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TRANSCRIPT OF PROCEEDINGS

O/N H-133116

FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES REGISTRY

RARES J

No. NSD 580 of 2012

JAMES HUNTER ASHBY

and

COMMONWEALTH OF AUSTRALIA and ANOTHER

SYDNEY

9.29 AM, TUESDAY, 2 OCTOBER 2012

MR M. LEE SC appears with MR M. HARMER for the applicant
MR J.E.K. BURNSIDE QC appears with MR M.L.L. ALBERT for the 1st respondent
MR P. SLIPPER appears in person as 2nd respondent

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HIS HONOUR: Call the part heard matter.

5 MR M. LEE: The same appearances of Tuesday, your Honour, but Mr Slipper is present.

HIS HONOUR: Yes. I want to clarify the court's position in relation to two matters. First, an article on page 4 on this morning's Age newspaper has been drawn to my attention. The Age is a journal of record. The article asserted:

10 *In the process, Mr Slipper was chastised by the judge for using his government car to avoid media waiting outside the court.*

15 It is essential that I correct that record. That assertion was a complete fiction. At no point yesterday did I have any contact, direct or indirect, with Mr Slipper or any of the parties on any matter at all. This was irresponsible journalism. I say that without rancour but with some frustration because it misrepresents the court's position. As any professional trained journalist should know, the court sits and acts in public in open court. The principles of open justice are a fundamental feature of our
20 democracy. Judges do not chastise litigants in private. All of the parties were involved in a private process of mediation with the registrar. I had no part in that at all. The court officers issued a public statement about Mr Slipper's access. That leads me to the second matter.

25 Yesterday, it came to the court's attention that the second respondent, Mr Slipper, had entered the law court's building without using the ordinary means of public access. This raised a concern that it could be suggested that he received some favourable treatment or assistance from the court to gain access to its premises in a different way from all other litigants. The court registry caused enquiries to be made
30 as how Mr Slipper gained entry without going through the public entrance. Those enquiries revealed that Mr Slipper used a COMCAR to gain access through the car park. He then used the public lists to go to the offices of the Commonwealth Attorney General that are located on level 17 of this building in an area adjacent to but separate from court registry on that level. COMCARs regularly enter the car
35 park unannounced in order to transport judges, the Attorney General and Solicitor General and senior members of their staff in the ordinary course of their duties.

The security officers on duty allowed the COMCAR to enter the car park without enquiring about its passenger. It was not appropriate for Mr Slipper to use this
40 means of gaining entry to the building. It's a fundamental principle of our system of justice under the Constitution that all persons, including ministers and members of the Parliament, citizens, aliens and even convicted criminals are equal before the law and are treated equally by the courts in any litigation in which they're involved. It would seriously undermine the confidence of the Australian community in the
45 independence and impartiality of the judiciary if there was any basis to think that inappropriate or special treatment or secret arrangements were given or made by the

court to benefit or favour any litigant or other person involved in court proceedings over what all other persons are entitled to expect.

5 The court has a duty, as the old saying goes, that justice must not only be done but it must be seen to be done. Judges are required to administer the law without fear or favour, affection or ill will. I'm not suggesting that any of the persons involved in what occurred on that occasion yesterday had any improper or wrong motive. No doubt, the arrangements were made because of the concerns Mr Slipper had
10 addressed in his email to my associate of 1 October 2012 about the intrusive effects of the media coverage of this and other matters. However, what I'm concerned about is that those, no doubt, will intentioned arrangements had the capacity, unintended, to cause the public to perceive that the court was somehow involved in Mr Slipper being able to avoid using the public entrance. The court had no such involvement.

15 MR J.W.K BURNSIDE: Your Honour, may I make one observation about that. The – you recited something said in the paper about Mr Slipper going to the Attorney General's office on the 17th floor. Can I say - - -

20 HIS HONOUR: That wasn't said in the paper, that's what I – my enquiries - - -

MR BURNSIDE: With respect, your Honour, the mediation rooms are inside that portion of the 17th floor where the Solicitor General and the Attorney General both have offices. To my understanding, the Attorney General was not in Sydney yesterday and to my understanding, he came to the mediation rooms as all the rest of
25 us did.

HIS HONOUR: Well, if that's the position, then I will stand corrected.

30 MR BURNSIDE: I certainly wouldn't want your Honour to think that he was going to see the Attorney General or going to the Attorney's office.

HIS HONOUR: Yes.

35 MR BURNSIDE: Your Honour, can I mention one thing. Although the mediation did not succeed yesterday, which was regrettable, what you're faced with by the oblique path of two separate motions for specific performance, what you're faced with is a question of which of two sets of deeds of release are appropriate to be signed. For the Commonwealth, we are content that whichever of those you regard as appropriate within the meaning of the Calderbank letter, we will sign. We simply
40 can't reach agreement about which of the two deeds is appropriate. We put forward ours, they put forward theirs. Now, without going through the oblique business of two separate motions, it seems to us, with respect, that the least time will be wasted on this question if your Honour has the two deeds and his brief submissions about which is preferable, as the single question is which of the two deeds of release is
45 "appropriate" so as to satisfy paragraph 4E of the Calderbank letter?

HIS HONOUR: Yes. Well, Mr Lee, what do you say about that?

MR LEE: With respect to my friend, it's not – that isn't really the question. The question is whether or not your Honour, viewing the materials which presently comprise part of MFI1, there was a contract that was entered into on the terms set out in those two documents. That's the first question. The second question is whether or not that agreement, objectively assessed, required a further document to be entered into. Our primary position, as your Honour has seen from the outline that was sent today, is that the agreement is complete on its face and this isn't one of those categories of cases where there is a need for a further document, deed or otherwise, to be entered into. In the event that your Honour is against that proposition, it doesn't matter, from the applicant's point of view, because there is an agreement in place, in any event, which is all that is necessary for the court to concern itself with in regularising this position.

In an attempt consistent with our obligations under the overarching purpose and to make this dispute go away, we have indicated in some correspondence this morning, which repeats in an open fashion correspondence, your Honour will see, that was sent yesterday, that we are prepared to enter into a deed but not a deed which goes beyond the agreement that was struck when the Calderbank letter was accepted. The deed propounded by the Commonwealth in eight ways, is an attempt to back fill and impose additional terms on my client which go beyond what was the bargain struck upon the acceptance of the Calderbank letter. So the issues, in my respectful submission, fall this way: (1) if your Honour is convinced that there was an agreement struck upon the communication of the acceptance of the Calderbank letter, your Honour doesn't need to deal with this matter any further.

If your Honour feels, upon reviewing those documents which will be tendered on the application shortly, that there is a – this falls within those category of cases where the parties do contemplate entering into a further agreement. Again, that's really not a matter that need detain your Honour when it comes to regularising the court record because it is common ground between us that whatever the effect of the agreement, it involves - - -

HIS HONOUR: Well, it's difficult to think, Mr Lee, that a statement the parties provide appropriate releases to each other doesn't contemplate something further going to be entered into.

MR LEE: Well, has your Honour read the letter in response, which is the acceptance?

HIS HONOUR: I have read the letter in response but that doesn't deal with – it may reveal a lack of consensus ad idem but you unequivocally accept the terms of this but then say, "But we don't need to do anything more." Now, it doesn't seem to me that you enter into an appropriate release by saying you don't need to do anything more.

MR LEE: But your Honour, is that – the first question is, is that an agreement?

HIS HONOUR: Well, that's right.

MR LEE: Is that a fully executed agreement?

HIS HONOUR: Well, that's right.

5 MR LEE: And your Honour, it is ungainsayable, in my respectful submission, that
the unconditional acceptance of that offer – and there's a whole range of textual
indications from the terms of the Calderbank letter and otherwise – would mean that
your Honour would form a view there's an agreement. If that's the case, then the
10 only the court need to concerns itself with when it comes to this proceeding is
whether or not my client should be given leave to file a notice of discontinuance and
Mr Burnside's client have leave to discontinue the interlocutory application before
the court. That is the extent of the controversy that need concern your Honour today.

15 HIS HONOUR: Well, the other controversy that's concerning me is what's left in
this case? I mean, apart from dealing with the interlocutory application Mr Slipper
has, what possible damages do you say, in addition to this \$50,000, this court would
award if your claim was entirely successful? I mean, how much more do you say
your client is entitled to against Mr Slipper? I'm looking at how much court time is
20 being taken up by this matter and the vast expense of public money that's going on
here. And the stress for all the litigants, including your client, as an individual, from
this litigation being pursued in this way for what does not seem to me to be, at the
end of the day, a very large sum of money, albeit that there are very important issues
that they wish to raise – important to them.

25 MR LEE: Well, your Honour, the - - -

HIS HONOUR: But how much more is this case worth, beyond the \$50,000,
Mr Lee, that you say the court will order?

30 MR LEE: But, your Honour, can we deal with it in stages? I'm willing to address
your Honour's question if you require me to address it now.

HIS HONOUR: I'm just concerned about what – how I prioritise what I'm doing
with - - -

35 MR LEE: Your Honour – well, the way you prioritise, with respect, what your
Honour – the way in which your Honour should deal with this matter, is this way.
There is a settlement that has been reached between the Commonwealth and my
client. That means the Commonwealth should play no further part in this litigation.
40 Now, your Honour should deal with that. There's a – your Honour gave leave to
have this interlocutory application before your Honour today, and we ask that your
Honour deal with it. That will mean, on any view of the attitude that your Honour
takes to the competing interlocutory applications, the Commonwealth then goes
away.

45 The question that your Honour then should deal with is the matter that your Honour
is part-heard in, and that is the interlocutory application which is a matter of great

seriousness and that ought be dealt with. Then it will become – and your Honour should assume, given that Mr Ashby is represented – legally represented, consideration will occur to what should flow from that in relation to the balance of this controversy. Now, there are a whole range of matters in your Honour's statement that, what else is worth – you've got \$50,000 for compensation which - - -

10 HIS HONOUR: Well, I'm looking at section 37M, Mr Lee, of the Federal Court of Australia Act that says I've got to look at the most expeditious way to get to the end result of this litigation and I appreciate there are these outstanding issues with allegations of some seriousness.

15 MR LEE: And your Honour heard a contested application to send this away to mediation yesterday, which I resisted and I said would be futile. Your Honour, notwithstanding that submission, sent us away yesterday. We mediated for nine hours and didn't resolve the matter, as was anticipated by Mr Harmer in his affidavit. On the first return date of this application my client came along and asked for a quick, speedy hearing date and proposed an interlocutory application together with an order for mediation on that day. That was opposed. Your Honour rejected that. We again asked for mediation. Your Honour rejected that. Now, with the greatest respect, your Honour, there is no moral equivalence here when it comes to wasting court time.

25 My client has been conscious from day one to try to resolve this controversy, either by curial determination or by mediation, as quickly, expeditiously and cheaply as possible. It has faced constant delay by reason of two very serious abuses of process applications. It wants that determined. In the meantime, conscious of its obligations under section 37M, it has proceeded to garner and produce to the court all its evidence that it proposes to rely upon in the substantive case. A psychiatrist report of some length and by an imminent practitioner has been filed in court, indicating the part of the damage suffered by my client. What has happened in recent days is that the Commonwealth and Mr Ashby, again presumably, your Honour should infer, conscious to their obligations under section – under part 4(b) of the Act, have resolved part of the controversy.

35 Now, your Honour, there is disagreement between us, mediated in good faith by both sides, where we say the Commonwealth is seeking to back-fill because it doesn't like the agreement that it struck. Now, your Honour has to determine that and has to determine that, with respect, first. Secondly, has to - - -

40 HIS HONOUR: Well, I can work out which way I determine things first, Mr Lee. I understand you're making that submission but the fact is, I'm trying to work out what the priorities in this case are but this case is not a case that involves a huge sum of money, which is the remedy, at the end of the day, the substantive remedy that your client is entitled to.

45 MR LEE: Your Honour says that's a - - -

HIS HONOUR: It's a breach of contract claim against – and damages claim against Mr Slipper at the moment, you've settled against the Commonwealth.

5 MR LEE: Your Honour keeps on saying that but, with respect, it's not right. If your Honour looks at the application, the amended application, your Honour sees the relief that's sought. The relief seeks a variety of things which go well beyond statutory compensation against the Speaker.

10 HIS HONOUR: Pecuniary penalty, statutory compensation, damages for breach of contract against the Commonwealth, interest, an order that the second respondent undergo counselling.

15 MR LEE: Yes, a pecuniary penalty. Well, that's not – your Honour, that is a matter of some importance and what's also of importance, your Honour, and of fundamental importance to my client – and, your Honour, this has been made plain and your Honour doesn't need to – your Honour can assume, when the people have given close attention to their obligations as practitioners, that, your Honour, we're not here on a lark. We're here because we have instructions, on behalf of our client, who believes that he suffered conduct which contravened an Act. He could see no redress on the affidavit evidence I will read on the application, other than commencing proceedings in this court and he asks, no more and no less, that any litigant in the Commonwealth to come along to one of Her Majesty's justices and ask him to decide the case.

25 And, your Honour, if there is anything left of this case, which there is, which includes, in my respectful submission, my client seeking to have proved the conduct, then that's something your Honour will have to determine. Now – but, your Honour, we're anticipating what will occur. Who knows what will occur after this abuse of process matter is determined. We have always said, consistently, and with the greatest respect, I think responsibly, that we do not believe it's possible for this case to resolve, unless and until these extraordinarily serious allegations are disposed of. So your Honour, there is merit, in my respectful submission, subject to your Honour's views, in dealing first with the question that agitates Mr Burnside and myself so my learned friend, Mr Burnside, can finally go back to Melbourne.

35 And then deal with the part-heard matter in the way in which we sought to have it dealt with the day before yesterday. Now, after that, then your Honour will need to make, it seems to me, directions in relation to the balance of the proceedings. If your Honour was to stand the matter over for a week, after the determination of these issues, to allow further consideration to be given as to what sort of orders should be made for people to consider their positions in the light of the determination of the – if your Honour – if I'm unsuccessful in the abuse of process case, then your Honour we're – it comes to an end, in any event.

45 HIS HONOUR: But I'm just curious to know what really the ultimate end result in dollars we're talking about because that's what your relief is seeking, compensation and pecuniary penalty. You're getting \$50,000 from the Commonwealth to resolve

the claims. The Safety Rehabilitation and Compensation Act says the maximum you get for non-economic loss as an employee is \$110,000. Yes, the pecuniary penalty is a different thing but I'm just curious to know how much money we're talking about, because there's a lot of money being spent running these proceedings.

5

MR LEE: There is, there is and, your Honour, no doubt, if we wasted court time following determination of this application that would be a factor that would bear in your Honour's analysis as to whether we behaved unreasonably and we will be visited with costs orders as a consequence, should your Honour form that view. But your Honour is assuming a huge number of things. Your Honour - - -

10

HIS HONOUR: Well, I'm not. I'm just asking you how much money you want, Mr Lee, in addition to the \$50,000 that you're getting from the Commonwealth - - -

15

MR LEE: Well, your Honour - - -

HIS HONOUR: That's all I'm asking you. It's a simple question. It's a dollar figure. What do you anticipate your client's damages, together with whatever pecuniary penalty you say should be imposed, will be? I would like to know.

20

MR LEE: Well, what I was seeking - - -

HIS HONOUR: It's not a hard question.

25

MR LEE: It is, your Honour, for this reason; because what your Honour – as I indicated to your Honour yesterday, this \$50,000 is not payment simply as compensation for the damages suffered by Mr Ashby. It is in consideration of a whole raft of things, including us not seeking costs in relation to the abuse of process application that was raised by the Commonwealth and in consideration of resolving two other controversies which are extant, at this time, in the Human Rights Commission and, your Honour, it's a consideration of releases which go beyond these proceedings. So for your Honour to say that \$50,000 – that one has \$50,000 and that equals the compensation that Mr Ashby says he has suffered is, with respect - - -

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35

HIS HONOUR: Well, I will have to work it out at some point, Mr Lee - - -

MR LEE: Well, you will, your Honour.

40

HIS HONOUR: - - - if I come to award damages, so I just want to know what you want me to award in this proceeding, for Mr Ashby against Mr Slipper. Why is that an unreasonable request, given that we have spent, I don't know, about six, seven days of court time and we haven't really got to the substance of your case. I would just like to know how much money your client is seeking.

45

MR LEE: Your Honour, we have provided particulars of loss. I will ask those to be turned up and I will provide a copy to your Honour. I haven't got the arithmetic in

my head, but I will provide those particulars to your Honour. But, as your Honour is aware, we do seek other relief. But we ask that your Honour deal with - - -

5 HIS HONOUR: Well, the only other relief is a pecuniary penalty, at least what I read in your amended application.

MR LEE: No, your Honour, the amended application also seeks additional orders.

10 HIS HONOUR: That he's to be sent for counselling or something.

MR LEE: Well, your Honour seems to suggest that's sought dismissively. One of the matters - - -

15 HIS HONOUR: No, I understand that. That doesn't work out at a dollar figure. I understand what it seeks.

MR LEE: Exactly. It's some relief that we seek in the application, which isn't sought flippantly given the nature of Mr Ashby's evidence before your Honour on the part-heard application, an order pursuant to section 5451 of the Fair Work Act that the second respondent undergo certain counselling and training in the area of
20 antidiscrimination. Now, your Honour, at the end of the day, my client is entitled, if he has a case, to bring it to the court and ask it be determined without being intimidated from doing it by - - -

25 HIS HONOUR: Well, I'm - - -

MR LEE: I'm not suggesting your Honour is doing that.

30 HIS HONOUR: I'm not trying to intimidate him at all, Mr Lee. All I'm trying to do is find out how much money your client wants in terms of a pecuniary relief from the court.

MR LEE: I'm not suggesting your Honour for a moment would do that. All I'm saying to your Honour - - -

35 HIS HONOUR: Because there may be other ways of resolving the other concerns your client wants to raise in the litigation in a way that can be done perhaps more efficiently.

40 MR LEE: Well, your Honour, we - - -

HIS HONOUR: I'm just trying to work out what the parameters are.

45 MR LEE: We didn't spend nine hours twiddling our thumbs yesterday, your Honour.

HIS HONOUR: I'm not suggesting you did. But unfortunately that didn't find a means of resolving any of the issues you currently have with both of your opponents and so I'm just trying to look at what I should be doing because you both want me to deal with your specific performance application. I've got part-heard applications.
5 And, then, I've got the main case at the background of all that and I'm just trying to work out what the main case really is about.

MR LEE: Well, the main case is about, we say – we say it: contravening conduct by the Commonwealth and Mr Slipper and we seek a variety of relief that arises from that, including, but not limited to damages. We have received a sum from the
10 Commonwealth, which discharges from any liability they have to us, but is not coterminous with the amount of compensation that we seek because it resolves other matters and it's given in consideration of other matters and, your Honour - - -

15 HIS HONOUR: But I will have to apportion all of that in working out - - -

MR LEE: You will. You will.

HIS HONOUR: - - - what damages Mr Ashby is entitled to and taking that into
20 account in fixing any penalty.

MR LEE: And what your Honour will - - -

HIS HONOUR: If I were to find in your client's favour.
25

MR LEE: And your Honour will find, no doubt – and I say this without revealing any confidential information: at the end of the day, there may – your Honour is a very experienced judge and is aware that at the end of cases, when it comes to issues of costs, one can't prejudge questions of costs or questions of waste of court time
30 without seeing what was the entire universe of discourse between the parties, including material not before your Honour at the moment and cannot be placed before your Honour at the moment. But in any event, I move on the applicant's interlocutory process and I seek to file in court a bundle of documents in support of that application, and can I take your Honour to it.

35 HIS HONOUR: Well, I just might ask Mr Slipper what his attitude is because I haven't heard from him. Mr Slipper?

MR P. SLIPPER: Well, firstly, your Honour, I appear on my own behalf. I would
40 like to apologise to the court if, inadvertently, yesterday I entered the building in a way that was inappropriate. I do offer that apology, your Honour.

HIS HONOUR: Thank you.

45 MR SLIPPER: Secondly, I also apologise for my unintended discourtesy to the court in not attending last – earlier this week. Upon reading a transcript of your Honour's expressed views, I was able to obtain legal advice for the mediation, but

after much endeavour have not been able to obtain legal advice for today. I tried up until 9 o'clock last night, your Honour, and it just wasn't possible. I do intend to continue to try this case – as your Honour has pointed out has been quite debilitating in a financial sense across the board and also has consumed much of your Honour's
5 time and also of the time of the parties. Your Honour, with respect to the matter raised by Mr Lee, it is my respectful submission that really once the – were it possible for the Commonwealth to come to an arrangement with Mr Ashby, then really there's not very much more – there's really nothing more left in the action and the action should be dismissed. Your Honour, I - - -

10

HIS HONOUR: Well, I don't think I can do that, Mr Slipper.

MR SLIPPER: I beg your pardon, your Honour?

15 HIS HONOUR: I can't do that, Mr Slipper, because there's a claim against you that you sexually harassed Mr Ashby and that is, at the moment, unresolved and if I resolve it in your favour, the dismissal would follow. If I resolve it in favour of Mr Ashby, then I have to move to looking at damages against you and the
20 application of a pecuniary penalty and whether I should make an order that you undergo counselling, as Mr Ashby is seeking in his amended application. So I can't dismiss that because that is unresolved and the other aspect that's unresolved at the moment is your application to have the proceedings dismissed as an abuse of the court's process. Now, those two things are all in – partly in your control, partly in Mr Ashby's control, but they're not in my control and I can't get rid of them just
25 because Mr Ashby and the Commonwealth have settled. You are locked in this.

MR SLIPPER: Well, I apologise for my inelegant and inexperienced expression, the way I articulated what I was saying. The point I was trying to make, your Honour, was that the Commonwealth is the employer – I'm technically not the employer –
30 and if, as your Honour says, the Commonwealth has reached a settlement with respect to that employment matter, one has to ask what is left in that matter, bearing in mind that while Mr Ashby was certainly working in my office, the Commonwealth was actually the employer.

35 HIS HONOUR: Well, I think what's left is – the allegation is that you, personally, caused him the harm he now complains of against you and that is what is left and that is a right of action that the law gives him. So if he can make it out, he makes it out. If he can't make it out, he loses. But he has a right against the person who actually did the things to him that he alleges happened. If he's able to prove that and if he's
40 not able to prove it, well, you're entitled to be vindicated on your side.

MR SLIPPER: Those things, your Honour, are, of course, denied and, as your Honour has said, however this case is consuming a lot of court time, a lot of your time, sir, a lot of time of the parties and, as you, yourself, indicated, under the
45 legislation the maximum compensation was, I think, \$110,000 and I think quite reasonably you asked Mr Lee – my friend, Mr Lee, what does Mr Ashby want and I

think that you highlight quite correctly, your Honour, the fact that this is a matter which is taking up a lot of time in a very important court, a very busy jurisdiction.

5 HIS HONOUR: But that doesn't relieve me of the duty I have to decide if the parties can't, who wins and who loses.

MR SLIPPER: I appreciate that, your Honour.

10 HIS HONOUR: All right. Well, Mr Burnside?

MR BURNSIDE: Your Honour, before Mr Lee starts up again – well, we've spent 25 minutes really spinning the wheels, with respect. Your Honour, it's pretty straightforward. There are two questions. The first is whether on your reading of the Calderbank letter, whether it is part of the settlement with the Commonwealth that appropriate releases be signed and, in our submission, it is plainly so because that's what paragraph 4(e) requires. The second question, then, is: what is the appropriate form of those releases? Now, I've just been through the bundle of documents that Mr Lee wants to tender. They're proposed deed starts at page 17 and our proposed deed starts at page 22 and I can tell your Honour that I'm instructed that whichever of those two forms of deed you think are appropriate, we will execute. There will need to be brief submissions justifying one or the other, but, with respect, that's a controversy which we think can be dealt with in 10 minutes, if we both focus on the question: which of the two deeds is more appropriate?

25 MR LEE: I agree.

HIS HONOUR: Well, Mr Lee, why - - -

30 MR BURNSIDE: We don't have to go into *Masters v Cameron* or anything.

HIS HONOUR: Why don't we just cut to the chase because - - -

MR LEE: Well, that's what I was trying to do at 9.30, your Honour.

35 HIS HONOUR: Well, you want to go – have the preliminary step of saying that clause 4E doesn't mean something else has to be provided.

MR LEE: Well, yes.

40 HIS HONOUR: And there's a conditional if the parties agree to the following to provide the releases.

HIS HONOUR: Well, at the moment, you haven't agreed to provide the releases, except to the extent that Mr Burnside says, well, whichever of the two forms I think is appropriate, he will sign.

45 MR LEE: If your Honour wishes to move to the issue of - - -

HIS HONOUR: Well, that – shouldn't I just deal with that?

MR LEE: That's why I put the material before you. If your Honour goes to paragraph – page 17.

5

HIS HONOUR: Well, I don't have this document.

MR LEE: Sorry, I thought I handed it up. I'm sorry, your Honour.

10 HIS HONOUR: Can I – is there a spare copy that I can draw on?

MR LEE: Yes.

MR BURNSIDE: We have a spare copy.

15

HIS HONOUR: Apparently – right.

MR LEE: I'm grateful to my friend.

20 HIS HONOUR: Right. Well, I will – so I will look at the releases, do I? So - - -

MR LEE: Well, before your Honour does that, can I ask your Honour to go to the letter because your Honour needs to see the offer and acceptance before one gets to the deed. It starts at page 1, as your Honour sees. Your Honour sees the heading Settlement Offer:

25

First respondent is willing to receive – resolve these proceedings if the first respondent and the applicant agree as following.

30 And your Honour relevantly – your Honour sees (a), (b), (c), (d) and (e). Now, and your Honour sees paragraph 5. If your Honour then goes to page 4, you will see what has happened is an acceptance of the offer contained in the letter. Your Honour sees paragraph 1. We say, your Honour, that's the end of it for the reasons identified in paragraph 3. Now, if I can then ask your Honour, while keeping – if the judicial
35 finger could stay at page 1, if one goes then to – perhaps I ask your Honour then to go to page 9. Your Honour will see some correspondence concerning some proposed orders. I think actually they have been superseded in a minor respect by the copy of the order that I handed up on Wednesday which comprises part of MF11, which is the
40 way in which we say the court record should reflect the terms of the agreement that were reached on the exchange of the letters. Now, if your Honour is against the primary - - -

HIS HONOUR: That looks the same.

45 MR LEE: Does it? Yes.

HIS HONOUR: Well, the first page does, I don't know what's on the second page.

MR LEE: It might be. No, I think that's right, your Honour. There was an earlier draft but I think that is the –

HIS HONOUR: Yes. All right. Well, then, where are we moving to now?

5

MR LEE: Then your Honour will see a letter at page 14 from my instructing solicitors yesterday. It's marked without prejudice, save as to costs but it has subsequently been made open. We refer to the - - -

10 HIS HONOUR: Is that right, Mr Burnside?

MR BURNSIDE: Well, it's their letter.

MR LEE: Yes, and we wrote and say and you should consider it open
15 correspondence. We refer to the issue that has arisen as to the settlement of these proceedings between the applicant and the first respondent. As you're aware, yesterday, we provided you with an interlocutory application which we will rely upon, etcetera, and your Honour, there's a reference to authorities. I take need to take you to that. And your Honour sees the second paragraph of page – on page 15:

20

The ambit of the appropriate release is to be provided to the parties as plainly set out in paragraph 4(e) of the letter dated 26 September 2012. There can be no certainty whatever as to the terms of the releases. As we indicate in our acceptance, as a consequence to the detail in the Calderbank letter, we do not believe that it was or is necessary a further document be entered into. Irrespective of this issue, we are prepared to enter into a deed which gives effect to the release as agreed and when the agreement came into existence. Accordingly, we enclose a copy of a deed which, although unnecessary, our client is prepared to enter into to give formality to the releases already provided for in the agreement. We invite you to enter into a deed on these terms or simply on the terms restricted to proposed clause 2.1.

