Chapter 4

The proposed Senate resolution

4.1 This chapter discusses the proposed resolution of the Senate contained in the reference to the committee, put forward by Senators Ludlam, Xenophon and Fielding, for an independent arbitration process in the Senate, and specific issues relating to that proposal.

Outline of the proposal

4.2 Mr Harry Evans, former Clerk of the Senate, submitted that:

> The proposed order…is intended to operate in conjunction with the order of the Senate of 13 May 2009.[1]

4.3 As discussed in chapter 2, the order of the Senate of 13 May 2009 requires unresolved claims of public interest immunity made by ministers and public servants in Senate committee hearings to be referred to the Senate. The order does not set out a process through which disputed claims are to be resolved. The proposed resolution attempts to fill that gap.

4.4 The proposed resolution provides that if a minister wishes to claim public interest immunity with respect to documents that have been ordered by the Senate, the minister must set out the reasons why it would not be in the public interest for the documents to be produced.

4.5 If a minister makes such a statement, or a committee reports to the Senate in accordance with the order of 13 May 2009, and the Senate does not make a resolution within two sitting days accepting the minister's reasons, then the matter is automatically referred to arbitration. This is a key difference between the proposed Senate resolution and the orders operating in other jurisdictions in Australia. The orders in Victoria, NSW and the ACT all require that a member of the house request that a matter be referred to arbitration, whereas the default position under the proposed Senate resolution is automatic referral.

4.6 Paragraph 3 of the proposed resolution specifies that where the minister's claim of public interest immunity includes commercial confidentiality issues, the independent arbitrator will be the Auditor-General. Where other reasons are given, the Senate must pass a resolution to appoint an independent arbitrator.

4.7 No timeframe is set out for the completion of the arbitrator's report. Paragraph 5 of the proposed resolution simply states that the report should be completed 'as soon as practicable'.

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

4.8 Paragraph 6 of the proposed resolution sets out that where the arbitrator finds the reasons for public interest immunity claimed by the government are not justified, then the documents or information shall be produced in accordance with the Senate's original order for production of documents, subject to any subsequent Senate orders.

4.9 During the course of the committee's inquiry, a number of significant concerns were raised about the way the proposed resolution is likely to operate. Key amongst them were:

- that the resolution amounts to an improper delegation of the Senate's power and sets out an inappropriate role for the arbitrator;
- that the resolution does not allow the arbitrator access to the documents subject to the immunity claim; and
- that the role specified for the Auditor-General is incompatible with the Auditor-General's existing role.

4.10 Each of these issues is discussed in turn below.

The role of the arbitrator

4.11 Two central questions were raised regarding the role of the arbitrator: the first was whether the arbitrator is legally entitled to perform the role specified in the resolution, or whether the Senate would be improperly delegating its powers; and the second, related issue was whether the making political judgements is an appropriate role for an unelected independent arbitrator to perform.

Improper delegation of Senate power

4.12 Associate Professor Anne Twomey has argued that the role of the independent arbitrator in NSW, and the role set out for the arbitrator in the proposed Senate resolution, may be an improper delegation of the powers of the respective upper houses. In the article attached to her submission, Associate Professor Twomey explained that:

> …there is doubt as to whether a House could, if it so desired, delegate its powers to a person who is not a member. Certainly the Parliament as a whole may delegate legislative power to a statutory officer holder or other non-Member by way of an Act of Parliament. Legislation…may also permit a parliamentary committee to appoint a person to conduct an inquiry. Further, a House can ask a person to assess documents for it as has occurred at the Commonwealth level. It is a different thing altogether, however, for a House to purport to delegate its powers to a non-Member or non-officer, or for that person to assert that he or she is exercising the powers of a House in making a decision. This would be a radical and probably unprecedented step, giving rise to all sorts of issues concerning parliamentary privilege.[2]

