

# Chapter 5

## Conclusions

5.1 The Senate's powers to obtain evidence, and particularly to order the production of government documents, are important mechanisms which enable it to perform its constitutional role of scrutinising the actions of executive government. It is essential that Senators have full access to as many government documents and as much information as possible in order to fulfil their scrutiny role.

5.2 Although governments generally comply with the Senate's orders for the production of documents, occasionally public interest immunity claims are raised, in essence claiming that it is not in the public interest for the documents or information to be produced. There is currently no mechanism to resolve disputes which may arise if the Senate insists on its order. Nor are there any procedures in place for determining whether a claim by the executive for public interest immunity is justified.

5.3 The proposed process of independent arbitration, which was the basis of this inquiry, seeks to shift the power to decide on release of government documents from the executive and the Senate to a person independent of government. In some respects, this idea is attractive, as it takes the decision out of the hands of both the Senate and the executive, both of which have vested interests in the outcome of the decision.

5.4 However, there are a number of practical barriers to the effectiveness of independent arbitration processes, as has been demonstrated by the 'stalemate' currently experienced in the Victorian Legislative Council. There are also a number of ways in which both the Senate and executive government would be able to potentially frustrate an independent arbitration system, which have arguably occurred in NSW.

5.5 The Victorian experience shows that without a clear mandate for the legislature to require privileged documents, the executive is under no obligation and has little incentive to cooperate with an independent arbitration process. Witnesses suggested that accordingly, a strong commitment from both executive government and the Senate is required in order for independent arbitration to work. However, the committee has doubts that such commitment from any government would be forthcoming in the absence of an obligation such as that on the NSW government arising from the Egan decisions.

5.6 If the Senate's powers were ever contested, it is probable that the courts would find that, like the NSW Legislative Council, the Senate has extensive powers to require documents. However, the committee agrees with the longstanding approach of the Senate that the best mechanism to deal with any conflicts is negotiation between the executive government and the Senate.

5.7 Furthermore, there are a range of flaws with the proposed order. Firstly, there are no effective deterrents for non-compliance with the order. The Senate has no remedies to enforce its powers against ministers who are members of the House of

Representatives; its penalties in the Senate, such as suspending ministers from the chamber, are ineffective; and it would be unfair for the Senate to punish public servants for following ministers' directions.

5.8 In addition, there are a number of ways in which an independent arbitration process can be frustrated, which reduce the prospect of success of any such process. This may also lead to an increase in the costs of an arbitration process, as the committee heard has occurred in NSW.

5.9 Finally, the committee has strong reservations about specific aspects of the proposed resolution. The committee considers that the proposed arbitration process would be of limited use because the arbitrator does not have a right to assess the documents themselves. The committee also has concerns about the legality and appropriateness of the Senate delegating its powers in the manner proposed, and about the proposed resolution's use of the Auditor-General to arbitrate on commercial-in-confidence claims.

5.10 Accordingly, the committee recommends against the Senate adopting the proposed process of independent arbitration over public interest immunity claims, and against the resolution proposed by Senators Ludlam, Xenophon and Fielding.

### **Recommendation 1**

**5.11 The committee recommends against the Senate adopting the proposed process of independent arbitration over public interest immunity claims.**

**Senator Cory Bernardi**

**Chair**