The Senate

Finance and Public Administration References Committee

Independent Arbitration of Public Interest Immunity Claims

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Recommendations

Recommendation 1

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

Chapter 1
The terms of the inquiry

Background to the inquiry

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

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

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

(5) The independent arbitrator shall, as soon as practicable, report to the Senate on whether the reasons given for withholding the documents or information are justified.

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

Conduct of the inquiry

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

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

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

Acknowledgments

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

Structure of the report

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

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

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

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, until otherwise defined by the parliament. Similarly, section 19 of the Victorian

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.

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.

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

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:

> 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]

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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.

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

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.

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

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

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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.

providing the documents is quite high'.[7] Professor Twomey noted in her submission that:

> [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

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

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.

> 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 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

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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.

> 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 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

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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.

widening of orders for documents does not justify the time and resources required to produce the documents.[20]

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

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

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.

> governments know that anything they put in writing, apart from cabinet documents, can be produced and made public by the Legislative Council.[25]

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]

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

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.

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 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.

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.

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

Australian Greens and Senator Xenophon's Dissenting Report

The Australian Greens and Independent Senator Nick Xenophon strongly disagree with the findings of government and opposition Senators expressed in the majority report. The conclusions drawn in the majority report do not properly reflect the evidence taken by the committee and fail to utilise the constructive suggestions of expert witnesses to improve the proposed Senate resolution.

The need for an independent arbitration process

At paragraph 3.3 of the majority report, the government and opposition members of the committee note that '[a]ll witnesses were ultimately positive about the benefits of an independent arbitration process for public interest immunity claims…'[1] The witnesses who gave evidence to this inquiry included the longest-serving Clerk of the Senate, Mr Harry Evans, and the Clerk of the only Australian Parliament to have introduced a successfully operating independent arbitration scheme, Ms Lynn Lovelock, Clerk of the Parliaments, NSW. Both of those highly-regarded officers spoke strongly of the need for an independent arbitration process in order to improve government accountability, and fill the existing gap in the Senate's scrutiny role.

Furthermore, notwithstanding the fact that the attempt to introduce independent arbitration into the Victorian Legislative Council has been vexed with problems, the Clerk, Mr Wayne Tunnecliffe remained enthusiastic about the benefits independent arbitration can deliver. Even Associate Professor Twomey, who has been the most ardent critic of the NSW scheme, was ultimately supportive of the Senate adopting an independent arbitration process:

> **Senator LUDLAM**—…Your main concern is narrowing the range of discretion, but on balance are you in favour of an instrument like this operating?
>
> **Prof. Twomey**—Yes, on balance I think it is actually a good idea. 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.[2]

The Australian Greens and Senator Xenophon see no valid justification for the majority of the committee ignoring these expert views in favour of their own preferences, which are unsupported by the evidence.

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1 Senate Finance and Public Administration References Committee, *Inquiry into Independent Arbitration of Public Interest Immunity Claims*, p. 21.

2 Senator Ludlam and Associate Professor Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 43.

Evidence presented to the committee highlighted the importance of developing a mechanism to resolve disputes over public interest immunity between executive government and the Senate.[3] As outlined in chapter 2 of the majority report, the current lack of such a mechanism amounts to a significant gap in the Senate's ability to hold government to account. Mr Evans described this gap as 'one of the biggest problems of legislatures around the world.'[4]

Given that holding government to account through examination of its administrative actions is a key aspect of the Senate's constitutional role it essential that this gap be addressed.

Dissenting Senators do not accept the majority of the committee's conclusion that the hypothetical potential for an independent arbitration process to be misused or circumvented is sufficient reason to ignore the overwhelming evidence in support of the independent arbitration to substantially improve government accountability.

The majority's arguments against independent arbitration

The majority of the committee's primary argument against the adoption of an independent arbitration process is based on the hypothetical possibility of executive government being uncooperative with such a scheme. This argument fails to take into account the expert opinions of witnesses, most of whom were optimistic about the Senate's ability to develop a fair, cooperative scheme which has the support of government. The argument also fails to recognise key differences between the proposed Senate model and the Victorian model, which make the former more likely to succeed.

