

40TH PARLIAMENT



Report 58

STANDING COMMITTEE ON PROCEDURE AND PRIVILEGES

Legal Proceedings by the Attorney General - Authorisation for President to defend

Presented by
Hon Kate Doust MLC (Chair)
October 2019

Standing Committee on Procedure and Privileges

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1 Background

- 1.1 By Resolution 4 made on 5 September 2019 and Resolutions 1 to 5 (inclusive) made on 25 September 2019, the Legislative Council authorised the President to commence and pursue legal proceedings in the Supreme Court of Western Australia, of the kinds described in those resolutions.
- 1.2 The kinds of proceedings that the President was so authorised to commence and pursue included:
 - 1.2.1 proceedings challenging the validity of:
 - (i) notices to produce documents, and a notice to produce information, issued by the Corruption and Crime Commission (**CCC**) to the Director General, Department of Premier and Cabinet, described in Resolution 4(1) made on 5 September 2019;
 - (ii) the CCC's actions in making and implementing an arrangement with the Director General, Department of Premier and Cabinet, described in Resolution 1(a) made on 25 September 2019;
 - (iii) notices to produce records or things issued by the CCC to the Clerk of the Legislative Council on 10 September 2019, and of any future notices issued by the CCC that in the opinion of solicitors and counsel give rise to similar issues, and of the conduct of the CCC in issuing those notices, as described in Resolution 2 made on 25 September 2019; and
 - 1.2.2 any causes of action which in the opinion of solicitors and counsel are related or raise similar questions to those proceedings described in Resolution 4(1) made on 5 September 2019.
- 1.3 On 25 September 2019, the Legislative Council noted that:
 - 1.3.1 similar questions arose in respect to the validity of the notices issued by the CCC to the Director General, Department of Premier and Cabinet, as arose in respect of the notices issued to the Clerk of the Legislative Council (Recommendation 1 paragraph (C) to (E)); and
 - 1.3.2 that to the extent the notices to produce are invalid, the CCC will not have a lawful right to the documents, data or information sought by those notices (Recommendation 1 paragraph (F)).
- 1.4 On 25 September 2019, the Legislative Council directed that the Clerk not comply with the notices to produce issued by the CCC and served upon the Clerk on 10 September 2019, pending:
 - 1.4.1 both the outcome of any proceedings and an assessment of parliamentary privilege by the Standing Committee on Procedure and Privileges (**Committee**) with respect to those notices; or
 - 1.4.2 further direction from the Committee taking account of legal advice, (Resolution 6 made on 25 September 2019).

2 Legal proceedings by the President against the Corruption and Crime Commission

- 2.1 On 27 September 2019, in accordance with the authorisation described above, the President commenced proceedings against the CCC, CIV 2717 of 2019 in the Supreme Court of

Western Australia, by writ of summons indorsed with a statement of claim attached as Appendix 1.

3 Legal proceedings by the Attorney General against the President

- 3.1 On the same day as the President commenced proceedings against the CCC, the Attorney-General commenced proceedings against the President, CIV 2716 of 2019 in the Supreme Court of Western Australia, challenging the legal validity of Resolution 6 made by the Legislative Council on 25 September 2019. The writ of summons indorsed with a statement of claim is attached as Appendix 2.
- 3.2 The President of the Legislative Council is named as the First Defendant in the Attorney General's proceedings.

4 Authorisation for the President to defend proceedings

- 4.1 At the time that the Legislative Council authorised the President to commence proceedings as described above, it was not known that the Attorney General would bring proceedings against the President.
- 4.2 The Attorney General's proceedings were foreshadowed in a letter from the State Solicitor to the President on 26 September 2019, attached in Appendix 3.
- 4.3 As the validity of the notices issued by the CCC to the Clerk of the Legislative Council on 10 September 2019 will, among other things, arise as material issues in the proceedings commenced by the Attorney General, the President instructed her solicitors to respond by letter to the State Solicitor on 27 September 2019, attached in Appendix 4.
- 4.4 The Committee notes that a failure to defend this action by the Attorney General imperils the legal proceedings against the CCC. Accordingly, the President has filed an appearance and a draft defence has been prepared and is intended to be lodged on 23 October 2019.
- 4.5 To enable the President to defend the legal action brought against her by the Attorney General, authorisation is sought in similar terms to that provided by the Legislative Council on 25 September 2019.

RECOMMENDATION 1

Recommendation 1

- 1. That the President of the Legislative Council of Western Australia:
 - (a) may defend proceedings CIV 2716 of 2019 for and on behalf of the Legislative Council of Western Australia;
 - (b) be authorised to conduct the defence of those proceedings in that capacity on behalf of the Legislative Council of Western Australia and to do all such things reasonably necessary for, and incidental to, the conduct of the defence of those proceedings, including to:
 - (i) engage solicitors and counsel to represent the Legislative Council of Western Australia and to act upon their advice with respect to the proceedings in consultation with the Standing Committee on Procedure and Privileges;

- (ii) without limitation on the preceding paragraph, file any document or take any step in relation to such proceeding, including any defence, counter-claim or other pleading;
- (iii) maintain the confidentiality and legal professional privilege attaching to communication relating to the proposed proceedings;
- (iv) take direction from the Standing Committee on Procedure and Privileges with respect to the conduct of the defence of those proceedings and matters related to them;
- (v) report to the Legislative Council of Western Australia, periodically, and when requested, with respect to the conduct of the defence of those proceedings; and
- (vi) to consult with the Deputy Clerk of the Legislative Council as the Accountable Authority of the Department of the Legislative Council to permit the authorisation of the expenditure of funds necessary and reasonable with respect to the defence of those proceedings.



Hon Kate Doust MLC
Chair

APPENDIX 1

CIV 2717 OF 2019: WRIT OF SUMMONS AND STATEMENT OF CLAIM

IN THE SUPREME COURT
OF WESTERN AUSTRALIA
HELD AT PERTH

No. CIV 2717 of 2019

BETWEEN

THE PRESIDENT OF THE
LEGISLATIVE COUNCIL OF WESTERN
AUSTRALIA

Plaintiff

AND

CORRUPTION AND CRIME
COMMISSION

First Defendant

-and-

Darren FOSTER

Second Defendant

-and-

Nigel PRATT

Third Defendant

WRIT OF SUMMONS

Date of Document: 27/09/2019

Filed on behalf of: The Plaintiff

Date of Filing (and valid for service from): 27/09/2019

Filed by:

Corrs Chambers Westgarth
Level 5, Brookfield Place Tower 2
123 St Georges Terrace
PERTH WA 6000
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Reference: 9150072

TO: CORRUPTION AND CRIME COMMISSION

OF: Level 5, 45 Francis Street
NORTHBRIDGE WA 6003
Australia

FILED

27 SEP 2019
Via eLodgment
CENTRAL OFFICE
SUPREME COURT

Folio 1
Page 1

AND TO: Darren FOSTER
OF: 2 Havelock Street
WEST PERTH WA 6005
Australia

AND TO: Nigel PRATT
OF: Parliament House
4 Harvest Terrace
WEST PERTH WA 6005
Australia

You are commanded that, within 10 days after the service of this writ on you, exclusive of the day of such service, you cause an appearance to be entered for you in our Supreme Court in an action at the suit of the abovenamed plaintiff, and take notice that in default of your so doing the plaintiff may proceed therein and judgment may be given in your absence.

Witness: **THE CHIEF JUSTICE OF WESTERN AUSTRALIA** on Friday, the 27th day of September 2019

NOTE: This writ may not be served later than 12 calendar months beginning with the above date unless renewed by order of the Court.

A defendant may appear to the writ by entering an appearance either personally or by solicitor at the Central Office of the Supreme Court at Perth.

If the defendant enters an appearance, then unless a summons for judgment is served on him in the meantime, he must also file a defence at the Central Office of the Supreme Court at Perth, and serve such defence on the solicitor for the plaintiff, within 14 days after the last day of the time limited for entering an appearance, otherwise judgment may be entered against him without notice.

