



Monday 14 February 2022

Stephen Palethorpe  
Committee Secretary  
Senate Environment and Communications Committee  
Department of Senate  
Parliament House  
Canberra ACT 2600  
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Dear Mr Palethorpe,

#### **PUBLIC INTEREST IMMUNITY CLAIM**

The ABC refers to your advice that the Senate Environment and Communications Committee (**Committee**) has considered the responses to questions 140 and 144 taken during Supplementary Estimates 2021-22 and come to the view that they require public interest immunity claims.

The responses to these questions (Q.140 and Q.144), as provided by the ABC to the Committee, are attached as Annexure A and Annexure B for ease of reference.

The purpose of this correspondence is to advise the Committee of the ABC's position and set out the Corporation's public interest immunity claims. The ABC has sought to be as open as possible on these matters but in a manner that does not compromise its independence, obligations to employees and the proper functioning of the corporation, both in relation to these specific matters and future legal matters.

For the reasons set out below, the ABC maintains that it would not be in the public interest to provide further information to the Committee beyond the answers already provided and any additional information contained below.

#### **Committee Question Number 140**

##### Abrogation of legal professional privilege

1. The total sum of external legal fees paid by the ABC for the past three financial years has already been provided to the Committee in response to

Question Number 140 (see Annexure A). Disclosing further information in response to the question would involve disclosing privileged information.

2. In circumstances where the total sum of external legal fees information has been made available, the ABC considers that it is not in the public interest to provide additional information that would disclose material that may be subject to a claim of legal professional privilege. Disclosure to the Committee would result in the information entering the public domain.
3. Legal professional privilege is a fundamental pillar of our legal system. The Australian Law Reform Commission (ALRC) observed in its report, *Privilege in Perspective*, that abrogation of legal professional privilege should occur only in exceptional circumstances. The ALRC has further noted that legal professional privilege is fundamental to the administration of justice, stating:

*The rationale most commonly given for the privilege is an instrumental one— that it serves the administration of justice by encouraging full and frank disclosure by clients to their lawyers. Without a relationship of confidence and trust between a lawyer and a client, a person may choose not to engage a lawyer, or not to reveal all of the facts to their lawyer.*

4. As a major publisher of matters of public importance, the ABC is engaged in matters, including litigation and non-litigious disputes, in which legal advice and litigation services are necessary. The disclosure of this advice may interfere with the ability of the ABC to obtain legal advice. It would also hinder the ABC's ability to share or receive legal advice on the basis of a common interest without fear of future disclosure to the public at large.
5. In addition, the disclosure of privileged material may adversely affect the ABC's ability to defend itself in other proceedings, or to negotiate effectively, by disclosing strategies and positions (legal, financial, tactical) that apply equally to matters beyond that to which the material refers, and in turn increase the corporation's exposure or risk.

#### The independence of the ABC

6. Further, the provision of privileged material would compromise the independence of the ABC. Notwithstanding the fact that the ABC is government-funded, the ABC has been statutorily established by the *Australian Broadcasting Corporation Act 1983 (Cth)* (ABC Act) as an entity that is both legally separate and operationally independent from the Commonwealth. Under section 78(6) of the ABC Act, the ABC is also not

subject to direction by or on behalf of the Government of the Commonwealth, unless where specifically set out in the ABC Act or other legislation.

7. In light of the ABC's statutory independence, any legal advice provided to the ABC, should be distinguished from legal advice provided to the Commonwealth or the Executive and treated with an additional degree of caution with respect to requests for production of such advice by parliamentary inquiries.

#### Public interest immunity

8. The ABC's position is that it would not be in the public interest (and there would be resultant harm to the public interest) to disclose the additional information requested as the disclosure of the material would:
  - (a) reveal commercial in confidence information hindering the ABC's ability to engage and negotiate with third parties;
  - (b) reveal private information about individuals, particularly prospective witnesses assisting the ABC in litigious matters. There is often a reasonable expectation of privacy in these circumstances. Further, disclosure of private meetings and personal information may dissuade potential witnesses from assisting the ABC in the future;
  - (c) provide potential litigants with a strategic advantage as the invoices disclose steps the ABC has taken in responding to a claim. More importantly, the description of work undertaken would also relate to legal proceedings which are still ongoing and could result in prejudice to those proceedings;
  - (d) be inconsistent with the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, specifically paragraphs 4.8.1 and 4.8.2 and Attachment A (at paragraph 13), which indicate it may be appropriate to decline to provide information or documents if to do so would unreasonably disclose personal information or disclose material that could be the subject of a claim for legal professional privilege; and
  - (e) be onerous and result in a substantial and unreasonable diversion of resources. The request would require three years' worth of invoices to be carefully reviewed. Due care would need to be given in respect of redactions applied for personal information, privilege, and to avoid prejudice to current legal proceedings.

