



THE SENATE

ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE

5 March 2024

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

Dear Mr Anderson

Additional Estimates 2023-24—ABC public interest immunity claim

I refer to your letter to the Senate Environment and Communications Legislation Committee (the committee) of 16 February 2024, which raises a public interest immunity (PII) claim. The claim relates to information requested by Senator Faruqi as part of the Additional Estimates 2023-24 process on the ABC's engagement of Ms Antoinette Lattouf for work in December 2023.

Your correspondence sets out that the PII claim relies on the ground that disclosing the requested information could cause prejudice to legal proceedings. Specifically, it refers to Ms Lattouf's claim of unlawful termination under the *Fair Work Act 2009* which is scheduled for hearing in the Fair Work Commission (FWC) on 8 March 2024. Your letter outlines that an application in the FWC is a necessary step before a claimant can commence proceedings in the Federal Court.

The committee acknowledges that the ground on which you rely is recognised as a potentially acceptable ground for PII claims, as set out in [Odgers' Australian Senate Practice](#) (14th Edition, p. 662). The committee notes that while this ground is usually raised in judicial settings, the Clerk of the Senate has confirmed that in certain circumstances, such as an unfair dismissal case before the FWC where the commission is charged with determining a dispute between parties, this ground could be relied on to make a PII claim (advice enclosed). The Clerk noted that other types of matters before the FWC may not warrant the same approach. He also noted that it is for the committee to determine whether the claim is compelling in all the circumstances of the matter.

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. In particular, you identified that disclosure of the information 'could influence the evidence given by witnesses or deter potential witnesses from coming forward' and 'risks undermining the integrity of, and confidence in, the Fair Work Commission process'.

The committee has carefully considered your PII claim, considering both the importance of the accountability and transparency of government agencies, against the potential harms outlined by the ABC. On balance, and based on the particular circumstances relating to this claim, the committee accepts the ABC's claim that the provision of the information requested may result in prejudice to current legal proceedings.

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

Finally, the committee notes its expectation that the ABC will answer questions on the ABC's engagement of

Ms Lattouf once the current legal proceedings have concluded, a position which appears to be confirmed by paragraph 3 of your letter.

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

Yours sincerely

Senator Karen Grogan
Chair



D24/16977

20 February 2024

Senator Karen Grogan
Chair
Environment and Communications Legislation Committee
Parliament House

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

Dear Senator Grogan

ABC PII claim - prejudice to proceedings before the Fair Work Commission

I understand the committee has sought my advice on the public interest immunity (PII) claim made by the Managing Director of the Australian Broadcasting Corporation, Mr David Anderson, in relation to a matter currently before the Fair Work Commission, involving possible termination of an employment contract or unfair dismissal. When Mr Anderson pre-empted the claim during a recent estimates hearing I advised that, in my view, a PII claim could be made on the ground of prejudice to legal proceedings in respect of a matter of this kind before the Commission. I also noted that it is for the committee to determine whether the claim is compelling in all the circumstances of the matter.

Now that the claim has been made, I confirm that that remains my view. It is open to the ABC to seek to rely on this ground in this matter and for the committee to determine in the usual way whether to accept or reject the claim.

Odgers' Australian Senate Practice identifies 'prejudice to legal proceedings' as a potentially acceptable ground for public interest immunity (PII) claims. It says, in part:

Prejudice to legal proceedings

There are two ways in which the production of information to the Senate or a committee could cause prejudice to legal proceedings. First, there may be a reasonable apprehension that disclosure of some information could prejudice a trial which is in the offing by influencing magistrates, jurors or witnesses in their evidence or decision-making. A case involving only questions of law before superior court judges is not likely to be influenced and therefore is unlikely to provide a basis for this ground. [14th ed., p. 662]

An aspect of this is seeking to avoid prejudice to the legal position of the parties ahead of matters being raised or heard in the Commission. There are precedents for the government raising this ground based on possible prejudice to the Commonwealth's position in legal proceedings. Such claims have been made in relation to orders seeking government legal advice, for example. These claims have sometimes been accepted and sometimes rejected, depending on circumstances.

[Odgers goes on to describe a second aspect of possible prejudice that doesn't appear to be relevant here, concerning the possibility of the Senate or a committee creating material that cannot be examined in legal proceedings because of parliamentary privilege.]

In paragraph 5 of his letter, Mr Anderson says, correctly, that 'Neither Odgers nor the [Government] Witness Guide restrict the public interest immunity grounds described in this paragraph to courts.' On the other hand, Odgers does not specifically reference proceedings before a tribunal such as the Fair Work Commission, and I'm not aware of any examples of this ground being raised other than in relation to courts. It is relevant, however, to look at what Odgers says about the sub judice convention, which rests on similar principles. In essence Odgers says that the sub judice convention doesn't extend to executive-government appointed inquiries, such as royal commissions, on the basis that they do not try individual cases: 14th ed., p.265.

The same argument does not apply in relation to a matter such as an unfair dismissal case before the FWC, because the commission is charged with determining a dispute between parties. The points made in paragraph 7 of Mr Anderson's letter, including the prospect of subsequent proceedings occurring in the Federal Court, support this interpretation. Other types of matters before the FWC may not warrant the same approach.

In summary, I think that it is in order for a witness to raise a PII claim in this matter on the basis of possible prejudice to legal proceedings, including because information might prejudice the legal position of parties in a dispute about unfair dismissal. As you know, however, a PII claim is just that: a claim. It is for the committee in the first instance and, ultimately, for the Senate to determine whether the claim should be accepted and what remedies might be pursued if the claim is rejected.

Let me know if you would like to discuss this further.

(Richard Pye)