The power to require the production of information is one of the most significant powers available to a legislature to enable it to carry out its functions of scrutinising legislation and the performance of the executive arm of government.

**Source of the power**

The Senate possesses this power through section 49 of the Constitution which provides that the powers of the Houses of the Commonwealth Parliament are, until declared by the Parliament, the powers of the UK House of Commons at the time of the establishment of the Commonwealth. Those powers undoubtedly included the power to call for documents. In 1987 the Commonwealth Parliament declared its powers through the Parliamentary Privileges Act, section 5 of which provided for the continuation of those powers in force under section 49 of the Constitution (except to the extent varied by that Act).

**History and terminology**

In the early days of the Senate, orders for the production of documents were frequently used as a routine procedure to obtain information from the government. Orders were directed at existing documents as well as at information which was specifically compiled in response to the Senate’s orders. The latter were frequently called “returns”, giving rise to the term “orders for returns” (the documents when supplied being “returns to order”) which is regarded as synonymous with the term “order for production of documents”.

Such orders were used by the first Senate to obtain a range of information including copies of government contracts, details of rents for government offices, and information about government appointments, defence procurements and intergovernmental agreements. Details may be found in *Business of the Senate 1901-1906*, available from the Senate Table Office.

The procedure fell into disuse after the Senate’s first decade because governments supplied information as a matter of course, but was revived in the 1970s and has been much used in recent years, particularly to obtain information about matters of controversy.

**Basic procedure**

Standing order 164 provides that documents may be ordered to be “laid on the table”. Most orders for production of documents start with a notice of motion, which is moved and determined during “Discovery of Formal Business” on any sitting day (see *Brief Guide No. 2—Notices of Motion*). Sometimes an order for production of documents is contained in an amendment moved to a motion for a particular stage in the consideration of a bill (see *Brief Guide No. 9—Consideration of Legislation*).

An order for production of documents has the following elements:

- The “activating” words, “that there be laid on the table”, are the core of any such order. Alternative phrases, such as “the Senate calls on the Minister to table…”, do not have the same force, although a minister may choose to respond as if the resolution were an order for production of documents.

- The person at whom the order is directed is identified. This is usually a minister but orders have also been directed to statutory authorities or office holders. If the relevant minister is a member of the House of Representatives, the order is directed to the Senate minister representing that portfolio. If the recipient of the order is not specified, responsibility for acting on the order lies with the Leader of the Government in the Senate to whom all such orders are communicated by the Clerk under standing order 164.
A deadline for production of documents is specified. This is essential for the order to be effective. In specifying a deadline, the volume and nature of the documents requested should be taken into account. The deadline may be a specific time and date or contingent on another event occurring; for example, an Act commencing or a minister receiving a report. For a permanent order, there may be an annual or biannual deadline.

Finally, the documents are identified. They may be identified by title or by a description of individual (or classes of) documents. The order may specify information, rather than documents, which may require the respondent to create a document (or return) containing the information. In some cases, particular information is excluded from the order to make it clear that the Senate is not requiring publication of, for example, cabinet submissions or genuinely commercially sensitive information.

What information can the Senate ask for?

There are no limits on the documents which may be ordered to be tabled. There are no exemptions or exceptions for cabinet submissions or national security documents or other classes of documents for which governments have traditionally claimed public interest immunity (for the meaning of this term, see below). There is also no requirement that a document be one that is already in existence.

Are there grounds for non-compliance with orders for documents?

Although most orders for the production of documents are complied with, ministers sometimes refuse to produce all or part of the information on a number of grounds. It is acknowledged that some information held by government ought not to be disclosed. However, while ministers may make such claims for non-production of information, it is up to the Senate to determine whether the claims are appropriate.

Public interest immunity

The grounds for refusing to produce information are encapsulated in the generic term “public interest immunity”. Public interest immunity, in the legal system, is a concept that recognises that it would be against the public interest for certain documents or information to be made public. It is the court’s duty to balance the public interest in non-disclosure against the public interest in the court having access to sufficient information to enable justice to be done, and to make determinations accordingly.

The concept is relevant to the relationship between parliament and the executive. Where ministers make claims for non-production of information sought by the Senate, the Senate reserves the right to determine those claims. The possibility that publication of a document may disclose cabinet deliberations, or prejudice national security or law enforcement operations, or adversely affect Commonwealth-State or international relations may be grounds for a claim by a minister of public interest immunity. These grounds may be accepted by the Senate. The Senate has resolved, however, that it does not accept “confusing the public debate” or “prejudicing policy consideration” as grounds for public interest immunity claims or that all advice to ministers is “cabinet-in-confidence”. For the background to this resolution, see Odgers’ Australian Senate Practice, 11th edition, pages 468-82.

