The Senate

Committee of Privileges

Guidance for officers giving evidence and providing information

Submissions to the inquiry

June 2013

AUSTRALIAN SENATE

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17 August 2010

Mr CJC Elliott
Secretary
Committee of Privileges
The Senate
Parliament House
Canberra ACT 2600

Dear Mr Elliott

SUBMISSION TO THE COMMITTEE'S INQUIRY INTO THE GOVERNMENT GUIDELINES FOR OFFICIAL WITNESSES BEFORE PARLIAMENTARY COMMITTEES

I attach for the committee's consideration a submission into its inquiry on the adequacy of advice contained in the *Government Guidelines for Official Witnesses before Parliamentary Committees and related matters* for officials considering participating in a parliamentary committee whether in a personal capacity or otherwise.

It is my intention to monitor submissions as they are published and to provide the committee with any supplementary submissions should the need arise.

Yours sincerely

(Rosemary Laing)

rm.sub.17390

Committee of Privileges

Inquiry into the adequacy of advice contained in the *Government Guidelines for Official Witnesses before Parliamentary Committees and related matters* for officials considering participating in a parliamentary committee whether in a personal capacity or otherwise

Submission by the Clerk of the Senate

The *Government Guidelines for Official Witnesses before Parliamentary Committees and related matters* is a document produced by the executive government and has no parliamentary status. Nevertheless, the document has been very useful over the years in providing guidance to public servants who appear as witnesses.

Procedures governing the protection and conduct of witnesses

The Senate's own view of what is expected of witnesses, including those witnesses who are public servants (or "officers" as they are called in the standing and other orders) is reflected in a series of orders and resolutions. On several occasions, the Senate has passed resolutions providing either guidance or direction to public servants appearing before Senate committees. The best known of these are the Privilege Resolutions, particularly Resolution 1 concerning procedures to be observed by Senate committees for the protection of witnesses. These procedures are binding on Senate committees.

Paragraph 16 of Privilege Resolution 1 provides as follows:

> (16) An officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister.

Other resolutions or orders of this nature include the following:

- witnesses – powers of the Senate (16 July 1975)
- accountability of statutory authorities (9 December 1971, 23 October 1974, 18 September 1980 and 4 June 1984)
- expenditure of public funds (25 June 1998)
- accountability to Parliament -- study of principles by public servants (21 October 1993)
- claims of commercial confidentiality (30 October 2003)
- public interest immunity claims (13 May 2009).

All of these are reproduced in the volume of *Standing Orders and other orders of the Senate* (June 2009).

Origins and evolution of the Government Guidelines

— the first version: 1978

The Government Guidelines had their origin in the work of the Royal Commission on Australian Government Administration which reported in 1976. When presenting the first guidelines to the House of Representatives on 28 September 1978, the Minister Assisting the Prime Minister, Mr Viner, also referred to earlier principles and procedures suggested by Prime Minister Menzies and former Solicitor-General, Sir Kenneth Bailey, in relation to inquiries by the Joint Committee on Public Accounts and the Senate Standing Committee on Regulations and Ordinances, respectively. The report of the royal commission made several suggestions for matters which could be included in guidelines (paragraphs 5.1.27 to 5.1.39 of the report). The royal commission also suggested that a joint select committee be established to consider and report on the desirability of dealing with these matters by statute.

Other contributing factors were a detailed proposal on the protection of witnesses appearing before parliamentary committees submitted to then Prime Minister Fraser by the Council of Australian Government Employee Organisations in 1977 and a report of the Privileges Committee of the House of Representatives in 1978 which proposed a review of parliamentary privilege.

One area where there had been little progress was in relation to Crown Privilege (now known as public interest immunity) which was the subject of the Senate Privileges Committee's second report tabled on 7 October 1975. This report considered directions given by various ministers to public servants ordered to appear at the bar of the Senate in 1975 in relation to the so-called loans affair. It was in relation to this episode that the Senate agreed to a resolution on 16 July 1975 asserting its power over witnesses and the right to determine any claims of privilege:

> (1) The Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.
>
> (2) Subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.
>
> (3) The fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.
>
> (4) Upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim (*Journals of the Senate*, p.831).

The Senate has never modified its position on these matters. It has not conceded that there is such a thing as executive privilege and has maintained the right to determine any matters of privilege, including claims of public interest immunity.

The first version of the guidelines was an attempt to address the issues with four considerations in mind:

- the importance of promoting the free flow of information through parliamentary committees to the public "consistent with the protection, in the national interest, of the necessary confidences of government and the privacy of individual citizens";
- the achievement of a proper balance between the needs of government to preserve some confidences and the needs of parliamentary committees to conduct inquiries;
- confirmation of the line of responsibility between the executive and Parliament with ministers having a central role in dealings between the executive and parliamentary committees; and
- maintenance of the traditional impartiality of public servants (*House of Representatives Debates*, 28 September 1978, p. 1505).

In concluding his statement to the House, Mr Viner said that "[c]laims of privilege would not, of course, be made by Ministers without substantial cause". It could be inferred, however, that the guidelines were weighted in favour of executive secrecy as opposed to responsiveness to Parliament. In particular, having listed possible grounds for claims of public interest immunity, the guidelines were then silent on any mechanism to resolve any disputed claims of public interest immunity, implying that such claims were conclusive. This inference is strengthened by the lack of any reference in the guidelines to the powers of the Houses under section 49 of the Constitution, or to the Senate's resolution of 16 July 1975, or otherwise to the Senate's often-stated position.

— the second version: 1984

On 29 April 1982, the Senate agreed to a resolution transmitted by the House of Representatives for the establishment of a joint select committee on parliamentary privilege. The committee was re-established after the change of government in 1983 (with the same chair and deputy chair). An exposure report was presented in June 1984 and the final report in October that year. The second version of the guidelines was tabled in both Houses on 23 August 1984 in response to the exposure report of the joint select committee. It was also stated to be guided by the principles of the *Freedom of Information Act 1982*, the new regime for giving the public a right of access to government documents, subject to exemptions for sensitive material. Again, the guidelines appeared in bad company with a regime that, in practice, limited access to all but innocuous information. (Incidentally, the application of FOI exemptions to the provision of information to Parliament was explicitly rejected by the Senate on 6 May 1993 with the adoption of the Procedure Committee's *Second report of 1992*.)

— the third version: 1989

Partly as a response to the report of the joint select committee but given added urgency by the judgments of Justices Hunt and Cantor in proceedings against Justice Murphy in the NSW Supreme Court, the Parliamentary Privileges Bill was passed in 1987 to declare the scope of proceedings in parliament and so prevent the future use of proceedings of the kind that had occurred in the case of *R v Murphy*. In February 1988, the Senate agreed to the Privilege Resolutions which gave effect to numerous recommendations of the joint select committee that did not require statutory expression but went to matters of practice and procedure.

The third (and current) version of the guidelines was tabled in the Senate on 30 November 1989 and took account of the enactment of the Parliamentary Privileges Act and the adoption by the Senate of the Privilege Resolutions. By this time, the Senate Committee system was approaching its 20th anniversary and many public servants had appeared before estimates committees as well as providing evidence to other committee inquiries. This version of the guidelines also noted that the report of the House of Representatives Procedure Committee on committee procedures had not yet been dealt with.

Developments since 1989

Since these guidelines were tabled have been several important developments affecting committees:

- the systematic referral of bills to Senate committees since 1990 has led to an explosion in committee work and much greater numbers of public servants appearing before Senate committees to provide routine explanations of policies and their proposed implementation through legislation;
- the adoption of supplementary estimates hearings in 1993 had led to three rounds of estimates each year and a correspondingly increased exposure of public servants to the estimates process;
- there has also been a steady growth in the number of statutory committees with oversight functions in relation to particular organisations, including the Australian Crime Commission (formerly the National Crime Authority), various intelligence agencies, the Australian Commission for Law Enforcement Integrity, and various financial services regulatory authorities;
- both Houses have agreed to new procedures that affect the operations of their committees.

At the very least, the guidelines require updating to acknowledge these developments and their impact. For example, it is now very common for committees to seek the attendance of public service witnesses directly to the department rather than through the minister's office and there can be little dispute that this expedites consideration of routine matters, including bills and estimates.

When the referral of bills process began in the early 1990s, it was quite common for ministers to appear at hearings into bills. House of Representatives ministers also appeared before

Senate committees on the odd occasion in this context (see attached list). Ministers have not attended bills inquiries since 2000 (and not regularly since the mid-1990s) and some recent experiences of Senate committees suggest that ministers are reluctant to appear (see, for example, the report of the Environment, Communications and the Arts References Committee on the *Energy Efficient Homes Package (ceiling insulation)*, July 2010 which includes a report pursuant to standing order 177(2) in respect of a Senate minister). The absence of a minister can leave officials in an invidious position, particularly when the matter being inquired into is controversial.

Problems with the guidelines

Recent Senate committee inquiries have exposed problems with the guidelines in several respects.

> *— Inadequate distinction between general inquiries into matters of policy or administration and inquiries into individual conduct*

The guidelines set out clearance procedures for submissions that generally involve clearance through the minister's office. It is accepted that this will be appropriate in cases involving inquiries into matters of policy and administration. Paragraph 2.5 of the guidelines refers to committees dealing with individual conduct and provides that there may be circumstances where it is not appropriate for the usual clearance procedures to be followed. There is then a reference to the capacity for witnesses to be accompanied by counsel and a reference to Privilege Resolution 1, paragraphs (14) and (15). It is not particularly clear what the paragraph is referring to but its reference to inquiries into the personal actions of a minister or official suggests that it includes contempt inquiries by committees of privilege, for example. There are other examples of inquiries that involve individual conduct in which committees strive to establish the facts of the matter and to draw conclusions from a chain of events. Inquiries of this nature include:

- allegations concerning a judge and conduct of a judge (Senate select committees, 1984, 1985)
- sexual harassment in the Australian Defence Force (Senate Foreign Affairs, Defence and Trade Committee, 1994);
- pay television tendering processes (Senate select committees, 1992-93);
- a certain maritime incident and the Scrafton evidence (Senate select committees, 2002, 2004)
- equity and diversity health checks in the Royal Australian Navy (Senate Foreign Affairs, Defence and Trade References Committee, current).

All of these inquiries involved committees seeking accounts of events from individuals about particular conduct. In such circumstances it is important that accounts not be subject to supervision or influence. Anything other than an individual's own account has the potential to mislead the committee and may therefore constitute a possible improper interference with the committee's ability to carry out its functions and, therefore, a potential matter of privilege.

This was an issue recently when the Committee of Privileges sought evidence from the Secretary and named officers from within the Treasury Department about any action they had taken following the appearance of former Treasury official, Mr Godwin Grech, before the Economics Legislation Committee on 19 June 2009 (142nd report). The Secretary provided his submission to the offices of the Treasurer and Prime Minister at the same time as it was provided to the committee. Fortunately, copies sent to ministers' offices were identified by staff of those offices and returned to the Secretary. Any damage was therefore contained. However, the Secretary later provided the committee with a copy of legal advice that had been sought to justify his actions. The legal advice addressed the Secretary's actions only in terms of the Westminster doctrine of ministerial responsibility which provides that a minister is responsible to Parliament for the conduct by his or her department of the government's business. Under this doctrine, the Secretary was obliged to respond to the committee through his minister (although the advice did not explain why it was necessary for the Secretary to include the Prime Minister as well, other than that the submission mentioned staff in the Prime Minister's office). The legal advice failed to refer to the only paragraph in the guidelines relevant to the particular circumstances, namely, paragraph 2.5. This was an incomprehensible omission when the committee was inquiring into what actions individuals may have taken as a consequence of Mr Grech giving evidence to the Economics Legislation Committee.

It is important to note that inquiries into matters of privilege may initially be very general. There are no "suspects" as such. Until the committee establishes the chain of events it may not be possible to identify any potential suspects or, indeed, the actual nature of the possible offence or offences that may have been committed. In this case, the committee also sought accounts from staff of the same ministers' offices to which the Secretary had copied the Treasury submission. There was a risk of collusion from such action and therefore a risk of prejudice to the committee's inquiry. When the committee raised the matter with the Secretary it acknowledged that the guidelines were not particularly clear on this crucial distinction between inquiries into matters of policy and administration and inquiries into individual conduct. However, it noted that the guidelines were the government's guidelines, not the Senate's.

The same issue arose in relation to a defence instruction (called a DEFGRAM) issued about the time that the Foreign Affairs, Defence and Trade References Committee received a reference on events that are alleged to have occurred on the HMAS Success. I refer the committee to advice I gave to that committee and which it published in its report, *Parliamentary privilege — possible interference in the work of the committee (Inquiry into matters relating to events on HMAS Success)*. The instruction was withdrawn at the direction of the Minister for Defence and was replaced with a more accommodating document that attempted to clarify the right of any person to participate in an inquiry in a personal capacity. The Foreign Affairs Defence and Trade References Committee remained concerned that the replacement instruction (which was actually the third in the series) continue to exert a subtle pressure on defence personnel that could well have the effect of deterring them from participating in any inquiry. The source of the pressure was the distinction made in the

guidelines about participating in an inquiry in a personal capacity as opposed to participating in an official capacity (see paragraph 2.50 of the guidelines).

The committee reported that it was:

> … particularly concerned that the current *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (the Guidelines) fail to make clear the meaning of 'private capacity'. This is especially so in the context of committee inquiries into incidents in the workplace where public servants may wish to provide evidence on their own behalf but of necessity cannot divorce themselves from their professional role. In drafting the three DEFGRAMS cited in this report, Defence relied on sections of the Guidelines to provide unsound advice to its personnel. The committee is strongly of the view that the Guidelines may need to be reviewed by the Department of Prime Minister and Cabinet (paragraph 1.39).

The committee has identified what is a very difficult area. On the one hand, public servants and defence personnel operate in a structured and hierarchical environment and are required to comply with particular standards of conduct and to embody particular values in their work practices. The courts have recognised that public sector employment has a unique nature, distinct from other kinds of employment, in that it accommodates the recognition and pursuit of the public interest. For example, in the case of *Commissioner of Taxation v Day* (2008) 236 CLR 163, the High Court said:

> The public service legislation in Australia has served and serves public and constitutional purposes as well as those of employment, as Finn J observed in *McManus v Scott-Charlton*. Such legislation facilitates government carrying into effect its constitutional obligations to act in the public interest. For reasons of that interest and of government the legislation contains a number of strictures and limitations which go beyond the implied contractual duty that would be owed to an employer by many employees. In securing values proper to a public service, those of integrity and the maintenance of public confidence in that integrity, the legislation provides for the regulation and enforcement of the private conduct of public servants.

As a disciplined service, the defence forces are even more subject to constraints on the conduct of their members.

On the other hand, however, parliamentary privilege is absolute. The Houses of Parliament have the power to protect persons who participate in proceedings in Parliament through the use of the contempt power. For example, under Privilege Resolution 6, the following actions may be dealt with as contempts:

> **Interference with witnesses**
>
> (10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

Molestation of witnesses

(11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

The contempt jurisdiction does not distinguish between a witness participating in an official capacity or in a personal capacity. From the Parliament's point of view, a witness is a witness and any action taken to a witness's detriment may be treated as a contempt regardless of what capacity a witness may claim to be appearing in.

The committee will recall that in its 141st report it examined the case of an employee of the Aboriginal Legal Service of Western Australia Inc (ALSWA) who was issued with a formal warning for serious misconduct for having made a submission to the Legal and Constitutional Affairs References Committee's inquiry into access to justice. It had come to the Committee of Privileges because the Legal and Constitutional Affairs References Committee was not persuaded that the ALSWA accepted its employee's right to make a submission ***in any capacity***. In its report, the Privileges Committee set out the arguments as follows:

> **1.19** It is quite clear on the facts available to the committee that the ALSWA issued a warning letter to Ms Puertollano as a direct consequence of her submission to the references committee. This action by the ALSWA was wrong in all the circumstances. As noted by the references committee in its report, it is irrelevant whether Ms Puertollano's submission was made in a private or official capacity. The references committee went on to conclude:
>
> > When giving evidence to a Senate committee, an individual's employment conditions, policies and guidelines, including confidentiality agreements however described are of no effect and the witness must be able to assist the committee in complete freedom, and without suffering any disadvantage as a consequence, regardless of whether the evidence was given in an official or a private capacity. The committee felt that this essential principle has not been understood by the ALSWA and its universal application needs to be restated.
>
> **1.20** This committee concurs. Under the law of parliamentary privilege, proceedings in parliament ought not be questioned or impeached in any place outside parliament. These are the terms of Article 9 of the Bill of Rights 1689, incorporated into Commonwealth law by section 49 of the Constitution and further declared by section 16 of the *Parliamentary Privileges Act 1987*.
>
> **1.21** A person who makes a submission to a committee is participating in proceedings in parliament and that participation therefore attracts all the protections conferred by Article 9 of the Bill of Rights and section 16 of the Parliamentary Privileges Act. Senate Privilege Resolution 6, made pursuant to section 50 of the Constitution, articulates conduct which may offend that protection by being intended to amount, or amounting or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions. Such conduct includes interference with witnesses or molestation of witnesses.

> **1.22** Time and again, this committee has declared that it regards the protection of witnesses as constituting the single most important duty of the Senate (and therefore of the committee as its delegate) in determining possible contempts.
>
> **1.23** Unfortunately, this is not an isolated case and the committee agrees that it would be useful to set out clear guidance for any person who seeks to take action of any kind against another person as a consequence of their evidence to a Senate committee. **The committee's advice is that such action should not be taken in any circumstances.** If it is taken, such action may constitute a contempt of the Senate. A person's right to communicate with the parliament and its committees is an untrammelled right, overriding all other considerations.
>
> **1.24** There is a very simple remedy available to any employer or professional organisation or any other body whose staff or members may make submissions to a parliamentary committee that do not accord with the official policy or practices of the organisation. The remedy is for that body to make its own submission to the committee in question, dissociating itself from the submission of the individual and indicating that the views expressed by the individual are not the official views of the organisation. Under no circumstances is it acceptable, as occurred in this case, for the organisation to take the matter up with the individual directly and threaten disciplinary action as a result of the individual's communication with the committee. [*footnotes not included in this extract*]

A problem with the existing government guidelines, therefore, is that they make a distinction between giving evidence in an official capacity and giving evidence in a personal capacity, a distinction which has no meaning in parliamentary terms. Moreover, such a distinction is potentially harmful because it invites public service managers to exert pressure on potential witnesses in respect of their evidence and therefore to influence that evidence or the giving of it.

It is not difficult to imagine a conversation between an officer and his or her supervisor about particular information that the officer may wish to put forward to an inquiry. The supervisor could well advise the officer that this line of information or argument would not be compatible with the agency's overall position and that it would be preferable, if the officer persisted in wishing to put the information before the committee, for the officer to make it clear that they were making a submission in a personal capacity. Fear of reprisal could influence the information the officer put to the committee or, indeed, whether they put it to the committee at all.

As the committee knows, this is not a theoretical problem. Its 125th report contains an account of the committee's experience of such cases on pages 46 to 56. The case covered in the 42nd report led directly to the Senate's requirement for senior public servants to undertake training and study in the principles governing the operation of Parliament and the accountability of executive agencies to Parliament, a call reiterated by the Foreign Affairs, Defence and Trade References Committee in its recommendation that officers of Defence Legal and the Ministerial and Executive Support Branch be required to undertake such study.

While the theory may be pure, the reality is far more problematic. Certain qualities and experience are needed to become a senior officer in a Commonwealth agency. Adherence to

the public service values and code of conduct is a fundamental requirement of employment in this sector. There is a potential tension between this required adherence and an individual's desire to present a committee with his or her version of the "truth" or the "facts". It is the same dilemma that surrounds whistleblowing. How is it defensible to continue to take the king's shilling while blowing the whistle on practices within the king's court? The reality is that many senior officers would consider giving evidence to a committee in a personal capacity to be self-indulgent and not compatible with their duties as public service employees or with the public service values. Those who persist in doing so may be regarded by their peers and supervisors as having demonstrated a lack of judgement which may subtly influence future employment decisions about them.

No guidelines can accommodate these fine distinctions of judgement and they should not attempt to do so. The principles should be stated clearly and the remedy noted (as described by the committee in paragraph 1.24 of its 141st report, quoted above).

— *Secrecy provisions*

A second area where the guidelines fall short is in relation to secrecy provisions. Paragraph 2.33 of the guidelines provides that the existence of secrecy provisions may affect a decision whether to make information or documents available to a committee. As the committee knows from its recent inquiry into the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009, a lot of water has flowed under the bridge since 1989 in relation to secrecy provisions.

In my submission to the committee on that bill, I outlined the history of the Senate's concerns about the use of secrecy provisions to limit the provision of information to Parliament. Matters came to a head in the early 1990s because of a conflict between the head of the National Crime Authority and the Parliamentary Joint Committee on the NCA. The NCA chairman insisted that the secrecy provision in the NCA legislation prevented the provision of information to the committee (notwithstanding that the committee had been established by the same legislation to monitor the operations of the Authority). It was finally conceded that only an express statutory declaration could limit the powers and immunities of the Parliament under section 49 of the Constitution, although the Solicitor-General maintained that such a limitation could also be supported by necessary implication. The Senate has never accepted the latter view.

The guidelines are quite inadequate on the issue of secrecy provisions. The only advice they give is for the Attorney General's Department to be consulted when such questions arise. As my earlier submission demonstrated, however, the Attorney General's Department has been a source of conflicting and confusing advice in the past and has therefore not proved to be a reliable source of advice on this critical issue.

Recent episodes in estimates also demonstrate that there continues to be a lack of understanding and acceptance of the fundamental principles involved, principles which are well articulated in the committee's 144th report. During the recent round of Budget estimates hearings, for example, officers of Austrade refused to answer questions about the company

Securency on the ground that they were protected by a secrecy provision in the Australian Trade Commission Act. The provision was in general terms and contained no express limitation of any parliamentary powers and immunities granted under section 49 of the Constitution. It therefore had no application to the operations of the committee. The officers were encouraged to inform themselves about the matter and to take the questions on notice (Foreign Affairs, Defence and Trade Legislation Committee, Budget estimates hearings, 3 June 2010, transcript FAD&T 58).

— Public interest immunity

Thirdly, the treatment of public interest immunity in the guidelines could usefully be revised to accommodate developments that have occurred since 1989. In particular, the Senate resolution of 13 May 2009 sets out procedures for dealing with claims of public interest immunity but, as the Procedure Committee has reported, these new procedures have not been well understood or incorporated into standard practices. Too many public servants are still not providing proper reasons for declining to answer questions and several very senior public servants seem to think that there exists an independent discretion to withhold information from the Parliament and its committees independently of public interest immunity (for example, responses by the Treasury Secretary to a hearing of the Senate Select Committee on Fuel and Energy, 13 July 2010, FUEL ENE 58; by the Secretary of the Department of Education, Employment and Workplace Relation at a supplementary budget estimates hearing, 21 October 2009, EEWR 158; by the Treasury Secretary at a budget estimates hearing, 3 June 2009, E 88-89). The guidelines would have more practical value if they explained how to raise a public interest immunity claim and what the next steps are.

Conclusion

In the end, these are the government's guidelines, not the Senate's, and while they do have shortcomings, the deficiencies are not such as would necessitate a complete rewriting of them. The old adage about sticking with the devil you know has some appeal. In any case, the more significant rights and obligations of witnesses are those enumerated in the Senate's own resolutions and orders.

On the other hand, there is considerable scope for improvement of the guidelines. An alternative approach to the guidelines might be the development of a "better practice guide" for public servants appearing before parliamentary committees (dropping the references to "official witnesses" and appearances in a personal capacity). Any such better practice guide should take into account the standards that have been set and reiterated time and again by the Houses and their committees, and should avoid being a rehash of Westminster conventions that only partially reflect constitutional arrangements in Australia.

(Rosemary Laing)

Clerk of the Senate

EXAMPLES OF FEDERAL MINISTERS WHO GAVE EVIDENCE AT COMMITTEE HEARINGS

31/08/2010 10:14 AM

Committee		Type	Date	Inquiry	Name	Status
1.	Education and the Arts	Standing	01/04/1987	The Proposed Amalgamation of the ABC and the SBS	Michael Duffy	Minister
2.	Legal and Constitutional Affairs	Standing	8 & 15/3/1991 9/4/1991	Crimes (Investigation of Commonwealth Offences) Amendment Bill 1990	Michael Tate	Minister for Justice and Consumer Affairs
3.	Employment, Education and Training	Standing	06/03/1992	The John Curtin School of Medical Research	Peter Baldwin	Minister/Parliamentary Secretary
4.	Superannuation	Select	06/05/1992	Super Guarantee Legislation	Bob McMullan	Minister/Parliamentary Secretary
5.	Industry, Science and Technology	Standing	25/05/1992	Australian Nuclear Science and Technology Organisation Amendment Bill 1992	Ross Free	Minister/Parliamentary Secretary
6.	Rural and Regional Affairs	Standing	09/12/1992	DPIE Appropriations	Peter Cook	Minister/Parliamentary Secretary
7.	Pay Television	Select	6 & 20/8/1993	Pay Television Tendering	Bob Collins	Minister for Transport and Communications
8.	Superannuation	Select	24/09/1993	Superannuation industry supervision bills	Nick Sherry	Minister/Parliamentary Secretary
9.	Legal and Constitutional Affairs	Standing	06/12/1993	Native Title Bill	Gareth Evans	Minister/Parliamentary Secretary
10.	Privileges	Standing	18/08/1994	Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994	Gareth Evans	Minister/Parliamentary Secretary
11.	Legal and Constitutional	References	19/09/1995	Payment of a minister's legal costs	Gareth Evans	Minister/Parliamentary Secretary

EXAMPLES OF FEDERAL MINISTERS WHO GAVE EVIDENCE AT COMMITTEE HEARINGS

Committee		Type	Date	Inquiry	Name	Status
12.	Legal and Constitutional Committee	Legislation	29/11/1996	Hindmarsh Island Bridge Bill 1996	John Herron	Minister for Aboriginal Affairs
13.	Economics	Legislation	30/08/1999	Superannuation Contributions and Termination Payments Taxes Legislation Amendment Bill 1999	Rod Kemp	Assistant Treasurer
14.	Superannuation and Financial Services	Select	26/06/2000	New Business Tax System (Miscellaneous) Bill (No.2) 2000	Rod Kemp	Assistant Treasurer
15.	Legal and Constitutional	References	18/08/2000	Stolen Generation	John Herron	Minister for Aboriginal and Torres Strait Islander Affairs
16.	Rural and Regional Affairs and Transport	References	29/09/2001	Ansett Australia	Ian Macdonald	Minister for Regional Services, Territories and Local Government
17.	Finance and Public Administration References	Standing	19/08/05	Government advertising and accountability	Eric Abetz	Special Minister of State
18.	Finance and Public Administration References	Standing	07/10/05	Government advertising and accountability	Eric Abetz	Special Minister of State

AUSTRALIAN SENATE

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rc.sub.17684

10 May 2011

Senator the Hon David Johnston
Chair
Committee of Privileges
The Senate
Parliament House
Canberra ACT 2600

Dear Senator Johnston

SUBMISSION TO THE COMMITTEE OF PRIVILEGES

INQUIRY INTO THE ADEQUACY AND APPROPRIATENESS OF GUIDANCE AND ADVICE AVAILABLE TO OFFICERS GIVING EVIDENCE TO SENATE COMMITTEES AND WHEN PROVIDING INFORMATION TO THE SENATE

Thank you for the invitation to make a submission to the committee's inquiry into the adequacy and appropriateness of current guidance and advice available to officers giving evidence to Senate committees and providing information to the Senate.

I refer the committee to my submission made to it in the last Parliament which was addressed to an earlier version of the terms of reference (now reflected in paragraph (a) of the current terms of reference). This submission should be considered as an addition to the earlier one. First, I would like to clarify an assertion on page 11 of that submission that "several very senior public servants seem to think that there exists an independent discretion to withhold information from the Parliament and its committees independently of public interest immunity". Examples cited included remarks by the then Treasury Secretary who, at his last appearance before Senate estimates, has now clarified what he meant by those remarks:

> **Dr Henry**—Sure. We have traversed these issues on other occasions and, on one of those occasions—in fact, in one of the hearings that you referred to—I indicated that I was not claiming public interest immunity in not providing information to the committee. I think I also said that, as far as I was aware, I had never made a claim of public interest immunity in any Senate committee hearing. I also said that I doubted that I ever would. I think it is pretty safe now to say that I never will. ***Instead, what I was doing on those occasions was taking the opportunity afforded to me by resolutions of the Senate to refer the question to the Treasurer for the Treasurer's consideration—nothing more or less than that.*** (*emphasis added*)

Given this recent clarification, I exclude the Treasury Secretary from my earlier remarks.

Specific comments on each of the terms of reference follow.

(a) the adequacy and applicability of government guidelines and instructions

I refer the committee to my earlier submission on this aspect of the terms of reference.

(b) the adequacy and appropriateness of current guidance and advice on procedural and legal protections afforded to officers

Current guidance and advice available to officers giving evidence to Senate committees includes the following:

- *Government Guidelines for Official Witnesses before Parliamentary Committees and related matters*

  See earlier submission. Somewhat dated.

- Internal departmental instructions/guidance

  The nature, extent and accuracy of such material are unknown. If examples come to notice, it tends to be because they are problematic as in the case of the DEFGRAMS referred to in my earlier submission.

- *Parliamentary Privileges Act 1987*

  Limited value as guidance but it contains essential definitions of proceedings in parliament and the extent to which such proceedings are immune from suit or other action outside parliament.

- Privilege resolution 1, Procedures to be observed by Senate committees for the protection of witnesses

  This resolution refers to a witness's rights and protections in a number of crucial areas, including the specific protections afforded to officers in paragraph (16). Because the resolution is directed at committees in setting out the procedures they are required to follow in respect of witnesses, witnesses' rights have to be inferred from the resolution.