2 Associate Professor Anne Twomey, *Submission 2,* Attachment 1, p. 9, references omitted.

4.13 Although Associate Professor Twomey considers that the NSW Legislative Council's standing order 52 does not purport to delegate the Council's power in such a way, she argues that certain comments of one arbitrator–Sir Laurence Street–indicate that he is asserting that he is acting as a delegate of the parliament.[3]

4.14 Ms Lovelock, Clerk of the NSW Parliaments, disagreed and suggested that Associate Professor Twomey was mistaken in her argument that Sir Laurence is purportedly acting as a delegate of the NSW Legislative Council, and has misunderstood Sir Laurence's comments in that respect:

> Professor Twomey has suggested that the House is somehow delegating its power and that Sir Laurence sees his position as a delegate. He uses that word but I do not think he is using the word in that sense that we have delegated our powers. The House itself is not delegating its power. What it is saying is that we would like an independent, non-political opinion about this.[4]

4.15 In simple terms, the question of whether the parliament has delegated its powers depends on the nature of the arbitrator's recommendation and the outcomes flowing from it. If the arbitrator is effectively making a decision for the parliament, then it can be said that the parliament has delegated its powers. However, if the arbitrator's decision is merely advisory, and the parliament remains free to act in whatever way it deems appropriate, then there has not been an effective delegation of the parliament's power.

4.16 Ms Lovelock argued that Sir Laurence's role has not overstepped this boundary. She pointed out to the committee that the NSW Legislative Council is in no way bound by the arbiter's recommendations, and that there is also no political pressure to follow those recommendations. She said:

> When the arbiter makes a report that report is not automatically made public. It is only available to members. It is not until the arbiter's report is actually tabled in the house that it can be made public. There has to be a vote in the house before that can happen. Not all of the arbiter's reports are made public, so there is no political pressure that I can see other than the usual argument that members may have between themselves, but they cannot even argue it in the house, because until the arbiter's report is made public they are not allowed to talk about what is in it.[5]

4.17 However, the role of the arbiter in the proposed Senate resolution differs significantly from the role of the arbiter in NSW. While in NSW no direct consequence results from the arbiter's recommendation, the proposed Senate resolution appears to make the availability of the relevant documents to Senators

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3 Associate Professor Anne Twomey, *Submission 2,* Attachment 1, p. 8.

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

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

contingent on a decision by the arbiter to reject the government's claim for privilege in respect of the documents.

4.18 Mr Harry Evans, former Clerk of the Senate, explained that it is necessary for the Senate to delegate its power to an arbitrator in order to resolve the longstanding issue of public interest immunity claims. He agreed that:

> If the Senate adopted this system it would in effect be giving away part of its power. By agreeing to accept the decision of an arbitrator it would be giving away its power ultimately to enforce the production of documents.[6]

4.19 Mr Evans also explained that, in his view, this delegation of its power ought not be necessary in order for the legislature to do its job. He said:

> Some purists, including myself at times, would say that if the legislature thinks that it needs information then the legislatures should prevail. The executive government is, after all, supposed to be accountable and responsible to the elected legislature.[7]

4.20 However, Mr Evans explained that the delegation of some of the Senate's power is necessary in order to resolve the issue because:

> Naturally, there is a reluctance of senators to go down the path of imposing some very heavy penalty on government to force it to produce documents. So what I say is: 'If you're not going to enforce the powers that you have, if you're always going to shrink from those serious remedies to force executive government to produce information, then perhaps you ought to seriously consider the system of arbitration.'[8]

Should an arbitrator be making political judgments

4.21 A related concern that was also raised by Associate Professor Twomey is the role of the arbitrator in making what essentially amount to political judgments. The NSW model specifically requires the independent arbitrator to be from a legal background, indicating that legal knowledge and skills are important in the role. However, Associate Professor Twomey has pointed out some of the inconsistencies with this approach.

