decrease over time, as executive government becomes more familiar with the arbitrator's balancing of public interests and makes privilege claims only over documents which it is truly necessitate such protections, and the Senate correspondingly refers fewer matters to the arbitrator.

Potential for misuse by the Senate

3.17 One of the key factors influencing cost appears to be the quantity of documents requested. The committee heard that a tendency amongst members of the NSW Legislative Council to make broad requests has substantially increased the costs of the process.

3.18 The Clerk of NSW Parliaments, Ms Lynn Lovelock gave evidence to the committee about the substantial quantities of documents that can be involved in requests by members of the NSW Legislative Council:

> There are thousands of boxes that have to be stored. We have entered into a memorandum of understanding with the state archives and we now have documents stored with them. But even so a recent return had over 500 boxes just for the one return. That is a significant number of documents and it has taken up two staff offices.[14]

3.19 Ms Lovelock highlighted that the preparation of such large quantities of documents can have high costs for government, and stated:

> I think members need to think about this when they are calling for documents—the time and effort that public servants must put into finding documents that are being requested. I do not think that is something which is easily quantifiable.[15]

3.20 Similarly, Associate Professor Anne Twomey gave evidence about the high costs associated with requests by the Legislative Council for a large volume of documents. She commented:

> [T]he broader the request that is made, the greater the time of public servants having to drop absolutely everything and frantically fish through hundreds and thousands of documents, copy them and then produce them in piles and piles of boxes, sometimes truckloads of boxes, to the Legislative Council only to find that nobody looks at them, which has happened on a

13 Mr Harry Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 51.

14 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard*, 7 December 2009, p. 20.

15 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard*, 7 December 2009, p. 19.

> number of occasions. So if you have very wide and broad requests, it costs an awful lot of money, an awful lot of trees, for very little purpose.[16]

3.21 Accordingly, Associate Professor Twomey queried whether the NSW arbitration process was being used by the Legislative Council in order to fulfil its role of scrutinising government, or whether it was being used by Members for political or other personal purposes:

> One of the perceptions that I had working for government was that some of these requests were being made for ulterior purposes; they were not being made for the purposes of the Legislative Council, through its committees or in the House. In fact, they were being made often for private purposes.[17]

3.22 Associate Professor Twomey gave an example of individuals lobbying members of the Legislative Council to make requests for documents in lieu of the individual making an FOI request, or when an FOI request had failed:

> There were some cases, for example, where people were involved in litigation with the government, could not get the government's legal advices through ordinary court procedures and so went and lobbied members of the Legislative Council to get those sorts of things through the production of documents in the Legislative Council.[18]

3.23 Associate Professor Twomey questioned the value of a costly independent arbitration process which is used in such a way, saying:

> [Orders for documents] should not be done for private purposes to benefit private individuals; it should only be done, in this case in the Legislative Council, for the purposes of parliamentary debate or committee inquiries and those sorts of things. So it is important to narrow this down to only requiring the production of documents for the purposes of the Senate for its legislative and scrutiny purposes, and that it not be used for any process outside that.[19]

3.24 The Clerk of the Victorian Legislative Council, Mr Wayne Tunnecliffe agreed with Associate Professor Twomey's views in this respect, which also mirror those of the Victorian Government. Mr Tunnecliffe told the committee that, in his view, the widening of orders for documents does not justify the time and resources required to produce the documents.[20]

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16 Associate Professor Anne Twomey, private capacity, *Committee Hansard*, 7 December 2009, pp 40–41.

17 Associate Professor Anne Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 40.

18 Associate Professor Anne Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 40.

19 Associate Professor Anne Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 40.

20 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Victoria, *Committee Hansard*, 7 December 2009, p. 8.

3.25 Both the NSW and Victorian Legislative Councils are cognisant of this potential problem with the independent arbitration model, and have put in place measures to discourage members from making unnecessarily broad requests. Ms Lovelock informed the committee that in order to avoid members making unnecessarily broad requests, or 'trawling expeditions', 'when members call for documents we talk them through the process in terms of what they are actually looking for'.[21]

3.26 Due in part to NSW Legislative Council's experiences, the Clerk of the Victorian Legislative Council adopted a similar process with regard to the Council's sessional order, and gave advice to the opposition that documentation requests were to be specific so as to avoid 'fishing expeditions'.[22]

3.27 On the other hand, the point was also raised that the government can occasionally misconstrue, or interpret requests for documents in a way which subverts the arbitration process. Ms Lovelock told the committee that this occurred in the early stages of the NSW process, and 'that was why we then went back and asked for returns, telling [the government] they had to identify each document in relation to their return'.[23]

Potential for frustration by government

3.28 It was also suggested, although no direct evidence was given, that the strengthening of parliamentary powers to order documents may result in the executive subverting the parliament's powers by being less inclined to create documents. Ms Lovelock stated, that although it is difficult to know for certain:

> I think there might also be changes in relation to what material is put into written form to form a document.[24]

3.29 Associate Professor Twomey also mentioned this risk, stating that:

> One of the bad outcomes of [the Egan cases] in New South Wales has been that a lot of things are now done orally rather than in writing because governments know that anything they put in writing, apart from cabinet documents, can be produced and made public by the Legislative Council.[25]

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21 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard,* 7 December 2009, p. 18.