The importance of cooperation

Witnesses before the committee emphasised the importance of cooperation between the executive and the Senate for an independent arbitration model to succeed. Chapter 3 of the majority report outlines the consequences of non-cooperation by both the legislature and the executive, which have the potential to undermine and circumvent an independent arbitration process. Based on this potential for misuse, the majority report concludes that an independent arbitration model in the Senate risks being costly and failing.

However, the majority report fails to take account of the expert views of witnesses which, although noting the possible pitfalls of independent arbitration, also argued that there is a high likelihood of the Senate and Commonwealth Government being able to achieve the requisite cooperation. For example, Associate Professor Twomey

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3 See Mr Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, pp 47–8; Mr Tunnecliffe, Clerk of the Legislative Council, Victoria, *Committee Hansard*, 7 December 2009, p. 13; Ms Lovelock, Clerk of the Parliaments, NSW, *Committee Hansard*, 7 December 2009, p. 28.

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

argued that the Senate had a greater chance of developing a cooperative model than NSW and Victoria because:

> 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...If, for example, the Senate does not receive the documents that it wants and it is unhappy about it, the strongest action it seems to have taken in the past is things like extending question time or making it difficult for governments to get their bills through on time. But it has not gone to the extent of suspending ministers and the like. And I think it is probably right in doing that. The Senate has always behaved in a more temperate way.[5]

Former Clerk of the Senate, Mr Evans was also confident that the requisite cooperation between the executive and the Senate could be achieved, and discussed the incentives for the executive to cooperate with the proposed scheme:

> 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.[6]

Furthermore, there are a number of specific aspects of the proposed Senate model which overcome the concerns of the Victorian government, and accordingly make the former more likely to achieve cooperation between the executive and the legislature.

Key differences between the Senate and Victorian Legislative Council models

The majority report argues that without the certainty of precedent, such as the Egan decisions in NSW, executive government has no definitive legal obligation to supply privileged documents to the Senate, and accordingly, that the government will be unlikely to comply with any independent arbitration model. The majority report further argues that it is undesirable for the Senate to seek clarification of its powers because 'the balance between the Senate and the executive's respective powers is an issue better resolved by those two arms of government'.[7]

Firstly, while the Australian Greens and Senator Xenophon agree that it is inappropriate for the courts to determine disputes between executive government and the parliament generally, it is not necessarily inappropriate for the courts to make a determination as to the constitutional powers of each arm of government in a general sense, as occurred in the Egan cases.

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

6 Mr Evans, former Clerk of the Senate, *Committee Hansard*, 7 December 2009, pp 50-51.

7 Senate Finance and Public Administration References Committee, *Inquiry into Independent Arbitration of Public Interest Immunity Claims*, p. 20.

As noted in the report of the Senate Privileges Committee on the Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994, the court should not be asked to adjudicate individual claims of privilege because that question is ultimately political.[8] However, the question of the extent of the Senate's powers to perform its scrutiny role, is less a political question than a constitutional one. Accordingly, it may be appropriate for the High Court, which is the final arbiter of constitutional law, to clarify the Senate's position. Therefore, the Australian Greens and Senator Xenophon do not accept the government and opposition committee members' argument that the court should not be asked to determine the extent of the Senate's powers to order documents.

Secondly, the majority of the committee's argument that that executive government is unlikely to comply with an independent arbitration process in the absence of a legal requirement to do so ignores the fact that, unlike the Victorian and NSW processes, the proposed Senate resolution does not require executive government to produce privileged documents to the Senate. The majority's argument relies on the Victorian Legislative Council's experience where the Victorian Government has circumvented the independent arbitration process by refusing to comply with orders for production of documents in respect of which public interest immunity is claimed.

The Victorian government's arguments against the arbitration process, as distilled in the Victorian Legislative Council's submission, are that:

- it breaches the principle of Cabinet confidentiality and enhances the possibility of Cabinet documents being leaked;
- the House is delegating its capacity to resolve a dispute to a third person;
- the Victorian Legislative Council does not have the capacity to call for privileged documents; and
- the Egan decisions are irrelevant to Victoria.[9]

However, three of these four arguments are dispelled by the differences between the proposed Senate resolution and the Victorian model. The fourth, relating to delegation, is discussed below, and argued to be a positive and indeed necessary aspect of the Senate's model.