- Privilege resolution 6, Matters constituting contempts

  Likewise, witnesses' responsibilities have to be inferred from the list of actions or omissions that may be dealt with as contempts, including specific conduct relating to witnesses in paragraphs (8) and (10) to (16).

- Senate Committee Office publications to assist witnesses (included as **Attachment 1**)

  How to make a submission to a Senate Committee inquiry: http://www.aph.gov.au/Senate/committee/wit_sub/bro_one.htm (practical guidance on lodging a submission and points of contact)

Notes for the guidance of witnesses appearing before Senate Committees: http://www.aph.gov.au/Senate/committee/wit_sub/bro_two.htm (a succinct one page summary of the basic information relating to parliamentary privilege and committee proceedings)

Procedures to be observed by Senate Committees for the protection of witnesses: http://www.aph.gov.au/Senate/committee/wit_sub/bro_thr.htm (Privilege resolution 1 and parts of Privilege resolution 6 – offences by and in relation to witnesses, and unauthorised disclosure of proceedings)

- Privilege resolution 2, Procedures for the protection of witnesses before the Privileges Committee

  Specific procedures with inbuilt natural justice safeguards to be used in contempt inquiries.

- Committee of Privileges, *125th Report: Parliamentary Privilege: Precedents, procedures and practice in the Australian Senate 1966-2005*

  The latest of several general reports by the committee which contain the committee's "case law", including analyses of contempt matters, the application of the right of reply procedures and information about the committee's characteristic operating procedures. Various appendices include summaries of reports, lists of members, chairs and deputy chairs and copies of the basic sources (*Parliamentary Privileges Act 1987* and Explanatory Memorandum, Privilege resolutions of 25 February 1988 and responses to issues raised in debate on the resolutions). It has been the practice of the committee to provide a copy of the latest general report to all parties involved in any contempt inquiry in order to provide parties with as much information as possible about how the committee operates. Although there have been only four contempt inquiries since the publication of the 125th report, they were significant inquiries[1] and there have also been two very significant general reports (on effective repetition and statutory secrecy provisions), suggesting that either another update is desirable or a new publication which may operate as a better practice guide for officers and others who deal with Senate committees.

- *Odgers Australian Senate Practice*, 12th edition, chapter 17 and standing orders 176-83 on witnesses

  Also see *Annotated Standing Orders of the Australian Senate*, Department of the Senate 2009, on standing orders 176-83. These are practice guides directed more at

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1 131st report, Possible false or misleading evidence and improper refusal to provide information to the Finance and Public Administration Committee (PP No. 171/2007) (the Maguire case)

133rd report, Possible false or misleading evidence before the Legal and Constitutional Affairs Committee (PP No. 260/2008) (evidence concerning Mamdouh Habib)

141st report, Possible interference with, or imposition of a penalty on, a witness before the Legal and Constitutional Affairs References Committee (PP No. 318/2009) (the Aboriginal Legal Service of Western Australia Inc case)

142nd report, Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009) (PP No.396/2009) (the Godwin Grech case)

committee chairs, members and staff than at witnesses, although they contain useful information.

- Courses run by the Department of the Senate for senior public servants on Parliament, Privilege and Accountability

  These courses have been part of the department's annual seminar program for many years in response to a recommendation by the Committee of Privileges, adopted by the Senate, for SES officers, in particular, to improve their knowledge and understanding of parliamentary operations by undertaking study on accountability to Parliament and the protection available to witnesses. The committee had identified this problem in numerous reports, including its 36th report (involving the then National Crime Authority), 42nd report (involving the then Australian Securities Commission) and 73rd report (involving proceedings of the then Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund). See also the 89th report of the committee (*Senior Public Officials' Study of Parliamentary Processes: Report on Compliance with Senate Order of 1 December 1998*, PP No. 79/2000). Realistically, these courses can cope with only a limited number of participants each year.

While there are numerous resources available for the guidance of witnesses, there is scope in my view for more comprehensive online publications, directed at witnesses, in the following areas:

- basic committee proceedings and how to interact with committees
- Senate powers and immunities and the operation of parliamentary privilege.

The first one is something the Department of the Senate can work on. There is already a great deal of material available in procedural manuals that could be adapted and published imaginatively (online) for the guidance of witnesses to provide more in depth treatment of common questions than is currently available in the brief Committee Office publications referred to above. Various projects are under way in this area. The second one would be more authoritative if it had the imprimatur of the Committee of Privileges and the Senate. The committee may wish to consider something along these lines to take the place of the 125th report. It would not have an exclusive focus on officers but would be applicable to all witnesses (although it could, of course, have particular content directed to officers such as the application of Privilege resolution 1 (16)).

Provision of information to the Senate and senators

The second aspect of the committee's inquiry concerns the provision of information to the Senate and to senators. The chief guidance here is provided by section 16 of the *Parliamentary Privileges Act 1987* which defines proceedings in parliament to include:

> ... all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
>
> (a) the giving of evidence before a House or a committee, and evidence so given;
>
> (b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

The meaning of 'impeached or questioned' is also defined. It is not lawful in any court or tribunal to question the truth, motive, good faith, or intention of any person by reference to parliamentary proceedings, or to draw any inferences or conclusions from those proceedings.

It is very clear that the provision of information to the Senate (whether or not pursuant to order) is protected by parliamentary privilege, as is the presentation of information or documents to a committee. What is less clear is the status of communications with individual senators. Explanatory material tends to focus on what is covered by parliamentary privilege rather than what is not covered. The main reference for this material is chapter 2 of *Odgers' Australian Senate Practice*, 12th edition, at pages 45-46 under "Provision of information to members". (Also see a paragraph on the case of *O'Chee v Rowley* on page 46 under "Subpoenas, search warrants and members" and the committee's 75th report which dealt with this matter.) A paper by the former Clerk, referred to in *Odgers*, is at **Attachment 2**.

A report by the former Privileges Committee of the House of Representatives in December 2000 on the status of the records and correspondence of Members of the House of Representatives also has some relevant material. Also see the resulting guidelines for members on the status and handling of their correspondence which contain a useful summary of the tests to apply in arguing whether an action is a proceeding in Parliament, with useful reference to the case of O'Chee v Rowley : http://www.aph.gov.au/house/committee/pmi/guidelines0903.pdf. An extract is at **Attachment 3**.

(c) the awareness among agencies and officers of the extent of the Senate's power to require the production of information and documents

There is considerable anecdotal evidence that the level of awareness among agencies and officers of the extent of the Senate's power to require the production of information and documents is patchy, as is the knowledge of basic parliamentary processes generally. The committee will recall its recent inquiry into the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009, involving an examination of statutory secrecy provisions (144th report). Aspects of the bill as drafted revealed a serious failure to understand the scope and nature of parliamentary privilege, relating to the receipt of evidence by committees. The bill was amended in accordance with the recommendations of the committee.

In last year's annual report of the Department of the Senate, I included in my Clerk's review some commentary on these issues. The relevant extract is at **Attachment 4.**

Since I made the earlier submission to the committee, there have been further developments which highlight the need for updated guidance on the interaction of officers with the Houses of the Commonwealth Parliament and their committees. Perhaps the most significant development was the enactment of the *Freedom of Information Amendment (Reform) Act 2010* and associated legislation which liberalised the access regime, including by abolishing application fees and making exemption provisions subject to a public interest test. In related

legislation, an office of the Australian Information Commissioner was established to conduct merits reviews and investigations with a view to enhancing access to information held by governments.

Liberalising of the FOI access regime does not appear to have had a flow on effect on the response of ministers to Senate orders for production of documents (although this may have nothing to do with the state of knowledge of officers). In an extraordinary case, information that was not provided to the Senate in response to orders for production of documents about assumptions underlying the proposed minerals resource rent tax estimates was subsequently released by the Treasury Department pursuant to FOI requests. The then Treasury Secretary provided an explanation to the Economics Legislation Committee during additional estimates hearings on 24 February 2011 (transcript, pp E32-33), referring to the response to the Senate orders, on the one hand, as "the way that our parliamentary procedures operate" and to the burden on the FOI decision-maker, on the other, "that the information is to be released unless, in the decision maker's mind, there is a clear public interest against release". In other words, there is now an unsatisfactory situation that information that there is no basis in law to withhold from the Australian public is withheld from the Senate, presumably for political reasons.

When the orders for production of information relating to the MRRT were not complied with, the Senate agreed to further orders requiring the Information Commissioner to provide a report on the adequacy of the grounds provided by the government for not complying with those orders. The Information Commissioner declined to do so, arguing that he could not comply with the orders because what they required him to do was beyond the powers and functions conferred upon him by his statute. He went on to query the extent of the Senate's power to make such orders, suggesting that it was not clear that the House of Commons had exercised such powers before 1901, an argument which goes to what powers the Senate inherited from the House of Commons by virtue of section 49 of the Constitution.[2] The Commissioner's responses were tabled in the Senate (see **Attachment 5**). When subsequently questioned about the matter at additional estimates on 21 February 2011, the Information Commissioner queried the Senate's view of the scope of its powers (as partly expounded by the committee in its 144th report on statutory secrecy provisions) by suggesting that, taken to its logical conclusion, the Senate could issue an order to any statutory officer "or indeed to a private citizen"! (pp. F&PA 161-63)[3] I disagree with the Information Commissioner's interpretation of Senate powers for reasons demonstrated in **Attachments 6** and **7**.

These developments emphasise the urgent need for clarification of these issues. The Information Commissioner has already been joined by the Productivity Commissioner in resisting Senate orders on the basis that what the Senate requires is not specified in the Productivity Commission's enabling statute and may therefore be disregarded. A subsequent order of the Senate has ordered the Productivity Commissioner to reconsider his response. These responses are similar in kind to those experienced in the past in relation to secrecy provisions, viz: because there is a secrecy provision in the relevant legislation, the Parliament

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2 It is clear that the House of Commons exercised such powers. See Attachment 6, "Occasional Note, Orders for production of documents: origins and development of the power", appended to *Procedural Information Bulletin No. 247*, Department of the Senate, 14February 2011.

3 The history of orders directed to statutory officers and authorities is described in Attachment 7, "Occasional Note, Recent applications of the power to order the production of documents involving statutory authorities or officers", appended to *Procedural Information Bulletin No. 249*, Department of the Senate, 28 March 2011.

is not entitled to the information. In both situations there is a failure to recognise the overarching powers of the Houses and the position of Parliament in the accountability framework inherent in our system of constitutional government (which imports both responsible government and federalism). There is also a failure to recognise the importance of section 49 of the Constitution. The powers conferred therein can be diminished only by explicit declaration to that effect.

Should these matters go unaddressed, the risk is that the Senate will be perceived as either not possessing, or apparently foregoing, powers that are essential to the effective performance of its constitutional functions. Such perceptions can only diminish the effectiveness of the institution. While I would not necessarily suggest that the Senate take a different approach to enforcing its powers, it is interesting to note recent Canadian experience in this area. The Speaker ruled that the government's failure to comply fully with an order for production of documents raised questions of privilege (see **Attachment 8**) and he allowed a motion to refer the matters to the appropriate committee which made a finding of contempt against the government[4]. The presentation of the report was followed by a successful no confidence motion in the House of Commons which was shortly thereafter prorogued. (The minority Conservative government has since been returned with a majority.)

(d) the awareness among agencies and officers of the nature of relevant advice and protections

As this is not a matter of which I have any direct knowledge, I make no submission to the committee on this aspect of the terms of reference.

I would be happy to assist the committee further in any way that I can.

Yours sincerely

(Rosemary Laing)

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[4] The report of the Standing Committee on Procedure and House Affairs is published on the Canadian Parliament's website: http://www.parl.gc.ca/content/hoc/Committee/403/PROC/Reports/RP5047570/procrp27/procrp27-e.pdf.

(4.)

Mr Richard Pye
Committee Secretary
Senate Standing Committee of Privileges
PO Box 6100
Parliament House
CANBERRA ACT 2600

Richard

Dear Mr Pye

Thank you for the invitation to make a submission to your Committee's inquiry into Guidance for officers giving evidence and providing evidence.

I would just like to point out to the Committee that there are guidelines for ACT Public servants appearing before Assembly committees which are developed, published and administered by the Chief Ministers' Department and these can be found at http://www.cmd.act.gov.au/data/assets/pdf_file/0018/113607/hbkassembly-inq.pdf

The committee may also be interested to know that a recent Select Committee of Privileges (Select Committee on Privileges 2009) made the following recommendation:

Recommendation 1

That the Government clarify the relationship between public servants and non-Executive Members of the Legislative Assembly, with a view to issuing guidelines for any interaction that is not covered by existing guidelines.

The recommendation was made following a letter written by the Chief Executive of the Department of Health to a non-Executive Member of the Assembly regarding a press release issued by that Member. The Government has since responded to the recommendation and indicated that it will be reviewing the guidelines and issuing them soon.

I hope this information is of some use to the Committee. I look forward to reading the Committee's report in due course.

Yours sincerely

Tom Duncan
Clerk of the Legislative Assembly

13 May 2011

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Australian Government
Australian Public Service Commission

AUSTRALIAN PUBLIC SERVICE COMMISSIONER
STEPHEN SEDGWICK

Mr Richard Pye
Committee Secretary
Senate Standing Committee of Privileges
PO Box 6100
Parliament House
Canberra Act 2600

Dear Mr Pye

SENATE COMMITTEE OF PRIVILEGES INQUIRY: GUIDANCE FOR OFFICERS GIVING EVIDENCE AND PROVIDING INFORMATION

Thank you for your invitation to provide the Committee with a submission for this inquiry.

The background paper issued as part of that invitation sets out a number of specific concerns being examined by the Committee:

a) the adequacy and applicability of government guidelines and instructions
b) the procedural and legal protections afforded to those officers
c) the awareness among agencies and officers of the extent of the Senate's power to require the production of information and documents
d) the awareness among agencies and officers of the nature of relevant advice and protections.

In preparing this submission I have also been aware of the concerns expressed by some concerning the HMAS Success matter, and those arising from the 'Utegate' matter. It is my understanding that those concerns, in effect, are:

a) whether material provided to committees by Australian Public Service (APS) employees acting in an official capacity should always be 'cleared to appropriate levels within the department, and normally with the Minister, in accordance with arrangements approved by the Minister(s) concerned'[1], and
b) protections against recrimination available to, for example, APS employees concerning testimony provided to committees.

The adequacy and applicability of government guidelines and instructions

Giving evidence to Senate Committees

The primary vehicle for the guidance available to APS employees appearing before Senate committees is, as noted by the Committee, contained in *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (the Guidelines). Those Guidelines have been in place since 1989, and the Department of the Prime Minister and Cabinet is responsible for them.

[1] *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters,* paragraph 2.14

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As currently drafted, the Guidelines highlight the requirement for officials to provide full and accurate information to the Parliament and the factual and technical background to policies and their administration, but also note[2] that this is as part of their role in assisting 'ministers to fulfill their accountability obligations... to the Parliament about the factual and technical background to policies and their administration'. This principle is supported by s 57(2) of the Public Service Act, which stipulates that

> *The Secretary of a Department must assist the Agency Minister to fulfil the Agency Minister's accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Department.*

This principle is also supported by the later emphasis within the Guidelines on ensuring that material presented to Parliamentary committees is properly developed and cleared. Given that the role of the APS employee is limited to providing factual and technical information, as distinct from, for example, a policy advocacy role, it is desirable to ensure that the material provided is accurate, comprehensive and helpful. A proper clearance process is useful in this regard.

The principle that the role of APS employees should be limited to providing factual and technical information is an important one. The APS Values, which are set out within the *Public Service Act 1999,* emphasise that the APS is an apolitical organisation, which performs its functions professionally and impartially.[3] This principle is also reflected in the resolutions adopted by the Senate on 25 February 1988.[4] The Guidelines should continue to support this established distinction between the roles of Ministers and APS employees, and APS employees should continue to be able to rely on those Guidelines for authority when asked questions that go beyond their role.

In this respect I believe that the current Guidelines are appropriate to assist employees who appear before a committee in an official capacity.

The Guidelines also note that APS employees may appear before committees in a 'personal' capacity.[5] They also refer to the *Guidelines on Official Conduct of Commonwealth Public Servants*, which has since been subsumed by a more recent publication of the Public Service Commissioner, *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads*. That later publication at Chapter 3[6] relevantly notes that

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[2] Ibid., paragraph 1.1
[3] Refer to section 10(1)(a) of that Act.
[4] Resolution 1(16) provides that '[a]n officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister.' Having noted that, the terminology within this resolution does not reflect current terminology contained within the *Public Service Act 1999*, which refers to 'employees' rather than 'officers' or 'officials'.
[5] Ibid., paragraph 2.50
[6] *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads.* (http://www.apsc.gov.au/values/conductguidelines5.htm).

APS employees may choose to submit information to, or appear as a witness before, a parliamentary committee of inquiry or a royal commission in a private capacity. Agencies cannot restrict employees from doing this. The above guidelines note the possible impact of any comment made by APS employees in a personal rather than an official capacity. Senior APS employees in particular should carefully consider the impact, because of their position, of any comments they make.

An APS employee who is providing information in a private capacity should make it clear that they are not speaking on behalf of the Government or any agency. The APS employee must not communicate information in a way that implies their private views are those of the agency, such as using official letterhead.

Before submitting information in a private capacity, APS employees should be aware of the legislation that restricts the disclosure and use of official information. The restrictions may provide grounds for the employee not to disclose certain information.

I believe that this guidance is appropriate for APS employees presenting material to, or appearing before, a Parliamentary committee in a genuinely private capacity.

Having said that, I think there is an argument that in one respect the current Guidelines could be usefully amended.

There will be occasions where committees are inquiring into, for example, particular incidents within an agency that concern the behaviour of employees or groups of employees, rather than policy decisions and actions taken by Government.

I have noted the earlier submission from Ms Laing, Clerk of the Senate, on this matter and her comment that

> *.... In such circumstances it is important that accounts not be subject to supervision or influence. Anything other than an individual's own account has the potential to mislead the committee and may therefore constitute a possible improper interference with the committee's ability to carry out its functions and, therefore, a potential matter of privilege.*

In cases such as this the facts may not have been settled and may be the subject of an ongoing dispute and even be under independent review. It may, therefore, in these circumstances be appropriate for a committee to acknowledge that the matters before them are open to varying interpretations. As a matter of principle I agree that it might be undesirable in such circumstances to require that that material be cleared by the department, particularly if the department is seen to have an interest in presenting a particular version of events. For similar reasons a requirement for Ministerial clearance would also be inappropriate. Paragraph 2.5 of the Guidelines arguably provides some assistance in such cases, but in its current form indicates that while the usual clearance process may not apply, it does not set out alternative arrangements or give any guidance about appropriate behaviour.

Arguably, the existing 'personal' capacity provisions at paragraph 2.50 of the Guidelines could also be interpreted to apply in such circumstances. However, it would reduce the risk of confusion if

the guidelines were to better acknowledge the distinction between circumstances in which APS employees appear in a genuinely private capacity (i.e. as members of the public), those in which they appear in their capacity as an individual APS employee providing evidence in their personal capacity, and those in which they assist the Minister to discharge his or her accountability obligations to the Parliament.

I would welcome amendments to the Guidelines that clarify these matters.

Providing information to Senators

Sections 3 and 4 of the Guidelines currently provide advice to APS employees concerning the provision of advice to party committees and individual members of Parliament. In short, those sections of the Guidelines are consistent with the general principles set out earlier, i.e.

a) material provided by APS employees should be confined to factual and technical information that explains or provides background content about policies
b) APS employees should not be expected to provide opinion on Government policies or policy options; such matters would be more appropriately referred to the relevant Minister
c) information that is already 'readily available' should be provided, but care should be taken 'to avoid unauthorised disclosure of classified or otherwise confidential information', and
d) requests for party briefings should be made through the relevant Minister.

Special provisions apply during caretaker periods.

Under Public Service Regulation 2.1[7], APS employees are required not to disclose material where, in broad terms, the disclosure could be prejudicial to the effective working of government, or the material is confidential. There are a number of exceptions to this, including disclosure in accordance with an authorisation given by an Agency Head or disclosure that is otherwise authorised by law.

Taken together, these documents reaffirm the importance of the particular relationship between the APS and the Government. It is a relationship that requires high levels of trust and a recognition of the respective roles of Ministers and public servants.

The procedural and legal protections afforded to those officers

Section 12 of the *Parliamentary Privileges Act 1987* provides extensive protections to people giving evidence to a House or committee. Those protections include an explicit prohibition against actions that by 'fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means' influence whether a person gives evidence. This is supported by an offence provision in section 12(2) that, in broad terms, applies to retribution against a person for giving or proposing to give evidence.

In relation to APS employees who give evidence, or witnesses who give evidence that concern the interests of APS agencies or APS employees, it should be noted that section 13 of the Public

[7] http://www.comlaw.gov.au/Details/F2010C00745/Html/Text#param4

Service Act creates a legally binding Code of Conduct that, among other things, requires APS employees to:

a) behave honestly and with integrity in the course of their employment

b) comply with all applicable Australian law when acting in the course of their employment

c) not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment, and

d) at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.

Breach of the Code of Conduct by an APS employee attracts a range of possible sanctions under s.15 of the Public Service Act, up to and including termination of employment.

In other words, in addition to the strong enforcement framework within the Privileges Act, APS employees are subject to particular additional penalties if they act improperly toward any person because they have given evidence, or are considering given evidence.

Furthermore, the APS Values, also contained within the Public Service Act, support a culture within the APS that recognises the importance of the Parliament, and underscores the accountability of the APS to Parliament.

Given all of the above, I believe that the framework within which witnesses should be able to present material to a House or its committees is well established and well protected within the APS, particularly at the most senior levels of the Service which contain most of the employees for whom this is a regular aspect of their employment.

The awareness among agencies and officers of the nature of relevant advice and protections.

The Australian Public Service runs an annual survey of APS agencies to collect data that is then fed into the State of the Service Report. As part of that survey, in some years the Commission collects data that goes to the material available to SES employees that appear before Parliamentary committees.

The most recent data on this issue was sought in relation to the 2008-09 financial year and, given the consistency of the data with other years sampled, provides a useful indication of the strategies used by agencies in this area. That data suggests that almost all agencies have SES staff that are required to appear before committees from time to time, and that the strategies adopted to support their employees in understanding their obligations include:

a) mandatory training courses for recently appointed SES staff
b) voluntary (i.e. self-nominated) training courses
c) internal guidelines
d) internal briefing prior to attendance
e) learning through observation of committees in action, and
f) simulation exercises

In addition to programs that might be run by other agencies, and I understand that both Houses conduct training on this matter from time to time, the Australian Public Service Commission runs its own training to prepare APS employees appearing before committees as witnesses. That training includes discussion of their rights and responsibilities based on material prepared and published by the Senate, legal advice prepared by the Australian Government Solicitor, and a detailed consideration of the Guidelines prepared by the Department of Prime Minister and Cabinet.

Demand for places in this program is steady.

Thank you again for the invitation to provide a submission to the committee about this matter. If there is anything that I can add to or clarify, I would be pleased to discuss that matter with you further.

Yours sincerely

Stephen Sedgwick

2 June 2011

Leeder, Heather (SEN)

From: Macgill, David [David.Macgill@pmc.gov.au]
Sent: Thursday, 2 June 2011 12:46 PM
To: Committee, Privileges (SEN)
Cc: Lynch, Philippa
Subject: PM&C submission [SEC=UNCLASSIFIED]
Attachments: Submission.tif; Attachment A Commercial in confidence advice 2004.pdf; Attachment B PII claims - Sept 09 guidance to secretaries.pdf; Attachment C - AGS advice.pdf

Richard

Attached is PM&C's submission to the Privileges Committee inquiry into the guidance for officers giving evidence and providing information. As you will see, we are currently reviewing the Guidelines for Official Witnesses and hope to be able to provide to the Committee by the end of June.

I understand that the Committee is likely to authorise publication of the submissions it receives. Could you let me know when that happens, please?

Regards

David Macgill
Assistant Secretary
Parliamentary and Government Branch

Ph: 6271 5761

Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

Mr Richard Pye
Secretary
Senate Standing Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Mr Pye

SENATE PRIVILEGES COMMITTEE INQUIRY

The Department of the Prime Minister and Cabinet is pleased to provide the following material in response to the Committee's request for submissions to its inquiry into the adequacy and appropriateness of current guidance and advice available to officers giving evidence to Senate committees. I understand that the inquiry will have a particular focus on:

(a) the adequacy and applicability of government guidelines and instructions;

(b) the procedural and legal protections afforded to those officers;

(c) the awareness among agencies and officers of the extent of the Senate's power to require the production of information and documents; and

(d) the awareness among agencies and officers of the nature of relevant advice and protections.

This submission addresses in particular terms of reference (a) and (c) above.

The adequacy and applicability of government guidelines and instructions

The *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (the Guidelines) provide advice to Australian Public Service (APS) employees and other officials preparing to give evidence to parliamentary committees. The Guidelines were tabled in the Parliament in November 1989. The Guidelines are available here: http://www.dpmc.gov.au/guidelines/index.cfm.

While the Guidelines have not been updated since 1989, written supplementary advice has been issued on two occasions:

- In February 2004, the Department of the Prime Minister and Cabinet (PM&C) advised all secretaries of the approach being adopted in PM&C in relation to the motion agreed to by the Senate on 30 October 2003 relating to the making of claims to

withhold information from the Senate on the ground that is commercial-in-confidence. A copy of this advice is Attachment A.

- In September 2009, PM&C provided advice to all secretaries on the Senate order of 13 May 2009 relating to the process for making claims for public interest immunity (PII). A copy of this advice is at Attachment B. This advice has been circulated to all secretaries in the lead-up to each round of estimates hearings.

PM&C is currently reviewing the Guidelines to incorporate this advice and to address other issues that have been identified since 1989, including those raised by the Senate Foreign Affairs, Defence and Trade References Committee in the course of its inquiry into matters relating to events on *HMAS Success*, discussed below, and to expand on the guidance relating to secrecy provisions in legislation.

The Department expects to be able to provide revised Guidelines for the Committee's consideration by the end of June 2011.

In addition to the Guidelines, PM&C provides advice as required to officials of departments and agencies on their obligations as witnesses before parliamentary inquiries.

PM&C also provides advice of a general nature to departments and agencies on the limitations on the evidence that officials may give and the types of documents for which a public interest immunity claim might be made, as set out in paragraph 2.32 of the Guidelines. PM&C's approach to this function was described in evidence to the Senate Finance and Public Administration Committee in the course of its 2009 inquiry into *Independent arbitration of public interest immunity claims* (http://www.aph.gov.au/hansard/senate/commtee/S12652.pdf).

The *HMAS Success* inquiry

On 7 December 2009, in the lead up to the Senate Foreign Affairs, Defence and Trade References Committee inquiry into matters relating to events on *HMAS Success*, the Department of Defence (Defence) issued a circular (DEFGRAM) for employees and Defence personnel covering Defence participation in Parliamentary committees. This document was intended to remind staff of the correct procedures to be followed in their dealings with Parliamentary committees. It was subsequently withdrawn at the direction of the then Minister for Defence, Senator the Hon John Faulkner, and a revised circular was issued on 17 December 2009. However, the Foreign Affairs, Defence and Trade References Committee, which had expressed concern about the content of the 7 December circular, considered that the second DEFGRAM neither withdrew nor corrected the deficiencies in the first. Defence issued a third version of the DEFGRAM on 3 February 2010.

PM&C acknowledges that the current Guidelines are deficient in that they do not adequately address the situation raised in the *HMAS Success* inquiry. In particular, the advice at paragraph 2.50 of the Guidelines could be more clearly stated. PM&C considers that where a committee is inquiring into a particular event, it would be appropriate for any submission explaining relevant departmental policies or practices to be cleared in the usual way through the minister and departmental executive, and for the secretary to determine which employees should attend and give evidence in relation to those matters. However, employees whose involvement in the inquiry is a result of them being witnesses to the event in question should be able to explain their version of the event to the committee without clearing their evidence with the minister or departmental executive, or seeking their permission to attend.

An exception to the general rule about employees in this situation not clearing their evidence with the departmental executive would be where the proposed evidence might properly be the subject of a public interest immunity claim.

The Department intends to make this advice clear in the revised Guidelines.

The awareness among agencies and officers of the extent of the Senate's power to require the production of information and documents

The *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* and the supplementary advice set out in Attachments A and B provide detailed guidance on the Senate's power to require the production of information and documents.

There are many other documents which refer to the Guidelines, or provide additional information about the powers of the Parliament and the accountability obligations of APS employees, including:

- *Foundations of Governance*, a document published by the Australian Public Service Commission (APSC), in particular, the chapter on Accountability (http://www.apsc.gov.au/foundations/accountability.htm#relationshipplt)

- APSC Circular 2009/4: Disclosure of official information (http://www.apsc.gov.au/circulars/circular094.htm)

- *APS Values and Code of Conduct in Practice*, in particular, Chapter 2 of Section 1: Working with the Government and the Parliament (http://www.apsc.gov.au/values/conductguidelines4.htm)

- *Supporting Ministers, Upholding the Values*, in particular, Part 2.2.8 - Responding to questions on notice and appearing before parliamentary committees (http://www.apsc.gov.au/publications06/supportingministers2.htm)

PM&C considers that it would be reasonable to expect that most APS employees, particularly SES officers who are the most likely to appear before a parliamentary committee, would be familiar with some or all of these documents.

