



ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE

23 November 2022

Mr David Anderson
Managing Director
Australian Broadcasting Association
700 Harris Street
Sydney NSW 2000

Dear Mr Anderson

Budget Estimates 2022-23—ABC Public Interest Immunity claims

I refer to your letters to the Senate Environment and Communications Legislation Committee (the committee) of 8 and 10 November 2022, both of which raise public interest immunity (PII) claims. These claims are based on [information requested by Senator Henderson](#) as part of the Budget 2022-23 Estimates process on remuneration of highly paid ABC staff and the role, gender, place of work and remuneration band of ABC employees, respectively.

Your correspondence sets out that the PII claims rely on the grounds that disclosing the requested information ‘would in many instances identify those individuals’ and ‘would be an unreasonable invasion of privacy for those affected individuals’. The claims also raise commercial-in-confidence concerns for the ABC. The committee acknowledges that the grounds on which you are rely are recognised as potentially acceptable grounds for PII claims, as set out both in [Odgers’ Australian Senate Practice](#) (14th Edition, p. 662), and noted in written advice from the Clerk of the Senate, which the committee has agreed to publish (enclosed).

Your correspondence also includes a statement specifying the harm to the public interest that could result from the disclosure of the information, as required by the [Senate order](#) of 13 May 2009.

The committee has carefully considered both PII claims, considering both the importance of the accountability and transparency of government agencies, against the potential harms outlined by the ABC. On balance, the committee accepts the ABC’s claims that the provision of the information requested may result in unwarranted privacy concerns for identifiable employees, as well as commercial-in-confidence concerns for the ABC more generally.

In accepting these claims, the committee notes that individual senators may raise objections to the PII claims in the Senate, should they wish to.

The committee has published your correspondence on its website, alongside the Clerk’s advices and this letter.

Yours sincerely

Senator Karen Grogan
Chair



D22/273256

4 November 2022

Senator Sarah Henderson
Suite SG.61
Parliament House

By email:

Dear Senator Henderson

Estimates - Obligations of statutory authorities

You have asked for advice about the obligation of organisations such as the Australian Broadcasting Corporation (ABC), the Special Broadcasting Service (SBS), NBN Co. and Australia Post to answer questions at Senate estimates hearings. In doing so, you have raised two specific subject areas: questions about remuneration and questions about employees bullying others in their workplace.

This advice goes to the obligations of statutory authorities to answer questions at estimates before turning to the two subject areas you have raised.

Statutory authorities and estimates

Odgers' Australian Senate Practice states:

On several occasions the Senate has, by resolution, asserted the principle that, while statutory authorities may not be subject to direction or control by the executive government in their day-to-day operations, they are accountable to the Senate for their expenditure of public funds and have no discretion to withhold from the Senate information concerning their activities.

[14th ed., p.671]

Some of these resolutions have been directed to statutory authorities generally (including [continuing order 47](#) of 9 December 1971 "...there is no area of expenditure of public funds by statutory authorities which cannot be examined by Parliament or its committees...") and one to the ABC specifically ([continuing order 52](#) of 19 November 1986), asserting "...that the ABC and any other witnesses before Senate committees have an obligation to co-operate and to answer questions within the terms of reference of Senate standing committees and Senate estimates committees alike...".

The passage in *Odgers* continues:

Officers of statutory authorities, therefore, so far as the Senate is concerned, are in the same position as other witnesses, and have no particular immunity in respect of giving evidence before the Senate and its committees. [14th ed., p.671]

Accordingly, the scope of questioning at estimates is the same for officers of statutory agencies as for other entities:

The only substantive rule of the Senate relating to the scope of questions is that questions must be relevant to the matters referred to the committees, namely the estimates of expenditure. Any questions going to the operations or financial positions of departments or agencies are relevant questions. [Odgers, 14th ed., p.482]

Similarly, officers do not have an independent discretion to withhold information. As with any other witness, if officers of the ABC or the other entities you have mentioned consider that information sought by senators at estimates ought not be disclosed, they should raise a public interest immunity (PII) claim to that effect. This obligation and the proper process for doing so is set out in a resolution of the Senate of 13 May 2009. It is then a matter for the committee (in the first instance) and ultimately for the Senate to determine whether to press for the information.

Ordinarily, where a PII claim is mooted, it is for the responsible or representing minister to determine whether the claim should be maintained. It is increasingly accepted that it is appropriate for statutory office-holders to make PII claims directly, “where it would not be appropriate for a minister to do so because of the relationship (or lack thereof) between the authority and the minister”: Odgers, 14th ed., p.671. This position is reflected in paragraph (8) of the 2009 order, and may be taken into account by a committee in deciding whether or not to accept a public interest immunity claim.

Remuneration levels

In your request for advice you raise concerns about the ABC declining to provide details in relation to the payment of high salaries ‘beyond what is reported in Annual Reports, citing privacy concerns’.