25

30

And then there's a reference to matters that I don't need to detain your Honour with. If your Honour then goes to page 16, you see the first page, you see some recitals,
35 your Honour sees a reference there to settlement and release. That replicates in precise terms, other than the date today, the terms set out in the earlier paragraphs at paragraph 4. Your Honour sees paragraph 2.1, 2.2 replicate precisely the words set out in the letter. The parties, other than taking out appropriate – the parties release – it should be:

40

The parties release each other from all claims arising out of the applicant's employment with the Speaker.

Etcetera, etcetera. Now, your Honour, we say 2.1, effective as of the date of the
45 letter, is – if your Honour is against the primary proposition that we ought enter into a deed, then a deed in terms of 2.1 would be sufficient but we provided these additional materials in order to give completeness to the bargain between the parties.

5 But nothing goes beyond the meats and beyond, other than – there are only two matters here which aren't in controversy, as I understand it, which go beyond the letters. One is that the law of New South Wales applies, that the acceptance occurred in New South Wales and that's clause 4.1. We have agreed to extend it to executors and assignees and execution by counterparts, given that Mr Ashby, when the deed is signed, may well be interstate.

10 Now, the alternative deed, your Honour, my friend – your Honour will see the letter at page 21:

Last night –

And this is at 20. I should take your Honour to 20 first:

15 *We refer to the interlocutory application dated 2 October which seeks, amongst other things, orders to reflect the agreement between our clients. Please advise by return whether or not your client agrees that there is an existing agreement to settle proceedings between the applicant and the Commonwealth.*

20 We wanted to know whether or not there's some suggestion there is an extant agreement. We received the letter of 3 October which we actually received this morning dated 3 October:

25 *We refer to your letter emailed today at 8.40 pm. The Commonwealth's position is as stated as its letter on 1 October.*

Pausing there, could I ask your Honour to go to the letter of 1 October, which is at page 12:

30 *We refer –*

So this is the Commonwealth's current position, as we understand it:

35 *We refer to your letter of 27 September accepting the Commonwealth's offer of settlement. We are pleased the parties are in agreement on the terms on which the matter can resolve. However, we do not agree with the proposition that no other document to record the agreement is necessary.*

40 And your Honour sees the third sentence in paragraph 3:

Until such releases are agreed, the agreement is not yet complete.

45 So that's why we sought some clarity as to whether or not they say the agreement is complete. I'm working on the assumption that, notwithstanding this letter which we have received this morning which seems to suggest the agreement isn't complete, they agree that there is an extant agreement but there may be a further obligation, they say, which exists to enter into a further document. That's the way I'm - - - 1

HIS HONOUR: Well, it's executory, at the moment, but it needs some further satisfaction to - - -

MR LEE: That's - - -

5

HIS HONOUR: - - - reach a final accord and satisfaction.

MR LEE: That's how I understand it's put. Now, can I take, then, your Honour to the deed which commences at page 22 and I want to indicate to you eight ways in which – sorry – seven ways in which this goes beyond the bargain between the parties. The first is your Honour will see it's dated 4 October 2012. That's important for reasons that I will come to because what is sought by this deed is to release everything up to the date of the deed, whereas we're prepared to enter into a deed which makes it plain that the – any releases are up to the date of the acceptance of the agreement. Now, that's significant because of certain matters that have occurred since the agreement was struck. Your Honour sees in clause 1 on page 2 of the deed, that is, page 24 of – sorry – page 25 of the bundle.

10
15

HIS HONOUR: Well - - -

20

MR LEE: There's a reference to indemnified people. So we're not just releasing the Commonwealth, we're releasing a whole range of people, present and former officers, employees, servants or agents of the Commonwealth and includes - - -

25 HIS HONOUR: Sorry, where am I looking?

MR LEE: Indemnified people on - - -

HIS HONOUR: Sorry. Page what?

30

MR LEE: Page 25, 1.1.1. Page 25 of the bundle.

HIS HONOUR: Indemnified people.

35 MR LEE: Indemnified people means present and former officers, employees, servants or agents of the Commonwealth and includes Mr Slipper and each of his staff. Where's that in the letter? 2.1.1:

The Commonwealth will pay the applicant \$50,000 –

40

And you have these words:

...by way of compensation for any loss.

45 Where's that in the letter? We're giving - - -

MR BURNSIDE: Paragraph 16.

MR LEE: We're giving consideration for a whole range of matters in paragraph 4 and 5. Then we have a provision in 2.1.2 which seeks to visit a tax liability on us in the event certain things happen. That wasn't in the agreement that was struck. Then we have 2.1.1, which seeks to - - -

5

HIS HONOUR: Well, just go slowly, Mr Lee.

MR LEE: I'm sorry, your Honour. I apologise, your Honour.

10 HIS HONOUR: I haven't even seen this document until you've taken me to it, I - - -

MR LEE: I'm sorry, your Honour.

HIS HONOUR: - - - have to make both notes and - - -

15

MR LEE: I'm sorry. I get excited, your Honour. I will try to restrain my natural enthusiasm.

20 HIS HONOUR: Yes, yes. Just contain some of the enthusiasm. So you say the tax payable by the Commonwealth - - -

MR LEE: Well, we just say

25 HIS HONOUR: I mean, you would have to bear your own tax liability on any ordinary, you know, reading of the document but tax payable by the Commonwealth seems to be a bit beyond anything that was suggested in the letter. All right.

30 MR LEE: At 2.2.1, your Honour sees there that it's said that we're obliged to indemnify people. That's not in the document. And these words – your Honour sees the difference between the release in 2.2.1 and the release in clause 4.4E and your Honour sees that in contradistinction our deed makes – uses precisely the same words. And this is arising out of broad words, arising out of the applicant's employment with Mr Slipper, save and except for various things. Now, your Honour sees, importantly however, that this is a deed which is said to be, in effect, from
35 4 October 2012. Now, what has happened, and your Honour will see we – if your Honour also receives on the application – just by way of illustration, I'm going to illustrate why it is that this just isn't an academic argument and we don't know what else has happened since the day of the agreement, but your Honour is aware from the affidavit that your Honour received on Wednesday, in particular, MDH29, certain
40 comments whereby Mr Albanese, we say, repeated his contentions that Mr Ashby was engaged in a Watergate style conspiracy.

45 Now, they may be actionable comments, they may not be, but this deed would have the effect, at least arguably, of preventing Mr Ashby taking proceedings in respect of those comments which were made after the date of this agreement which, on no conceivable view, could possibly be ones that were released by Mr Ashby. That's just by way of illustration. But, your Honour, there's no remit, we say, for going

beyond what the terms of release were in the deed. Clause 2 – so that’s the next point. I think I’m up to clause 2.2. - - -

HIS HONOUR: I’m just looking at Mr Albanese.

5

MR LEE: Your Honour sees the bottom paragraph:

The Attorney-General has –

10 Second paragraph – second – penultimate paragraph:

The Attorney-General has made it clear she doesn’t resolve from any of the statements that have been made on this issue and nor do I.

15 Now, your Honour, if you want me to put into evidence the original comments of Mr Albanese that were made, which are repeated, we say, by that, they can be found as pages 1 through to 2 in the rule 17.02 documents in support of the applicant’s interlocutory application dated 5 July 2012 where Mr Albanese said that my client was - - -

20

HIS HONOUR: All right. Well, I - - -

MR LEE: Well, your Honour knows the - - -

25 HIS HONOUR: Well, I think I remember something about that.

MR LEE: - - - what I will describe as, for present purposes, the imputation. In any event, your Honour sees - - -

30 HIS HONOUR: You mean, the matter complained of.

MR LEE: - - - that that’s an illustration of why it should be confined, both temporally and also in its terms, to the date of the agreement. 2.4 – there’s a provision which seeks to, as it were, buttress the release by saying:

35

For the avoidance of doubt nothing in this deed prevents certain things. The respondent relying on past conduct of the applicant to support any decision relating to his employment.

40 Well, your Honour, what does that mean? We say, in respect of the agreement that was struck, and can I take your Honour back to it. It’s at page 1:

The parties provide appropriate –

45 This is at 4E:

The parties provide appropriate releases to each other from all claims arising out of Mr Ashby's employment with the Speaker.

5 Now, if they are going to rely on conduct or they are seeking, by this deed, to allow themselves to rely on certain conduct of Mr Ashby in order to allow them to take whatever action they wish to take relating to his employment. Now, that may be right, it may be wrong, but that's not what was agreed. They seek to reserve themselves a claim for breach of confidence arising from disclosure of confidential settlement discussions between the parties. Now, - - -

10 HIS HONOUR: Well, that's an act in futuro. That wouldn't deal with a past act.

MR LEE: Yes, exactly. So if the deed was entered into along the terms that I suggest, that is, it's effective as of the date of the agreement; it's completely unnecessary. And they seek also, for the avoidance of doubt, nothing in this deed precludes referral of matters for investigation of the Australian Federal Police or consideration of the Commonwealth Director of Public Prosecutions. Well, your Honour, the – why should my client be forced, with respect, to sign a deed which includes matters like that. It either does or it doesn't - - -

20 HIS HONOUR: Well, would it be an appropriate release to – for the Commonwealth to release your client from some criminal liability? I mean, I don't think it could.

25 MR LEE: Of course not. Of course not.

HIS HONOUR: So that would be contrary of public policy. So what's the problem?

30 MR LEE: Well, why would one sign a – there's no ambiguity. Why would one have a superfluous term in there?

HIS HONOUR: Well, the question is, you say it goes beyond what was agreed. I'm not sure - - -

35 MR LEE: No. I'm sorry. I should refine that submission

HIS HONOUR: - - - I follow what you're saying. I mean, it may be that it's over – it's unnecessary, that's one thing, but saying it goes beyond what's agreed. I just don't quite see that that would be right. You can't bargain away any potential criminal liability you have in civil settlements.

MR LEE: No. I should refine my submission. I should refine - - -

45 HIS HONOUR: As part of our public policy at the moment we don't have plea bargains.

MR LEE: I should refine my submission to say, in respect of 2.2.2 – 2.2.4, I say (b) and (c) are unnecessary in the event that one enters in a deed

5 HIS HONOUR: Well, they're unnecessary but they're not particularly harmful - - -

MR LEE: Well, your Honour - - -

10 HIS HONOUR: - - - in terms of – they might not be necessary but they're not contrary to something that's appropriate. They're implicit in whatever the agreement was, aren't they?

MR LEE: That may or may not right but my - - -

15 HIS HONOUR: I mean, if they're implicit then they're part of what was agreed.

MR LEE: Exactly.

HIS HONOUR: If they're beyond what was agreed they're not implicit.

20 MR LEE: But they're not – yes, but why – well, this is why this is descending down a rabbit hole which is inappropriate and 2.2.4(a) – but - - -

HIS HONOUR: (a) I can understand. I understand that, yes.

25 MR LEE: - - - is over something important.

HIS HONOUR: That you get a release from what you've done.

MR LEE: Your Honour - - -

30 HIS HONOUR: Well, I mean, it's more claims arising out of his employment, so that's that.

35 MR LEE: Well – and, your Honour, the rest of it, again, we say departs from the terms of the agreement but we are completely unfussed by the law of New South Wales applying and being executed by counterparts. Except for clause 3.2, which I'm reminded by Ms, obviously enough, goes further and says:

40 *Shall operate for the benefit of the indemnified people.*

So if one goes back to the – in the those circumstances, if one goes back to the deed that is proposed on behalf of Mr Ashby - - -

45 HIS HONOUR: Do we go back to what you claim in your statement of claim and originating process to see what the liability of the Commonwealth is, and it arises under the Members of Parliament Staff Act so you construe how that arises?

MR LEE: If your Honour wishes.

5 HIS HONOUR: I mean, does that bear on what it is that's being released, because the Commonwealth becomes an employer by force of that Act in the situation where a member of parliament is given a right to employ staff through the Commonwealth and to choose who works for him or her and to dismiss him or her as they wish.

MR LEE: Well, your Honour, that - - -

10 HIS HONOUR: That brings into place all the Fair Work Act stuff but the question is, well, what's the Commonwealth – you know, what is the intended scope of liability that's being released?

15 MR LEE: I think your Honour sees that by reference to – and really, this is the meats and bounds of it and it's why we think, because 4(e) sets out on page 1 of the bundle, sets out what is being released and what is being released are all claims arising out of Mr Ashby's employment with the Speaker, including claims made to the Human Rights Commission and Fair Work Australia.

20 HIS HONOUR: Well, his employment with the Speaker is under that Members of Parliament Staff Act.

MR LEE: Yes.

25 HIS HONOUR: Speakers are a constitutional officer holder.

MR LEE: Yes.

30 HIS HONOUR: They're part of the government of the Commonwealth.

MR LEE: Yes. So that's just why we think the safest course is to simply replicate what the nature of the bargain was.

35 HIS HONOUR: Well, see - - -

MR LEE: And it says - - -

40 HIS HONOUR: - - - that's what you're disagreeing about because you say the indemnified people aren't part of the employment – the Commonwealth's employment of the Speaker under an act of parliament. Commonwealth's employment of Mr Ashby by the Speaker is under an act of parliament, so don't I need to work out how the act of parliament works? Then that's how Mr Ashby is employed and so that's - - -

45 MR LEE: As your Honour has heard, it's common ground amongst everyone at the bar table that the employer of Mr Ashby is the Commonwealth of Australia.

HIS HONOUR: But - - -

MR LEE: This is an agreement struck between the Commonwealth of Australia and
the applicant by which each of those parties release the Commonwealth and
5 Mr Ashby of certain things, not anyone else.

HIS HONOUR: Yes, but it's in a context of claim against the Commonwealth that
arises under the act of Parliament.

10 MR LEE: Yes, and the Commonwealth is being released. Your Honour can't
divorce this from paragraph 4(e) of page 1:

*The parties provide appropriate releases to each other, the Commonwealth of
Australia and Mr Ashby.*

15
And your Honour, whatever that means can be a matter for – if it ever is a matter of
debate, it will be a matter of debate but that's the bargain struck. So if your Honour
then goes to the proposed deed at page 17 of the bundle. There are two errors that I
should make – should correct in this document. There's a typographical error in 2.1,
20 the word to should not appear as the fourth word.

HIS HONOUR: I think you told me that one.

MR LEE: Yes. And your Honour, it should be - - -
25

HIS HONOUR: This is on - - -

MR LEE: This is on page 18. And after the word arising, it should say up to
whatever the date of the communication of the acceptance of the offer was.
30

HIS HONOUR: Arising up to 27 September.

MR LEE: Yes.

35 HIS HONOUR: Up to and including?

MR LEE: Up to and including 27 September.

HIS HONOUR: Yes.
40

MR LEE: Up to the time of the communication of the acceptance.

HIS HONOUR: Up to and including the time of communication of the acceptance.

45 MR LEE: 4.47 pm, I'm told.

HIS HONOUR: Up to and including 4.47 pm Australian Eastern Standard time.
Yes.

5 MR LEE: And your Honour, 2.1 in those terms repeats precisely what the nature of
the agreement was.

HIS HONOUR: Well, that's – that begs the question, though, I mean, section 13 of
the Act says that the relevant office holder can employ on behalf of the
Commonwealth. So a claim arising out of his employment by the Commonwealth
10 - - -

MR LEE: Well, that's what - - -

HIS HONOUR: - - - through the agency of an office holder.
15

MR LEE: That's what has been agreed and if - - -

HIS HONOUR: Well, I know but that's – you say that the indemnified persons
aren't there.
20

MR LEE: No.

HIS HONOUR: And that's the question, isn't it?

25 MR LEE: It is.

HIS HONOUR: When you look at - - -

MR LEE: But your Honour doesn't have to decide that in determining whether or
30 not - - -

HIS HONOUR: Well, don't I? Because you say Mr Burnside's draft is not
recording the agreement.

35 MR LEE: No, your Honour. If there is – I'm pointing to various matters which go
beyond the terms of what was agreed. We only what was agreed. Now, that may, as
a matter of objective construction, mean a whole range of different things in different
contexts but that's not a matter for your Honour. Your Honour is there - - -

40 HIS HONOUR: Well, I have to work out what those words mean. You're telling
me that Mr Burnside's recording is not what they mean, which you may be right
about, but if you're wrong about that, then you have to sign his. There may be bits
where he has gone too far, there may be bits where he hasn't. You - - -

45 MR LEE: Well - - -

HIS HONOUR: But the question is what does it mean, employment – out of his employment with the Speaker?

5 MR LEE: But your Honour, in signing a deed which reflects agreement between the parties, if those - - -

HIS HONOUR: It may be that you haven't agreed, if you can't work out what this means. I mean, you're asking me to sort of say what this means so I have got to work out - - -

10 MR LEE: If your Honour says - - -

HIS HONOUR: - - - consistently with the Act - - -

15 MR LEE: Your Honour - - -

HIS HONOUR: - - - and how your claims arise against different people, whether this indemnity is – the extension, you say, to the indemnified people is legitimate or not. If you have agreed to that by unconditionally accepting it because, on its true construction, that's what it means, then you can't complain about Mr Burnside putting it into words.

MR LEE: But your - - -

25 HIS HONOUR: If you haven't agreed to that, then you have got every right to complain about it.

MR LEE: But your Honour, if we have agreed – if those words bear the interpretations, your Honour, on that analysis, would find that they have.

30 HIS HONOUR: Then you have no right to refuse to sign his document.

MR LEE: Then – well, no, he can't force a document on me.

35 HIS HONOUR: Yes, you can because he can be entitled to specific performance of your agreement. That's what you're both seeking against the other.

MR LEE: But your Honour, it - - -

40 HIS HONOUR: So I have out to work out what it means.

MR LEE: It presupposes that your – on that analysis, that your Honour would find that those words bear that construction, in any event. So by repeating those words in the deed as provided for, one saves any ambiguity at all.

45 HIS HONOUR: But you're saying they don't bear that construction.

MR LEE: Well, that can be - - -

5 HIS HONOUR: Now, that tends to suggest you're not quite ad idem at the moment, in one sense. Although, objectively, you may have committed yourself to something beyond what you thought you were doing.

MR LEE: Well, if we did – if Mr Burnside is correct about that contention, then he will correct about that contention should it ever be relevant but it - - -

10 HIS HONOUR: Well, it is relevant because you're disagreeing about what you should sign.

15 MR LEE: Well, your Honour, our proposition is that there's no need to sign it. If your Honour is against that proposition and your Honour forms the view that the indemnity – that we are going further than what we say is the plain objective terms of clause 4(e) and that is:

The parties provide appropriate releases to –

20 Instead of the words:

...each other, Mr Ashby and the Commonwealth of Australia, who are the parties of this litigation, as a contract in settlement of this litigation.

25 And it's made plain as a pikestaff textually that it doesn't extend beyond the position of resolving the proceedings as between the applicant and the first respondent, something, again, which seems to be accepted, then your Honour, I don't see what the debate is. We think the appropriate course is for your Honour to – if your Honour is against the primary proposition that there's no need to enter into a deed,
30 then the deed should most closely reflect the words the parties chose when they struck the bargain. And the bear the mean – what their subject intention is, as we all know, is irrelevant. They will bear the mean that they bear but your Honour, that's not a matter you need to decide, in my respectful submission, if your Honour can.

35 HIS HONOUR: Well, the question is what's appropriate, Mr Lee.

MR LEE: Well, your Honour - - -

40 HIS HONOUR: Something might be appropriate to avoid further disputation in the future.

MR LEE: Well, there's no suggestion that that would cause further disputation in the future at present before your Honour.

45 HIS HONOUR: Well, you seem to be having one now.

MR LEE: Well, your Honour - - -

HIS HONOUR: And - - -

MR LEE: We just don't want there to be any confusion that what we accepted was what was put to us. We see this as an attempt, as your Honour has seen, in those
5 various ways that I put to go beyond what the bargain was that was struck. Now, if there's any ambiguity in relation to that, the appropriate course for your Honour to take is to use the words that the parties chose, which is reflected plainly in the consensus. There's no suggestion there was not a consensus ad idem. Everyone agrees there's an agreement. It's a question of what it means and your Honour isn't
10 faced with a construction suit, your Honour is faced with an application for specific performance. They're distinct notions, as your Honour is well aware.

HIS HONOUR: I am, but where one is trying to express in words what the agreement was and there are textual differences, then - - -

15

MR LEE: But the parties - - -

HIS HONOUR: - - - I have to construe what the agreement was.

20 MR LEE: No, but the parties have chosen the words of their bargain. They agree there's a bargain. Those words should be used.

HIS HONOUR: The word "appropriate" is the question.

25 MR LEE: Well, what, in my respectful submission, could "appropriate" otherwise mean than – if your Honour is against the primary proposition that if one takes the two documents together that is the bargain and that's the end of it and there is a binding agreement, what could it possibly mean more than the parties will document in a more formal way what is set out in these letters – what is the release set out in
30 that letter?

HIS HONOUR: Well, I think the word "appropriate" has got a certain amount of flexibility about it.

35 MR LEE: It does, but - - -

HIS HONOUR: And the question is: to what extent would this release arising out of his employment with the Speaker go? I mean - - -

40 MR LEE: But that can be decided at some stage by someone, if it ever becomes a controversy.

HIS HONOUR: Well, isn't that the controversy you currently have?

45 MR LEE: Well, with respect, it isn't because, your Honour – your Honour, it's not a real controversy because the parties have agreed on a form of words. They can execute a deed if your Honour is against the primary proposition, which give effect

to those words in a more formal document and those words bear the meaning that they mean, objectively assessed, irrespective of the subjective intentions of the parties. If your Honour pleases, for those reasons, we say that the only thing that should entertain your Honour today is to whether or not orders should be made.

5 Your Honour shouldn't proceed to be in the position here of forcing parties to sign a deed. But in the event that your Honour is against that proposition and says that it's appropriate that we sign a deed as the deed that we have propounded with the amendments that I've indicated orally is the one which is the best reflection of what was, in fact, agreed.

10

HIS HONOUR: Yes, Mr Burnside.

MR BURNSIDE: Your Honour, can I take the seven points in turn, dealing with them, starting at page 24 of the bundle. The first point is the date. We accept that it's appropriate that the deed be dated as at 27 September.

15

HIS HONOUR: Well, you accept that the deed should operate as and from - - -

MR BURNSIDE: Yes. Yes.

20

HIS HONOUR: - - - that time on - - -

MR BURNSIDE: So that by whatever form of words it should be – I think dating as at 27 September is probably a sufficient way of flagging that. The second point is on page 25, paragraph 1.1.1. The point of that, when coupled with the reference to indemnified people in the operative clauses in the release simply means this: that because of the rather curious employment structure through the Members of Parliament Staff Act, it is legally, theoretically possible – let's suppose Mr Ashby had some complaint about a typist in the Speaker's Office, a complaint which hasn't been made, a complaint which self-evidently arises out of his employment with the Speaker.

25

30

That person, by virtue of the Members of Parliament Staff Act would be employed by the Commonwealth and would be, therefore, an employee of the Commonwealth, but it is plain enough from clause 4E of the Calderbank letter that an action against that person or of the Commonwealth arising out of that person's conduct is the subject of the release. Now, if this was an orthodox employment situation, you probably wouldn't need the reference to indemnified people, but it's complicated by the existence of the Members of Parliament Staff Act.

35

40

HIS HONOUR: Well, Mr Lee says the release is of each other not of the person for whom the Commonwealth may or may not be vicariously liable.

MR BURNSIDE: That's true, but the "each other" – if the "each other" includes the Commonwealth, then because of the Members of Parliament Staff Act, the Commonwealth also equals people who are employed by it or at least formally, although ostensibly by the Speaker.

45

HIS HONOUR: Well, that's the question, isn't it? I mean, if you can – it may be that there's a release of the Commonwealth of its vicarious liability for acts of persons who are its employees or for whom it's otherwise answerable, but does that release a joint tortfeasor or a joint – or a several tortfeasor. I mean, the allegation here is that – and the Acts, Sex Discrimination Acts, etcetera, appear to give to causes of action, one against an employer as employer and one against the actual alleged harasser. So that if you have a person sexually harassed in their employment, they've got two causes of action, one against the person who has employed them, who may be the corporation of a one-person company and the managing director or the director is the actual harasser, you get a cause of action against that person. So why would you release the harasser in that context by a release of the employer - - -

MR BURNSIDE: And the answer to that is - - -

HIS HONOUR: - - - which is what you're trying to say here?

MR BURNSIDE: Your reference to vicarious liability, I think, is the key to it and, of course, all of this is difficult to grapple with because we're dealing with entirely hypothetical things. No suggestion has been made that the inclusion of indemnified people is going to alter Mr Ashby's rights in the slightest way. In the real world, there's no suggestion of any other complaint he's going to make, but in any event, your Honour, the point of it is: it's not a concern about vicarious liability, so much as a concern about the fact that if the Commonwealth because of the Members of Parliament Staff Act, if the Commonwealth is the employer it could be directly liable not vicariously liable and the employee, officer, servant, etcetera - - -

HIS HONOUR: But that's right. Well, he's releasing you against all your direct liability.

MR BURNSIDE: Yes.

HIS HONOUR: But he's saying, he says, nothing about people against whom he has independent causes of action for whose action you may also be vicariously liable.

MR BURNSIDE: Well, if you're releasing us from any direct liability by virtue of being the employer as a matter of law and any vicarious liability - - -

HIS HONOUR: Well, suppose somebody punched him and he wanted to bring an action against them for damages and they happened to be employed by the Commonwealth prior to 27 September and it happened as a result of his employment, is he releasing the person who committed the assault as well?

MR BURNSIDE: Two responses to that, the first is: if it had happened, I'm pretty confident we would have heard about it already. Second - - -

HIS HONOUR: Yes, but that's how you construe this.

MR BURNSIDE: Exactly. And if it had happened and that person was an employee under the Members of Parliament Staff Act, then the employee could be liable as well as the Commonwealth being liable.

5 HIS HONOUR: Yes. Well, that's the situation here. I think Mr Lee is looking at it and saying, "Well, are you trying to get Mr Slipper out of this case by using the words "indemnified persons" – by saying, "Well, you've settled effectively by settling with the Commonwealth with Mr Slipper."

10 MR BURNSIDE: No, no, because you will see in the operative clauses of the release, the claims against Mr Slipper are explicitly excised from the scope of the release.

15 HIS HONOUR: Well, then, why is there an implication that third parties against whom Mr Ashby may have a cause of action at the time of this release coming into effect should be protected as opposed to the Commonwealth being protected in respect of its primary and vicarious liabilities? It seems to me that asking for the "indemnified people" to go in there goes beyond what you were agreeing because you're trying to get rid of primary liabilities of third parties as opposed to your
20 liability as employer directly or vicariously.

MR BURNSIDE: Well, your Honour, I think I've said all I can say about that, if that's your view, but if you otherwise thought that our deed was appropriate - - -

25 HIS HONOUR: Well, why is that wrong?

MR BURNSIDE: - - - then it can be altered by excising that and the later reference to "indemnified people". It can be done with a blue pencil.

