



THE LAW SOCIETY  
OF NEW SOUTH WALES



2 December 2009

Mr Stephen Palethorpe  
Secretary  
Standing Committee on Finance and Public Administration  
PO Box 6100 Parliament House  
Canberra ACT 2600

Dear Attorney-General

**Re: Inquiry into Independent Arbitration of Public Interest Immunity Claims**

I enclose with this letter the submissions of the Arbitration Liaison Committee of the Law Society of NSW.

The Law Society of NSW thanks you for the opportunity of providing comments on the subject matter of this inquiry.

Yours sincerely,

**Joseph Catanzariti**  
President

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**INQUIRY INTO INDEPENDENT ARBITRATION OF PUBLIC INTEREST IMMUNITY CLAIMS BY THE SENATE STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION**

**Submission by the Arbitration Liaison Committee of the Law Society of NSW**

**Introduction**

The terms of reference are not limited to independent arbitration as a means of determining claims of public interest immunity made by the government in response to orders of the Senate or Senate committees for the production of information and documents. However, the terms of reference specifically include consideration of a proposed order of the Senate for public interest immunity claims to be determined by independent arbitration. The comments in this submission are limited to consideration of the proposed order.

**Paragraph 3 – Claims based on commercially confidential**

Paragraph 3 of the proposed order provides for the Auditor-General to be appointed as the independent arbitrator of all claims of public interest immunity based, at least in part, on the information or documents being commercially confidential.

It is noted that the Auditor-General is an independent officer of the Parliament, whose method and terms of appointment are enshrined in legislation designed to ensure the independence of the office bearer. The Auditor-General's functions and powers are defined in legislation without any implied functions or powers from the Auditor-General being an independent officer of the Parliament. A specific legislated function or power would be needed for the Auditor-General to act as the independent arbitrator.

Determination of claims of public interest immunity, based on information or documents being commercially confidential, requires more than independence and knowledge of commercial practice. It requires that an arbitrator with a sound knowledge of the legal principles involved in public interest immunity and the process of arbitration. It is submitted that the independent arbitrator should be a qualified lawyer with expertise in arbitration and commercial contracts.

**Paragraph 4 – Claims based on grounds other than commercially confidential**

Paragraph 4 provides that where the claim for public interest immunity does not involve the information or documents being commercially confidential, the claim will be determined by an independent arbitrator appointed by resolution of the Senate. The paragraph does not provide any details of the experience and qualification to be held by the appointee or any method of ensuring the appointees independence.

Proper arbitration of claims of public interest immunity needs an arbitrator with a sound knowledge of the legal principles involved in public interest immunity and the process of arbitration. It is submitted that the independent arbitrator should be a qualified lawyer with expertise in arbitration and the areas of law relevant to the subject matter of the claim.

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