



Our ref: A776223

6 September 2019

Mr Nicholas Egan
State Solicitor
State Solicitor's Office
GPO Box B83
Perth WA 6838

Via email: n.egan@sso.wa.gov.au

PRIVILEGED AND CONFIDENTIAL

Dear Mr Egan,

**Supreme Court of WA Action: CIV 2518 of 2019: Darren Jon Foster v Catherine Esther Doust
Legislative Council Resolution dated 5 September 2019**

I refer to our previous correspondence and attach a copy of the Resolutions passed by the Legislative Council on 5 September 2019.

I draw your attention to Resolutions No. 1 and No. 2 foreshadowed in my letter of 28 August 2019. Resolution No. 1 is declaratory of the Legislative Council's privileges, immunities and powers. Resolution No. 2 rescinds the Order made by the Legislative Council on Thursday, 15 August 2019, the subject of the abovementioned proceedings.

In the circumstances, there now appears to be no utility in the declarations sought by your client in the above proceedings. Please confirm by Monday, 9 September 2019 at 4pm that your client will discontinue the proceedings and that there is therefore no need for the defendant to enter an appearance or file a defence.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'N. Pratt', with a long horizontal flourish extending to the right.

Mr Nigel Pratt
Clerk of the Legislative Council

Attachment: Resolutions of the Legislative Council dated 5 September 2019

Resolution 1 —

That the Legislative Council:

- (1) notes that:
 - (a) the law of parliamentary privilege is intended to protect the ability of the Houses of Parliament, their members and committees, to exercise their authority and perform their duties without undue external interference; and
 - (b) an aspect of that law is the protection of the legislature against improper interference by the judiciary and the executive;
- (2) further notes and affirms that:
 - (a) the privileges, immunities and powers of the Legislative Council are secured through s.36 of the *Constitution Act 1889*, the *Parliamentary Privileges Act 1891*, and *Parliamentary Papers Act 1891* and include the freedoms and immunities formulated in Article 9 of the *Bill of Rights 1688*, protecting speech and debates and proceedings in Parliament against being impeached or questioned in any court or place out of Parliament;
 - (b) the protections recited in Article 9 are not confined to courts and tribunals but also encompass the protection of material subject to parliamentary privilege against incursion by the executive and executive agencies including an Investigative Agency; and
 - (c) a thing, material and Document or Data subject to parliamentary privilege is immune from compulsory seizure by an Investigative Agency under a notice to produced, warrant, or similar compulsory process;
- (3) declares for the avoidance of doubt:
 - (a) that the right of the Legislative Council to determine claims of parliamentary privilege over material sought to be seized or accessed by an Investigative Agency adheres regardless of the form of the material, the means by which those agencies seek seizure or access, and the procedures followed;
 - (b) that the right of the Legislative Council to determine claims of parliamentary privilege over material sought to be seized or accessed by an Investigative Agency applies to Documents or Data of its members, former members and their staff in the possession, custody, or power of the Director General, Department of the Premier and Cabinet or other Government department or agency; and
 - (c) that a person served with a Notice by an Investigative Agency for the production of Documents or Data who, without the authority of the Legislative Council or its authorised delegate, purports to determine, either personally or by any agent of the executive, the question of whether a Document or Data is subject to parliamentary privilege:
 - (i) would usurp the right of the Legislative Council to determine that question; and
 - (ii) in the absence of a lawful excuse, may commit a breach of the privileges of the Legislative Council;
- (4) expects that where there are reasonable grounds to believe that a Notice served by an Investigative Agency on a person may require production of Documents or Data which attract parliamentary privilege, the person upon whom the Notice is served will inform the Clerk of the Legislative Council promptly following receipt of the Notice and before producing any Documents or Data in compliance with the Notice;
- (5) requires an Investigative Agency to observe the privileges, immunities and powers of the Legislative Council, its committees and members (including as declared in

paragraph 3 above) in determining whether and how to exercise its powers, rights or functions in matters which might engage questions of parliamentary privilege; and
For the purpose of this order:

Document or Data, includes a document or electronic or other data in the possession, custody or power of a government department that was created or received by a current or former member of the Legislative Council or their staff;

Investigative Agency, includes the Western Australian Police Force, the Australian Federal Police, the Corruption and Crime Commission and any like body with a power to issue a Notice to produce or obtain Documents or Data;

Notice includes a notice to produce, warrant, or similar compulsory process for the production or obtaining of Documents or Data.

