

13 July 2018

[REDACTED]  
Legislative Council – Privileges Committee  
Parliament of Victoria  
Spring Street  
East Melbourne VIC 3002

Senior Associate [REDACTED]  
Direct Line [REDACTED]  
Email [REDACTED]@holdingredlich.com  
Partner [REDACTED]  
Our Ref [REDACTED]

By email [REDACTED]@parliament.vic.gov.au

Dear [REDACTED]

## **Inquiry into the use of electorate staffing entitlements**

We act for Johan Scheffer and refer to your letter to our client of 3 July 2018.

You will note that we also act for a number of other people who are the subjects of the Inquiry. While there are similarities between our clients' circumstances, each should be dealt with separately.

### **1. The Inquiry**

In your letter you refer to the terms of a motion passed by the Legislative Council (**the Motion**), referring certain matters to the Privileges Committee (**the Committee**). The Motion requires the Committee to inquire into and report "*whether any Members are in contempt of Parliament in relation to the Code of Conduct in the Members of Parliament (Register of Interests) Act 1978*" (**the Act**).

The Code of Conduct (**the Code**) is set out in section 3 of that Act; sub-section (1) of that section provides for five further paragraphs describing conduct which the Code purports to regulate. Your letter does not identify which part of the Code our client is alleged to have breached. We will proceed on the basis that the Committee proposes to investigate whether our client has breached s 3(1)(a) of the Act, namely engaging in conduct that would bring the Parliament discredit.

We note, further, the Motion also extends the inquiry to examine "*whether the conduct of any current or former Members constitutes any other form of contempt of Parliament and if so, what sanction, if any, should be imposed*". Significantly, we note, details of this element of the inquiry are not provided.

### **2. Background**

The relevant facts in relation to Mr Scheffer are as follows:

- (a) Mr Scheffer was a member of the Victorian Legislative Council representing the Eastern Victoria Region in the 57<sup>th</sup> Parliament.
- (b) Mr Scheffer is not a member of the 58<sup>th</sup> Parliament.

Melbourne . Sydney . Brisbane

Level 8 555 Bourke Street Melbourne Vic 3000 DX 422 Melbourne  
GPO Box 2154 Melbourne Vic 3001 T +61 3 9321 9999 www.holdingredlich.com

ABN 15 364 527 724

- (c) For the purposes of the Ombudsman’s investigation, Mr Scheffer provided a Statutory Declaration (see **attached**). In his Statutory Declaration Mr Scheffer:
- Agreed that he employed a casual electorate officer using funds within his Electorate Office and Communications Budget.
  - Agreed that the casual electorate officer in question was assigned to work in the Electorate Office of the ALP Member for Monbulk which is a Legislative Assembly district within Eastern Victoria Region.
  - Agreed that he was aware that the casual electorate officer would also be employed part-time by the ALP and that he understood the need to have a delineation between the electorate officer’s role as an electorate officer and her role as a field organiser employed by the ALP.
  - Describes actions he took to ensure a delineation between the two roles.

The Ombudsman had no evidence as to the role performed by the electorate officer employed by Mr Scheffer, other than a newspaper report about his activities. The Ombudsman, nonetheless, concluded, “on the significant weight of evidence in this Report” that field organiser role was a full time role. Having made this statement, the Ombudsman said at paragraph 661:

“I do not suggest that any participating Member of Parliament set out to deceive, or that no work was performed for any of them that could legitimately claimed to be electorate officer work.”

### **3. The 58<sup>th</sup> Parliament’s purported inquiry into the 57<sup>th</sup> Parliament**

We do not agree that a Committee of the 58<sup>th</sup> Parliament can inquire to the activities of a member of the 57<sup>th</sup> Parliament in respect of their activities as a member of that Parliament. We note that the objective of contempt proceedings before a parliamentary committee tasked to hear them is to provide a mechanism whereby a House of Parliament can regulate the orderly conduct of its own affairs. Consequently, that inquiry is properly limited to a given parliament inquiring into the conduct of its own members, rather than the members of previous parliaments.