4.22 Judges and lawyers are familiar with public interest immunity claims as they relate to legal trials. As Associate Professor Twomey has written:

> When it comes to public interest immunity, courts balance the public harm from the disclosure of documents against the significance of the information to the issues at trial.[9]

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6 Mr Harry Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 50.

7 Mr Harry Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 47.

8 Mr Harry Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 50.

9 Associate Professor Anne Twomey, *Submission 2*, Attachment 1, p. 11.

4.23 However, the issue of public interest immunity is 'a different matter when parliamentary proceedings, rather than court proceedings, are involved'.[10] Chief Justice Spigelman, in *Egan v Chadwick* commented that judges do not have the experience to balance the public harm that may result from the disclosure of documents against the importance of the documents for the legislative accountability functions of the parliament. He expressed the view that it is therefore inappropriate for the court to perform such a role.[11]

4.24 Associate Professor Twomey has similarly argued that to place an arbitrator in the position of determining the public interest takes the political judgment away from those elected to make such judgments. She asks:

> How, one wonders, is a retired judge qualified to make the judgment…that the public interest in the cross-city tunnel is lower than the public interest in millennium trains?[12]

4.25 Furthermore, Associate Professor Twomey has suggested that the principal arbiter used in NSW, Sir Laurence Street, has misconstrued his role by asking and answering the wrong question in the arbitration process. She suggests that the question the NSW arbitrator is really being asked to answer is whether the harm that may be caused by disclosure of the document to the public is outweighed by the benefit to the Legislative Council process that publication of the document would have. Instead, Associate Professor Twomey suggests that Sir Laurence Street has been asking whether the general public is interested in the issue, and has balanced the public harm in disclosure against the public interest in 'contributing to the common stock of public knowledge and awareness'.[13]

4.26 Clerk of the NSW Parliaments, Ms Lynn Lovelock, disagreed with Associate Professor Twomey's view in this respect, stating that:

> Sir Laurence is very concerned with the process…I think he brings a very measured response to what he is doing. Yes, he does go beyond strict legal interpretation, because I think he sees his role as weighing up the competing interests between recommending that the privilege be upheld and recommending against it. The thing is, we should not lose sight of the fact that the arbiter provides an independent opinion. It is up to the house to decide whether or not to subsequently make documents public.[14]

4.27 Sir Laurence Street discussed the impossibility of separating politics from the arbitrator's decision-making process and stated:

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10 Associate Professor Anne Twomey, *Submission 2,* Attachment 1, p. 11.

11 *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [52] – [53].

12 Associate Professor Anne Twomey, *Submission 2,* Attachment 1, p. 12.

13 Report of Sir Laurence Street, Papers on Data Electricity, 14 October 1999, p. 3, quoted in Associate Professor Anne Twomey, *Submission 2,* Attachment 1, p. 12.

14 Associate Professor Anne Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 21.

> It is very hard to divorce the politics from the question of privilege. This [matter] that I have on the table in front of me at the moment of course reeks of politics: seeking to discover what particular expenditures are claimed in, I think, every electorate across the state, one by one. That is a red-hot political issue. At the same time it is an issue of very considerable public interest. It is not always easy for those who are involved in the political process to keep those two separate.[15]

4.28 However, Sir Laurence Street also explained to the committee how his role as an arbitrator, and the decisions he was charged with making differ from the decisions courts make. He gave the example of the application of legal professional privilege and the different considerations he would be charged with taking into account as a judge compared to those he takes into account as an arbitrator.[16]

4.29 The committee acknowledges Mr Evans' arguments regarding the need for the Senate to delegate or give up some of its power in order to reach a compromise on the 'constantly recurring problem'[17] of public interest immunity claims. However, the committee is concerned about the level of power delegated by the proposed resolution and whether it is justified by the potentially compromised outcome that may be achieved.