Resolution 2 —

That the Legislative Council rescind its Order No. 4 made on 15 August 2019.

That Order was as follows:

Order 4 —

That Mr Darren Foster, Director General, Department of the Premier and Cabinet (Department), or any person acting in that capacity, is hereby ordered:

- (1) to not produce to the Corruption and Crime Commission or any other investigative agency in answer to any further compulsory process or otherwise any document or data in the Department's possession, custody or power that was created or received by a current or former member of the Legislative Council or their staff; and
- (2) to produce any documents or data that is the subject of any further compulsory process immediately to the Legislative Council Standing Committee on Procedure and Privileges at the Legislative Council Committee Office, Ground Floor, 18-32 Parliament Place, West Perth, pursuant to the provisions of the Parliamentary Privileges Act 1891 for that Committee to determine whether:
 - (a) its description falls within the lawful scope of any warrant, notice to produce, or other similar power granted to an investigative agency under a written law; and
 - (b) the documents or data is not proceedings in Parliament within the meaning of Article 9 of the *Bill of Rights 1688* or does not otherwise fall within the scope of parliamentary privilege.

Resolution 3 —

That the Legislative Council order the Corruption and Crime Commission to produce to the Clerk of the Legislative Council by Wednesday, 11 September 2019 at 4.00pm, the laptop issued to Mr Phillip Edman by the Department of Premier and Cabinet that was seized from Mr Edman pursuant to a search warrant, on 14 August 2019, and all copies of the data contained on it in the Corruption and Crime Commission's possession.

Resolution 4 —

- (1) That proceedings be commenced and pursued, in the Supreme Court of Western Australia, on behalf of the Legislative Council of Western Australia, challenging the validity of some or all of three notices to produce documents, and one notice to produce information issued by the Corruption and Crime Commission to the Director General, Department of Premier and Cabinet, issued between April and August 2019, and of the conduct of the Commission in issuing those notices;
- (2) That the President of the Legislative Council of Western Australia be authorised to conduct such proceedings in that capacity of behalf of the Legislative Council of Western Australia and to do all things reasonable necessary for, and incidental to, the commencement and pursuit of those proceedings, including to:
 - (a) engage solicitors and counsel to represent the Legislative Council of Western Australia and to act upon their advice with respect to the proceedings in consultation with the Standing Committee on Procedure and Privileges;
 - (b) if considered appropriate, engage separate solicitors and other service providers to search and review the records produced to the Commission in response to the above notices;
 - (c) maintain the confidentiality and legal professional privilege attaching to communication relating to the proposed proceedings;
 - (d) take direction from the Standing Committee on Procedure and Privileges with respect to the conduct of the proceedings and matters related to them;
 - (e) report to the Legislative Council of Western Australia, periodically, and when requested, with respect to the proposed proceedings; and
 - (f) to consult with the Clerk as the Accountable Authority of the Department of the Legislative Council to permit the authorisation of the expenditure of funds necessary and reasonable with respect to any proceedings.



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Your Ref: A774625
SSO Ref: 1570-19
Enquiries: Nicholas Egan | (08) 9264 1871 | n.egan@sso.wa.gov.au

Mr Nigel Pratt
Clerk of the Legislative Council
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

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

Date: 9 September 2019

Privileged and Confidential

Dear Mr Pratt

**SUPREME COURT OF WA ACTION: CIV 2518 OF 2019
DARREN JON FOSTER v CATHERINE ESTHER DOUST**

I refer to the above matter, and in particular to your letter dated 6 September 2019.

I note from your letter that on Thursday, 15 August 2019, the Legislative Council, by Resolution No. 2, rescinded the order the subject of these proceedings. On that basis I further note that you are of the view that there would now appear to be no utility in the proceedings continuing.

Resolution No.2 appears to be underpinned by legal advice from Mr Zelestis QC confirming "... that the Legislative Council does not have the power to order persons, not being members of the Council, to not produce documents" (see Report 56 Standing Committee on Procedure and Privileges: Parliamentary Privilege and Intrusive Powers - Interim Report Judicial Proceedings for Declaration Challenging the Validity of the Order made by Legislative Council on 15 August 2019).