30 HIS HONOUR: Well, I have to say at the moment, Mr Burnside, I think you didn't say in clause 4E that you were releasing – getting a release of any liability outside the Commonwealth's primary and vicarious liability and that the agents of the Commonwealth or other persons who might have been persons against whom there are independent, even if concurrent or joint causes of action, he can still proceed
35 against them.

MR BURNSIDE: The other element to this perhaps, sir – one other thing I can say, your Honour, and I should have said already and that is that in the event that there is some servant, agent, employee, etcetera, of the Commonwealth who has done
40 something of that sort, then under the legal services directions, the Commonwealth would almost certainly be required to indemnify that person.

HIS HONOUR: Well, they're not doing it with Mr Slipper. It has been made fairly clear, hasn't it?

45 MR BURNSIDE: Yes, of course.

HIS HONOUR: So why do I need to worry about that?

MR BURNSIDE: Because of the - - -

5 HIS HONOUR: You have to indemnify people under private arrangements you make. That's different to what you are getting a release for.

MR BURNSIDE: Except that the hypothetical person who punched Mr Ashby, if an employee, etcetera, would by virtue of a claim made arising out of his employment –
10 Ashby's employment with Mr Slipper that would carry with it a liability for the Commonwealth by virtue of the existing obligation to indemnify.

HIS HONOUR: Yes, but that's not a claim Mr Ashby could bring directly against the Commonwealth and that's all he's releasing. Why should he give you a release
15 for that?

MR BURNSIDE: Well, I've made the point, your Honour. I don't want to - - -

HIS HONOUR: Well, I don't think I can sustain that.
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MR BURNSIDE: Yes. The next complaint that's made arises under 2.1.1 that the payment is by way of compensation for any loss. Now, your Honour, if you go to the Calderbank letter, beginning at paragraph numbered 6 through to 15, there's a detailed discussion of the reasons for the settlement sum, showing plainly that it is a
25 calculation of the loss that Mr Ashby might be able to prove if everything goes his way and, in our submission, it is impossible to read the offer as being anything other than an offer to compensate him for the possibility of establishing damages for loss suffered, and it's also plain, if I may say so, that it is being done in order to avoid the future cost of defending a complex and expensive action in a jurisdiction where costs
30 generally are not awarded against a successful party – sorry, I beg your pardon, in favour of a successful company.

If the Commonwealth goes through to the end and wins, it won't recover the costs that it has put into defending the case, and that's why the Commonwealth thinks that
35 doing the best it can, the amount that it is prepared to offer is as much as Mr Ashby could reasonably expect to get, and plainly it is put forward in settlement of any compensation for which he might be entitled, and that's what the deed seeks to say in paragraph 2.1.1.

40 HIS HONOUR: Well, 4D - - -

MR LEE: Happy with those words.

HIS HONOUR: - - - which works against your submissions and Mr Lee's is this is
45 for this claim, and he's getting rid of the other cases.

MR BURNSIDE: The difficulty is, with respect, it's artificial to read 4D without reading the bulk of the letters from paragraph 6 to 15, which sets out the basis on which that offer is made, and it's all with respect to the damage that he might be able to establish. I mean, plainly, it's not throwing something at him in respect of his costs. It is self-evidently calculated by reference to his possible damage.

HIS HONOUR: Yes.

MR BURNSIDE: The very same question that exercised your mind when you came into court this morning – what is he after? He seeks compensation, we're offering to settle the matter by offering compensation, to the extent that he could reasonably expect to get it.

HIS HONOUR: Yes.

MR BURNSIDE: In any event, your Honour, that's the basis on which we seek to justify clause 2.1.1. 2.1.2 – the only element of that which might be thought controversial is paragraph C, and it is the case that in some circumstances, and most likely not this case – but in some circumstances the Commonwealth does actually tax itself.

HIS HONOUR: Well, then, why should he be – where did he agree to pay your liability for taxation? How ridiculous. I mean, Mr Burnside, really, you're offering a settlement - - -

MR BURNSIDE: Your Honour, I agree that's not there. I agree it's not there.

HIS HONOUR: So that's out. Right.

MR BURNSIDE: But 2.1.2C is not there. 2.1.3, in our submission, plainly is supported by paragraph 16 of the Calderbank letter. In 2.1.3, we say that the settlement sum is offered and it does not constitute an admission of liability.

HIS HONOUR: Hang on. Mr Lee – I didn't think Mr Lee was complaining about that one.

MR BURNSIDE: Well, I thought he did. I've put an asterisk - - -

HIS HONOUR: Sorry. I didn't pick it up in my note.

MR BURNSIDE: Yes.

HIS HONOUR: Mr Lee, I didn't think – am I wrong? Are you complaining about that?

MR LEE: I wasn't seeking to be exhaustive in my complaints. I'm propounding for the deed.

HIS HONOUR: Well, I thought you got pretty well exhaustive with 7.

MR LEE: Your Honour.

5 HIS HONOUR: And nearly got to 8, so – I didn't hear you complain about that, so I haven't taken that into account.

MR BURNSIDE: Well, your Honour, let me just say, in respect of 2.1.3, it speaks for itself. The Calderbank letter speaks for itself.

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HIS HONOUR: Well, it does, and that seems to suggest that they don't - - -

MR LEE: Well, your Honour, we - - -

15 HIS HONOUR: - - - nobody admits liability, apart from leaving the people out of it, but - - -

MR LEE: Your Honour, it's not a question called within the content of what an appropriate release is, grandstanding about whether or not they've admitted liability or not. Now, it's for the objective observer to form a view, on the basis of the material. They had an abuse of process application, they're not pressing it, and they're paying compensation. Now, we're not suggesting that they have admitted liability in terms, but your Honour, people will draw their own conclusions, and there's no suggestion that we should be forced to sign a document which really states the obverse of that.

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HIS HONOUR: Well, Mr Burnside, you shouldn't have talked about that. How do you get that in as an appropriate release? It's not a release.

30 MR BURNSIDE: Paragraph 16 of the Calderbank letter makes it plain:

In order to avoid the very significant expenses associated with ventilating these issues at trial, the Commonwealth is prepared to make an offer based on the worst case scenario analysis.

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HIS HONOUR: But that's not a release.

MR BURNSIDE: That's plainly no admission of liability.

40 HIS HONOUR: It's not a release. The question is, you have agreed to sign appropriate releases, you've both agreed to this, you've made your public attitude plain, Mr Lees made his client's public attitude plain; this is not a matter that is an appropriate release.

45 MR BURNSIDE: Your Honour, the difficulty is this: the matter proceeds – as things presently stand, the matter proceeds against Mr Slipper, whose liability is accessory to the alleged primary liability of the Commonwealth. If the matter is

resolved, and releases are signed, it is appropriate that it should be recorded formally that it was resolved without an admission of liability, because it has to be clear – and it is appropriate that it remain clear – that although the Commonwealth is released from liability, and Ashby is released from liability - - -

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HIS HONOUR: I see what you mean. I see what you mean.

MR BURNSIDE: - - - it is appropriate that it's recorded that no primary obligation of the Commonwealth is acknowledged, because in the litigation, if it continues against Mr Slipper, primary liability would have to be established. And it is – regardless of whether it's an admission by Mr Slipper, the point is, is it appropriate to make it plain that there is no admission of liability by the Commonwealth – in our submission it is – because otherwise the deed could be misconstrued or used for an inappropriate purpose. Now, I don't think I can remember ever seeing a deed of release which didn't include something about non-admission, if that was the foundation of the settlement. And in our submission, it is appropriate that the basis of the release should be expressed in the document itself.

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HIS HONOUR: Well, we have to take out the indemnified people, but - - -

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MR BURNSIDE: I accepted that. If you're against us on the indemnified people definition, well, then - - -

HIS HONOUR: All right.

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MR BURNSIDE: - - - it would have to come out in a couple of clauses. The next matter concerned the operative paragraphs of the release.

HIS HONOUR: 2.2.1.

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MR BURNSIDE: 2.2.1. Again, there's a reference to indemnified people. If you're against us on that, that would go.

HIS HONOUR: Yes. And the time – when you've accepted the time of operations, so - - -

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MR BURNSIDE: Yes. 2.2.2 – in our submission, it is appropriate that a release should include a clause which says that the deed can operate as a bar, and that's what 2.2.2 does. And again, it's absolute - - -

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HIS HONOUR: Sorry. The next one Mr Lee, I noted, complained about is 2.2.4a.

MR BURNSIDE: Yes. Okay. b and c, in our submission, are pretty clearly appropriate, because you can't waive away the obligation to report things to the Federal Police, and so on.

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HIS HONOUR: Hang on. Mr Lee effectively isn't going to take you to the wall on that.

5 MR BURNSIDE: Okay. Then can I focus on a. The point about this is, as Mr Ashby's own material demonstrates - - -

10 HIS HONOUR: Well, I think the breach of confidence from the time of after the release – that's in b – I mean, if you've had a claim for breach of confidence beforehand, then he ought to have - - -

MR BURNSIDE: It's the disclosure of the confidential settlement discussion which is the Calderbank letter and the response to it, both of which were apparently released to the media somehow, certainly not by us.

15 MR LEE: Not by us.

MR BURNSIDE: And Mr Lee says not by Mr Ashby either; that may well be true. But in any event, the point is that b only operates on act done after the time the Calderbank offer was accepted at 4.47 on 27 September, and we accept that that is what it's intended to mean, and of course, that must be - - -

HIS HONOUR: All right. Well, so then, how do you get a?

25 MR BURNSIDE: a. Now, what Mr Ashby's evidence shows is that while he was actively employed by Mr Slipper – I say actively; he's still employed by Mr Slipper, of course, well, by the Commonwealth as Mr Slipper's staff, but while he was actively engaged in it - - -

30 HIS HONOUR: Yes. Well, that also bears on what damages he should be getting.

MR BURNSIDE: Indeed. While he was actively employed, as his own material shows, he provided material to the press, and to Mr Slipper's political opponents, all of which tended to damage Mr Slipper in public and politically. Now, the question will arise, hereafter, whether the Commonwealth – I should say, that material, your Honour - - -

HIS HONOUR: But your release of each other from all claims arising out of his employment with the Speaker.

40 MR BURNSIDE: Sure. If I can develop - - -

HIS HONOUR: Where did you reserve some action, which you were fully aware of – I mean, I can't ignore what I've already seen in these proceedings – that you allege he committed all these things that would have been treated as being disloyalty by an employee, and were worthy of his instant dismissal.

MR BURNSIDE: Yes.

HIS HONOUR: But you didn't do that, so why shouldn't you – you know, you've fixed your colours to the mast; it's months after all this has come to light – why wouldn't any person reading this think you've released him from all that by this letter?

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MR BURNSIDE: Releasing from claims. That's what has been released. No claim is made against him about his misconduct as an employee, but the question that – you may remember that at one of the directions - - -

10 HIS HONOUR: Well, if it's not a claim, you're entitled to dismiss him.

MR BURNSIDE: And that's why 2 point - - -

HIS HONOUR: But that's a question of law. But saying that - - -

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MR BURNSIDE: 2.2.4 is there to avoid that.

HIS HONOUR: Well, the question – I'm not sure I think it should be in there in that form. I mean, you've chosen to say you're going to release him from all claims arising out of his employment - - -

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MR BURNSIDE: Let me articulate the

HIS HONOUR: You obviously can't sue him for breach of the contract, whether or not - - -

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MR BURNSIDE: I accept that.

HIS HONOUR: - - - it doesn't say you release him from – well, the question is, does claims include breaches or entitlements? I mean, you have a cause of action for breach of contract against him; if you can use it to terminate him - - -

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MR BURNSIDE: Can I articulate the – what this is directed to. You may remember that back in July, we sought – quite early on, we got from the applicant the so called McKemmish material. It was an analysis of the contents of Mr Ashby's phone.

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HIS HONOUR: Yes.

40 MR BURNSIDE: Okay. We had that.

HIS HONOUR: I have had some reading of that.

MR BURNSIDE: And later on, you will recall we sought a release from the implied undertaking so that that material could be relied on for the purpose of making decisions about Mr Ashby's continuing employment. That's necessary background to the reading of 2.2.4(a). All 2.2.4(a) is directed to is making it clear that the

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Commonwealth can still continue to look at that McKemmish material in order to make decisions about Mr Ashby's employment, whether to bring him back from leave, whether to reassign him, whether to dismiss him or whatever else. Now, of course, the release would operate to prevent the Commonwealth from suing him for his conduct. That's clear. 2.2.4(a) is designed to leave it open to the Commonwealth to say, "Well, look, we have looked at all those text messages that you have sent and received and we're dissatisfied with your performance as an employee and we therefore decide to terminate you," if – let's suppose that's the most extreme possibility.

Now, of course, if the Commonwealth is wrong in making that decision, Mr Ashby has his rights. On the other hand, if the Commonwealth is correct in that decision, we say that in making that decision by reference to what he has done in the past, has to remain available because it is not, in any sense, a claim. It is simply conduct in the course of his employment, which gives rise to consequences for his future employment. It's necessary simply because he continues to be employed, even though he's on paid leave.

HIS HONOUR: Well, I thought under section 16(3), it's Mr Slipper who can dismiss him at any time by notice in writing.

MR LEE: Perhaps he can. That would still be a dismissal by the employer, the Commonwealth, and the question then is, is the Commonwealth entitled, in taking that step, is it entitled to look at the way he behaved himself in his employment, in particular, by undermining Mr Slipper's position? Now, that, in our submission, cannot, by any stretch of language, be called a claim which is being released and it would be fanciful, especially given that the Calderbank letter was sent and accepted, in the context where we had been given permission by Mr Ashby to rely on the text messages he sent and received, in making decisions about his employment. And all we – all 2.2.4(a) is directed to is continuing that state of affairs. It would be a very curious thing if, in the circumstances of this case, the employer was not entitled to look at his performance as an employee and say, "Well, we think we need to make a decision about your employment."

HIS HONOUR: A very curious thing it hasn't got round to that, Mr Burnside.

MR BURNSIDE: Well, imagine the bush fire it would - - -

HIS HONOUR: I mean, really - - -

MR BURNSIDE: Imagine the bush fire it would cause in the context. I mean, really, with respect, this has been a brawl of extraordinary proportions, given - - -

HIS HONOUR: Well, I know that but he's on the personal staff of the person who he obviously can't work with, for whatever reason, because this litigation has started and nothing has happened in months but that's the fact. Now, you have agreed to

provide appropriate releases. He has agreed to provide appropriate releases. If you terminate him, I suppose he has got his cause of action - - -

MR BURNSIDE: Yes.

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HIS HONOUR: - - - and is not released.

MR BURNSIDE: We have agreed to provide appropriate releases from claims and in our submission, and it's as simple as this, releasing him from claims does not entitle the Commonwealth from making decisions about his conduct – sorry – his future employment by reference to his conduct in his previous employment.

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HIS HONOUR: Well, there's no previous employment, it's still continuing.

MR BURNSIDE: I'm sorry, I couldn't hear that.

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HIS HONOUR: There's no previous employment, he's still continuing as a member of Mr Slipper's personal staff under section 15.

MR BURNSIDE: I know, it was inelegant. I meant his employment up to 27 September. His conduct in that employment, in particular, from – in February and March of this year, are matters which, in our submission, the employer is perfectly entitled to look at in making decisions about his continuing employment. And they could not – looking at that conduct, cannot be, by any stretch of language, be characterised as a claim which is released by the settlement, mainly because it's simply not a claim. It's simply conduct stuff which has happened and on which an employer could reasonably rely in order to make decisions about the continuing employment.

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HIS HONOUR: Well, how does – I mean, whether you're right or wrong about that, at the moment, I'm just having a great struggle intellectually understanding how 2.2.4(a) can be seen as being implicit in anything in your letter.

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MR BURNSIDE: It doesn't have to be implicit in it, the question is whether it is – I think the way to look at it actually is that - - -

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HIS HONOUR: Well, no, it has to be implicit, Mr Burnside, because an implication is something that effectively goes without saying and is part of what the parties agreed. Anything else is additional.

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MR BURNSIDE: I understand.

HIS HONOUR: And this is not a release, this is a – something that sounds very super refined to me.

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MR BURNSIDE: Can I turn it around the other way, your Honour. The question is, is it implicit in the Calderbank letter that, notwithstanding we have been given by

Mr Ashby permission to look at the text messages with a view to making employment decisions - - -

5 HIS HONOUR: A long time ago and you haven't made a decision.

MR BURNSIDE: Exactly so but we - - -

HIS HONOUR: And you have agreed to settle with him.

10 MR BURNSIDE: We have been given permission to rely on that material for the purpose of making decisions in his employment. The question is, is it implicit in the settlement that our right to make decisions about his future employment has been taken away? And in our submission, you simply cannot read that into the settlement and the point about 2.2.4 is that all of it saying to avoid any doubt, this does not
15 cover these possibilities. Now, of course, the possibility of referring matters for investigation by the Federal Police is not implicit in the settlement and – but making it plain that it's not implicit in the settlement - - -

20 HIS HONOUR: Well, that – yes, but (b) and (c) may well be matters that do arise or potentially arise but they may also be unnecessary but (a) is a world away from that, Mr Burnside. I mean, you know, your own statements are you have been sitting on your hands about things you have known about that happened in February and March for months with the ability to do something about it from having got release from the implied undertaking and you don't mention it in your letter and you now say, well,
25 somehow it's implicit. Now, it may or may not be that the releases that you have agreed extend to that or don't but I don't see how you can ask for it to go into this deed as being something which you agreed. It may be that that is something which I shouldn't get into because it seems to me that it goes outside the terms in the sense of appropriate releases. It's a subject matter that doesn't seem to me to be referred to in
30 the releases and therefore, I don't see that he is bound to sign off on it. You may be perfectly right but I just don't think - - -

MR BURNSIDE: I may not have expressed myself adequately, your Honour. I don't say that 2.2.4(a) is implicit in the Calderbank letter, quite the opposite. We say
35 that the Calderbank letter cannot be regarded as releasing the – as preventing the Commonwealth from relying on his past conduct and therefore, it is appropriate for a release to make that fact plain, just as in (b) and (c). There's nothing in the Calderbank that refers to referring matters to Federal Police or the DPP, so that's not implicit in it. The point is that it can't be read as covering it.

40 HIS HONOUR: Well, paragraph 6 and 7 of your letter - - -

MR LEE: Yes, exactly. It seeks - - -

45 HIS HONOUR: - - - don't exactly square up to this. They suggest that he's going to stay on as - - -

MR LEE: Quite.

HIS HONOUR: - - - Mr Slipper's confidential employee in his office as Speaker until Mr Slipper ceases to hold office or ceases to be a member of the Parliament.

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MR BURNSIDE: I - - -

HIS HONOUR: That's what the suggestion is.

10 MR BURNSIDE: I understand that - - -

HIS HONOUR: And you now say, "But anybody reading this would have always understood that we still kept up our sleeve this other thing." Well, I just don't think I can put that into a document that Mr Ashby has to sign. Now, whether you're right or wrong is a different question and you can decide that in other circumstances.

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MR BURNSIDE: The - - -

HIS HONOUR: But I just don't think, given what you have said in paragraph 6 and 7, the suggestion that you're still contemplating terminating him and therefore, he should agree to sign a document that says, "Whatever this – whatever I agreed to, that's for the avoidance of doubt on leaving the Commonwealth open to that."

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MR BURNSIDE: Yes. The only one thing I want to say in further support of this proposition, your Honour, is this. We're looking at the meaning of 4(e). What 4(e) provides is the parties will provide appropriate releases to each other from all claims arising out of his employment. If you look at the way an employee has behaved and you say, "Because of that behaviour, we're going to terminate your employment," is that a claim? Of course it's not. It's simply identifying a factual foundation - - -

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HIS HONOUR: Well, it's relying on a breach of contract that gives you rights.

MR BURNSIDE: No, no. No, no, no, no. You don't have to characterise it as a breach of contract. You simply say, "We regard that conduct as not consistent with your continued employment." Now, they might be right or they might be wrong. Of course, if they said, "You breached your contract of employment," then that would be reference to a claim which has been released. But if you simply point to conduct and say that conduct is not consistent with your continued employment in that role, then if you're justified in that position then the termination is good. If you're not justified in that position, the termination is bad. But either way, pointing to conduct is not a claim and certainly not a claim which has been made and not a claim which has been resolved. But I can't put anything further than that, your Honour.

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HIS HONOUR: Well, I don't think I can force Mr Ashby to sign that. As I say, you may be perfectly correct about the consequence of all of this, but it just seems to me that that's – if you wanted to have that in the deed or the release, then you should

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have written about it, particularly looking at what you've said in six and seven. I mean, there's - - -

MR BURNSIDE: I understand, your Honour. I've said what - - -

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HIS HONOUR: I mean, the simple fact is the relationship has broken down irretrievably, I would have thought and the question is what damages would he be entitled to if he were – ceased to be employed and that issue will, no doubt, occur rather – or come about naturally in the circumstances paragraphs 6 and 7 talk about.

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MR BURNSIDE: And if he continues to be paid, without having to actually work, well, then, his assessment of damages is - - -

HIS HONOUR: Well, that's what your client has chosen to allow to happen - - -

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MR BURNSIDE: Yes, I understand. My client - - -

HIS HONOUR: - - - particularly given the time since you got access, unrestricted access to the McKemmish material relating to that issue.

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MR BURNSIDE: I merely make the point that it has consequences for the balance of the litigation, but in any event, your Honour, I don't want to pursue that point.

HIS HONOUR: Well, it would be hard to prove any damages at the moment.

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MR BURNSIDE: My point, precisely.

HIS HONOUR: Getting paid to be on gardening leave.

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MR BURNSIDE: Yes. Your Honour, can I say, with respect, it's apparent that you're against me on a couple of points. In our submission, those points can be adequately accommodated by a blue pencil through a couple of provisions and with those excisions, our deed would be more appropriate than the rather slender version that the applicant has put forward. And consistent with what I said before, the Commonwealth will execute the deed, as altered in the ways that accord with your reasons or rather your findings – they're probably the same thing. Now, your Honour, if that's the case – if that's the way it should be done, well, then, we can redo the deed so as to get rid of the bits that you don't agree with. If you think we should sign the other deed, well, then, that's as it may be, but either way a deed can be signed this morning.

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HIS HONOUR: Yes. Mr Lee?

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MR LEE: Well, I'm not sure what's left of the differences and why we just can't proceed to sign the deed in the form proposed by Mr Ashby. I should say, your Honour, just so there's no misapprehension as to the applicant's position that by reason of what we say was the representation made in paragraph 6, we legitimately

held the view when we got this letter and accepted the offer that he would continue to remain employed in those circumstances and if contrary action is taken would amount, we would say, to contravening conduct under section 345, if that's not what the basis of making that statement was.

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HIS HONOUR: Well, Mr Slipper has got the right under section 15 of the Act to terminate him at any time.

MR LEE: I'm talking about the Commonwealth, your Honour, talking about the Commonwealth. But in any event, I will move on.

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HIS HONOUR: Yes, but - - -

MR LEE: I think, your Honour, I need to make just - - -

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HIS HONOUR: But if it has no productive work for him to do as a member of Mr Slipper's staff, I mean, that will be - - -

MR LEE: Well, your Honour, you don't need to get into that.

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HIS HONOUR: I certainly don't. I've got enough problems in this case without getting into other ones that it may never happen and so far haven't happened.

MR LEE: Well, your Honour - - -

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HIS HONOUR: All right. So we can leave all that to one side, Mr Lee.

MR LEE: So, your Honour, I think the only residual issues that I should reply to then are these: the appropriate words concerning payment of the applicant, \$50,000, the words really should be, we say, in – should be the words that were used in 4D, that is, the Commonwealth will pay the applicant \$50,000 in settlement of his claim against the first respondent. Full stop. Now, I think the next issue - - -

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HIS HONOUR: Well, then, he pays his own tax. The Commonwealth pays its tax.

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MR LEE: Yes. Well, your Honour exactly.

HIS HONOUR: I don't think I've got any problem with that.

MR LEE: Your Honour - - -

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HIS HONOUR: I think he's entitled to – the Commonwealth is entitled to a statement that there's no admission of liability.

MR LEE: You think the Commonwealth is entitled to that?

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HIS HONOUR: Yes. Yes.

MR LEE: Well, can I be heard on that, your Honour. It's not a release. It's not an appropriate release.

5 HIS HONOUR: Well, Mr Lee, I think it's entitled to record in the document that while it is settled your claim, it is not admitting it's liable. That's a perfectly normal provision in release and that's the Commonwealth's position and they're entitled to have it recorded in the - - -

10 MR LEE: Well, if your Honour has reached that view, I'm not going to seek to persuade you. I simply say this - - -

15 HIS HONOUR: I mean, you and I both have seen enough documents to know – the deeds of release – that people who are not admitting liability, but paying money – and the Commonwealth has explained its reasoning process in these letters, then it seems to me that that's an appropriate clause – leaving a way out of it – count the indemnified people. So I think they're entitled to have - - -

20 MR LEE: If your Honour pleases. I won't trespass further on your Honour's time. And we say the release should be in the terms replicating – as is set out in the proposed deed by Mr Ashby, that is, on page 18, as amended temporally and with the excision of the word "to". It means what it says and says what it means. Your Honour, once we go past the deed proposed by Mr Ashby, we then have the problems about – they can plead something is a bar, but we don't get that. I mean, what's good for the goose would be good for the gander, but if we go down that path, what's the point? The parties didn't turn their minds to that, about pleading points. It's - - -

HIS HONOUR: Well, that's a usual provision in a deed of release.

30 MR LEE: Well, if it is a usual provision, it's mutual.

HIS HONOUR: Yes.

35 MR LEE: And the Commonwealth's one doesn't provide any mutuality in that respect. That's why we're concerned about adopting the Commonwealth's deed, your Honour. Every time you look at there's a further thing, which may mean something other than what the parties agreed, we say. And, your Honour, the simplest way of doing this is simply to replicate what the parties actually agreed, which is provided for in Mr Ashby's deed. The further we go down, departing from
40 the precise terms used by the parties as part of their bargain, the more you have the possibility that something is being placed in there, which was not the bargain struck.

45 And, your Honour, that has been seen by the matters that your Honour has already rejected and so we would suggest, your Honour, that the appropriate course in all the circumstances is for the – given what has fallen from your Honour is for Mr Ashby's deed to be preferred with the following changes: the words on page 17, in 1.1.1, the addition of the words after "The Commonwealth will pay the applicant \$50,000," the

words “In settlement of his claim against the first respondent,” to replicate what’s in 4D. The changes - - -

HIS HONOUR: Sorry. Sorry. Now, just slow down. So in your 1.1.1 - - -

5

MR LEE: In my 1.1.1, we would agree, given what has fallen from your Honour and in order to more faithfully replicate what was agreed, 1.1.1 would say, “The Commonwealth will pay the applicant \$50,000,” – and these words “In settlement of his claim against the Commonwealth”.

10

HIS HONOUR: Well, I think from all – settlement of all claims, other than – and if you’re going to do that, you’ve got to put in what’s in 4E.

MR LEE: “All his claims,” if your Honour wishes to put those words. I’m just trying to most faithfully replicate the words that were used. It’s a distinction without a difference. If your Honour wishes to have “all his claims” - - -

15

HIS HONOUR: Well, when you say, “His claim,” I think they’re intended to get rid of anything he might have, including anything he has not articulated, except a Comcare claim.

20

MR LEE: We accept that. We accept that.