Power of the Senate to order the production of documents

PM&C considers that the Senate's power to require the production of documents in the possession of departments and agencies is well understood across the APS. However, the Department is aware that the Senate has on two recent occasions ordered the Productivity Commission to create and table reports on particular issues:

- On 16 November 2010, the Senate ordered that there be laid on the table a report by the Productivity Commission on the design of a process for the selection and ongoing review of the superannuation funds to be included in modern awards as default funds.

- On 12 May 2011, the Senate ordered that there be laid on the table a report by the Productivity Commission on the development of a sovereign wealth fund for Australia.

The Senate has also passed resolutions requiring the Australian Information Commissioner to provide a report to the Senate on the production of information and documents by a minister.

The Department has obtained advice from the Australian Government Solicitor on the Senate's powers to require statutory officers to produce reports in such circumstances. That advice states that the Senate does not have the power to require that such tasks be undertaken. A copy of the Australian Government Solicitor's advice is at Attachment C. The Department is aware that this advice is contrary to the views of the Clerk of the Senate on the matter. In the Department's view, however, and with respect to the Clerk, the advice of the Australian Government Solicitor is the correct statement of the Senate's powers.

Parliamentary Privilege

The Committee has expressed an interest in the application of parliamentary privilege to officers providing information to senators.

The protection of submissions and evidence is discussed in paragraph 2.39 to 2.42 of the Guidelines. It was also considered in Chapter 8 of the report of the former House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into whistleblowing protections within the Australian government public sector. The report made three recommendations that are relevant to the Committee's inquiry. They, and the government's response to those recommendations, are set out below:

> Recommendation 22:
> *The Committee recommends that the Public Interest Disclosure Bill include Commonwealth Members of Parliament as a category of alternative authorised recipients of public interest disclosures.*
>
> Government Response: Not agreed.
>
> The Government notes that parliamentary privilege and the implied right to freedom of political communication already provide some protection to Members of Parliament and persons who provide information to them in certain circumstances. The Government also refers to its responses to Recommendations 23 and 24.
>
> Recommendation 23:
> *The Committee recommends that, if Commonwealth Members of Parliament become authorised recipients of public interest disclosures, the Australian Government propose amendments to the Standing Orders of the House of Representatives and the Senate, advising Members and Senators to exercise care to avoid saying anything in Parliament about a public interest disclosure which would lead to the identification of persons who have made public interest disclosures, which may interfere in an investigation of a public interest disclosure, or cause unnecessary damage to the reputation of persons before the investigation of the allegations has been completed.*
>
> Government Response: Agreed in principle.

While the Government does not consider Members of Parliament should be authorised recipients under the scheme, it may be that they will from time to time become aware of a matter which is a public interest disclosure. Accordingly, the Government will consider whether to support the introduction of amendments advising Members of Parliament to exercise care in how such a matter is handled, were they to become aware of the substance of a public interest disclosure. For instance, the Government is concerned to avoid the identification of persons who have made public interest disclosures, interference in an investigation of a public interest disclosure, or unnecessary damage to the reputation of persons before the investigation of allegations has been completed.

Recommendation 24:
The Committee recommends that the Public Interest Disclosure Bill provide that nothing in the Act affects the immunity of proceedings in Parliament under section 49 of the Constitution and the Parliamentary Privileges Act 1987.

Government Response: Agreed.

For the avoidance of doubt, the PID Bill will provide that nothing in the Act affects the immunity of proceedings in Parliament under section 49 of the Constitution and the *Parliamentary Privileges Act 1987.*

The Government is developing legislation reflecting its response to the recommendations to the report for introduction this year. The proposed legislation will establish a framework for investigating allegations of wrongdoing in the Australian public sector through appropriate channels prior to any public disclosure. The framework will offer broad protections to persons who report wrongdoing in accordance with the scheme, including safeguards from victimisation and immunity from criminal liability, civil penalty and civil action such as defamation.

The Department will provide a further submission when the review of the Guidelines is complete. As I indicated earlier, I expect the review to be finalised by the end of June.

Officials from the Department will be pleased to assist the Committee with its inquiry if necessary.

Yours sincerely

Barry Sterland PSM
Acting Deputy Secretary
Governance

2 June 2011

(E) (A)

Sent to all Secretaries + ANAO, Omb, ONA, IGIS, NADC.
Sue 12/2/04

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Mr M J Taylor
Secretary
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Core 1, Level 4, Wing 2
Edmund Barton Building
Cnr Kings Ave & Blackall Street
BARTON ACT 2600

Dear Mr Taylor

Several agencies have asked this department for advice on the effect of the motion agreed to by the Senate on 30 October 2003 relating to the making of claims to withhold information from the Senate on the ground that it is commercial-in-confidence.

The attached paper has been prepared to provide guidance to employees of this department if the issue arises when they are giving evidence to a Senate Committee. You might wish to adopt the guidance in your department and provide copies to agencies within your portfolio.

Should you wish to discuss this matter, please contact me, on 6271 5786, or David Macgill, Assistant Secretary, Parliamentary and Government Branch, on 6271 5761.

Yours sincerely

Barbara Belcher
First Assistant Secretary
Government Division

11 February 2004

PROVISION OF COMMERCIAL-IN-CONFIDENCE MATERIAL TO THE SENATE

Purpose: To remind staff of Senate requirements regarding the provision of commercial-in-confidence material.

Background: On 30 October 2003 the Senate agreed to the following motion on commercial-in-confidence material:

> That the Senate and Senate committees shall not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information.

Comment: In accordance with paragraph 2.28 of the "Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989", staff are reminded that any claim to withhold information from the Senate on the grounds public interest, including commercial-in-confidence, must be made by a minister and accompanied by a statement setting out the basis for the claim.

In practice, and particularly at Estimates hearing, Senate Committees have not always pressed a request for material when officials have indicated that they believe there are grounds for considering it confidential. The Senate order set out above does not mean that officials should no longer indicate that they consider that material might appropriately be withheld. However, if the Committee presses its request, officials should refer it to the relevant minister. It will frequently be necessary at that point for officials to brief the minister on the reasons for their belief that the material is confidential and it would be appropriate for them to ask the Committee for time to allow this to occur. If the minister subsequently decides to withhold any material, the Senate order requires that he or she, rather than an official, makes the claim for confidentiality.

In briefing the minister, staff are reminded that there is no general basis to refuse disclosure of commercial information to the Parliament even if it has been marked "commercial-in-confidence". The appropriate balance between the interests of accountability (ie. the public interest in disclosing the information) and appropriate protection of commercial interests (ie. the public interest in the information remaining confidential) should be assessed for each case.

As a general guide, it would be inappropriate to disclose information that could disadvantage a contractor and advantage their competitors in future tender processes, for example:

(a) details of commercial strategies or fee/price structures (where this would reveal information about the contractor's cost structure or whether the contractor was making a profit or loss on the supply of a particular good or service);
(b) details of intellectual property and other information which would be of significant commercial value; or
(c) special terms which are unique to a particular contract, the disclosure of which may, or could reasonably be expected to, prejudice the contractor's ability to negotiate contracts with other customers or adversely affect the future supply of information or services to the Commonwealth.

The following information would normally be disclosed:

(a) details of contracting processes including tender specifications, criteria for evaluating tenders, and criteria for measuring performance of the successful tenderer (but not information about the content or assessment of individual tenders);
(b) a description of total amounts payable under a contract (ie as a minimum the information that would be reported in the Commonwealth Gazette or, for consultants, the information that would be reported in an agency's annual report);
(c) an account of the performance measures to be applied; and
(d) factual information about outcomes.

Where commercial information has been received on the basis of undertakings of confidentiality, this does not automatically preclude release to the Parliament. Staff should consider the public interest balance, as part of their advice to the minister, and may wish to seek the views on the possible release of the document of any person(s) or organisation(s) to whom undertakings were given (as would occur under sections 27 or 43 of the FOI Act). In most cases, the sensitivity of commercial-in-confidence material would diminish with time and this should be taken into account when assessing the public interest balance.

Any public interest immunity claim should be supported by reference to the particular detriment that would flow from release of the information in the particular case.

6

ESTIMATES HEARINGS AND PUBLIC INTEREST IMMUNITY CLAIMS: SENATE ORDER OF 13 MAY 2009

Background

On 13 May 2009, the Senate passed an Order setting out the process for making claims of public interest immunity (PII) in committee proceedings. A copy of the order is attached.

2. The Senate Procedure Committee reviewed the operation of the Order in August 2009. A copy of the Procedure Committee's report can be downloaded from http://www.aph.gov.au/Senate/committee/proc_ctte/reports/2009/report3/index.htm.

3. Officials who are expected to appear at Estimates and other Parliamentary committee hearings need to be familiar with the requirements of the Order and the grounds for claiming public interest immunity as set out in the Guidelines.

4. The process for claiming public interest immunity described in the Order is largely consistent with the process that is set out in paragraphs 2.19 to 2.38 of the *Government Guidelines for Official Witness before Parliamentary Committees* (the Guidelines) published by the Department of the Prime Minister and Cabinet at http://www.dpmc.gov.au/guidelines/docs/guidelines_govt_docs.pdf. While the Guidelines explain the process for making public interest immunity claims to protect against the disclosure of information or documents at committee hearings, it has been relatively uncommon in practice for officials appearing as witnesses at committee hearings, particularly Estimates hearings, to be asked to provide copies, for example of departmental briefs to ministers. The Order of 13 May 2009 makes it seem more likely that officials and ministers will be asked to provide information or documents of this kind at Senate committee hearings, including Estimates hearings, than has been the case in the past.

Summary of advice

5. It is important that the public interest is not inadvertently damaged as a result of information or documents being released without a proper assessment of the possible consequences. Accordingly, if an official is asked to provide information or documents to a Senate committee:

- if the official is satisfied that its disclosure would not harm the public interest, he or she should advise the minister that the material can be provided;
- if the official is satisfied that the disclosure of the material would damage the public interest, he or she should advise the committee that the material cannot be provided and explain how its disclosure would damage the public interest; and
- if the official is uncertain whether the disclosure of the material would damage the public interest, he or she should take the question on notice.

The grounds for claiming public interest immunity and the process for making such a claim at Estimates hearings are set out below.

Grounds for a public interest immunity claim

6. While the parliament has the power to require the production of documents, it is acknowledged that the Government holds some information the disclosure of which would be contrary to the public interest. Where the public interest in the information remaining confidential outweighs the public interest in its disclosure, the Government would normally make a public interest immunity claim.

7. There are several recognised and accepted grounds on which ministers may rely when claiming public interest immunity in relation to information or documents requested by the Senate or a Senate committee. These are set out at paragraph 2.32 of the Guidelines. As the Procedure Committee notes in its report, however, it is conceivable that new grounds could arise.

8. By way of example, public interest immunity claims may be made in relation to information or documents whose disclosure would, or might reasonably be expected to:

- damage Australia's national security, defence or international relations;
- damage relations between the Commonwealth and the States;
- disclose the deliberations of Cabinet; and
- prejudice the investigation of a criminal offence, disclose the identity of a confidential source or methods of preventing, detecting or investigating breaches of the law, prejudice a fair trial or endanger the life or safety of any person.

9. It is, of course, possible for more than one ground to apply to the same document, in which case all relevant grounds should be specified.

Deliberative documents

10. A public interest immunity claim may also be made in relation to material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government *where disclosure would be contrary to the public interest* [emphasis added – see paragraph 2.32(d) of the Guidelines]. Because the Senate Order requires ministers to specify the harm that could result from disclosure of information or a document of this kind, claims for public interest immunity on this ground will involve a greater degree of judgment and subjectivity, and may therefore be less readily accepted, than claims based on the various grounds described in paragraph 8 above.

11. Information and documents whose disclosure would not damage the public interest should be provided to Parliamentary committees as soon as possible. It is important, however, that officials and ministers do not inadvertently damage the public interest by disclosing information that ought to remain confidential. Officials and ministers therefore need to consider carefully whether particular documents should be the subject of a public interest immunity claim before they are released. This will frequently not be possible in the relatively short timeframe available for Estimates hearings, particularly as the responsible minister and relevant officials may need to devote their time to the hearings. If the request relates to a small number of documents, it may be possible to respond before the committee completes its hearings. If a large number of documents have been sought, or if the issues involved are complex, the minister may need to advise the committee that it will not be possible to respond until a later date (although it may be possible to provide some documents, or parts of some documents, while the committee is sitting).

12. In briefing ministers on the question whether it is appropriate to disclose information or documents to a committee, officials must assess and balance the public interest in disclosure of the information or document against the public interest, if any, in maintaining its confidentiality. This is a similar process to that which is undertaken when officials provide advice to ministers in relation to a Senate order to produce documents, or in deciding

whether to provide access to documents under section 36 of the *Freedom of Information Act 1982* (although it should be noted that the provisions of the FOI Act have no direct application to questions about the provision of information to a Senate committee), or in response to an order to discover documents that are relevant to litigation involving the Commonwealth.

13. It may also be appropriate to decline to provide information or documents if to do so would unreasonably disclose personal information or disclose material that could be the subject of a claim for legal professional privilege.

Process for claiming public interest immunity

14. Public interest immunity claims must be made by ministers. However, Senate committees, particularly Estimates committees, receive most of their evidence from officials, and it is they who are most likely in the first instance to be asked to provide information or documents that might be the subject of a public interest immunity claim.

15. The Senate Order describes in some detail the process leading up to a claim for public interest immunity. An official who considers that he or she has been asked to provide information or a document that might properly be the subject of a public interest immunity claim could either:

- advise the committee of the ground for that belief and specify the damage that might be done to the public interest if the information or document were disclosed (paragraph 1 of the Order); or
- take the question on notice.

The official could also refer the question to the minister at the table, but it is unlikely that the minister would be well-placed to make a considered decision on the question at that time.

16. The public interest in not disclosing information or documents on any of the grounds described in paragraph 8 above is self-evident and in many cases the need for such a claim would be readily apparent to officials at the hearing. If it is not, the official should ask if the question can be taken on notice so that it can be properly considered and the minister briefed.

17. It would be reasonable to expect that an official's evidence that a document is a Cabinet document or that, in his or her view, disclosure of the information or document in question might damage Australia's national security, for example, would be accepted by individual senators and committees with the result that the matter would not be taken further.

18. If that is not the case, however, the committee or the senator may request the official to refer the matter to the responsible minister (paragraph 2 of the Order). This would frequently mean that the question would need to be taken on notice. It is possible that the minister at the table, if he or she is not the relevant portfolio minister, may wish to ascertain the portfolio minister's views on the possible release of the information or document.

19. If the minister concludes that it would not be in the public interest to disclose the information or document, he or she "shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document" (paragraph 3 of the Order).

20. Paragraph 4 of the Order is not relevant for the purposes of Estimates committees, which cannot take evidence in camera, but needs to be considered in the context of other committee hearings.

21. If a committee considers that a minister's statement in support of a public interest immunity claim does not justify the withholding of the information or document, it can report the matter to the Senate (paragraph 5 of the Order). In that event, the Senate would probably consider whether to order that the documents be produced. If the committee decides not to report the matter to the Senate, the senator who sought the information or document may do so (paragraph 6 of the Order).

22. In recent years, officials and ministers have not normally been pressed for copies of deliberative documents, particularly during Estimates hearings, with questions being limited to whether ministers have been briefed on particular issues and, if so, when that occurred. Paragraph 7 of the Order makes it clear, however, that committees will not accept a claim for public interest immunity based only on the ground that the document in question is a deliberative document: a minister must also specify the harm to the public interest that may result from the disclosure of the information or document that has been requested. Again, the need to give careful consideration to the issues involved will frequently mean that the matter has to be taken on notice.

23. Finally, the Order recognises that there may be occasions when it would be more appropriate for the head of an agency, rather than the minister, to make a claim for public interest immunity (paragraph 8 of the Order). This might occur, for example, in relation to information or documents held by agencies that have a significant degree of independence from Government, such as law enforcement agencies, courts and tribunals, the Auditor-General, Commonwealth Ombudsman and some regulatory agencies.

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31 May 2011

David Macgill
Assistant Secretary
Parliamentary and Government Branch
Department of the Prime Minister and Cabinet
One National Circuit
BARTON ACT 2600

Dear Mr Macgill

Power of the Senate to order the Information Commissioner or the Productivity Commission to report to the Senate

1. We refer to your request for advice of 24 May 2011 in relation to this matter.

BACKGROUND

Senate orders

2. On 26 October 2010 and 23 November 2010, the Senate agreed to orders requiring the Information Commissioner to report to the Senate on disputes between the executive and the Senate as to production of documents by the executive to the Senate.

3. On 16 November 2010, the Senate agreed to an order requiring the Productivity Commission (Commission) to provide to the Senate by 31 May 2011 a report which sets out the design of a process for the selection and ongoing review of the superannuation funds to be included in modern awards or enterprise agreements as default funds.

4. On 12 May 2011, Senator Bob Brown gave notice that he intends to move the Senate to make an order which would require the Commission to provide to the Senate by 20 September 2011 a report on the development of a sovereign wealth fund for Australia.

5. The terms of the orders and proposed order are set out in the Attachment. For the purposes of this advice, we will treat the proposed order as having been made and we will refer to all of the orders as the relevant orders.

Senate Standing Order 164

6. As we understand it, the Senate has purported to exercise the power in Senate Standing Order 164 which provides that:

> (1) Documents may be ordered to be laid on the table, and the Clerk shall communicate to the Leader of the Government in the Senate all orders for documents made by the Senate.
>
> (2) When returned the documents shall be laid on the table by the Clerk.
>
> (3) If a minister does not comply with an order for the production of documents, directed to the minister, within 30 days after the date specified for compliance with the order, and does not, within that period, provide to the Senate an explanation of why the order has not been complied with which the Senate resolves is satisfactory:
>
> (a) at the conclusion of question time on each and any day after that period, a senator may ask the relevant minister for such an explanation; and
>
> (b) the senator may, at the conclusion of the explanation, move without notice – That the Senate take note of the explanation; or
>
> (c) in the event that the minister does not provide an explanation, the senator may, without notice, move a motion in relation to the minister's failure to provide either an answer or an explanation.

Interpretation of orders

7. We understand the order of 26 October 2010 to require the Information Commissioner to review the adequacy of the grounds given by the executive for refusing to produce information related to certain mining tax proposals and to report to the Senate in relation to the release of the information. The report is to include, 'if applicable', the Information Commissioner's 'arbitration' on the release of the information. It is not clear what is meant by arbitration being applicable. It may be possible to read the order as requiring a report to be laid on the table if any exists at the relevant time, but it would appear that this was not the intention. In our view, it is clear that the order is intended to require the Information Commissioner to assess the executive's claims and produce to the Senate a report on the adequacy of those claims.

8. The order of 23 November 2010 is in the same form as the order of 26 October 2010 but relates to documents about GST arrangements between the Commonwealth and the States and Territories.

9. We understand the order of 16 November 2010 to be an order to the Commission to produce a report which sets out the design of a process for the selection and ongoing review of the superannuation funds to be included in modern awards or enterprise agreements as default funds, and which meets the other requirements specified in the order. Again, it may be possible to read the order as requiring a

report to be laid on the table if any exists at the relevant time, but it would appear that this was not the intention.

10. We understand the sovereign wealth order to be an order to the Commission to produce a report on the development of a sovereign wealth fund for Australia, having regard to the matters in paragraph (c) of the order. Again, it does not appear that the intention of the order was to require a report to be laid on the table only if a report exists at the relevant time.

11. In all cases, the use of the term order, rather than request, makes it clear that the Senate is purporting to require creation and production of the relevant report, such that failure to do so may be the basis for a finding of contempt of the Senate. Although paragraph (c) of the sovereign wealth order 'requests' the Commission to consider options in preparing the report, paragraph (b) 'orders' production of the report.

Information Commissioner

12. The Information Commissioner is appointed under s 14(1) of the *Australian Information Commissioner Act 2010*. Section 10(1) of that Act gives the Information Commissioner the following functions:

> (a) the information commissioner functions;
>
> (b) the freedom of information functions;
>
> (c) the privacy functions.

13. These functions are defined in ss 7-9 of the Australian Information Commissioner Act. Section 7 provides:

> The ***information commissioner functions*** are as follows:
>
> (a) to report to the Minister on any matter that relates to the Commonwealth Government's policy and practice with respect to:
>
> (i) the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by the Government; and
>
> (ii) the systems used, or proposed to be used, for the activities covered by subparagraph (i);
>
> (b) any other function conferred by this Act or another Act (or an instrument under this Act or another Act) on the Information Commissioner other than a freedom of information function or a privacy function.

Section 8 sets out the freedom of information functions which include:

> ...

(d) providing information, advice, assistance and training to any person or agency on matters relevant to the operation of the *Freedom of Information Act 1982*;

...

(f) making reports and recommendations to the Minister about:

(i) proposals for legislative change to the *Freedom of Information Act 1982*; or

(ii) administrative action necessary or desirable in relation to the operation of that Act;

(g) monitoring, investigating and reporting on compliance by agencies with the *Freedom of Information Act 1982*;

(h) reviewing decisions under Part VII of the *Freedom of Information Act 1982*;

...

(k) any other function conferred on the Information Commissioner by the *Freedom of Information Act 1982*;

(l) any other function conferred on the Information Commissioner by another Act (or an instrument under another Act) and expressed to be a freedom of information function.

14. Section 9 sets out the privacy functions which include functions conferred on the Information Commissioner by the *Privacy Act 1988*.

15. The functions of the Information Commissioner do not include any function which would encompass reporting on or arbitrating disputes between the executive and a House of the Parliament as to production of documents by the executive to the House.

16. Neither the Australian Information Commissioner Act nor any other Act or other legislative instrument gives the Information Commissioner power to require production to him of the Treasury documents on which the orders of 26 October 2010 and 23 November 2010 would require him to report.

Productivity Commission

17. The Commission is established by s 5 of the *Productivity Commission Act 1998*. Its functions are set out in s 6:

(1) The functions of the Commission are:

(a) to hold inquiries and report to the Minister about matters relating to industry, industry development and productivity that are referred to it by the Minister; and

(b) to provide secretariat services and research services to government bodies as directed by the Minister; and

(c) on and after 1 July 1997, to receive and investigate complaints about the implementation of competitive neutrality arrangements in relation to Commonwealth government businesses and business activities and to report to the Minister on its investigations; and

(d) to provide advice to the Minister about matters relating to industry, industry development and productivity, as requested by the Minister; and

(e) to undertake, on its own initiative, research about matters relating to industry, industry development and productivity; and

(f) to promote public understanding of matters relating to industry, industry development and productivity; and

(g) to perform any other function conferred on it by this Act; and

(h) to do anything incidental to any of the preceding functions.

...

18. Parts 3 and 4 of the Productivity Commission Act establish procedures for requiring the Commission to hold inquiries and report to the Minister, or give advice to the Minister. There is no express authority in the Productivity Commission Act for the Senate to compel the Commission to provide a report to it.

SUMMARY OF ADVICE

19. You ask for advice about the power of the Senate to order a person or body to create a report and then produce the report to the Senate, and in particular the power to make the relevant orders.

20. Under s 49 of the Constitution, the powers of the Senate are as 'declared by the Parliament' (i.e., by Act of the Parliament), and until so declared, are 'those of the Commons House of Parliament of the United Kingdom ... at the establishment of the Commonwealth'.

21. Generally, the powers of the Senate include a power to punish for contempt a person who fails to comply with an order of the Senate to produce documents which are in existence, subject to any appropriate public interest immunity claim.

22. In our view, it is clear that the powers of the Senate do not extend to compelling production of documents which are not in existence, and which the person to whom the requirement is directed would need to create from information not held by or known to the person. The powers of the Senate do not extend to requiring the Information Commissioner to obtain and consider documents, review them and the grounds specified by the Government for its failure to produce them to the Senate, create a report on these matters and produce the report to the Senate, as the orders of 25 October 2010 and 23 November 2010 purport to do. Nor do they extend to requiring the Commission to design a process, create a report about the process and produce the report to the Senate, as the order of 16 November 2010 purports to

do. Nor do they extend to requiring the Commission to gather information, consider options, reach a conclusion, create a report and produce the report to the Senate, as the sovereign wealth order purports to do.

23. No such power has been declared by Act of Parliament. Nor is there a basis for any such power in the powers of the House of Commons at the establishment of the Commonwealth. The practice of the Senate since federation is not a source of power. In any case, that practice does not support the existence of such a power.

REASONS

24. A House of the Parliament can **request** that a person produce to it any documents or do anything else (including prepare a report). However, it is necessary to consider the scope of the power to make an **order** for production of documents which is enforceable against a person, in that failure to comply may amount to a contempt of the House. This advice proceeds on the basis that we are considering the scope of the Senate's power to require production of documents on pain of contempt of the Parliament.

25. It is well established that, subject to appropriate public interest immunity claims, both Houses of the Commonwealth Parliament have a power to compel production of documents on pain of contempt of the Parliament.[1]

26. However, it is necessary to consider the scope of the power to produce 'documents'. It is necessary to consider whether the Senate has power to compel a person to produce to it a document which is not already in existence, and which is not created from information held by or known to the person. This is the task set out in the relevant orders. Each order would involve work to obtain information, consider a range of factors, reach a conclusion and create a report based on this new information and thinking which could be produced to the Senate.

27. For the purposes of this advice, it is not necessary to consider whether the Senate has the power to compel a person to produce to it a document which is not already in existence, to the extent to which the document compiles information (i.e., puts together materials from various sources[2]) held by or known to the person or otherwise provides information held by or known to the person. Nor is it necessary to consider whether the power to compel production of a document extends to production of a document not already in existence which analyses or expresses an opinion about information held by or known to the person. The relevant orders seek to exercise a much broader power.

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1 *Odgers' Australian Senate Practice*, 12th ed., 2008, pp.30, 58-61, 415-416, 441-445; *House of Representatives Practice*, 5th ed., 2005, pp.591, 643-644; Campbell, *Parliamentary Privilege*, 2003, p.152.

2 See *Macquarie Dictionary*, online edition, definition of 'compile'.

Section 49 of the Constitution

28. Sections 49 and 50 of the Constitution provide that:

> 49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.
>
> 50. Each House of the Parliament may make rules and orders with respect to:
>
> (i) the mode in which its powers, privileges, and immunities may be exercised and upheld;
>
> (ii) the order and conduct of its business and proceedings either separately or jointly with the other House.

29. Under s 49 of the Constitution, the Senate has two sources of power, a declaration by the Parliament (i.e., an Act of the Parliament), and the powers of the House of Commons at the establishment of the Commonwealth in 1901.[3]

30. It is clear that, at 1901, the House of Commons had power to punish a person for contempt of the House where the person failed to comply with an order that the person attend to give evidence or produce documents, including under a 'return to order' (the equivalent of an order made under Senate Standing Order 164).[4] Subject to any limitation on the power in s 49 of the Constitution, and any declaration by the Parliament, s 49 would provide each House of the Commonwealth Parliament with the same power.

31. There is a possible limitation on the power conferred by s 49 of the Constitution derived from the limitations on the legislative power of the Commonwealth which may preclude the use of compulsory powers by a House of the Parliament to inquire into matters on which the Commonwealth Parliament cannot legislate.[5] However, the Commonwealth Parliament would be empowered to legislate in relation to all of the matters the subject of the relevant orders.

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3 Another possible source of the powers of a House of the Parliament is an implication of power necessary to the functioning of the House: see Greenwood QC and Ellicott QC, *Parliamentary Committees: Powers over and Protection Afforded to Witnesses*, 1972 – Parliamentary Paper No. 168, p.3; *Odgers*, p.59. However, any such power is unlikely to extend the power to compel production of documents. The Parliament can also make laws with respect to 'matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof ...' (Constitution, s 51(xxxix)).

4 *Erskine May's Parliamentary Practice*, 10th ed., 1893, pp.507-510.

5 *Odgers*, pp. 59-60; *House of Representatives Practice*, pp.645-647; Campbell, pp.153-154; Greenwood and Ellicott, pp.8-9.

32. There may also be limitations on the use of compulsory powers against members of the other House of the Parliament and in relation to State members of parliament and office-holders, but the relevant orders do not give rise to any such issue.[6]

33. The Parliament has declared some of the relevant powers, privileges and immunities in the *Parliamentary Privileges Act 1987*. That Act preserves the powers, privileges and immunities conferred by s 49 of the Constitution other than as expressly provided by the Act (s 5). It regulates to some extent the contempt powers of the Houses (e.g., in relation to levels of penalty (s 7)) but does not make any declaration affecting the question of the scope of the power to compel production of documents. There are no other Acts which relevantly declare the general scope of this power.

34. Therefore the central question is whether the House of Commons at 1901 could have required the executive (including an officer like the Information Commissioner and a body like the Commission) to create a report and produce the report to the House as purportedly required by the relevant orders.

Power of the House of Commons at the establishment of the Commonwealth

35. The Commons were 'the general inquisitors of the realm' – they could investigate any subject matter and, ancillary to performance of this function, could compel the attendance of witnesses.[7] The purpose of the investigation could have been in aid of the legislative function of the House and possibly also in aid of a function of scrutinising, and offering advice to, the executive.[8] At the least, the House of Commons had power to require presentation to the House of documents held by public offices and bodies (returns by order and by address) and, by way of select committees, to 'send for persons, papers, and records' because these are the instances of the power to produce documents mentioned in the 1893 edition of Erskine May's *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (*May*).[9]

36. It is not clear that the Houses of the Commonwealth Parliament have the function of 'general inquisitor'.[10] Nevertheless, they have the power to compel attendance of witnesses and require production of documents at least in order to make inquiries in aid of their legislative function, and perhaps also a function of scrutinising, and

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6 *Odgers*, pp. 60-61; *House of Representatives Practice*, pp.655-656.

7 *Howard v Gosset* (1845) 10 QB 359 at 379-380.

8 See the discussion in Greenwood and Ellicott, pp.3-5.

9 10th ed., 1893, pp.507-510, 384.