As you will appreciate, the Order the subject of the proceedings not only caused Mr Foster reputational damage but also exposed him to serious legal peril. As I explained in my letter dated 26 August 2019, if Mr Foster complied with the Order then he would be exposed to a contempt by failing to comply with a compulsory process issued by the Corruption and Crime Commission, and if he failed to comply with the Order then he would be exposed to a contempt from the Legislative Council. As you are aware, that irreconcilable paradox left Mr Foster with no alternative but to commence proceedings seeking a declaration that the Order was unlawful. Had Mr Foster not taken that action then it seems that the Legislative Council would have been content for the unlawful Order to remain on foot, and in this regard I point to the fact that the Deputy Chair of the Committee and a majority of the Legislative Council were happy to proceed with passing a motion in circumstances where the Chamber

had been advised by the Honourable Sue Ellery MLC that the motion was not in fact lawful (see Legislative Council Debate on 15 August 2019). I further note that the unlawfulness of the Order was a matter about which I raised grave doubts in my letter to you of 26 August 2019, and yet in your response you still did not concede that the Order was unlawful, but instead purported to defend its validity. Despite the serious negative impacts that the Order were likely to have on Mr Foster, it seems the Committee and the majority of the Legislative Council were prepared to proceed with making the Order in contumelious disregard of Mr Foster's position.

Given these circumstances I note - with some significant surprise - that neither the Committee nor the Legislative Council have sought to explain the basis for the making the Order in the first place, let alone apologise, privately or publicly, to Mr Foster. Given the untenable position into which Mr Foster was forced, and the fact that it would have been entirely avoidable had the Committee or the Legislative Council sought legal advice on the terms of the Order, or even just heeded the comments of the Honourable Sue Ellery MLC, it seems appropriate for an apology to be made. Such an apology could best be managed by a Members Statement. I would therefore be grateful if you could bring this letter to the attention of the President and thereafter confirm that such a statement will be made, the contents of which will be discussed and agreed with Mr Foster beforehand. As far as content is concerned, it would, at the very least, contain an acknowledgement that the Committee and the Legislative Council failed to properly consider the legality of the motion and the Order, and unreservedly apologise for any and all damage caused to Mr Foster by reason of the Order.

I look forward to hearing from you.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'N. Egan', with a stylized flourish extending to the right.

NICHOLAS EGAN
STATE SOLICITOR



Our ref: A776795

10 September 2019

Mr Nicholas Egan
State Solicitor
State Solicitor's Office
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Perth WA 6838

Via email: n.egan@sso.wa.gov.au

PRIVILEGED AND CONFIDENTIAL

Dear Mr Egan,

Supreme Court of WA Action: CIV 2518 of 2019: Darren Jon Foster v Catherine Esther Doust

I refer to your letter dated 9 September 2019.

The Order the subject of the proceedings was made in circumstances which had arisen from notices issued by the Corruption and Crime Commission to Mr Foster, which plainly and impermissibly sought production of records which were the subject of parliamentary privilege, and the subsequent arrangements that were made between Mr Foster, the Commission and your office which resulted in a purported determination of the Legislative Council's privilege over documents being made by your office at the behest of Mr Foster. As you are aware, the Legislative Council has passed a resolution authorising the commencement of proceedings with respect to those matters.

It is not appropriate to address Mr Foster's position only from the perspective of the now rescinded Order, as your letter does. There are much wider significant matters to be considered, but neither is it appropriate to deal with those matters in correspondence at the present time.

There is no remaining justiciable controversy with respect to the proceedings commenced by Mr Foster. Please confirm that they will be discontinued promptly so that no further public resources are wasted on those proceedings.

Yours sincerely

A handwritten signature in blue ink, appearing to read "N. Pratt", with a long horizontal stroke extending to the right.

Mr Nigel Pratt
Clerk of the Legislative Council



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Mr Nigel Pratt
Clerk of the Legislative Council
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

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

Date: 11 September 2019

Privileged and Confidential

Dear Mr Pratt

**SUPREME COURT OF WA ACTION: CIV 2518 OF 2019
DARREN JON FOSTER v CATHERINE ESTHER DOUST**

Thank you for your letter dated 10 September 2019 concerning this matter.