HIS HONOUR: So I think the words of their release in 2.2.1, leaving out the indemnified people is probably a more effective - - -

25

MR LEE: I’m sure it’s more effective.

HIS HONOUR: More effective to reflect the intention of the parties. I mean, as you know, I haven’t sat down and analysed this chapter and verse, but speaking as a matter of impression, I think that’s – what you’ve got in 4E of the letter is really all his claims arising out of his employment and - - -

30

MR LEE: We would agree – if that’s right, then, your Honour – and the words that we suggest “The Commonwealth will pay the applicant \$50,000, the settlement sum, in settlement of all his claims against the Commonwealth,” does the trick. That’s what the parties said.

35

HIS HONOUR: Well, it may be that we can do that by putting in at the beginning of your 2.1, “In consideration of a payment referred to in,” -1.1 point whatever it is.

40

MR LEE: Yes, your Honour.

HIS HONOUR: Yes?

45

MR LEE: Then, your Honour, at 2.1 on page 18, the changes - - -

- HIS HONOUR: So up to 4.47 pm on 27 September and then take out your two.
- MR LEE: Yes. And then the only other things we need, it seems to me, from your Honour, is to include the fact that we will pay our tax liability.
- 5 HIS HONOUR: Tax – no admissions.
- MR LEE: And no admissions and - - -
- 10 HIS HONOUR: All right.
- MR LEE: - - - we are completely indifferent to whether or not the matters that were in 2.2.4(b) and (c) are included.
- 15 HIS HONOUR: Well, we will put those two in, but with the limitation in (b) that it's after 4.47 on the 27th.
- MR LEE: Yes, yes.
- 20 HIS HONOUR: All right. Well, is that done and dusted then?
- MR LEE: I think that reflects your Honour's reasons.
- HIS HONOUR: Well, yes I don't propose to give a judgment about this.
- 25 MR BURNSIDE: Your Honour, can I just suggest a shorter way round to the same point. If you go to our deed, I think the effect of what you have said – Mr Lee seems to accept is that if you have our deed, at page 25, paragraph 1.1 – well, the whole of paragraph 1 would go because it only has one definition. And in two places, I think,
- 30 the indemnified people are referred to, that reference would come out.
- HIS HONOUR: No, no. But I think – well, I think, Mr Burnside, your 2.2 has a whole – well, you know, 2.2.1, 2 and 3 have got all these and – well, hang on - - -
- 35 MR BURNSIDE: Well, there was no complaint about 2.2.2 until my learned friend got up in reply, and it's an orthodox clause. It's a bar – using the document at the bar to any subsequent proceeding.
- MR LEE: We would in a mutual bar provision if that assists it being added to
- 40 our deed.
- MR BURNSIDE: I said earlier that a blue pencil approach to ours would produce a result, rather than having to supplement, in four respects, the applicant's deed. The other blue pencil excisions would be 2.1.2, paragraph (c).
- 45 HIS HONOUR: Sorry, 2.1. - - -

MR BURNSIDE: 2.1.2(c). In 2.2.1 - - -

HIS HONOUR: Well, hang on, you've got – results in any tax liability. It will have to be in 2.1.2, payable by the applicant.

5

MR BURNSIDE: Quite.

HIS HONOUR: Now, why doesn't it just stop after "tax liability" in the third line? The rest of it – he has got a liability under taxation laws. You can go after him for the Commissioner of Taxation if he doesn't meet them. Having the rest of it just – I don't think appropriate.

10

MR BURNSIDE: Well, that's the Commonwealth withholding any tax. It might have to be withheld as a consequence of the settlement. That's paragraph (a).

15

HIS HONOUR: What tax would you have to withhold?

MR BURNSIDE: I have no idea, your Honour. I've never understood the Tax Act. I'm - - -

20

HIS HONOUR: Well, it defies anybody trying to understand it because it's written in such convoluted, extensive, unreasonable expression - - -

MR BURNSIDE: It's a standard - - -

25

HIS HONOUR: - - - as is the Commonwealth standard drafting style.

MR BURNSIDE: It's a standard drafting in releases.

30

HIS HONOUR: All we have here is, if he has a liability he's going to meet it.

MR BURNSIDE: Yes. Well, that's paragraph (b).

HIS HONOUR: I don't see – if you don't – haven't worked out that you've got to deduct something, tough luck. You've agreed to pay him \$50,000. It's very difficult to see how, in a compensation case where there's no, as I understand it, claim against Comcare at the moment that would entitle you to deduct the money and pay it to Comcare. You're entitled to keep anything else back out of the 50,000.

35

MR BURNSIDE: Your Honour, the point is this. Paragraph (a) is directed to this, that in some circumstances when an employer pays an employee money referable to wages, they are sometimes required to withhold something for tax.

40

HIS HONOUR: But this isn't wages. This is a claim for damages, quantified damages plus settlement of potential costs issues and everything else. It's an undivided sum. I think your client was in a position to work out, under its own legislation, anything it might have had to deduct.

45

MR BURNSIDE: I follow that, your Honour. I think it's there for an abundance of caution. But, of course, that's why it's probably important to have reference in the settlement clause that it is in respect of any compensation payable to him. It's his damages, it's not his wages. Now, if none of it's his wages then presumably there will be no withholding tax. (a) is directed to withholding tax, if relevant. (b) is directed to - - -

HIS HONOUR: There's no withholding tax for wages, it's a PAYG system, as I understand it.

MR BURNSIDE: I know. It's an obligation to withhold money referable to tax that may be payable.

HIS HONOUR: Well, he's not getting any money for his wages, so why are you asking for authority to withhold something?

MR BURNSIDE: It's just the counterpart of (b). If it turns out there are tax consequences of this that require the Commonwealth to withhold anything or require him to pay anything, well, that's on him. That's all.

HIS HONOUR: Well, if you just – if the settlement sum results in any tax liability payable by the applicant, he will be responsible for it. If he has to pay it, he has to pay it.

MR BURNSIDE: Yes, but even - - -

HIS HONOUR: And if you learn of something in the meantime you can let him know.

MR BURNSIDE: But even that wouldn't go far enough because if the tax – if it did give rise to tax liability, on his part, it is possible that it would give rise to a liability on the Commonwealth's part to withhold the tax component to be dealt with the way PAYG tax is dealt with. It's - - -

HIS HONOUR: But it's not a PAYG tax payment.

MR BURNSIDE: I know. And so there are probably not going to be any tax implications but it's desirable to deal with these things just in case, otherwise we've got yet another controversy, and the point of this is to avoid it.

HIS HONOUR: Well. No, Mr Burnside, this is about a release.

MR BURNSIDE: Yes. And a document which - - -

HIS HONOUR: And that doesn't seem to be an appropriate term in a release.

MR BURNSIDE: Well, we're in your Honour's hands but, whilst we accept what you say about (c), it does seem appropriate to deal with the possibility of tax consequences that affect his liabilities and the Commonwealth's obligations in respect of those liabilities. I mean, it seems a bit cavalier just to leave it to the law to operate and if he complains about it, we just say, well, too bad that's the way the law – what the law provides. The idea is to make this clear so that the releases can operate and, of course, it's appropriate for that sort of clarity to be provided.

HIS HONOUR: It would have been a lot clearer for your client to find out the tax situation before it made the offer or in the course of working this out, rather than saying, well, we can't work out what this tax legislation means but if at some point we work it out before we pay you the money and we want to deduct something, we will – and we don't deduct it, then something else will happen. I mean, really.

MR BURNSIDE: Yes. In my present state I don't even lift the Tax Act, let alone open it and understand it.

HIS HONOUR: Well, Mr Burnside, you made this deal. I think I will just say that you could be held to say, in the event that the payment results in any tax liability payable by him, he will be responsible for it.

MR BURNSIDE: Okay.

HIS HONOUR: If you – if he – and that's that and - - -

MR BURNSIDE: I've said all I can, your Honour. That could – that would mean the - - -

HIS HONOUR: Your client has to obey the law. He has to obey the law. If there's some provision of the Tax Act that says you have to deduct some from that and it's treated as having been paid by you to him, so be it. He will have to live with that. You will have to live with that.

MR BURNSIDE: In that case, your Honour, 2.1.2 would simply stop short after the words "tax liability" in the third line.

HIS HONOUR: That's what I was saying. And leaving out, "payable by the –" – whether the Commonwealth or –".

MR BURNSIDE: Yes.

HIS HONOUR: Okay.

MR BURNSIDE: And then 2.1.3, we say, is appropriate to remain. 2. - - -

HIS HONOUR: Without "the indemnified people" at the end.

MR BURNSIDE: Sorry?

HIS HONOUR: 2.1.3, without “the indemnified people” at the end.

5 MR BURNSIDE: Yes, quite. And 2.2.1, remove reference to “the indemnified people”.

HIS HONOUR: Well, why isn’t it simply to do it his way with, effectively,
10 following what you did say in the letter and just say, in consideration of payment of the – whatever the settlement sum, and his 2.1.

MR BURNSIDE: With respect, it says, effectively, the same. The operation is the same. In other words, it - - -

15 HIS HONOUR: Okay. So let’s leave it at that, less words are better. So we don’t need all that. So we will put there, 2.1 with up to 4.47 pm and consideration of principal and – okay. So then you’ve got (b) and (c) with the time limitation in 2.2.4
- - -

20 MR BURNSIDE: And the rest, I think, is uncontroversial.

HIS HONOUR: Yes. All right. Well, Mr Lee, I think with those amendments to Mr Burnside’s draft - - -

25 MR LEE: Yes, your Honour, that can be done. Well, in those - - -

HIS HONOUR: You should be able to work that out without me having through another drafting exercise.

30 MR LEE: That can be done. In those circumstances, we would ask your Honour to make the orders in accordance with the short minutes of order.

HIS HONOUR: Well, the – being - - -

35 MR BURNSIDE: I think, your Honour, it might be worth waiting until we come back with the document and get it signed.

HIS HONOUR: I think I should just wait with – until all that’s sorted out, Mr Lee, and do it when - - -

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MR LEE: Well, your Honour should stand it down and sort it out then, because, your Honour, for two days now, after settling this case, the Commonwealth has been here. We want to get to the substance of this case, rather than have the Commonwealth hanging around like a cranky uncle at a Christmas lunch and - - -

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HIS HONOUR: Well, Mr Lee, I've got limited time. I'm not going to stand it down. I will adjourn for 10 minutes for a break and then I will start on the motion – the interlocutory applications.

5 MR LEE: If your Honour pleases, but - - -

HIS HONOUR: Because, I mean, I've only got till Friday to hear this. I set aside Tuesday, Wednesday, Thursday and Friday. I appreciate that the parties had an unfortunate problem on Tuesday and couldn't proceed, and then we've had this
10 dispute about the settlement. We've had mediation and it hasn't worked but I only have so much time.

MR LEE: Well, as long as it's understood that - - -

15 HIS HONOUR: And I should point out that this court is down a number of judges, so there are only so many judges to deal with the ordinary work of the court. However high profile cases might be, they are not entitled to more consideration than other litigant's demands on the court's time.

20 MR LEE: Well, that's Mr Burnside's client's responsibility, your Honour. But - - -

HIS HONOUR: Well, it's a matter that applies to everybody's use of the court's time.

25 MR LEE: But, your Honour, I accept that and that's why we wanted to proceed on Tuesday with the – Mr Slipper's position - - -

HIS HONOUR: Well, that wasn't your fault.

30 MR LEE: - - - and tried to hand up short minutes but, your Honour, it just raises a serious issue which was one which is a matter of concern from the applicant on Tuesday. I don't mind the matter not being resolved by way of short minutes now, but the Commonwealth, after having resolved this case, should take no further part in this litigation and it did, on Wednesday, make submissions on behalf of Mr Slipper.

35 HIS HONOUR: Wednesday?

MR LEE: Mr Burnside made submissions - - -

40 HIS HONOUR: On Tuesday.

MR LEE: - - - on Tuesday and that – the Commonwealth should no longer be engaged in this process as some sort of roving amicus. Now, as long as that's understood, then we have no difficulty, but otherwise, your Honour should regularise
45 the position. The Commonwealth is no longer a part of this proceeding, it hasn't been since Tuesday. We've been trying to get that regularised since Tuesday morning.

HIS HONOUR: Well, it has been because you haven't been able to sort out the terms of settlement which we've just been spending two hours dealing with.

MR LEE: Well - - -

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HIS HONOUR: So it has been here until you've got an agreement.

MR LEE: Which was, essentially, resolved.

10 HIS HONOUR: You've finally, I think, got an agreement but I would like to see the ink dry on the paper and then we can deal with it in that way, so I might adjourn for – just give the court staff a break and come back at quarter to.

15 **ADJOURNED** [11.35 am]

RESUMED [11.48 am]

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HIS HONOUR: Yes. Well, now, we will move on to the interlocutory motion that's part heard with Mr Slipper and –

25 MR BURNSIDE: Before I seek leave to be excused, your Honour, I think the document is, sort of, going through the air to be printed out and then hopefully signed. Can I say things before we seek to be excused, your Honour. The first is, obviously, Mr Slipper has some disadvantage in being here as a layperson acting for himself. If you thought it would be of any use to the court for us to remain present, we can be but we're simply putting that forward as a courtesy to the court, in the
30 event that you thought you might get any help from us in respect of the application that's on foot. And can I say in that connection, we say that primarily as – with the thought that it may be of some assistance to your Honour but also to rebut the absurd suggestions that have been floating in the press that the Commonwealth has abandoned Mr Slipper or cut him adrift or whatever other florid expressions people
35 use. That is not the case. We have resolved the matters for reasons which your Honour obviously understands. The second thing is - - -

40 HIS HONOUR: Well, that's not a good reason for you to be here in somebody else's litigation, though, Mr Burnside. If you're wanting to appear for him, that's one thing but - - -

MR BURNSIDE: We're not.

45 HIS HONOUR: And as much as I would value some assistance, if you wanted to be – give Mr Slipper gratuitous assistance, that's a matter for you but – or for your client but at the moment, he's appearing by himself and I have to deal with that and it's not making the task of the court any easier but that's not something I can use as a

justification. Now, your client's public perception of how it wants to be seen as, no doubt, with other parties in this proceedings have, from time to time, taken postures publicly for other purposes than the court proceedings, that's a matter for them but I have just got to deal with the case in front of me.

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MR BURNSIDE: Yes. Let me make it plain, your Honour, we're offering assistance as amicus in the event that you thought that was useful because, in the circumstances, we know a bit more about the case than counsel might who just wandered past the court on the morning.

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HIS HONOUR: Yes. Well - - -

MR BURNSIDE: The only other thing I wanted to say before we seek to be excused is that we, whilst we still – whilst we're still an active party in the case, we had flagged a number of objections to the quite surprising evidence which has been put forward by the applicant in respect of this – in respect of our parallel interlocutory application. Now, your Honour, I understand that those objections were sent to Mr Ashby's legal team. They didn't respond and accordingly, the document hasn't been filed. If it's of some assistance, your Honour, we think that the court should not proceed on evidence that is not admissible and if Mr Slipper doesn't have the necessary skills to take objections, your Honour should at least be aware of them and what I thought I would do, if it's some help, is provide to you a list of what we think are appropriate objections to the material, some of which goes an extraordinarily long distance from matters that could be regarded as relevant to the issue you have to decide.

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HIS HONOUR: Well, Mr Burnside, as much as I would appreciate having an amicus, I'm not sure, in private litigation, that's something I can do. I mean, ordinarily, the court is very grateful for counsel who appear under the scheme for assisting unrepresented litigants and the like. If you wish to offer Mr Slipper assistance, then he may or may not wish to accept that offer. That may well be of assistance to me. Without any disrespect to him, it is difficult as a person not experienced in day to day litigation in the court and the rules of evidence to deal with issues of evidence but I'm not sure I can allow you, as a third party, even as an amicus, to just come along because you know something about the case, having till just now been representing a party who's no longer interested in the proceedings as a litigant.

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I think if you want to offer Mr Slipper assistance and if he wants to accept that, in whichever way you want to make – or he wants to make those arrangements, if that's what he wants to do, that's a matter between you and him but I don't know I can, despite the use that it would no doubt be to have some assistance from someone with your experience in litigation, Mr Burnside, I think I – you know, Mr Slipper is here and he's the litigant. And so if he engages you to assist or if he accepts an offer from you to assist, that will be a matter between you and him.

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MR BURNSIDE: Well, that's not something I'm in the position to do, your Honour, but what I will do – and I make it clear in open court – is that I brought along for your Honour's assistance the objections that we were going to take to the applicant's evidence on the abuse application that we had made and which is not, in effect, resolved. I will hand those copies to Mr Slipper and he can either hand them up and rely on them or not, according to his own choice, but your Honour can understand that they come from us. They were going to be deployed by us and they may be of some assistance to avoid the risk that you proceed to receive evidence that's not admissible in circumstances where the litigant, unrepresented, mightn't be able to take the objections himself.

HIS HONOUR: Yes. Well, I will let you take that course, Mr Burnside.

MR BURNSIDE: I will do that. And rather than – since my ten minute estimate was pretty hopelessly out, rather than interrupt proceedings later when we have got the document, might I, in anticipation, seek leave to be excused from the bar table when the matter is actually resolved.

HIS HONOUR: You may, Mr Burnside, and your junior as well.

MR BURNSIDE: Thank you.

MR SLIPPER: If it pleases, your Honour, could we have a short break for about just three minutes, please.

HIS HONOUR: Well, Mr Slipper, I'm trying to use the court's time efficiently.

MR SLIPPER: Just so I could have a brief word to Mr Burnside.

MR LEE: We don't that course if your Honour wishes to do it.

HIS HONOUR: All right. Well, I will adjourn till midday.

ADJOURNED [11.56 am]

RESUMED [12:00 pm]

MR LEE: On 23 July 2012, your Honour made various directions in relation to this part-heard matter, one of which was that the applicant serve section 78B notices; I should inform your Honour there is an affidavit which - - -

HIS HONOUR: I thought you had dropped all that, though.

MR LEE: We had, but I will just inform your Honour that it occurred and there's an
- - -

HIS HONOUR: Sorry. Mr Slipper dropped his unlawful allegation - - -

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MR LEE: Yes.

HIS HONOUR: - - - you dropped that.

10 MR LEE: I just wanted to tell your Honour that before that happened, your Honour's direction was complied with. Your Honour also made – and there's an affidavit to that effect of Mr Buffoni which, for the sake of the record, should be read, and I will come to that in due course.

15 HIS HONOUR: Well, it doesn't need to be read because it's not an issue now.

MR LEE: Well, if your Honour - - -

20 HIS HONOUR: I don't have to deal with it, Mr – I only need to deal with things that matter.

MR LEE: If your Honour pleases. An affidavit was sworn, however, in order to do that; it complied with that requirement. Now, your Honour also made directions concerning the service of affidavit material on behalf of the applicant being the respondent to the interlocutory application, which remains before your Honour. That affidavit material has been filed and served. There was direction that the applicant file any material he wished to rely upon in response to that; no material has been filed and served. Your Honour has also received an outline of submissions, which I will take your Honour to presently. Now, your Honour would be best assisted by going initially to - - -

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MR SLIPPER: Excuse me. Your Honour, I'm just wondering, as an unrepresented applicant – sorry, unrepresented second respondent, as the application for abuse of proceeds was actually filed by my former solicitors on my behalf, would it be appropriate if I addressed the court ahead of Mr Lee, in the sense that I wanted to make a number of submissions, and they could well affect what Mr Lee proposes to do.

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HIS HONOUR: Well, your counsel said that they had closed your case on the last occasion, in terms of its evidence; I'm not quite sure what you - - -

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MR SLIPPER: Well, I mean – and again, that's not new evidence, your Honour. I did want to adopt the objections mentioned by Mr Burnside, and I would like to be able to hand those up, and in particular, I would like to object, in addition to the general objection, to the inclusion of material in the affidavit of Mr Harmer, pursuant to the Evidence Act, section 135. And I realise your Honour would obviously direct

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his mind to those particular matters, but if I could hand those up. And I would also – your Honour - - -

HIS HONOUR: Can you have - - -

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MR BURNSIDE: - - - I would just like to mention a couple of matters without actually bringing in new evidence. The original – I want to press the abuse of process application. The original application had five major allegations as to conduct. It was given much media attention. Usually these matters are handled 10 confidentially, through the Human Rights & Equal Opportunities Commission, and your Honour, when the statement of claim was filed, two of the most damaging allegations that had been given widespread publicity were left out. Now, your Honour, after the election in Queensland, which saw the Liberal National Party Government elected, Mr Ashby leaked more information to the press and continued 15 communication with senior members of the LNP, including political opponents of mine, like Mr Mal Brough, who has now got endorsement for the LNP for my electorate of Fisher.

Your Honour, a lot of the evidence that has been filed about Mr Harmer’s purpose of 20 filing this litigation – sorry, a lot of evidence has been filed about Mr Harmer’s purpose in filing the litigation, but there has been no evidence led as to Mr Ashby’s purpose. Your Honour, I make the submission that this case is not about sexual harassment; if it was, the usual procedures would have been followed. It’s all about 25 damaging me politically, damaging me financially, and destabilising the government of Australia.

Your Honour, I do wish to rely on my submissions already filed, and the submissions made by those acting on my behalf, and also, on those of the Commonwealth with respect to the abuse of process applications. And I do thank your Honour for the 30 indulgence of listening to me, but I did want to make those points because I thought they were relevant to the fact that this is an abuse of process application. Also, some of the communications that were referred to were communications which were prior to any employment occurring, and it was – they were communications in the sense of being – of a friendship which had previously – or which had existed. So your 35 Honour, I make those points. I hope your Honour will take those into consideration, but I strongly endorse the objections that I passed up to you, and I would ask your Honour to very carefully consider those objections before allowing the matter to proceed.

40 HIS HONOUR: Well, I think, Mr Slipper, that there are multiple copies that you handed up, so I might put one on the court record, keep one for myself, and hand back two of the others that - - -

45 MR SLIPPER: Thank you, your Honour, and I apologise.

HIS HONOUR: - - - you have a working copy as well. Yes, Mr Lee.

MR LEE: Can I commence by taking your Honour to the second respondent's amended points of claim by way of opening, before I come to the evidence, and I will deal with the objections when I come to read the evidence. But it's important for your Honour to understand the nature of the evidence and the material upon
5 which my client will rely, both by way of submission and by way of evidence, to understand the nature of the allegations that were made and are persisted in even now by the second respondent.

Your Honour will see that the document is structured in a particular way. After
10 introductory paragraphs introducing various characters, including various people associated with the Liberal National Party, one comes to paragraph 10, which is a foundational and primary allegation in the proceeding. That could be seen from a number of ways, but essentially, what is alleged in paragraph 10 are the reasons, called in aid, by the Speaker to suggest that this proceeding is an abuse of process.
15 Now, this document, your Honour will see, on the last page, when we come to the terms of paragraph 10, was the document dated 26 June 2012, prepared by senior and junior counsel then for the second – then acting for the second respondent on the instructions of the Speaker.

20 Going back to paragraph 10, your Honour will see the nature of the allegation made in paragraph (a), that is, what is identified pursuant to your Honour's direction that there be specificity, given the nature of the allegation, is what is described as the predominant purpose of my client. The predominant purpose which is said to constitute the abuse of process was that in bringing this proceeding against
25 Mr Slipper, he acted in combination with a number of persons – Ms Doane, Mr Brough, Mr Lewis, Mr McClellan, Mr Harmer, and/or the firm, Harmers. And your Honour sees, in the subparagraphs, that it said to:

30 *A combination or agreement between certain people whose purpose was to vilify the Speaker, expose him to scandal, bring him into disrepute and/or to destroy or seriously damage his reputation of standing and his position and career.*

35 Pausing there, that has been somewhat extended this morning to include destabilisation of the government of Australia. Presumably, that is, as it is in further particularisation of what was said to be the reason why these people were acting in this combination to cause this harm to Mr Slipper, was to advance the political interests of the Liberal National Party and/or Mr Brough and by those means, enhance or promote my client and Ms Doane's prospect of advancement or
40 preferment within or at the hands of the LNP.

So that's the purpose that's identified and paragraph (b) at the top of page 3 goes further and identifies a statement of material facts by which it is contended that this proceeding was commenced and, note the conjunctive, prosecuted – presumably
45 that's an allegation which continues up to today – in a manner that is seriously and unfairly burdensome, prejudicial and damaging to the Speaker or is productive of serious and unjustified trouble in that and your Honour sees the various matters set

out in sub-paragraphs (1) to (v) which I will not repeat. (c) is important because what it says is:

5 *For the reasons given in (a) and (b), that is, by reason of the predominant purpose which is identified in (a) and by reason of the matters set out in (b) –*

That is, that Mr Ashby didn't raise the dispute with the Speaker and filed the proceedings in the form that were originally filed:

10 *...that is said to bring the administration of justice into disrepute and use the process of the court as an instrument in a calculated and orchestrated political and public relations campaign which has had as its objects the purposes referred to in (a) –*

15 Then these words are important:

...in connection with which the Speaker relies upon the facts and matters referred to hereafter in these points of claim.

20 So everything ties back, as I have said more than once in the interlocutory stages of this, in turn, interlocutory application, to the allegation of the predominant purpose pleaded in 10(a). Now, your Honour, there could not be a more serious allegation made against Mr Harmer and my client that he acted in a way which effectively amounted to conduct which was a conspiracy to harm the Speaker and grossly unprofessionally and grossly inappropriately engaged the court's processes to achieve or attempt to achieve that end. So then one comes to paragraph 11 onwards of the points of claim which are said to be the matters which are identified as proving the predominant purpose and what happens, as your Honour will see from the pleading, is that it's split into, effectively, five distinct periods.

30 There's mid 2011 until 4 December 2011, that is – on the top of page 4, that's the period prior to Mr Ashby's employment as Mr – on the Speaker's staff and that's paragraph 11 to 12. If your Honour goes over to the bottom of page 5, then there's the period from 10 December 2011 to 2 February 2011 and that's paragraphs 18 –
35 sorry – paragraphs 13 through to paragraph 15. Then there's a third period from 2 February 2010 – 2012 to 20 April 2012. Fourthly, and then your Honour goes to paragraph 34 where various matters are said to prove the conspiracy. And then your Honour goes to the period from 16 April through to 11 May 2012 and your Honour has then seen at paragraph 5, there's a period which is during the course of the
40 proceedings which deals with the abandonment of the allegations and other matters. That's from paragraph 47 onwards. Now, what we have attempted to do in the opening submissions, which I might ask your Honour to have regard to.

45 HIS HONOUR: Yes. Well, I have read those.

MR LEE: Is to identify – I won't take your Honour – I assume your Honour doesn't want me to take you to matters that have been set out in writing – is to identify a

number of matters and I will address these by way of closing submissions. But in sections (c) and (d) of the opening submissions, they are of particular importance because they detail the allegations made by the Speaker and the elements of each allegation as pleaded in the Speaker's points of claim and identify how they're each
5 reliant on the other. Additionally, the opening submissions deal with questions such as the evidentiary and persuasive burden resting on the Speaker, the state of the evidence at the close of the Speaker's case and the relevant legal principles and pleading issues raised by the Speaker.