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Statement of Claim

STATEMENT OF CLAIM

Parties

1. The Legislative Council of Western Australia (Legislative Council) is a House of the Parliament of Western Australia and was constituted as such pursuant to s 2 of the *Constitution Act 1889 (WA)*.
2. The plaintiff brings this action for and on behalf of the Legislative Council, having been authorised to do so by resolutions of the Legislative Council passed on 5 and 25 September 2019.
3. The first defendant is a body corporate, established, and able to be sued in its corporate name, by s 8 of the *Corruption, Crime and Misconduct Act 2003 (WA)* (CCM Act).
4. The second defendant is and was at all material times the Director General of the Department of Premier and Cabinet, in Western Australia.
5. The third defendant is and was at all material times the Clerk of the Legislative Council, who was appointed to that office in February 2014, by the Governor, under cl III of Letters Patent dated 14 February 1986.
6. At all material times, the second defendant, in his capacity as Director General of the Department of Premier and the Cabinet, had custody of the electronic records of the parliamentary email accounts of all members and former members of the Legislative Council and of their electorate staff, which include records of all email communications and electronic calendar entries made through that account.

Parliamentary privilege of the Legislative Council

7. By s 36 of the *Constitution Act 1889*, the Parliament of Western Australia was empowered, by any Act, to define the privileges, immunities and powers to be held, enjoyed and exercised by the Legislative Council and its members.
8. By s 1 of the *Parliamentary Privileges Act 1891 (WA)* (PP Act), the Legislative Council and its members and committees have and may exercise, to the extent that they are not inconsistent with the PP Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees, as at 1 January 1989.
9. Those privileges, immunities and powers of the Commons House of Parliament of the United Kingdom include the:
 - (a) immunity expressed in article 9 of the Bill of Rights 1689 (UK), to the effect that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament, by which, amongst other things, records and information of and related to the transaction of parliamentary business are protected from coercive production for, relevantly, examination or use outside Parliament, for a purpose for which the coercive production is purportedly required (Parliamentary Privilege); and
 - (b) the privilege and power to determine for itself whether any particular records or information are or is the subject of that immunity, the occasion and manner of enforcement of the immunity in respect of particular records or information and whether any coercive production for, relevantly, examination or use of such records or information outside Parliament, for a purpose for which the coercive production is purportedly required, constitutes contempt of Parliament.

First defendant's notices to second defendant to produce records

10. In purported exercise of the power conferred by s 95 of the CCM Act, in April, June and August 2019, the first defendant served on the second defendant three notices to produce, amongst other things, certain specified

electronic records, being notices dated 12 April 2019 (First Notice), 11 June 2019 (Second Notice) and 6 August 2019 (Third Notice).

11. The First Notice purported to require production, by a specified date, of certain specified electronic records, pleaded in paragraph 13 below, relating to two specified former members of the Legislative Council, whose terms ended on 21 May 2017, and specified former members of their electorate staff.
12. The Second Notice purported to require production, by a specified date, of certain specified electronic records, pleaded in paragraph 13 below, relating to one specified former member of the Legislative Council, whose term ended on 21 May 2017, and specified former members of that person's electorate staff.
13. The First and Second Notices purportedly required production, amongst other things, of:
 - (a) a complete electronic copy of all emails and email attachments sent to, and received by, the specified former members of the Legislative Council and their electorate staff, through their parliamentary email accounts, for the period 1 January 2014 to 30 September 2017; and
 - (b) a complete electronic copy of all calendar entries created by, or on behalf of, the specified former members of the Legislative Council, through their parliamentary email accounts, for the period 1 January 2014 to 30 September 2017.
14. The Third Notice purportedly required production, amongst other things, of the electronic "back-up" records of all of the electronic records pleaded in paragraph 13(a) above, by a specified date, which has been extended by the first defendant to 30 September 2019.

Records obtained by first defendant as a result of First and Second Notices

15. In or about July 2019:

- (a) all of the electronic records pleaded in paragraph 13 above were searched electronically by a member of the staff of the Department of Premier and Cabinet, using search terms and with technical assistance provided by the first defendant;
 - (b) the records identified by the application of those search terms were provided by the second defendant to the State Solicitor's Office, members of whose staff purported to determine whether any of those records were the subject of Parliamentary Privilege;
 - (c) all of the records identified by the application of those search terms, other than those which staff of the State Solicitor's Office purportedly determined were the subject of Parliamentary Privilege and certain other records which the first defendant informed the State Solicitor's Office it did not require to be produced, were then produced by or on behalf of the second defendant to the first defendant, in purported compliance with the First and Second Notices; and
 - (d) the first defendant extended the time for compliance with the First and Second Notices.
16. The first defendant received and retains the records produced to it pleaded in paragraph 15(c) above, in circumstances where:
- (a) the classes of records specified in the First and Second Notices included records which were the subject of Parliamentary Privilege, as pleaded in paragraph 24 below;
 - (b) it was and is for the Legislative Council to determine whether any records of its former members and their former staff were or are the subject of Parliamentary Privilege, as pleaded in paragraph 9(b) above; and
 - (c) no determination as to whether any of the records specified in the First and Second Notices were the subject of Parliamentary Privilege had

been made by the Legislative Council and instead a purported determination had been made by staff of the State Solicitor's Office.

First defendant's notices to third defendant to produce records and things and thing and records obtained from search warrant

17. In purported exercise of the power conferred by s 95 of the CCM Act, in September 2019, the first defendant served on the third defendant two notices to produce, being notices dated 9 September 2019 and numbered NPR 00615-2019-4695 (Fourth Notice) and NPR 00615-2019-4696 (Fifth Notice), which purportedly require production of certain specified records and things by 7 October 2019.
18. The Fourth Notice purportedly requires production, by 7 October 2019, of a specified laptop computer and a specified external USB hard drive, of which the third defendant has custody on behalf of the Legislative Council Standing Committee on Procedure and Privileges (PPC), and of all data contained therein, save and except for any data or content on those devices which is determined by the PPC to be subject to Parliamentary Privilege.
19. The laptop computer was originally provided by the Department of Premier and Cabinet to one of the former members whose records were the subject of the First Notice and contains, amongst other things but relevantly, some or all of the records of that member pleaded in paragraph 13 above.
20. The USB contains electronic copies of some or all of the records from the parliamentary email account of the former member referred to in the preceding paragraph, being some or all of the records of that member pleaded in paragraph 13 above.
21. On 23 August 2019, the second defendant produced to the PPC, in response to a summons to produce issued by the plaintiff, electronic copies of the records identified by the first defendant, as pleaded in paragraph 15(b) above, which were some of the records the subject of the First and Second Notices and which comprised approximately 69,000 individual records.

22. The Fifth Notice purportedly requires production, by 7 October 2019, of all of the documents the subject of the First and Second Notices which were produced by the second defendant to the PPC on 23 August 2019, of which the third defendant has custody on behalf of the PPC, save and except for any data or content on those devices which is determined by the PPC to be subject to Parliamentary Privilege.
23. The first defendant:
- (a) in August 2019, pursuant to a search warrant issued under s 101 of the CCM Act, obtained from the former member referred to in paragraph 19 above, another external hard drive which contains an electronic copy of some or all of the records from the parliamentary email account of that former member, being some or all of the records of that member pleaded in paragraph 13 above; and
 - (b) has retained and used those records in connection with the investigation pleaded in paragraph 26 below, in purported exercise of the powers conferred under ss 18, 22, 32, 101 and 136 of the CCM Act.

Records the subject of Parliamentary Privilege

24. The classes of electronic records pleaded in paragraphs 13 and 14 above and the electronic records pleaded in paragraphs 15(a) and 15(b) above included records which were the subject of Parliamentary Privilege.
25. The electronic records contained on the laptop, the USB and the other external hard drive pleaded in paragraphs 19, 20 and 23(a) above include records which are the subject of Parliamentary Privilege.

First defendant's investigation

26. Each of the pleaded notices was purportedly served for the purposes of an investigation by the first defendant into whether certain former members of the Legislative Council had engaged in "serious misconduct", within s 4(a), (b) and (c) of the CCM Act, with respect to the use of travel and electorate allowances and as to whether there was generally such a lack of public

accountability and transparency with respect to the use of these allowances as to pose a risk that serious misconduct could occur in that regard.

27. By s 4(a), (b) and (c) of the CCM Act, “serious misconduct” by a public officer, which includes a member of Parliament, relevantly occurs if a public officer:
- (a) corruptly acts or corruptly fails to act in the performance of the functions of the public officer’s office;
 - (b) corruptly takes advantage of the public officer’s office to obtain a benefit for himself or herself or another person or to cause a detriment to any person; or
 - (c) whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years’ imprisonment.