10 *Attorney-General (Cth) v MacFarlane* (1971) 18 FLR 150; Greenwood and Ellicott, pp.6-7; Campbell, pp.154-155.

advising, the executive.[11] The Standing Orders of the Senate and the House of Representatives give the Houses the returns by order and committee powers.[12]

37. Yet there is nothing to suggest that the powers of the House of Commons at 1901 extended to requiring production of documents not in existence and not derived from information held by or known to the person required to produce them, or that these powers were ever used by the House of Commons for this purpose.

38. *May* states that 'Parliament is invested with the power of ordering all documents to be laid before it, which are necessary for its information'.[13] 'Information' means, in essence, knowledge of facts or circumstances.[14] The statement is made under the heading 'Accounts, Papers, and Records Presented to Parliament' by way of introduction to a description of the procedures for returns by order and by address. The examples given of documents obtained are existing documents or documents containing matters of fact known to the person required to produce them.[15]

39. The other instance of the use of a power to compel the production of documents described in the 1893 edition of *May* is the power of select committees to send for persons, papers and records. The discussion in *May* concerns existing documents.

40. In addition, *May* states that the purpose of a select committee is 'to consider or to take evidence upon any matters, and to report their opinion, for the information and assistance of the house'.[16] The power to send for persons, papers and records is said to be needed because the object of select committees is usually to take evidence. Under the power, 'witnesses may be summoned by an order ... and must bring all documents that will be required for the use of the committee'.[17]

41. Thus *May* makes clear that witnesses can be summoned by order to give oral evidence and to produce documentary evidence. Not surprisingly, one judge of the Australian High Court has presumed that the power of the House of Commons to compel production of documents derives from its status as a court of record.[18] It is true that there are significant differences between taking evidence in aid of the judicial function and taking evidence in aid of the legislative function. However, the origin of the powers to compel attendance and production of documents as a process for taking evidence from witnesses, vested in an institution which was a court of record, strongly suggests that the powers were directed at obtaining

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11 *Odgers*, p.59; Campbell, p.155.

12 Senate Standing Orders 34(1), 164; House of Representatives Standing Orders 200, 236.

13 p.507.

14 *A New English Dictionary on Historical Principles* (1901), p.274; *Macquarie Dictionary*, online edition.

15 pp.507-510.

16 p.378.

17 p.384.

18 *Egan v Willis* (1998) 195 CLR 424 at 472 [92], McHugh J.

information held by or known to the person to whom the order was directed, not at compelling a person to undertake original work to create documents for production to that body.

42. There can be no denying that the power of the House of Commons at 1901 to require production of information was extensive. However, in 1908 Redlich described the power 'in its most general form' as being 'to summon any subject of the state as a witness, to put questions to him and to examine any memoranda in his possession'.[19] This is a conception of the power entirely consistent with the power of a court to summon witnesses and produce documents, and entirely consistent with the understanding at 1901 of the power of the House of Commons as disclosed by *May* – i.e., in both cases, a power not extending to ordering the creation of documents derived from information not held by or known to the person required to produce.

No power to compel persons to undertake tasks

43. Furthermore, having regard to both the ordinary understanding of a power to produce documents and broader principle, it would be difficult to maintain that the power to require a person to produce documents extended to requiring the creation of documents which were not derived from information held by or known to the person. The effect of such a power would be to require a person to undertake a task, and then create a document evidencing this. In the case of the order of 16 November 2010, for instance, the effect of the order would be to compel the Commission to design a process for selection of default superannuation funds for modern awards and enterprise agreements (albeit that the Commission would also be required to record its design in a document to be provided to the Senate). This would in substance be a power to require the undertaking of a task, not the provision of a document.

Private citizen

44. Assuming that the power of the Houses to compel production of documents extends in the same way to private citizens as to the executive,[20] such a power would mean that a House of the Parliament could compel a private citizen to undertake original work (including conducting wide ranging reviews and arbitrating disputes) for the purposes of a House of the Parliament.

45. In our view, it is clear that such a broad power was not within the powers of the House of Commons at the establishment of the Commonwealth acting on its own (i.e., without legislation). On that basis, it is not within the powers of the Senate acting on its own. The power of the Senate to require production of a document does not extend to impose a legal obligation on a private citizen to undertake a task,

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19 Redlich, *Procedure of the House of Commons: A Study of its History and Present Form*, 1908, cited in Department of the Senate, *Procedural Information Bulletin No. 247*, 14 February 2011, p.8.

20 See *Odgers*, pp.416, 444.

and then create a document recording this to be produced to the Senate, where failure to comply with the obligation would render the citizen liable for contempt.

Executive

46. Even if the power of the Houses to compel production of documents extends only to the executive (including statutory bodies and offices), the same is true. A power to require production of documents is not a power to require original work to be undertaken, at least where not derived wholly from information held by or known to the person required to produce the document.

47. In any case, it is quite clear that the power of a House of the Parliament to require production of documents cannot be exercised to usurp the powers of the executive. Acceptance that the Senate has the power asserted in the relevant orders would involve acceptance that a House of the Parliament could usurp the executive power by directing the activities of persons and bodies (whether Ministers, public servants or statutory office-holders or bodies) across the whole of government, regardless of the resources available to them and subject only to a requirement that they provide a report to the House.

48. This would clearly be inconsistent with the proper roles of the Parliament and the executive, whether at 1901 or now.

49. In 1882, May in his *Constitutional History of England* stated that:

> Parliament has no direct control over any single department of the state. It may order the production of papers for its information; it may investigate the conduct of public officers and may pronounce its opinion upon the manner in which every function of government has been or ought to be discharged; but it cannot convey its orders or directions to the meanest executive officer in relation to the performance of this duty. Its power over the executive is exercised indirectly, but not the less effectively, through the responsible ministers of the Crown.[21]

50. To like effect is Hearn, in *Government of England* (1886):

> Although in matters of state Parliament possesses so unlimited a power of criticism, it has not the smallest share of direct authority. It may censure and complain of any proceeding in which the prerogative has been improperly exercised. It may remonstrate against any anticipated act of the Crown. It may recommend the adoption of any line of policy. It may express its opinion that any officer or any public body to whom any discretionary power is entrusted by law should exercise that power in a particular manner. But these powers are merely acts of admonition. The legal responsibility of action still remains with the person in whom the discretion is vested. It is the duty of Parliament to advise but not to command the Crown. ... It cannot of itself issue orders even to the doorkeepers of any public departments.[22]

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21 Vol. II, 1882, pp. 85-86, quoted in Greenwood and Ellicott, p.4.

22 2nd ed., 1886, p.149.

51. Anson in *The Law and Custom of the Constitution* (1911) states that 'the power of the House of Commons to criticize the action of the executive and to call ministers to account is undoubted, but it is distinguishable from the direct interference with executive action which would ensue from Parliamentary inquiries held on transactions which were in course of being carried though by ministers', and notes, in this context, that the executive can always hold inquiries on its own account.[23]

52. This principle is reinforced for the Commonwealth Parliament by the structure of the Australian Constitution, within which s 49 sits. The Constitution provides for different functions for the Parliament and the executive, and a level of separation between them. Of course Ministers are required to be members of the Parliament (s 64), and are accountable to the Parliament in fundamental ways pursuant to the principle of responsible government. But executive power is vested in the executive by s 61 of the Constitution, and not in the Parliament, let alone one House of the Parliament.

53. We note also that contemporary understanding of the inability of a House of the Parliament to direct the executive as to the performance of its functions is the same as it was at federation. *House of Representatives Practice* (5th ed., 2005) states:

> Other than in relation to matters such as its power to send for persons, documents and records and its powers in regard to enforcing its privileges, decisions of the House alone have no legal efficacy on the outside world. The House, as a rule, can only bring its power of direction into play in the form of an Act of Parliament—that is, only in concert with the other two components of the legislature, the Sovereign and the Senate. This is the only means by which the House can direct (rather than influence) departments of State, the courts and other outside bodies to take action or to change their modes of operation.[24]

54. Of course the executive for this purpose includes the statutory bodies and officers which are part of the Commonwealth and enjoy the privileges and immunities of the Crown. The Information Commissioner and the Commission have a measure of independence from Ministers but nevertheless are part of the Commonwealth and enjoy the privileges and immunities of the Crown.[25]

55. Therefore in our view the House of Commons at 1901 could recommend a course of action, including after inquiring into the matter itself, but it could not require the executive to inquire into a matter or adopt a policy or otherwise exercise the executive power or statutory power in a particular way. By operation of s 49 of the Constitution, the powers of the Senate are limited in the same way. We think therefore that the relevant orders of the Senate are not within its powers.

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23 Volume I: The Parliament, 4th ed., 1911, p.378.

24 p.313.

25 The functions of the Information Commissioner and the Commission are determined to a large extent by the relevant Ministers. Their employment regimes are subject to the *Public Service Act 1999* (Australian Information Commissioner Act ss 5(3), 23; Productivity Commission Act s 44), and their financial management regimes are subject to the *Financial Management and Accountability Act 1997* (*Financial Management and Accountability Regulations 1997*, reg 5, Schedule 1, items 164A, 177).

Post-federation practice

56. The practice of the Senate since federation is not a source of power for the Senate. It is necessary to find the Senate's powers in a declaration by the Parliament, or the power of the House of Commons at the establishment of the Commonwealth, or some other source in or derived from the Constitution. We acknowledge that the practice of the Senate may provide some evidence of the powers of the House of Commons at the establishment of the Commonwealth. However, we do not think that the practice of the Senate supports the power to make the relevant orders.

Standing Orders

57. The Standing Orders of the Houses continue to reflect the position at 1901 – i.e., they contain descendants of the 'return to order' provision and the committee power to send for persons, papers and records.[26] The Standing Orders continue generally to be used to obtain from the executive documents held by the executive or derived from information held or known by it.[27] Committees continue to summon witnesses to give evidence and produce documents, suggesting a power to obtain information held or known by them.[28]

Odgers' Australian Senate Practice

58. *Odgers' Australian Senate Practice* (12th ed., 2008) (*Odgers*) asserts no more than a power to require production of documents compiled from information held by a person or to make statements about matters. *Odgers* states that:

> Orders for the production of documents may require the production of documents in the possession of a person or body, or the creation and production of documents by the person or body having the information to compile the documents ... . Some orders require the production by the relevant officers or bodies of statements about particular matters ... .[29]

59. Even accepting that the power to produce documents extends to compilation, the first sentence in this statement in *Odgers* first appeared only in the 7th edition of that publication in 1995, and the second sentence of that paragraph in the 8th edition in 1997, both well after 1901. Statements to this effect did not appear in the earlier editions. In particular the 1st edition which was published in 1953 stated only that:

> The Senate, on motion upon notice, may order Accounts and Papers to be laid upon the Table. As an illustration, on the 30th June, 1943, motion was made, upon notice, that all papers in relation to the differentiation in the payment of travelling allowances to officers of the Commonwealth Public Service be laid on the Table of the Senate.[30]

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26 See footnote 12 above.

27 See *Odgers*, pp.442-444.

28 See, for example, *Odgers*, p.59, Ch 17; *House of Representatives Practice*, Ch 18.

29 *Odgers*, p.442. No change to this statement is made by the 2010 Supplement.

30 p.209.

60. The orders to produce cited in *Odgers* to support the statement quoted at paragraph 58 above were all made from 1992, again well after 1901. The only exceptions are examples given in a 1993 advice of the Clerk of the Senate (discussed below), none of which involved a requirement to produce documents not compiled from information held or known by a person (i.e., 19th century British statistics, VIP flights (1967) and unproclaimed legislation (1988)).

61. Furthermore, the examples given in *Odgers* to support these statements do not establish a consistent practice since 1901 which could provide evidence of a power in the House of Commons at 1901 to compel production of documents not in existence, and which need to be created from information not held by or known to the person ordered to produce them. This is not surprising given that *Odgers* does not assert such a power.

62. In support of the proposition in the first sentence in the statement quoted at paragraph 58 above, *Odgers* cites a 1993 Senate debate in which advice of the then Clerk of the Senate dealing with this issue was incorporated.[31] The Clerk advised in much the same terms as the first extracted sentence from *Odgers* above, also using the language of 'compiling' documents from 'information'. The 'occasional' examples the Clerk cited in support of his advice were:

— production to the British Parliament in the 19th century of statistics compiled by government bodies – details were not provided but use of the word 'compilation' suggests that the relevant information was held by the government bodies;

— production of documents relating to VIP flights 'which clearly required the creation of documents containing information culled from various records';

— production of lists of unproclaimed legislation;

— production by the Auditor-General of a statement answering questions about reports provided by Australia Post to the Prices Surveillance Authority.

63. *Odgers* also cites production of an indexed list of departmental files and production by a Minister of information as to certain financial contributions already made.

64. The examples given to support the proposition in the second sentence of the quotation from *Odgers* in paragraph 58 above (statements of officers or bodies) are production of:

— a report by the Australian Securities Commission (ASC) of the *First Corporate Law Simplification Act 1995* – the report was based on information in the ASC's databases;[32]

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31 *Senate Hansard*, 27 September 1993, pp.1165-1166.

32 *Report to the Senate: Review of the First Two Years of Operation of Certain Amendments of the First Corporate Law Simplification Act 1995*, 1998, [1.4].

- a statement by a Minister as to progress of an inquiry, proposed finalisation date and likely tabling date, and a copy of the report of the inquiry when finalised;
- a report, commissioned by a Minister, of an ASC investigation into a sale of a company's assets;
- a statement of a Minister explaining an alleged failure to monitor and control sites of genetically-engineered crops and details of action being taken, when and how the Minister was informed, how he reacted and other factual information; and
- indexed lists of departmental and agency files.

65. In the context of orders to produce documents, *Odgers* also refers to a number of other reports to the Senate by the Auditor-General in 1994 and 1995 before that office was constituted under the *Auditor-General Act 1997* and given immunity from parliamentary and executive direction.[33] However, it is not clear that the Auditor-General accepted that he was compelled to provide the relevant documents.

66. In the case of a report into leasing arrangements for a building in Melbourne, the Auditor-General presented his report to the President and the Speaker '[i]n accordance with the authority contained in the *Audit Act 1901*' to undertake a special investigation.[34] He stated that:

> On 22 June 1994, the Senate agreed to an order **requesting** the Auditor-General to investigate and table a report on fourteen specific matters relating to tenancy arrangements in the Casselden Place building in Melbourne. .... The Auditor-General **consented** to the Order and has now completed the investigation. This report of the findings of the investigation is tabled in accordance with the Order for production of the document.[35] [emphasis added]

67. One at least of the other orders requires that there be laid on the table a report by the Auditor-General which takes into account information publicly available information (relating to the financial statements of Australian National Line) and 'information which the Auditor-General requires and is authorised or empowered to obtain'. However, this report also states that it is undertaken '[i]n accordance with the authority contained in the *Audit Act 1901*' and specifically refers to the Senate's order as a 'request'.[36]

68. Even if the Auditor-General had accepted that he was compelled by the Senate's orders to provide the reports, it may be that at that time there was some acceptance of the view that the Auditor-General's position was distinguishable from that of other

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33 p.444.

34 *Audit Report No. 4 1994-95: Project Audit: Special Investigation into Casselden Place Building, Melbourne*, p.iii.

35 *Audit Report No. 4 1994-95*, p.1.

36 *Audit Report No. 11 1994-95: Project Audit; ANL Valuation Issues*, pp. iii, ix, 1.

members of the executive, given that the office had been described as working 'first and foremost for the Parliament' or as a 'constitutional orphan' (neither directly part of the legislature nor the executive).[37]

69. *Odgers* also refers to orders requiring the Australian Competition and Consumer Commission (ACCC) to report to the Senate.[38] The production of these reports seems to have been treated by the ACCC as authorised by s 29(3) of the *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010*).

70. *Odgers* also refers to a report by the Human Rights and Equal Opportunity Commission on mandatory sentencing laws.[39] As acknowledged in *Odgers*, however, the resolution of the Senate merely 'requested' the Commission to provide the report.

71. Most of the examples cited by *Odgers* involved production of documents compiled from information held or known by a person. The only exceptions are where the Senate did not purport to compel production or the executive did not accept, or clearly accept, that there was compulsion to produce.

Erskine May

72. We note that the 23rd edition of *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (2004) discusses the descendants of the returns power and the committee inquiry power.[40] No statements are made equivalent to the statements from *Odgers* cited at paragraph 58 above and no other suggestion is made that the powers extend to require production of documents not in existence, and which need to be created from information not held or known by the person. It notes that a select committee has formally ordered a private society to produce information, but only information possessed by the society.[41]

Practice generally

73. It is also noted more generally that the fact that the executive has in the past complied with orders to produce documents does not necessarily demonstrate the existence of a power in the House of Commons at 1901, and thus the Senate, to compel provision of the documents on pain of contempt. There are a number of reasons why the executive may treat any such order as a request and, in its discretion, comply with it. In particular, if the Senate is of the view that information would be helpful, and the executive is agreeable to providing it, then the executive in doing so does not demonstrate the existence of a power to compel provision of the

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37 Joint Committee of Public Accounts, *Report No. 346: Guarding the Independence of the Auditor-General*, 1996, pp.37-44.

38 p.444.

39 p.444.

40 pp.263-264, 757-758.

41 p. 758.

document on pain of contempt. It is clearly not possible to presume that an executive body which has not disputed the power of the Senate to make an order has done so because there is no basis to make a challenge.[42]

Conclusion

74. Therefore in our view the practice of the Senate does not provide evidence that the powers of the House of Commons at the establishment of the Commonwealth extended to compelling production of documents which were not in existence, and which the person to whom the requirement was directed would need to create from information not held by or known to them.

Senate Standing Order 164

75. The relevant orders were purportedly made in exercise the power in Senate Standing Order 164(1). This is quoted above in paragraph 6 and provides that '[d]ocuments may be ordered to be laid on the table'. As we have noted, we do not think this Standing Order is evidence of a relevant power of the House of Commons at the establishment of the Commonwealth. In any case, we do not think that this Standing Order in its terms extends to compelling production of documents which are not in existence, and which the person to whom the requirement is directed would need to create from information not held by or known to them, including to making the relevant orders.

Relationship between Senate power to produce documents and statutory functions of Information Commissioner and Commission

76. The Australian Information Commissioner Act sets out the functions and powers of the Information Commissioner. The Productivity Commission Act sets out the functions and powers of the Commission and the mechanism for the conduct of inquiries by the Commission. The functions of the Information Commissioner and the Commission extend to anything incidental to any of their other functions[43] and this would extend to producing to a House of the Parliament documents they hold related to any of their functions.

77. The functions of the Information Commissioner and the Commission do not extend to compliance with the relevant orders. A statutory office-holder or body can perform only the functions that it is given by statute.[44] The powers of the Senate alone cannot extend to the conferral of additional functions on statutory office-holders and bodies.

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42 See Department of the Senate, *Procedural Information Bulletin No. 249*, 28 March 2011, p.11.

43 Section 10(2) of the Australian Information Commission Act provides that the Information Commissioner has power to do all things necessary or convenient to be done for or in connection with the performance of the specified functions. Section 6(1)(h) of the Productivity Commission Act expressly confers incidental functions on the Commission.

44 *MacLeod v Australian Securities Investment Commission* (2002) 211 CLR 287 at 302 [44], 305 [57].

78. The Information Commissioner can of course report to the Minister on the government's policy and practices in relation to the production to Houses of the Parliament of information held by the government.[45] This function could be performed after a request from the Senate.

79. Equally, the Commission can make inquiries and report to the Minister on matters that are referred to it by the Minister,[46] and can undertake, on its own initiative, research about matters.[47] These powers of the Minister and the Commission could be exercised, in accordance with the terms of the Productivity Commission Act, after a request from the Senate.

80. The Australian Information Commissioner Act and the Productivity Commission Act contain no express limitation on the powers and privileges of the Houses of the Parliament. However, in the present context, there is no conflict between the powers of the Houses and the functions and powers of the Information Commissioner and the Commission under those Acts. The Houses of the Parliament do not have power to require the Information Commissioner and the Commission to undertake the tasks set out in the relevant orders. The statutory functions and powers of the Information Commissioner and the Commission do not authorise them to undertake the tasks.

81. The principle that statutory office-holders and bodies cannot be given functions except by statute is consistent with, and supports, accepted understandings of the relationship between the Houses of the Parliament on the one hand, and the executive and its agencies on the other – i.e., that one House alone cannot direct the activities of the executive and its agencies.

82. Please let us know if we can provide any further assistance.

Yours sincerely

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45 Australian Information Commissioner Act, s 7(a).

46 Productivity Commission Act, s 6(1)(a).

47 Productivity Commission Act, s 6(1)(e).

ATTACHMENT

Information Commissioner

1. On 26 October 2010, the Senate agreed to the following order:

That the Senate—

(a) notes that:

(i) the Government has refused to provide information requested by the Senate about key assumptions it has used to estimate revenue from its original as well as its revised mining tax proposals,

(ii) specifically, the Government has refused to provide information about changes to commodity price, production volume and exchange rate assumptions and any other variables relevant to its mining tax revenue estimates,

(iii) in its response to the relevant order of the Senate, the Government justified its refusal to provide the information on the basis that, `commodity price forecasts underpinning the terms of trade forecasts are based in part on information provided by companies that is commercial in confidence. Disclosure of these individual commodity price forecast may therefore prejudice negotiations between private companies',

(iv) the information sought by the Senate is published by the Western Australian State Government in its budget papers as a matter of course, and

(v) information published by the Western Australian Government includes its commodity price assumptions developed after relevant information about commodity price expectations is obtained from relevant mining companies, which includes at least some of the companies involved in the mining tax negotiations with the Federal Government;

(b) based on the Government's response does not accept that there are any legitimate public interest grounds for the Government to refuse to provide the requested information;

(c) orders that there be laid on the table by noon on Thursday, 28 October 2010:

(i) all the Government assumptions used to estimate the revenue from the Resource Super Profits Tax as contained in the 2010-11 budget, including, but not limited to, the assumptions on commodity prices, production volumes and exchange rates, and

(ii) all the Government assumptions used to estimate the revenue from and overall fiscal impact of the Minerals Resource Rent Tax/expanded Petroleum Resource Rent Tax arrangement announced on 2 July 2010, including all changes to assumptions used for the 2010-11 budget;

(d) notes the agreements between the Government and other parties and independents to refer disputes about public interest disclosures to the Information Commissioner, who will arbitrate on the release of documents; and

(e) orders that, if the Government does not produce the information required by this order within the specified timeframe, there be laid on the table by 15 November 2010, a report on the matter by the Information Commissioner, including a review of the adequacy of the grounds specified by the Government for its refusal to produce the information and, if applicable, his arbitration on the release of the information.

2. On 23 November 2010, the Senate agreed to the following order:

That the Senate—

(a) notes that:

(i) the Government has refused to provide the information requested by the Senate in relation to advice to Government about the requirement for unanimous agreement from all parties to change the GST arrangements,

(ii) the Government did not justify its refusal by pointing to a recognised public interest ground and by explaining any harm to the public interest from releasing that information,

(iii) both the 1999 *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations* (GST Agreement) as well as the *Intergovernmental Agreement on Federal Financial Relations in 2008* require unanimous agreement from all parties to make any changes to GST arrangements,

(iv) there is no unanimous agreement to change the GST arrangements, and

(v) in its Incoming Government Brief, Treasury advised the Government that 'Western Australia has indicated that it is not prepared to agree to proposed amendments to the IGA notwithstanding that they preserve the current arrangements for Western Australia' and that 'as changes can only be made to the IGA by unanimous agreement of all parties, alternative approaches may need to be considered to give effect to the financing arrangements for other jurisdictions';

(b) orders again that there be laid on the table by 5 pm on Thursday, 25 November 2010, any advice (including legal advice and advice from the Solicitor-General or the Australian Government Solicitor) to the Department of the Prime Minister and Cabinet or the Department of the Treasury, or advice from these departments to their respective Ministers, concerning the need for unanimous agreement to vary GST arrangements;

(c) notes the agreements between the Government and other parties and independents to refer disputes about public interest disclosures to the

Information Commissioner, who will arbitrate on the release of documents; and

(d) orders that, if the Government does not produce the information required by this order within the specified timeframe, there be laid on the table by 15 December 2010, a report on the matter by the Information Commissioner, including a review of the adequacy of the grounds specified by the Government for its refusal to produce the information and, if applicable his arbitration on the release of the information.

Productivity Commission

3. On 16 November 2010, the Senate agreed to the following order:

That the Senate—

(a) notes that:

(i) the current process to select default superannuation funds under modern awards is not transparent, not objective or evidence based, not competitive and not subject to systematic review,

(ii) the top ten most commonly listed default funds under modern awards are all union based industry super funds, with these ten funds listed as default super funds in modern awards 330 times,

(iii) the Cooper Review into superannuation also confirmed that current default superannuation fund arrangements undermined competition as new employees typically become a member of a default fund, and

(iv) a competitive, transparent and efficient superannuation industry is critically important to maximise value for all superannuants;

(b) endorses the Labor Party's commitment before the 2010 election to instruct the Productivity Commission to design a process for the selection and ongoing review of the superannuation funds to be included in modern awards or enterprise agreements as default funds; and

(c) orders that there be laid on the table, no later than 31 May 2011, a report by the Productivity Commission on the design of a process for the selection and ongoing review of the superannuation funds to be included in modern awards or enterprise agreements as default funds, with the requirements that:

(i) the process is to be based on objective criteria and evidence and be subject to systematic review, so that the selection and ongoing review of eligible default funds is transparent and competitive,

(ii) the process is to help maximise employees' retirement incomes by ensuring that only those superannuation funds that deliver – and continue to deliver – the best results to their members are

able to be included as default fund options in modern awards and enterprise agreements, and

(iii) in designing the process the Productivity Commission make reference to the existing sophisticated system of superannuation fund ratings which has evolved over the past 20 years and is already used widely by employees, employers and financial planners in making decisions on fund selection.

4. On 12 May 2011, Senator Bob Brown gave notice of the following motion:

That the Senate—

(a) notes that:

(i) the current resources boom is generating enormous wealth from which all Australians should reap the benefits,

(ii) a sovereign wealth fund could help fund the needs of future generations, as well as seeking to improve budget measures in the immediate budget cycle,

(iii) approximately 36 countries have sovereign wealth funds which currently manage more than $4.2 trillion worth of assets globally, and

(iv) a recent statement by the International Monetary Fund called on Australia to establish a sovereign wealth fund to protect the economy from shock falls in commodity prices and 'save revenue to ensure a more equal distribution of its benefits across generations and reduce long-term fiscal vulnerabilities from an ageing population and rising health care costs';

(b) orders that there be laid on the table, no later than 20 September 2011, a report by the Productivity Commission on the development of a sovereign wealth fund for Australia; and

(c) requests that the Productivity Commission in preparing its report consider options for the establishment of a sovereign wealth fund in Australia, including:

(i) regulatory framework,

(ii) how funds are invested and managed,

(iii) funding mechanisms,

(iv) transparency and accountability,

(v) governance structure,

(vi) how capital and returns should be utilised, and

(vii) any other related matters.

TO: SENATE PRIVILEGES COMMITTEE

FROM: PROFESSOR GEOFFREY LINDELL

SUBJECT: GUIDANCE FOR OFFICERS GIVING EVIDENCE AND PROVIDING INFORMATION

DATE: 7 JUNE 2011

SUBMISSION

Introduction

1. The purpose of this document is to provide a submission in relation to the above Inquiry and I am grateful to the Committee for having granted to me generous extensions of time to enable me to provide the submission to the Committee.

2. I wish to deal with one of the issues which the Committee is inquiring into, namely, the requirements to give evidence and produce documents in order to provide information to the Senate and its committees. In particular I wish to deal with the difficulties encountered by the Senate with the newly created Australian Information Commissioner to report on the failure of Ministers to produce documents to the Senate. [1]

3. I believe I have the expertise to comment on such matters having regard to the knowledge I have gained in this area both as a former senior public servant and a senior academic with an established research interest in the fields of constitutional and parliamentary law. Amongst other things I have written widely on the scope of parliamentary inquiries and their powers to compel the giving of evidence. [2]

4. Finally, by way of introduction, I should indicate that my interest in the issue canvassed in this submission was first aroused when Professor McMillan drew my attention to the differences that have arisen between the Senate and himself in his capacity as the newly created Australian Information Commissioner. This was because of my interest in matters of parliamentary law. I have also known him as a professional colleague and friend since the time when we both lectured at the Australian National University Law School. However the views expressed in the submission are my own and the submission has been prepared independently of him or his office.

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[1] *Department of the Senate Procedural Information Bulletin* No 247 dated 14 February 2011 (Occasional Note) and No 249 dated 28 March 2011(Occasional Note – Conclusion)('Senate Information Bulletins Nos 247 and 249').

[2] "Parliamentary Inquiries and Government Witnesses" (1995) 20 *Melbourne University Law Review* 383 and "Current and Former Members and Ministers (and their Ministerial Staff): Immunity from Giving Evidence to Parliamentary Inquiries Established by Houses of Parliament in which they were not Members" (2002) 17 *Australasian Parliamentary Review* (Spring 2002 No 2) 111.

Summary of views

5. The views expressed in this submission are summarised below as follows:

(i) The submission is concerned with whether the Senate possesses the power to compel public or private experts to 'create documents' in the sense of providing reports or expressing considered opinions on matters that fall within their expertise when:

- those witnesses have not previously provided those reports or expressed those opinions to anyone else; and

- the reports or opinions are otherwise outside their personal knowledge or cannot be collated from documents within their possession.

The reports and opinions in question would also require fresh work before a report is made or an opinion is expressed.

(See para 6.)

(ii) In my view there are strong reasons for thinking that the power referred to in sub-para (i) above does not exist in law. This means that the Senate may lack the power to compel witnesses to "create" documents for the same purpose under the undoubted power of the Senate to call for persons, papers and records. (See paras 7 – 25.)

