



31 January 2024

Senator Karen Grogan  
Chair of Environment and Communications Legislation Committee  
PO Box 6100  
Senate  
Parliament House  
Canberra ACT 2600  
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Dear Senator

**2023-24 SUPPLEMENTARY BUDGET ESTIMATES: BREAKDOWN OF EXTERNAL LEGAL SPEND BY MATTER – PUBLIC INTEREST IMMUNITY CLAIM**

1. I refer to departmental question number SQ23-004825 taken during the 2023-24 Supplementary Budget Estimates hearing on 24 October 2023 and Committee Question Number 49 (SQ23-003799) from the 2023-24 Budget Estimates hearing on 24 May 2023.
  - (a) SQ23-003799 included a request for the total of all money spent on external lawyers over the past two financial years as well as a breakdown on each particular matter.
  - (b) SQ23-004825 refers to the ABC's response to SQ23-003799 and asks for the same breakdown as requested in SQ23-003799 as well as what the ABC is paying to each barrister and each legal firm for each matter on foot.
2. The ABC provided the totals spent on external lawyers for financial years 2020/21 and 2021/22 in response to SQ23-003799. A copy of the response is attached as **Appendix A** for ease of reference.
3. The purpose of this correspondence is to advise the Committee of the ABC's position and set out the ABC's public interest immunity claim in respect of the breakdown of information referred to in paragraph 1 above. The ABC is mindful of its obligations under the *Australian Broadcasting Corporation Act 1983* and does not wish to compromise its independence, obligations to employees or the proper functioning of the corporation, both in relation to these specific matters and future legal matters.

4. The ABC uses external legal services for advice on a range of matters, projects and issues across the breadth of the corporation's activities, including matters which are confidential and/or sensitive in nature.
5. Providing the breakdown information as requested would require the ABC to publicly disclose particularised information about each matter on which it engaged external legal services during financial years 2020/21 and 2021/22, which would reveal:
  - (a) identifying confidential, commercially sensitive and/or legally privileged information about the nature of each matter, which could disclose the existence of a legal issue, the substance of the matter, and the individuals or other parties involved and compromise the ABC's commercial interests with respect to that matter/issue;
  - (b) identifying personal information of individuals involved in any such matter;
  - (c) each barrister and legal firm used for each matter, which could further identify the substance of each matter; and
  - (d) the amount spent with each barrister and legal firm on each matter, which could further indicate the extent or complexity of the legal issues related to each matter and undermine the ABC's ability to obtain cost-effective services in the legal market.
6. 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 provided in response to the questions referred to in paragraph 1 above.

### **Abrogation of legal professional privilege**

7. The totals of all money spent on external lawyers for financial years 2020-21 and 2021-22 have already been provided to the Committee in response to question SQ23-003799 (see Appendix A). Disclosing information about each legal matter in response to the question would involve disclosing privileged information.
8. In circumstances where the total sum of external legal fees 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.
9. 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.*

10. 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 information about each matter may:
  - (a) interfere with the ability of the ABC to obtain legal advice by discouraging the ABC and its staff from seeking appropriate legal advice;
  - (b) 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;
  - (c) inhibit the exercise of the ABC's editorial independence, particularly having regard to the confidential and/or sensitive matters the ABC regularly seeks legal advice on as part of its editorial processes; and
  - (d) potentially exacerbate the legal risk the subject of the matter by the fact of its public disclosure. This could include, but not be limited to, disclosing matters on which the ABC has sought pre-publication advice, disclosing areas of risk the ABC has identified and sought advice on, and/or disclosing matters which raise commercially sensitive information and/or privacy concerns (discussed further below).
11. 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.
12. 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 material by parliamentary inquiries.
13. Further, we note that other Commonwealth entities are not required to publicly report such detailed information under the *Legal Services Directions 2017*(Cth), which only requires those entities to publicly report on annual total amounts.

## Commercial and privacy concerns

14. *Odgers' Australian Senate Practice* (14th ed) (**Odgers**) acknowledges that the disclosure of some information can damage the commercial interests of participants in the marketplace, and potentially compromise the privacy of individuals. See also *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, specifically Attachment A (at paragraph 13).
15. The ABC uses external legal services for advice on a wide range of matters, including matters which are confidential and/or sensitive in nature.
16. The material requested includes:
  - (a) confidential information related to the management and performance of staff members and the names of staff members involved with the matters;
  - (b) commercial in confidence material about corporate operational and strategic matters;
  - (c) commercial in confidence material about proposed project, editorial, and programming matters; and
  - (d) information about external suppliers and fees charged for specific legal services.
17. In light of the nature of this information, the ABC submits that the public interest is served by:
  - (a) the preservation of reasonably held expectations of confidentiality and trust between the ABC and its employees;
  - (b) compliance with the duty of care owed by the ABC to staff members in respect of their personal information and workplace safety;
  - (c) the protection of ABC staff from workplace health and safety risks, including unwarranted public criticism or targeted online abuse that may arise from the disclosure of information about individual staff members;
  - (d) the protection of commercial in confidence information relating to corporate operational and strategic matters, the disclosure of which would undermine the value of the information to the ABC and the work done to produce it;
  - (e) the protection of commercial in confidence information relating to proposed ABC projects and programs ahead of that information being made public and avoiding a situation where another media organisation can use that information to the ABC's disadvantage; and