With respect, the circumstances that led to the Committee and the Legislative Council making the Order are irrelevant; those circumstances cannot, on any view, or in any circumstances, justify the Legislative Council acting unlawfully. To submit otherwise, and to suggest that the blame somehow lies with the Corruption and Crime Commission is unbecoming. It is also unbecoming to suggest that Mr Foster's position in the proceedings should not be considered solely from the perspective of the Order; it is the unlawfulness of the Order, and nothing else, that led to the proceedings being commenced, and it seems that it is Mr Zelestis QC's advice (advice that the Legislative Council acted beyond power), and nothing else, that led to the Order's rescission. Accordingly, whilst the Committee and the Legislative Council may well have other complaints about Mr Foster's actions, with respect, they have nothing to do with the lawfulness of the now rescinded Order or indeed the proceedings.

In any event I confirm that Mr Foster is willing to discontinue the proceedings but after receiving confirmation that the President agrees that there will be no order as to costs. I would therefore be grateful if you could discuss this with the President and provide confirmation by way of return.

Should you wish to discuss any of the above, I will make myself available.

Yours sincerely

**NICHOLAS EGAN
STATE SOLICITOR**



Our ref: A777116

11 September 2019

Mr Nicholas Egan
State Solicitor
State Solicitor's Office
GPO Box B83
Perth WA 6838

Via email: n.egan@sso.wa.gov.au

PRIVILEGED AND CONFIDENTIAL

Dear Mr Egan,

Supreme Court of WA Action: CIV 2518 of 2019: Darren Jon Foster v Catherine Esther Doust

I refer to your letter dated 11 September 2019 and your confirmation that Mr Foster is willing to discontinue the proceedings subject to the President agreeing that there will be no order as to costs.

In the interests of ensuring no further public resources are wasted on these proceedings, the President confirms that there will be no order sought as to costs. On this basis, the President will not be filing an appearance in this matter.

Please confirm by 4pm on Thursday, 12 September 2019 that the proceedings have been discontinued.

Yours sincerely

Mr Nigel Pratt
Clerk of the Legislative Council



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

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

Date: 12 September 2019

Dear President

**SUPREME COURT OF WA ACTION: CIV 2518 OF 2019
DARREN JON FOSTER V CATHERINE ESTHER DOUST**

I refer to Mr Stockton's email sent to the Hon Justice Hall's Associate earlier today and **attach** by way of service filed copies of the following documents:

1. Notice of discontinuance; and
2. Plaintiff's minute of proposed orders.

Yours faithfully

**NICHOLAS EGAN
STATE SOLICITOR**

Enc.

IN THE SUPREME COURT OF WESTERN AUSTRALIA
COMMERCIAL AND MANAGED CASES LIST
HELD AT PERTH

CIV 2518 of 2019

B E T W E E N:

DARREN JON FOSTER

Plaintiff

and

CATHERINE ESTHER DOUST

Defendant

PLAINTIFF'S MINUTE OF PROPOSED ORDERS

Date of Document: 12 September 2019

Filed on behalf of: The Plaintiff

Date of Filing: 12 September 2019

Prepared by:

STATE SOLICITOR FOR WESTERN AUSTRALIA
DAVID MALCOLM JUSTICE CENTRE
28 BARRACK STREET
PERTH WA 6000
SOLICITOR FOR THE PLAINTIFF

TELEPHONE: 9264 1888
REF: SSO 3425-19

-
1. The action be discontinued.
 2. There be no order as to costs.



IN THE SUPREME COURT OF WESTERN AUSTRALIA
COMMERCIAL AND MANAGED CASES LIST
HELD AT PERTH

CIV 2518 of 2019

B E T W E E N:

DARREN JON FOSTER

Plaintiff

and

CATHERINE ESTHER DOUST

Defendant

NOTICE OF DISCONTINUANCE

Date of Document: 12 September 2019

Filed on behalf of: The Plaintiff

Date of Filing: 12 September 2019

Prepared by:

STATE SOLICITOR FOR WESTERN AUSTRALIA
DAVID MALCOLM JUSTICE CENTRE
28 BARRACK STREET
PERTH WA 6000
SOLICITOR FOR THE PLAINTIFF

TELEPHONE: 9264 1888
REF: SSO 3425-19

TAKE NOTICE THAT the Plaintiff DARREN JON FOSTER hereby discontinues his
action against the Defendant pursuant to Order 23 rule 2 of the *Rules of the Supreme
Court 1971 (WA)*.

STATE SOLICITOR FOR WESTERN AUSTRALIA
SOLICITOR FOR THE PLAINTIFF



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