



D24/47679

14 June 2024

Senator Raff Ciccone
Chair
Foreign Affairs, Defence and Trade Legislation Committee
Parliament House

By email

Dear Senator Ciccone

Public interest immunity claim – National Anti-Corruption Commission investigations

You have asked for advice about the interaction between investigations undertaken by the National Anti-Corruption Commission (NACC) and information that may be provided to parliamentary committees.

Background

At an estimates hearing on 4 June 2024, the Managing Director of Tourism Australia (TA), Ms Phillipa Harrison, answered a number of questions about three former TA employees who had been required to repay certain costs after breaching TA's travel policies. Ms Harrison told the committee that TA had referred the matter to the NACC, whose processes were still under way.

When pressed on the identity of one of the people involved, Ms Harrison indicated that TA had sought advice from the NACC as to the extent of information that she might provide to the committee. She indicated that she was unable to provide further detail on the roles and the people involved until the NACC had finished its investigations. She went on to note that the NACC did not want her to disclose that information as to do so "may compromise current or potential investigations and prematurely impact the reputation of individuals in circumstances when the legislation enacted by the Parliament intends to avoid that by requiring that investigations generally be conducted in private."

After a short suspension, you drew attention to the requirement for witnesses seeking to withhold information sought during committee proceeding to do so by making a public interest immunity (PII) claim, in accordance with established Senate practice. Ms Harrison subsequently indicated that she would make a PII claim in relation to the information sought, and noted the requirement to provide in writing the ground for the claim and the apprehended harm to the public interest that might be caused by disclosing the information.

The Minister at the table indicated his interest in receiving advice on the matter, characterising the witness as being subject to a "direction" from the NACC and noting that similar circumstances would no doubt arise in the future.

Advice

The main thing to say is that the *National Anti-Corruption Commission Act 2022* does not relevantly affect the law relating to the powers, privileges and immunities of the Commonwealth Houses, their members, or committees: NACC Act, s. 374.¹ While the NACC may express a preference that evidence should not be provided to a committee, it cannot make a direction to that effect.

A suggestion that material should be withheld from a Senate committee because of NACC investigations should therefore be dealt with in accordance with established practice. In the context of Senate committees, this means that witnesses seeking to withhold information sought by a committee or a committee member should make a public interest immunity claim, as provided for in continuing order 10.

As noted during the hearing, this appears to be the first occasion on which a PII has been raised on the basis of possible prejudice to Anti-Corruption Commission investigations.

Practice in relation to public interest immunity claims continues to evolve. That practice identifies a non-exhaustive list of “potentially acceptable grounds” for such claims, which are identified in Odgers’ *Australian Senate Practice*, 14th ed., from p. 662. These include prejudice to legal proceedings and prejudice to law enforcement investigations. The committee can look to principles applied in relation to those grounds to assist in deciding whether a claim of possible prejudice to Anti-Corruption Commission investigations should be accepted.

Drawing on those principles, the committee might conclude that the ground of “prejudice to Anti-Corruption Commission investigations” should only be invoked where it is established that there are NACC investigations in progress and that the information sought could interfere with those investigations.

Clearly the fact that a matter had or may have been referred to the NACC would not provide a sufficient basis for a PII claim. Virtually anyone may refer a matter to the NACC and a mere referral in no way indicates that a matter warrants investigation. Casting the net so wide would overly constrain the Senate and its committees in scrutinising the work of government. Even where it is known that NACC investigations were on foot, it is difficult to see how a PII claim would be justified unless there was some evidence that disclosure of the information sought would prejudice those investigations.

Noting the advice in Odgers in relation to law enforcement investigations, the committee might expect that the ground should normally be raised directly by the NACC and “not by some other official who can merely speculate about the relationship of the information to the investigation”: Odgers, 14th ed., p. 663. In considering a PII claim on this ground, the committee might look to something more formal by way of evidence of the NACC’s position than oral evidence of a conversation.

1. The only constraint on the parliament’s powers, which is not relevant here, is a provision restraining the Joint Standing Committee on the NACC from receiving certain information relating to national security or international relations if it is certified to be confidential by the Attorney-General: NACC Act, s. 181.

The question whether to accept a PII claim turns on a committee's consideration of the apprehended harm that may follow the disclosure of the information sought to be withheld. From the evidence given at the hearing it seems that the NACC was not concerned about the witness before the committee providing details of the breaches that occurred and of the subsequent actions undertaken by her agency. Rather, the witness told the committee that she had been asked not to disclose the roles and people involved. There were two aspects to her explanation: a general concern that the provision of that information "may compromise current or potential investigations"; and a concern that the provision of roles or names might:

prematurely impact the reputation of individuals in circumstances where the legislation enacted by the parliament intends to avoid that by requiring that investigations generally be conducted in private.

Given that the matter is now proceeding by way of formal PII claim, the committee will presumably receive written advice as to the apprehended harm involved, which may expand on matters raised at the hearing. It is for the committee, in the first instance, to determine whether, in all the circumstances, the claim should be accepted.

In doing so, the committee might wish to consider how information provided to the committee might compromise investigations. It must be doubted that NACC commissioners would themselves be influenced by evidence provided to an estimates hearing, in the same way that it is unlikely that superior court judges are unlikely to be influenced by information produced to a committee: see Odgers, 14th ed., p. 662. However, the committee may wish to consider the possibility that evidence provided at its hearing might influence the subsequent provision of evidence to the NACC.

In relation to the second aspect raised at the hearing, of premature damage to individuals' reputations, the committee might wish to consider:

- whether to distinguish between current investigations, which might warrant greater protection, and potential investigations, which might warrant protection only if there is some evidence that they are imminent,
- whether the identities of people involved have been widely reported, or are easily deduced, such that the apprehended harm might already have occurred, and
- whether the legislated requirement that NACC investigations 'generally' be conducted in private should always be taken to override the public interest in committee or Senate scrutiny of a matter.

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

Yours sincerely,

(Richard Pye)