In this regard we note the observations of the learned author of *Constitutional and Administrative Law*, writing in respect of the House of Commons:

*The House of Commons is, however, powerless in relation to the punishment of former Members of Parliament in respect of breaches of privilege while Members.*<sup>1</sup>

We note that, if the Committee were to find that it could institute contempt proceedings against former members of Parliament, then a range of outcomes could occur. For instance, with the ‘ebbs and flows’ of political fortunes, Committees could make ‘tit for tat’ charges against individuals long retired from the Parliament.

### **4. The Committee’s reliance on the Act**

It is plain that the Committee cannot examine whether the Code has been contravened by Mr Scheffer because he has ceased to be a Member of Parliament.

---

<sup>1</sup> Barnett, H., *Constitutional and Administrative Law* (4<sup>th</sup> ed., 2002), at p 580.

Section 2 of the Act defines a ‘member’ in the following terms:

***Member means a person who is for the time being—***

*(a) a Member of the Legislative Assembly; or*

*(b) a Member of the Legislative Council.*

[emphasis added]

Further, section 9 of the Act establishes a power to impose a fine on Members in certain circumstances:

*Any wilful contravention of any of the requirements of this Act by any person shall be a contempt of the Parliament and may be dealt with accordingly and in addition to any other punishment that may be awarded by either House of the Parliament for a contempt of the House of which the Member is a Member the House may impose a fine upon the Member of such amount not exceeding \$2000 as it determines.*

[emphasis added]

In each case, sections 2 and 9 of the Act describe membership of a House of Parliament in the present tense. Both of these sections make it clear that the Act only applies to current Members of Parliament, and consequently, the Committee cannot inquire into whether former Members of Parliament have contravened any of the Act’s provisions.

## **5. The Code of Conduct, contempt and the question of ‘wilfulness’**

The Committee should, initially, determine its position in relation to the matters set out under sections 3 and 4 above. If the positions expressed in those sections are accepted, then the Committee should conclude its inquiry and not make any findings in respect of our client for the reasons that we have advanced. If the Committee does not accept the positions advanced in sections 3 and 4, then our client seeks to advance his position in the following sections.

As noted above, the Committee has not identified which paragraph of s 3(1) it believes to have been contravened to establish contempt under s 9 of the Act. Each of the paragraphs deal with different and specific subject matter, most of which are irrelevant to the Motion. However, we assume that the Committee is considering whether our client has failed to comply with s 3(1)(a) of the Act—if we are wrong in this assumption please advise us, and indicate which other paragraphs the Committee relies upon and how it is alleged our client has breached those paragraphs.

Section 9 of the Act provides that a Member of Parliament may be found to be in contempt of Parliament if he or she contravenes the Act. Importantly, before finding that a Member has engaged in a contempt of Parliament, the Committee must establish that there has been a ‘wilful contravention’ of the Code. The courts have described ‘wilful’ as synonymous with ‘intentional’ and ‘deliberate’.<sup>2</sup>

The Committee counterpart in the Legislative Assembly has previously considered the question of what constitutes ‘wilful’ conduct. In that committee’s *Inquiry in relation to recommendation 2 of the Ombudsman’s report Whistleblowers Protection Act 2001: Investigation in to allegations against Mr Geoff Shaw MP (the Shaw Inquiry)*, the committee made the following comments (paragraphs 38 to 41):

---

<sup>2</sup> See *Lewis v Ogden* [1984] HCA 26 at [8].

38 *The Committee has found that Mr Shaw contravened the code of conduct. This constitutes a contravention of a requirement of the Act. However, this does not amount to a contempt of Parliament unless the contravention was wilful. The first question to be addressed is therefore what amounts to a ‘wilful’ contravention in this context?*

39 *As legal advice provided to the Committee has stated:*

*It is clear that any course of conduct embarked upon intentionally, deliberately, voluntarily or consciously will constitute “wilful” conduct for the purposes of the [Members of Parliament (Register of Interests) Act 1978].*

...

