



ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE

10 February 2023

Mr David Anderson
Managing Director
Australian Broadcasting Association

via email

Dear Mr Anderson

Budget Estimates 2022-23—ABC Public Interest Immunity claim

I am writing on behalf of the Senate Environment and Communications Legislation Committee (the committee) regarding the ABC's public interest immunity (PII) claim made on 17 January 2023 concerning information requested by Senator Henderson as part of the 2022-23 Budget Estimates process. In evidence, you stated that you considered there 'was a breach of the ABC's code of conduct when it comes to personal use of social media' by Ms Louise Milligan. In response, Senator Henderson requested 'the determination that the ABC made in relation to this matter, including all relevant correspondence, e-mails, briefing documents and messages' ([Budget Estimates transcript](#), p. 13).

Senator Henderson has sought advice from the Clerk of the Senate regarding this PII claim and has subsequently provided that advice to the committee (attached). The Clerk's advice concludes that the committee may wish to require additional information from the ABC regarding 'the specific harm that would arise from disclosure of these documents in order to assess the claim.' The Clerk also suggests that 'the committee might also like to consider whether there is a basis for the ABC to provide at least some of the documents sought, with redactions for material in relation to which a cogent PII claim might apply.'

In order to progress this matter, the committee seeks the following further information:

1. elaboration on the specific harm that would arise from disclosure of the documents sought; and
2. whether the ABC can provide the documents sought, with appropriate redactions if necessary.

In accordance with Standing Order 26(2), the committee has agreed to publish this correspondence, including the Clerk's advice and will publish your response when it arrives.

Noting that the ABC is due to appear at the committee's Supplementary Budget Estimates hearing on 14 February, the committee would appreciate an interim response if a fully considered response is not possible by that time.

The committee also notes that individual senators may pursue this matter separately.

Please contact the Committee Secretary, Mr Stephen Palethorpe (02 6277 3526) if you would like to discuss this matter.

Yours sincerely

Senator Karen Grogan
Chair



D23/6653

3 February 2023

Senator Sarah Henderson
Suite SG.61
Parliament House

By return email

Dear Senator Henderson

ABC – Public Interest Immunity claim – Code of conduct determination

You have asked for advice about a public interest immunity (PII) claim made by the Managing Director of the Australian Broadcasting Corporation (ABC), Mr David Anderson, in response to a question taken on notice at an estimates hearing of the Environment and Communications Legislation Committee on 29 November 2022. You have asked for this advice in advance of the committee's consideration of the claim.

Background and procedure

While much of the Senate's practice in relation to PII claims reflects its dealings with the executive government, the same principles apply in relation to statutory authorities. In advice to you and to the committee in November last year I set out the basis upon which statutory authorities like the ABC are accountable to the Senate, particularly through the estimates process. I will not repeat that advice in detail here.

As with other witnesses, if officers of the ABC consider that information sought at estimates ought not be disclosed, they should raise a PII claim to that effect. This obligation and the proper process for doing so are set out in a Senate resolution of 13 May 2009. The committee has an established practice of considering PII claims made by the Managing Director of the ABC.

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 this principle 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 or document'.

It is for the committee (in the first instance) and ultimately for the Senate to determine whether to accept the claim or to press for the information.

The claim on the code of conduct determination

Mr Anderson told the committee on 29 November 2022 he felt there 'was a breach of the ABC's code of conduct when it comes to personal use of social media' [by Ms Milligan]. In response, you asked for 'the determination that the ABC made in relation to this matter, including all relevant correspondence, e-mails, briefing documents and messages.'

Mr Anderson wrote to the committee on 17 January 2023 making a PII claim in respect of the documents sought. He wrote that the question:

...specifically seeks the disclosure of an individual's employee records. The ABC treats employee records confidentially and does not make a practice of disclosing information about employees at an individual level, aside from information published for Key Management Personnel and Board Members in the ABC's annual report.

Mr Anderson argues that 'disclosing the requested documents would be an unreasonable disclosure of personal information' and seeks to make a PII claim on four grounds:

- (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.

Before turning to the stated grounds, it is worth considering the procedural requirement in the 2009 resolution that a claim should specify 'the harm to the public interest that could result from the disclosure of the information or document'. The letter appears to make generalised claims about the apprehended harm of disclosing and publishing a category of documents identified as 'employee records', rather than specifying the harm that might be occasioned by the disclosure of the particular documents sought, that is, a code of conduct determination and associated documents. You may wish to suggest that the committee requires additional information regarding the specific harm that would arise from disclosure of these documents in order to assess the claim.

The grounds identified in the claim are the same as those identified in PII claims made to the committee by Mr Anderson on different matters on 8 and 10 November 2022. I provided advice to the committee on these matters on 10 and 14 November 2022, respectively. As I said on those occasions, *Odgers' Australian Senate Practice* 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. Again, 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]

The PII claim mainly addresses privacy in paragraph 6(a). That begins by arguing that 'disclosure of the requested documents would clearly identify an individual'. I'm not sure how this can be relevant, given that the individual was identified in the questions and answers at the hearing. In my view, there are sound reasons for agencies appearing at estimates to be circumspect about the level of detail they provide in respect of code of conduct investigations and findings involving their employees, in order to protect their privacy. However, rather than making that argument, the remainder of the paragraph (a) essentially rehearses the principles involved – that private information about individuals should not be unreasonably disclosed, and that care should be taken in assessing potential damage – without addressing why disclosure in this particular case would be unreasonable or specifying the apprehended harm from disclosing the particular documents sought. Paragraphs (b) and (c) are similarly generic, making general claims about employee records, rather than addressing the documents sought. As noted above, you may wish to suggest that this does not provide the committee with sufficient information to assess the claim.

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.

It is difficult to see how the commercial claim is made out here. The information sought would not appear to be commercially sensitive in the same manner as, for instance, the remuneration and salary-band information sought by the earlier orders. Again, the claim seems to amount to a generic argument that disclosure of any confidential employee record undermines the ABC's commercial position. It provides no information as to how disclosure of the particular information sought would harm the public interest.

On that basis, it may be that the committee would require additional information from the ABC before determining the matter. The committee might also like to consider whether there is a basis for the ABC to provide at least some of the documents sought, with redactions for material in relation to which a cogent PII claim might apply.

Let me know if I can provide any further assistance.

Yours sincerely,

(Richard Pye)