(iii) I respectfully suggest that the proper and legal course to follow when the Senate seeks a report to provide it with information and expert opinions it requires to fulfil its inquisitorial function, is to appoint paid special advisers or invite willing experts to attend round table discussions and seminars, to provide that information and expert opinions. (See para 21.)

(iv) There are additional and equally strong reasons for thinking that the power in question does not exist in the case of statutory officers or bodies who only possess such powers and functions as are outlined in the legislation which creates those officials or bodies when those powers and functions do not include the preparation of the reports required to be produced by the Senate. (See paras 27 and 33.)

(v) The additional reasons mentioned in sub-para (iv) above include the legal inability of statutory officials and bodies to perform functions and duties which are otherwise *inconsistent* with the performance of the powers and functions conferred by the legislation on those officials or bodies. paras 28 and 33.)

(vi) Even though legislation is not presumed to override the privileges of the Parliament without a clear statutory intention to that effect, that principle does not apply to a power which does not form part of those privileges.

Different considerations may apply to the powers of the Senate as regards matters which relate to the way statutory officials or bodies exercise and perform the powers and duties conferred and imposed on them by legislation. (See para 29 – 30.)

(vii) Even if the power of the Senate to order the 'creation' of a document exists in the sense denied in this submission so as to form part of the privileges of the Senate, the legislation which confers powers and imposes duties on statutory officials and bodies is likely to be seen as a sufficient statutory intention to rebut the presumption referred to in sub-para (vi) above as regards the exercise of the power of the Senate in relation to those officials and bodies. (See para 31.)

(viii) The reasons referred to in sub-paras (iv) – (vii) above for denying the relevant power of the Senate may not however be inconsistent with such an official or body acceding to the request by the Senate to prepare a report in both their voluntary and personal capacity as long the performance of such a function was not inconsistent with the performance of their statutory functions and duties. (See para 32.)

(ix) In my view the refusal of the Australian Information Commissioner to accede to the order of the Senate asking him to report on the failure of Ministers to produce certain documents to the Senate is well based having regard to the considerations referred to above in sub-paras (i) – (viii) above including the principles referred to in sub-para (iv) – (viii) above. (See paras 34-7.)

(x) In my respectful opinion the recent and other practices and precedents relied on to support the alleged power of the Senate to prepare the kind of reports described in sub-para (i) above do not support the existence of that power. (See paras 38-42 and 44.)

(xi) Unlike the position which prevailed before the passing of the *Parliamentary Privileges Act* 1987 (Cth), there may now be scope for testing in a court of law the soundness of the conclusions referred to sub-paras (ii), (iv) and (x) abovc. (See paras 43-4.)

(xii) A number of considerations militate against the wisdom or propriety of the Senate exercising the power denied in this submission. The preferable course, both as a matter of law and policy is for the Senate to appoint willing persons to act as special advisers to assist it and its committees or seek the willing participation of experts at round table discussions and seminars held for the same purpose. Such advisers and round table and seminar participants could provide the information and opinions needed to enable the Senate to perform the fact finding functions as part of the 'Grand Inquest of the Nation'. (See paras 47 – 9.)

The relevant issues

6. The submission is concerned with whether the Senate possesses the power to compel public or private expert witnesses to provide reports or express considered opinions on matters that fall within their expertise when:

- those witnesses have not previously provided those reports or expressed those opinions to anyone else; and

- the reports or opinions are otherwise outside their personal knowledge or cannot be collated from documents within their possession.

The reports and opinions in question would also require fresh work before a report is made or an opinion is expressed. The Senate has asserted that it possesses this power and it is in this sense that it is has asserted that it has the power to compel witnesses to "create" documents.

7. This in turn gives rise to four essential issues The *first* is whether the power in question is conferred on the Houses of the Australian Parliament under s 49 of the Australian Constitution and, in particular, under the undoubted powers of both Houses to call for persons papers and records. The *second* concerns the effect of legislation which defines the functions and duties of statutory officials and bodies on the same power. A *third* issue concerns the justiciability of the foregoing issues. The *fourth* and final issue is concerned with the fairness of exercising the power in question even if contrary to the doubts expressed in this submission it is thought that the power nevertheless exists in law.

First issue: scope of the power to call for persons, papers and recordsdocuments

8. The Houses of the Australian Parliament, their members and their committees enjoy the same powers privileges and immunities as those of the House of Common in the United Kingdom at the establishment of the Commonwealth by reason of Con s 49. [3] At that time in 1901 the House of Commons had the power to act and did act as the 'Grand Inquest of the Nation.' [4] In *Howard v Gossett* [5] Coleridge J said:

> "[T]he Commons are in the words of Lord Coke, the general inquisitors of the realm…it would be difficult to define any limits to which the subject matter of their inquiry can be bounded…they may inquire into everything which it concerns the public weal for them to know; and they themselves…are entrusted

[3] The considerations raised in this submission with regard to the powers of the Senate and its committees are equally applicable to the House of Representatives and its committees. It needs to be remembered that the powers of the Senate to order persons, papers and records can only be exercised by Senate Committees to whom such powers have been delegated. Any references in this submission to the Senate should therefore also be taken to include those committees which have been given those powers by the Senate.

[4] See as regards this term the authorities cited in Lindell "Parliamentary Inquiries and Government Witnesses" above n 2 at p 385 n 4. See also J Hatsell, *Precedents of Proceedings in the House of Commons* (1818) vol 2 at 158 and P Thomas, *The House of Commons in the Eighteenth Century* (Clarendon Press: Oxford, 1971) at p 14.

[5] (1845) 10 QBD 359.

> with determination of what falls within that category. Co-extensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, [and] to enforce it by arrest where disobedience makes that necessary…" [6]

9. It is also worth quoting in full a passage from a well known source of parliamentary law upon which reliance was placed in the relevant Senate Information Bulletin:

> "The House of Commons has long maintained as a principle of its customary law that it is entitled to demand the use of every means of information which may seem needful, and, therefore, to call for documents which it requires. The claim may be enforced without restriction. In its most general form it is displayed in the right of the House to summon any subject of the state as a witness, to put questions to him and to examine the memoranda in his possession. Practically speaking in its constant thirst for information upon the course of administration and social conditions, the House generally turns to the departments as being the organs of the state which are best, in many cases exclusively, able to give particulars as to the actual conditions of the life of the nation and as to administrative action and its results from time to time."[7]

The passage is highly significant and its correctness can be readily accepted as long as care is taken not to read more into the reference to "every means of information which may seem needful" than is reasonably justified. It will be important to refer again to this passage later in this submission.

10. As will be apparent from my previous writing I have in the past subscribed and continue to subscribe to the enjoyment of the widest powers of parliamentary inquiry and the co-extensive power to call for persons, papers and records. In particular I have not accepted that those powers are legally constrained by doctrines of Executive privilege which are applied to constrain the powers of ordinary courts of law to compel the giving of evidence and the production of documents. It is possible that this view should now be reconsidered even for the Houses of the Australian Parliament in the light of *Egan v Chadwick* [8] and the recent judicial acknowledgments that the Australian Constitution impliedly incorporates essential features of the British doctrine of *responsible* government [9] Those possibilities may be put to one side as not directly bearing on the issue canvassed in this submission.

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[6] *Ibid* at pp 379-380.

[7] Senate Information Bulletin No 247 cited above n 1 at pp 8-9 quoting with approval from J Redlich, *The Procedure of the House of Commons - A Study of its History and Present Form* (1908) vol 2 at pp 39-40.

[8] (1999) 46 NSWLR 563.

[9] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-9, 561. And see also G Lindell, "Responsible Government and the Australian Constitution – *Conventions* transformed into *Law*?: *Law and Policy Paper No 24* (ANU Centre for International and Public Law and Federation Press 2004) esp at pp 2-3 and 15-6. A majority of the NSW Court of Appeal recognised Cabinet secrecy but not legal professional privilege as a constraint on the power of the NSW Legislative Council to call for the production of documents.

11. I should also indicate that, like others, [10] I have assumed in the past that the same power extends to compelling ordinary persons to give evidence when they do not have any connection with the government of the nation - even though the High Court may be tempted in the future to imply legal limits on the power in order to protect the rights of individuals.[11] However this submission is based on the same key assumption whatever limits on that power, if any, may be developed by the Court in the future. The assumption is important because if the power to compel public officials extends to compelling them to create documents in the sense asserted by the Senate it will also appy to ordinary individuals.

12. Finally in this connection, I am also prepared to assume as I have in the past that the mere potential for the abuse of a power is not a reason in itself for denying the existence of a power. [12] Some level of trust and good sense should be presumed on the part of those who exercise public power.

13. But it is not inconsistent with this presumption to realise that sometimes the obviously unfair results which flow from adopting a point of view regarding the scope of a power requires clear and persuasive authority to confirm the existence of that scope if it is to be read as leading to such a result. At the very least the unfair results would seem to require the exercise of caution before accepting the asserted scope of

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[10] See in particular the valuable discussion in G Taylor, "Parliament's Power to Require the Production of Documents – a Recent Victorian Case" (2008) 13 *Deakin Law Review* 17 esp at pp 38-43 where the author makes out a strong case in favour of the assumption outlined in the text above and cites some pre-1900 examples of the House of Commons ordering the production of documents from private individuals and bodies. Like the Houses of the Australian Parliament, the Houses of the Victorian Parliament enjoy the same powers privileges and immunities as the British House of Commons in 1901 and 1855 respectively. The learned author has undertaken careful research to explain why a statement to the contrary only began to appear in Sir Erskine May's famous work on Parliamentary Practice by the time the 4th edition was published in 1859. He concludes that it was probably only intended as a statement about "the wise use of the Parliament's powers, and certainly not a statement about their legal extent" (at p 40). The statement had suggested that the power could not be exercised in relation to private associations or from individuals not exercising public functions. It also seems to account for a similar limitation on the power to order the production of documents made in I Harris (ed), *House of Representatives Practice* (5th ed, 2005) at p 591 where reliance is placed on the 23rd ed of May at p 263 but the statement found on that page seems to contradict another statement on p 751 of the same edition ("There is no restriction on the power of committees …order of reference.") I respectfully suggest that the suggested qualification in Harris requires re-examination in the light of the analysis by Associate Professor Taylor. For further support for the assumption in the text see Thomas above n 4 at p 24, P Leopold, "The Power of the House of Commons to Question Private Individuals [1992] *Public Law* 451 (despite the fact that reference is there made to what may have been the first instance in which a witness refused to produce documents to a committee of the British House of Commons since 1835) and D McGee, *Parliamentary Practice in New Zealand* (2005, 3rd ed) at p 428.

[11] Lindell "Parliamentary Inquiries and Government Witnesses" above n 2 at pp 390 -1. Note the refusal of McHugh J to accept that the implied powers of the NSW Legislative Council extended to compelling ordinary citizens to produce documents: see *Egan v Willis* (1999) 195 CLR 424 at [93] and cf Gaudron, Gummow and Hayne JJ who thought it was unnecessary to address that issue in that case at [56]. They also distinguished the powers of both Houses of the Australian Parliament because of the Con s 49: at [28] – [29]. The powers of the Houses of the New South Parliament are not as wide as the powers of the Houses of other Australian Parliaments which enjoy the powers of the British House of Commons.

[12] Lindell "Parliamentary Inquiries and Government Witnesses" above n 2 at p 390.

the power. [13] I believe that the first question addressed in this submission involves the need for the caution mentioned.

14. It is clear that witnesses subpoenaed by the Senate to give evidence or produce documents, as is the case with witnesses in ordinary court proceedings can be required to answer relevant questions or produce relevant documents. But the issue here relates to the insufficiency of the answers or the inability to produce the documents where this results from the:

- inability of witnesses to provide meaningful information because the question raises matters outside their field of knowledge or, if the witnesses are experts, they had not previously had to consider the issue on which their expert opinion was required ; or

- in the case of an order to produce documents, they are not in the possession of the witnesses or could not be created by collating information from documents that are within the possession of the witnesses.

In short the expert witnesses concerned - whether public or private - would have to undertake fresh work which would involve time and effort and possibly also without adequate remuneration to prepare a report in the circumstances mentioned above.

15. The normal and long accepted notion of evidence is that a witness in ordinary court proceedings can only provide evidence based on things acts or events and words which the witness has become directly aware by their own observation *ie* what the witness has seen, heard, felt, smelt and tasted. [14] So far as expert witnesses in those proceedings are concerned the practice that is followed in Australia and England is that as a general rule the court will not in its discretion compel an unwilling expert to give evidence where the expert has had no connection with the facts or the history of the matter in issue in any court proceedings. [15] Regard is had to the necessity of the expert having to spend time and study collating material to prepare to take part in a trial in which the expert witness had no professional interest. The position may be different if the expert has already given an opinion on the issue in question. [16] It is possible that he same rules of practice may be followed in the United States. [17]

16. This is surely significant even though it is true that the rules of evidence in court proceedings which are generally *adversarial* in nature do not apply to constrain the manner in which evidence is obtained by parliamentary committees which are

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[13] *Reid v Sinderberry* (1944) 68 CLR 504 at pp 510 per Latham CJ and McTiernan J.
[14] A Wells, *An Introduction to the Law of Evidence (*1963) at para 1.16.
[15] See eg *Re Application of Forsythe; Cordova v Philips Roxan Laboratories* (1984) 2 NSWLR 327, *Seyfang v G D Searle & Co* [1973] QB 148 and Cross *on Evidence* (LexisNexis Online) para 13265 where other authorities are cited to the same effect (as available to me in May 2011 <http://www.lexisnexis.com.proxy.library.adelaide.edu.au/au/legal/results/pubTreeViewDoc.do?nodeId=TAAHAABAADAAI&pubTreeWidth=23%25>).
[16] *Harmony Shipping Co SA v Davis* [1979] 3 All ER 177 and Cross above n 15 para 13265 where other authorities are cited to the same effect.
[17] See the cases cited in L Berlin "Can a Radiologist Be Compelled to Testify as an Expert Witness" 185 *American Journal of Roentgenology* 36 in nn 6-11 (available to me online as at 7 May 2011 <http://wwww.ajronline.org/cgi/content/full/185/1/36>). I have not however found it necessary to make an exhaustive search of the American position.

essentially *inquisitorial* in character. A few examples will suffice to show the sweeping and wide ranging nature of the power of Senate to call for persons papers and records if the practice described above in relation to court proceedings is not applied in this context. If the power existed to force expert witnesses to give opinions and prepare reports on matters with which they had no previous connection the following results would flow:

- practising and retired lawyers as well as retired judges could be required to express opinions about the law on new matters;

- medical research workers could be required to carry out research and report in regard to matters not previously researched; and

- car manufacturers could be required to report on the effectiveness of safety devices which had yet to be fitted to newly manufactured cars

17. The foregoing examples show that if the power exists it would mean that in effect the expert witnesses could be conscripted into the service of the Senate by having to perform new work against their will and possibly without adequate remuneration for their services. It would be apt to describe such a service as "civil conscription" – the phrase found in Con s 51(xxiiiA).[18] The traditional view has been since the famous historical struggles between the Crown and Parliament during the 17th century that explicit legislative authority is needed to authorise governmental authorities to require ordinary citizens to pay tax or lend money to the government and one would think the same applies to the conscription of labour. [19]

18. It follows that *explicit* judicial or parliamentary authority should be required to uphold a view of the power which is alleged to authorise this kind of compulsion. But such judicial and other authority that I am aware of, has not gone beyond upholding the powers of the House of Commons and its Committees in 1901 to require the giving of evidence or the production of documents. They have not extended to requiring private individuals or public officials to perform new tasks which involve particular skills within their sphere of expertise. My researches into old [20] and, with

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[18] Regarding the power of the Australian Parliament to make laws for "the provision of … medical and dental services (but not so as to authorise any civil conscription)".

[19] This recalls the remarks of a famous Chief Justice of NSW, namely, Sir Frank Jordan who had occasion to refer to war time regulations and directions made under them which required ordinary civilians to accept employment nominated by war time Commonwealth officials. He thought the regulations "according to their natural construction would have reduced the population to a state of serfdom more abject than any which obtained in the Middle Ages": *Ex parte Sinderberry; Re Reid* (1944) 44 NSW SR 263 at p 266. He also thought there was nothing "in the Australian Constitution which authorised the Executive Government to impose upon the people of Australia the status of villeinage.": *ibid.* It is significant that he also referred the famous John Hampden who figured in the 17th century disputes referred to in the text: at p 270. The decision of the Court to hold the relevant regulations and direction invalid was later reversed on appeal to the High Court because of the exigencies of the war under the extended aspect of the federal legislative power to make laws with respect to defence: Con s 51(vi) as to which see the case on appeal cited in n 13 above.

[20] Hatsell above n 4 (including vol 2 ch X at pp 151-162), Sir R Palgrave and A Bonham Carter (eds), *Sir Erskine May's Parliamentary Practice* (10th ed , 1893) (in chs XV, XVI and XXI and pp 384 and 509)('May's Parliamentary Practice'), E Blackmore, *Manual of the Practice, Procedure, and Usage of the House of Assembly of the Province of South Australia* (1885) (inc pp 113 -7, 166 – 170) and same

one significant exception, new texts [21] on parliamentary law and the relevant judicial authorities have failed to yield authority for such a sweeping and far ranging power. A similar absence can be found in the some leading texts which deal with the coercive powers of Royal Commissions and other public inquiries which play an inquisitorial role. [22]

19. Moreover some of the statements which I did find tend to assume that witnesses would only be required to give evidence on matters within their existing knowledge. Thus in one reputable source of the subject it was stated:

> "When an inquiry is instituted, and an examination of witnesses undertaken by the house, in its *inquisitorial* capacity, it is customary for the member, on whose motion or suggestion the inquiry has been engaged in, or for some of the members voting with him for inquiry, to take the lead in the examination of the witness, by making the proper motions for calling them in, and either by suggesting or putting such introductory questions to each witness, as may be necessary to bring forward *the facts relating to the subject of the inquiry which are within his knowledge; in other words, to examine the witness in chief"* (emphasis added).[23]

In another passage from the same work it is stated in regard to the production of documents:

> "When information is wanted by either house, *respecting any matter which is within the appropriate functions, or known to be in the possession of any department, or public officer,* the course is to pass a resolution, directing the head

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Manual for the Legislative Council of the same Parliament (1889) (inc at pp 88-90 and 115, L Cushing, *Elements of the law and practice of Legislative Assemblies in the United States of America* (1866) Pt V chs III and IV and Redlich above n 7 (inc vol 2 inc Pt II ch III, and Pt VI ch at pp 187 – 197 and cf the passage quoted earlier in the text of this submission above at para 9 and cited at n 7.

[21] Joint Paper by Attorney-General Sen I J Greenwood QC and the Commonwealth Solicitor - General, Mr R J Ellicott QC, "Parliamentary Committees: Powers Over and Protection Afforded to Witnesses" Commonwealth Parliament : *Parliamentary Paper* No 168 Oct 1972 (inc pp 12 – 6, 18-20, 23- 4, 30 – 2), *May's Parliamentary Practice* (23rd, ed 2004) (inc chs 8-10, 26 and pp 130, 173-4, 756 – 762), Harris above n 10 (inc chs 17, 18 and pp 591, 652 – 656 and 662 – 4) and McGee above n 10 ch 30 (inc pp 427 – 432) . The exception is H Evans (ed) *Odgers Australian Senate Practice* (12 th ed 2008) at pp 397-9, 453 - 460 esp at pp 454 – 6 (and generally chs 16-19 and Online *Supplement* updates to 31.12.10
<http://www.aph.gov.au/senate/pubs/odgers/supplement.htm#p443>) ('Odgers 12th ed').

[22] See L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982) esp Ch VI (including pp 103 – 6), S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001) esp Ch 2 and Australian Law Reform Commission *Report No 111*: "Making Inquiries: A New Statutory Framework"(2009) esp Chs 11 (including pp 257-277), 17, 18, and 19 (including pp 490 – 500) and the corresponding chapters in *Discussion Paper No 75*: "Royal Commissions and Official Inquiries". The way expert assistance is to be obtained by Royal Commissions and Public Inquiries is to provide for the appointment of experts in any field as advisers to provide technical or specialist advice which of course presupposes the willingness of such persons to be appointed to perform that task: ALRC Report No 111 at pp 151-3, 374 and see also DP No 75 at pp 124 – 8.

[23] Cushing above n 20 at p 383 para 965. The work in questions also draws on British and Canadian practice even though it is concerned with legislative bodies in the United States.

of that department or officer, to prepare and lay before the house a statement containing the information in question (emphasis added)." [24]

Finally in the same work it is stated

"When a question has been propounded to a witness, without objection, or if objected to, has been directed by the house to be put or answered, it is then the duty of the witness forthwith to answer it directly, plainly, fully, and truly, *according to the best of his knowledge*, and in a respectful manner, both towards the house and members individually" (emphasis added).[25]

20. Furthermore such precedents as I was able to find which involved the practice of the English House of Commons up to 1901or even since that time [26] do not seem, with respect, to provide explicit support for the position asserted in the Senate Information Bulletins cited at the beginning of this submission. Reliance was placed in one of those Bulletins on three examples of orders to "non-departmental bodies" to provide returns on various matters. [27] These consisted of:

- the returns of incomes earned by pilots required to be provided by the Corporation of Trinity House of Depford Strond – a fraternity of mariners described as being independent of government which was given the exclusive power to licence River Thames pilots (1830) [28];

- returns of particulars respecting holdings in Ireland put up for sale by the Irish Land Commissioners (1890) [29]; and

- a document containing detailed information by each savings bank in the Great Britain regarding the conduct of their business including amongst other things the names of their officers and their respective salaries and allowances, the number of accounts remaining open, rates of interest charged, the amount of management expenses, the total amounts of funds invested with them the days

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[24] *Ibid* at p 368 para 928. See also for the same kind of reference to documents in the possession of witnesses in McGee above n 10 at p 428 ("The power to summons…inquiry being prosecuted.")

[25] Cushing above n 20 at p 390 para 984. Significantly a similar statement may be found in the 12th ed of Odger's *Australian Senate Practice* where it is stated that "[o]rders for the production of documents may require the production of documents *in the possession of a person or body*, or the creation and production of documents *by the person or body having the information to compile the documents*" (emphasis added and in Odger's 12th ed above n 21 at p 454). However it is clear from what is stated further on in that book that the current author or authors would not confine the authority of the Senate to that situation. Reference is made to what appear to be the precedents relied on in Senate Information Bulletin No 247 discussed below in para 39 of this submission.

[26] *May's Parliamentary Practice* (23rd ed 2004) cited above in n 21.

[27] Senate Information Bulletin No 247 at p 9.

[28] *Journals of the House of Commons* vol 85, 23 March 1830 at p 10 ((British History Online: as available to me on 31.5.11 < http:www. British-history.ac.uk/report aspx? compid=16201&strquery+depford>. The other numerous items cited for the same day which are to be found on pp 216-223 in the official Journal record which was cited in the Senate Information Bulletin No 247 (and which correspond to pp 1-14 in the online version) - including the item under "Account of Pilotage, presented" on p 2 - did not relate to the order referred to in the same Senate Information Bulletin.

[29] *Journals of the House of Commons* vol 146, 4 December 1890 at p 29.

> and hours in each week during which they conduct business with their customers (1891). [30]

A close examination of the sources of information cited for these orders which were in the form of brief and succinct entries in the *Journals of the House of Commons* fails to shed further light on the nature of the orders mentioned or whether they involved any debate about the making of them. In the absence of further details regarding those orders they may all be consistent with the ability of those bodies to have compiled the necessary returns from documents and other information collected and in the possession of those bodies.

21. I mentioned earlier that such precedents as I was able to find which involved the practice of the English House of Commons up to 1901, and even since that time, did not seem to provide explicit support for the position asserted in the Senate Information Bulletins cited at the beginning of this submission. [31] However one of the sources consulted pointed to committees of the House of Commons being empowered to appoint specialist advisers either to supply information which is not readily available or to elucidate matters of complexity within the committees' order of reference with such persons being normally paid for work done on a daily basis. [32] In fact the Senate has itself appointed such persons as happened with the appointment of a senior barrister as an 'Independent Assessor' to make an assessment of the evidence and documentation in the 'child overboard affair.' [33] As indicated earlier this is also what is contemplated for Royal Commissions and other Public Inquiries. [34] In recent years committees of both Houses of Parliament have also found it useful to invite willing experts to attend round table discussions and seminars held for essentially the same purpose. I respectfully suggest that this is the proper and legal course to follow when the Senate seeks a report to provide it with information and expert opinions it requires to fulfil its inquisitorial function.

22. I also referred earlier to the remarks of Redlich which suggested that the House of Common had long maintained as a principle of its customary law that it was entitled to demand the use of every means of information which may seem needful and, therefore, to call for all documents which it requires. The remarks also went on to uphold the right of the House summon any subject of the state as a witness, to put questions to him and examine any memoranda in his possession. [35]There are two comments to make about the remarks which were quoted in full earlier. The first is that like the passages from Cushing when the general remarks are read in the context of particular instances of what is meant it may well be the case that witnesses were only expected to respond to questions in relation to documents when the documents were in their possession. There was no suggestion of the document being "created" for that purpose. Secondly, and more generally, a distinction should be drawn between, one the one hand, the ends or objectives to be served which is to gather

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[30] *Journals of the House of Commons* vol 146, 17 February 1891 at p 95.
[31] Above text accompanying n 26.
[32] *May's Parliamentary Practice* (23rd ed 2004) cited above in n 20 at p p768-9.
[33] Select Committee on A Certain Maritime Incident: *Report* (Oct 2002) eg at pp xv and xxxv. The reasons for appointing such a person were, in part at least, based on the unwillingness of the Government of the day to allow government witnesses to give evidence before that Committee but this does not alter the potential role which such Assessors may perform in other situations.
[34] Above n 22
[35] Quoted above para 9.

information as part of the Grand Inquest of the Nation and, on the other hand, the means that could be used to obtain such information. This is so despite the reference by Redlich to "every means of information which may seem needful". Hence the need for caution in reading too much into what was said when an attempt is made to justify the wide ranging and sweeping powers asserted in the Senate Information Bulletins cited at the start of this submission. [36]

23. In my view the more reasonable approach to the question addressed in this submission is to assume that in the absence of any explicit statement to the contrary the power which the House of Commons possessed as at 1901 only gave it the power to ask questions which presuppose the ability of individuals to respond from their existing knowledge or require the production of documents which are within their possession This would extend to giving evidence about their recollection of documents which were once in their possession. It may also cover information which may be collated from documents and other sources in their possession. Questions and documents which do not fall within those bounds could properly and lawfully elicit an inability to answer those questions based on the existing knowledge of a witness or the failure to produce documents not in the possession of the witness or incapable of being compiled from information contained in documents in the possession of the witness. In the case of expert witnesses this would include a failure of the expert witness to express an opinion on matters with which the experts had no connection in the past or the present. This would then leave it to the witness to indicate whether that person is willing to consider the matter raised. But such a willingness would be voluntary and the Senate would not be able to go further and conscript witnesses to perform unpaid services in providing information sought by the Senate.

24. So far I have assumed that there is no relevant difference for present purposes between public and private witnesses. Doubtless it may be argued that witnesses who are public officials are, like those who occupy parliamentary office, servants of the public. It is also true that the Houses of Parliament play an undoubted role in oversighting and holding to account the Government and its officials and public instrumentalities and their officers and employees. But this does not make them servants and employees of the Parliament in the sense of being open to control and directions by the Houses of Parliament in the sense that applies to any servant or employee in the relevant legal sense. This is especially so when it is remembered that under the system of British responsible government recognised under the Australian Constitution it is the Ministers who are formally responsible for the actions of their subordinate taken on behalf of those Ministers and not the subordinates themselves. [37] The limits within which Parliament or either house of Parliament can exercise control over the executive government was aptly summarised in a classical work on British constitutional law:

> "Parliament has no direct control over any single department of the state. It may order the production of papers for its information; it may investigate the conduct of public officers

[36] Above n 1.

[37] J Griffith and M Ryle, *Parliament: Functions, Practice and Procedures* (Sweet and Maxwell: London, 1989) ("The Minister in charge of a department of State is responsible for the decisions and actions he takes and for those taken in his name by his subordinates.") at p 34. This states the theory which underpins the legal position whether or not that responsibility can be regarded as effective under modern conditions.

> and may pronounce its opinion upon the manner in which every function of government has been or ought to be discharged; but it cannot convey its orders or directions to the meanest executive officer in relation to the performance of his duty. Its power pver the executive is exercised indirectly, but not the less effectively, through the responsible ministers of the Crown. These ministers regulate the duties of every department of the state, and are responsible for the proper performance to parliament as well as the Crown." [38]

25. The conclusion that I have therefore reached on the first issue is that if reliance is to be placed on Con s 49 and the law and practice which applied to the House of Commons as at 1901, there are strong reasons for thinking that the Senate does not possess the power to compel public or private expert witnesses to provide reports or express considered opinions on matters that fall within their expertise when:

- those witnesses have not previously provided reports or expressed any considered opinions to anyone else, and

- the reports or opinions are otherwise outside their personal knowledge or cannot be collated from documents within their possession.

As indicated before, the reports and opinions in question would also require fresh work before a report is made or an opinion is expressed. This means that the Senate may lack the power to compel witnesses to "create" documents for the same purpose under the undoubted power of the Senate to call for persons, papers and records.

Second issue: effect of legislation which defines the functions and duties of statutory officials and bodies

(a) General principles

26. It is now necessary to consider the effect of legislation which defines the functions and duties of statutory officials and bodies on the powers of both Houses to call for persons, papers and records and, in particular, the power that has been questioned in this submission as it applies, if at all, to officials or bodies whose functions are derived from legislation. I have already suggested that there are strong reasons for thinking that the Senate does not have the legal power to compel expert witnesses to "create" documents in order to provide reports on matters with which they have not had any connection in the past so under the undoubted power of the Senate to call for persons papers and records.