Effect of CCM Act

28. By s 3(2) of the CCM Act, nothing in that Act affects, or is intended to affect, the operation of the PP Act or the *Parliamentary Papers Act 1891* and a power, right or function conferred under the CCM Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable by a House of Parliament.
29. For the purposes of s 3(2) of the CCM Act and by reason of the matters pleaded in paragraphs 8 and 9 above, whether a particular record or information is the subject of the Parliamentary Privilege of the Legislative Council, the occasion and manner of enforcement of Parliamentary Privilege in respect of a particular record or information, and whether any coercive production, relevantly, for examination or use of such record or information outside Parliament, for a purpose for which the coercive production is purportedly required, constitutes contempt of Parliament are matters determinable by a House of Parliament.
30. On the proper construction of the CCM Act, by s 3(2) of that Act:

- (a) no provision of the CCM Act and no exercise of any power, right or function conferred on the first defendant under the CCM Act has any effect upon the privileges, immunities and powers of the Legislative Council pleaded in paragraphs 8 and 9 above and no such power, right or function may be exercised if that exercise would relate to any of the matters pleaded in paragraph 29 above;
- (b) the first defendant has no power to require the production of records or information the subject of Parliamentary Privilege;
- (c) the first defendant has no power to require the Legislative Council or any Committee of the Legislative Council to determine whether any record or information is the subject of Parliamentary Privilege, or to authorise or permit any other person to make such a determination;
- (d) a notice served by the first defendant on a person, purportedly under s 95 and purportedly requiring production of specified records, does not have effect to require production of records which are the subject of Parliamentary Privilege;
- (e) the first defendant is prohibited from exercising its power under s. 95 to serve a notice on a person purporting to require production of records specified in the notice which include records which are the subject of Parliamentary Privilege;
- (f) a notice served by the first defendant on a person, purportedly under s 95 and purportedly requiring production of records specified in the notice, does not have effect to require production of any of those records where a determination whether any of those records is or are the subject of Parliamentary Privilege would first be required in order to establish which, if any, of those records the first defendant could be empowered to require the person to produce, and the first defendant is prohibited from exercising its power under s 95 to serve such a notice;

- (g) a purported exercise of power by the first defendant, contrary to the prohibitions pleaded in subparagraphs (e) and (f) above, would constitute a contravention of the CCM Act and would be invalid;
 - (h) a notice served by the first defendant on a person, purportedly under s 95, which purports to require production of records which are the subject of Parliamentary Privilege or which would require a determination to be made whether any of the records specified in the notice are the subject of Parliamentary Privilege in order to establish which, if any, of those records the first defendant could be empowered to require the person to produce, would be invalid;
 - (i) the first defendant is not empowered to receive, and is prohibited from exercising its power to receive, relevantly under s 95, records which are produced as a result of a notice of the kind pleaded in subparagraph (h) above, at all, and in particular where no determination as to whether any of the records specified in the notice are the subject of Parliamentary Privilege has been made by the appropriate House of Parliament;
 - (j) any such purported exercise of power by the first defendant would constitute a contravention of the CCM Act and would be invalid;
 - (k) the first defendant is not empowered to retain and use, and is prohibited from exercising its power to retain and use, relevantly under ss 18, 22, 32, 101 and 136 of the CCM Act, records contained on things which are obtained as a result of a search warrant, in connection with a serious misconduct investigation, where those records are of the kind pleaded in subparagraph (h) above, at all, and in particular where no determination as to whether any of the records are the subject of Parliamentary Privilege has been made by the appropriate House of Parliament; and
 - (l) any such purported exercise of power by the first defendant would constitute a contravention of the CCM Act and would be invalid.
31. On the proper construction of the CCM Act:

- (a) the first defendant's power under, s 95, to serve a notice on a person requiring production of specified records, may only be exercised for the purpose of the proper performance of a function conferred on the first defendant under the CCM Act;
- (b) such a notice may only require production of specified records which reasonably relate to such a purpose; and
- (c) such a notice which does not so confine the specified records purportedly required to be produced would be invalid.

First defendant's notices and receipt, retention and use of records invalid, first defendant's contraventions of CCM Act – Parliamentary Privilege

- 32. All of the records pleaded in paragraphs 13 and 14 above and some of the records pleaded in paragraph 19, 20 and 23(a) above were or are records from parliamentary email accounts of former members of the Legislative Council and former members of their electorate staff, such that a determination whether any of those records was or were the subject of Parliamentary Privilege would first be required in order to establish which, if any, of those records the first defendant could be empowered to require the second and third defendants to produce.
- 33. In the premises pleaded in paragraphs 24, 29, 30(a) to 30(h) and 32 above, insofar as the First, Second and Third Notices purportedly required production of the records pleaded in paragraphs 13 and 14 above, the purported exercise of power by the first defendant, under s 95 of the CCM Act, in serving each of those notices on the second defendant was in contravention of s 3(2) of the CCM Act and invalid, and each notice was invalid, in that as to each notice:
 - (a) it purported to require production of specified records which included records which were the subject of Parliamentary Privilege;
 - (b) a determination as to which of those records was or were the subject of Parliamentary Privilege would first be required in order to establish

which, if any, of those records the first defendant could be empowered to require the second and third defendants to produce;

- (c) it related to matters determinable by a House of Parliament, namely the matters pleaded in paragraph 29 above; and
 - (d) it did not confine the specified records to those of which the first defendant was authorised to require production.
34. In the premises pleaded in paragraphs 24 (as to the Fifth Notice), 25 (as to the Fourth Notice), 29, 30(a) to 30(h) and 32 above, the purported exercise of power by the first defendant, under s 95 of the CCM Act, in serving each of the Fourth and Fifth Notices on the third defendant was in contravention of s 3(2) of the CCM Act and invalid, and each notice was invalid, in that as to each notice:
- (a) a determination as to which of the specified records, in the case of the Fifth Notice, and any records contained on the specified things, in the case of the Fourth Notice, were the subject of Parliamentary Privilege would first be required in order to establish which, if any, of those records the first defendant could be empowered to require the third defendant to produce;
 - (b) it purportedly required production of specified records and things, including records, and things which contained records, which were the subject of Parliamentary Privilege if the PPC made no determination whether or not any records were the subject of Parliamentary Privilege before the specified date for production;
 - (c) it related to matters determinable by a House of Parliament, namely the matters pleaded in paragraph 29 above;
 - (d) in the case of the Fourth Notice, it did not confine the production required to those records contained on the specified things of which the first defendant was authorised to require production; and

- (e) in the case of the Fifth Notice, it did not confine the specified records to those of which the first defendant was authorised to require production.
35. In the premises pleaded in paragraphs 15, 16, 24, 29, 30(a) to 30(j) and 32 above, the purported exercise of power by the first defendant, under s 95 of the CCM Act, in receiving records produced by or on behalf of the second defendant as a result of the First and Second Notices, was in contravention of s 3(2) of the CCM Act and invalid, in that:
- (a) those notices purported to require production of specified records which included records which were the subject of Parliamentary Privilege;
 - (b) a determination as to which of those specified records was or were the subject of Parliamentary Privilege would first be required in order to establish which, if any, of those records the first defendant could be empowered to require the second and third defendants to produce;
 - (c) such a determination could only be lawfully made by the Legislative Council and no such determination had been made; and
 - (d) it related to matters determinable by a House of Parliament, namely the matters pleaded in paragraph 29 above, in that the records received were records as to which subparagraphs (b) and (c) above applied.
36. In the premises pleaded in paragraphs 23, 25, 29, 30 and 32 above, the purported exercise of power by the first defendant, under ss 18, 22, 32 and 101 of the CCM Act, in retaining and using records on the hard drive pleaded in paragraph 23 above as there pleaded, was and is in contravention of s 3(2) of the CCM Act and invalid, in that:
- (a) those records include records which are the subject of Parliamentary Privilege;
 - (b) a determination as to which of those records are the subject of Parliamentary Privilege would first be required in order to establish which, if any, of those records the first defendant could be empowered to retain and use for the investigation pleaded in paragraph 26 above;

- (c) such a determination could only be lawfully made by the Legislative Council and no such determination had been made; and
- (d) it relates to matters determinable by a House of Parliament, namely the matters pleaded in paragraph 29 above, in that the records are records as to which subparagraphs (b) and (c) above apply.

