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LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
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Senator Stephen Parry
Chair
Senate Standing Committee on Procedure
Parliament House
CANBERRA ACT 2600

14 MAY 2014

Dear Senator Parry Stephen,

I refer to your letter of 26 March 2014 inviting me in my capacity as Leader of the Government in the Senate to make a submission to the Senate Standing Committee on Procedure Committee's Inquiry into Third Party Arbitration of Public Interest Immunity (PII) Claims.

As you know, amongst other findings, the recent inquiry by the Senate Legal and Constitutional Affairs References Committee (L&C Committee) suggested it was necessary to find an alternative mechanism to resolve disputes between the Parliament and the Executive over PII claims. An independent arbitration model based on the system currently in place in the New South Wales Legislative Council was proposed as one possible option for resolving such disputes. The rationale behind the L&C Committee's conclusion was that the status quo for resolving contested claims was unsatisfactory and a more effective regime was required.

However, the Government notes that previous examinations of this particular issue have drawn differing conclusions. For example, there is reference in *Odgers Australian Senate Practice* (Thirteenth Edition, page 597) to several Senate committees having considered the same question of settling a process for dealing with disagreements between the Executive and the Senate. The common thread that emerged from those committees' considerations of these matters was that "there appears to be a consensus that the struggle between the two principles involved, the executive's claim for confidentiality and the Parliament's right to know, must be resolved politically".

The issue was again examined in 2010 by the Senate Finance and Public Administration Committee (SFPA Committee). It also concluded that the question of resolution of PII claims was a political and not a legal or procedural question.

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The SFPA Committee also noted there were a number of practical barriers to the effectiveness of the process of independent arbitration which have been borne out in the New South Wales and Victorian systems. I am not proposing to revisit the shortcomings of the independent arbitration model covered in the SFPA Committee's report other than to note that, in the absence of clear law requiring a government to submit to an order to produce documents, an independent arbitration mechanism is no more enforceable than the requirement to provide them to the Senate in the first place.

While there may be a desire to have an alternative mechanism to resolve disputes that may arise, to date, there has been reluctance on the part of the Senate to move to a position where this matter should be determined by the courts. The SFPA Committee recommended against the proposed process of independent arbitration, albeit with dissenting views from the Australian Greens and Senator Xenophon.

As noted above, this matter has been considered in exhaustive detail by the Senate, through its committees, first in 1982 and then in 1994, 1998 and most recently in 2010. Each time the relevant committee rejected the principle of independent arbitration.

The Government's view is that claims for PII should continue to lie with Ministers, who are best placed to determine the balance of the public interest in confidentiality for the proper functioning of government with the public interest in transparency and public scrutiny. In turn, disputes as to claims are, in the Government's view, best resolved by the Parliament, in this case the Senate.

The Committee would be also aware that the Senate Order of 13 May 2009 on PII which was moved by Senator the Hon Mathias Cormann, on behalf of the then Opposition, has significantly improved the operation of PII by providing ministers and officers with guidance as to the proper process for raising public interest immunity claims. The Government remains committed to the principles covered in the 2009 Senate Order, which improves the guidance available to officials when determining the grounds for claiming PII and the process for making such a claim.

Thank you for this opportunity to clarify the Government's position in relation to this matter.

Yours sincerely

ERIC ABETZ