27. It is clear that there are strong additional reasons for thinking that the same power cannot be exercised in the case of *statutory* officials or bodies who only possess such powers and functions as are specified in the legislation which creates those officials or bodies when those powers and functions do not include the preparation of the reports required to be produced by either House of Parliament or its committees. This follows from the basic principle of public law that statutory bodies and officials only enjoy

[38] May, *Constitutional History of England* (1882) vol II at pp 85-6 quoted with approval in Greenwood and Ellicott above n 21 at p 4. Of course the degree of responsibility exercised by Ministers with regard to independent statutory authorities may be somewhat attenuated and will depend upon the degree of independence conferred upon them. But depending again on the degree of independence conferred this does not make them subject to direction from either Houses of the Parliament in the sense indicated in the passage quoted in the accompanying text.

such powers and functions as fall within the powers and functions they are authorised or required to perform or, as are otherwise reasonably implied from those powers or functions, as being incidental to their exercise or performance. Unlike the Crown or corporations chartered by the Crown they do not possess the legal capacity to exercise other powers or functions. These principles are too well known to require the citation of authority but they have their origins in the emergence of the principle of statutory *ultra vires* in the late 19th Century. [39]

28. It is also equally clear that the overriding force of legislation has the effect of ensuring statutory officials and bodies cannot perform functions and duties which are otherwise *inconsistent* with the performance of the powers and functions conferred by the legislation on those officials or bodies. [40]

29. It may be acknowledged that there is also a well known and sound principle of statutory construction to the effect that legislation is not presumed to override parliamentary privilege without express words to that effect. Like Professor Carney I believe the principle is likely to be interpreted today as enabling parliamentary privilege to be overridden by necessary implication or a clear intention to that effect even in the absence of express provisions to the same effect.[41] With that in mind there are two responses to the argument used in the Senate Information Bulletins that this presumption has *not* been rebutted as regards the alleged power of the Senate to require the "creation" of documents in the sweeping and wide ranging sense referred to in this submission.

30. In the *first* place the presumption has no application if on a proper examination the alleged power is found not to be part of the powers privileges or immunities of the Senate under Con s 49 and it has already been suggested that there are strong reasons for thinking that the power does not exist. This is not to deny that the presumption may need to be rebutted if the statutory officials and bodies are to be immune from the ordinary powers of the Senate to call for persons papers or records as regards matters which relate in the case of statutory bodies or officials to the way they have exercised and performed their statutory powers and functions. Whether the presumption is rebutted for a parliamentary inquiry into those matters will crucially depend on the degree of independence which was intended to be accorded to them by the legislation which provides for their establishment. That of course would turn on the construction of the relevant provisions of the same legislation.

31. *Secondly*, however, even if the wide sweeping and far ranging power does exist as part of the powers privileges and immunities of the Senate, in my respectful opinion the statutory *ultra vires* principle explained above would be sufficient to rebut the relevant presumption by necessary implication as a sufficient indication of the intention of the Parliament even in the absence of express provisions to the same effect.

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[39] See eg *McLeod v Australian Securities Investment Commission* (2002) 211 CLR 287 at pp 292 and 305 and for the origins of the statutory *ultra vires* principle see eg *London County Council v Attorney General* [1902] AC 165, *Attorney-General v Smethwick Corporation* [1932] 1 Ch 562 at p 577 and S A de Smith, *Judicial Review of Administrative Action* (2nd ed, 1968) at pp 85-6.

[40] See eg *McLeod (*2002) 211 CLR 287 at p 305

[41] See the helpful discussion in G Carney, *Members of Parliament: law and ethics* (2000) at pp 200-2 and 203.The principle was recognised in *Duke of Newcastle v Morris* (1970) LR 4 HL 661

32. In what has been said so far the assumption has been that the Senate has directed its requirement to give evidence or produce documents to a statutory body or official and not the actual persons who are those officials or comprise those bodies when those persons act voluntarily and only in a personal capacity. It is perhaps possible that those persons could accede to the requests made by the Senate to prepare the kind of reports discussed in this submission. [42] However for this to be so those persons would have to be seen to act voluntarily with the ability to decline any such request and provided also that the performance of such a function did not detract or impair their ability to perform their normal statutory powers and functions. Otherwise they would in all probability be seen to act inconsistently with the powers and functions conferred on them by legislation.

33. Leaving that possibility aside, to effectively add to the powers and functions conferred on the officials and bodies by their empowering legislation could compromise their ability to perform their statutory powers and functions eg in terms of the deployment of time and resources. Any inconsistency or lack of statutory authority could obviously be cured by amending legislation in order to enable such officials or bodies to accede to the orders or requests of the Senate or indeed the House of Representatives and their respective committees. Needless to say however such legislation requires the approval of both Houses of the Parliament and of course the assent of the Crown and a mere resolution of either House would not suffice for this purpose. [43]

(b) Application to the *Australian Information Commissioner*

34. In the Senate Information Bulletin No 247 reference was made to documents tabled in the Senate following the resumption of business on 9 February which consisted of the responses from the Australian Information Commissioner to the orders of the Senate. Those orders asked him to report on the reasons proffered by the government for not complying with earlier orders about the proposed mining tax and a proposal to vary the GST agreements for a different health funding model. As I understand what he was required to do was to perform a function which required him to review the adequacy of the grounds specified by the Government for its refusal to produce information sought by the Senate and if necessary to arbitrate on that refusal. The Commissioner was reported to have argued that he could not comply with the order because what it required him to do was beyond the powers and functions conferred upon him by his statute. [44]

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[42] There may be some analogy here with the possible inability of the States and the Commonwealth to impose duties as distinct from mere functions and powers on their respective public authorities and officers. One difference would be however that the relevant power as distinct from a duty would be conferred on those bodies and officers themselves as distinct from the persons acting in those capacities.: see generally G Lindell, "Advancing the Federal Principle through the Intergovernmental Immunity Doctrine" in H Lee and P Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (ch 2) at pp 46 - 50

[43] Con ss1 and 58 and *Stockdale v Hansard* (1839) 9 A&E 1; 112 ER 1112. As was stated by McHugh J in *Egan v Willis* (1999) 195 CLR 424, "Resolutions of a parliamentary chamber cannot alter the law" at [92].

[44] See Senate Resolutions adopted on 26 October 2010 (notice of motions 59, 60 and 61: 26/10/20011 *Journals of the Senate* ('*Journals*') at pp 206, 207 -9)), 22 November (notice of motion 116: 22/11/2010 *Journals* at p 367) and 23 November (notice of motion 121: 23/11/2010 *Journals* at pp

35. In my view the ground of his refusal is, with respect, well founded. That ground is additional to the general denial of the relevant power of the Senate under Con s 49 already considered. So far as I am aware the preparation of reports for either House of Parliament was not a function or power conferred on the Commissioner in ss 7 – 12 of the *Australian Information Commissioner Act* 2010 (Cth) Act or something that could be regarded as reasonably incidental to the functions and powers conferred on the Commissioner. [45] Moreover there are I think grounds for suspecting that the performance of such a function or power would be inconsistent with those provisions because:

- if it involved him in arbitrating in disputes between the Senate and the Government this may detract from the harmonious relations the Commissioner would need to enjoy with Government Ministers and officials in respect of matters he is required to deal with under his Acts;

- it may involve dealing with issues which may arise under his Act which would have to be dealt with according to different criteria and procedures under that Act and perhaps giving rise to questions of pre-judgment and bias; and

- it may require the deployment of significant time and resources which impairs the ability of his office to deal with the powers and functions conferred on him under his Act implications especially if the task which the Senate seeks to have the Commissioner perform becomes a regular occurrence.

36. There is the added anomaly that the Commissioner may need to obtain possession of the very documents which the Government was unwilling to produce to the Senate for the purpose of examining those documents with a view to report to the Senate on whether the refusal on the part of the Government was justified. It is doubtful whether the Government would accede to producing the documents to the Commissioner when it was unwilling to produce them to the Senate.

37. Nothing in the foregoing regarding the Commissioner purports to cover the power of the Senate to require the Commissioner to provide evidence or documents regarding the exercise of the powers or functions conferred on the Commissioner under the legislation which establishes that office. Such an order would raise the considerations referred to above in para 30 of this submission. That however is not the situation addressed in the submission since it is assumed that what the Commissioner has been asked or required to do falls outside his statutory remit.

(c) Practice and Precedents

395-6). Apparently a similar response was received from the *Productivity Commission* when it refused to comply with an order to produce a document on superannuation default funds in industrial awards and agreements: Senate Information Bulletin No 247 at p 1.

[45] The same view can be taken in relation to the Productivity Commission mentioned in the preceding note as to which see ss 6 and 7 of the *Productivity Commission Act* 2010 (Cth).

38. Despite the general legal principles outlined above, and their application to the Australian Information Commissioner, it is suggested in the Senate Information Bulletin No 249 that the alleged power to order and request statutory bodies and officers to prepare reports for the Senate is supported by recent practice and precedents. I respectfully disagree.

39. Those practices and precedents have involved instances where certain statutory bodies or officials have acceded to orders and requests made by the Senate and may be summarised as follows:

(1) *Auditor-General*

It seems that the Auditor-General has acceded to such orders or requests to prepare audit reports both before and after the *Audit Act* 1901 (Cth) was replaced by the *Auditor-General Act* 1997 (Cth).

The *Audit Act* did not apparently make any provision for the Auditor-General to carry out investigations or audits at the request of Parliament. It seems that on one occasion the Auditor-General suggested that part of the task requested or ordered by the Senate could be carried out by the *Department of Finance* which had expertise in the area and that the remaining part of the task would be done by in the normal course of audits of the department of and bureau in question. Whatever may be the position with other instances involving the Auditor-General before 1997, and despite the characterisation of the first of these requests as being described as 'unusual' by the Auditor-General, this occasion can furnish no support for the view that the Auditor-General acted outside the statutory authority conferred on his office, if as seems likely, the normal course of audits refers to audits carried out under the *Audit Act*

It seems that in 1997 the independence of the Auditor-General was sought to be guaranteed by the provisions of s 8 of the *Auditor-General Act* 1997(Cth) which were designed to give effect to the recommendations of the Joint Committee on Public Accounts in 1989. [46] These provisions were intended to enshrine the independence of the Auditor-General by

[1] limiting the powers of the Parliament to act in relation to the Auditor-General to those specified in the same Act or other legislation (sub-ss 8(2) and 8(3); and

[2] by protecting the Auditor-General from direction by anyone (sub-s 8(4)).

The *Explanatory Memorandum* is said to have clarified this provision as a declaration for the purposes of Con s 49, limiting the power of the Parliament in that regard. Presumably the inference to be drawn from what is stated in the Senate Information Bulletin is that without the 'declaration' mentioned, the Senate could have continued to require the Auditor-General to prepare reports

[46] *The Auditor-General : Ally of the people and Parliament* (March 1989) Report No 296 referred to by the Minister in his Second Reading Speech in Parliamentary Debates (*House of Representatives*) vol 210 (12 December 1996) at p 8342

outside the statutory remit of that office and that these were the express provisions needed to put an end to that practice.

However if this inference was intended to be drawn as an accurate reflection of the parliamentary intention behind the enactment of the provisions in s 8 of the *Auditor-General Act*, it is, with respect, far from clear that the inference is supported by the parliamentary record or that it is consistent with what has apparently occurred since s 8 was enacted.

In order to examine the soundness of what is to be inferred it is necessary to set out in full the terms of s 8 of the *Auditor-General Act* which state*:*

> (1) The Auditor-General is an independent officer of the Parliament.
>
> (2) The functions, powers, rights, immunities and obligations of the Auditor-General are as specified in this Act and other laws of the Commonwealth. There are no implied functions, powers, rights, immunities or obligations arising from the Auditor-General being an independent officer of the Parliament.
>
> (3) The powers of the Parliament to act in relation to the Auditor-General are as specified in or applying under this Act and other laws of the Commonwealth. For this purpose, ***Parliament*** includes:
>
> (a) each House of the Parliament; and
>
> (b) the members of each House of the Parliament; and
>
> (c) the committees of each House of the Parliament and joint committees of both Houses of the Parliament.
>
> There are no implied powers of the Parliament arising from the Auditor-General being an independent officer of the Parliament.
>
> (4) Subject to this Act and to other laws of the Commonwealth, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not subject to direction from anyone in relation to:
>
> (a) whether or not a particular audit is to be conducted; or
>
> (b) the way in which a particular audit is to be conducted; or
>
> (c) the priority to be given to any particular matter.

The reasons for doubting the soundness of the inference can now be outlined. In the *first* place a close examination of the relevant parts of the Explanatory Memorandum,[47] the Minister's Second Reading Speech and the relevant parts of the Report of the Joint Parliamentary Public Accounts [48] fails to contain any:

(a) reference to Con s49 (explicitly at least); or

(b) reference to the pre-existing practice which the Auditor-General had described as "unusual" when it first began.

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[47] House of Representatives *Auditor- General Bill* 1996 (Cth) at pp 1-5.
[48] See above n 46 in chs 5 ("Independence and Accountability") and 18 ("Legislation").

Secondly, the terms of s sub-s 8(4) which were designed to free the Auditor-General from direction are only concerned with the possibility of a direction with the exercise of the powers and function of the Auditor–General which *did come within the terms of that or any other Act* eg in the way audits are carried out. If the analysis put forward in this submission is correct no legislation was needed to prevent the Auditor-General being required to perform tasks *outside* his statutory remit, by the Senate or anyone else

Thirdly, there remains the provisions which, as indicated before, purport to limit the powers of the Parliament in relation to the Auditor-General to those specified in sub-ss 8(2) of the *Auditor-General Act* or any other legislation. For this purpose 'Parliament' was defined to include each House, its committees and its members. As with the provisions of sub-s 8(2), the reference in sub-s 8(1) to the "Auditor-General being an independent officer of Parliament" was not to be taken as conferring "implied powers" on the Parliament in relation to the Auditor-General. If this provision was intended to put an end to the powers of the Senate to order the production of a report by the Auditor-General under Con s49, the reference to 'implied powers' hardly seems apt to describe the powers possessed Senate under that section of the Constitution. [49] More importantly, the denial of those implied powers was confined to only those that could otherwise have been derived from the declaration of the Auditor-General as being "an independent officer of the Parliament" in sub-s 8(1) *ie* as being some kind of employee or servant and so open to direction and control. As already seen, the powers of either House to order the production of documents is not limited to or exercisable only as regards officers and employees of the Parliament.

Finally, if the inference is to be drawn that without the provisions of s 8 the Senate could have continued to require the Auditor-General to carry out investigations and prepare reports outside the statutory remit of that office, and s 8 is read as now precluding such reports, it is difficult to reconcile this interpretation of s 8 with the investigations and reports that have since 1997 been carried out and prepared at the *request* of and not the *order* of the Senate when those investigations and reports fell outside the statutory powers and functions of the Auditor–General.

(2) *Australian Securities Commission* (ASC) and *Australian Securities and Investment Commission* (ASIC)

It seems that ASC and ASIC have likewise responded to orders made by the Senate to produce reports on matters that may be assumed to have been outside their statutory functions. Those functions included the power of ASC to do whatever was necessary for or in connection with or reasonably incidental to the performance of its functions. [50] There was apparently no mention in the legislation of responding to requests by the Parliament or either

[49] The expression 'implied powers' is that usually used to describe the powers of Parliament which like the NSW Parliament only possessed such implied powers as were reasonably for the existence and not those of the British House of Commons.

[50] Reference was made as regards ASC the *Corporations Act* 1989) (Cth) ss-sub 11(4).

House or their Committees. I am prepared to assume that this was also the case with its successor, ASIC, and that the functions performed by order of the Senate did indeed fall outside the statutory remit of both of those bodies.

(3) *Australian Competition and Consumer Commission*

Although numerous orders have been directed to the ACCC established under the *Trade Practices Act* 1974 (Cth) the provisions of that Act required the Commission to comply with directions of the Minister and requirements of Parliament by providing:

> "If either House of the Parliament or a Committee of the either House, or of both Houses, of the Parliament requires the Commission to furnish to that House or Committee any information concerning the performance of the function of the Commission under this Act, the Commission shall comply with the requirement.

It is possible that these provisions may confirm the existing power of the Houses under Con s 49 since it relates to information of the Commission within its knowledge concerning the exercise and performance of its statutory powers and functions, although as indicated before this would depend on the degree of independence that body was intended to enjoy. However even if it did confirm the power under s 49 this would not and does not support a power to require the preparation of a report on new matters within in its expertise when they do not deal with the way the Commission has or has not exercised or performed its *statutory powers and functions* in the past.

(4) *Human Rights and Equal Opportunities Commission* (HREOC)

It also seems that that the Senate asked HREC to carry out particular inquiries and report to the Senate. It was not an order for the production of documents in the strict sense and as such was not thought to have involved a formal exercise of its statutory powers. HREOC apparently responded nonetheless in a letter which included numerous attachments which detailed relevant inquiries *it had conducted in the past.*

This instance does not, with respect, bear on the issue presently in question since it did not seem to involve HREOC carrying out any new investigation beyond merely listing previous inquiries which were carried out presumably within its statutory remit.

Moreover the response given by the Manager of Government Business which is quoted in the Information Bulletin is consistent with the view expressed in this submission:

> "In any case, for the Senate's information the Government notes that the Commission is an independent statutory body with powers of inquiry. As such the Senate cannot bind or direct the Commission to exercise those powers. It is a matter for the Commission to determine how it would respond to such a request by the Senate…

> The Government also notes that while the Commission could conduct an inquiry on its own motion, under the *Human Rights and Equal Opportunity Commission Act* 1986 the results of such an inquiry must be reported to the Attorney-General and not directly to Parliament" [51]

40. It will be noticed that a specific response has already been provided to some of the instances and precedents summarised above and it now remains to provide a more general response to the extent that the instances and precedents may still be thought to bear on the issue in question *ie* to the extent that they can be seen as instances where statutory bodies and officials have responded to orders or requests to prepare reports and investigations *outside* the powers and functions conferred upon them in the legislation which provides for their establishment.

41. *Firstly*, the Senate (and the House of Representatives) cannot by their own actions or conduct acting alone create new powers which they do not already possess under Con s49 or legislation passed under Con ss49 and 51(xxxvi). The issue is and remains whether the claimed powers were possessed by the House of Commons as at 1901 subject always to the effect of overriding legislation passed by the Australian Parliament. At most, all that previous instances or precedents can provide is evidence of an understanding of how the powers possessed by the House of Commons have been interpreted in Australia. As such it should be accorded respect but it cannot be regarded as conclusive.

42. *Secondly*, if the views I have expressed in this submission are accepted, it will mean that the Senate and others:

[1] may have acted on a mistaken view of the scope of the Senate's powers; and

[2] the persons who make up the statutory bodies or are appointed as the statutory officials who acceded to the orders or requests of the Senate voluntarily decided to act in a personal capacity although the question still remains whether this would be consistent with the legislation which established the same bodies and officials.

Third issue: justiciability

43. In the Senate Information Bulletin No 247 reference was made to early Senate practice which was to make regular use of orders for the production of documents both in existence and created for that purpose.[52] By way of example it is stated that in the first three sessions of the Australian Parliament (1901-03) the Senate agreed to 54 orders. It was also stated that the power to order the production of documents exercised by the Senate and access disputes in relation to such documents were resolved by political settlement and the exercise of self-restraint on the part of the

[51] Although it is indicated that that those considerations would only have applied to *inquiries* conducted pursuant to the Act and not to an order to produce a document, the compilation of a new document which involved the production of a report into the matter identified by the Senate would have required an inquiry albeit without the benefit of the powers given to inquire by the Act.
[52] At p 10.

Houses and not by testing the limits of the power in the courts assuming such access disputes were justiciable.

44. It is important to appreciate that before 1987 each of the Houses of Parliament had it within their powers to order the imprisonment of persons who did not comply with their orders to give evidence or produce documents without a court having the ability to review the legal validity of the power to give evidence or produce documents. This could be done by framing the warrant of imprisonment in general terms alleging a breach of parliamentary privilege: see *R v Richards Ex p Fitzpatrick and Browne*[53]. Even leaving aside whether the instances mentioned in para 43 above did involve ordering the creation of documents in the sense which is questioned in this submission, the inability of a court to review the validity of the orders made by the Senate means that the orders made on those occasions cannot provide a safe indication of the legal validity of what was done.

45. The position was in any event changed with the enactment of the *Parliamentary Privileges Act* 1987 (Cth). In the *first* place s 4 makes it clear that for an offence against the Parliament to be proved it must be shown that the impugned conduct constitutes an improper interference with the free exercise by a House or committee of its authority or functions. *Secondly*, by reason of s 9, any warrant of imprisonment must now state the particulars of the conduct which is alleged to have amounted to a breach of privilege. As the Explanatory Memorandum made clear the purpose of s 9 was to attract the power of a court to determine whether the ground for imprisonment is sufficient in law to amount to a contempt of the House. [54] This means that any attempt by either House to use imprisonment as a sanction for failing to obey its orders may now be open to legal challenge on the ground that the order was itself not lawful especially in the light of *Egan v Willis* [55]and *Egan v Chadwick* [56]even though those cases dealt with the NSW Parliament and not a Parliament which, like that of the Australian Houses of Parliament, enjoyed the powers of the House of Commons.

46. The importance of these considerations is that they help to underline the possibility that the conclusions reached in paras 25 and 35-6 above of this submission which denied the existence of the legal powers asserted by the Senate with respect to the Australian Information Commissioner and other statutory bodies in relation to the 'creation' of documents, may well be capable of being tested in a court of law.

Fourth issue: Propriety of exercise

47. A number of considerations militate against the wisdom or propriety of the Senate exercising the power doubted in this submission. The first is the risk of legal challenge based on the same doubt.

48. The second is that the legal reasons that were advanced to deny the existence of the relevant power of the Senate may also constitute important policy reasons for not exercising the power in question. This is so even if, contrary to the views expressed in this submission, the power is thought to exist. It is not, with respect, fair or

[53] (1955) 92 CLR 157.
[54] See Lindell above n 2 at p 417.
[55] (1998) 195 CLR 424.
[56] (1999) 46 NSWLR 563.

appropriate for expert witnesses whether public or private to be forced to perform new work for the Senate or its Committee against their will and - at least in the case of private witnesses - without adequate remuneration. So far as statutory bodies and officials are concerned it also seems unwise for them to be asked to perform such a function when it can be seen to clash with or be in conflict with the powers and functions conferred upon them under or by the legislation which provide for their establishment and legal existence.

49. Finally I respectfully suggest that rather than conscript expert public or private witnesses into providing information and opinions on matters of concern to the Senate, the preferable course, both as a matter of law and policy, is for the Senate to appoint willing persons to act as special advisers to assist it and its committees or, as indicated earlier, seek the willing participation of experts at round table discussions and seminars held for the same purpose.[57] Such advisers and round table and seminar participants could provide the information and opinions needed to enable the Senate to perform the fact finding functions as part of the 'Grand Inquest of the Nation'.

Geoffrey Lindell

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7 June 2011

[57] Above para 21.

AUSTRALIAN SENATE

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15 August 2011

Mr Richard Pye
Secretary
Standing Committee of Privileges
The Senate
Parliament House
Canberra ACT 2600

Dear Mr Pye

In light of various interpretations or misinterpretations of my views, I provide a brief supplementary submission to clarify for the committee, in general terms, some of the points raised in submissions from the Department of the Prime Minister and Cabinet (in attached legal advice from AGS) and Emeritus Professor Lindell, both of which contain a useful discussion of important points, albeit of marginal relevance to the committee's terms of reference.

The area of contention concerns certain orders made by the Senate for production of documents by the Australian Information Commissioner and the Productivity Commission. The assumption has been made that the Senate orders are effectively orders requiring those statutory officers to perform certain statutory functions under their respective enabling acts – to conduct a review in the case of the Information Commissioner and to conduct an inquiry in the case of the Productivity Commissioner. This is not the case, and I have not argued that it is or that the Senate has the power to order such actions. My comments have related to the Senate's power to order the production of documents. The contentious orders were framed as such orders.

The Senate's power is a power of inquiry, deriving via section 49 of the Constitution from powers enjoyed by the United Kingdom House of Commons at the date of Federation, subject to any subsequent declaration by the Parliament varying those powers.

One expression of the inquiry power is as a power to order the production of documents (for example, as expressed in standing order 164[1]). Another expression of the inquiry power is

found in the delegation of certain powers to committees in the form of powers to send for persons, papers and records (or persons and documents in the updated terminology of standing order 25, for example). That these particular expressions may not be exhaustive of the inquiry power has long been understood.[2]

There is no complete or exhaustive definition of the scope of the inquiry power of the House of Commons as at 1901. Such contemporary or near contemporary descriptions as exist, by clerks and other commentators, are necessarily general, but support a broad interpretation. The House of Commons tacitly conceded by around 1840 that it was for the courts to determine the existence and scope of a power, privilege or immunity. The courts, in turn, have left it to the parliament to determine all matters connected with the exercise of powers and the application of privileges.

This approach is consistent with the doctrine of the separation of powers, which is more clearly delineated in Australia through its written constitution than in the United Kingdom, and it also preserves the courts from entanglement in political controversies. In Australia, the courts have had relatively little occasion to become involved in examining the limits of parliamentary powers, because most matters are resolved by political means long before they reach the point where any question arises that may be justiciable.[3] Courts have also expressed the same reluctance as their UK counterparts to interfere in parliamentary matters:

> In the absence of a statutory requirement, a court should not entertain a claim for a declaration that a resolution of a House of Parliament is invalid. In the course of determining the legal rights of parties, it may be necessary for a court, as an incident of that determination, to hold that a resolution of a legislative chamber cannot affect a person's legal rights. But that is a different matter from directly entertaining a claim that a resolution of the chamber is invalid.[4]

There is no suggestion that the inquiry power of the Commonwealth Houses is not limited, although specific limitations in respect of the Commonwealth Houses have not been adjudicated. It is generally accepted, however, that there may be limitations inherent in the federal structure of the Constitution and the enumeration of specific heads of legislative power. So, for example, the inquiry power may be limited to subjects that come within the Commonwealth's legislative responsibility[5]. There may be a limitation on the power of the Houses to summon witnesses in relation to members of the other House or of a state or territory legislature, at least on the basis of courtesy and comity between Houses. This may extend to officers of state or territory governments on the basis of a doctrine of intergovernmental immunity or the "Melbourne Corporation" doctrine.

Limitations on the congressional inquiry power have been found within the United States Constitution, including on the basis of the First and Fifth Amendments[6] and there may likewise be other limitations on the inquiry power of the Houses implicit in the Australian Constitution.[7]

I suggest that the following summary represents common ground on the extent of the power to order the production of documents:

- the Commonwealth Houses possess the power under section 49 of the Constitution to order the production of documents

- such orders cover documents in existence and in the possession of any person over whom the Commonwealth Houses have jurisdiction

- such orders may be subject to a soundly-based claim of public interest immunity which the Senate has claimed the right to determine

- such orders also cover documents created for the purpose (a "return to order") from information available to the person to whom the order is directed

- the creation of documents may involve research (including, for example, searching for and examining information to identify what information would be relevant to satisfy the order) and analysis of such information (including, for example, analysis required to correctly categorise the information for the purposes of creating the return).

Further to the above, the Senate has, on occasion, ordered documents to be produced that require a greater degree of original research and analysis and, on occasion, acquisition of information for that purpose. The Senate has also requested that such work be carried out. The different contexts of each occasion have been explained.[8] While I see these occasions as variations on the application of the power to order documents (albeit quite adventurous variations in some of the cases), others conclude that compliance with the orders provides no proof that the power extended that far in the first place.[9]

This appears to be the main difference of view. It is not useful to characterise it otherwise in the absence of any determination of the question by the courts (and the unlikelihood of the conditions arising for such a determination to occur in the future).

Of the three contentious orders on which the Australian Government Solicitor was asked to advise:

- the third matter (a report on the development of a sovereign wealth fund) collapsed at the first hurdle when the motion was negatived;

- the second matter (a report on the selection of default superannuation funds in awards) has not been pursued and the Productivity Commissioner gave evidence at the recent

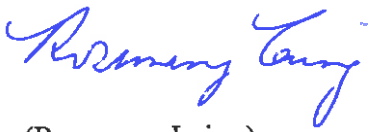
budget estimates hearings that he expected a reference of this matter under the Productivity Commission Act in the near future[10];

- the first matter (a report by the Information Commissioner on the adequacy of reasons provided to the Senate for not complying with orders, which reasons were provided to the Commissioner) has also not been pursued at this stage, perhaps pending further work on the implementation of the various agreements on parliamentary reform which contemplated the Information Commissioner performing a function akin to arbitration in respect of disputes over access to information required by the parliament.

To the extent that each of these cases has been resolved, at least for the time being, the resolution is a political one, involving, respectively, rejection of the proposal as part of the normal political process, access to information by alternative means (a future review commissioned under the Act) or a pause in "hostilities" pending exploration of alternatives. To jump too quickly to define a dispute or disagreement in purely legal terms can be to limit the options for its resolution, even though there may be legitimate questions to be asked about, for example, the scope of a power. The question whether Messrs Murdoch (non-citizens of the UK and probably not ordinarily resident there) were legally compellable by a House of Commons select committee to attend its hearings may well have been asked. Their decision to attend may have been made quite independently of the answer. It may even have been made as a mark of respect to the institution of Parliament and its status as a representative body.

I would be happy to provide any further assistance to the committee that it wishes.