9. For the reasons set out above, the ABC claims public interest immunity in respect of this request.

#### **Committee Question Number 144**

10. A copy of the ABC's response to Committee Question Number 144 is set out at **Annexure B**. We understand Senator Bragg specifically references subparagraphs (b) and (f) of that response.

#### Subparagraph (b)

11. In order to assist the Committee, the ABC can provide the following information:

The then General Counsel informed the Board Ms Louise Milligan had removed her tweets and settlement approaches had been made at the Board meeting dated 9 June 2021. The ABC does not waive privilege in respect of this information.

12. The request relates to information subject to legal professional privilege. The ABC repeats and relies upon the preceding paragraphs of this letter, including [3]-[9].

#### Subparagraph (f)

13. This request concerns documents referenced in the *Daily Telegraph* on 26 October 2021 relating to a freedom of information (FOI) request made by a *Daily Telegraph* journalist pursuant to the *Freedom of Information Act* (Cth) 1982 (the FOI Act). The documents referenced are in connection to a legal claim and legal proceedings.
14. The various exemptions within the FOI Act permit government departments and agencies to, where appropriate after proper assessment, prevent the release of information. By containing these exemptions, the FOI Act acknowledges that it is not in the public interest for all documents from Government or other bodies within the purview of the FOI Act to be released publicly.
15. The ABC routinely assesses FOI applications and processes the applications in line with FOI Act. That occurred in this instance.
16. In answering Q144 from Senator Bragg, the ABC does not seek to rely on the fact that the documents were withheld pursuant to the FOI process, but rather

sets out relevant grounds upon which the ABC says the documents should remain confidential and why that is in the public interest (including commonly held societal views of the importance of maintaining confidentiality in certain circumstances, such as with legal professional privilege). More generally, however, the ABC is concerned that care be taken in assessing a circumvention of the Commonwealth FOI process, including an appreciation of the inevitable knock-on effects that would flow from the decision.

17. As with subparagraph (b), the request relates predominantly to information subject to legal professional privilege, and the ABC repeats and relies upon the preceding paragraphs of this letter, including [3]-[8].
18. Further, the ABC believes disclosing the documents would not be in, and would harm, the public interest, for the following reasons:
  - (a) Disclosure would be inconsistent with the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, specifically paragraphs 4.8.1 and 4.8.2 and Attachment A (at paragraph 13), which indicate it may be appropriate to decline to provide information or documents if to do so would unreasonably disclose personal information or disclose material that could be the subject of a claim for legal professional privilege.
  - (b) Providing the documents would disclose allegations made by a third party against another third party, which are not otherwise in the public domain. The ABC is concerned that the disclosure of this document may:
    - i. breach the privacy of the party providing those allegations to the ABC, in circumstances where that party has not consented to the ABC disclosing this information, and thereby undermining the ability of the ABC, and its journalists, to cultivate relationships with sources, including anonymous or confidential sources; and
    - ii. damage the reputation of the individual who is the subject of the allegations, in circumstances where the allegations have not been tested or interrogated, and are not otherwise in the public domain.
  - (c) Some of the material identified in the documents canvassed in the Daily Telegraph on 26 October 2021 contain the names and direct contact details of individuals employed by the ABC. In addition to the general concerns of privacy outlined above, the ABC has special obligations to its employees. The ABC is concerned that disclosure of names and direct

contact details of ABC staff may result in unwarranted public criticism or targeted online abuse. The ABC seeks to:

- i. comply with the duty of care owed to staff members in respect of their names, direct contact details and workplace safety;
- ii. protect individuals from unreasonable interferences with their privacy;
- iii. protect staff from occupational health and safety risks; and
- iv. preserve reasonably held expectations of confidentiality and trust between the ABC and its employees.

The ABC is concerned that disclosure of this material may damage the public interest by hindering the ABC's ability to recruit staff from the market at large, but particularly for content makers who specialise in matters of public importance, and in-house legal staff. The ABC is also concerned that disclosure of these documents may limit the ABC's ability to seek participation from the staff members in question in the future.

19. Accordingly, the ABC claims public interest immunity in respect of the requests relating to both subparagraph (b) and (f).

We hope the above information is of assistance.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'D Anderson', with a horizontal line underneath.

David Anderson  
Managing Director