Notices invalid – records and things purportedly required in excess of purpose

37. The First, Second and Third Notices, insofar as they purportedly required production of the records pleaded in paragraphs 13 and 14 above:
- (a) included records which did not reasonably relate to the purposes pleaded in paragraph 26 above, in that:
 - (i) they purportedly required production of all records of the specified kinds during the specified period, regardless of whether the records had any connection with those purposes;
 - (ii) they purportedly required production of vast numbers of records and amounts of data, further particulars of which will be provided separately;
 - (iii) there was no reasonable basis to conclude that all of the specified records had a connection with those purposes;
 - (iv) most of the records had no such connection; and
 - (b) did not specify the records purportedly required to be produced in a way which enabled the second defendant to determine which, if any, of those records the first defendant was lawfully empowered to require the second defendant to produce.
38. In the premises pleaded in paragraphs 31 and 37 above the First, Second and Third Notices were invalid in so far as they purportedly required production of the records pleaded in paragraphs 13 and 14 above, under s 95 of the CCM Act.

AND THE PLAINTIFF CLAIMS:

- (a) a declaration that each of the First, Second and Third Notices purportedly served by the first defendant on the second defendant, under s 95 of the CCM Act, was invalid insofar as it purported to require production of the records pleaded in paragraphs 13 and 14 above, on the grounds pleaded in paragraph 33 above
- (b) a declaration that, insofar as it purported to require production of the records pleaded in paragraphs 13 and 14 above, each of the First, Second and Third Notices was served by the first defendant in contravention of s 3(2) of the CCM Act and in excess of the first defendant's powers, rights or functions, on the grounds pleaded in paragraph 33 above;
- (c) a declaration that each of the Fourth and Fifth Notices purportedly served by the first defendant on the third defendant, under s 95 of the CCM Act, was invalid, on the grounds pleaded in paragraph 34 above;
- (d) a declaration that each of the Fourth and Fifth Notices purportedly served by the first defendant on the third defendant, under s 95 of the CCM Act, was served in contravention of s 3(2) of the CCM Act and in excess of the first defendant's powers, rights or functions, on the grounds pleaded in paragraph 34 above;
- (e) a declaration that the first defendant's retention and use of records on the hard drive pleaded in paragraph 23 above, as there pleaded, purportedly under ss 18, 22, 32 and 101 of the CCM Act, was and is in contravention of s 3(2) of the CCM Act, in excess of the first defendant's powers, rights or functions and invalid, on the grounds pleaded in paragraph 36 above;
- (f) a declaration that each of the First, Second and Third Notices, insofar as it purported to require production of the records pleaded in paragraphs 13 and 14 above, was invalid, on the grounds pleaded in paragraphs 37 and 38 above;
- (g) a declaration that the receipt of records pleaded in paragraph 15(c) above by the first defendant, purportedly under s 95 of the CCM Act, was in

contravention of s 3(2) of that Act, in excess of the first defendant's powers, rights or functions and invalid, on the grounds pleaded in paragraph 35 above;

- (h) delivery up to the plaintiff of the records which were produced by the second defendant to the first defendant as a result of the First and Second Notices and of any records which are produced by the second defendant to the first defendant as a result of the Third Notice;
- (i) delivery up to the plaintiff of the hard drive pleaded in paragraph 23 above;
- (j) such further or other relief as the Court thinks fit; and
- (k) costs.



C L Zelestis

Patricia Cahill

Rebecca O'Brien

Place of Trial: Perth

This writ was issued by or on behalf of the plaintiff.

The plaintiff's geographical address is: THE PRESIDENT OF THE
LEGISLATIVE COUNCIL OF
WESTERN AUSTRALIA
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005
Australia

The plaintiff's service details are: c/-Corrs Chambers Westgarth
Level 5, Brookfield Place Tower 2
123 St Georges Terrace
PERTH WA 6000
Australia



Indorsement as to service

This writ was served by me at _____
on _____
(The Defendant or one of the Defendants)
on _____ day the _____ day of _____ 20__.
Indorsed the _____ day of _____ 20__.
(Signed)
(Address)

This writ was served by me at _____
on _____
(The Defendant or one of the Defendants)
on _____ day the _____ day of _____ 20__.
Indorsed the _____ day of _____ 20__.
(Signed)
(Address)

This writ was served by me at _____
on _____
(The Defendant or one of the Defendants)
on _____ day the _____ day of _____ 20__.
Indorsed the _____ day of _____ 20__.
(Signed)
(Address)

APPENDIX 2

CIV 2716 OF 2019: WRIT OF SUMMONS AND STATEMENT OF CLAIM

IN THE SUPREME COURT
OF WESTERN AUSTRALIA
HELD AT PERTH

No. CIV 2716 of 2019

BETWEEN

ATTORNEY GENERAL OF WESTERN
AUSTRALIA

Plaintiff

AND

PRESIDENT OF THE LEGISLATIVE
COUNCIL OF WESTERN AUSTRALIA

First Defendant

-and-

CLERK OF THE LEGISLATIVE
COUNCIL OF WESTERN AUSTRALIA

Second Defendant

WRIT OF SUMMONS

Date of Document: 27/09/2019

Filed on behalf of: The Plaintiff

Date of Filing (and valid for service from): 27/09/2019

Filed by:

State Solicitor's Office

David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000
Australia

Telephone: (08) 9264 1888

Facsimile: (08) 9264 1440

Contact: Gregory Stockton

Email: sso@sso.wa.gov.au

Reference: SSO 3887-19

TO: PRESIDENT OF THE LEGISLATIVE COUNCIL OF WESTERN
AUSTRALIA

OF: C/- Legislative Council of Western Australia
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005
Australia

FILED

27 SEP 2019

CENTRAL OFFICE
SUPREME COURT

Folio 1
Page 1

AND TO: CLERK OF THE LEGISLATIVE COUNCIL OF WESTERN
AUSTRALIA

OF: C/- Legislative Council of Western Australia
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005
Australia

You are commanded that, within 10 days after the service of this writ on you, exclusive of the day of such service, you cause an appearance to be entered for you in our Supreme Court in an action at the suit of the abovenamed plaintiff; and take notice that in default of your so doing the plaintiff may proceed therein and judgment may be given in your absence.

Witness: **THE CHIEF JUSTICE OF WESTERN AUSTRALIA** on Friday, the 27th day of September 2019

NOTE: This writ may not be served later than 12 calendar months beginning with the above date unless renewed by order of the Court.

A defendant may appear to the writ by entering an appearance either personally or by solicitor at the Central Office of the Supreme Court at Perth.

If the defendant enters an appearance, then unless a summons for judgment is served on him in the meantime, he must also file a defence at the Central Office of the Supreme Court at Perth, and serve such defence on the solicitor for the plaintiff, within 14 days after the last day of the time limited for entering an appearance, otherwise judgment may be entered against him without notice.

Page 2

Statement of Claim

Parties

1. The plaintiff is the Attorney General of Western Australia.
2. The first defendant is:
 - (a) the person who occupies the office of the President of the Legislative Council of Western Australia for the time being (the "**President**"), after being duly elected to that position pursuant to section 11 of the *Constitution Acts Amendment Act 1899* (WA);
 - (b) Catherine Esther Doust, for the time being.
3. The second defendant is:
 - (a) the person who occupies the office of the Clerk of the Legislative Council of Western Australia for the time being (the "**Clerk**");
 - (b) Nigel Scott John Pratt, for the time being.

Department of Premier and Cabinet

4. The Department of the Premier and Cabinet (the "**Department**") is established pursuant to section 35 of the *Public Sector Management Act 1994* (WA), and the Minister responsible for the Department is the Premier of Western Australia.

Corruption and Crime Commission

5. The Corruption and Crime Commission (the "**Commission**") is established by section 8 of the *Corruption, Crime and Misconduct Act 2003* (WA).