The question whether details of executive remuneration or remuneration of high-paid employees of the organisations you have mentioned should be published has been a frequent feature of estimates (and similar) hearings over many years. The situation you describe echoes the experience of the Environment and Communications Legislation Committee in 2017. The committee received answers to questions on notice setting out the numbers of ABC staff who received salary within particular salary bands. The then managing director declined to identify individual recipients, citing possible breaches of the Privacy Act. It should be noted that the Privacy Act does not restrict parliamentary committees in seeking information or the provision of information to such committees. Of course, a committee may agree that the principles in that Act should inform its consideration of relevant PII claims.

As noted above, officers do not have an independent discretion to withhold information sought by senators during estimates. If they consider that such information ought not be disclosed, they should raise a public interest immunity (PII) claim to that effect for the committee to determine. It is open to the committee to negotiate a position whereby information can be provided in a form that seeks to limit the harm to the public interest identified in the claim. If a senator is not satisfied with the committee’s decision on a PII claim, that senator can raise the matter in the Senate, including by proposing an order for the production of the information sought.

Occasionally, committees have received this kind of information on a confidential basis, although this option is not immediately available during estimates, where evidence must be taken in public session: standing order 26(2). As noted in Odgers, however, committees inquiring into ABC estimates have on at least two occasions accepted that information about the salaries of ABC television presenters was ‘commercially sensitive’ and elected instead to receive it as in camera evidence in the course of other inquiries: 14th ed. p.502.

While a committee may be willing to adopt this approach where it has a relevant inquiry on foot, one consequence is that only members and participating members of the committee would be have access to the information, and they would not be able to communicate it unless the committee resiled from its original decision to receive the information in camera.

By contrast, in 2017 the Environment and Communications Legislation Committee published details of executive remuneration at Australia Post, which that organisation sought to provide on a confidential basis. The committee rejected belated public interest immunity claims made on the grounds of privacy, contractual obligation and commercial-sensitivity, finding an overriding public interest in publishing the information. The committee published its correspondence, a copy of which is attached.

Bullying allegations

In your request for advice you raise the possibility of an employee being found to have bullied others in the workplace, and the ABC again declining to provide details citing privacy concerns.

To repeat what I have said above, officers seeking to withhold information sought at estimates on these and other questions should do so by raising a public interest immunity claim for the committee to determine.

The Senate has accepted that there are circumstances in which a claim based on unreasonable invasion of privacy might be accepted. On this point, Odgers says:

It is in the public interest that private information about individuals not be unreasonably disclosed. It is usually self-evident whether there is a reasonable apprehension of this form of harm. It is also usually possible to overcome the problem by disclosing information in general terms without the identity of those to whom it relates. [14th ed., p. 665]

That advice doesn't quite capture the circumstance that you have raised, but may be relevant to a committee in determining whether to accept a PII claim. You put the view that:

The privacy of the perpetrator should not be considered more important than the public interest in shining a light on this unacceptable, and potentially unlawful, behaviour including the way an organisation responds to such complaints.

Again, consideration of this perspective might be expected to inform a committee's consideration of a PII claim. However, a committee may wish to be circumspect on such matters, in case disclosure of the identity of an alleged perpetrator also discloses the identity of those subjected to bullying behaviour. An additional consideration might be that a witness may be able to be more forthcoming if processes for investigating complaints and mediating outcomes have been completed.

For completeness, given that your questions have mainly focussed on the ABC, this advice would apply equally in relation to the other organisations you mentioned.

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

Yours sincerely,



(Richard Pye)



D22/273877

10 November 2022

Senator Grogan
Chair, Environment and Communications Legislation Committee
Suite S1.94
Parliament House

By email: ec.sen@aph.gov.au

Dear Senator Grogan

Estimates – Consideration of public interest immunity claim

The committee has asked for advice about a public interest immunity (PII) claim made by the Managing Director of the Australian Broadcasting Corporation (ABC) during the committee's estimates hearing on 8 November 2022. This advice focuses on the question whether the claim meets the Senate's requirements. The question whether claims ought be accepted are for the committee, in the first instance. Committee members will be familiar with much of this advice, some of which is derived from advice provided to Senator Henderson on 4 November 2022, which I understand has been shared with the committee.

While much of the Senate's practice in relation to public interest immunity claims reflects its dealings with the executive government, the same principles apply in relation to statutory authorities. It is useful to touch on the accountability of the ABC to the Senate before turning to the PII claim.

The ABC and estimates

The Senate has repeatedly asserted that:

while statutory authorities may not be subject to direction or control by the executive government in their day-to-day operations, they are accountable to the Senate for their expenditure of public funds and have no discretion to withhold from the Senate information concerning their activities. [*Odgers' Australian Senate Practice*, 14th ed., p. 671]

This principle underpins in particular the accountability of statutory authorities to the Senate through its estimates process. As with other entities, any questions going to the operations or financial positions of statutory authorities appearing at estimates are relevant questions.

