Appendix 9

Letter of advice from the Clerk of the Senate dated 12 July 2010

AUSTRALIAN SENATE

CLERK OF THE SENATE

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12 July 2010

Senator Mathias Cormann
Chair
Select Committee on Fuel and Energy
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cormann

You have asked for advice about the answers provided by the Treasury Department to questions taken on notice at a hearing of the Select Committee on Fuel and Energy on 5 July 2010. Several of the answers take the form of a statement that "The Government has not released this level of detail, in line with usual budget practice". You are correct in your assessment of these as "non-answers".

Taking your second question first, the resolution of the Senate appointing the committee on 25 June 2008 provided for the committee and any subcommittee to have power to send for and examine persons and documents, to move from place to place and to sit in public or in private. In other words, the committee has the full range of inquiry powers to enable it to pursue the terms of reference delegated to it by the Senate. There is thus no basis for any suggestion that the committee is limited to asking questions about matters that are already in the public domain. Indeed, if committees were so limited, there would be little rationale for any inquiry being undertaken. The whole point of Senate committee inquiries is to gather information from any appropriate source and to report to the Senate on its terms of reference. Committees are fact-finding in nature and may often need to find those facts from private or previously unpublished sources.

In relation to your first question, as you know, the Senate has long recognized that there are certain kinds of information in the possession of the government that it would not be in the public interest to disclose. Accordingly, the Senate has in practice refrained from pressing requests for information about such matters. In a resolution dated 16 July 1975, the Senate declared that it would consider any claims of privilege advanced for the non-production of information but that it reserved the right to determine them in the particular circumstances of each case. Otherwise, the resolution went on to declare, "it is the obligation of all such persons to answer questions and produce documents". If any minister or officer of the Commonwealth does not wish to provide answers or information to a committee, the claim for non-disclosure must be based on a recognised ground of public interest immunity which is ultimately assessed by the Senate. There is no other basis on which a public servant has a

discretion to withhold information from a committee (other than in accordance with the protection afforded by a Privilege Resolution 1(16) against being asked to give opinions on matters of policy).

In the past, there has been some degree of acceptance of claims based on the following grounds:

- 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;
- prejudice to relations between the Commonwealth and the states.

Claims based on the following grounds have **not** been accepted:

- 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".

A claim that the "Government has not released this level of detail, in line with usual budget practice" is not amongst the recognized grounds that have previously gained some acceptance in the Senate. Without further elaboration, it is difficult to see how this statement could operate as a claim of public interest immunity.

In the courts, public interest immunity is a rule of evidence that protects executive documents from production in legal proceedings on the ground that production would be harmful to the public interest. It involves the court balancing the competing public interests between the proper administration of justice on the one hand and the desire of the executive not to disclose the information on the other. In the Senate, the concept of public interest immunity operates analogously with its operation in the courts, although there are obvious differences. In order for any assessment of competing public interests to occur, it is necessary for there to be some statement of the possible harm to the public interest that could ensue from the disclosure of the information in question. A statement that an action is in line with usual practice goes nowhere towards providing an assessment of the harm to the public interest that could ensue from a departure from that practice.

Turning now to your third question, if the committee is not prepared to accept the grounds advanced for not answering the questions (a position that would be entirely consistent with Senate practice in this area), then the committee should seek elaboration of the reasons from Treasury officers when they appear before the committee tomorrow. In particular, the committee should draw the Treasury officers' attention to the resolution of the Senate of

13 May 2009 which is a codification of the Senate's practice in relation to claims of public interest immunity and sets out a procedure to be followed when a witness does not wish to answer a question.

I also draw the committee's attention to Privilege Resolution 1(10) which sets out the process to be followed where a witness objects to answering a question on any ground. If the Treasury witnesses decline to provide better elaboration of the grounds on which the questions taken on notice have not been answered, the committee may wish to consider in private session during the course of tomorrow's hearing whether it wishes to insist on an answer from the witnesses (and whether it would be prepared to receive the information in private session). Note that the Treasury officers also have the right (under the resolution of 13 May 2009 and under Privilege Resolution 1(16)) to refer the questions to the Treasurer. If, in the end, no more satisfactory justification is provided for not answering the questions, the committee may then wish to treat it as a refusal to answer the questions and to report the facts to the Senate in accordance with Privilege Resolution 1(10). It is often the case, however, that follow-up questioning of a witness can elicit the information that the committee requires to discharge its terms of reference.

Please let me know if I can be of any further assistance.

Yours sincerely

(Rosemary Laing)