10 And your Honour is aware that, for reasons already explained in the opening submissions, these pleading issues, your Honour has already indicated, be deferred until the determination of this application and given the settlement now with the Commonwealth, these pleading issues are likely to be rendered otiose, in any event. But what we will do – and I will do it in more detail in closing submissions – is seek
15 to identify what we say are 13 core factual contentions upon which this whole case is based and we say, as I will demonstrate, that from the lack of evidence to support these contentions, the application must inevitably fail. But more than that, your Honour will be persuaded that you should find that the allegations made by the Speaker were so serious, so lacking in a reasonable basis and so misconceived that
20 they should never have been made and the behaviour in making them was unreasonable.

Now, can I just deal very briefly by way of opening with just identifying what the 13
25 core contentions are and then I will move to the question of the evidence. The first contention is the one that I took you to by reference to paragraph 10 of the amended points of claim and that is the predominant purpose of Mr Ashby's conduct in bringing the proceeding was in combination with others to harm the Speaker. The second core contention is that there was an express agreement between Mr Ashby and Ms Doane D-o-a-n-e, that the proceeding was for the collateral purpose
30 identified. Thirdly, the third contention is that Mr Ashby made no attempt to achieve any result for which the proceedings are designed. Fourthly, that the proceedings were designed to achieve the collateral purpose by what was said in the opening submissions to be the application of the, "Harmer's approach to litigation."

35 Fifthly, the contention is that the available and potential remedies are wholly disproportionate to the costs and complexity of bringing this proceeding and the damage inflicted on the Speaker. Sixthly, and this is an important matter when it comes to the objections that are made to the evidence which, for reasons I will explain, are misconceived, this is this suggestion which is a particularly serious and
40 unreasonably based one and that is that Mr Ashby carefully cultivated a close, personal and flirtatious relationship with the Speaker in order to achieve this purpose. Seventhly, that – which is related, in a way, to the first contention but it's dealt with differently in the opening submissions of the Speaker, that's why I have it separate –
45 separately for reasons that will be explained when I come to final submissions – Mr Ashby actually acted in combination with others to facilitate the predominant purpose.

Eightly, there is a matter which is no longer pressed but remains in the submissions and because of the way in which the application is pleaded still has relevance to why it is that the claim must fail and that is that Mr Ashby breached his obligations to the Speaker by providing material which was the subject of the Speaker's confidence.
5 Ninthly, and again, this is connected to the - - -

HIS HONOUR: Isn't that allegation simply that you used your position in his office to supply material to people for purposes outside the office?

10 MR LEE: Yes. That's the contention.

HIS HONOUR: But before it was that it was unlawful.

MR LEE: I'm sorry, your Honour?
15

HIS HONOUR: Before it was put that it was unlawful for your client to do so.

MR LEE: Yes.

20 HIS HONOUR: Involving suggestions of criminality, etcetera, but - - -

MR LEE: Well, no, criminality – it was also – he was put before unlawful – as your Honour will recall the particulars, unlawful was – there were two issues, and it's important to keep them separated. There was, as your Honour will recall, an
25 allegation that was made in correspondence – it was put before your Honour that the actions in Mr Ashby acting that way may be a criminal offence, and the Speaker sought access to the material produced pursuant to compulsory process, to be released from the implied undertaking to give that to the Australian Federal Police in order for them to investigate. That was what I will describe as the illegality
30 allegation.

The unlawful misallegation in the pleading was explained by senior counsel, and particularised in correspondence it has been before your Honour, not to be the self
35 same allegation of criminality, but was said to be a breach of both the contractual duties, and also an equitable duty of confidence to the Speaker. And what was withdrawn when unlawful was excised from the amended points of claim was not the anterior disavowal of the fact that he was engaging in criminal conduct, but the particularised assertion that he engaged in an equitable breach of confidence, and that
40 he had breached an implied term of his contract of employment with the Commonwealth, to the extent that he had contractual duties to the Speaker.

HIS HONOUR: What's the implied term that was breached?

MR LEE: I can provide your Honour with a copy of the particulars, which I do
45 propose to tender on the application. I can get that turned up.

HIS HONOUR: So the suggestion that it was an act of disloyalty as the employee is being disavowed as well, is it?

5 MR LEE: Yes. That's, we say, the burden of what was excised from the pleading, given the nature of the particulars, and I can take your Honour to the transcript in due course. We say your Honour has, together with that – and I'm just running through the points; I will come to this later – also has – yes. The obligations which were said to have been unlawfully breached which were abandoned were these: the obligations arising from Mr Ashby's contract of employment with the Commonwealth were one, and implied contractual duty of fidelity and good faith owed by Mr Ashby to the Commonwealth, which required Mr Ashby, among other obligations, to render faithful and loyal service to Mr Slipper and the Commonwealth; to avoid conduct incompatible with the continuing relationship of trust and confidence between them; and to avoid disclosing or using confidential information that could be detrimental to Mr Slipper and the Commonwealth; and (2) 10 the equitable duty of confidence which prohibited Mr Ashby from using or disclosing information where such information was imparted in circumstances importing obligation of confidence. So that was what was abandoned. That has gone.

20 I was up to 9, and I said that that was – I was about to say that that is connected to the allegation that is made that – which is contention 6, that Mr Ashby carefully cultivated a close personal flirtatious relationship to the Speaker. Contention 9 was that Mr Ashby acted in a manner that was deliberately duplicitous and deceitful. 25 Contention 10 was that Mr Ashby engaged in secret dealings with the LNP as part of a plan to commence this proceeding. Again, it goes without saying that all these contentions are made in aim of proving that the purpose was as is pleaded in paragraph 10.

30 Contention 11 is that by commencing the proceeding, Mr Ashby would have erased a black mark and secured preferment from the LNP. Contention 12, that Mr Ashby – apparently this is also called in aid in support of the predominant purpose – elicit predominant purpose – that Mr Ashby was lying about the reason for his absences from work. And finally, contention 13 is that the initial application contained 35 allegations that were unsupported and unreasonably made, also being an allegation of both Mr Ashby and the person who was acting in combination, Mr Harmer, and also the firm of Harmers in putting that material before the court. So they're the 13 core contentions and in final addresses I will take your Honour to a document by which we identify the problems in the applicant's evidence in not getting within a bull's 40 roar of proving each of those contentions, and also the reasons why your Honour should take regard to the respondent's evidence, which I'm about to come to.

HIS HONOUR: Well, why don't we talk about people rather than applicants and respondents so I don't get - - -

45 MR LEE: I'm sorry, your Honour.

HIS HONOUR: - - - as to who's who. Mr Ashby and Mr Slipper – I know who they are.

MR LEE: Yes.

5

HIS HONOUR: It's your evidence, Mr Ashby's evidence – you're not pointing out problems in his evidence; you're pointing out problems with Mr Slipper's evidence; is that right?

10 MR LEE: I apologise, your Honour. Let me say that again. In the document – and your Honour will be very pleased to hear that in the document I use defined terms – identify why it is that the Speaker's evidence, to use the term that was adopted, falls hopelessly short of not only establishing it, but providing a reasonable basis for those allegations, and secondly, why it is that the respondent's evidence also establishes, beyond peradventure, that non of those contentions could be established, nor should they have been recently made.

20 Now, can I then turn to the material – and I'm conscious that the Speaker has adopted the submissions made – sorry, the document entitled First Respondent's Objections to the Applicant's Evidence, and what I will do is seek to be circumspect in making sure that ideal seriatim with the objections to ensure that your Honour deals with all the objections that have been raised by the Speaker. On the application, therefore, I lead the following evidence. The first is I will tender, as an exhibit, the letter from Maurice Blackburn to my instructing solicitors, dated 5 July 25 2012, which particularise the allegation of - - -

HIS HONOUR: Yes, well, the letter of 5 July 2012 from Maurice Blackburn to Harmers Workplace Lawyers will be exhibit A1 in the interlocutory application.

30

**EXHIBIT #A1 LETTER FROM MAURICE BLACKBURN TO HARMERS
WORKPLACE LAWYERS DATED 5/07/2012**

35 MR LEE: I have a particular order in which I wish to read the affidavits. The first is the affidavit of David Graham Russell sworn 23 July 2012. Your Honour sees there's some objections on page 5 of the document of that affidavit.

HIS HONOUR: Yes.

40

MR LEE: Now, I can tell your Honour that affidavit appears in volume 3 of the court book - - -

HIS HONOUR: I've got it, Mr Lee.

45

MR LEE: - - - at page 1043.

HIS HONOUR: Sorry. It's in volume 3 at page 95 – something.

MR LEE: 953. Yes, your Honour is quite right.

5 HIS HONOUR: 953.

MR LEE: Now, the first objection to that affidavit is paragraph 8 to 14. Now, in order to understand developments of paragraphs 8 to 14, your Honour has to read paragraph 3. Mr Russell QC was a barrister, as your Honour would be aware - - -

10

HIS HONOUR: Well, I've read through the material in this - - -

MR LEE: If your Honour pleases.

15 HIS HONOUR: - - - to understand what it was said to be – I haven't looked at for the pertinent objections.

MR LEE: If your Honour pleases. At paragraph 8 to 14 and 15 to 24, what Mr Russell deposes to is his motivation as a senior member of the LNP in seeing Mr – it gives the background to his motivation of seeing and providing assistance at a derisory amount of money to Mr Ashby for the purposes of giving him legal advice.

20

HIS HONOUR: And how is that relevant to the issue – his motivations? He's not alleged to be in this combination that you have identified in paragraph 10. There's no suggestion that he has an involvement. So his motivations in getting himself involved are his own personal reflections. They don't seem to have anything with the case that I've got to decide as to whether or not your client's motivation and those he is alleged to have combined with was to do something else.

25

30 MR LEE: Well - - -

HIS HONOUR: What Mr Russell thought he was embarking on has nothing to do with that issue.

35 MR LEE: Well, what is being alleged, your Honour, is not only a combination of which Mr Russell doesn't form a part – we accept that – but to further a purpose. That was to further the purposes of the LNP. Now, Mr Brough, who was there – who arranged – made contact with Mr Russell, in order – Mr Russell being involved, is said to be part of this conspiracy.

40

HIS HONOUR: But Mr Russell isn't. So his motivations are irrelevant.

MR LEE: Well - - -

45 HIS HONOUR: There's no suggestion that he's acting in any way other than, so far as he's concerned, appropriately.

MR LEE: All right. If your Honour pleases.

HIS HONOUR: I don't think his political background and the like has anything to do with it and - - -

5

MR LEE: Well, I think - - -

HIS HONOUR: - - - it's not suggested he was acting maliciously towards Mr Slipper.

10

MR LEE: If your Honour pleases. If that assertion is not going to be made, then I don't need to - - -

HIS HONOUR: Well, that's what I understand from the opening and from the pleading. There's no suggestion that Mr Russell had some particular involvement. Indeed, I don't think anyone knew of his involvement, apart from some text message about a lawyer for that small sum of money.

15

MR LEE: But what is suggested is that the proceedings were commenced, that he was – that Harmers were engaged and as part of this conspiracy, Mr - - -

20

HIS HONOUR: But it doesn't have anything to do with him.

MR LEE: Well, your Honour, it doesn't have anything to do with him, but it is background to why it is that Mr Ashby ended up with Harmers Workplace Lawyers - - -

25

HIS HONOUR: That he went to see Mr Russell?

MR LEE: Well, your Honour, I won't - - -

30

HIS HONOUR: I understand that.

MR LEE: I won't seek to debate it. Your Honour knows the very low level of evidence – irrelevance in a conspiracy case. I think it's relevant as adjectival background to the dealings between all these parties, which led to the proceedings being commenced. If your Honour is against that proposition, then that would deal with eight to 14 and also 15 to 24.

35

HIS HONOUR: Yes. Well, I reject those paragraphs on the ground of relevance.

40

MR LEE: Your Honour, that means your Honour doesn't have to deal with the third objection because it's already struck out on relevance grounds.

HIS HONOUR: Yes.

45

MR LEE: 25 to 29, the dealings with Mr Brough at 29 – in deference to your Honour’s – I mean, it is not his motivations. It’s his dealings with Mr Brough. We would say that’s in a different category. It is relevant. I don’t need to say anything more than what we’ve already said about that point. It does seem to me to be his
5 dealings with Mr Brough and the circumstances in which Mr Ashby came to see Mr Russell seem to me to be relevant.

HIS HONOUR: Well, you say that that bears on what might be inferred from Mr Brough seeing him.
10

MR LEE: Yes.

HIS HONOUR: Yes. All right. Well, Mr Slipper, if you want to make a submission or anything, you should do so, but at the moment, I’m minded to admit
15 those paragraphs.

MR SLIPPER: Well, if it pleases your Honour, I just want to reiterate the objection contained in the material.

20 HIS HONOUR: Well, you don’t have to reiterate. I’m looking at what’s there.

MR SLIPPER: Yes.

HIS HONOUR: And my view is unless you can contribute to it - - -
25

MR SLIPPER: I beg your pardon?

HIS HONOUR: Unless you can contribute something to the reasoning process that
- - -
30

MR SLIPPER: Well, I suppose I object to Mr Lee’s contention and I would support the contention contained in the material, which, of course, is before your Honour.

HIS HONOUR: Yes. Well, I understand that and I’m ruling on these on the basis
35 that these are being put forward by you, but I will admit paragraphs 25 to 29.

MR SLIPPER: What was that? Sorry.

HIS HONOUR: I will admit paragraphs 25 to 29 of Mr Russell’s affidavit. And in
40 paragraph 42, it’s the sentences on page 961, is it, Mr Lee, about his impression and as best he could judge?

MR LEE: Your Honour, it – exception to the hearsay rule. It’s evidence of his contemporaneous – it’s section - - -
45

HIS HONOUR: His impression as to your client?

MR LEE: If your Honour just bears with me just for a moment, I will just see whether I press it, your Honour. Just let me understand which is the objection – second and third sentence is paragraph 42. Your Honour, it's put on two bases. One is a relevance objection. Plainly, the question of whether or not he was sincere or
5 seemed to be a zealot is relevant to a fact in issue. The question is whether he appeared that way. If the question is whether or not it's inadmissible, was falling foul of the opinion rule – I will have to avoid bringing Mr Odgers – it's getting book to court – it's becoming too difficult to get to the sections:

10 *The opinion rule does not apply to the evidence of an opinion expressed by a person if the opinion is based upon what the person saw, heard or otherwise perceived about a matter or event and evidence of the opinion is necessary to obtain an adequate account or understanding of a person's perception of the matter or event.*

15 Now, your Honour, I would only – that this – your Honour can either accept it or reject it. It will inform a couple of objections. That in a case where someone's motivation is clearly at issue, his contemporaneous perception – that what he perceived as to his motivation can assist you – is rationally probative of the fact in
20 issue given the meaning of section 55 and 56 of the Evidence Act.

HIS HONOUR: No, I reject the second and third sentences in paragraph 42 of Mr Russell's affidavit.

25 MR LEE: Your Honour pleases. All right. I think that means that your Honour would also reject paragraph 57.

HIS HONOUR: I think it does.

30 MR LEE: And - - -

HIS HONOUR: I reject paragraph 57.

35 MR LEE: And similarly - - -

HIS HONOUR: And I reject paragraph 58.

MR LEE: Similarly, 58 falls in the same category.

40 HIS HONOUR: Yes. All right. So apart from that, the affidavit of David Graham Russell is read.

MR LEE: Then I move to the affidavit of Michael Daniel Harmer.

45 HIS HONOUR: So the one - - -

MR LEE: Affirmed on the - - -

HIS HONOUR: Yes, on 1049. Is that the one that's - - -

MR LEE: No, 1016, affirmed on 17 May 2012.

5 HIS HONOUR: Yes.

MR LEE: And I only read paragraph 4 of that affidavit.

10 HIS HONOUR: So you only read paragraph 4 of that affidavit. So you probably read paragraph 1, I suspect, too. So you only read paragraph 1 of 4. All right.

MR LEE: Nextly, an affidavit by the same deponent, Michael Daniel Harmer, affirmed 23 July 2012, I read. And your Honour will see that it has four exhibits which I tender and your Honour will see that that's a subject of objection.

15

HIS HONOUR: Yes.

MR LEE: And in particular, paragraph 28.

20 HIS HONOUR: So this is what's in paragraph 1 and following of – 2 and following of the notice of objections; is that right?

MR LEE: Yes. I have a different document, your Honour, but I have a different objections to evidence document, I'm afraid, from the first respondent. It's on page 4 of my document.

25

HIS HONOUR: Well, I'm just trying to work out what I'm following. I think Mr Slipper got back some of the – I see, yes. No, I see. Yes, it starts on page – on the bottom of page 4.

30

MR LEE: Yes.

HIS HONOUR: Objections – there's from prefatory material on the first page. Yes. Okay.

35

MR LEE: So - - -

HIS HONOUR: So we get to paragraph 28, do we?

40 MR LEE: So paragraph 28. Now, Mr Harmer, you will see in this affidavit, is responding to various allegations that were made as to the amended points of claim and your Honour will see, in respect of paragraph 28, there's a reference to paragraph 84 of the Commonwealth submissions – 27 – and this is an explanation of an allegation made at that paragraph. That self same allegation is made in 47(b) of
45 the – and paragraph 52 of the Speaker's points of claim and that is that by including
- - -

HIS HONOUR: Sorry, which paragraphs? 47(b)?

MR LEE: 47(b) – paragraph 47 of Mr Slipper’s or the Speaker’s, rather, points of
claim says certain things about the originating application containing allegations of
5 unlawful conduct. And it is said in paragraph 51 that the statement in paragraph 49,
that the allegations were supported by sworn evidence, was – made by Mr Harmer
was false and that is evidence of the predominant purpose. And paragraph 52 and 53
deals with abandonment of those allegations. So the contention made is that
10 Mr Harmer made a knowingly false statement and your Honour, at paragraph 27, the
circumstances – paragraph 27 and onwards are the circumstances in which
paragraph 34, that Mr Harmer had material in his possession. And your Honour sees
a reference in Mr Harmer’s affidavit to him being cogniscent of his obligations under
the relevant professional conduct rules. That’s paragraph 10 and in paragraph 11 and
12, what he needed to have in his possession at the time in order to have a reasonable
15 basis to make those allegations.

Now, paragraph 27 and onwards says what he did have in his – at the time the
proceeding was commenced. It’s notable, your Honour, that my learned – that the
20 Speaker has adopted these submissions but what is said in the Commonwealth
submissions – this is a relevance objection. It’s relevant because the Commonwealth
has admitted or had admitted prior to the conclusion of the proceedings that what
Mr Harmer said did give him a reasonable basis to make those allegations. That was
not in issue in the proceedings because the Commonwealth said by reason of the
matters contained in the exhibit, that Mr Harmer did have a reasonable basis in order
25 to make those allegations. no such concession was made on - - -

HIS HONOUR: Paragraph 5 of the submissions that Mr Burnside gave to
Mr Slipper says that parts of this material from Ms Hobson don’t provide a basis for
the allegations and they’re irrelevant and should be rejected.

30 MR LEE: No, that do not provide. There are parts of it that do. The parts that
don’t, I was going to come to, the meats and bounds of the Commonwealth’s
concession. They accept that they did provide a reasonable basis. The
Commonwealth accepted they provide a reasonable basis for the allegation the
35 Speaker complains of but they didn’t provide a reasonable basis for – they just didn’t
deal with or they were irrelevant to other allegations in respect of which there simply
wasn’t – there wasn’t any sworn material. That’s the distinction and your Honour,
they plainly do provide a reasonable basis, in my respectful submission, hence the
concession that was made.

40 HIS HONOUR: Well, it provided a basis as opposed to a reasonable basis.

MR LEE: Well, I - - -

45 HIS HONOUR: Anyway, that’s a matter for me, at the end of the day.

MR LEE: That's a matter for you and – but it's a matter against the context that whatever – whether Mr Harmer was right or wrong, he had material in his possession and your Honour, the evidence is that he used that material to make the allegations and the circumstances in which those allegations did not form part of the statement of claim and it is also set out in the evidence before your Honour.

HIS HONOUR: Well, the issue is whether they were properly included in the originating application when it was filed.

MR LEE: Well, the issue is two fold. One is – well, not on this application. The issue in this application, the fact in issue in this application is the motivation for them being there. Now, people can be - - -

HIS HONOUR: Well, part of that and part of it is whether it's a proper use of the court's process that I have to look at. I have in mind Clyne's case at 104 CLR at page 200 to 201.

MR LEE: Well, your Honour has to look at it but the predominant – on this application, what is said is that was done for a purpose. That's the issue that needs to be determined but in any event.

HIS HONOUR: Anyway.

MR LEE: So that's the relevance. It's plainly relevant, in my respectful submission. He has been – your Honour has to receive the material in order to form a view as to whether or not what Mr Harmer says is correct or whether or not, as alleged, there was simply no basis extant and that Mr Harmer put this in, as it were, further to perfect the conspiracy. It really - - -

HIS HONOUR: Well - - -

MR LEE: It really is the core of the case, in my respectful submission, that – ultimately, the really two competing contentions come down to this. Were all these people involved in this conspiracy to harm and that activated everything they did or alternatively, is there an explanation of how this occurred by which Mr Russell was involved and said, "You can't have any help from the LNP"? Your Honour has already received that evidence. And, "You should go off and seek independent legal advice from someone not associated with the LNP." You go to Mr Harmer, Mr Harmer says he's the one who prepared the application. He thought he had a proper basis of putting it, having been conscious of his professional obligations and put it. Now, we say, irrespective of whatever view your Honour feels about the originating application, we say that there, on the basis of the material, there was a compliance with the professional conduct rules.

But we don't even have to go that far, all we have to say for the purposes of these proceedings is that he wasn't activated himself or somehow have some imputed – that Mr Ashby is seen as furthering his illicit purpose by using his agent, Mr Harmer.

HIS HONOUR: Isn't what Mr Burnside's objection document is saying in paragraph 9, that Mr Harmer in his affidavit in paragraphs 27 to 31, has set out, subject to seeing whether the – the objection is really to the draft documents that are attached. It sets out what his basis, the Commonwealth accepts that that provides
5 what he says his basis was and also, it doesn't say that the draft material should be admitted into evidence because its probative value is outweighed by its prejudicial effect.

MR LEE: If this was the Commonwealth's application, that was the only thing
10 before your Honour, it would be an unexceptionable objection but it's not. That concession, that the Commonwealth is prepared to accept that Mr Harmer believed the Hobson material provided a basis for making the 2003 allegations, is one that is not only not made by Mr Slipper, the directly opposite contention is made on the matter as it currently is before your Honour and repeated this morning, more over.

15 HIS HONOUR: I think what the Commonwealth is saying is you read this and see what Mr Harmer's basis – that was the basis on which he made the allegation. Whether it was a good basis or a bad basis, is a different question. Whether the allegation should ever have been made, assuming it had a basis - - -

20 MR LEE: Yes.

HIS HONOUR: - - - is the relevant question and what the purpose of making the
25 allegation was and you don't need the affidavit material – sorry – the draft affidavit material that was not sworn before this was filed to get you anywhere at all. He had that as his basis. The nuts and bolts of it are set out in the originating application and in his affidavit again. You don't need this material.

MR LEE: Well - - -
30

HIS HONOUR: We know that he had a basis. Whether that justified, including the
allegation in the beginning of the originating application that dealt with this topic, is a different question. That's the issue, isn't it?

35 MR LEE: But your Honour, the difference between the Commonwealth and the Speaker is that this is engaged at an anterior point. Your Honour just said we know that he had a basis, well, the Speaker doesn't embrace that proposition. He said he had no basis. That's the difference. I accept what your Honour says. If this was simply the Commonwealth's application, the objection ought be upheld because
40 it's – well, not the objection, perhaps the discretionary exclusion should be upheld because it has minimal probative value in those circumstances and it's potentially prejudicial. But in circumstances where that is in issue on the application, then a different discretionary result should flow.

45 HIS HONOUR: But the points of claim allege, as I think is perfectly correct, in paragraph 51, that it was false to say those allegations were, at the time the time the document was filed and signed by Mr Harmer as being supported by sworn or

affirmed evidence, but they were. There's no question that it's false on this evidence. He says, "I didn't have Ms Hobson signed up on an affidavit. I didn't realise she wasn't signed up." That's a different question.

5 MR LEE: But what he deposes to is the fact that she had declared - - -

HIS HONOUR: Provided a basis for making those allegations.

10 MR LEE: No, but your Honour – no, had declared a statutory declaration in the same terms. So she had put her oath to it and – but she put - - -

HIS HONOUR: But we haven't seen a statutory declaration. It's not part of the evidence.

15 MR LEE: It is, it's in the affidavit that I have read. He has referred to the fact that he was aware that a – he had been told that a statutory declaration had been declared on that basis. Now, your Honour will recall the cross-examination of Ms Mann. It's 1045, that's the statutory declaration. He was told that that was signed, declared, which is – and the fact that he has that information and he's also told what he was
20 told by Mr Perfoni, that if you - - -

HIS HONOUR: Well, 1044 can go in.

25 MR LEE: 1044.

HIS HONOUR: Why should 1045 go in?

MR LEE: 1044 and 1055?

30

HIS HONOUR: 1044 says:

Here's my statutory declaration.

35 The document attached, I don't know if it was declared, the circumstances in which it was made.

MR LEE: Well - - -

40 HIS HONOUR: I'm not going to let that in.

MR LEE: Your Honour, there's evidence about that. Your Honour would see at paragraph 31, his belief:

45 *The statutory declaration in the form annexed had previously been declared by her and been provided to a media organisation.*

HIS HONOUR: That's what he understood and it's accepted that he had a basis for making the allegations but he hadn't seen anything that was sworn or declared.

MR LEE: Your Honour, his - - -

5

HIS HONOUR: I mean, Mr Lee, there is – and a solicitor knows this – there's a difference between being told something has been done by different groups and saying this is supported by sworn evidence.

10 MR LEE: Well, your Honour has - - -

HIS HONOUR: And not having satisfied himself that it is, particularly when you're going to make serious allegations in a pleading.

15 MR LEE: Well, your Honour heard the evidence of Ms Mann who drew no distinction whatever between sworn evidence and something which had been declared. He had been told it had been declared and someone had put their imprimatur to it.

20 HIS HONOUR: And he hadn't seen what was declared.

MR LEE: Well, your Honour, it would be an extraordinary proposition that a solicitor, in this court or elsewhere, was obliged to get a sworn affidavit and see the sworn affidavit in order to have a reasonable basis for putting an allegation in a pleading.

25

HIS HONOUR: It depends on what it's for.

MR LEE: The professional conduct rules, as deposed to by Mr Harmer and set out, provide what he needed to satisfy himself in order to put this material – to make a serious allegation of this type. Now, your Honour, we don't need to go into the - - -

30

HIS HONOUR: And it's accepted that that – that there was material that gave him a basis for doing so.

35

MR LEE: Accepted by the Commonwealth, not accepted by Mr Slipper. I keep on coming back to that point, your Honour. That's not accepted by Mr Slipper.

HIS HONOUR: Well, there's a statement that this is a:

40

Here is my statutory declaration.

But the document with it is not a statutory declaration. It's an unsigned document. Now, it may be she made it, she may be she drafted, it may it was drafted for her. I don't know.

45

MR LEE: But her - - -

HIS HONOUR: But it's not evidence that she actually had declared that as a statutory declaration.

MR LEE: That's evidence that's provided in paragraph 31 of his affidavit:

5

I believed that, at the time the application was filed, I believed a statutory declaration in the form annexed and marked MDH3 had previously been declared by her and been provided to a media organisation.