*... we also consider that a “wilful” contravention can exist within the meaning of section 9 of the [Members of Parliament (Register of Interests) Act 1978] in the absence of a positive intention to breach the ... Act. For example, we consider that a “wilful” contravention of the ... Act could be found in circumstances where a member of Parliament did not deliberately seek to breach the ... Act, but showed a reckless carelessness or indifference to their obligations under the [Members of Parliament (Register of Interests) Act 1978].*

*It is not necessary that the member concerned actually knew and intended that their actions would contravene the Act, because all persons are taken to know the applicable law. However, the member concerned needs to have sufficient knowledge of all the relevant facts such that, if they were fully aware of the law, they would realise that what they were doing or not doing would amount to, or was likely to result in, a contravention of a requirement of the Act.*

40 *Whether particular reckless conduct, such as reckless carelessness or indifference, will amount to a wilful contravention of a legislative requirement will depend on the terms of the requirement concerned. Here the requirement imposed on members under the Act is to ensure that their prime responsibility to the performance of their public duty is not subordinated by involvement in conflicting private interests and that their conduct must not be such as to bring discredit upon the Parliament.*

41 *In short, the question is whether, on the one hand, Mr Shaw deliberately intended that the parliamentary vehicle be used for the purposes of his business, or foresaw the likelihood that this would occur given the arrangements for its use that he had made yet failed to take any further measures to prevent it, or whether, on the other hand, he did not so intend or foresee, but was negligent in the manner in which he made the parliamentary vehicle available for his staff to use. The former would constitute wilful contravention of a requirement of the Act, whereas the latter would be a contravention but not a wilful contravention.*

Further, the Shaw Inquiry made the following comments in relation to issue of the burden of proof in the committee’s inquiries (paragraph 46 and 47):

46 *In order to find that a person is guilty of a contempt of Parliament through wilful contravention of a requirement of the Act, it must, of course, be established that such a wilful contravention has occurred. On one view, the Committee should require to be satisfied as to that beyond reasonable doubt, in contrast to findings of fact by the Committee on other matters, where it is appropriate for the Committee to determine*

*matters in accordance with the civil standard of proof, namely on the balance of probabilities. To require satisfaction beyond reasonable doubt in relation to a contempt of Parliament would be consistent with a ruling by the High Court that court proceedings that could result in the imposition of a fine should be determined in accordance with the criminal standard of proof.<sup>60</sup> While the Victorian Parliament is not obliged to apply to its own proceedings a ruling of the High Court in relation to contempt of court, it can be argued that the Parliament should nonetheless find the High Court's ruling highly persuasive, because of the common origins of the law regarding contempt of Parliament and contempt of court.*

- 47 *However, the legal advice provided to the Committee by Lander and Rogers is that, while it is open to the Committee to apply whatever standard of proof it considers appropriate, previous decisions of privileges committees suggest that a 'High Civil Standard' ordinarily applies in determining whether a contempt of Parliament has occurred.<sup>61</sup> A 'High Civil Standard' is determined on the balance of probabilities, but, given the seriousness of the allegations, requiring proof of a very high order. The Committee has decided to follow the approach recommended by Lander and Rogers.*

We submit that these approaches should be adopted by the Committee in dealing with the Motion.

## **6. Material before the Committee**

The starting point is the Ombudsman's Report from which we extract the following relevant sections:

Paragraph 53 of the Report:

*The Members of Parliament who signed time-sheets authorising payments to Field Organisers derived little or no personal benefit from the use of parliamentary funds for campaigning purposes, which almost invariably benefited the election prospects of others. These Members appear to have parted with a portion of their Electorate Office and Communication Budgets, in the mistaken belief that it was legitimate. They did not check with DPS or consult the Members' Guide.*

Paragraph 700 of the Report:

*I accept that the Members of Parliament who signed time-sheets authorising payments to Field Organisers derived little or no personal benefit from the use of parliamentary funds for campaigning purposes, which almost invariably benefited the election prospects of other Members or candidates. I also accept that they agreed to part with a portion of their budget entitlement in good faith, following discussions with Mr Lenders, believing it to be legitimate. Regardless of their intentions, however, they were wrong, and their actions breached the Members' Guide.*

Paragraph 736 of the Report:

*The Members of Parliament who signed time-sheets authorising payments to Field Organisers derived little or no personal benefit from the use of parliamentary funds for other people's campaigns, and I accept the assertions of those who provided evidence that they believed the arrangement was a legitimate use of their budget entitlement. Regardless of their intentions, they were wrong; the effect of their acquiescence was that public money was used for an inappropriate purpose.*



The paragraphs set out above clearly indicate that there was no finding of ‘wilfulness’ on the part of any of the members under investigation. In the Report the Ombudsman finds that the Members of Parliament in question were mistaken as to their position, but acted honestly on the basis of their mistaken beliefs.

Further, the Ombudsman, having had the benefit of an extensive investigation of this matter, did not make any finding that our client (or other Members’) wilfully contravened the Members’ Guide.

Apart from, having regard to these findings, the Committee has Mr Scheffer’s Statutory Declaration which is the only direct evidence before the Committee concerning our client. It is submitted that the Declaration provides no basis to conclude, on a level of proof of a ‘very high order’, that Mr Scheffer wilfully contravened s 3(1)(a) of the Act, that is, there was no wilful conduct on the part of Mr Scheffer to bring discredit upon the Parliament.

If, however, the Committee intends to rely on other evidence in its Inquiry in respect of our client please advise us of that evidence and our client shall respond accordingly.

## 7. Contempt not arising under s 9 of the Act

The Motion requires the Committee to inquire as to whether our client has engaged in “*any other form of contempt of Parliament*”. The letter to our client does not provide any details as to the form of contempt this part of the Motion refers to. As the matter stands, effectively, our client is required to respond without knowing what form of contempt the Committee has in its mind.

In circumstances, where the Committee bears the onus, on a high civil standard of proof to establish the alleged contempt, it must provide our client with procedural fairness; the Committee must identify the alleged contempt and set out the acts, facts and matters it alleges support that contempt. To illustrate this point, where the courts have considered contempt proceedings, they have observed that “*the charge of contempt should specify the nature of the contempt i.e. [in the matter relevant to the case before the court] that it consists of a wilful insult to the judge and identify the alleged insult*”.<sup>3</sup>

Once this detail has been provided to our client, he will respond further. We do say, however, for the reasons referred to above, the Committee is constrained by the requirement that it not inquire into the activities of a member of the 57<sup>th</sup> Parliament and any contempt would need to involve wilful action.

## 8. Conclusion

Our client makes these written submissions on the basis of the Report and his Statutory Declaration; he does not have access to all the material the Committee has received. Our client submits that there is no evidence to the standard required to conclude that our client had wilfully contravened s 3 of the Act. Consequently, no finding of contempt should be made against our client. In respect of contempt not arising under s 9 of the Act, our client refers to his position outlined above.

We will be monitoring the progress of the Committee’s Inquiry. If events transpire in the conduct of the Inquiry such that our client considers that further submissions from him are warranted, then he reserves his rights to provide the Committee further information.

Further, we request that the Committee provide us with the transcript of the Committee’s hearings and any documents other than the Report and our client’s Statutory Declaration that it relies upon in

---

<sup>3</sup> See *Lewis v Ogden* [1984] HCA 26.

considering whether our client has contravened s 3 of the Act or engaged in any other form of contempt. We also seek access to any legal advice provided to the Committee relating to the Committee's deliberations. Again, depending your response to these requests, our client reserves his rights to make further submissions to the Committee.

If you have any questions relating to this matter please contact [REDACTED] of our office.

Yours sincerely

[REDACTED]  
Holding Redlich