6. Pursuant to section 18 of the *Corruption, Crime and Misconduct Act*, it is a function of the Commission:
- (a) to receive and initiate allegations of "serious misconduct" (as that term is defined in section 4) (section 18(2)(a));
 - (b) to investigate or take other action in relation to allegations related to serious misconduct if it is appropriate to do so (section 18(2)(c));
 - (c) regardless of whether or not there has been an allegation of serious misconduct, to investigate whether serious misconduct has or may have occurred; is or may be occurring; is or may be about to occur; or is likely to occur (section 18(2)(e)); and
 - (d) to assemble evidence obtained in the course of exercising the serious misconduct function and –
 - (i) furnish to an independent agency or another authority, evidence which may be admissible in the prosecution of a person for a criminal offence against a written law or which may otherwise be relevant to the functions of the agency or authority; or
 - (ii) furnish to the Attorney General or a suitable authority of another State, a Territory, the Commonwealth or another country, evidence which may be admissible in the prosecution of a person for a criminal offence against a law of the jurisdiction concerned or which may otherwise be relevant to that jurisdiction (section 18(2)(h)).

7. Pursuant to section 95(1) of the *Corruption, Crime and Misconduct Act*, the Commission may, by written notice served on a person ("**Production Notice**"), require the person:
- (a) to attend, at a time and place specified in the notice, before the Commission or an officer of the Commission as specified in the notice; and
 - (b) to produce at that time and place to the person so specified a record or other thing specified in the notice.

Parliamentary Email Accounts

8. At all relevant times, the parliamentary email accounts of members of the Parliament of Western Australia:
- (a) have been managed outside the precincts of Parliament by the Department;
 - (b) have been in the possession and custody of the Department (and therefore the State); and
 - (c) have not been deleted upon a member of Parliament retiring.
9. There are no guidelines, protocols or other arrangements which have been agreed by the members of Parliament or the Houses of the Parliament of Western Australia, and the Director General of the Department, in respect of the disclosure of material from parliamentary email accounts to the Commission or any other investigative agency or body.

Allowances Investigation

10. On 16 August 2019, the Commission held public hearings in relation to an investigation into whether any public officer has, is or may have engaged in serious misconduct in relation to, but not limited to, corruptly taking advantage of their public office for their own personal benefit or in any other function in their capacity as a public officer, and to consider and report on any corruption risks surrounding electoral allowances (the "Allowances Investigation").

Departmental Production Notices

11. For the purposes of the Allowances Investigation, the Commission issued three Production Notices addressed to the Director General of the Department dated 12 April 2019, 11 June 2019 and 6 August 2019 (the "Departmental Production Notices").

Particulars

1. The first Departmental Production Notice was NPR 00615-2019-4614.
 2. The second Departmental Production Notice was NPR 00615-2019-4647.
 3. The third Departmental Production Notice was No NPR 00615-2019-4669.
12. The Departmental Production Notices required the Director General of the Department to provide the following material in relation to the

parliamentary email accounts of three named former members of the Legislative Council, one of whom was Phillip Edman (**Edman**), and named staff members, except for any documents which were the subject of parliamentary privilege:

- (a) a complete electronic copy of all emails and email attachments sent to, and received by, all of the email addresses listed for the date period 1 January 2014 to 30 September 2017;
- (b) a complete electronic copy of all calendar entries created by, or on behalf of, the former members of Parliament for the date period 1 January 2014 to 30 September 2017;
- (c) copies of various other documents of the former members of Parliament for the date period 1 January 2014 to 31 December 2015;
- (d) a complete electronic copy of all back up emails and email attachments sent to, and received by, the three former members of Parliament and their staff;
- (e) copies of all applications, approvals and disapprovals, in electronic or hard copy form, for the issuance/disbursement of parliamentary travel allowance for the three former members of Parliament;
- (f) copies of all pay slips and PAYG group certificates for the three former members of Parliament; and
- (g) in relation to certain named former electoral officers (not being members of Parliament), copies of their respective employment

contracts and job description forms, along with copies of any Code of Conduct that was applicable to their roles.

Particulars

1. In respect of the first and second Departmental Production Notices, the exception not requiring production of documents which were the subject of parliamentary privilege was confirmed by letters dated 20 May 2019 and 9 July 2019 sent by the Commission's Director of Legal Services to the State Solicitor, on behalf of the plaintiff.
2. In respect of the third Departmental Production Notice, the Director General of the Department acted upon the basis that the exception which applied to the first and second Departmental Production Notices also applied to the third Production Notice.
13. On various dates during August 2019, the Director General of the Department produced documents to the Commission in compliance with the requirements of the Departmental Production Notices (the "Commission Material").
14. Prior to complying with the Departmental Production Notices, the Director General sought and obtained legal advice from the State Solicitor's Office as to whether any documents which might otherwise be the subject of the Departmental Production Notices were subject to parliamentary privilege.
15. The Director General did not include any documents in the Commission Material which he was advised by the State Solicitor's Office were subject to parliamentary privilege.

Production to PPC

16. On 15 August 2019, the Legislative Council resolved that the Director General of the Department, or any person acting in that capacity, was ordered to attend before the Legislative Council Standing Committee on Procedure and Privileges ("PPC") to produce the following documents to the PPC in relation to the first Departmental Production Notice, the second Departmental Production Notice, and any further notice issued by the Commission to the Director General:
- (a) all documents that were identified as relevant to the Commission's investigation, together with a list of those documents;
 - (b) all documents that were identified as being subject to parliamentary privilege, together with a list of those documents; and
 - (c) all documents that were produced to the Commission in compliance with each of the Departmental Production Notices, together with a list of those documents.
17. On or about 23 and 27 August 2019, the Director General of the Department produced documents to the PPC in compliance with the requirements of the order made by the Legislative Council made on 15 August 2019 (the "PPC Material").

The Edman Laptop

18. On 14 August 2019, a laptop and an external hard drive issued to Edman by the Department were seized by the Commission from Edman pursuant to a search warrant executed by the Commission.

-
19. The seized laptop and external hard drive contained emails passing to and from Edman while he was a member of the Legislative Council.
20. On 4 September 2019, the PPC released Report 56 entitled "Parliamentary Privilege and Intrusive Powers – Interim Report Judicial Proceedings for Declaration Challenging the Validity of the Order made by the Legislative Council on 15 August 2019", which recommended to the Legislative Council that it should order the Commission to produce the seized laptop to the Clerk by Wednesday 11 September 2019 at 4.00 pm.
21. On 4 September 2019, after the release of Report 56, the Commission delivered the seized laptop and external hard drive to the Clerk.
22. On 5 September 2019, the Legislative Council ordered the Commission to produce the seized laptop to the Clerk by Wednesday 11 September 2019 at 4.00 pm.

The PPC Production Notices

23. On 10 September 2019, the Commission served two Production Notices (the "PPC Production Notices") on the Clerk requiring him to produce the following records or things by 4 pm on Monday 7 October 2019, save and except for any content which is determined by the PPC to be subject to parliamentary privilege:
- (a) the confidential email data and documents of the three former members of the Legislative Council and their staff which had been originally sought from the Director General of the Department between April and June 2019; and

- (b) the seized laptop of Phillip Edman and its external hard drive.

Particulars

1. The first PPC Production Notice was NPR 00615-2019-4695.
2. The second PPC Production Notice was NPR 00615-2019-4696.

Non-Production Order

24. On 25 September 2019, the Legislative Council resolved that the Clerk was directed not to comply with the PPC Production Notices pending:
 - (a) both the outcome of any proceedings concerning the validity of the Departmental or the PPC Production Notices, and an assessment of parliamentary privilege by the PPC with respect to those notices; or
 - (b) further direction from the PPC taking account of legal advice, (the "Non-Production Order").

Non-Production Order not Legally Valid

25. (a) The *Parliamentary Privileges Act 1891* (WA) does not confer any power or authority upon the Legislative Council to order the Clerk not to produce (at all or for a specified period) a document which is not the subject of parliamentary privilege, in answer to a compulsory process issued pursuant to a statutory authority by an investigative agency investigating serious or criminal misconduct; and / or
- (b) The Legislative Council did not have the power or authority to resolve to make the Non-Production Order with legally binding

effect upon the Clerk, further or alternatively could not lawfully make the Non-Production Order with legally binding effect upon the Clerk.