10 It was the existence – it was sworn. He doesn't need to see – well, your Honour, it
- - -

HIS HONOUR: Well - - -

15 MR LEE: He had – as the Commonwealth accepted, the material provided a basis
for making the 2003 allegations. If that is accepted, provided a basis for making the
2003 allegations, if that is accepted, then if there's going to be a submission he didn't
have a reasonable basis and your Honour regards that as being relevant, then your
Honour has to have the material in front of you in order to form a view about
20 whether or not - - -

HIS HONOUR: No, I don't, I can't look at the allegation. The allegation, on its
face, is questionable of whether it's reasonable to make that allegation in the context
of the pleading. That's the issue.

25

MR LEE: Well, if - - -

HIS HONOUR: The issue is whether or not putting it into the originating
application at all would have had a reasonable basis and whether it had a legitimate
30 forensic purpose.

MR LEE: Well, I come to affidavit evidence explaining why that's the case and
why it is said it is relevant to an issue, a breach of contract, but that was - - -

35 HIS HONOUR: Well, I'm – at the moment, the material in those draft documents is
material that seems to me to fall within section 135. I think it's dealing with events
that have no – given that it's accepted that they – that Mr Harmer, from the material
he had access to, had a basis from that material to make the allegation, the question is
whether he had a justification for making it based on that basis. That's the issue.

40

MR LEE: Well - - -

HIS HONOUR: What was it doing in the originating application in the first place?

45 MR LEE: Well, your Honour, I will address that.

HIS HONOUR: Yes. Well, that's - - -

MR LEE: It's the subject of a specific affidavit and - - -

HIS HONOUR: That's the issue, it seems to me - - -

5 MR LEE: But - - -

HIS HONOUR: - - - having the detail of what Ms Hobson says in unverified documents and reventilating that, given that you're not pressing it, is, it seems to me, materially prejudicial value against Mr Slipper has no probative – outweighs any
10 probative effect of it.

MR LEE: Well, as long as there's - - -

HIS HONOUR: Substantially.
15

MR LEE: As long as there's not going to be any submission made that he lacked a basis for making the 2003 allegations.

HIS HONOUR: The question of whether it's a reasonable basis is the issue.
20

MR LEE: No, your Honour.

HIS HONOUR: Not – he has got the material to make the allegation.

25 MR LEE: That's not the issue on the pleadings, your Honour.

HIS HONOUR: Well - - -

MR LEE: That's not the issue on the pleadings.
30

HIS HONOUR: Well –

MR LEE: It is the issue in the Commonwealth's settled application and your Honour, this is set out in great detail in their submissions, in the submissions that the Speaker has adopted, that he had no basis whatever. He was activated by the predominant purpose, illicit predominant purpose but – so they're the submissions I want to make on that point, your Honour. And I see the time.
35

HIS HONOUR: All right. Well, I will resume at 2.15.
40

MR LEE: If your Honour pleases.

45 **ADJOURNED** [1.05 pm]

RESUMED [2.15 pm]

HIS HONOUR: Yes, Mr Lee.

MR LEE: I'm not sure whether your Honour made a ruling.

5 HIS HONOUR: I haven't made a ruling yet.

MR LEE: No.

HIS HONOUR: So you can continue to address.

10

MR LEE: Yes, I didn't want to be so impertinent as to continue to make submissions if your Honour has formed a view one way or the other. Now, in relation to the objection which is a relevance objection, the question of the basis of belief of – and the legitimacy of the basis of the belief of Mr Harmer is directly in issue and probative to that enquiry, that fact in issue on the interlocutory application is seeing what it is that Mr Harmer had in order to form the basis of his belief that he was discharging his professional obligations properly and he was not informed in preparing and filing the application by the illicit purpose of which he is accused.

15

20 HIS HONOUR: Well, I might just ask Mr Slipper so that we understand what his position is but Mr Slipper, do you challenge or put into contest what Mr Burnside's submissions suggests, namely, that Mr Harmer – there was material that was available to Mr Harmer to support the making of the allegations in paragraphs 5 to 9 of the originating application that was filed on 20 April? But – and therefore, he says, as I understand it, there's no relevance in this material now. Do you accept that or do you challenge Mr Harmer having had any basis at all for challenging – for putting that material on?

25

MR SLIPPER: Well, if it please, your Honour, it would seem to me that it's a question as to whether it was a reasonable basis, particularly as the material was not sworn, it was not declared. As your Honour pointed out, it was – it could have been prepared for a person, it might have been prepared by a person and in fact, given the fact that when the statement of claim was lodged, some of that material was dropped, I think it is a fairly powerful argument that Mr Harmer did not have, sort of, sufficient reason to include it in his affidavit and therefore it ought not to be admitted into evidence, sir.

35

HIS HONOUR: But – well, I think you're saying that you accept that there was at least available to Mr Harmer in the form his – in the text of his affidavit refers to, that is unsworn material coming from Ms Hobson dealing with the 2003 allegations, that if that were all supported by sworn evidence, would enable him to say what was said in the originating application about the 2003 matters in paragraphs 5 to 9. So you don't challenge that he had a basis for saying that but you challenge whether or not using that material as it was used at all was reasonable or proper; is that right?

45

MR SLIPPER: Absolutely so, your Honour. I don't believe it was appropriate, given the fact that it was not sworn or declared and it was used in a way that got

widespread publicity, caused me enormous damage and then it was withdrawn and sir, my submission is that it's not appropriate.

5 HIS HONOUR: Well, I think, Mr Lee, there's no issue then, as I understand it, that
the material that Mr Harmer had supported in the sense of gave him a basis to put
what he put in the originating application in paragraphs 5 to 9. The issue is whether
that was appropriate or reasonable and it doesn't seem to me that this material has
any relevance to that. He had this material. It was from Ms Hobson. It was not
sworn. He has a statutory declaration in a form that was not sworn or affirmed or
10 declared or whatever you want to call it and he said he had a basis for thinking that
it – somebody else had seen a declared copy of the statutory declaration but he has
got all that in his affidavit. He says, "That's the reason I was able to say what I
said." The issue is whether or not that was appropriate use of the court's process. So
there's no relevance to this material in the sense of saying it doesn't take the case any
15 further. It doesn't show that what was alleged in those paragraphs had no basis, it
simply says what is alleged in those paragraphs should never have been there in the
first place.

MR LEE: Well, your Honour, I think I should say two things and I think I should
20 make my position terribly clear because this is a matter of significant, given what fell
from your Honour before lunch. If what the Speaker is saying is that he adopts the
position adopted by the Commonwealth in its submissions, I understand that's what
your Honour has just put to me. If that's the case, then what I said earlier about
relevance in the light of that stance, but – that is, I accept what falls from your
25 Honour concerning the distinction between having a factual basis and whether or not
- - -

HIS HONOUR: It should have been acted on.

30 MR LEE: - - - there is then a reasonable basis to act upon a putting in the pleading.
It's that second point that troubles me because Mr Harmer has deposed in his
affidavit and deposes elsewhere in the material to the fact that he believed,
objectively, he had a reasonable basis and your Honour, the material, as a matter of
procedural fairness, I certainly would want to put to your Honour the legal basis, if
35 that's in issue. If you think that's a matter that falls for determination on this
application - - -

HIS HONOUR: The legal basis seems to me to be the issue.

40 MR LEE: Well, if that's – if - - -

HIS HONOUR: I don't think that's being challenged - - -

45 MR LEE: Well, it's not now.

HIS HONOUR: - - - that from what Mr Harmer in front of him, if it was appropriate and reasonable to use that material, what is in the originating application has substantively set out what was in that material.

5 MR LEE: That deals with the evidentiary question I understand that we're on.

HIS HONOUR: That's what I understand - - -

MR LEE: That's what I understand as well.

10 HIS HONOUR: - - - what the Commonwealth was saying and I think Mr Slipper is now accepting.

MR LEE: Yes. Well - - -

15 HIS HONOUR: But saying that you should – it should never have been pleaded against him.

MR LEE: In light of that concession, that does deal with the evidentiary issue,
20 consistent with the position that I submitted to your Honour before lunch. However, I just wanted to indicate to your Honour that I will address that question which is, strictly speaking, in my respectful submission, irrelevant to the pleading – to the interlocutory application that's before your Honour in determining that but I will address that question in submissions concerning the deployment of that information,
25 I have used that expression.

HIS HONOUR: So I think what I should do is admit, in the terms of those annexures or annexures to Mr Harmer's affidavit or exhibits or whatever they are,
30 page 1028, which is the covering email of – from Ms Hobson but exclude 1029 to 1033 inclusive. Then admit 1035 but exclude 1036 to 1040 inclusive. Admit 1041 and 1042, so these are the emails, effectively, and then – and 1043 and 1044 but take out 1045 and 1046.

MR LEE: Yes.

35 HIS HONOUR: So I mean, I'm not seeking to suggest that Mr Harmer did not have material to do this and I don't think that's the point. The point is whether he was justified in using that material in his originating application.

40 MR LEE: Yes. And I will address that point.

HIS HONOUR: And that there's no issue that the material that was available to him, save about swearing which is an issue but he has dealt with it in his affidavit, that was – that gave him – that supported what is alleged there.

45 MR LEE: I understand what has fallen from your Honour and I will address it.

HIS HONOUR: I'm not trying to put him into a position where it looks like he had no available material because that's not – obviously not the case. The question is a question of whether it should have been deployed and that's - - -

5 MR LEE: Yes. And I will address that in due course, if your Honour pleases. Well, that deals with the affidavit of 23 July 2002. The next affidavit by the same deponent, 31 August –

10 HIS HONOUR: Now, there are some – some of those text messages are objected to on the ground that they might infringe parliamentary privilege.

MR LEE: Yes.

15 HIS HONOUR: I mean, I must say, the very idea that I've got to sit down and read 200 pages of text messages, most of which have got nothing to do with very much, that I can see, is not a task that I'm relishing.

20 MR LEE: Your Honour, I think the objection can be deal in an omnibus fashion, and that is, the article 9 point, obviously enough - - -

HIS HONOUR: Section 16(3).

25 MR LEE: - - - section 16, which is the modern expansion of bill of rights, provides in subsection (3):

In proceedings in any court or tribunal it's not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made concerning proceedings in parliament by way of –

30 And then your Honour sees various purposes are identified. The matter would be addressed, in my respectful submission, by making a limitation on section 136 of the Evidence Act saying the evidence is not led. It's not received for the purpose of recording or making comment on proceedings in the Parliament.

35 HIS HONOUR: Well, the first question I have is, what is its relevance - - -

MR LEE: Your Honour - - -

40 HIS HONOUR: - - - to anything in the case?

MR LEE: Well, your Honour - - -

45 HIS HONOUR: I mean, some of these things are to do with Mr Slipper's decision to act in a particular way at the end of last year. Some of them are to do with his pre-selection or something. Some of them are to do with what he's saying in Parliament. What – I mean, how is that - - -

MR LEE: Well, your Honour, can I say what the relevance is by reference to the propositions that I put to your Honour. Two of the more, we would say, egregious contentions are contention six, which was that Mr Ashby carefully cultivated a close, personal and flirtatious relationship with the Speaker and there was a pattern of
5 conduct, during the whole period, where Mr Ashby was, in effect, behaving in a duplicitous – deliberately duplicitous and deceitful manner, contention nine, which
- - -

10 HIS HONOUR: I thought that was in the period after 2 February.

MR LEE: That's from 2 February. That second one is 2 February.

HIS HONOUR: Yes, you said the whole period.

15 MR LEE: No, the whole period is the carefully cultivated – that's why they're different contentions and they're split up in the pleading – in the submissions that I will give to your Honour in due course. But the first one, your Honour, says:

20 *The Speaker relies upon a selection of text messages, and only text messages, to establish his assertion that Mr Ashby cultivated a close, personal and flirtatious relationship with the Speaker.*

And in due course we're going to submit, your Honour, that upon close examination of the text messages and the surrounding contextual material which is in the exhibit,
25 it's evident that it was, in fact, the Speaker who cultivated a personal and flirtatious relationship with Mr Ashby, and it was the Speaker and not Mr Ashby who repeatedly sought to introduce sexual references into communications which were ignored, deflected or rebutted by Mr Ashby. Now, you can only get that contextually if you the record of communications between them. Now, that deals with the
30 communication between Mr Ashby and Mr Slipper. Without that – and, your Honour, when I go through them your Honour will see that these matters are raised and Mr Ashby tries to change the subject and it keeps on coming back to these sexual comments. And that is plainly relevant to this serious and, we say, wholly baseless allegation made in the points of claim. And without having that material you can't
35 assess it.

HIS HONOUR: Well, if we look at what's on page 1242, as the first series of objections.

40 MR LEE: 1242.

HIS HONOUR: In volume 4.

45 MR LEE: Yes, your Honour.

HIS HONOUR: And then – okay – starting at 10094 and going to 98, and then dropping down to 101. I don't see, leaping off the page, anything to do with that topic, either way.

5 MR LEE: Well, your Honour, it's not just relevant to that issue, it's also relevant to the fact that – what is being said, effectively, that Mr Ashby was a plant and he was grooming Mr Slipper for the predominant purpose of furthering the political interest of the LNP. That's the allegation made squarely in these submissions. That he was there behaving in a deliberately deceitful way. And your Honour, I take you through
10 what it said in the submissions and what we need to establish is that one looks at the whole of the communications between these parties. You will see that Mr Ashby was behaving perfectly appropriately as an employee discharging his employment obligations and you see the context in which this sexualised contact was raised and dealt with. Now, if - - -

15 HIS HONOUR: I – excepting all that for the purposes of argument. Just looking at the material that's being objected to and looking at how that being taken out of the evidentiary material – if it would harm or affect any inference, one way or another, that I could draw on that topic.

20 MR LEE: Well, can I give you a perfect example by reference to those. Start in the middle of that page, 10089 - - -

HIS HONOUR: That's not objected to.

25 MR LEE: No. But, your Honour, I'm talking about context. 10089 has a reference to:

Been to the fish shop yet to buy the bottle of shell-less mussels.

30 Now, your Honour would see from previous references that that's a reference to female genitalia that has been raised, and I will take your Honour to the messages in due course. Now, what happens then is when Mr Speaker raises this issue of female genitalia, then Mr Ashby then returns - - -

35 MR SLIPPER: Excuse me, your Honour. I would have to – Mr Lee is endeavouring to, shall we say, get onto the record some of the material which your Honour is obviously considering whether it should be on the record or not, and Mr Lee is endeavouring to, shall we say, achieve this. I don't want to say, in an
40 inappropriate way, but to, basically, get on the record something that your Honour still has to consider.

MR LEE: Well, your Honour, without saying it, can I take your Honour back to page 20 to make good this - - -

45 HIS HONOUR: Page 20 of - - -

MR LEE: Page 1240, and I'm not reading anything which is the subject of an objection. Now, 1074, Peter Slipper sends an email at that time saying what says there, referring to female genitalia, describing Mr Brough as that - - -

5 HIS HONOUR: Well, Mr Lee - - -

MR LEE: No, your Honour, go down. Then you go – then you see:

You make me laugh.

10

How so, sir.

The next one, over the page, 1078:

15 *Funny how we say a person is a C when many guys like Cs.*

And now Mr Ashby gives evidence. Recollection was that Mr Slipper's reference to Cs was the first time Mr Slipper - - -

20 HIS HONOUR: Mr Ashby is not giving any evidence, I as I understand it, Mr Lee.

MR LEE: And then your Honour goes down - - -

25 HIS HONOUR: Mr Lee, I don't understand Mr Ashby is giving any evidence, is he? You said Mr Ashby is giving evidence and I don't - - -

MR LEE: Well, Mr Ashby's representation contained in this document.

HIS HONOUR: Well - - -

30

MR LEE: There, your Honour has 1080:

They look like mussel removed from its shell. Look at the bottle of mussel meat.

35 And then there's a reference there. Now, when you see that, and that's part of the – see, your Honour, the bold one is the material that Mr Slipper led. The sexualised reference was left out. Then we go to the next page where, your Honour, the objected material is – Mr Ashby, after this further reference at the middle of page 22 to this issue of shell-less mussels, coming back to a work-related matter. Now, that's
40 why, contextualised, you have to see all the communications to give the lie to the contention that Mr Ashby was involved in this flirtatious grooming of the Speaker in order to have this flirtatious relationship. It shows - - -

45 HIS HONOUR: Well, it doesn't look very contextualised; I haven't got the other side of the conversation on the text messages.

MR LEE: Yes, you have. Read, sent, read, sent.

HIS HONOUR: I see.

MR LEE: Your Honour, we've got – unlike the Speaker, and unlike the Commonwealth, we have put every single message passing between these people to
5 give your Honour the full picture, and when you see the full picture it's
extraordinarily different from the picture that's presented in the submissions. Now,
read, sent means – this is, as the affidavit says, from the position of Mr Ashby – sent
means something that was sent to Mr Ashby, read means something that was sent to
Mr Ashby. I'm sorry, the other way around. Sent his – yes, from the perspective of
10 Mr Ashby. Sent by Mr Ashby, read by Mr Ashby. There would be no suggestion
whatever that we have not put the full context in, and that's the whole point of this
affidavit, because if one looks at the whole thing contextually, you see a completely
different picture. So that's just an example there that your Honour said what was the
possible relevance? Well, there's sexualised communication, which Mr – from the
15 Speaker, which Mr Ashby moves on, or rejects, or rebuffs.

HIS HONOUR: Yes.

MR LEE: Well, there's no – your Honour, that – it seems to me, your Honour,
20 there's no objection taken to relevance by the first respondent in its objections,
presumably because it considers the forensic task that has been gone to in a huge
amount of detail is one in which we're seeking. But we're seeking to meet a case
where there's this widespread conspiracy. We have included every communication
between these people, warts and all, because we want to present the full picture to the
25 court of these communications to give the lie to the contention that these people were
involved in an illicit purpose.

Now, it's relevant, your Honour – there's no question about it – and it should be
admitted. It's part of – it is necessary for your Honour to have the material to
30 demonstrate that what is put on behalf of the Speaker is something which is, we will
submit in due course, a completely inappropriate submission and contention in the
points of play. And your Honour, it is an exhibit to an affidavit which is not the
subject of objection, save for the Parliamentary privilege point, and that can be dealt
with in the way that I've suggested. If that contention is unequivocally withdrawn,
35 that Mr Ashby was not engaged in this activity, then, obviously enough, in a cognate
way to what occurred earlier in relation to other allegations, this material would not
be needed. But it is advanced against us, and we're obliged to meet it. I was
speaking there about the communications between - - -

40 HIS HONOUR: You and your junior.

MR LEE: Yes. Exactly. But your Honour, you've been presented on the
application by both the Commonwealth and the Speaker with a potted version of the
text messages, in order to advance a particular view. We say when one looks at that
45 contextually, they don't present anything like the picture that was put to your Honour
in-chief, and we went to a lot of trouble to indicate which are the ones that are in
evidence, and which are the ones that aren't in evidence already. And your Honour

sees the colour coding, one sees the material that was in bold, and the material – the new communications – the material that we say is the additional contextual material – in italics. It's only the stuff that's in bold that's before your Honour now.

5 HIS HONOUR: Yes. All right. All right. Well, pursuant to section 136 of the Evidence Act, I order that the text messages numbered in the table on pages 6, 7, and 8 of the first respondent's objections to the applicant's evidence be admitted into evidence, but that their use be limited so as not to be for any purpose prohibited under section 16(3) of the Parliamentary Privileges Act 1987.

10 MR LEE: That deals with the affidavit and the exhibits to the affidavit of – the next affidavit, if your Honour pleases, is the affidavit of Mr Harmer, affirmed 26 September 2012. Your Honour sees that commencing at page 1096.

15 HIS HONOUR: Yes. Now, I'm not sure whether that is the subject of any consideration by Mr Burnside's side because that's the day that they made the settlement offer.

MR LEE: Yes.

20

HIS HONOUR: Mr Slipper, have you got any objection to that affidavit?

MR SLIPPER: Which one is that, sorry?

25 HIS HONOUR: 26 September 2012, Mr Harmer.

MR SLIPPER: I don't think I've seen this.

30 MR LEE: Well, your Honour, there are two versions of the court book, including this affidavit. It was served initially on the Speaker in addition to further versions of the court book, including the affidavit that was served.

HIS HONOUR: Yes.

35 MR LEE: So that makes three versions. Three copies, rather. I can provide a copy to the Speaker.

HIS HONOUR: Is there any objections to that, Mr Slipper?

40 MR SLIPPER: If I could just have a moment, your Honour, just to look at this particular piece. Your Honour, I do object to that material on the basis of relevance and I would ask your Honour to take into account my submission in this respect - - -

45 HIS HONOUR: Yes. Well, I think it is relevant, Mr Slipper, and I will admit the affidavit of Mr Harmer of 26 September.

- MR LEE: In deference to what your Honour said, I don't read the affidavit at 1104, which is the service of the section 78B - - -
- 5 HIS HONOUR: All right. Well, I can take that out.
- MR LEE: That goes all the way through to - - -
- HIS HONOUR: 1162.
- 10 MR LEE: - - - 1162.
- HIS HONOUR: Well, then, the rest of that volume is exhibits already in the proceedings.
- 15 MR LEE: Yes. That's it. That's the evidence.
- HIS HONOUR: Yes. All right. Well, now, Mr Slipper, do you want to cross-examine any of the witnesses that Mr Ashby has relied on, Mr - - -
- 20 MR SLIPPER: Sorry, your Honour?
- HIS HONOUR: Do you want to cross-examine Mr Russell or Mr Harmer?
- MR SLIPPER: No, your Honour. Are you inviting me to make some summing-up
25 comments at this stage or - - -
- HIS HONOUR: No. No, I'm asking whether you have – you can apply to cross-examine either Mr Harmer or Mr Russell. I was told on Tuesday that they had been required for cross-examination, I think. So do you want to ask them any questions or
30 put to them any allegations that you want to make in your case - - -
- MR SLIPPER: No, your Honour.
- HIS HONOUR: - - - because normally in court when you make allegations against
35 people that they have done something wrong, you have to confront them in the witness box with those allegations and give them a chance to answer, so - - -
- MR SLIPPER: No, your Honour, I don't wish to cross-examine them.
- 40 HIS HONOUR: All right. Well, now, do you – and that's – Mr Lee, that's your case in response to Mr Slipper's. Mr Slipper, do you have any evidence you want to put in reply? That's evidence in reply to the evidence that Mr Lee has tendered this morning and this afternoon.
- 45 MR SLIPPER: I thank your Honour very much for the opportunity of making this address to the court.

HIS HONOUR: No, this isn't an address. I'm asking if you want to put any evidence on. Then, it's Mr Lee's turn to make an address and you will get to reply to his address at the end.

5 MR SLIPPER: Not at this stage. No. Thank you.

HIS HONOUR: All right.

MR LEE: I think it's the Speaker's – he's the moving party.

10

HIS HONOUR: I thought I had got submissions from – I see. Yes. Yes, I see.

MR LEE: Yes. You've got opening submissions.

15 HIS HONOUR: I'm sorry, Mr Slipper, I've got things round the wrong way. Yes, please, Mr Slipper, you proceed.

MR SLIPPER: Thank you, your Honour. I did, in fact, think it was my turn, but

20

HIS HONOUR: Yes. No, I've - - -

MR SLIPPER: I must confess to be - - -

25 HIS HONOUR: I've had a busy day and I've got it all around the wrong way in my head. I'm sorry.

MR SLIPPER: I must confess not to be as experienced in this jurisdiction as others. In fact, I've had no experience in this jurisdiction. Your Honour, the last time I
30 appeared in a court was the Family Court and I was dressed down by a Family Court judge for having a duplicate back sheet on an original document, your Honour, and I resolved never to go back again and didn't. But having said that, I did – when your Honour was kind enough to allow me to make a few points, I made a number of points and I reiterate those particular points. I won't repeat them, your Honour,
35 because your Honour would have noted them.

I also wish to emphasise that I rely on the submissions already filed and those of the Commonwealth with respect to the abuse-of-process application. I have no further submissions, but rely upon the submissions already before you, both the
40 Commonwealth and from my prior counsel and I reiterate my point that's already made to your Honour and I particularly adopt the objections to the applicant's evidence document. While it is, of course, headed Objections by the First Respondent, they are also my objections. I would like to - - -

45 HIS HONOUR: Well, I have dealt with all the objections.

MR SLIPPER: I'm aware of that, your Honour. And I do thank you for the courtesy you've given to me today as an unrepresented applicant before your court and I must say that I do appreciate the chance that you've given me to put forward the points that I have made.

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HIS HONOUR: Yes. Thank you, Mr Slipper. Yes, Mr Lee.

MR LEE: Your Honour, please, if we be given a moment, I will provide you – I provide your Honour with two copies of an outline of final submissions. Now, can I deal first with the way in which this case has evolved? Your Honour will recall that this case was first raised on the first return date of the application where it was said that thought was going to be given to filing an application by way of either a strikeout or an abuse of process. My immediate response to that comment being made by the Speaker's legal representative was that if an abuse-of-process application was to be brought, it should be brought immediately and with due regard to the seriousness of the sort of allegations that were raised in that transcript of that first directions hearing.

There was then, as your Honour is aware, further communications between the parties where upon the application of Mr Ashby we indicated that we wished the colours of both the Commonwealth and, relevantly, the Speaker to be nailed to the mast about what they said was the nature of the abuse of process. And your Honour made an order that points of claim identify with specificity all matters relied upon in order to make out the serious allegations of abuse of process.

20

Now, I've handed up today some closing submissions, but what I wanted to do was to remind your Honour, without – your Honour has already said you have reviewed the document, but your Honour is also aware that a detailed opening document was filed on behalf of my client, which set out the contentions about why it was that the Speaker had a very high burden indeed to discharge in order to make out such an allegation. Now, I do separately want to deal also with the question of what constitutes a vexatious proceeding, which is a separate allegation that is made that your Honour has to determine. Has your Honour got a copy of the submissions that were filed on behalf of the applicant by way of opening?

25

HIS HONOUR: When you say, "Applicant," you mean Mr Ashby?

MR LEE: I'm sorry. Mr Ashby. I'm sorry, your Honour. I'm sorry.

HIS HONOUR: Yes. What, these are the ones that were filed around 31 August
- - -

MR LEE: Yes.

HIS HONOUR: - - - that are about 37 pages long?

45

MR LEE: Yes.

HIS HONOUR: Yes.

MR LEE: And your Honour sees – I indicated by way of opening for continuing
5 relevance – what’s set out at page 4, the allegations of the Speaker, where there is a
dissection of the relevant allegations that are made and what are the facts, matters
and circumstances, which are said to constitute each allegation. That’s set out in
section D, the elements of each allegation. I won’t go through that, merely to remind
your Honour that that material is there because – and your Honour can pass over the
– it starts at D(vii), section 7, D(i) to D(vi) are obviously matters which relate to a
10 matter that’s no longer before your Honour.

The Speaker’s points of claim, as identified in paragraph 22 of that document, do not
identify with any clarity or precision the specific matters upon which the Speaker
relies because, as your Honour has already seen, there’s this bald allegation in
15 paragraph 10 and these – a series of discursive facts which are said to make out that
claim. But one gets some further particularisation of the way in which the Speaker
puts his case in the submissions dated 8 June 2012 which are referred to. Now, I
won’t repeat any of the matters contained in those submissions, other than to remind
your Honour at D(ix) we deal with what is said to be the other reasons the
20 proceedings are an abuse of process, what’s described as the unfairly burdensome
allegation.

HIS HONOUR: Well, I think Mr Slipper relies, he said, on the Commonwealth’s
25 submission as well.