- (f) the protection of commercial in confidence information relating to third parties that provide services to the ABC and avoid a situation where the ABC's ability to engage and negotiate with such parties is hindered, including in respect of obtaining cost-effective services in the legal market.

## Public interest immunity

18. In summary, the ABC is concerned that disclosure of the requested information would harm the public interest because disclosure would:

- (a) undermine the ABC's statutory independence by disclosing material that is the subject of a claim of legal professional privilege;
- (b) set a precedent where an independent agency such as the ABC will be obliged to produce material that is the subject of a claim of legal professional privilege;
- (c) undermine key principles relating to the administration of justice, as highlighted by the ALRC report referred to at paragraph 9 above;
- (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 material that could be the subject of a claim for legal professional privilege;
- (e) provide potential litigants with a strategic advantage in respect of matters under active or recent consideration by the ABC. The list of matters would also relate to legal proceedings which are still ongoing and could result in prejudice to those proceedings;
- (f) provide potential litigants with a strategic advantage because of the general applicability of the costs associated with specific matters, and therefore hinder the ABC's ability to defend itself effectively in potential proceedings;
- (g) be contrary to the public interest factors against disclosure listed in paragraph 17 above;
- (h) reveal personal information about individual staff members contrary to a reasonable expectation of privacy and confidentiality, undermining the ABC's ability to attract and retain staff;
- (i) reveal confidential information about matters under active or recent legal consideration by the ABC. The ABC is concerned that disclosure of this information may dissuade it from seeking appropriate external legal expertise in the future and increase the corporation's exposure or risk; and

(j) reveal commercial in confidence information hindering the ABC's ability to engage and negotiate with third parties.

19. For the reasons set out above, the ABC claims public interest immunity in respect of these requests.

Yours sincerely

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

David Anderson  
Managing Director

## Appendix A

### Money spent on external lawyers over the past two financial years

Committee Question Number: 49

Departmental Question Number: SQ23-003799

Division/Agency Name: Agency - Australian Broadcasting Corporation

Hansard Reference: Spoken, Page No. 74 (24 May 2023)

Topic: ABC - Money spent on external lawyers over the past two financial years

#### Senator Sarah Henderson asked:

Senator HENDERSON: We would welcome you making a public interest immunity claim so it could be properly considered by the committee. Can I ask about your legal fees and the outsourcing of legal work? Are you able to provide to the committee a total of all money spent on external lawyers over the past two financial years? Mr Anderson: I'm not going to be able to lay my hands on that right now, but I will provide that to you on notice. Just to make sure I got the question right, is it just external legal fees? Senator HENDERSON: Both the total amount and also a breakdown on each particular matter. Mr Anderson: I'm not sure- I will take that on notice and take advice and provide the information to you. Senator HENDERSON: In doing so, could you please provide the total amount of legal fees spent on the defamation case involving the war veteran Heston Russell? Mr Anderson: Again, I will take that on notice and take advice about what I can provide. With regard to that, as you know those legal proceedings are currently on foot. If there was a settlement or something happened there, I don't want to prejudice that either, nor do I want to break any confidentiality undertakings. I will just take it on notice. Senator HENDERSON: I would argue that revealing your legal fees would not impact on your ability to settle the matter. Mr Anderson: Probably not, but I will take advice and get back to you.

#### Answer:

All amounts set out below exclude GST.

Financial Year 2020/21: \$2.89m

Financial Year 2021/22: \$2.99m

With respect to the request for a breakdown of all external legal spend by matter, the Australian Broadcasting Corporation (ABC) utilises external legal services for advice on a wide range of matters, projects, and issues across the breadth of the organisation's activities, including matters which are confidential and/or sensitive in nature. Providing a breakdown of all external legal spend by matter could undermine the ABC's ability to obtain cost-effective services in the legal market and adversely affect its commercial and/or legal position, which would not be in the public interest.

With respect to the request for total amount of legal fees spent on the defamation case involving Heston Russell, the ABC considers that it is not in the public interest to provide information about an ongoing litigated matter.