Other frequently-mentioned grounds for public interest immunity claims are as follows.

—commercial confidentiality

As the level of interaction between governments and the private sector increases, particularly through contracting out of functions and projects, commercial confidentiality is being used more and more frequently as a ground for withholding information from the Senate and its committees. Although there is a broad public interest in governments being able to carry out their functions efficiently, including through arrangements with the private sector, commercial confidentiality claims were generally made to protect the interests of particular companies and individuals against potential competitors. The recent tendency, however, has been for claims of commercial confidentiality to be made in relation to any information that is vaguely commercial in nature, rather than in respect of information whose disclosure could harm the commercial interests of a person. The Senate has not accepted such a broad
interpretation of commercial confidentiality and made an order on 30 October 2003 for any claim of
commercial confidentiality to be made by a minister and 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. The Senate may then determine whether the claim is accepted.

—legal professional privilege

Legal professional privilege is often claimed to avoid disclosure of advice given to ministers or public
servants by the government’s legal advisers, but the Senate has not accepted that this category of
immunity applies to the relationship between parliament and the executive. It applies in a very
restricted sense in proceedings before the courts to protect the relationship between legal advisers and
their clients.

—sub judice convention

The sub judice convention relates in a broader sense to legal proceedings. As practised in the Senate,
it is a convention whereby the Senate agrees to limit debate or inquiry to avoid prejudicing proceedings
that are before a court. For the convention to be invoked, there must be proceedings actually afoot or
charges laid. There must be a real danger of prejudice to those proceedings by public canvassing of
issues in the Senate, and the danger of prejudice must be weighed against the public interest in the
issues being discussed. Danger of prejudice is considered greater where proceedings are being heard
by a magistrate, or where a jury is involved. The preliminary nature of magistrates’ court proceedings
and the perception that juries are less practised at ignoring public commentary about a case than
judges are the reasons for this greater apprehension of danger. For further details, see Odgers:

The sub judice convention may be invoked by a minister to avoid disclosing information relating to legal
proceedings but, again, the claim is one to be determined by the Senate.

What can the Senate do if a minister refuses to produce information?

It is clear that the Senate has the power to enforce its orders. (See Senate Committee of Privileges,
49th Report, available from the Senate Table Office.) The refusal of a minister to comply with an order
of the Senate may ultimately be dealt with as a contempt of the Senate, with penalties applied in
accordance with the Parliamentary Privileges Act 1987. On most occasions, however, ministerial
refusals to produce information are resolved through political means, according to the circumstances of
the case.

There are many remedies available to senators to pursue information which governments are reluctant
to disclose. These remedies fall broadly into two categories: punitive remedies and coercive remedies.

—punitive remedies

Punitive remedies are those which make it more difficult for ministers to operate in the Senate and for a
government’s legislative program to be achieved. Examples include:

• impeding the progress of legislation through motions to postpone consideration of particular bills,
  including until after the requested information has been produced, or by taking up time that would
  otherwise be spent on government legislation;

• censure motions;

• motions restricting the ability of ministers to handle government business;

• motions depriving ministers of procedural advantages they enjoy under the standing orders, such
  as the ability to rearrange business on any day or determine the order of government business on
  the Notice Paper;

• motions to extend question time or other elements in the routine of business.
Coercive remedies are those which use alternative means of obtaining all or part of the information to which access has been refused. Committees often play a major role in such remedies because of the ability of committee members to question ministers and officials directly, and because they can take evidence in camera (in private). Examples include:

- orders for the information or documents to be produced to a specified committee, including instructions to the committee about how the information is to be handled (received in camera, not published for a specified period etc);
- orders requiring particular committees to hold hearings and particular witnesses to attend for the purpose of answering questions about the information or documents;
- further orders for production of the documents, perhaps refining the scope of the demand or excluding certain kinds of information to encourage compliance;
- motions requiring ministers to make regular explanations to the Senate about the reasons for non-compliance with the previous order (or orders) and providing for motions to be moved, without notice, to take note of such explanations;
- motions requesting the Auditor-General, or requiring another third party, to examine the contentious material and report to the Senate on the validity of the grounds claimed by the minister for non-production.

All such remedies require the support of a majority of the Senate.

**Need assistance?**

Advice on any of the matters covered by this Brief Guide is available from the Clerk of the Senate extension 3350, the Clerk Assistant (Table) extension 3020 (for ministers) or the Clerk Assistant (Procedure) extension 3380 (for non-government senators). The Clerk Assistant (Procedure) is also available to assist with drafting notices of motion for orders for documents.

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