4.30 The committee acknowledges that the role of an arbitrator goes beyond a strict legal analysis of whether public interest immunity may apply to documents, and is inherently bound up with policy and political considerations of what is in the 'public interest'. However, the committee ultimately sees that the power to make decisions about whether disclosure of government documents is in the public interest, as a role the Senate ought not delegate to an unelected official. The Senate may benefit from an independent arbitrator's advice on these issues, however an independent arbitrator's recommendations, no matter how qualified, should not supplant the decision-making powers of a democratically elected Senate. The committee sees this issue as a significant flaw in the proposed resolution.

The arbitrator's access to documents

4.31 A further concern with the proposed Senate resolution that was raised by a number of witnesses is the fact that the independent arbitrator would not automatically have access to the documents over which public interest immunity is claimed. The proposed resolution is silent on the issue of whether or not the arbitrator would have access to the documents subject to the immunity claim, and only provides that the minister's statement regarding the application of public interest immunity or the committee's report under the 13 May 2009 order shall be referred to the arbitrator.[18]

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15 Sir Laurence Street, *Committee Hansard*, 7 December 2009, p. 66.

16 Sir Laurence Street, *Committee Hansard*, 7 December 2009, p. 66.

17 Mr Harry Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 50.

18 See paragraph (2) of the proposed resolution.

4.32 The clerks of both the Victorian and NSW Legislative Councils expressed concern about this aspect of the proposed resolution, as did a number of other witnesses.[19]

4.33 Ms Lovelock, Clerk of the Parliaments, NSW submitted that:

> If it is envisaged that the arbitrator report to the Senate on the basis of the Government's assertions alone, in the Council's experience, it may be difficult for the arbitrator to reach any meaningful conclusions. In the Council, the reasons provided in support of privilege claims are often scant.[20]

4.34 Mr David MacGill, Assistant Secretary from the Department of the Prime Minister and Cabinet, confirmed that the government had interpreted the draft resolution to require the government to produce only a statement of reasons to the proposed arbitrator, and not the documents themselves:

> I did not interpret the proposed resolution as requiring government departments or minister to produce the documents that have been requested so that a public interest immunity claim could be considered by the independent arbitrator.[21]

4.35 Ms Lovelock explained her concerns with this aspect of the proposed resolution when she appeared before the committee:

> I cannot see how the arbitrator can make a valid assessment solely on the basis of the claim that the executive put forward. I think that it is impossible to do that without seeing what the documents are. I think it could end up with formulaic responses by the executive that would be impossible to dispute because they are formulated in such a way that they fall within any definition of what would be legal professional privilege.[22]

4.36 Similarly, the Clerk of the Legislative Council of Victoria submitted that on the whole he 'agree[s] with the principle that the onus should be on the Executive to substantiate' claims of public interest immunity, however:

> The Victorian Council's approach has been that without the documents the role of the arbiter is made difficult, and the House has instead dealt with the matter by passing further resolutions calling for the documents, admonishing the Executive and, on two occasions, carrying out the ultimate sanction of suspending the Leader of the Government in the House.[23]

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19 Including Associate Professor Anne Twomey, private capacity, *Committee Hansard*, p. 38; and the Hon Tim Smith QC, Chairman of the Accountability Round Table, *Submission 11*, p. 2.

20 Ms Lynn Lovelock, NSW Legislative Council, *Submission 6*, p. 5.

21 Mr David MacGill, Assistant Secretary, Department of Prime Minister and Cabinet, *Committee Hansard*, 7 December 2009, p. 62.