Particulars

1. The *Parliamentary Privileges Act* does not expressly confer any power or authority to order any person not to produce (at all or for a specified period) a document which is not the subject of parliamentary privilege, either generally or specifically in answer to a compulsory process issued by an investigative agency investigating serious or criminal misconduct.
2. There is no parliamentary or judicial precedent establishing that the Commons House of Parliament of the United Kingdom as at 1 January 1989 possessed any power or authority to order the clerk of that House, or any person who is not a member of that House, not to produce (at all or for a specified period) a document which is not the subject of parliamentary privilege, in answer to a compulsory process issued pursuant to a statutory authority by an investigative agency. In these circumstances, the Non-Production Order is not within a power or authority conferred upon the Legislative Council by section 1(b) of the *Parliamentary Privileges Act*.
3. An order of the Legislative Council cannot diminish the statutory powers of the Commission conferred by sections 94 or 95 of the *Corruption, Crime and Misconduct Act*.

4. To the extent that the terms of the Non-Production Order prevent the Clerk from producing documents to the Commission created or received by a current or former member of the Legislative Council or their staff, which are not the subject of parliamentary privilege, the terms of the order are too wide and the whole order is invalid.
5. If the Clerk requires further time to comply with the PPC Production Notices to Produce, in order to assess whether documents are the subject of parliamentary privilege or in order to challenge the validity of the Departmental or PPC Production Notices, the Clerk should seek an extension of time from the Commission or rely upon these circumstances as a matter of reasonable excuse for the purposes of section 158 of the *Corruption, Crime and Misconduct Act*.
26. In the circumstances alleged in paragraph 25 above, the Non-Production Order is not legally valid.

AND THE PLAINTIFF CLAIMS AGAINST THE DEFENDANTS:

- A. A declaration that the *Parliamentary Privileges Act 1891* (WA) does not confer any power or authority upon the Legislative Council of the Parliament of Western Australia to order the Clerk not to produce (at all or for a specified period) a document which is not the subject of parliamentary privilege, in answer to a compulsory process issued pursuant to a statutory authority by an investigative agency investigating serious or criminal misconduct.

- B. A declaration that the Non-Production Order made by the Legislative Council on 25 September 2019 was outside the power or authority of the Legislative Council and not legally valid.
- C. Such other order as the Court thinks is just and appropriate.

J A Thomson SC

G Stockton



Place of Trial: Perth

This writ was issued by or on behalf of the plaintiff.

The plaintiff's geographical address is: ATTORNEY GENERAL OF WESTERN
AUSTRALIA
C/State Solicitor's Office
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000
Australia

The plaintiff's service details are: c/-State Solicitor's Office
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000
Australia



Indorsement as to service

This writ was served by me at _____

on _____

(The Defendant or one of the Defendants)

on _____ day the _____ day of _____ 20__.

Indorsed the _____ day of _____ 20__.

(Signed)

(Address)

This writ was served by me at _____

on _____

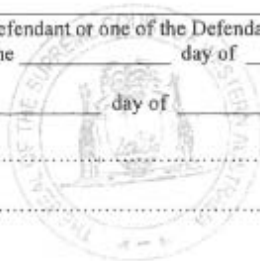
(The Defendant or one of the Defendants)

on _____ day the _____ day of _____ 20__.

Indorsed the _____ day of _____ 20__.

(Signed)

(Address)



APPENDIX 3

LETTER (26/09/19) FROM STATE SOLICITOR TO PRESIDENT



STATE SOLICITOR'S OFFICE

David Malcolm Justice Centre
28 Barrack Street
Perth, Western Australia 6000
GPO Box 983 Perth WA 6838
Telephone (08) 9264 1888
Fax (08) 9264 1440
Email sso@so.wa.gov.au
DX 175

Your Ref: New Matter
SSO Ref: Nicholas Egan | (08) 9264 1888 | n.egan@sso.wa.gov.au
Enquiries:

The Hon Kate Doust
President of the Legislative Council
Parliament House
4 Parliament Terrace
WEST PERTH WA 6005

By email: ClerkLC@parliament.wa.gov.au

Date: 26 September 2019

Privileged and Confidential

Dear President

JUDICIAL PROCEEDINGS FOR DECLARATION CHALLENGING VALIDITY OF ORDER MADE BY LEGISLATIVE COUNCIL

The purpose of this letter is to raise an issue concerning the Legislative Council's order of 25 September 2019 which requires the Clerk of the Legislative Council (Mr Nigel Pratt) not to comply with notices to produce served on the Clerk by the Corruption and Crime Commission (CCC) on 10 September 2019 pending, in effect, the outcome of proceedings by the Standing Committee on Procedures and Privileges (SCPP), or alternatively further direction from the SCPP. I will refer to this as the Order. I note of course that the terms of the Order were not confined to documents or data in the Clerk's possession which are properly the subject of a claim for parliamentary privilege.

Validity of the Order

There are very serious doubt exists as to whether the Order is valid to prevent the Clerk from producing documents to the CCC in answer to any existing or future compulsory process such as a notice to produce.

With the greatest of respect to the Legislative Council, those doubts exist for the following reasons.

1. Section 4 of the *Parliamentary Privileges Act 1891* (WA) expressly confers power upon the Legislative Council to "order any person ... to produce to [a House of the Parliament] any paper, book, record, or other document in the possession or power of such person". The *Parliamentary Privileges Act* does not expressly confer any power to order a person not to produce a document in answer to a compulsory process issued by the Corruption and Crime Commission;

2. There is no parliamentary or judicial precedent, as far as we are aware, establishing that the Commons House of Parliament of the United Kingdom as at 1 January 1989 possessed any power to order a person not to produce a document in answer to a compulsory process lawfully issued pursuant to a statutory authority by an investigative agency. Consequently, the order is not within a power conferred upon the Legislative Council by section 1(b) of the *Parliamentary Privileges Act*.

If, contrary to the above points, the Legislative Council does have the power to order the Clerk not to produce documents, then, in my view the following additional reasons support the conclusion that it could not be used to order the Clerk not to comply with a compulsory process issued by the CCC:

3. Section 95 of the *Corruption, Crime and Misconduct Act 2003 (WA) (CCM Act)* was enacted as legislation by the Parliament of Western Australia and expressly confers power upon the CCC, by written notice served on a person, requiring that person to produce a record or other thing specified in the notice. It does not seem to me that an order of the Legislative Council alone, as compared to the Parliament as a whole, can diminish the statutory powers of the CCC conferred by legislation;
4. To the extent that section 3(2) of the CCM Act provides that nothing in CCM Act affects the operation of the *Parliamentary Privileges Act*, points 1 and 2 above show that the *Parliamentary Privileges Act* did not have any relevant operation in respect of a compulsory process issued by the CCC pursuant to section 95 of the CCM Act. To put it another way, at the time the CCM Act was enacted, and notwithstanding the *Parliamentary Privileges Act*, Parliament as a whole had no difficulty with providing powers of compulsion to the CCC pursuant to section 95 of the CCM Act - rather, the only restraint on that process was captured within section 3(2) of the CCM Act;
5. To the extent that section 3(2) of the CCM Act also provides that a power conferred under that Act is not to be exercised if that exercise would relate to a matter determinable by a House of Parliament, the terms of the order made by the Legislative Council are not confined to preventing production of documents or data which relate to any matter determinable by the Legislative Council
6. Lastly, and very importantly, I note that in Report 56 of the SCPP dated September 2019, the SCPP reported, relevantly, that the SCPP had received advice from Mr Zelestic QC that he had confirmed (in the context of an order made on 15 August 2019 concerning Mr Darren Foster, Director General, Department of Premier and Cabinet), that "the Legislative Council does not have a power to order persons, not being members of the Council, to not produce documents", although Mr Zelestis had confirmed that "the Legislative Council does have the power to pass a resolution in terms which "require" a person not to produce privileged documents to another person or body" (such as the CCC). On this basis alone, the Legislative Council's own published legal advice (which appears apposite) is to the effect that the Order (which, on its face, is not dissimilar in operation to the order made by the Legislative Council in relation to Mr Foster) is not within the power of the Legislative Council to make. Indeed, it was on the basis of Mr Zelestis' advice that the Legislative Council rescinded the order concerning Mr Foster. Report 57 does not offer any explanation for why such an order could be made in relation to Mr Pratt when it could not be made in relation to Mr Foster.



In addition, and again with the greatest of respect to the Legislative Council, despite what appears to very clear legal advice from Mr Zelestis QC to the contrary (and advice upon which the Legislative Council has previously acted), it would appear, that the Order is based on two tenets:

- (a) first, parliamentary privilege may protect some documents from production to the CCC for the purposes of an investigation carried out by the Commission; and
- (b) secondly, it is solely for the Legislative Council to determine the existence of parliamentary privilege in respect of documents created or received by a current or former member of the Legislative Council or their staff.