The Victorian Government's concerns regarding the risk of cabinet, and other privilege breaches, is mitigated by the fact that the Senate model does not propose that documents be produced to the Senate, and then referred to an arbitrator who advises whether or not those documents are made public, as in Victoria. Instead, the Senate model proposes that the independent arbitrator decides whether or not the documents are subject to public interest immunity, and if the arbitrator finds that documents are

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

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

not privileged *only then* are they made available to Senators (depending on the original order of the Senate). Hence the risk of leaks is nullified.

The proposed Senate resolution also avoids the question of whether or not the Senate has the power to receive privileged documents, which is the basis of the third and fourth arguments of the Victorian government set out above. As documents subject to a disputed claim of public interest immunity are produced not to the Senate, but to an arbitrator, the Senate never receives documents found to be subject to a valid public interest immunity claim under the proposed Senate model.

Therefore, by avoiding the major reasons for the Victorian government's refusal to comply with the Legislative Council's arbitration process, the Australian Greens and Senator Xenophon consider that the prospects of the proposed Senate's model succeeding are far higher than the majority report has recognised. The fact that under the proposed Senate's model no privileged documents are produced to Senators at any time means that the process carries far less risk for government and would accordingly be substantially less objectionable to government than the Victorian model.

The proposed Senate resolution

The committee was fortunate to receive the considered views of numerous experts on its proposed resolution. As outlined in the majority report, a number of aspects of the proposed resolution attracted criticism and concern from those experts. However, the Australian Greens and Senator Xenophon see no reason why those views cannot be taken on board to improve the resolution, and develop a workable independent arbitration model. The Senate has the benefit of the Victorian, NSW and ACT parliaments' experiences, and is in the fortunate position of being able to take these experiences on board and address problems experienced in those jurisdictions.

However, the majority has failed to take this next step of proposing an improved model using the thoughtful contributions provided by witnesses and in submissions. Instead, the majority has simply focussed on the few negative aspects of the specifics of the proposed model in order to reject the concept of independent arbitration in its entirety.

Delegation

As discussed in chapter 4 of the majority report, a number of witnesses raised the issue of whether the appointment of an independent arbitrator would be an inappropriate delegation of the Senate's power. While acknowledging the concerns of the majority regarding the appointment of an unelected official to make political decisions about whether the release of particular documents is in the public interest, the dissenting Senators accept the comments of Mr Evans that the delegation of some

of the Senate's power is necessary in order to make an independent arbitration process work.[10]

As discussed above, the fact that the proposed resolution does not require the government to produce privileged documents to the Senate is a key aspect of its likely success. In order for an independent arbitration process to work effectively in the Senate, it is therefore necessary for the Senate to delegate its power to decide whether a document attracts public interest immunity to an independent, unelected person.

Furthermore, the dissenting Senators emphasise that the delegation of the Senate's power to an independent arbiter under the proposed model does not mean that the arbiter is finally determining political decisions. While the Senate would delegate its powers to decide whether or not a document in fact attracts privilege to the arbiter, it is not delegating its power to decide whether or not the document ought to be made public. It is foreseeable that while it may be useful for the Senate to consider a particular document in order to fulfil its scrutiny role, the public interest in not making the document publicly available may be an overriding consideration. This is why, for example, Senate committees often take evidence *in camera*. Under the proposed model the Senate would retain its powers to make decisions about the public release of documents as it currently does with evidence taken *in camera*.

Therefore, the Australian Greens and Senator Xenophon do not consider that the proposed independent arbitration model would be an inappropriate delegation of the Senate's powers.

Annual reporting

However, should the Senate consider it more appropriate for elected Senators to make decisions about whether documents attract public interest immunity, this does not mean that the notion of independent arbitration should be abandoned. There is a range of other ways in which independent arbitration could effectively assist in resolving disputes over public interest immunity which do not involve any delegation of power, including that suggested by the Commonwealth Ombudsman.

