24 December 2009

Mr. Stephen Palethorpe

Secretary

Senate Finance and Public Administration Reference Committee

Parliament House

Canberra, ACT, 2600

Dear Mr. Palethorpe

Re Inquiry into Independent Arbitration of Public Interest Immunity Claims

The Accountability Round Table (ART) is very grateful for the extension of time given to it by the Committee in which to make a submission to the above Inquiry. In the time made available I was able to research and prepare the submission that follows. It was not possible, however, to complete it as a joint submission of the ART. Accordingly, what follows is my submission to the Inquiry.

The proposal

The Senate has put forward a proposal for determining objections by the Government in response to orders of the Senate or of Senate committees for the production of documents or information where the objections are based on arguments that production would be against the public interest, including claims that production would reveal commercially valuable confidential information. It is envisaged that the public interest claims would be referred to an independent arbitrator and that, if they included "commercial-in-confidence." claims, such claims would be referred to the Auditor-General. The proposal will be additional to the procedure set out in the order of the Senate of 13 May 2009 for raising claims of public interest immunity in response to requests made by Senate Committees or their members for the production of documents or information.

The proposal that an independent arbiter determine such claims should be strongly supported in principle. There appear, however, to be some issues as to its operation.

(a) ***Auditor-General proposal.*** This proposal has the advantage that an independent arbiter of high calibre and repute is selected. But there appear to be at least two difficulties. The first is the concern raised by the Auditor-General , that acting as an independent arbitrator would be

inconsistent with the Auditor-General's independent audit role. The second is a concern about the impracticality of differentiating between claims of "commercial-in-confidence." and public interest immunity. There are likely to be situations where the Government of the day claims to be entitled to refuse production on more than one ground, including the claim of "commercial in confidence" and various privileges. To hive off one of the issues to the Auditor-General will duplicate costs and effort. There is in any event, no particular magic in determining a "commercial-in-confidence" claim. It is another instance where the courts have given protection to the confidentiality of communications and information because they have recognised that there can be a public interest in protecting the possession of confidential information of commercial value. Thus, resolving such a claim will include weighing up the public interest in preserving the confidentiality of such information against the public interest in holding the Government of the day to account through parliamentary processes. Court recognition of a public interest in protecting other communications and information is also the basis for the common law privileges such as client legal privilege and public interest immunity. It is suggested, therefore, that, whatever be the claim for protection advanced in any reasons given by the Government of the day, the arbitrator will be faced with the task of determining where the balance of public interest lies in each case. It will do so in the constitutional and political context of the Senate (or one of its committees), seeking access to documents or information to enable it to perform its critical function of holding the Executive to account and thereby enabling it and the electors to be informed.

For these reasons, it is suggested that the procedure should not provide specific classes of arbitrators for specific types of claims.

(b) ***Limits to the procedure?*** Turning to other details, it is proposed that the reasons advanced for claims of immunity will be referred to an independent arbitrator who will report to the Senate on whether the reasons given for withholding documents or information are justified. The statement of the proposal stops at that point. At first sight, this seems an inadequate approach because experience of FOI applications and of the discovery process in litigation suggests that disputed claims of immunity can only be satisfactorily resolved by an examination of the documents in question.

This issue was raised with the former Clerk of the Senate, Mr. Evans, during the recent public hearing. He explained that

> "The resolution is deliberately silent on that, because it may not be necessary for the arbitrator to look at the documents. That is something that could be perhaps left to the judgement of the arbitrator. If the arbitrator comes back and says, 'I'm not able to determine this matter because I really can't tell whether the claim is justified without seeing the documents', then the Senate could order the production of the documents to the arbitrator."

Looking at the history of this long-running issue, the Senate appears to have taken a cautious incremental approach. If, however, the hopes expressed as to the likely quality of the reasons are not realized, then, obviously, the Senate could modify the procedure to include a request for production of the documents in question to the independent arbitrator when making the initial request. I turn to other issues.

Issues -- the legal basis of the right of the Senate to call for documents

There has not, as yet, been an authoritative judicial decision on the question of the nature and extent, of the right of the Senate to call for the production of documents from the Government. That is an interesting legal question, but it may never be resolved and the history of the issue, as described in Odgers, reveals that for more than 20 years the government of the day has accepted that the Senate has the right to call for documents. The last challenge to the Senate's right is noted in Odgers as occurring in 1982,when the government of the day, in response to a request for documents relating to tax evasion schemes, refused to produce them on the grounds of harm to the public interest stating that if the Senate persisted, it would go to the High Court to challenge the Senate' s right to claim access to documents. An election intervened before further action was taken. It should also be noted that in 1994, Senator Evans, then government leader in the Senator, conceded that the Senate had the power to order production of documents and to punish for default. In recent years, resistance to production of documents has focused on claims of immunity.

The argument for a legal basis for the Senate's right to seek production of documents and information, is supported by the very strong merits of the case for the existence of such a right. The Parliament plays a critical role in holding the Government of the day to account. It cannot do so, unless each of the Houses of Parliament has an enforceable right to call for the production of documents from the Government.

Future Issues - selection of the independent arbitrator and other issues-

The proposed resolution states that the independent arbitrator will be appointed by resolution of the Senate. It is silent as to the process for the selection of the person or persons to be so appointed.

There are various ways in which the selection process could be carried out. The way that issue is handled, could play a significant role in ensuring the co-operation of the government of the day. So too would issues of procedure, including an appeal process. But it would appear that this is not something on which views are presently sought.

Future Issues -- defining the content of the immunities claimed

If it be decided to take up the suggestion in submissions that that the content of the immunities that can be claimed should be articulated, that task may be assisted by the work undertaken for the purposes of court proceedings and pre-trial access to documents for the Uniform Evidence Act in respect of a number of immunity claims including client legal privilege, public interest immunity, and settlement negotiations (see Part 3.10 of the legislation presently operating federally, and in New South Wales, Tasmania, the A CT, Norfolk Island and, beginning on 1 January 2010, in Victoria). Discussion of the issues can be found in the original Australian Law Reform Commission Reports (ALR C 26 and 38) and the more recent Report of the joint review conducted by the Australian Law Reform Commission, the New South Wales Reform Commission and the Victorian Law Reform Commission (see ALRC Report No.102).

There would also be considerable benefit in clearly limiting the boundaries of some claims; for example, claims in respect of

- Cabinet documents- to those that would directly or indirectly reveal Cabinet deliberations

- "commercial-in-confidence" documents - to claims for the protection of confidential commercial information of the claimant, disclosure of which could cause financial loss to the claimant.

Future Issues – "fishing expeditions" and "snowing".

If there is a concern that

- requests for documents by the Senate might, on occasions, take the form of fishing expeditions, or
- that governments might, in response, attempt to hide documents, by supplying vast numbers of documents of little or no relevance to the request,

the powers of the arbitrators could be defined to include the power to resolve such issues when they arise.

I hope that the above will be of some assistance

Yours Sincerely

Hon T.H.Smith, Q.C.

Chairman of The Acoountability Round Table