I will discuss each of these in turn.

Parliamentary Privilege Prevents Production

7. Whether parliamentary privilege applies to protect material from disclosure which demonstrates criminal or serious misconduct in response to the exercise of compulsory investigative powers by an investigative body, in my respectful opinion, is to be resolved by reference to the extent of parliamentary privilege in the House of Commons on 1 January 1989: section 1(b) of the *Parliamentary Privileges Act*.

In *R v Chaytor* [2011] 1 AC 684, Lord Phillips PSC said, at [83], that "the House [of Commons] does not assert an exclusive jurisdiction to deal with criminal conduct, even where this relates to or interferes with proceedings in committee or in the House": (underlining added). He also said, at [83], where it is necessary to investigate facts and obtain evidence of criminal misconduct, "[w]hat occurs is that Parliament permits the police to carry out their investigations within the precincts". Although he did not elaborate, Lord Phillips mentioned, at [92], that in the course of a criminal prosecution (but he did not say investigation), issues might arise involving areas of inquiry precluded by parliamentary privilege. Lord Hope, Baroness Hale, Lord Brown, Lord Mance, Lord Collins, Lord Kerr and Lord Clarke all expressly concurred with Lord Phillips. There is no UK authority or parliamentary precedent for or against parliamentary privilege providing immunity from the exercise of functions and powers of a statutory body in the investigation of criminal or serious misconduct by a parliamentarian (and I note none is cited in any recent report of the SCPP).

Determination of Parliamentary Privilege

8. I note, with the greatest of respect to the Legislative Council, that determining the existence of parliamentary privilege is not the sole province of the Legislative Council. For example, a court will do so whenever a question of parliamentary privilege properly arises in proceedings before it.
9. Indeed, this position was confirmed by Lady Hale and Lord Reed in the judgement of the Court in the very recent decision of *R (on the application of Miller) v The Prime Minister and others* [2019] UKSC 41 (**the Brexit Decision**) where their Lords stated [at 66], amongst other things, that *R v Chaytor* established "that it is for the court and not for Parliament to determine the scope of Parliamentary privilege..." (emphasis added).

Given all of the above, serious doubts as to the validity of the Order remain.



Letter from the Attorney General

I note that the issue of the lawfulness of the Order was raised with you by the Attorney General on the morning of 26 September 2019 (ahead of any consideration by the Legislative Council of the Order) in the context of the aforementioned advice from Mr Zelestis QC. I also note that the issue was raised by the Hon Sue Ellery MLC, Leader of the House, during debate.

Despite these concerns it does not appear that the SCPP squarely addressed the matter, although of course the Hon Simon O'Brien MLC, Deputy Chair of the SCPP, did say (during debate) that the Order was required to provide the Clerk with the further assurance of the House; that is, the House's further assurance (of the Order) that the Clerk need not comply with the notices to produce issued by the CCC. With the greatest of respect to the Legislative Council, the provision of extra comfort to the Clerk does not form a legal basis for the making of the Order. To the extent that the Clerk has a reasonable excuse to not comply with the notices to produce from the CCC, then the CCMA provides a framework upon which the Clerk can rely in the same way as any other member of the public.

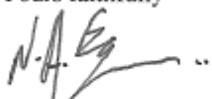
Declaratory Relief

Having regard to the above, I have been instructed by the Attorney General to commence proceedings (on behalf of the State of Western Australia) urgently in the Supreme Court of Western Australia (for and on behalf of the State), seeking a declaration that the Order is null and void and of no legal effect. I respectfully advise that the defendant in the proceedings will be yourself as President of the Legislative Council. As far as the timing of those proceedings are concerned, I would anticipate, subject to any communications we might have in the intervening period, that they would be commenced tomorrow.

In the light of this letter I would be hopeful that you, or those acting on your behalf would be able to confirm by 2pm tomorrow (Friday, 27 September 2019) that the Order will be rescinded, thereby obviating the need for the proceedings. If such confirmation is not provided by that time then I will proceed to issue to the proceedings. In the event that is necessary I would be grateful if you could advise how best to serve those proceedings, and indeed, whether they should be served on solicitors acting on your behalf or whether, in the alternative, the Clerk might come to my Offices and accept service on your behalf.

Finally, to the extent that you, or those who might provide advice to you on this matter, see benefit in discussing the matter, then I will make myself available.

Yours faithfully



NICHOLAS EGAN
STATE SOLICITOR

APPENDIX 4

LETTER (27/09/19) FROM CORRS CHAMBERS WESTGARTH TO STATE SOLICITOR

Our reference
KHS/PRES27245-9150072

Brookfield Place Tower 2
123 St Georges Terrace, Perth WA 6000, Australia
GPO BOX 9925, Perth WA 6001, Australia
Tel +61 8 9460 1666
Fax +61 8 9460 1667
www.corrs.com.au

**CORRS
CHAMBERS
WESTGARTH**

27 September 2019

Sydney
Melbourne
Brisbane
Perth
Port Moresby

By email: n.egan@sso.wa.gov.au
Nicholas Egan
State Solicitor
David Malcolm Justice Centre
28 Barrack Street
Perth WA 6000

Contact
Glyn Watson (08) 9460 1649
Email: glyn.watson@corrs.com.au

Partner
Kirsty Sutherland (08) 9460 1620
Email: kirsty.sutherland@corrs.com.au

Dear State Solicitor

Judicial proceedings for declaration challenging validity of order made by Legislative Council

We respond to your letter dated 26 September 2019 regarding Resolution 6 of Recommendation 1 of Report 57 that was ordered by the Legislative Council on 25 September 2019 (the **Order**).

We are instructed to represent the President of the Legislative Council and to accept service of any court process as foreshadowed in your letter.

The President of the Legislative Council has earlier received and responded to correspondence from the Attorney General. We **attach** those letters, for your information.

The position of the Legislative Council is that the notices issued by the Corruption and Crime Commission (**CCC**) that are the subject of the Order are wholly invalid because they are beyond the power of the CCC and contravene section 3(2) of the *Corruption Crime and Misconduct Act 2003* (WA) (**CCMA**).

Section 3(2) of the CCMA, amongst other things, precludes the CCC from issuing a notice pursuant to s 95 of that Act if the notice would purport to affect the privileges, powers or immunities of the Legislative Council or would relate to a matter determinable by it. Any notice issued in such circumstances contravenes s 3(2) and is invalid and of no effect.

The Legislative Council's privileges, powers and immunities include the immunity from coercive production of records the subject of parliamentary privilege, the privilege and power to determine for itself whether parliamentary privilege attaches to particular records, and the occasion and manner of enforcement of that immunity with respect to particular records: *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162; *Egan v Willis* (1998) 195 CLR 424, [27], [79]. Your letter at [8] and [9] conflates these exclusive privileges, powers and immunities of the Parliament with the well understood yet separate role of the courts in determining the existence and scope of parliamentary privilege. To the extent that *R v Chaytor* [2011] 1 AC 684 is relevant to the circumstances under consideration, it is consistent with the authorities cited above insofar as it recognises that

3475-3753-6269v1

27 September 2019

Nicholas Egan

**Judicial proceedings for declaration challenging validity of
order made by Legislative Council**

CORRS
CHAMBERS
WESTGARTH

areas of criminal investigation may be precluded by the operation of parliamentary privilege: at [92].

Consequently, the notices the subject of the Order offend s 3(2) of the CCMA for at least three reasons.

First, the notices are predicated upon a requirement for the Legislative Council to determine which of the records described in the notice are the subject of parliamentary privilege in order to establish which records are required to be produced to the CCC. That purported requirement sought to be imposed upon the Legislative Council is beyond the CCC's power and interferes with the Legislative Council's exclusive right to determine the occasion and manner of exercise of the immunity.

Second, the notices purport to compel production of documents the subject of parliamentary privilege if the Legislative Council does not determine which records are privileged. The manner in which the issue of the notices relates to matters determinable by the Legislative Council is readily apparent.

Third, the terms of the notices do not enable the recipient to determine for themselves which of the records on the things in question as to which the CCC might, pursuant to a properly framed and valid notice, have lawful power to require production.