The majority report gives little consideration to the very constructive and sensible suggestion by the Commonwealth Ombudsman of using the proposed Information Commissioner to act as an independent adviser to the President of Senate on public interest immunity matters. The proposed Information Commissioner might usefully advise the Senate in a similar way to the way the Auditor-General currently advises the Senate with respect to the Murray Motion (Senate order for departmental and agency contracts). The Commissioner could examine the documents over which the government has claimed public interest immunity and refused to produce to the Senate and comment on the veracity of those claims. This proposal has numerous benefits, including:

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

- avoiding any delegation of the Senate's power; and
- only requiring government to produce documents over which privilege is claimed to the Information Commissioner (which, if the Information Commissioner Bill 2009 and amendments to the *Freedom of Information Act 1982* are passed, it would have to anyway).

The Information Commissioner could then prepare an annual report to the President of the Senate outlining the government's compliance with the Senate's various orders for production of documents.

In essence this would simply mirror the role of the Auditor-General under the existing Murray Motion, discussed at paragraph 2.47 of the report. The Murray Motion has been enormously successful in decreasing the government's use on confidentiality clauses in contracts, and accordingly increasing accountability in government contracts. In the ANAO's first report on the use of confidentiality provisions in government contracts in 2000–01, it found that, of the sample of contracts examined, 89 per cent contained confidentiality clauses.[11] In its report on compliance in the 2008 calendar year, the ANAO found that only nine per cent of Commonwealth contracts contain confidentiality provisions.[12]

However, the annual compliance audits conducted by the ANAO illustrate the continuing tendency of government departments to overuse privilege (in this case contractual confidentiality provisions), demonstrating that there remains significant room for improvement in the government's use of privilege. Of the sample of government contracts reviewed in the ANAO's report on 2008 contracts, the ANAO found that 92 of the 115 contracts (80 per cent) were incorrectly listed as containing confidentiality provisions, leading to the observation that:

> Incorrectly including confidentiality provisions, or incorrectly listing contracts as containing confidentiality provisions, potentially precludes or restricts the Parliament and the public from accessing information about these contracts.[13]

The report also found that only 26 (7 per cent), of the total of 186 confidentiality provisions contained in the audited contracts, met the test for confidentiality set out in the Finance Department's publication *Guidance on Confidentiality in Procurement*.[14]

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11 ANAO, *Audit Report No.38 2000-01, The Use of Confidentiality Provisions in Commonwealth Contracts*, May 2001, p. 47.

12 ANAO, *Audit Report No.6 2009–10, Confidentiality in Government Contracts - Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, September 2009, p. 15.

13 ANAO, *Audit Report No.6 2009–10, Confidentiality in Government Contracts - Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, September 2009, p. 15.

14 ANAO, *Audit Report No.6 2009–10, Confidentiality in Government Contracts - Senate Order for Departmental and Agency Contracts (Calendar Year 2008 Compliance)*, September 2009, p. 36.

This clearly demonstrates that government agencies continue to have a propensity to claim privilege when none in actual fact exists.

The Australian Greens and Senator Xenophon are of the view that a similar report of public interest immunity claims may strengthen government accountability.

Recommendation 1

The Australian Greens and Senator Xenophon recommend that, if the Information Commissioner Bill 2009 and Freedom of Information Amendment (Reform) Bill 2009 are passed, the Information Commissioner be required to report annually to the Senate on the veracity of government claims of public interest immunity.

The arbitrator's access to documents

A second concern with the proposed Senate resolution raised by a number of witnesses was whether the arbitrator would have access to the documents subject to a claim of public interest immunity. The issue is considered in chapter 4 of the majority report.

The majority report notes the problems with this aspect of the proposed resolution, but fails to provide any solution. The dissenting Senators note that solving this problem would require a simple amendment to the proposed resolution to the effect that documents subject to an order of the Senate over which the government claims privilege should be made available to the arbiter on request.