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

23 Legislative Council of Victoria, *Submission 5*, p. 4.

4.37 However, Mr Harry Evans explained to the committee that:

> The resolution is deliberately silent on [the arbitrator's access to documents] because it may not be necessary for the arbitrator to look at the documents. That is something that could perhaps be left to the judgment of the arbitrator. If the arbitrator comes back and says, 'I'm not able to determine this matter because I really can't tell whether the claim is justified without seeing the documents' then the Senate could order the production of the documents to the arbitrator.[24]

4.38 The Chairman of the Accountability Round Table, the Hon Tim Smith QC commented that in this respect 'the Senate seems to have taken a cautious incremental approach'.[25] He added:

> If, however, the hopes expressed as to the likely quality of the reasons are not realized, then, obviously, the Senate could modify the procedure to include a request for production of the documents in question to the independent arbitrator when making the initial request.[26]

4.39 Although the committee sees merit in the cautious approach of allowing the arbitrator to determine, in each case, whether or not they need to examine the documents themselves, the committee sees certain risks in this approach. Without a clear statement of the Senate's power to order the executive to produce documents to the arbitrator from the outset, the executive may not be inclined to negotiate on that point at a later date.

4.40 Furthermore, while the committee agrees that in certain, albeit rare, situations the arbitrator may not require access to the documents themselves in order to determine whether immunity attaches to the documents, in most situations the arbitrator will require the documents to make such a determination. Without access to documents in the majority of situations, the committee sees little benefit in establishing an independent arbitration process, with all its associated costs and limitations, and therefore considers that the process could simply be a waste of time and resources.

The proposed role of the Auditor-General

4.41 The proposed Senate model differs from the state and territory models in the choice of arbitrator. Paragraph 3 of the proposed resolution provides that where the government's reasons for claiming public interest immunity include a claim of commercial confidentiality, the Auditor-General will be the arbitrator in respect of that claim. Paragraph 4 provides that where other reasons are given for the claim, an arbitrator will be appointed by resolution of the Senate. This aspect of the proposed resolution generated significant criticism from witnesses.

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24 Mr Harry Evans, Former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 48.

25 The Hon Tim Smith QC, Chairman of the Accountability Round Table, *Submission 11*, p. 2.

26 The Hon Tim Smith QC, Chairman of the Accountability Round Table, *Submission 11*, p. 2.

4.42 The Auditor-General's current role is to provide parliament with reports on performance and financial statement audits. While the Auditor-General makes recommendations, the office does not hold any executive powers, placing responsibility on agencies to adopt or reject the recommendations.[27]

4.43 Mr Harry Evans, former Clerk of the Senate, submitted that the role for the Auditor-General in the proposed resolution stems from a role 'already performed by the Auditor-General in relation to claims of confidentiality in contracts'.[28] Mr Evans was referring to the role of the Auditor-General, discussed in chapter 2 of this report, in assessing claims of commercial confidentiality under the Murray Motion. Accordingly, Mr Evans submitted that '[t]he Australian National Audit Office has the required expertise to assess claims of commercial confidentiality'.[29]

4.44 However, in his oral evidence to the committee Mr Evans acknowledged that:

> The Senate may…think it is neater to have all claims referred to the same arbitrator or panel of arbitrators and not to involve the Auditor-General separately at all.[30]

4.45 Mr Ian McPhee, the Auditor-General, was strongly opposed to performing the role of independent arbitrator for commercial-in-confidence claims. The Auditor-General expressed concern that the independence of his audit role would be compromised by also performing the role of independent arbitrator, as it would, '…in effect, mean that the Auditor-General would have a decision-making role, that is, akin to an executive role', which would be contrary to the current independent operation of the Auditor-General.[31]

4.46 A second point of contention was the matter of expertise. The Auditor-General argued that neither he nor his staff have the legal expertise to perform the functions of the independent arbitrator. In its current review of performance and financial statements, the Australian National Audit Office (ANAO) bases its assessment of whether the statements meet with professional standards upon the representation provided by the relevant department and utilising their skills in finance and accounting. The Auditor-General argued that this does not converge with the role of independent arbitration whereby the arbiter will be required to make an independent judgement. The Auditor-General added:

> The hesitation I have is that I see this task as relying heavily on probably legal precedent – there would be court considerations, court cases et cetera which deal with this. I would need to have legal expertise, and the question

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27 Mr Ian McPhee, Auditor-General, Australian National Audit Office, *Committee Hansard*, 7 December 2009, p. 54.