22 Mr Wayne Tunnecliffe, Clerk of the Legislative Council, Victoria, *Committee Hansard,* 7 December 2009, p. 6.

23 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard,* 7 December 2009, p. 26.

24 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard,* 7 December 2009, p. 17.

25 Associate Professor Anne Twomey, private capacity, *Committee Hansard,* 7 December 2009, p. 45.

3.30 Associate Professor Twomey cautioned that this outcome has substantial drawbacks from the point of view of good governance:

> …you end up with the unfortunate problem of government by Chinese whispers—and that you do not want. This is particularly problematic in New South Wales in terms of legal advice. The government knows that any legal advice that it is given can be made public…so it starts asking for legal advice orally. It then gets passed down the chain, and the person who is at the end of the chain who receives it may not have it in exactly the same form that it was actually given. This is not a good form of government.[26]

3.31 Similarly, Ms Lovelock told the committee that, as the NSW Legislative Council is not empowered to order cabinet documents:

> There is certainly a belief amongst some members that more and more documents are being bundled together, put under a cabinet minute and then not tabled in the house because they are cabinet-in-confidence.[27]

3.32 Ms Lovelock referred to the apparent practice whereby governments have sought to avoid disclosure of documents by 'put[ting] a document into a wheelbarrow and wheel[ing] it through cabinet' so that the government could claim that the document is subject to cabinet confidentiality exemptions.[28]

3.33 There is certainly anecdotal evidence of this practice having occurred, and a number of judicial decisions have commented on the practice.[29] However, Associate Professor Twomey described it as 'apocryphal' and said:

> There were allegations that during Joh Bjelke Petersen's time they used to wheel documents through the cabinet room but at least that was while cabinet was sitting. In *The Hollowmen* they wheeled them through the room when no-one was in it. Personally, I have never actually known it to happen.[30]

3.34 Whether or not the practice extends to the level parodied in *The Hollowmen*, it is clear that there is a real risk of independent arbitration processes being frustrated if the executive is not committed to the independent arbitration process.

3.35 A number of witnesses highlighted the importance of commitment from both sides in evidence to the committee. Associate Professor Twomey noted that one of the

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26 Associate Professor Anne Twomey, private capacity, *Committee Hansard,* 7 December 2009, p. 45.

27 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard,* 7 December 2009, p. 17.

28 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard,* 7 December 2009, p. 19.

29 NSW Legislative Council, Answers to Questions on Notice, 7 December 2009, received 22 December 2009.

30 Associate Professor Anne Twomey, Private Capacity, *Committee Hansard*, 7 December 2009, p. 34.

most difficult aspects of implementing an effective process would be persuading executive government:

> I think the Senate does show cooperation and has not taken things to an extreme, and that is probably one of the virtues of the Senate…The Senate has always behaved in a more temperate way…But the quid pro quo for doing that is that governments also need to be more flexible and more prepared to provide the Senate with documents when they are legitimately called for by the Senate. How you manage to persuade governments that they need to be more cooperative with upper houses is, I concede, a difficult issue.[31]

3.36 Former Clerk of the Senate, Mr Harry Evans, however was more confident that it was in the interests of executive government to cooperate in an independent arbitration scheme. Mr Evans expressed the view that:

> I suppose the incentive for the executive government to agree to this sort of proposal is that it will avoid those constantly recurring cases in the future, which end up with the government being accused of engaging in a cover-up and the public not knowing whether it is a cover-up or whether it is not. It will avoid some really serious problems in the future, like the 1982 case in which the government could very well have borne a heavy political penalty for not having a process in place to determine these things. It depends on the cooperation of both parties.[32]

Committee view

3.37 The committee, is not as optimistic as Mr Evans about the potential for cooperation between the executive and the Senate. In the absence of clear authority on the part of the Senate to receive privileged documents, the committee foresees a 'stalemate' situation as has been experienced in the Victorian Legislative Council as the likely outcome.[33] Ultimately, the committee's view is that more accountability benefits will be achieved when the Senate and the executive work together to develop mutually agreeable strategies for resolution of public interest immunity claims, than would be achieved by implementing an arbitration process which results in deadlock.

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31 Associate Professor Anne Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 39.

32 Mr Harry Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, pp 50–51.

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