Recommendation 2

The Australian Greens and Senator Xenophon recommend that paragraph (2) of the proposed Senate resolution be amended to provide that the independent arbitrator be provided with documents subject to a disputed claim of public interest immunity, on request.

The role of the Auditor-General

The dissenting Senators take on board witnesses' concerns regarding the role of the Auditor-General in the proposed resolution. However, again, solving this problem would require a simple amendment to the proposed Senate resolution and is not justification for dismissing the entire arbitration process.

Given the ANAO's expertise in commercial-in-confidence issues, the Auditor-General could be given an advisory role within the resolution, rather than treating commercial-in-confidence claims as a separate category of privilege. The resolution could provide that, where the arbiter thinks appropriate, the Auditor-General would be asked to provide advice and assistance on commercial-in-confidence claims. This would provide a simple solution to the problems identified by witnesses with this aspect of the proposal.

Recommendation 3

The Australian Greens and Senator Xenophon recommend that paragraph (3) of the proposed Senate resolution be amended to provide that the independent arbitrator may request the independent advice of the Auditor-General if a claim involves commercial-in-confidence matters.

Functions and qualifications of the arbiter

Associate Professor Twomey helpfully pointed out that the Senate's arbitration process may benefit from providing guidance to the arbiter.[15] She suggested that this would solve a number of the problems encountered in NSW. The Australian Greens and Senator Xenophon accept this suggestion, and recommend that the proposed Senate resolution be amended to allow the President of the Senate to set out guidelines for the way in which the arbiter should exercise his or her discretion.

Recommendation 4

The Australian Greens and Senator Xenophon recommend that an additional paragraph be inserted after paragraph (4) of the proposed resolution to provide that the President of the Senate may issue guidelines to the independent arbitrator setting out the manner in which the arbitrator's discretion ought to be exercised.

Conclusion

The Australian Greens and Senator Xenophon are committed to improving the accountability of government, through the development of a process for independent arbitration of public interest immunity claims in the Senate. Dissenting Senators are convinced by witnesses and submitters that such a process would significantly improve government accountability, and fill the existing gap in the Senate's scrutiny role.

Unlike the majority of the committee, dissenting Senators have taken on board the considered comments and suggestions of experts, and made recommendations for improving the proposed Senate resolution. As amended, the proposed Senate resolution would provide an excellent prospect of successfully encouraging cooperation between the Senate and executive government to resolve disputes over public interest immunity. In the view of the Australian Greens and Senator Xenophon, this is far preferable to the majority's recommendation of doing nothing to address a problem 'which has vexed legislatures over many years all around the world'.[16]

15 Associate Professor Twomey, private capacity, *Committee Hansard*, 7 December 2009, p. 41.

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

Recommendation 5

The Australian Greens and Senator Xenophon recommend that the Senate adopt the proposed resolution, as amended, and implement an independent arbitration process for resolving executive claims of public interest immunity with respect to Senate orders for documents.

Senator Scott Ludlam **Senator Nick Xenophon**

Appendix 1
Submissions Received

Submission Number	Submitter
1	Associate Professor Greg Taylor
2	Associate Professor Anne Twomey
3	Mr Michael Pearce SC, Victorian Council for Civil Liberties
4	Mr Harry Evans, Clerk of the Senate, Department of the Senate
5	Legislative Council of Victoria
6	Ms Lynn Lovelock, New South Wales Legislative Council
7	Sir Laurence Street
8	Australian National Audit Office
9	Commonwealth Ombudsman
10	The Law Society of New South Wales
11	The Hon Tim Smith QC

Additional Information Received

1. Response to Question on Notice taken by New South Wales Legislative Council at a public hearing on 7 December 2009.

Appendix 2
Public Hearing and Witnesses

Sydney, Monday 7 December 2009

COLEMAN, Mr Russell, Principal Auditor,
Australian National Audit Office

EVANS, Mr Harry, Private Capacity, Former Clerk of the Senate

LOVELOCK, Ms Lynn, Clerk of the Parliaments,
New South Wales Legislative Council

LYNCH, Ms Philippa, First Assistant Secretary, Government Division,
Department of The Prime Minister and Cabinet