Yours sincerely



(Rosemary Laing)

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1 Standing order 164 is not a source of power in itself but prescribes the form for orders for documents (which may be "ordered to be laid on the table") and the manner in which they will be processed (communicated by the Clerk to the Leader of the Government in the Senate"). It is a rule made under section 50 of the Constitution

prescribing the mode of exercise of a power available under section 49. The rule itself was based on similar standing orders of the Victorian and South Australian Legislative Assemblies whose powers were based on similar adoptions of House of Commons powers but at an earlier date. The practice was so common and so well understood and used in the colonial parliaments (including NSW which, although it lacked the grant of Commons powers, routinely used orders for documents, as recognised in *Egan v Willis* [1998] HCA 71 at paragraphs 17, 46, 50, 106, for example) that the rule was adopted without debate. It was used routinely in the Senate's first decade to order documents to be produced that were both already in existence and created for the purpose, just as it was routinely used in the House of Commons before 1901 for both purposes.

2 Notes made by Thomas Jefferson, for example, based on 17th century parliamentary commentaries by Henry Scobell (1670) and others, record that "Grand Commees. [ie committees of the whole] have their powers & rules in other circumstances [ie other than for framing and examining bills] given them in express words by the house as to send for witnesses, to hear counsel, or assign them on either part, to send for persons, papers and records". See *Jefferson's Parliamentary Writings: "Parliamentary Pocket-Book" and A Manual of Parliamentary Practice*, edited by W S Howell, Princeton, New Jersey, 1988, pp. 111, 249. However, this was not universally the case and some delegations of power were more open, suggesting that this particular formula did not exhaust the scope of the inquiry power; for example, committees established in June 1660 were given power "to send for Persons, Papers and Witnesses, **and what else may conduce to this Business**" (emphasis added), *House of Commons Journals*, 25 June 1660, p. 74; see also 30 June 1660, p. 78. While I take Professor Lindell's point about the functions of the House of Commons as a Court of Record (with its committees "trying" individual petitions) and the interpretation of inquiry powers in this context (cf. AGS opinion paragraphs 41 - 42), it is also the case that the "grand inquisitions" with which we equate modern committee inquiries also have deep historical (and certainly pre-1901) roots; see, for example, the Committee appointed to inquire into the Miscarriages of the War (when the Dutch fleet sailed up the Medway and sent fire ships amongst the English fleet at anchor, *House of Commons Journals*, 1667-68), the Select Committee appointed to consider the present high Price of Corn (*House of Commons Journals*, 3 November 1795, p. 19), the Select Committee appointed into the condition of the Army before Sebastopol (the conduct of the Crimean War, *House of Commons Journals*, 29-30 January 1855, p. 36) or the more mundane Select Committee on Adulteration of Food &c. (*House of Commons Journals*, 5-6 July 1855, p. 355). For some hundreds of years before 1901, then, the House of Commons and its committees undertook at least three distinct streams of inquiry (into individual petitions or cases, into the framing and examination of bills and into broader "state of the nation" issues), suggesting a broader context for the interpretation of its inquiry powers.

3 This is in contrast to the relative frequency with which the courts examine the limits of legislative or executive power. Relevant exceptions include the matters covered in *Egan v Willis* [1998] HCA 71 (which concerned the particular powers of the NSW Legislative Council) and *Attorney-General for Commonwealth v MacFarlane* (1971) 18 FLR 150 (which concerned the powers of the pre-self government Legislative Council of the Northern Territory). In the latter case, it was held that the power to act as "grand inquest" was not a power but a function of the House of Commons and was not committed to the Commonwealth Parliament at Federation. This somewhat problematic conclusion has not been further tested. It does not take account of another

possibility, namely, that certain powers are inherent in legislatures to enable them to perform their functions. Courts in the United States have come to this conclusion; for example *McGrain v Daugherty* 1927 273 US 135. For the particular case of the NSW Parliament, see also *Egan v Willis and Cahill* 1996 40 NSWLR 650.

4 *Egan v Willis* [1998] HCA 71 at paragraph 111 per McHugh J.

5 See cases listed in *Odgers' Australian Senate Practice*, 12th edition, page 60, paragraph 1.

6 See, for example, *Watkins v United States* 1957 354 US 178, *United States v Rumely* 1953 345 US 41, *Quinn v United States* 1955 349 US 155.

7 An idea "floated" by Kirby J in *Egan v Willis* [1998] HCA 71 at paragraph 136. In this context, the point made by Professor Lindell about conscription is an interesting one.

8 See *Procedural Information Bulletins* Nos. 247, 249.

9 For example, AGS opinion, paragraph 73.

10 Confirmed in a response to the Senate's order of 21 February 2011 presented out of sitting on 12 August 2011 [to be tabled].

Australian Government

Department of the Prime Minister and Cabinet

ONE NATIONAL CIRCUIT
BARTON

Reference:

Mr Richard Pye
Secretary
Senate Standing Committee of Privileges
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Pye

SENATE PRIVILEGES COMMITTEE INQUIRY

On 2 June 2011, the Department of the Prime Minister and Cabinet provided a submission to the Committee which foreshadowed a review of the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (the Guidelines).

I am pleased to provide the Committee with a copy of the revised Guidelines.

Officials from this Department are available to assist the Committee with its inquiry, if necessary.

Yours sincerely

Renee Leon
Deputy Secretary
Governance

8 February 2012

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GOVERNMENT GUIDELINES FOR OFFICIAL WITNESSES BEFORE PARLIAMENTARY COMMITTEES AND RELATED MATTERS – FEBRUARY 2012

1. INTRODUCTION

1.1. Application and scope of the *Guidelines*

1.1.1. The *Guidelines* are designed to assist departmental and agency officials, statutory office holders and the staff of statutory authorities in their dealings with the parliament. The term 'official' is used throughout the *Guidelines*; it includes all persons employed by the Commonwealth who are undertaking duties within a Commonwealth department or agency (whether employed under the *Public Service Act 1999* or other legislation) and those in government business enterprises, corporations and companies. It is recognised, however, that the role and nature of some statutory office holders and their staff will require the selective application of these *Guidelines*, depending on the individual office holder's particular statutory functions and responsibilities (see paragraph 2.9).

1.1.2. Contractors and consultants to departments and agencies and other individuals who are invited to give evidence to a parliamentary committee will also find these *Guidelines* useful.

1.1.3. While the *Guidelines* apply primarily to the preparation of submissions and the giving of oral evidence, parts 7 to 11 cover certain other matters related to the parliament. The *Guidelines* should also generally apply to submissions to and appearances before other public inquiries, such as royal commissions, and to the preparation and presentation of speeches by officials in their official capacity (for further information on the involvement of APS employees in public information initiatives, see *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads* (section 1: Relationship with the Government and the Parliament), published by the Australian Public Service Commission.

1.2. Powers of the parliament

1.2.1. There are obligations and protections that govern anyone who volunteers or is required to provide information to the parliament. These obligations and protections flow primarily from the Constitution and the *Parliamentary Privileges Act 1987*, supplemented by privilege resolutions adopted by both the Senate and the House of Representatives and by the Standing Orders of both houses. While very rarely called upon, the parliament has the power to impose penalties for contempt (see sections 5.1. and 5.2 on parliamentary privilege and contempt of parliament below).

1.2.2. The *Guidelines* detail obligations and protections, providing references and links to primary documents.

1.3. Accountability

1.3.1. A fundamental element of Australia's system of parliamentary government is the accountability of the executive government to the parliament. Ministers are accountable to the parliament for the exercise of their ministerial authority and are responsible for the public advocacy and defence of government policy. Officials are accountable to ministers for the administration of government policy and programs. Officials' accountability regularly takes the form of a requirement for them to provide full and accurate information to the parliament about the factual and technical background to policies and their administration.

1.3.2. The most common ways that officials will be required to answer directly to the parliament is through submissions to and appearances before committees. They may also be required to support ministers' accountability by, for example, drafting answers to parliamentary questions, advising a minister during the debate on legislation in the parliament or assisting a minister in responding to an order by one of the houses to produce documents.

1.3.3. The Guidelines are intended to assist in the freest possible flow of information to the parliament.

1.4. Types and powers of committees

1.4.1. Parliamentary committees may be established by the Senate, the House of Representatives, jointly by the two houses or by legislation. They have either an ongoing role (statutory and standing committees) or are established for a specific purpose (select committees).

1.4.2. Appearance as a witness before a Senate legislation committee conducting hearings into the Appropriation Bills (i.e. Senate estimates hearings) is the most common situation in which officials will appear before a parliamentary committee.

1.4.3. The functions and powers of parliamentary committees derive from enabling statutes, resolutions or the standing orders of the houses. Committees are generally established and empowered, among other things, to:

(a) seek submissions and documents and invite persons to give evidence in relation to matters under consideration

(b) summon witnesses and require the production of documents in relation to those matters.

1.4.4. The operations of joint statutory committees are governed by the relevant legislation (e.g. the *Public Accounts and Audit Committee Act 1951*, the *Public Works*

Committee Act 1969 and the *Australian Security Intelligence Organisation Act 1979*). Select committees are governed by the resolutions which establish them.

1.5. Types of witnesses

1.5.1. Officials can make submissions and appear as witnesses in an official capacity or in a personal capacity. Within these two broad categories there are distinctions that affect the clearance of submissions, selection of witnesses and preparation for appearances before committees. Depending on the nature of the inquiry that the committee is undertaking, the same officials can fall into either or both of these categories.

Official witnesses

1.5.2. Most often, officials will make submissions or appear before committees as representatives of their departments or agencies to explain the administration and implementation of government policies and programs. For those witnesses, the Guidelines provide details of procedures for the clearance of submissions, choice of witnesses and consultation ahead of committee hearings.

1.5.3. There are circumstances, however, where those procedures would not be appropriate. On occasion witnesses may choose or be required to give personal accounts of events or conduct that they have witnessed. This situation can arise in the course of any committee hearing but will most often arise when a committee is inquiring into a particular event and the accounts of individuals witnesses are required to allow the committee to ascertain the facts surrounding the event. In such cases, witnesses must not have requirements placed upon them that might deter them from giving evidence or cause them to feel constrained about the nature or content of their evidence. Part 3 of the *Guidelines* provides information about the approach to be adopted in cases where witnesses have had direct involvement in or have direct knowledge of events under inquiry.

1.5.4. It is, of course, possible that the same person may appear to explain the way that a particular program is administered and to provide an account of an event that may have occurred in the administration of the program.

Personal witnesses

1.5.5. Officials may also make submissions and appear as witnesses in a personal capacity. Guidance on contributions by officials appearing in a personal capacity is in Part 6.

2. PRELIMINARIES TO A COMMITTEE INQUIRY

2.1. Requests for written material and attendance

2.1.1. Without providing an exhaustive list, requests for submissions to or for the attendance of an official at a committee hearing in an official capacity may be made to one of the following:

(a) the relevant minister

(b) the relevant departmental secretary or agency head

(c) an official who previously appeared before the committee in relation to the matter being considered

(d) an official who has been identified by a committee as a person who could assist the committee in establishing facts about a particular event

2.1.2. There are exceptions to these formal requests e.g. for Senate estimates committees hearings.

2.1.3. Committees often advertise publicly for written submissions from interested persons and organisations.

2.1.4. A witness may first be invited to give evidence or produce documents, but a committee has the power to summon a witness if it considers circumstances warrant such an order. This is a rare occurrence, however, and departments are requested to bring any cases of an official receiving a summons to the attention of the Department of the Prime Minister and Cabinet (see Part 11 for contacts).

2.2. Preparation of submissions

2.2.1. If appropriate, departments and agencies making formal submissions should provide them in a written form; subsequent oral evidence would, if required, be based on the written submission but could also encompass other matters.

2.3. Matters of policy in submissions

2.3.1. Submissions:

(a) should not advocate, defend or canvass the merits of government policies (including policies of previous Commonwealth governments or state or foreign governments)

(b) may describe those policies and the administrative arrangements and procedures involved in implementing them

(c) should not identify considerations leading to government decisions or possible decisions unless those considerations have already been made public or the minister authorises the department to identify them

(d) may, after consultation with the minister, and especially when the government is encouraging public discussion of issues, set out policy options and list the main advantages and disadvantages, but should not reflect on the merits of any judgement the government may have made on those options or otherwise promote a particular policy viewpoint.

2.4. Clearance of submissions by minister

2.4.1. Submissions should be cleared to appropriate levels within the department or agency, and normally with the minister, in accordance with arrangements approved by the minister concerned.

2.4.2. Where a committee seeks comments on the merits of government policies, it is for ministers to respond by making written submissions, by appearing personally or arranging for ministers representing them to appear personally, or by inviting committees to submit questions on policy issues in writing.

2.4.3. Part 3 provides guidance in relation to officials giving evidence of personal knowledge of or involvement in events. Part 6 covers evidence given in a personal capacity.

2.5. Declining to make a submission

2.5.1. There may be occasions where a department is requested by a committee to make a submission and considers it inappropriate to do so e.g. where the issue being examined is administered by another department. In such cases it would be appropriate for the departmental secretary or agency head, or the official to whom a request was addressed, to write to the committee advising that the department does not intend to make a submission. If a committee persists with its request for a written submission, the department or agency may wish to seek the minister's views.

2.6. Requests for more time to prepare evidence

2.6.1. If the notice is considered insufficient, the minister (or the department on the minister's behalf) may ask a committee for more time to prepare evidence. The Senate resolutions provide for a witness to be given reasonable notice and an indication of the matters expected to be dealt with (Senate resolution 1.3).

2.7. Confidentiality of submissions and draft reports of committees

2.7.1. The release of submissions and the receipt of draft committee reports without the authority of a committee is prohibited by the *Parliamentary Privileges Act 1987* and may be judged as a contempt of the parliament. (See sections 5.1 and 5.2.)

2.7.2. It is sometimes necessary for the executive government to draw on contributions from various departments and agencies in order to provide accurate and comprehensive information. In such cases, draft submissions must be circulated between relevant agencies. The final submission may be made available to contributing departments and agencies at the time the submission is sent to the committee. Once forwarded to a committee, however, written submissions are confidential until the committee authorises their release or publication (see Senate Standing Order 37, House of Representatives Standing Order 242). Material in submissions may be used for other purposes, but the actual submission must not be published without the committee's approval.

2.7.3. Similarly, a draft report of a committee prepared for its own consideration is the property of the committee and must not be received or dealt with except with the committee's authority. If an official receives a draft report, it should be returned promptly to the committee through the committee secretary, either directly or by returning it to the individual who provided it, who should be informed of the requirement to return it.

2.8. Choice of witnesses

2.8.1. A minister may delegate to a departmental secretary or agency head the responsibility for deciding the officials most appropriate to provide the information sought by a committee. It is essential that the officials selected have sufficient knowledge and authority to be able to satisfy the committee's requirements. Where the matter before the committee involves the interests of several departments or agencies, it would be appropriate to inform the committee secretary (after consulting the other departments or agencies) so the committee can arrange for other witnesses to appear if required.

2.8.2. Where a committee specifically requests an official to appear and the official is unavailable or the department considers it more appropriate that another official appear, it is desirable to advise the committee in advance and indicate the reason e.g. that another official or another department is now responsible for the matter in question. That course is likely to be inappropriate if the specified official has direct knowledge of an event under inquiry (see paragraph 1.5.3 and Part 3).

2.9. Official witnesses from statutory authorities

2.9.1. Both Houses regard statutory office holders and the staff of statutory authorities as accountable to the parliament, regardless of the level of ministerial control of the authority.

Most of them should comply with the usual rules about canvassing the merits or otherwise of policies. However, a number of statutory office holders and authorities, particularly those with statutory responsibilities for promoting good practice in particular fields or protecting the interests of individuals or groups, may provide comment to committees on policies relevant to their areas of responsibility to the extent that the functions of their office properly permit that role. In doing so, they should take care to avoid taking partisan positions.

2.10. How to prepare as a witness

2.10.1. All witnesses should be thoroughly prepared for hearings. Preparation should include ensuring familiarity with probable lines of questioning by discussion with the committee secretariat or by examining Hansard (for parliamentary questions and previous, related inquiries) and other sources, including the media. Officials who have not previously attended committee hearings should be briefed on the requirements and should consider training offered by the Australian Public Service Commission and by the Departments of the Senate and the House of Representatives. Senior officials should satisfy themselves, as far as possible, that all witnesses are capable of giving evidence in a professional manner.

2.11. Senate and House of Representative resolutions

2.11.1. All officials appearing before Senate committees should also make themselves aware of the Senate resolutions relating to the rights of witnesses (Senate resolutions 1.1-1.18) and matters which may be treated as a contempt of the Parliament (Senate resolutions 3 and 6.1- 6.16). Officials appearing before the House of Representatives Committee of Privileges should be aware of the resolution adopted by the House on 25 November 2009 in relation to the protection of witnesses (available at: http://www.aph.gov.au/house/pubs/standos/pdf/resolutions.pdf).

2.12. Consultation with ministers ahead of hearings

2.12.1. The extent of consultation with ministers when preparing for hearings may vary depending on the committee and capacity in which a witness is appearing. For Senate estimates committee hearings, it is usual for officials to provide the minister, or the minister's representative in the Senate, with a list of significant matters on which the department or agency is likely to be questioned and with copies of briefing if the minister wishes. Regardless of the type of committee, witnesses should alert the minister before a hearing if it is likely that a claim of public interest immunity (PII) will be required (see sections 4.4 to 4.11). In most cases, ministers should also be given advance notice by officials of likely requests for the hearing of evidence *in camera* (see section 4.12), although official witnesses who will give personal accounts of an event (see Part 3) are under no obligation to indicate that they intend to request an *in camera* hearing.

3. OFFICIALS GIVING EVIDENCE OF EVENTS OR CONDUCT

3.1.1. Parliamentary committees are occasionally established to inquire into particular events. Officials whose personal accounts of events or conduct are relevant to the inquiry should prepare themselves for the hearing in much the same way as officials appearing in a representative capacity (see paragraph 2.10) by, for example, considering what questions might be asked, reviewing files and contemporaneous notes about the event and attempting to recall their experiences as exactly as possible. While these witnesses may choose to advise the minister or the departmental or agency executive before making a submission or attending a hearing, they should not be required to do so, nor should they be required to clear the content of their submissions or intended evidence.

3.1.2. An official who is appearing in relation to a particular event should, like all official witnesses, be aware that they might need to restrict the evidence they give (see paragraph 4.2). It is possible, for example, that certain information relevant to an inquiry should properly remain confidential (see sections 4.4 to 4.11). In this situation, the official should discuss the proposed evidence with senior officials familiar with the subject matter so as to ascertain whether the minister should be given an opportunity to consider making a PII claim in respect of the information.

3.1.3. Officials giving evidence about particular events are entitled to request that their submissions and oral evidence remain confidential. This may be appropriate if the subject matter of the inquiry or the proposed evidence is inherently confidential (e.g. if it is related to defence capabilities and a PII claim is not being made), if the evidence would be damaging to personal reputations, or if the witness does not wish his or her identity to be made public.

3.1.4. Officials who intend to give evidence about their personal experiences or observations should be careful, if they discuss their intended evidence with other officials or potential witnesses, to avoid creating the perception that they are trying to influence those other witnesses or being influenced by them.

3.1.5. As indicated in paragraph 1.54, it is possible for the same official to be required to give evidence to the same inquiry both to explain the way a program is administered and to provide an account of an event that might have occurred in the administration of the program. In such cases, the witness needs to follow the appropriate clearance procedures for evidence relating to his or her evidence as a representative of the department or agency, while at the same time avoiding inappropriate processes in preparing to give evidence about his or her personal knowledge of the event or conduct in question.

4. CONDUCT OF HEARINGS BY COMMITTEES

4.1. General Principles

4.1.1. As indicated above (paragraph 1.3.3), it is intended, subject to the application of certain necessary principles, that there be the freest flow of information between the public sector and the parliament. To that end, officials should be open with committees and if unable or unwilling to answer questions or provide information should say so and give reasons. It is also incumbent upon officials to treat parliamentary committee members with respect and courtesy. Officials who consider that a question or statement made by a committee member reflects unfairly on them can seek assistance from either the minister or the committee chair. (See also section 5.7 on Right of Reply.)

4.2. Limitations on officials' evidence

4.2.1. There are three main areas in which officials need to be alert to the possibility that they may not be able to provide committees with all the information sought or may need to request restrictions on the provision of such information. These are:

(a) matters of policy

(b) material that may be the subject of a PII claim

(c) information where in camera evidence is desirable.

4.3. Matters of policy in oral evidence

4.3.1. It is not the role of an official witness to give opinions on matters of policy. It is the role of an official witness to speak to any written submission provided to the committee and to provide, in answer to questions, factual and background material to assist the understanding of the issues involved. The detailed rules applying to written submissions also apply to oral evidence. Not all restrictions necessarily apply to statutory officers (see paragraph 2.9).

4.3.2. The Senate resolutions (see paragraph 2.11) provide that, "an officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister" (resolution 1.16).

4.3.3. Senate resolutions also prescribe the procedure by which a witness may object to answering "any question put to the witness" on "any ground" (resolution 1.10). This would include the ground that the question requires the witness to give an opinion on a matter of policy contrary to Senate resolution 1.16. In such a situation an official may ask the person

chairing the committee to consider whether questions which fall within the parameters of policy positions are in order.

4.3.4. If an official witness is directed to answer a question that goes to the merits of government policy and has not previously cleared the matter with the minister, the official should ask to be allowed to defer the answer until such clearance is obtained. Alternatively, it may be appropriate for the witness to refer to the written material provided to the committee and offer, if the committee wishes, to seek elaboration from the minister or to request that the answer to a particular question be reserved for submission in writing.

4.4. Public interest immunity

4.4.1. While the parliament has the power to require the giving of evidence and the production of documents, it has been acknowledged by the parliament that the government holds some information which, in the public interest, should not be disclosed.

4.5. Claims to be made by ministers

4.5.1. Only ministers, or in limited circumstances statutory office holders, can claim that information should be withheld from disclosure on grounds of PII. However, committees, and especially Senate estimates committees, receive most of their evidence from officials, and it is officials who are most likely in the first instance to be asked to provide information or documents that might be the subject of a PII claim. Officials need in particular to be familiar with the Senate Order of 13 May 2009 on PII claims (see Attachment A).

4.5.2. It is important that the public interest is not inadvertently damaged as a result of information or documents being released without a proper assessment of the possible consequences. Officials who consider that they have been asked to provide information or a document (either by way of a submission or in a hearing) that might properly be the subject of a PII claim should either:

(a) advise the committee of the grounds for that belief and specify the damage that might be done to the public interest if the information or document were disclosed; or

(b) ask to take the question on notice to allow discussion with the minister. A committee would be expected to allow an official or minister at the table to ascertain the portfolio minister's views on the possible release of the information or document or seek further advice on whether a PII claim was warranted.

4.5.3. If a minister concludes that it would not be in the public interest to disclose the information or document, a statement should be provided to the committee setting out the

ground for that conclusion and specifying the harm to the public interest that could result from the disclosure of the information or document.

4.5.4. Where practicable, decisions to claim PII should take place before hearings, so that the necessary documentation can be produced at the time. The normal means of claiming PII is by way of a letter from the minister to the committee chair. The Department of the Prime Minister and Cabinet should be consulted on the appropriateness of the claim in the particular circumstances and the method of making the claim.

4.5.5. Before making a claim of PII, a minister or, in appropriate circumstances, a statutory office holder, might explore with a committee the possibility of providing the information in a form or under conditions which would not give rise to a need for the claim (including *in camera*, see section 4.12).

4.6. Grounds for a PII claim

4.6.1. There are several generally accepted grounds on which a minister or, in appropriate circumstances, a statutory office holder, may rely when claiming PII. For example, PII claims may be made in relation to information and documents the disclosure of which would, or might reasonably be expected to:

(a) damage Australia's national security, defence or international relations

(b) damage relations between the Commonwealth and the States

(c) disclose the deliberations of Cabinet (other than a decision that has been officially published)

(d) prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance

(e) disclose, or enable a person to ascertain, the existence or identity of a confidential source or information, in relation to the enforcement or administration of the law

(f) endanger the life or physical safety of any person

(g) prejudice the fair trial of a person or the impartial adjudication of a particular case

(h) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law, the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures

(i) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

4.6.2. The Senate Order of 13 May 2009 made it clear that committees will not accept a claim for public interest immunity based only on the ground that the document in question has not been published, is confidential, or is advice to or internal deliberations of government; a minister must also specify the harm to the public interest that may result from the disclosure of the information or document that has been requested. Further advice on the Senate Order and PII claims is at Attachment A.

4.6.3. If a minister concludes that a PII claim would more appropriately be made by a statutory office holder because of the independence of that office from ministerial direction or control, the minister should inform the committee of that conclusion. A statutory office holder might, for example, consider the disclosure of particular information would be likely to have such a substantial adverse effect on the proper and efficient conduct of the operations of his or her agency that it would be contrary to the public interest to disclose that information.

4.7. Classified documents

4.7.1. Documents, and oral information relating to documents, having a national security classification of 'confidential', 'secret' or 'top secret' would normally be within one of the categories in paragraph 4.6.1, particularly sub-paragraph 4.6.1(a). If, however, a document bearing such a classification is to be provided to a committee, an official should seek declassification of the document in accordance with relevant government policies. (Note that it does not follow that documents without a security classification may not be the subject of a PII claim. Nor does it follow that classified documents may not in any circumstances be produced. Each document should be considered on its merits and, where classified, in consultation with the originator.)

4.8. Legal professional privilege and legal advice

4.8.1. Legal advisers owe a duty to their clients not to disclose the existence or content of any advice. It would therefore be inappropriate for any official who has provided legal advice to government, who has obtained advice from an external lawyer or who possesses legal advice provided to another agency, to disclose that advice. All decisions about disclosure of legal advice resides with the minister or agency who sought and received that advice. The Attorney-General or the Attorney-General's Department must always be consulted about disclosure of constitutional, international and national security legal advice.

4.8.2. If asked by a committee, it will generally be appropriate for an official to disclose whether legal advice had been sought and obtained on a particular issue and, if asked, who provided the advice and when it was provided, unless there are compelling reasons to keep that information confidential. The content of the advice, however, should not be disclosed without the agreement of the minister.

4.8.3. While it has not been the practice for the government's legal advisers to provide advice to parliamentary committees, situations may arise during a hearing where a committee asks an official a question which amounts, in effect, to a request for legal advice. Officials should provide committees with such information as they consider appropriate, consistent with the general understanding that the Government's legal advisers do not provide or disclose legal advice to the parliament, and consistent more generally with these Guidelines. (It may be, for example, that officials are in a position to explain in general terms the intended operation of provisions of Acts or legal processes, particularly where this reflects the settled government view on the matter.)

4.9. Freedom of information (FOI) legislation

4.9.1. The *Freedom of Information Act 1982* (FOI Act) establishes minimum standards of disclosure of documents held by the Commonwealth. The FOI Act has no application as such to parliamentary inquiries, but it may be considered a general guide to the grounds on which a parliamentary inquiry may reasonably be asked not to press for particular information. The converse also applies. Any material which would be released under the FOI Act should (with the knowledge of the minister in sensitive cases or where the minister has a particular interest or has been involved) be produced or given to a parliamentary committee, on request. However, officials should bear in mind that, because of the Executive's primary accountability to the parliament, the public interest in providing information to a parliamentary inquiry may be greater than the public interest in releasing information under the FOI Act. In addition, the ability to provide information and documents to the parliament on a confidential basis might provide scope to release information that would not be appropriate for release under the FOI Act (see section 4.12). For a more detailed understanding of the exemption provisions, refer to the FOI Act and separate guidelines on its operation issued by the Australian Information Commissioner and the FOI Guidance Notes issued by PM&C (references and links to these documents are in Part 12).

4.10. Commercial-in-confidence material

4.10.1. There is no general basis to refuse disclosure of commercial information to the parliament, even if it has been marked 'commercial-in-confidence'. The appropriate balance between the interests of accountability (i.e. the public interest in disclosing the information) and appropriate protection of commercial interests (i.e. the public interest in the information remaining confidential) should be assessed in each case.

4.10.2. A Senate order, adopted on 30 October 2003, states that, 'the Senate and Senate committees shall not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a

minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information.'

4.10.3. As a general guide, it is inappropriate to disclose information which could disadvantage a contractor and advantage competitors in their business operations. Further information about the circumstances in which a PII claim based on commercial-in-confidence information might legitimately be made, and about information that would normally be disclosed, is at Attachment B.

4.10.4. A department or agency receiving commercial information on the basis of undertakings of confidentiality does not automatically preclude release of that information to the parliament. Agencies should consider where, on balance, the public interest lies as part of their advice to the minister and may wish to seek the views of any person or organisation to whom undertakings were given about the possible release of the document.

4.10.5. In most cases, the sensitivity of commercial-in-confidence material diminishes with time and this should be taken into account when assessing the public interest balance.

4.10.6. As with any other PII claim, a claim around commercial-in-confidence information should be supported by reference to the particular detriment that could flow from release of the information.

4.11. Secrecy provisions in legislation

4.11.1. Some Commonwealth legislation contains secrecy provisions that protect certain information from disclosure except to specified persons or in specified situations. Examples include s.37(1) of the *Inspector-General of Taxation Act 2003*, which protects information relating to a taxpayer's affairs; s.86-2 of the *Aged Care Act 1997* which protects information obtained under or for the purposes of that Act; and s.187(1) of the *Gene Technology Act 2000* which limits the provision of commercial-in-confidence information.

4.11.2. The existence of secrecy provisions in legislation does not provide an automatic exemption from providing information to the parliament unless it is clear from the provision that a restriction has been placed on providing information to a committee or a House of the parliament (section 37 of the *Auditor-General Act 1997* is an example). The fact that the parliament has included secrecy provisions in legislation suggests, however, that an official may be able to put to a committee a satisfactory case for not providing requested information, at least in public hearings. If the official's case is not accepted by the committee and the official remains concerned about providing the information, it would be open to the responsible minister to make a PII claim in the manner outlined in sections 4.4 to 4.10.