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

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

30 Mr Harry Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, p. 49.

31 Mr Ian McPhee, Auditor-General, *Submission 8*, p, 2.

> then becomes a judgment of whether, as an auditor, I am able under the professional requirements to take on a function whereby I am heavily and possibly unduly reliant on a level of specialist expertise that I do not have myself.[32]

4.47 Mr Wayne Tunnecliffe, Clerk of the Legislative Council of Victoria agreed with the Auditor-General's assessment regarding the need for legal expertise and knowledge-base in order to fulfil the functions of the role of independent arbiter:

> I would…question…why the Auditor-General is better placed than an independent legal arbiter to determine such matters. The prevailing knowledge that should be held by an independent arbiter is about the powers of the House and the principle of public interest immunity, much of which is derived from an understanding of parliamentary practice and law, and evolving standards of public interest immunity in the courts.[33]

4.48 In reference to the ANAO's expertise with claims of commercial-in-confidence, Mr Tunnecliffe added, 'I regard an understanding of the commercially confidential nature of a document to be relevant, but secondary'.[34]

4.49 Mr Tunnecliffe was also concerned about the division in the proposed resolution of commercial-in-confidence claims and other public interest immunity claims:

> Given that I consider the prevailing Parliamentary view to be that claims of commercial confidentiality enjoy no special status, I see no benefit for the Senate in differentiating such claims.[35]

4.50 The Commonwealth Ombudsman suggested that a more appropriate arbiter, or adviser, would be the proposed Information Commissioner.[36] The Information Commissioner is a new statutory office proposed in the Information Commissioner Bill 2009. The role proposed for the Information Commissioner includes determinative powers regarding Freedom of Information (FOI) claims, which would more readily extend to assessing public interest immunity claims than the existing roles of the Auditor-General and arguably lawyers and judges. The Ombudsman submitted that:

> The Commissioner would have the independence and expertise required to examine the Minister's claim and to advise the President.[37]

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32 Mr Ian McPhee, Auditor-General, *Committee Hansard*, 7 December 2009, p. 58.

33 Legislative Council of Victoria, *Submission 5*, p. 4.

34 Legislative Council of Victoria, *Submission 5*, p. 4.

35 Legislative Council of Victoria, *Submission 5*, p. 4.

36 Commonwealth Ombudsman, *Submission 9*, p. 5.

37 Commonwealth Ombudsman, *Submission 9*, p. 5.

4.51 The Ombudsman also added that:

> Using the Information Commissioner in this restricted role would also remove any ground for criticising decisions of an arbitrator appointed by the Senate against claims of political alignment or bias. A decision of a standing independent officer…is more likely to be perceived as credible.[38]

4.52 However, the committee notes that the legislation establishing the Information Commissioner has not yet been considered by the Senate, and if the legislation is passed it will take time to establish the office.

4.53 Ms Lynn Lovelock, Clerk of the Parliaments, NSW, noted the difference between the proposed Senate resolution and the current working model in NSW. Ms Lovelock said that if the proposed Senate model were to be applied in New South Wales, she would raise concerns about:

> …the arbiter's ability to provide timely reports, given the heavy workload of the Auditor-General, and the deadline of seven days for the provision of reports imposed by standing order 52.[39]

4.54 In light of the evidence presented, the committee's view is that the Auditor-General, while having a sound knowledge base of commercial confidentiality claims, does not have the supporting legal expertise required to fulfil the role of independent arbitrator. In addition, the committee would be reluctant to impose a role on the ANAO which the Auditor-General himself is reluctant to embrace and sees as incompatible with the current independent functioning of that office.

38 Commonwealth Ombudsman, *Submission 9*, p. 6.

39 Ms Lynn Lovelock, New South Wales Legislative Council, *Submission 6*, p. 5.