Sir Laurence Street

27 November 2009

Mr Stephen Palethorpe
Secretary
Standing Committee on Finance and
Public Administration
Parliament House
P O Box 6100
CANBERRA ACT 2600

Dear Mr Palethorpe

Thank you for sending me a copy of the proposed resolution of the Senate on the Independent Arbitration of Public Interest Immunity Claims.

In commenting on the proposed resolution I should say that not infrequently I am retained by the Clerk of the NSW Parliament on instructions from the President of the Legislative Council to fill the role of Independent Arbiter of claims for privilege made by Government entities. I am thus familiar with this topic but I hasten to acknowledge that in the State Parliament the separation of powers doctrine does not apply as it does in the Commonwealth sphere. Having noted that, there are some matters of general relevance that it may be of assistance for me to refer to.

The matter that attracts particular comment is paragraph (3) of the proposed resolution. Very frequently NSW Government entities put forward a claim of privilege on a number of concurrent grounds. Public interest immunity is not a term of art and it is often used loosely as including commercial/confidential material, documents unnecessarily encroaching upon rights of privacy (e.g. names and addresses of private individuals included in some way or another in the topic under consideration but whose identity need not in the public interest be disclosed), documents containing material being the private property of an individual and other similar documents such as personal financial records and the like.

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All claims for protection from production are ultimately tested by balancing the public interest in production and consequent exposure, on the one hand and, on the other, public interest in protecting the private interest of the person who owns or is affected by the contents being disclosed. Claims for legal professional privilege often run concurrently with claims of commercial confidentiality.

In every case when deciding whether to allow or reject the claim the approach of the Arbitrator is broadly based and I see the prospect of confusion by separating the identity of the Arbitrator as is proposed in paragraph (3).

By way of example, there were a number of directions given by the NSW Parliament over a period of some months to the Roads and Traffic Authority (RTA) to produce documents relating to the Cross City Tunnel. The Departmental material included a great deal of correspondence to and from its solicitors which would normally be protected by legal professional privilege. As legitimate public interest in disclosure of material relating to the tunnel continued to escalate I ultimately determined that the public had a legitimate and overriding interest to know what legal advice the RTA was seeking and what legal advice it was receiving. The public's legitimate interest in having access to this body of knowledge outweighed the public interest in protecting the sanctity of legal professional privilege. The same view was extended to other material which might on the grounds of intellectual property privilege or otherwise have been withheld but which were ultimately held to be open for view by Parliament.

In short, paragraphs (3) and (4) do not appear to me to be mutually exclusive and hence the very real prospect of confusion as to who should be the Arbitrator.

There are a number of other matters to which I should, perhaps, direct a brief comment. It was becoming common for Government entities to seek legal advice as to whether privilege could be claimed and if the answer was yes then it would be claimed. Such an enquiry only went part of the way and left the Arbitrator in the position of having to identify the public interest in disclosure without an adequate formulation of reasons by the Government entity. I have in some of my reports referred to this difficulty and expressed the firm view that there are two parts of the question to be answered:

1. Can we claim privilege for this document?; and

2. Do we need to claim privilege for this document and if so for what reason?

Within this context it is a useful step to require the Government entity to produce a document containing the reasons for objection directly linked on to each document for which privilege is claimed. This restricts the tendency for Government entities simply to make a generally expressed objection leaving it to the Arbitrator to work out which aspect of the objection relates to which documents. It is for the Government entity to make good the objection.

The topic is a wide-ranging one as I am sure you and the members of the Standing Committee are acutely aware and I offer these comments in a constructive sense in the hope that they may assist in a formulation of procedure which will adequately address the whole of the topic.

Yours sincerely