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26 November 2009

Mr Stephen Palethorpe
Secretary
Finance and Public Administration Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Palethorpe

PUBLIC INTEREST IMMUNITY CLAIMS – INQUIRY BY COMMITTEE

Thank you for your letter of 17 November 2009, in which the committee invites me to make a submission in connection with the reference to the committee of 16 November 2007 in relation to a process for determining pubic interest immunity claims made before the Senate and Senate committees.

I hope that the following observations will be of some utility to the committee. In view of the shortage of time, I will keep these observations concise.

The proposed order contained in the reference to the committee is intended to operate in conjunction with the order of the Senate of 13 May 2009, which specifies a process for dealing with public interest immunity claims made by ministers and departmental and agency officers before Senate committees. The historical background, purpose and effect of that order were set out in an advice dated 24 March 2009 tabled in the Senate by Senator Cormann on 13 May 2009. The operation of the order in Senate estimates hearings was referred to in the Third and Fourth Reports of 2009 of the Procedure Committee, presented in August and November, respectively. I refer the committee to those documents for consideration of that order. Copies are attached.

There is one point that needs to be reiterated in relation to the operation of that order. The intention of the order, and the past Senate precedents on which it is based, is that ministers and public officers should not seek to withhold answers or information from Senate committees without specifying some recognised public interest ground for doing so. I mention this point because, as indicated in the reports of the Procedure Committee, there may be some misunderstanding on the part of some witnesses that public interest immunity claims are only one avenue for withholding information, and that there is some independent discretion above and beyond such claims to withhold some information. It needs to be emphasised that the order is intended to cover all and any claims by ministers or officers to be excused from answering questions or providing information or documents.

In effect, the order of 13 May 2009 seeks to ensure that unresolved claims of public interest immunity before Senate committees are referred to the Senate. The order does not specify how the Senate should then resolve such claims. The proposed order now referred to the Finance and Public Administration References Committee seeks to complete the process by providing a means of resolving such claims, by independent arbitration.

The idea of independent arbitration of public interest immunity claims made before the Senate is not new. For example, the Senate attempted to put such an arrangement in place when in 1982 it demanded from the then government documents relating to the "bottom of the harbour" tax evasion affair, and the government declined to produce those documents. That attempt was not successful. There have been other suggestions from time to time for independent determination of public interest immunity claims. The Senate Privileges Committee in its 52nd Report of 1995 (Parliamentary Paper 21/1995), suggested the use of such a process, and cited an example. The Finance and Public Administration References Committee recommended such a procedure in a report in May 1998 (Parliamentary Paper 52/1998). The Senate, in effect, made an arrangement for independent arbitration of public interest immunity claims in its order of 20 June 2001, as amended, in relation to the publication of a list of departmental and agency contracts. Paragraphs (5) and (6) of that order provide for the Auditor-General to examine claims of confidentiality in respect of contracts.

The New South Wales Legislative Council has successfully used such a procedure for a decade. The committee will no doubt seek from the Council details of the operation of that procedure. (A cautionary note should be sounded about the judgments in the New South Wales courts that led the Council to establish that arrangement, in *Egan v Willis and Cahill* 1996 40 NSWLR 650, 1998 158 ALR 527 and *Egan v Chadwick and others* 1999 40 NSWLR 563: the law underlying the powers of the New South Wales Houses differs from that on which the Senate relies in the federal sphere.)

The suggestion in the proposed order that the Auditor-General be the independent arbitrator in respect of claims of commercial confidentiality arises directly by the role already performed by the Auditor-General in relation to claims of confidentiality in contracts under the order of the Senate already referred to. The Australian National Audit Office has the required expertise to assess claims of commercial confidentiality.

In relation to claims based on other public interest grounds, it would be desirable for the Senate to appoint some standing arbitrator rather than rely on individual appointment as each case arises. It is difficult, however, to nominate an office-holder or body as such a standing arbitrator. Perhaps the Senate could appoint a standing panel of, say, former office holders with expertise in various areas. It is not envisaged, however, that references to an arbitrator will be frequent. The hope is that the existence of such a procedure will discourage ministers and officers from excessively making public interest immunity claims.

The ultimate aim of the proposed procedure is to overcome the difficulty of the executive government being a judge in its own cause in determining whether information should be made available to the legislature. This is a problem which has vexed legislative bodies around the world, and, apart from the procedure in the New South Wales Legislative Council, no comparable legislature has found a complete solution. The establishment of such a procedure would be in accordance with the spirit of recent amendments of the Freedom of Information Act that abolished conclusive certificates. Claims by the executive

government to withhold information from the legislature and the public should not be finally determined by the executive government itself.

Please let me know if I can provide any further information to the committee in relation to this matter.

Yours sincerely

(Harry Evans)