In these circumstances, the notices are wholly invalid and there is no question of the Order purporting to supersede a valid exercise by the CCC of a statutory power, right or function.

In response to your letter at [6], the Clerk of the Legislative Council stands in a relevantly different position to that of the Director-General of the Department of Premier and Cabinet. The Clerk is appointed by the Governor on the recommendation of the President of the Legislative Council. The Clerk is the chief permanent officer of the Legislative Council and is responsible for the conduct of its business. It is in respect of this role that the Clerk has custody of records or documents.

Against this background, the Legislative Council is empowered to direct the Clerk (and any other officers of the Legislative Council) as to the disposition or otherwise of documents and records which it is the role of the Clerk to hold for the Legislative Council. The Order protects parliamentary privilege and does no more than direct the Clerk not to deal with the documents in purported response to invalid notices.

Yours faithfully

Corrs Chambers Westgarth



Kirsty Sutherland
Partner



Attorney General; Minister for Commerce

Our Ref: 67-14016

Hon Kate Doust MLC
President of the Legislative Council
Chair of the Standing Committee on Procedure and Privileges
C/- Parliament House
4 Harvest Terrace
West Perth, WA, 6005

Dear Madam Chair

I refer to Report 57 of the Standing Committee on Procedure and Privileges (Committee) dated September 2019 and tabled in the Legislative Council on Tuesday, 24 September 2019.
I note in particular paragraph 6 of Recommendation 1 which provides as follows:-

That the Clerk is directed not to comply with the CCC notices to produce served on the Clerk on 10 September 2019 pending:

- (a) both the outcome of any proceedings and an assessment of parliamentary privilege by the [Committee] with respect to those notices; or*
- (b) further direction from the [Committee] taking account of legal advice.*

As I understand Report 57, paragraph 6 is the Committee's response to the receipt by the Clerk of two Notices to Produce dated 10 September 2019 from the Corruption and Crime Commission of Western Australia (CCC) for the Clerk to produce, by 7 October 2019, relevant documentation other than documentation to which Parliamentary privilege attaches. As I understand it therefore, the CCC is not seeking from the Clerk any material which is properly the subject of a claim for Parliamentary privilege, and indeed, the Notices to Produce contemplate that any claims for Parliamentary privilege are to be determined by the Committee.

I also note from Report 56, also dated September 2019, but tabled in the Legislative Council on [insert date] that the Committee had received legal advice from Mr Zelestis QC and that his advice "... confirms that the Legislative Council **does not have the power to order persons, not being members of the Council, to not produce documents** ..." [emphasis added] although the Report goes on to observe that Mr Zelestis confirmed that "... the Legislative Council does have the power to pass a resolution in terms which 'require' a person not to produce privileged documents to another person or body". See paragraph 4.2 of Report 56.

I note further that Mr Darren Foster commenced Supreme Court proceedings against you in relation to a previous order, which was Order No.4, passed by the Legislative Council on 15 August 2019. Order No.4 was of course an order which the Leader of the House advised the Legislative Council was unlawful, however, despite that, a majority of the House voted (along party lines) in favour of it. Subsequently, the State Solicitor wrote to you by letter dated 26 August 2019 expressing serious doubts as to the lawfulness of the Order. Seemingly it was that letter and the subsequent proceedings which were issued that led to Mr Zelestis' above advice being obtained,

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and it was that advice that seemingly led to Order 4 being rescinded, which in turn led to Mr Foster discontinuing the Supreme Court proceedings.

As the First law Officer of the State I am extremely concerned that the Committee would, for a second time, recommend to the Legislative Council that it agree to a recommendation which it would seem meets the precise description of the kind of order the Mr Zelestis QC advised was unlawful. Based on the Committee's own legal advice the Legislative Council does not have the power to order the Clerk (as a non-Member) to not produce documents (to the CCC) which are not the subject of a proper claim for Parliamentary privilege, and yet this is what resolution 6 in Recommendation 1 of Report 57 purports to recommend.

In addition, as the Minister responsible for the administration of the *Corruption, Crime and Misconduct Act 2003 (WA)*, I am very troubled by the fact that the Committee would recommend measures, let alone seemingly **unlawful** measures, which would have the effect of hindering the CCC obtaining relevant (non-privileged) documentation for an investigation which was designed to uncover misconduct and corruption. I of course note from paragraphs 1.8 of Report 57 that the Committee has no intention of impeding the CCC's investigation (and that it intends to develop a workable procedure with the CCC as referred to in paragraph 1.9), however paragraph 6 of Recommendation 1 would appear to do precisely that.

In the circumstances I would be grateful if you could confirm that no such unlawful recommendation will be made to the Legislative Council. Of course, to the extent that you have received legal advice from Mr Zelestis QC (or anyone else) confirming, contrary to his aforementioned opinion, that the recommendation, if adopted, would be lawful, then I would be pleased to receive a copy.

I look forward to hearing from you.

Yours sincerely



Hon. John Quigley MLA
ATTORNEY GENERAL; MINISTER FOR COMMERCE

25 SEP 2019

RECEIVED:
PRESIDENT OF THE LEGISLATIVE COUNCIL
Date: 25/9/2019
File No: PR 0588

PROCEDURES AND PRIVILEGES COMMITTEE



Our ref:
Your ref: 67-14016

27 September 2019

Hon John Quigley MLA
Attorney General; Minister for Commerce
Level 5, Dumas House,
2 Havelock Street
West Perth WA 6005

Dear Attorney General

Report 57 of the Standing Committee on Procedure and Privileges (PPC)

Thank you for your letter of 25 September 2019.

As you are aware, the measure described in Resolution 6 of Recommendation 1 of Report 57 was ordered by the Legislative Council on 25 September 2019 (the **Order**).

As to your request in respect of the Council's legal advice, Resolution 3(c) passed on 25 September 2019 requires the confidentiality and legal professional privilege to be preserved. Nevertheless, I can confirm that prior to the recommendation of the Order, the PPC has had the benefit of legal advice from Mr Zelestis QC.

I have now received correspondence from the State Solicitor informing me that you have instructed him to commence proceedings on behalf of the State of Western Australia in relation to the Order. I will respond separately to the State Solicitor in respect of his letter.

As to your letter, the Legislative Council's position is that the notices issued by the Corruption and Crime Commission that are the subject of the Order are invalid because they are beyond the power of the Commission and contravene section 3(2) of the *Corruption Crime and Misconduct Act 2003* (WA).

There is therefore no question of the Order purporting to supersede a valid exercise by the Commission of a statutory power, right or function.

The Clerk of the Legislative Council stands in a relevantly different position to that of the Director-General of the Department of Premier and Cabinet. The Clerk is appointed by the Governor on the recommendation of the President of the Legislative Council. The Clerk is the chief permanent officer of the Legislative Council and is responsible for the conduct of its business. It is in respect of this role that the Clerk has custody of records or documents.

Against this background, the Legislative Council is empowered to direct the Clerk (and any other officers of the Legislative Council) as to the disposition or otherwise of documents and records of the Legislative Council which it is the role of the Clerk to hold for the Legislative Council. The direction protects parliamentary privilege and prevents the things in question being produced to the Commission as a result of invalid notices.

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The Legislative Council seeks to facilitate, and not impede, the Commission's investigation. At the same time, it is obliged to respect and preserve parliamentary privilege. To that end, the Legislative Council is continuing to address the task of determining the privilege issues raised by the notices the Commission has issued to the Clerk.



Yours sincerely,

Hon Kate Doust, MLC

President

Chair of the Procedure and Privileges Committee

3453-4588-1101v1

Standing Committee on Procedure and Privileges


Date first appointed:

24 May 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'1. Procedure and Privileges Committee

- 1.1 *A Procedure and Privileges Committee* is established.
 - 1.2 The Committee consists of 5 Members, including the President and the Chair of Committees, and any Members co-opted by the Committee whether generally or in relation to a particular matter. The President is the Chair, and the Chair of Committees is the Deputy Chair, of the Committee.
 - 1.3 With any necessary modifications, Standing Order 163 applies to a co-opted Member.
 - 1.4 The Committee is to keep under review the law and custom of Parliament, the rules of procedure of the Council and its Committees, and recommend to the Council such alterations in that law, custom, or rules that, in its opinion, will assist or improve the proper and orderly transaction of the business of the Council or its Committees.'
- 



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