MR LEE: Well, your Honour – yes, he is. I understand, I understand. I will deal
with that.

HIS HONOUR: I’m just reminding you so that you don’t overlook the fact that
30 they’re - - -

MR LEE: I will deal with that.

HIS HONOUR: I mean, that have been up till this morning, they have been
35 travelling together and it’s understandable that there may have been overlapping - - -

MR LEE: There are overlap - - -

HIS HONOUR: It would curious if one application had succeeded and the other
40 failed.

MR LEE: There are overlapping contentions. Of course, your Honour would then
have to have regard – and your Honour should regard as being before you – the reply
submissions to the Commonwealth’s submissions that were filed on behalf of
45 Mr Ashby in which we go through and identify, hopefully in some sort of coherent
way, the matters that were raised in the Commonwealth’s submissions.

HIS HONOUR: Now, these are 30 August as well.

MR LEE: Yes, I think they are, your Honour. I will just check that. There was one document I thought I could put behind me but – so I don't have it in front of me.

5

HIS HONOUR: That, I think, was – it's about eight pages long.

MR LEE: Yes.

10 HIS HONOUR: Yes.

MR LEE: In any event, I rely on those submissions. There is some overlap but if this was Venn diagram, you would still end up with large parts of the intersecting circles which are different. And your Honour, insofar as that part of the overlapping is concerned, I have addressed that in my response to what the Speaker has said. But there is - - -

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HIS HONOUR: Well, I mean, there are different claims against the Commonwealth and Mr Slipper, so there's - - -

20

MR LEE: There are different – but that also - - -

HIS HONOUR: There's definitely not an overlap of entirety of - - -

MR LEE: But the purpose pleaded also is different and of course, in the Commonwealth's case, there's no allegation of a combination of unlawful conduct by a series of people, such as that made in paragraph 10 of the Speaker's points of claim. That really is – what I described as contention 1 in the opening and the document identified as the closing submissions is something which is absent from the Commonwealth's case and that is this notion that people had a plan. Your Honour will see littered throughout the submissions filed on behalf of the Speaker and also the amended points of claim is the notion of sometimes it's described as a scheme, sometimes it's described as a plan which predated the matters pleaded in this statement of claim and that is this was a calculated, mutual intention to harm the Slipper – Mr Slipper.

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35

Now, your Honour, you have the unchallenged evidence of Mr Russell of Queen's Counsel and Mr Harmer. What occurred, in very broad summary, is this and this is summarised in the opening submissions at paragraph 53, page 21, the state of the evidence. And this was the state of the evidence at the close of the case, at the highest and we make the submission at paragraph 52 at page 21 of the opening submissions:

40

45

What is notable upon close examination of the relevant communications and the surrounding contextual material not put in evidence by the respondents is the stark disparity between the conclusions asserted by the respondents and

*what evidence is relied upon to support those conclusions actually reveals.
In broad summary, the evidence led by Mr Ashby will disclose –*

And they're identified (a) to (g). One - - -

5

HIS HONOUR: When do you say the position in (a) was reached, 2 February or when?

MR LEE: You're referring to:

10

Mr Ashby acted in the interest of the Speaker in discharging his employment obligations.

HIS HONOUR: When is it that you say that become intolerable? The evidences seems to suggest that around 2 February, he started saying he was going to take action. As I read it unless I'm misreading – misrecollecting – he was going to take some action against Mr Slipper.

15

MR LEE: There was a period – there is a period where – and your Honour sees this from the best chronological that can be really seen from the text messages which have the communications and your Honour sees - - -

20

HIS HONOUR: Well, rather than having to read every single page of 200-odd pages - - -

25

MR LEE: I was going to give your Honour a summary. I was just saying where the detail is found.

30

HIS HONOUR: But I'm just asking you for a simple date. You say his position became intolerable. I'm asking whether you say it's some time other than what appears in the other evidence to be 2 February.

MR LEE: No. 2 February I think your Honour is referring to – what happens on 1 February, as your Honour sees, there is the text:

35

Relax my friend, X, we could be closer.

Now, in response to that, and your Honour sees the representations contained, on 2 February, which is the date your Honour referred to, that Mr Ashby texted Mr McArdle to arrange a meeting to discuss his concerns. Now, then there is some text messages which refer to the fact – and I can – on the transcript, that is 13460, that text message – and then there's a series of text messages, 1856, 185 - - -

40

HIS HONOUR: Well, Mr Lee - - -

45

MR LEE: Which can be found at 15 - - -

HIS HONOUR: - - - I'm just asking you for a simple date. What is the date you say your client's position became intolerable by reason of Mr Slipper's conduct? And I'm saying my impression had been, from what had been said on 23 July and the evidence that was led on that occasion, that it was 2 February when he determined
5 that he was going to take action against – to seek redress against Mr Slipper for what he regarded as conduct he didn't appreciate.

MR LEE: Well, your Honour - - -

10 HIS HONOUR: Now, if I'm wrong about that, that's fine. I would just like a date. You have got a - - -

MR LEE: Well, your Honour, like most complex human decisions, when one is asking about when something got to a stage of being intolerable, it's very difficult to be specific. What I was trying to do is provide your Honour with a continue on from
15 2 February to 26 March where there is a definitive decision to commence this proceeding. And there's a series of communications, including where Mr Ashby goes to the – gets to the stage where he's going to engage a lawyer which was 22 March. Prior to that stage, he discussed his problems and concerns with friends,
20 that's evident from the text messages, and also Mr McArdle. He thought about it, on my instructions, all through that period. He was concerned about whether he felt he could tough it out and he thought he could tough it out until the situation finally became intolerable. He was concerned, and he was seeking the solace of his friends, and seeking the counsel of various people.

25 MR SLIPPER: Your Honour, could I just - - -

HIS HONOUR: Well, Mr Slipper, you will get a chance to get your say when Mr Lee has finished.

30 MR SLIPPER: Thank you. Sorry.

HIS HONOUR: That's how we do this here. He gets his say, you get your say, I get to ask questions about what I don't understand or would like – concerns addressed.

35 MR LEE: And the point I was seeking to make to your Honour by going through this narrative is what's pleaded in paragraph 20 of the statement of claim, which is the last part of the relevant conduct, which is the final straw, where it is alleged that the Speaker asked Mr Ashby, "Can I kiss you both?" Now, that was the final straw.

40 MR SLIPPER:

MR LEE: Paragraph – on 20 March 2012. Paragraph 20 of the statement of claim. Now, he immediately thereafter arranges various matters, and then sees Mr Russell
45 on Good Friday. That's what we say in respect of – and your Honour, the notion about him discharging his employment obligations – your Honour seeks exhibit A1 on the application? – there's no suggestion whatever, anywhere, that he hasn't

faithfully discharged – didn't faithfully discharge his employment obligations, or is in breach of any obligation to his employer. Secondly - - -

HIS HONOUR: Well, if I look at page 898 - - -

5

MR LEE: 898?

HIS HONOUR: - - - of volume 2 of the court book, on 3 February he's asked by Ms Simpson, "Decision made?" – "Yes."

10

MR LEE: I'm sorry, your Honour, can I just – can you bear with me while I turn it up. 898?

HIS HONOUR: Maybe you tell me it's all out of context and I'm misunderstanding it, but this was - - -

15

MR LEE: 898.

HIS HONOUR: Yes.

20

MR LEE: And it will be - - -

HIS HONOUR: Well, you know, the - - -

25

MR LEE: - - - the message your Honour was referring me to – 178.

HIS HONOUR: I mean, and you say it's all out of context, and maybe it is, but that's the sort of thing I had in mind about the second - - -

30

MR LEE: Well, as I've indicated to your Honour - - -

HIS HONOUR: I mean, I'm just trying to understand it.

MR LEE: - - - at that stage he was considering his position, and talking, as one does in complex human decisions, with people about what the step he should – what's the step he should take. But I can take your Honour through the material from 3 February. I mean, one of the things that's clear – this is one of the more remarkable aspects of this conspiracy – is he goes to see Mr McArdle after this time, and say, "Well, what should I do?" and Mr McArdle says, "Don't do anything." And that's plain from the text messages. This is a man who's supposed to be involved in the conspiracy, and yet he's someone who's entreating him because he – well, your Honour will see the text messages between Mr McArdle and Mr Ashby. And then Mr Russell – he goes - - -

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45

HIS HONOUR: The question is whether his position became intolerable, not what he ultimately did. You're saying he acted in the interest of Mr Slipper until his position became intolerable.

MR LEE: Yes.

5 HIS HONOUR: So that's what I'm trying to pin your colours to the mast about – how, when he's starting to go and talk to the political opponents of Mr Slipper and others about what he should do, and presumably the problem one might infer that he was having in the office, what that leads to in terms of when he made his – felt he was in an intolerable position.

10 MR LEE: Well, your Honour, can I just say this - - -

HIS HONOUR: And you know, I understand that people have crises moments when they've got to make up their mind about things; I'm just trying to get a picture of a timeline.

15 MR LEE: Well, your Honour, it was a - - -

HIS HONOUR: Because you say he's working loyally until his position becomes intolerable.

20 MR LEE: Yes, I do.

HIS HONOUR: That's the issue.

25 MR LEE: And it was - - -

HIS HONOUR: What is the dividing line? What makes it intolerable?

30 MR LEE: Well, what makes this intolerable is he felt he has no choice but to make an extremely serious decision and goes and sees lawyers about how would – and speaks to his friends and colleagues about how he should deal with what he perceived to be a problem, and a problem which was a cumulative one.

HIS HONOUR: Well - - -

35 MR LEE: Ms Simpson is not one of the co-conspirators; Your Honour will not see her text messages in the table.

40 HIS HONOUR: No. No. But you know, I mean, the suggestion at 177 to Mr Nagel, or by Mr Nagel – I can't – yes, to Mr Nagel – "I'm serious when I ask this; would you put a bullet in my head to save the nation?"

MR LEE: Yes.

45 HIS HONOUR: You know, this is all after your client pleads that the events of 1 and 2 February put him in a position where he felt he was being prejudiced in his employment by Mr Slipper telling him on the night of 1 February he wasn't going on

some harbour cruise, and the next morning Mr Slipper texting him back saying, “Just joking.”

MR LEE: Yes. Well, that’s not quite - - -

5

HIS HONOUR: Now, is that when it was intolerable?

MR LEE: Your Honour - - -

10 HIS HONOUR: I’m just looking at your submission.

MR LEE: Your Honour, this is a case, like a lot of sexual harassment type case, where, by virtue of the disparity and power between the individuals, the steps that one takes to stand up to someone who they believe has behaved towards them
15 inappropriately is not a straight-forward one. It’s one that involves thought, reflection, and a series of factors including taking legal advice or taking other advice as to what is the best way to handle this. Now, it’s plain from the text messages that are in evidence that Mr Ashby wanted to work in this area. He had what he perceived to be a job that he would accept and your Honour has his representations in the
20 evidence about his motivation for taking the job. He took the job. He didn’t want to give it up unless he felt there was no other way of resolving this issue but to take the steps that he took. It is natural, in those circumstances, that someone under pressure, someone feeling that they have been placed in that position, is going to talk about it to their friends and colleagues and to other people they feel may be able to do
25 something to redress the issue.

Now, he acts quite swiftly from the relevant conduct first being engaged in. Your Honour would have seen sexual harassment cases where the conduct complained of happens over years. He moves quite swiftly in order to reach a position where he
30 seeks, come 20 March, that there is – nothing can be done. He then goes and sees someone who arranges him a lawyer, sees the lawyer and the lawyer says, “You have got a stark choice. You’re probably going to – you’re going to have to leave your employment, in all probability, and you are going to have,” – perhaps the most prescient words in the entire case, Mr Russell saying to him, “You’re going to have
35 the full resources of the Commonwealth thrown against you. It’s going to have to take courage to take this on.” And he decides, notwithstanding that warning from Mr Russell, on the basis of him having a legitimate subject view and your Honour has that in the evidence, that is, his motivation contained in the affidavit material that was tendered – of Mr Ashby that was tendered by the Commonwealth about his
40 motivation, which I remind your Honour of.

He went and saw Mr Russell. And can I remind you of Mr Russell’s evidence. Your Honour has read it. What Mr Russell says is important. What Mr Russell deposes to – and your Honour would accept – is that a conversation then took place where he
45 said, your Honour, at page 959 at about point 7:

5 *Look, this would have to be handled very sensitively. If something happened, then it would be fairly explosive and if there were anything in it, it would have to be handled by someone completely independent from the LNP. Some might perceive I would have a conflict acting for you in the long term but I suppose I could see –*

10 This is communication with Mr Brough, sorry. That's background. I'm sorry, I was taking you to a different conversation. Yes, paragraph 41. What Mr Russell says when he first sees him after this arrangement where he obtained somewhat
10 economical legal advice:

15 *Before we go into any detail, the first point I want you realise is that you must be sure any allegations are true. Any claim you make will be strongly contested. You must tell the truth. I need to see whether you're wasting your
15 money because if you go off half cocked, it will be a disaster.*

20 Now, your Honour, that, in my respectful submission, reflects a real life assessment by somebody who has some political experience deposed to in his affidavit about the seriousness of the step that Mr Ashby would be taking.

25 HIS HONOUR: Mr Lee, does your client realise that fully – of page 13 of the court book with the message he sent on 4 February, "You know, will I be, you know, condemned or rewarded after the smoking gun is – after the shot has been fired? We haven't seen the gun go off. I need protection. You're right."

MR LEE: Yes.

HIS HONOUR: I mean, this is not rocket science.

30 MR LEE: That's entirely consistent with what Mr Russell was saying.

HIS HONOUR: Two months later.

35 MR LEE: Yes, exactly.

HIS HONOUR: Well, I don't see how that changes the perspective of when you say I ought to infer his position was intolerable.

40 MR LEE: Well, your Honour doesn't have - - -

HIS HONOUR: By the time he went to see Mr Russell, I think you were saying it's clear that it was. I just wanted to get a better picture but it seems to me, on the material I have got, it's around 2 or 3 February.

45 MR LEE: Well, if – 2 or 3 March.

HIS HONOUR: February.

MR LEE: February. Well, no, your Honour. He continued to talk to various people and if your Honour – I can go through the text messages and explain that. If your Honour wants me to go through the text messages from 2 and 3 February to make good the proposition that his position did not become intolerable on 2 or 3 February in the sense that he believed that he had been the subject of conduct which was clearly inappropriate and he was hoping that he would be able to deal with various people to see whether he could tough it out. That is plain, in my respectful submission, if one looks at the entire context of the text messages that flow from 2 and 3 February. And if your Honour wishes some assistance in relation to that, I had better go to them. So if your Honour goes to 2 and 3 February in volume 4.

HIS HONOUR: 13, page 6? He's talking to Mr McArdle.

MR LEE: You see - - -

HIS HONOUR: Saying this is 100 per cent confidential.

MR LEE: Yes. And your Honour, what your Honour will see from the previous – if your Honour just pauses there for a moment. What your Honour will see from the long standing relationship between Mr McArdle and Mr Ashby and your Honour sees this from as long ago as, in the evidence, 27 May 2011, that the evidence – that Mr Ashby recollects that the first contact with Mr McArdle was within a couple of months of his previous employment because he worked in a farming enterprise in Mr McArdle's state electoral division and the managing director of his former employer was an LNP supporter and Mr Ashby developed a relationship with Mr McArdle which developed over time. He was someone who – with whom he was in regular contact – conduct – and someone who your Honour will see, from the communications marked in green, was someone in whom he reposed confidence and sought advice from time to time.

So your Honour, yes, your Honour sees at page 1386, he does talk about confidential communication and to which Mr McArdle says:

Yes. See you in 15 minutes.

Then Mr Ashby recollects having a conversation with Mr McArdle in his office. He informed Mr McArdle about the fact that he had felt distressed and uncomfortable about text messages he received. In response, Mr McArdle told Mr Ashby it was probably best to ignore the messages and try to continue to go on having a normal professional relationship. Mr McArdle he would think the matter over and give him any advice in the event that he changed his mind. Now, yes, that's a perfectly appropriate, proportionate, sensible response and entirely consistent with what I submitted to your Honour. Then he speaks to Karen Doane and your Honour knows Ms Doane:

Thanks for the chat.

He's again talking about somebody who's close to it:

Well, wait, what did we talk about?

5 Etcetera.

Have a good night. Night.

10 Then there's – and this is what I'm consistent with the submission that I asked your Honour to make. Mr Ashby having a series of communications with Mr Slipper which show him faithfully discharging his obligations. Now, he's talking about on the following page, articles in the Kalandra News. He contacts Mr McArdle again asking further advice:

15 *Any thoughts overnight?*

Mr Ashby recollects that this email was sent to Mr McArdle to ask whether he had some further advice as to how he should handle the issue that had arisen with Mr Slipper. This time he regarded Mr McArdle as a close personal friend and
20 someone whose experience and judgment he respected. Mr Ashby also reposed confidence in Mr McArdle because he was a lawyer and he was someone whose wife had worked with Mr Slipper for a long period and advised him against taking the job with Mr Slipper in the first place. So he's talking to these people. Your Honour then sees a communication with the Speaker's wife down the bottom:

25

Be on high media alert these next couple of days. Avoid any questions. Andrew Bolt has been art equating.

Etcetera, etcetera. So he – in the midst of this asking advice, he's seeking to
30 continue to perform his job. He sends that again to Mr Slipper and to Mr Knapp and exchanging with the Speaker concerning the activities of Mr Bolt, who your Honour will infer is – your Honour will take notice under section 144 is somebody who is a journalist. Then there's references there to various other matters and, then, your Honour sees what is set out at page 170, about the sexualised conduct. So this is all
35 happening at the time. And at 1856, on the 3rd of the 2nd, Mr Ashby advised that he had with Martin about the text messages. This is Martin, FBI. This is someone who is referred to from time to time. FBI, the evidence will show is food and beverage industry. He's not someone involved in North American law enforcement.

40 HIS HONOUR: Yes, I don't think we've got the American connection.

MR LEE: No. That he had spoken with Martin about the text messages sent by Mr Slipper and his conduct more generally. He felt Mr McArdle had wiped his hands of the matter. Mr Ashby had to make a decision about what to do: report,
45 ignore or resign. He's contemplating those. Then, your Honour, you have the communication with Ms Hubbard and your Honour sees Mr Ashby recollects this communication occurred after an evening where he confided in Ms Hubbard the

feelings of distress and harassment he felt concerning the Speaker's actions. He informed Ms Hubbard, a former political adviser that he was considering whether he should take steps to raise issues relating to Mr Slipper's behaviour.

5 Mr Ashby also recollects he informed her that he had spoken to Mark McArdle, who told him not to take such steps and see whether he could ignore the problem. By this stage, Mr Ashby recollects he was feeling resentful towards Mr Slipper, etcetera, etcetera. And, your Honour, can I remind you of the evidence, which is at page 1201 of the unredacted affidavit that came in as part of the exhibit. This is activities on
10 2 February. Paragraph 175 of the unredacted affidavit:

I felt that providing that I had someone that I could confide in, in my work that I could keep an eye on the situation, so watch – leave me in a room on my own with him, I would be all right. When I don't leave a room –

15 etcetera, etcetera. So, you know, this is a complex series of emotions being worked through in a sensible way. Then your Honour sees down the bottom of page 173, "Ms Hubbard," "Guidance that only friends can offer." "Friendship, appreciate the guidance". He's seeking assistance about what he should do. And again then your
20 Honour has at 1394, during this period where he's reflecting on things, he's discharging his obligations to the Speaker. Your Honour sees that also at the middle of page 1395, communications with Ms Doane, his communications with the Speaker concerning these other work activities, the next page, the following page. So now we're up to the 7th.

25 So your Honour sees over the course of the four days – this is text messages, which make it clear what is happening. Now, then one gets to – and I won't take your Honour through the individual messages, but your Honour sees him – and your Honour sees here, after doing all this work – then there's the reference to what's set
30 out at the top of page 1404, which again brings it back to these issues where – and what does Mr Ashby do when that sort of activity is referred to? He brings it back, saying, "You should never be seen there. It wouldn't help your image," again inconsistent with the narrative.

35 Then we go through – the 10th – I mean, this has the crystal-clear ring of clarity, contemporaneous communications, which shows someone working through a problem. Never thought they would be seen by anyone else. Your Honour would accept them as an accurate reflection of those mental processes. Then, you know, for example, at the bottom of 1411, he's speaking again about – you know, faithfully
40 discharging his duty. Mal Brough on Sunrise, something he should be monitoring and telling people about.

HIS HONOUR: That's from Ms Doane.

45 MR LEE: Yes, but your Honour sees the next page, "Oh, God, what now?" Just about Labour and dumping Gillard, etcetera, etcetera, and a completely candid

communication, entirely consistent with faithfully discharging his obligations. It doesn't say anything about a conspiracy with Mr Brough to harm the Speaker.

5 HIS HONOUR: I don't think it was suggested that at that time Mr Brough was involved.

MR LEE: Yes, it is. Yes, it is. Absolutely that is. Mr Brough was part of the plan at all times – paragraph 10. These things are pleaded in evidence of what is said to have been the predominant purpose. Then, your Honour, we go right through to the – if your Honour goes through to – and I will stop at the 20th. The end – there's all this material about work. The 19th, they have – he sends an email – 13887, page 195, at about point 5, "Daily" – presumably referring to the Daily Telegraph – "had a shitty story yesterday," from a particular journalist, referring to the facts being wrong, etcetera, continuing to do these – to his work and then you get to the - - -

15

HIS HONOUR: Sorry. Where am I?

MR LEE: One five – 1415, sorry, your Honour, 1415.

20 HIS HONOUR: All right.

MR LEE: And I was just referring – this is the day before – or two days before the 20th and orthodox communications about discharging his duties. For example – I'm sorry, I was thinking 20 March. Anyway, your Honour sees all these communications through February and, then, there's communications between Mr Slipper and Mr Ashby concerning work, at 1427, where – can I just ask your Honour, without reading it out, to first go to page 1426. You see more of the relevant conduct there, 14232 and 1233, further escalation. Over the page, your Honour sees at 14242, Mr Ashby advises he did not consider the continuation of his contract with the LNP to be a matter that was inconsistent with his job on behalf of Mr Slipper. Mr Ashby considered Mr Slipper was well aware that Mr Ashby had long-standing relationships with persons who associated with the LNP and that from time to time, he continued to help people within the LNP with whom he had a close relationship. LNP people. And your Honour sees the exchange between them where Mr Ashby and Mr Slipper are talking about various matters.

35

HIS HONOUR: Well, what Mr Ashby says there, I must say, I thought there was something that Mr Slipper sent in a text message saying,

40 *Well, what you do reflects on me in public.*

MR LEE: Yes.

HIS HONOUR: Well, if he's helping somebody who is from the LNP, which is setting out to unseat him, as the allegation is - - -

45

MR LEE: No, your Honour, you must – you can't form that view.

HIS HONOUR: I know he's helping the state but - - -

MR LEE: He is someone who's - - -

5 HIS HONOUR: You know, it's Mr Slipper's political interests are no longer aligned with the LNP, state or federal.

MR LEE: They weren't but you see Mr Ashby and Mr Slipper explaining the fact – and well, for example, look what Mr Slipper says at 14243, the page 1427. This is
10 from Mr Slipper:

Having said that, had I been consulted, I would encouraged you to help Andrew –

15 Who's the – an LNP candidate:

...though I cannot think if of any other LNP candidates worth supporting except Steve Dixon.

20 Now, what he was doing was doing a video for – I will just make sure I'm right about making this submission – for the person described there as Andrew. So your Honour, it's hardly something which is relevant to a conspiracy and your Honour, at 1429, Mr Ashby provides his representations about his recollection at the time he had this communication. He wished to make it clear to Mr Slipper there was a difference
25 between his political and work activities and assisting those with whom he had a personal relationship. Mr Ashby's reference to being:

...proud of the fact I took on this role against all advice from the LNP.

30 Was a reference to the fact he knew various persons within the LNP disapproved of his association with Mr Slipper. He thought that he could continue to have personal relationships with those within the LNP without compromising his position and when the interests of those persons did not conflict with those of Mr Slipper, he was free to be able to continue to ass his friends.

35

HIS HONOUR: Well, the quote I had in mind is at 14255:

Sorry. If you intend to assist my political enemies, it's your right need to tell me so you and I can sort out our respective positions.

40

MR LEE: Well, your Honour, it has got to be read in the context of the whole communications.

HIS HONOUR: I know. He's working for a politician.

45

MR LEE: Well, there's no evidence here that he assisted his political enemies.

HIS HONOUR: Well, you're taking me through this - - -

MR LEE: Yes, I know.

5 HIS HONOUR: - - - saying it's all performance of his job - - -

MR LEE: I'm sorry, your Honour. I'm sorry.

10 HIS HONOUR: - - - in the ordinary course and I'm saying it - - -

MR LEE: Yes.

15 HIS HONOUR: - - - doesn't look like an ordinary course to me, to work for one politician who has switched sides or switched out of a party and who he would like to know what Mr Ashby is doing because of his staff members working for people who he's now no longer aligned with and who regarded him as, in the way that Mr Slipper has been - - -

20 MR LEE: And in the particular - - -

HIS HONOUR: - - - painted, he's saying, well, you have just got to deal with this appropriately.

25 MR LEE: And in the particular circumstance which gave rise to this issue, Mr Slipper says:

If you had have consulted me, I had no problem with you helping Andrew.

30 HIS HONOUR: Well -

MR LEE: In any event, so this is all occurring in the end of February. But your Honour, there's no reason why your Honour would reject what Mr Ashby said at 1435 item 14291:

35 *No need for any further angst, I will consult you wish any future request for assistance from outsiders. Thanks. Appreciated. Sleep well, my friend.*

It seems to be a resolution of any controversy. And the next morning - - -

40 HIS HONOUR: Well, that's in response to the one - that is what I was thinking of:

You're a senior person you cannot freelance without consent.

That's what he's saying.

45

MR LEE: Yes, in the context of that whole communication and I ask your Honour to review it.

HIS HONOUR: Yes.

MR LEE: But in any event, so what, I say rhetorically. In any event, your Honour sees dealings again with Ms Doane showing him continuing to deal with these issues.
5 Your Honour sees the relevant conduct on 1 March in the middle of page 1436. Again, Mr Ashby continues, then there's a series of matters, just jumping over, on page 1442, concerning an incident that occurred on 8 March where there was an altercation with a journalist. And there's a series of text messages that concern the media reaction to that event. This is a case where Mr Ashby had had a confrontation
10 with somebody who was a – perceived, as one sees from the text messages, as a journalistic enemy of Mr Slipper and Mr Ashby was involved in an altercation and your Honour sees those references continuing too. Now, one comes up to the 20th and you see the day before.

15 HIS HONOUR: Well, Mr Lee, can you give me a page?

MR LEE: 1545.

HIS HONOUR: Right.
20

MR LEE: And you see again, these communications between Ms Doane and Mr Slipper. He's getting on with his life or trying to deal with things. Top of page 1455, you have:

25 *Hi Mark. Just though if see you needed the speaker system for the weekend.*

Then you have:

Watch Sky News.
30

Etcetera. Then you have the relevant conduct which is pleaded at paragraph 20. Now, that happened – the time of that, it's probably – that's misleading to have it there, it should be down the bottom of the 20th. It's on the same day but you see the communications here, he's still on the 20th trying to deal with matters. And then you
35 see, over on page 1461, by the 26th, he had reached the process at 14902 on page 1461:

*I have decided to press ahead with what I spoke to you about some weeks ago. It's going to be the biggest challenge of my life but this man needs stopping. He has hurt too many people. I would appreciate your comments about not
40 doing it but I have the strength to go through with it and regardless of the outcome, I know I will have done the right thing, I have no doubt. We will chat soon.*

45 And then your Honour knows from the narrative that he then seeks the legal advice of Mr Slipper but I have been interrupted, your Honour, to be said – to be told that the issues concerning the deed and the first respondent have been resolved.