The passage in Odgers continues:

Officers of statutory authorities, therefore, so far as the Senate is concerned, are in the same position as other witnesses, and have no particular immunity in respect of giving evidence before the Senate and its committees. [14th ed., p.671]

Those officers do not have an independent discretion to withhold information. As with other witness, if officers of the ABC consider that information sought by at estimates ought not be disclosed, they should raise a public interest immunity claim to that effect. This obligation and the proper process for doing so is set out in a Senate resolution of 13 May 2009. It is then a matter for the committee (in the first instance) and ultimately for the Senate to determine whether to press for the information.

While PII claims are usually made by ministers, it is increasingly accepted that independent statutory office-holders may make PII claims directly: Odgers, 14th ed., p.671. I understand the committee has been happy to consider PII claims made by the Managing Director of the ABC in previous parliaments. That practice is supported by the 2009 resolution.

Public interest immunity claims

To sketch the rationale for the 2009 resolution on PII claims, Odgers says 'It has long been recognised that there is information held by government that it would not be in the public interest to disclose.' It goes on to outline 'potentially acceptable grounds' for claims of public interest immunity, based on cases in the Senate, but cautions that, while those grounds have attracted 'some measure of acceptance in the Senate', this is:

...subject to the circumstances of particular cases, the inclusion of an explanation of the harm to be caused [by disclosure], and without acceptance of distorted or exaggerated versions of the grounds. [14th ed., p. 662]

This emphasises that the Senate does not accept an approach based on the categorisation of documents but seeks to identify the public interest on a case-by-case basis.

The 2009 order applies these principles to the proceedings of Senate committees. It provides that claims to withhold information or documents may only be raised on public interest grounds and must be supported by a statement specifying the harm to the public interest that could result from the disclosure of the information.

The claim on staff remuneration

Mr Anderson provided the committee with a written PII claim, responding to a letter from Senator Henderson foreshadowing questions seeking details of remuneration of ABC employees, contractors, sub-contractors or workers paid \$230,000 per annum or more. Mr Anderson's letter provides contextual information about the ABC's reporting on remuneration and his reasons for making the claim. The claim itself is made on four bases:

- (a) unreasonable invasion of privacy,
- (b) protection of staff from work health and safety risks, particularly in the form of online abuse,
- (c) the statutory independence and role of the ABC warrants additional caution in assessing requests for the production of information and particularly personal information
- (d) damage to commercial interests.

Odgers recognises the first and last of those grounds – privacy and commercial confidentiality – as having attracted some measure of acceptance: 14th ed., pp 664-5. I am not sure that the second and third grounds mentioned are grounds, per se, rather than arguments in support of the privacy claim. Of course, it is entirely a matter for the committee how to assess the material put before it here.

In relation to privacy, Odgers says:

It is in the public interest that private information about individuals not be unreasonably disclosed. It is usually self-evident whether there is a reasonable apprehension of this form of harm. It is also usually possible to overcome the problem by disclosing information in general terms without the identity of those to whom it relates. [14th ed., p. 665]

In advice to Senator Henderson I noted that:

...the Privacy Act does not restrict parliamentary committees in seeking information or the provision of information to such committees. Of course, a committee may agree that the principles in that Act should inform its consideration of relevant PII claims.

In relation to commercial confidentiality, Odgers mentions a standalone Senate resolution from 2003 (a precursor in many ways to the 2009 resolution) that makes it clear that ‘a claim on this ground must be based on specified potential harm to commercial interests’, rather than a blanket claim that information is commercial and therefore confidential.

Consideration of the claim

The Senate generally expects that PII claims be raised on established grounds and specify the harm to the public interest that might be occasioned by the provision of the information sought. It would seem that Mr Anderson’s claim meets these requirements. It is for the committee to determine whether to accept the claim.

In 2014 my predecessor, Dr Rosemary Laing, explained to the Legal and Constitutional Affairs References Committee that the process established by the 2009 resolution is:

...a means to balance competing public interest claims by government on the one hand, that certain information should not be disclosed because disclosure would harm the public interest in some way, and by parliament’s claim, as a representative body in a democratic polity, to know particular things about government administration, so that the parliament can perform its proper function of scrutinising and ensuring accountability for expenditure and administration of government programs.

Where such claims are made, a committee may explore whether the provision of the information in a different form, or in camera (where available), may satisfy its requirements. The process allows committees and witnesses to negotiate on the scope of any request for information and is intended to ensure that committees have enough information to determine where the public interest in a particular matter lies.

