



D23/26490

6 June 2023

Senator Deborah O'Neill

Parliament House

By email

Dear Senator O'Neill

PwC matter – receipt of names

You asked me for advice about reports that PricewaterhouseCooper (PwC) had provided a list or lists of names to the Finance and Public Administration References Committee of those involved in the misuse of confidential government information, discussed in my recent advice to the Finance and Public Administration *Legislation* Committee. In doing so, you also asked me to expand on one aspect of that advice.

As is now well known, these events are being investigated by several entities, including through an internal inquiry PwC has undertaken to publish and an AFP investigation. They are of significant interest to the Senate in its accountability role, as we saw through the course of numerous estimates hearings in the past fortnight.

Media reports yesterday suggested that PwC had provided the Finance and Public Administration References Committee with a list of names of those involved. The list reportedly included the names of four former partners (also identified by PwC publicly), nine partners identified as being stood down last week, and another 63 people who received some of the confidential information but may not have been aware of its nature.

As we have discussed, there are several options available to the committee. The committee could publish the list, in part or in full; with or without redactions. My previous advice covered some of the procedural questions involved here. These include the committee's task in identifying how the public interest is best served and use of the 'adverse comment' provisions to reflect natural justice in the committee's work.

The challenge in applying the adverse comment provisions should not be underestimated. Public statements from the Acting Chief Executive last week challenged the assumption that all those whose names had been redacted from the emails referred to above were necessarily involved in any wrongdoing. As I said in my earlier advice, the committee has no means of testing that without further

information. I am not aware whether the documents now received by the committee contain sufficient information to enable the committee (or others) to discern the extent to which any of the people named have been involved. It seems to me that PwC is best placed to minimise the reputational damage likely to flow to staff it says were only peripherally involved, by publishing accurate information about their involvement, rather than leaving it to the committee or others to pick through available information.

Returning to the options available to the committee. The committee could receive the list, but withhold it from publication at this stage; instead using it as a frame of reference for assessing PwC's still evolving responses to the matter and as the basis for questions, if the committee decides to call PwC to give evidence.

The committee could also consider publishing a statement or report identifying what it has received; itemising the nature and timing of any submissions, and indicating its view on what should happen from here. This might include the committee making other public statements about the matter; for instance:

- seeking assurances that PwC had also provided the names to the AFP;
- seeking assurances that PwC had or would provide the list to government, so that undertakings in relation to removing partners involved in the matter from government work could be assessed and maintained.

Your recent public statements, and those of other senators pursuing this issue, continue to press for PwC to publicly account for its actions here, rather than being dragged to account through (for instance) Senate committee processes. The above options would seem to provide the committee with some latitude to continue to explore matters relevant to its inquiry, and the Senate's broader accountability agenda, without interfering with that aim.

Privilege of committee proceedings

The matter you asked me to expand upon from my earlier advice was around the concern that putting material before Senate committees might inadvertently interfere with later legal proceedings. As I said last week, I do not think that is a concern for the committee at this stage.

To recap the advice, I quoted a passage from Odgers' Australian Senate Practice, which noted that:

Committees may...indirectly cause difficulties in legal proceedings by generating evidence which, because of parliamentary privilege, cannot be used in any substantive way in the legal proceedings. For example, if a party to legal proceedings makes statements before a committee relevant to those proceedings, the other party may claim that the inability to examine those statements leads to unfairness in the proceedings, perhaps even justifying their termination. Particularly in criminal proceedings, there may be a danger of defendants deliberately placing material before a parliamentary committee in the hope of aborting or disrupting the court proceedings. Committees should therefore be wary of taking evidence relevant to legal proceedings. [14th ed., p. 536]

As the Senate Privileges Committee has noted, that concern principally arises when primary documents are put before the parliament which do not exist in any other form: 67th report, p. 17. In other words, the concern only really arises if those investigating matters or putting them to the courts are unable to gather the material in another form.

Let me expand on that with a pertinent example. The fact that the Tax Practitioners Board (TPB) has put redacted PwC emails before the Economics Legislation Committee does not put those documents beyond the reach of investigators and the courts. This is because the emails have a previous life. They can be sought directly from the TPB or from PwC itself if they are required as evidence in criminal proceedings. There is no risk involved in the committee seeking unredacted versions of the emails from TPB or PwC, because again the originals may be sought from those entities rather than from the parliament. In short, the privilege attracted by submitting the emails to the committee and their subsequent publication does not prevent their being used for forensic purposes before the courts.

The same would be true of the list of names provided by PwC and any supplementary material. The primary PwC sources used to compile the material would be accessible to investigators and, if required, to the courts.

In short, it does not seem to me that the committee's consideration of the matter, including any decision to publish or part-publish any of this material would present a problem to subsequent legal proceedings, should they arise.

Let me know if I can be of any further assistance.

Yours sincerely,

(Richard Pye)