HIS HONOUR: Yes.

MR LEE: And I'm anxious for Mr Burnside to be able to hobble back to Melbourne and so - - -

5

HIS HONOUR: Probably not as anxious as he is. So - - -

MR LEE: So if I could – I'm sorry, your Honour. The document is just being signed an order, which reflects the settlement. The deed has been in conformity with your Honour's Solomon like determination of the deed issue and the deed - - -

10

HIS HONOUR: Yes.

MR LEE: - - - is in the process of being executed.

15

HIS HONOUR: So can we keep going with your submissions.

MR LEE: Yes. I'm sorry. I thought there was something to hand up.

20

HIS HONOUR: I gathered.

MR LEE: So your Honour, this all started with me making the contention I made, that the evidence would support that Mr Ashby acted in the interests of the Speaker in discharging his employment to his position, as he perceived it became intolerable. That's a - - -

25

HIS HONOUR: All right. So you say that's on 26 March.

MR LEE: Well, no, I don't necessarily say it's 26 March. That's the first objective – the text message which says it in unqualified terms. My instructions are it really is from the 20th.

30

HIS HONOUR: 20th.

35

MR LEE: Yes. But I don't want to give your Honour the impression that these things, on my instructions or on the basis of human experience, can be seen as being – one knows when it's midnight and one knows when it's the blazing day time, but when the twilight comes as to when it passes from day to night, where something becomes – it is a good analogy to when something moves from being tolerable to intolerable. It's often hard to dissect the precise moment that one passes over that threshold. That is human experience in complex matters. It's not binary type notion. Your Honour, at (b) – I invite your Honour to look at the material – it is plain as a pikestaff, in my respectful submission, that he did try to avoid such conduct. (c) is also established. Your Honour would see that by reviewing the messages. He took steps to address the matter, from seeking assistance to others – your Honour has seen part of that, that it is well established. He obtained - - -

40

45

HIS HONOUR: Yes. Well, I've read all that.

MR LEE: - - - legal advice from Queen's Counsel and then – and, your Honour, this is where the conspiracy breaks down. Even if you thought there was something
5 improper going on concerning Mr Ashby and the LNP and various other things. He goes and sees a highly experienced Queen's Counsel who tells him, in no uncertain terms, you cannot – I can't help you, in the sense of having an ongoing relationship as a legal advisor, because I would be perceived of having a conflict. You must go and get independent legal advice. You get that from someone who – Mr Russell, a
10 very senior member, a person – I'm not sure whether this is part of the evidence your Honour excluded – is essentially responsible for the merger of the Liberal and National parties in Queensland is – tells him, you can't get any advice – you can't get any support from the LNP or its members, directly or indirectly.

15 You are going to be faced with the full might of the Commonwealth against you, and on the basis of that he goes and sees a solicitor without any connections whatever. The fact that your Honour receives the evidence concerning Mr Harmer's position – political affiliations, such as they are, who gives him, according to Mr Harmer, dispassionate, disinterested, in the true sense of the word, advice in order to take
20 forward his complaints in a manner that Mr Harmer believes, as someone who is an experience lawyer, is the only way that they can be adequately advanced. Now that, as your Honour has seen in the closing submissions I put out – hasn't that been borne out by experience.

25 Do you think there's any prospect whatever that Mr – that it wasn't rational for people to have a view; that this somehow could be dealt with by Mr Ashby seeking to deal with this through a process which didn't involve a court.

HIS HONOUR: Well, Mr Lee, having started it in the way it was, and without any
30 attempt to resolve it beforehand and using the originating application in the way it was framed, it's hardly surprising that backs got put up on the other side of the fence and then when they put their motions on to strike you out, on the basis of bringing the proceedings for an improper purpose, your back gets put out. We're talking about a lot of water passed under the bridge, but the way your client started these
35 proceedings was calculated to bring about people getting into trenches and firing across at each other, which is what has happened. There's no doubt that that has happened and when you say, is there any doubt that that would have happened, in any event, I very much doubt it.

40 Once you start proceedings in the way this was started, with allegations suggested of criminality by Mr Slipper and other things, which you then drop when a statement of claim is put on, I would have thought that it was calculated to put people's backs up and to say, well, that makes it much harder to settle it. So I don't accept, for a
45 moment, the suggestion that looking at what has happened demonstrates this could never have been resolved amicably. To the contrary, I think, the way this has been dealt with inflamed the matter and it may well have been that all the different

possibilities of dispute resolution that Mr Burnside's submissions referred to could have produced a much happier result for everybody.

5 MR LEE: Your Honour, but that, with respect, flies in the face of the political reality, disclosed in the evidence, in which this issue arose. Your Honour is aware, from the material and would be aware by reference to material – you can take into account of section 144 of the Evidence Act, of the fact that Mr Slipper holds a particular position of importance. That it is in the interests of people that he continues to hold that position. That an admission of wrong-doing which was sought
10 by Mr Ashby and continues to be sought by Mr Ashby is something that was unlikely, in my respectful submission, given the denial by Mr Slipper repeated again this morning, to have come out of any contested – of any consensual approach.

15 It is, with the greatest respect, fanciful to suggest that if Mr Slipper, going to the executive government, had gone along and said, I have been abused by a person who is someone who is being put in his place by reason of the political considerations which your Honour sees coming out of the text messages in evidence, was going to get any redress of the type that he sought. He seeks to bring the matter before the court in order to obtain vindication that this conduct, which he says occurred, which
20 he says caused him harm, occurred, and that - - -

HIS HONOUR: Well, he had a perfectly good Comcare claim. That has got nothing to do with the executive government's discretion. Comcare would run those proceedings. He could bring proceedings against Comcare.

25 MR LEE: Well, your Honour - - -

HIS HONOUR: I mean, Mr Lee, there are all sorts of possibilities if he couldn't get a resolution.

30 MR LEE: But – I'm sorry, can I just hand up this material because they're waiting – the notice of discontinuance and the order, before I address your Honour further on that point.

35 HIS HONOUR: All right. Well,

- (1) I grant leave to the first respondent to file in court, notice of discontinuance dated today.
- 40 (2) I grant leave to the applicant to file a notice of discontinuance in court, dated today and by consent between the applicant and the first respondent,
- (3) I order that there be no orders as to costs between the applicant and first respondent, including any reserved costs.

45

And I note the agreement, as between the applicant and first respondent is to the letter from the solicitors for the first respondent to the solicitors for the applicant

dated 26 September 2012 in response to that letter dated 27 September 2012 annexed to the orders. I congratulate the parties on eventually coming to a resolution of their dispute.

5 MR LEE: Now, your Honour mustn't proceed, in my respectful submission, on the basis of what your Honour just said about Comcare. Comcare is a no fault scheme which has no power to order anyone to do anything. The unchallenged evidence of Mr Ashby has said this motivation was to stop Mr Slipper from doing this again. Ms Doane's comment to Mr Russell was, contextually with the communications with
10 Mr Russell is, "If you don't do something," – I will get the precise quote because it's of sufficient importance. This is the communication, which, your Honour, is not inherently improbable and, your Honour, it comes from a witness who wasn't cross-examined, who also happens to be senior counsel:

15 *James, you know if you do nothing, he's just going to do it again to someone else. It's an ongoing pattern of behaviour and he has to be stopped before he hurts others, just as he has hurt us.*

Now, that has got nothing whatever - - -

20

HIS HONOUR: Sorry. That's what Ms Doane said or Mr Russell?

MR LEE: Ms Doane to Mr Russell, Mr Ashby and Mr Brough in the context of talking about the motivation – about what they should given the predicament that
25 they're in. Now, that simply was – an end which was completely inapt to be achieved by reference to making a Comcare complaint or any other of these measures, which don't involve a determination being made that an order can be made that someone be stopped and there be a recognition that someone behaved in a particular way.

30

Mr Harmer was then seen – Mr Harmer has deposed twice in his affidavit material, again unchallenged, about the fact that he believed, subjectively, as an experienced lawyer in this area, given the nature of his instructions – and your Honour would infer that from what had passed between Mr – draw inferences about what passed in
35 relation to Mr Ashby's motivation given the communication with Mr Russell, Mr Harmer saw independently – took the view that none of the other alternatives by which he could seek redress were practicable in the circumstances. He considered them, actively considered his evidence and decided that they were not practicable to achieve the end of stopping this behaviour and obtaining the relief that he was
40 instructed to obtain on behalf of his client. And, your Honour, in that regard, Mr Harmer - - -

HIS HONOUR: Have you taken me to any evidence to suggest that your client ever asked Mr Slipper to stop before he began the proceedings?

45

MR LEE: Well - - -

HIS HONOUR: You've said he avoided things, but have you taken me to anything where he confronted him and said, "Look, this is not appropriate. I don't appreciate it."?

5 MR LEE: Yes. Yes. Yes, I will take you to some evidence which says that. This is
a power dynamic, your Honour, where someone is one of the most powerful people
in the country to someone who is an employee, but he did have the courage to say
that and I will take you to it. I'm finding this text message. But can I say when your
Honour reviews the text message, what it says. Is that issues are raised and he
10 immediately changes the subject, immediately tries to bring it back to work-related
matters, in order to deflect the issue, handle the issue, make it go away. It doesn't.
And in one communication, which Ms Doane is about to show me – Ms James,
rather, sorry. Gosh. Sorry. Yes, when he's talking about whether or not – can your
Honour go to page 1295, Mr Slipper is asking him questions about whether or not he
15 had consummated his relationship with someone who is a male friend of his. This is
at page 1295. One of a succession of - - -

HIS HONOUR: This is a month before he accepts the job.

20 MR LEE: Yes.

HIS HONOUR: Well - - -

MR LEE: And he tells him, your Honour – he tells this person, 'inappropriate'.

25

HIS HONOUR: Yes.

MR LEE: And he's saying to a friend, "I told him that was inappropriate." And he
gives evidence about the fact – at page 11770, at page 1296, Mr Ashby advises that
30 he considered any issue relating to communications concerning personal details to
have been resolved following this communication. Where he says:

35 *My closest friends don't share that kind of info. Others might feel differently
towards their real personal details, might we consider Andrew's feelings as
well as mine. I couldn't see him liking that info divulged either. I would be
disappointed in him if he told his friends our personal details. I wouldn't
consider asking you that about you and Mrs Slipper. In respect of two of you –*

40 etcetera, etcetera. Now, your Honour, that's a response that he had and he - - -

HIS HONOUR: This is not to do with sexual harassment or any allegation of sexual
harassment. I mean, your client – you're telling me it would have been useless for
him to have said to Mr Slipper when he was working for him, "Please stop doing
this, I regard it as unwelcome or harassing," and that that would never have produced
45 a result.

MR LEE: No, your Honour, I'm - - -

HIS HONOUR: Well, all I asked you was whether that had ever happened.

MR LEE: I'm giving you context. That's one. Then your Honour sees the various communications, some of which I've taken you to, but some of which your Honour will have to look at, in which he changes the subject. Then you get to some communications, which are at the heart of the case. For example, page 24 - - -

HIS HONOUR: Sorry. Page what?

MR LEE: Now, at the bottom of page 1384 – 13437:

But your call and no hard feelings if you only want business-like contact in the event of the difficulty in our persona. I don't know what type of conduct you expect, Peter.

Rebuffing:

Perhaps you should define what you like and then I can be clearer on my position. You want something more? You're brilliant at massages. No, happy the way things are. I care for you, Pete, but the massages, as far as it goes, life's a lot more simpler when it's business and a few drinks after work. Oh, no problems and thanks for.

Now, your Honour – and he says, “Appreciate your frankness”. And, then, he immediately says:

Appreciate your frankness. In future, all – sorry, things not working about but appreciate your frankness. In future, in circumstances please arrange all communications through Tim, as cannot guarantee availability.

So he pushes back. What's the immediate response? “I don't want any contact. You have to arrange everything through somebody else.”

HIS HONOUR: And the next morning, he sends one saying, “I'm only joking,” so - - -

MR LEE: Well, your Honour, your Honour asked me did he push back. He pushed back once. What does he get? Victimisation. Now, it lasted a short period of time, but, your Honour, would infer that that is a form of saying, “If you push back, you are going to be someone who doesn't enjoy the close relationship you would like to enjoy in the employment relationship.” Now, your Honour, we're not trying to the case here.

HIS HONOUR: Yes, I know.

MR LEE: You're saying whether or not my client has engaged in what amounts to a huge conspiracy for improper purpose. You've asked me whether he pushed back. He did push back. He pushed back - - -

5 HIS HONOUR: Well, yes, I asked whether he had ever said – asked Mr Slipper to stop and saying that was inappropriate and you've taken me to something.

MR LEE: If your Honour please.

10 HIS HONOUR: It's what I was asking you about.

MR LEE: I'm sorry.

15 HIS HONOUR: You're making a submission it would be impossible to ever resolve it.

MR LEE: It would have been.

20 HIS HONOUR: And by asking that – and I've you about that and you've said something.

25 MR LEE: Isn't that a good example, your Honour? Because the first time he tries to push – takes the courage to push back to someone who is in that position of power, he immediately finds that that is regarded as being something which was the subject of a direction, which otherwise wasn't in place and moreover, your Honour has the evidence – and, your Honour, you have the subjective views at page 1203 where in his unredacted affidavit, he said – it was on the 1st. It was the day before. He goes:

30 *I felt if I kept someone nearby, I would be right. So we did. We let it go and I was prepared to let that all go, but I was also in the mindset that he has been told now, it has been made clear I'm not interested and I shouldn't have any more issues, but it never stopped.*

35 HIS HONOUR: So where are you reading that?

MR LEE: 1201.

HIS HONOUR: So you said 1203 and - - -

40 MR LEE: I'm sorry. That's undoubtedly why your Honour is having a difficulty following what I was saying.

HIS HONOUR: Well, it's not necessarily the only reason, but - - -

45 MR LEE: The last - - -

HIS HONOUR: Where are we looking?

MR LEE: The last part of paragraph 175. Now, so you have the unchallenged evidence of Mr Harmer. You have the view that Mr Ashby had the intention that he thought he needed to take steps for the Speaker to be stopped. That it was a problem. It was going to affect others, potentially. And he took the steps following obtaining
5 legal advice from someone who is experienced in the area and so for those reasons for your Honour would make the findings, which are summarised at paragraph 53 of the opening submissions. Now, balanced against that, which we say, as I – to use the expression I used before, “Has the crystal-clear ring of clarity about it,” given that they’re based on communications, which no one ever thought for a moment would
10 ever see the light of day until there was a waiver of privilege, your Honour has what the state of the evidence is to support the improper purpose, and I don’t – I know I don’t need to detain your Honour long on the detail, but your Honour, of course, will have regard in your fact finding to the matters that we set out in section E of the opening submissions, being the applicability of section 140 of – 142 of the
15 Evidence – 140, subsection (2) of the Evidence Act and the like.

HIS HONOUR: Yes. Well, I think I’m familiar with that.

MR LEE: Yes, I know. And for those reasons, your Honour, in my respectful
20 submission, the application that this is an abuse of process just doesn’t come anywhere near being proved. Can I then deal quickly, given the time, because I am anxious to see whether we can finish this evening, if we can, to two matters. One is the – I’m not sure whether your Honour – I won’t finish in ten minutes but I need to deal with, it seems to me, the issue of vexatious proceedings and secondly, the issue
25 that your Honour raised about the use of the material upon which it’s conceded that Mr Harmer had a basis, which is a matter of - - -

HIS HONOUR: Well, there’s that and the Cabcharge allegations. I want to ask about that as well.

30 MR LEE: Well, if your Honour - - -

HIS HONOUR: As I have mentioned to you, I have looked at what Clyne’s case is and about the use of absolute privilege and I have got a concern about all that.

35 MR LEE: All right. Well, can I address that now perhaps. It might be – I won’t finish in five minutes but I can start on that topic because - - -

HIS HONOUR: No, no.

40 MR LEE: - - - it’s obviously one that’s a matter of interest to in Clyne.

HIS HONOUR: You do it in your own order, Mr Lee, but I just want to make clear that I have a concern about the use of the court’s process. In particular, those that the
45 pleading of both of those matters in the originating application and when I look at what is said by – in the last sentence on paragraph 9:

After viewing the video, Ms Hobson formed the view the relationship was consensual.

5 You just wonder what on earth that had to do with anything legitimately being pleaded in the proceedings, the paragraphs 5 to 9. And when I look at the way paragraph 55 and 56 are – 55 is pleaded with the Cabcharge allegations, I just do not understand how that was done.

10 MR LEE: Well, let me - - -

HIS HONOUR: And I'm mindful of those pages in Clyne's case that I referred to.

15 MR LEE: Yes. Well, I will squarely deal with those – I will read those overnight and - - -

HIS HONOUR: And I have read Mr Harmer's affidavit where he talks about the BCCI case and it doesn't come within a bull's roar of running a fraudulent and dishonest enterprise. This is a suggestion that somehow you're not allowed to have someone involved in questionable conduct and statement that he intends:

20 *...to make arrangements to make a statement to the Federal Police concerning these expense issues concurrent with the filing of this application.*

25 What is that a use of the court's process about?

MR LEE: Well - - -

HIS HONOUR: It's very, very troubling, Mr Lee.

30 MR LEE: Yes. And I will address it and your Honour, I think your Honour allowed me the indulgence of dealing with it in order I propose to deal with it.

HIS HONOUR: Yes. No, no. I do - - -

35 MR LEE: If I can. No, you want assistance on that point?

HIS HONOUR: - - - regard this as a matter of great concern.

40 MR LEE: Yes. And I will address it, your Honour. Can I start, however, by saying – dealing first with the evidence concerning subjective intention because subjective intention is relevant to what the true issue is that falls to determination by your Honour. That is, what was Mr Harmer's subjective intention. The allegation made against Mr Harmer and others is the allegation, as your Honour knows, that in putting those matters in the pleading to which your Honour has referred, Mr – that is,
45 in using the information, using the information, deploying the information which we understand there's no issue he didn't have a reasonable basis – he didn't have a basis for the – for knowing the information. That what he was doing was pleading it out in

that originating application for the purpose of vilifying the Speaker, exposing him to scandal, bringing him into disrepute and destroying or seriously damaging his reputation and standing for a purpose.

5 In order to advance the political interests of the LNP and/or Mr Brough and by those means, enhance or promote Mr Ashby's or Ms Doane's prospects of advancement. So that's the allegation which your Honour has to determine, whether or not he deployed that material. That's the issue determined – your Honour's focus is whether or not he deployed that material for the purpose that's identified. Now,
10 that's by way of background. That's the introduction. Now, that involves an analysis of his subjective intention. This is the first matter I want to take you to and then I will take your Honour more directly to the issue that your Honour wishes to address by reference to the comments in Clyne's case and the like.

15 HIS HONOUR: Well, there are two possible issues and you may need to help me about this but Mr Ashby is the litigant. His conduct was to start these proceedings and he had agents in your instructing solicitors and Mr Harmer. In a situation like this, Mr Harmer may have had a different purpose to your client. The question may or may not be as whether the court's process is being abused by the filing of this
20 document in this form.

MR LEE: Well - - -

HIS HONOUR: I mean, there are plenty of paragraphs in there that have got a
25 perfectly cognisable and objectively understandable forensic purpose that could be proved by admissible and relevant evidence but I don't, at the moment, have any conception how paragraphs 5 to 9 and 55 could have led to anything ever being run in this case.

30 MR LEE: Well, I - - -

HIS HONOUR: It doesn't seem to me to give rise to any cause of action for which relief could be given or to allow this material to be deployed

35 MR LEE: Well, I have taken that on board. I know I have to address that.

HIS HONOUR: So that's – that is what I am concerned about.

40 MR LEE: I'm grateful to your Honour. Your Honour mentioned a case that the pages of Clyne is particularly - - -

HIS HONOUR: Yes, 200 to 201.

45 MR LEE: 200 to 201. I may – I'm – well, what I would propose to do overnight is prepare a short note directed precisely to that point.

HIS HONOUR: Yes.

MR LEE: It might be a convenient time because I think I might be shorter and more coherent.

5 HIS HONOUR: Well, there's one other question I want to raise with you, Mr Lee, which I raised this morning and I would like an answer. How much money does your client say he should be awarded? And one thing Mr Slipper may be able to do, as Mr Burnside was saying earlier, is make an assessment of whether he wants to pay money to the court.

10 MR LEE: Well - - -

HIS HONOUR: I would just like to know how much is involved, given that we have just had a settlement for \$50,000.

15 MR LEE: Your Honour is straying into – with respect, your Honour is straying into dangerous territory when you're asking – in anticipating what will happen following the determination of this application. Your Honour doesn't know what the subject of without prejudice communications, if any, are between parties. Your Honour doesn't know what the intention is of the applicant, having been paid the sum by the
20 Commonwealth. That is something which simply is not an issue that arises on the determination of this application. For all your Honour knows, after the determination of this application, could be a whole range of various scenarios that play out and with respect, your Honour, it's not appropriate for your Honour to delve into that issue without – because it is a matter that's only relevant to the issues of
25 costs. We will provide you with particulars of the way in which the loss – the particulars of the damage that's being particularised in this case. We can do that and we will do that - - -

HIS HONOUR: Sorry. It's not necessarily only in relation to a cost, is it?

30 MR LEE: I'm sorry, your Honour?

HIS HONOUR: It's not only in relation to costs, I mean.

35 MR LEE: No, no. No, I - - -

HIS HONOUR: I thought you said it's only in relation to costs.

40 MR LEE: No.

HIS HONOUR: I may have misheard you.

MR LEE: I'm responding to what your Honour said about paying money into court and what the various - - -

45 HIS HONOUR: Well, I mean, to resolve the proceedings, I mean, how much is involved that's left?

MR LEE: Well, your Honour – but your Honour, we will provide particulars of the loss but I would make a submission to your Honour that your Honour shouldn't make assumptions about what should happen following the determination of this application and what will be the case that's advanced against the Speaker in the event that my client is – following the determination of this application. I will just leave it at that. I understand what your Honour wants. We can provide to you tomorrow the particulars of the loss that we say that we suffered and do our best to provide your Honour with a direct answer by way of quantification of the question, but that is not something which should inform your Honour's decision concerning the abuse of process application, leaving aside issues concerning civil penalties and other orders.

HIS HONOUR: Well, you can tell me how much you say the civil penalties should be, based on the pleaded case.

MR LEE: Well, that will - - -

HIS HONOUR: And there are obviously precedents about these things - - -

MR LEE: Well, your Honour, I –

HIS HONOUR: - - - which gives me some idea of the scale that we're talking about.

MR LEE: Yes. Well, as your Honour would be aware, the orthodox course would be your Honour to make findings and for people to have a separate phase where people might talk about what the appropriate penalty might be.

HIS HONOUR: Well, when you're running a concurrent case for damages and civil penalty, I would have thought that I should deal with it all at once. If I find liability, the formulation of how much and the civil penalty would be – I'm not doing that at the moment, as we know – would be all dealt with together.

MR LEE: Well, I would use the analogy, which I think has been – I will look at the cases but which I think is a fairly inapt analogy, and that is, in respect of exemplary damages, where one needs to know what is the amount of compensatory damages that are paid in order to take into account all relevant considerations. I mean, one has to make a decision about whether an amount is awarded to punish. Similarly, when it comes to determining what would be an appropriate penal order, an to exemplary damages, although different because it's a statutory creature. One would want to know, as a very material consideration, what is the amount that your Honour was to award by way of statutory compensation and also any other orders, prior to making determination about what penalty should be imposed.

That seems to me, with respect, to be the orthodox and sensible way of approaching it, otherwise someone might say, if your Honour didn't – it could be dealt with together but it couldn't be dealt with – it would be – without identifying what is the amount of compensatory damages that would be awarded and the other orders that

your Honour might be – there could be a whole series of combinations that might be appropriate, depending upon what your Honour does with statutory compensation, depending upon what your Honour does with counselling and training. A whole range of different – what your Honour does in respect of compensatory orders
5 concerning costs if your Honour finds unreasonable – a whole range of different factors.

HIS HONOUR: Well, I'm not sure that the considerations dealing with a situation where you're being asked to find, in civil penalty proceedings, whether a breach has
10 occurred apply where you're concurrently seeking damages. I mean, there are all sorts of reasons why you might get two bites at a cherry with one, but in a case like this I just wonder why you wouldn't decide the whole thing so that the award of damages took into account the award – any civil penalty if it were ordered to be recoverable by your client, as opposed to the Commonwealth and if it were ordered
15 to be recoverable by your client, what would be appropriate. I mean, you don't punish people twice and you - - -

MR LEE: No. I agree, your Honour. That's precisely the point I'm making. All I'm saying is without looking – there are various integers that need to be taken into
20 account in determining – it could be determined at the same time. Your Honour can sit in chambers and make a determination at the same time, but the integers – for me, saying in advance of understanding what's in your Honour's mind about those integers, it's not something that I can usefully provide assistance on at this stage of the proceedings to your Honour. That's the only point I'm making.

HIS HONOUR: No. Well, I was raising with you that particularly since this is not a large case in terms of either the conduct or the amounts that could possibly be awarded, at least by way of compensation, that to have another hearing after I gave a
25 decision, if it went to that, on liability would just be – I mean, we've had enough hearing it in this case.
30

MR LEE: I don't – in the interchange - - -

HIS HONOUR: Far more than it would ordinarily have.
35

MR LEE: In the interchange between bench and bar, after hearing what's your Honour. I, with respect, come back to the point I made before which I think is right. You can't determine a penalty, like you can't determine exemplary damages without knowing everything else. Your Honour can make a decision about everything else at
40 the same time so it avoids the need for two hearings. I accept that.

HIS HONOUR: I'm just really looking for guidance of how much you want and there's a bottom line, at the end of the day, of how much you say is an appropriate, all up, sum going to your client, be it by way of compensatory damages, be it by way
45 of penalty or whatever, so we get some idea of the scale of this case - - -

MR LEE: Well, your Honour - - -

5 HIS HONOUR: Because, at the moment, it seems to me that it would ordinarily, apart from the horrendous complexity brought about by the political dimension of it, be a case that would have been in the Federal Magistrates Court or the Circuit Court, as it's going to be called, as a matter that could be dealt with in a couple of days, or a day.

MR LEE: Well, your Honour, that may be right and it may be the orders that we urge upon your Honour - - -

10 HIS HONOUR: But that's not at the moment - - -

MR LEE: - - - but that's not before your Honour. Your Honour is anticipating something which your Honour, with the greatest respect, ought not anticipate in determining this application.

15 HIS HONOUR: All right. Well, I've got some directions - - -

MR LEE: It may be that we make an open offer.

20 HIS HONOUR: Well, I've got some directions in the morning and I will resume this after those directions. Is that satisfactory? I will adjourn.

MATTER ADJOURNED at 4.23 pm UNTIL FRIDAY, 5 OCTOBER 2012

Index of Witness Events

Index of Exhibits and MFIs

EXHIBIT #A1 LETTER FROM MAURICE BLACKBURN TO
HARMERS WORKPLACE LAWYERS DATED 5/07/2012

P-60