My advice to Senator Henderson canvassed how the committee dealt with similar matters in previous parliaments. This has varied from agreeing to receive information in camera, on the basis of commercial sensitivity, to declining requests for confidentiality and PII claims in relation to remuneration of Australia Post executives.

The committee will be aware that it must receive all estimates evidence in public. If it wished to receive in camera information from the ABC it would need to do so outside the estimates process.

The committee has before it letters from Senator Henderson and from Mr Anderson arguing the public interest for and against disclosure of the information sought. Parts of the discussion at Tuesdays hearing also fleshed out these arguments. The information in Odgers, and senators' own experience of PII claims in other settings, provide some guidance to the committee in assessing these claims.

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

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'R Pye', written in a cursive style.

(Richard Pye)



D22/274190

14 November 2022

Senator Grogan
Chair, Environment and Communications Legislation Committee
Suite S1.94
Parliament House

By email: ec.sen@aph.gov.au

Dear Senator Grogan

Estimates – Consideration of public interest immunity claim 2

On 10 November 2022 I provided the committee with advice on a public interest immunity (PII) claim by the Managing Director of the Australian Broadcasting Corporation (ABC), responding to questions asked by Senator Henderson relating to ABC staff remuneration. The committee has now sought advice about a second PII claim, dated 10 November 2022, responding to questions from Senator Henderson relating to ABC staff roles, gender, location and remuneration.

The two claims are substantially the same. However, the second request requires information by position title and description, rather than against individual names. I am asked whether that would alter my advice. It does not affect my advice, although it may affect senators' assessment of the claim.

My advice on the first claim was that it met the Senate's procedural requirements, as set out in the 2009 resolution on PII claims before committees. It identified public interest grounds, including grounds that had attracted some measure of acceptance in the Senate, and sought to explain the apprehended harm to the public interest that might flow from the disclosure of the information in the form sought. The second claim also meets those requirements.

Beyond that, it is a matter for the judgement of senators whether in all the circumstances the claims should be accepted. My earlier advice set out some of the considerations senators might apply in weighing up the claims. Those considerations also apply here.

The claim on staff roles, gender, location and remuneration

Senator Henderson is seeking, for every ABC employee, a list showing their position title, gender (where available), place of employment and 'total remuneration band in forty thousand dollar increments'; categorised into departments etc.

The claim from Mr Anderson is essentially made on the same four grounds as the earlier claim:

- (a) unreasonable invasion of privacy,
- (b) protection of staff from work health and safety risks, particularly in the form of online abuse,

- (c) the statutory independence and role of the ABC warrants additional caution in assessing requests for the production of information and particularly personal information
- (d) damage to commercial interests.

The Senate has recognised the first and last of those grounds – privacy and commercial confidentiality – as attracting some measure of acceptance: *Odgers' Australian Senate Practice*, 14th ed., pp 664-5. My earlier advice discussed Odgers' observations about those grounds, so I won't repeat that here.

Of course, senators may form a different view of a claim where, for instance, a request does not seek the same degree of personal information; apprehending a lesser risk of harm to the public interest. Senators would also be aware, however, that de-identifying information does not necessarily protect privacy, particularly where small cohorts are involved. No doubt there are also circumstances where such data remains commercially sensitive.

As I noted in my previous advice, I am not sure that the second and third grounds mentioned are grounds, per se, rather than arguments in support of the privacy claim. Mr Anderson also provides what he describes as a fifth ground: that examining the specific allegation raised by Senator Henderson 'is a more appropriate, and direct, way to deal with the Senator's allegation and concern'. While this does not itself seem to be a public interest immunity ground, senators may conclude that it is an acceptable way to approach the matter.

As with the first claim, the committee has before it letters from Senator Henderson and from Mr Anderson. Senator Henderson places her request in the context of debates about the size of the ABC's staffing budget and the adequacy of ABC funding, including in regional Australia. She argues that 'it is a matter of acute public interest that the ABC provides greater transparency about the role, gender, place of work and remuneration band of ABC Employees as well as how various departments, divisions, program and offices are resourced.'

In making his claim on the grounds discussed above, Mr Anderson argues that the request 'well exceeds established disclosure practice in Australia' and would unreasonably disclose personal information 'where a significant amount of aggregated information is publicly available'. He attaches extracts from ABC reports on remuneration for senior executives and other highly paid staff, and on gender distribution of its workforce by occupational group; and undertakes to provide the committee with workforce statistics in accordance with the *Workplace Gender Equality Act 2012*.

Senator Henderson adds that her request seeks to 'strike a balance between the privacy of ABC Employees with the right of the Parliament to scrutinise more comprehensively the expenditure of the ABC, and the manner in which the ABC is resourced.' In many ways, the task of the committee is to assess whether that balance has been appropriately struck. It remains a matter for the committee, in all the circumstances, whether to accept the PII claim or to press for the information as requested.

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

Yours sincerely,



(Richard Pye)