MACGILL, Mr David, Assistant Secretary, Parliamentary and Government Branch,
Department of The Prime Minister and Cabinet

MCPHEE, Mr Ian, Auditor-General,
Australian National Audit Office

STREET, Sir Laurence, Former Chief Justice, Supreme Court of New South Wales
Independent Arbiter, New South Wales Legislative Council

TUNNECLIFFE, Mr Wayne, Clerk of the Legislative Council,
Victorian Legislative Council

TWOMEY, Associate Professor Anne, Associate Professor of Law,
University of Sydney (private capacity)

Appendix 3

NSW Legislative Council Standing Order 52

(1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.

(2) When returned, the documents will be laid on the table by the Clerk.

(3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.

(4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to have been presented to the House and published by authority of the House.

(5) Where a document is considered to be privileged:

  (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,

  (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:

    (i) made available only to members of the Legislative Council,

    (ii) not published or copied without an order of the House.

(6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.

(7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

(8) A report from the independent legal arbiter is to be lodged with the Clerk and:

  (a) made available only to member of the House,

  (b) not published or copied without an order of the House.

(9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

Appendix 4

Legislative Council of Victoria, Sessional Order adopted on 14 March 2007

PRODUCTION OF DOCUMENTS

21. The following arrangements will apply in relation to the production of documents:

(1) The Council may order documents to be tabled in the Council. The Clerk is to communicate to the Secretary, Department of Premier and Cabinet, all orders for documents made by the Council.

(2) An order for the production of documents must specify the date for the documents to be provided.

(3) When returned, the documents will be laid on the table by the Clerk.

(4) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.

(5) If at the time the documents are required to be tabled the Council is not sitting, the documents may be lodged with the Clerk, and unless Executive privilege is claimed, are deemed to have been presented to the Council and published by authority of the Council.

(6) Where a document is claimed to be covered by Executive privilege —

(a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of Executive privilege; and

(b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the Council and —

(i) made available only to the mover of the motion for the order; and

(ii) not published or copied without an order of the Council.

(7) The mover may notify the Clerk in writing, disputing the validity of the claim of Executive privilege in relation to a particular document or documents. On receipt of such notification, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within 7 calendar days as to the validity of the claim.

(8) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

(9) A report from the independent legal arbiter is to be lodged with the Clerk and —

(a) made available only to members of the Council; and

(b) not published or copied without an order of the Council.

(10) The Clerk will maintain a register showing the name of any person examining documents tabled under this order.

Appendix 5

ACT Legislative Assembly Order for the Production of Documents

213A (1) The Assembly may order documents to be tabled in the Assembly. The Clerk is to communicate to the Chief Minister's Department all orders for documents made by the Assembly.

(2) When returned, the documents (where no claim of privilege is made by the Chief Minister) will be laid on the Table by the Clerk.

(3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.

(4) If at the time the documents are required to be tabled the Assembly is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to have been presented to the Assembly.

(5) Where a document is considered by the Chief Minister to be privileged, a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege.

(5A) Where the Assembly requires a document to be returned, either the document requested or a claim of privilege must be given to the Clerk within 14 calendar days of the date of the order by the Assembly. *(Inserted 2 April 2009).*

(6) Any Member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk will advise the Chief Minister's Department, who will provide to the Clerk, within seven days, copies of the disputed document or documents. The Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.

(7) The independent legal arbiter is to be appointed by the Speaker and must be a retired Supreme Court, Federal Court or High Court Judge.

(8) A report from the independent legal arbiter is to be lodged with the Clerk and:

(a) made available only to Members of the Assembly; and

(b) not published or copied without an order of the Assembly.

(9) If the independent legal arbiter upholds the claim of privilege the Clerk shall return the document(s) to the Chief Minister's Department.

(10) If the independent legal arbiter does not uphold the claim of privilege, the Clerk will table the document(s) that has been the subject of the claim of privilege. In the event that the Assembly is not sitting, the Clerk is authorised to release the document to any Member.

(11) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order. *(Temporary order adopted 12 February 2009)*