4.11.3. In some instances it might be possible to meet a committee's request by removing information that identifies individuals.

4.11.4. Officials may wish to seek legal advice when a request for information covered by secrecy provisions is pressed by a committee.

4.12. *In camera* evidence

4.12.1. Witnesses may seek a committee's agreement to give evidence in a private session (i.e. *in camera*). Senate estimates committees, however, must conduct hearings in public.

4.12.2. It would be unusual for an official witness to seek to give evidence *in camera*, but it may be necessary in situations where:

(a) a case could be made for a PII claim but the minister considers, on balance, that the public interest lies in making information available to the committee;

(b) similar or identical evidence has previously been given in camera to other hearings of the committee or other committees of the parliament and has not been made public.

4.12.3. Requests for an *in camera* hearing would normally be made by the minister or by a witness after consultation with the minister and departmental secretary or agency head. Such consultation might not be appropriate, however, in the case of officials giving evidence of events or conduct, as described in Part 3.

4.12.4. It is important to be aware that committees (or the Senate or House or Representatives) are able to decide that evidence taken in camera or provided in confidential submissions should be published. Committees would usually inform a witness before publication, and possibly seek concurrence, but there is no requirement for that to occur.

4.12.5. If a committee seeks an official witness's concurrence to publish in camera evidence, the witness should ask the committee for time to allow him or her to consult the minister or the departmental secretary or agency head (noting that this may not be necessary if the witness is appearing in a personal capacity – see Section 6).

4.13. Requests for evidence 'off the record'

4.13.1. There is no category of 'off the record' provision of information to a committee and officials should not offer to brief committees or members in this way. In the event that an official is asked to provide information to members of a committee 'off the record' or in any manner that would not appear to be covered by parliamentary privilege, the official should request a postponement until the minister can be consulted, unless the possibility has been

clearly foreshadowed with the minister and the official has been authorised to provide the information.

4.13.2. Some committees, such as the Joint Committee on Public Accounts and Audit, frequently hold relatively informal, or roundtable, committee hearings. These hearings are usually recorded by Hansard and are in all cases covered by parliamentary privilege.

4.14. Qualifying evidence

4.14.1. During hearings, committees may seek information which could properly be given, but where officials are unsure of the facts or do not have the information to hand. In such cases, witnesses, if they choose not to take the question on notice, should qualify their answers as necessary so as to avoid misleading the committee and, if appropriate, undertake to provide additional or clarifying information. It is particularly important to submit such further material promptly.

4.15. Taking questions on notice

4.15.1. While it is appropriate to take questions on notice if the information sought is not available or incomplete, officials should not take questions on notice as a way of avoiding further questions during the hearing. If officials have the information, but consider it necessary to consult the minister before providing it, they should state that as a reason for not answering rather than creating the impression that the information is not available.

4.16. Written questions and questions taken on notice

4.16.1. Where a committee asks written questions, written replies should be provided through the committee secretary. It is common practice at Senate estimates committee hearings for questions to be taken on notice. Responses should be provided promptly to the minister for clearance so that answers can be lodged with the committee by its deadline. Where answers cannot be provided by the deadline, the committee should be advised when responses are expected to be available.

4.16.2. When the interests of several departments are involved, adequate consultation should take place in preparing material.

4.17. Questions about other departments' responsibilities

4.17.1. It is important that witnesses take care not to intrude on responsibilities of other departments and agencies (see also paragraph 2.7.2). Where a question falls within the administration of another department or agency, an official may request that it be directed to that department or agency or be deferred until that department or agency is consulted.

5. PROTECTION OF SUBMISSIONS AND WITNESSES

5.1. Parliamentary privilege

5.1.1. The act of submitting a document to a parliamentary committee is protected by parliamentary privilege (subsection 16(2)(b) of the *Parliamentary Privileges Act 1987*). Any publication of the submission other than to the committee, however, is protected by parliamentary privilege only if that publication takes place by or pursuant to the order of the committee, in which case the content of the document is also protected (subsection 16(2)(d) of the Act). The unauthorised disclosure of a document or evidence submitted to a parliamentary committee (that is, a disclosure not authorised by the committee or the House concerned) may be treated as a criminal offence under section 13 of the Act or as a contempt (Senate resolution 6.16.). (See also section 2.7.)

5.1.2. The protection of parliamentary privilege means that a person cannot be sued or prosecuted in respect of the act or the material protected, nor can that act or material be used against a person in legal proceedings.

5.2. Contempt of the parliament

5.2.1. Officials need to be aware that the *Parliamentary Privileges Act 1987* and Senate Resolutions have defined offences against a House. Each House has the power to declare an act to be a contempt of the House and to punish such an act.

5.2.2. The *Parliamentary Privileges Act 1987* creates the following offences in relation to attempts to improperly influence a person about evidence given or to be given:

(a) a person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence (subsection 12(1));

(b) a person shall not inflict any penalty or injury upon any person, or deprive any person of any benefit, on account of the giving or proposed giving of any evidence, or any evidence given or to be given, before a House or a committee (subsection 12(2)).

5.2.3. As indicated in 5.1.1 above, section 13 of the *Parliamentary Privileges Act 1987* creates an offence in relation to the disclosure of submissions or evidence without the authority of the parliament or a committee.

5.2.4. The giving of any evidence that a witness knows to be false or misleading is also a contempt (see Senate resolution 6(12)).

5.3. Self incrimination

5.3.1. In general, a witness cannot refuse to answer a question or produce documents on the ground that the answer to the question or the production of documents might incriminate the witness. The exceptions to this are witnesses appearing before the Joint Committee of Public Accounts and Audit or the Parliamentary Standing Committee on Public Works, who are permitted to refuse to give evidence on grounds on which a witness in court is able, including self incrimination.

5.3.2. If concerned about self incrimination, a witness may request that the committee take the evidence *in camera* (see section 4.12).

5.4. Access to counsel

5.4.1. A witness may apply to have assistance from counsel in the course of a hearing. In considering such an application, a committee shall have regard to the need for the witness to be accompanied by counsel to ensure the proper protection of the witness. If an application is not granted, the witness shall be notified of reasons for that decision (see Senate resolution 1.14). If an application is granted, the witness shall be given reasonable opportunity to consult counsel during a committee hearing (see Senate resolution 1.15 and p 671 of *House of Representatives Practice* – references and links in Part 12).

5.4.2. In normal circumstances officials should not need counsel when appearing before parliamentary committees. Should the need arise, however, the Attorney-General's Department should be consulted.

5.5. Publication of evidence

5.5.1. Evidence provided to committees in a public hearing is normally published in the form of a Hansard record.

5.5.2. Authority for the publication of evidence is vested in committees by virtue of ss.2(2) of the *Parliamentary Papers Act 1908*. Evidence taken *in camera* is confidential and its publication without a committee's consent constitutes a contempt (see s.13 of the *Parliamentary Privileges Act 1987* and Senate resolution 6.16.).

5.6. Correction or clarification of evidence

5.6.1. Witnesses will receive transcripts of their evidence in the days following their appearance. The transcript should be examined promptly to establish whether any evidence needs to be corrected or clarified. On occasions, a witness may become aware of the need for correction or clarification before the receipt of the transcript or, in the case of a written submission, before the commencement of hearings.

5.6.2. Once the need to provide a committee with revised information has been established, it is most important that the committee receive that revised information at the earliest opportunity. In the case of officials who made submissions or appeared as witnesses in relation to the administration and implementation of government policy (but not necessarily those covered by Part 3), the departmental secretary or agency head (or senior official who represented the secretary at the hearing) should be informed that revised information is to be provided. Depending on the nature of the correction, it may also be appropriate to inform the minister. Officials need to keep in mind that, while their evidence remains uncorrected or unclarified they are vulnerable to allegations that they have misled a committee.

5.6.3. Supplementary information for a committee should be forwarded to the committee secretary. If uncertain of the most appropriate way to provide a committee with additional or corrected information, officials should seek the guidance of the committee secretary.

5.7. Right of reply

5.7.1. Where evidence taken by a committee reflects adversely on an official, the committee shall provide reasonable opportunity for the official to have access to that evidence and to respond to that evidence by written submission and appearance before the committee (Senate resolution 1(13)).

5.7.2. Officials have the same right as other citizens who have been adversely referred to in a House of the parliament (see Senate resolution 5 and House of Representatives resolution adopted on 27 August 1997 – pp 751-3 of *House of Representatives Practice*). They may make a submission to the President of the Senate or to the Speaker of the House of Representatives requesting that a response be published, and the relevant presiding officer may refer such a submission to the Privileges Committee. The procedures of each House then provide for scrutiny of the submission and for the possibility of it being incorporated in Hansard or ordered to be published.

5.7.3. Officials proposing to exercise their right of reply should inform their departmental secretary or agency head.

6. APPEARANCE IN A PERSONAL CAPACITY

6.1.1. Nothing in these guidelines prevents officials from making submissions or appearing before parliamentary committees in their personal capacity, and the *Parliamentary Privileges Act 1987* makes it clear that an agency has no power to prevent an official from doing so. An official proposing to give evidence in a personal capacity should consult the *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads* (section 1: Relationship with the Government and the Parliament), published by the Australian Public Service Commission. Individual agencies may also have developed advice for their own staff on these matters.

6.1.2. An official giving evidence in a personal capacity might do so in relation to matters entirely unrelated to his or her current or recent responsibilities e.g. an official in the Attorney-General's Department putting forward personal observations or suggestions on aged care accommodation. It would be a matter completely for that official to decide whether to inform either a senior official in his or her own department or anyone in the department responsible for aged care policy. The official should, of course, seek leave to attend the hearing, if necessary.

6.1.3. There is no intention for there to be any restriction arising from these Guidelines on officials appearing before parliamentary committees in their 'personal' capacity. An official so called, however, should pay heed to the guidelines relating to public comment contained in the *APS Values and Code of Conduct in Practice*. As those guidelines emphasise, it is particularly important for senior officials to give careful consideration to the impact, by virtue of their positions, of any comment they might make. Indeed heads of agencies and other very senior officials need to consider carefully whether, in particular cases, it is possible for them realistically to claim to appear in a 'personal' rather than an 'official' capacity, particularly if they are likely to be asked to comment on matters which fall within or impinge on their area of responsibility. An official who is appearing before a committee in a personal capacity should make it clear to the committee that the officer's appearance is not in an official capacity.

6.1.4. An official contemplating giving evidence in a personal capacity in these circumstances might consider discussing his or her intentions with the departmental executive or agency head or other senior officials, as the views that he or she wishes to put forward might be covered in the agency's submission or the evidence of official witnesses. There is, however, no obligation on the official to do so.

6.1.5. An official who gives evidence in his or her personal capacity is protected by parliamentary privilege and must not be penalised for giving that evidence (see section 5.1).

7. PARTY COMMITTEES

7.1. General issues

7.1.1. Officials may be invited to attend party committees, both government and non-government to, for instance, explain proposed legislation.

7.1.2. Requests for briefing from any party committee should be directed to the minister concerned. It is also open to a minister to initiate proposals for briefing of committees where the minister considers that to be desirable.

7.1.3. Officials will not be expected or authorised to express opinions on matters of a policy or party political nature.

7.1.4. Unlike committees of the parliament, party committees do not have the powers or privileges of parliamentary committees, so officials appearing before them do not have the protection afforded to witnesses appearing before parliamentary committees. Party committee hearings are generally held in private.

7.1.5. Where the minister does not attend the committee proceedings, officials should keep the minister informed of the nature of the discussions and of any matters the officials could not resolve to the committee's satisfaction.

8. REQUESTS FOR INFORMATION FROM NON-GOVERNMENT PARTIES AND MEMBERS OF PARLIAMENT

8.1. Rules at times other than during the caretaker period

8.1.1. Requests for information from members of parliament are usually made to the minister, but direct approaches to officials for routine factual information, particularly on constituency matters, are also traditional and appropriate.

8.1.2. Depending on the nature or significance of a request, an official may judge it appropriate to inform the minister and departmental secretary or agency head of the request and response. Ministers should be informed of any matter which is likely to involve them.

8.1.3. A request should also be referred to the minister if it seeks an expression of opinion on government policy or alternative policies, or would raise other issues of a sensitive nature, or where answering would necessitate the use of substantial resources of the department or agency.

8.1.4. When a request is for readily available factual information, the information should be provided.

8.1.5. Care should be taken to avoid unlawful disclosure of information, for example, unauthorised disclosure of information that is classified or otherwise confidential information such as where a breach of personal privacy or commercial confidentiality could be involved.

8.2. Requests from shadow ministers

8.2.1. Requests from shadow ministers for briefing by officials would normally be made through the appropriate minister and, where this is not the case, the minister should be informed. If the minister agrees to the briefing, it would be normal for him or her to set conditions on the briefing, such as the officials to attend, matters to be covered and whether a ministerial adviser should also be present. These conditions are matters for negotiation between the minister and shadow minister or their offices.

8.2.2. With regard to the substance of such a briefing, officials will not be authorised to discuss advice given to government, such as in Cabinet documents, or the rationale for government policies, or to give opinions on matters of a party political nature. Officials should limit discussions to administrative and operational matters and observe the general restrictions relating to classified or PII material. If these latter matters arise, officials should suggest that they be raised with the minister.

8.2.3. Where a ministerial adviser is not present, it would be usual for officials to advise the minister of the nature of matters discussed with the shadow minister.

8.3. Special rules for pre-election consultation with officials during the caretaker period prior to an election

8.3.1. On 5 June 1987 the government tabled in the parliament specific guidelines relating to consultation by the Opposition with officials during the pre-election period. These guidelines, which are almost identical to the guidelines first tabled on 9 December 1976, are as follows:

(a) The pre-election period is to date from three months prior to the expiry of the House of Representatives or the date of announcement of the House of Representatives election, whichever date comes first. It does not apply in respect of Senate only elections.

(b) Under the special arrangement, shadow ministers may be given approval to have discussions with appropriate officials of government departments. Party leaders may have other members of parliament or their staff members present. A departmental secretary may have other officials present.

(c) The procedure will be initiated by the relevant Opposition spokesperson making a request of the minister concerned, who is to notify the Prime Minister of the request and whether it has been agreed.

(d) The discussions will be at the initiative of the non-government parties, not officials. Officials will inform their ministers when the discussions are taking place.

(e) Officials will not be authorised to discuss government policies or to give opinions on matters of a party political nature. The subject matter of the discussions would relate to the machinery of government and administration. The discussions may include the administrative and technical practicalities and procedures involved in implementation of policies proposed by the non-government parties. If the Opposition representatives raise matters which, in the judgement of the officials, call for comment on government policies or expressions of opinion on alternative policies, the officials should suggest that the matter be raised with the minister.

(f) The detailed substance of the discussions will be confidential but ministers will be entitled to seek from officials general information on whether the discussions kept within the agreed purposes.

9. APPEARANCES BEFORE THE BAR OF A HOUSE OF PARLIAMENT

9.1.1. Only in exceptional circumstances would an official be summoned to the bar of a House of the parliament and each case would need individual consideration.

9.1.2. As a general rule, it would be appropriate for these guidelines to be followed insofar as they apply to the particular circumstances.

10. REQUESTS RELATING TO INQUIRIES OF STATE AND TERRITORY PARLIAMENTS

10.1.1. Commonwealth officials may receive a request to appear before or make a submission to a state or territory parliamentary inquiry. In considering the appropriate response, officials should be aware that it would be rare for Commonwealth officials to participate in such inquiries.

10.1.2. However, there may be cases where, after consulting the minister about the request, it is considered to be in the Commonwealth's interests to participate. Officials should not participate in any state or territory parliamentary inquiry without consulting the minister.

10.1.3. Where additional guidance is required regarding appearances before state or territory inquiries or if an official is summoned to appear at such an inquiry, advice should be sought from the Department of the Prime Minister and Cabinet, the Attorney-General's Department, and the Australian Government Solicitor or the agency's legal service provider[1].

[1] Use of a legal service provider must be consistent with the Legal Service Directions issued by the Attorney-General under the *Judiciary Act 1903*.

11. USEFUL CONTACT NUMBERS

11.1.1. The following contact numbers are provided for use where these guidelines suggest consultation with the Department of the Prime Minister and Cabinet, the Attorney-General's Department or the Australian Government Solicitor:

(a) Department of the Prime Minister and Cabinet:

Assistant Secretary Parliamentary and Government Branch	phone: (02) 6271 5761 fax: (02) 6271 5776
First Assistant Secretary Government Division	phone: (02) 6271 5786 fax: (02) 6271 5776

(b) Attorney-General's Department:

Assistant Secretary Constitutional Policy Unit	phone: (02) 6250 3650 fax: (02) 6250 3674

(c) Australian Government Solicitor:

Australian Government Solicitor Office of General Counsel	phone: (02) 6253 7000 fax: (02) 6253 7307

12. REFERENCES

12.1.1. The following material is available to assist officials in their contact with parliament:

(a) Odgers' *Australian Senate Practice*, 12th Edition, Canberra, 2008.
www.aph.gov.au/senate/pubs

(b) *House of Representatives Practice*, Fifth Edition, Canberra, 2005.
www.aph.gov.au/house/pubs.

(c) *Procedures to be Observed by Senate Committees for the Protection of Witnesses.* Department of the Senate.
www.aph.gov.au/senate/committee/wit_sub/bro_thr.htm

(d) *Senate Standing Orders and Resolutions.*
www.aph.gov.au/senate/pubs/standing_orders

(e) *House of Representatives Standing and Sessional Orders* (and Resolutions)
www.aph.gov.au/house/pubs/standos

(f) *Appearing Before Parliamentary Committees*, Legal Practice Briefing No. 29, Australian Government Solicitor.
www.ags.gov.au/publications/agspubs/legalpubs/legalbriefings

(g) *How to make a submission to a Senate or Joint Committee inquiry.* Department of the Senate.
www.aph.gov.au/senate/committee/wit_sub/bro_one.pdf

(h) *Preparing a submission to a Parliamentary Committee Inquiry.* Department of the House of Representatives.
www.aph.gov.au/house/committee/documnts/howsub.htm

(i) *Notes for the Guidance of Witnesses Appearing before Senate Committees.* Department of the Senate.
www.aph.gov.au/senate/committee/wit_sub/bro_two.htm

(j) *Appearing as a witness at a Parliamentary committee hearing.* Department of the House of Representatives.
www.aph.gov.au/house/committee/documnts/witadv.htm

(k) *Outline of the Inquiry Process.* Department of the House of Representatives.
www.aph.gov.au/house/committee/documnts/howsub.htm

(l) *Parliamentary Privileges Act 1987*

(m) *Public Accounts and Audit Committee Act 1951*

(n) *Public Works Committee Act 1969*

(o) *APS Values and Code of Conduct in practice.* Australian Public Service Commission 2009.
www.apsc.gov.au/values/conductguidelines.htm

(p) Reports of the Senate Committee of Privileges, including the Committee of Privileges *1966-96 History, Practice and Procedures (76th Report).*
www.aph.gov.au/senate/committee/priv_ctte

(q) Reports of the House of Representatives Committee of Privileges
www.aph.gov.au/house/committee/priv_ctte

(r) Guidelines on exemption provisions of the *Freedom of Information Act 1982.* Australian Information Commissioner 2011
www.oaic.gov.au/publications/guidelines/guidelines-s93a-foi-act_part5_exemptions.html

(s) FOI Guidance Notes. Department of the Prime Minister and Cabinet.
http://www.dpmc.gov.au/foi/docs/foi_guidance_notes/foi_guidance_notes.pdf

ATTACHMENT A

Claims of public interest immunity

See also sections 4.4 to 4.11 in the *Guidelines*

On 13 May 2009, the Senate passed an Order setting out the process for making claims of public interest immunity (PII) in committee proceedings. A copy of the order is attached (Attachment A1).

2. The Senate Procedure Committee reviewed the operation of the Order in August 2009. A copy of the Procedure Committee's report can be downloaded from http://www.aph.gov.au/Senate/committee/proc_ctte/reports/2009/report3/index.htm.

3. Officials who are expected to appear at estimates and other parliamentary committee hearings need to be familiar with the requirements of the Order and the grounds for claiming public interest immunity as set out in the Guidelines.

4. The process for claiming public interest immunity described in the Order is largely consistent with the process that is set out in sections 4.4 to 4.11 of the *Government Guidelines for Official Witness before Parliamentary Committees* (the Guidelines) published by the Department of the Prime Minister and Cabinet at http://www.dpmc.gov.au/guidelines/docs/guidelines_govt_docs.pdf. While the Guidelines explain the process for making public interest immunity claims to protect against the disclosure of information or documents at committee hearings, it has been relatively uncommon in practice for officials appearing as witnesses at committee hearings, particularly estimates hearings, to be asked to provide copies, for example of departmental briefs to ministers. The Order of 13 May 2009 makes it seem more likely that officials and ministers will be asked to provide information or documents of this kind at Senate committee hearings, including estimates hearings, than has been the case in the past.

Summary of advice

5. It is important that the public interest is not inadvertently damaged as a result of information or documents being released without a proper assessment of the possible consequences. Accordingly, if an official is asked to provide information or documents to a Senate committee:

- if the official is satisfied that its disclosure would not harm the public interest, he or she should advise the minister that the material can be provided;
- if the official is satisfied that the disclosure of the material would damage the public interest, he or she should advise the committee that the material cannot be provided and explain how its disclosure would damage the public interest; and

- if the official is uncertain whether the disclosure of the material would damage the public interest, he or she should take the question on notice.

The grounds for claiming public interest immunity and the process for making such a claim at estimates hearings are set out below.

Grounds for a public interest immunity claim

6. While the parliament has the power to require the production of documents, it is acknowledged that the Government holds some information the disclosure of which would be contrary to the public interest. Where the public interest in the information remaining confidential outweighs the public interest in its disclosure, the Government would normally make a public interest immunity claim.

7. There are several recognised and accepted grounds on which ministers may rely when claiming public interest immunity in relation to information or documents requested by the Senate or a Senate committee. These are set out at section 4.6 of the Guidelines. As the Procedure Committee notes in its report, however, it is conceivable that new grounds could arise.

8. By way of example, public interest immunity claims may be made in relation to information or documents whose disclosure would, or might reasonably be expected to:

- damage Australia's national security, defence or international relations;
- damage relations between the Commonwealth and the States;
- disclose the deliberations of Cabinet; and
- prejudice the investigation of a criminal offence, disclose the identity of a confidential source or methods of preventing, detecting or investigating breaches of the law, prejudice a fair trial or endanger the life or safety of any person.

9. It is, of course, possible for more than one ground to apply to the same document, in which case all relevant grounds should be specified.

<u>Public interest conditional exemption – deliberative processes</u>

10. A public interest immunity claim may also be made in relation to material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government *where disclosure at that time would, on balance, be contrary to the public interest* [emphasis added – see paragraph 4.6.2 of the Guidelines]. Because the Senate Order requires ministers to specify the harm that could result from disclosure of information or a document of this kind, claims for public interest immunity on this ground will involve a greater degree of judgment and subjectivity, and may therefore be less readily accepted, than claims based on the various grounds described in paragraph 8 above.

11. Information and documents whose disclosure would not damage the public interest should be provided to parliamentary committees as soon as possible. It is important, however, that officials and ministers do not inadvertently damage the public interest by disclosing information that ought to remain confidential. Officials and ministers therefore need to consider carefully whether particular documents should be the subject of a public interest immunity claim before they are released. This will frequently not be possible in the relatively short timeframe available for estimates hearings, particularly as the responsible minister and relevant officials may need to devote their time to the hearings. If the request relates to a small number of documents, it may be possible to respond before the committee completes its hearings. If a large number of documents have been sought, or if the issues involved are complex, the minister may need to advise the committee that it will not be possible to respond until a later date (although it may be possible to provide some documents, or parts of some documents, while the committee is sitting).

12. In briefing ministers on the question whether it is appropriate to disclose information or documents to a committee, officials must assess and balance the public interest in disclosure of the information or document against the public interest, if any, in maintaining its confidentiality. This is a similar process to that which is undertaken when officials provide advice to ministers in relation to a Senate order to produce documents, or in deciding whether to provide access to documents under section 47C of the *Freedom of Information Act 1982* (although it should be noted that the provisions of the FOI Act have no direct application to questions about the provision of information to a Senate committee), or in response to an order to discover documents that are relevant to litigation involving the Commonwealth.

13. It may also be appropriate to decline to provide information or documents if to do so would unreasonably disclose personal information or disclose material that could be the subject of a claim for legal professional privilege.

Process for claiming public interest immunity

14. Public interest immunity claims must be made by ministers. However, Senate committees, particularly estimates committees, receive most of their evidence from officials, and it is they who are most likely in the first instance to be asked to provide information or documents that might be the subject of a public interest immunity claim.

15. The Senate Order describes in some detail the process leading up to a claim for public interest immunity. An official who considers that he or she has been asked to provide information or a document that might properly be the subject of a public interest immunity claim could either:

- advise the committee of the ground for that belief and specify the damage that might be done to the public interest if the information or document were disclosed (paragraph 1 of the Order); or

- take the question on notice.

The official could also refer the question to the minister at the table, but it is unlikely that the minister would be well-placed to make a considered decision on the question at that time.

16. The public interest in not disclosing information or documents on any of the grounds described in paragraph 8 above is self-evident and in many cases the need for such a claim would be readily apparent to officials at the hearing. If it is not, the official should ask if the question can be taken on notice so that it can be properly considered and the minister briefed.

17. It would be reasonable to expect that an official's evidence that a document is a Cabinet document or that, in his or her view, disclosure of the information or document in question might damage Australia's national security, for example, would be accepted by individual senators and committees with the result that the matter would not be taken further.

18. If that is not the case, however, the committee or the senator may request the official to refer the matter to the responsible minister (paragraph 2 of the Order). This would frequently mean that the question would need to be taken on notice. It is possible that the minister at the table, if he or she is not the relevant portfolio minister, may wish to ascertain the portfolio minister's views on the possible release of the information or document.

19. If the minister concludes that it would not be in the public interest to disclose the information or document, he or she "shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document" (paragraph 3 of the Order).

20. Paragraph 4 of the Order is not relevant for the purposes of estimates committees, which cannot take evidence in camera, but needs to be considered in the context of other committee hearings.

21. If a committee considers that a minister's statement in support of a public interest immunity claim does not justify the withholding of the information or document, it can report the matter to the Senate (paragraph 5 of the Order). In that event, the Senate would probably consider whether to order that the documents be produced. If the committee decides not to report the matter to the Senate, the senator who sought the information or document may do so (paragraph 6 of the Order).

22. In recent years, officials and ministers have not normally been pressed for copies of deliberative documents, particularly during Estimates hearings, with questions being limited to whether ministers have been briefed on particular issues and, if so, when that occurred. Paragraph 7 of the Order makes it clear, however, that committees will not accept a claim for public interest immunity based only on the ground that the document in question is a deliberative document: a minister must also specify the harm to the public interest that may result from the disclosure of the information or document that has been requested. Again, the need to give careful consideration to the issues involved will frequently mean that the matter has to be taken on notice.

23. Finally, the Order recognises that there may be occasions when it would be more appropriate for the head of an agency, rather than the minister, to make a claim for public interest immunity (paragraph 8 of the Order). This might occur, for example, in relation to information or documents held by agencies that have a significant degree of independence from Government, such as law enforcement agencies, courts and tribunals, the Auditor-General, Commonwealth Ombudsman and some regulatory agencies.

Order of the Senate, 13 May 2009

Public interest immunity claims

That the Senate—

(a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;

(b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;

(c) orders that the following operate as an order of continuing effect:

(1) If:

(a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and

(b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee,

the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

(2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

(3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground

for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

(4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

(5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.

(6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

(7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).

(8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

(d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.

(13 May 2009)

ATTACHMENT B

Provision of commercial-in-confidence material to the Senate

See also section 4.10 in the *Guidelines*

On 30 October 2003 the Senate agreed to the following motion on commercial-in-confidence material:

> That the Senate and Senate committees shall not entertain any claim to withhold information from the Senate or a committee on the grounds that it is commercial-in-confidence, unless the claim is made by a minister and is accompanied by a statement setting out the basis for the claim, including a statement of any commercial harm that may result from the disclosure of the information.

Senate committees have not always pressed a request for material when officials have stated the grounds on which they considering material to be confidential-in-confidence. The Senate order set out above does not mean that officials should no longer indicate that they consider that material might appropriately be withheld. However, if the Committee presses its request, officials should refer it to the relevant minister. If the minister determines that a claim of public interest immunity should be made, the procedures set out at sections 4.4 to 4.11 should be followed.

As a general guide, it would be inappropriate to disclose information that could disadvantage a contractor and advantage their competitors in future tender processes, for example:

(a) details of commercial strategies or fee/price structures (where this would reveal information about the contractor's cost structure or whether the contractor was making a profit or loss on the supply of a particular good or service);

(b) details of intellectual property and other information which would be of significant commercial value; or

(c) special terms which are unique to a particular contract, the disclosure of which may, or could reasonably be expected to, prejudice the contractor's ability to negotiate contracts with other customers or adversely affect the future supply of information or services to the Commonwealth.

The following information would normally be disclosed:

(a) details of contracting processes including tender specifications, criteria for evaluating tenders, and criteria for measuring performance of the successful tenderer (but not information about the content or assessment of individual tenders);
(b) a description of total amounts payable under a contract (i.e., as a minimum the information that would be reported in the Commonwealth Gazette or, for consultants, the information that would be reported in an agency's annual report);
(c) an account of the performance measures to be applied; and
(d) factual information about outcomes.