

14 November 2013

Thank you for retaining this firm to provide advice to the Ashbygate Trust.

#### Nature of Advice

Advice has been sought by the Ashbygate Trust as to whether there are grounds for a private prosecution, or cause for a prosecution more generally, against anybody arising out of the events surrounding the circumstances of James Ashby commencing legal action against Peter Slipper. In the event no prosecution can be sustained at this time, advice is sought as to whether there is information or investigations that may be carried out that may affect the prospect of a prosecution succeeding against any individual.

This firm has no power to compel any prosecution or investigation to be undertaken in relation to this advice. It can merely highlight the matters that may be considered as part of any contemplated investigation or prosecution.

No part of this advice is to be construed as any commentary or advice on the ongoing litigation before the Federal Court of Australia.

This firm has been provided confidential advice relating to the same issue written by Siobhan Keating, which is dated 28 August 2013. Reference will be made to that advice, given the common areas of advice.

Liability limited by a scheme approved under professional standards legislation

#### Material

This firm has been provided or have read the following material:

- Advice from Siobhan Keating (28 August 2013)
- Letter to Commissioner Negus (AFP) from Graham Perrett MP (19 March 2013)
- Originating Application – James Ashby (20 April 2012)
- Interlocutory Application – James Ashby (18 May 2012)
- Amended Originating Application – James Ashby (21 May 2012)
- Interlocutory Application – Peter Slipper (8 June 2012)
- Affidavit – Catherine Heather Mann (8 June 2012)
- Interlocutory Application – Commonwealth (8 June 2012)
- Affidavit – Siobhan Keating (13 June 2012)
- Interlocutory Application – Commonwealth (13 June 2012)
- Interlocutory Application – Peter Slipper (13 June 2012)
- Interlocutory Application – Commonwealth (13 June 2012)
- Points of Claim – Commonwealth (22 June 2012)
- Points of Claim – Peter Slipper (25 June 2012)
- Amended Points of Claim – Peter Slipper (26 June 2012)
- Interlocutory Application – James Ashby (29 June 2012)
- Interlocutory Application – Steve Lewis (2 July 2012)
- Respondents' Books of Evidence (Volumes 1 and 2)
- Affidavit – Catherin Mann (19 July 2012)
- Interlocutory Application – Peter Slipper (13 August 2012)
- Interlocutory Application – Commonwealth (13 August 2012)
- Interlocutory Application – Peter Slipper (30 August 2012)
- Interlocutory Application – Commonwealth (30 August 2012)
- Applicant's Book of Evidence (Part 1 and 2) (8 October 2012)
- Annexure – telephone messages (2 October 2012)
- Affidavit of Michael Harmer (2 October 2012)
- Interlocutory Application – Peter Slipper (19 December 2012)

#### Summary of Advice

On the material provided to this firm, there is no prospect of a private prosecution succeeding against any individual. Further, based on the material provided, there is no reasonable prospect of a conviction being secured against any individual nominated to be of interest by the Ashbygate Trust.

It may be thought that there is sufficient suspicion to warrant further investigation by the Australian Federal Police (AFP). It is unlikely without the investigative powers of the AFP, it is unlikely any significant new evidence will be found (if it is there to be found). Experience shows the passage of time diminishes the availability of evidence, which may impede further investigations.

While it is open for the Ashbygate Trust to investigate matters itself, a lack of investigative powers may inhibit the collection of information as well as gather evidence that would ultimately be in an admissible form for legal proceedings.

It may be concluded that there was a political element to the actions of a number of individuals. The ethics of such actions and motivations of individuals in their conduct is beyond the scope of this advice. Even taking into account that political element, I do not consider there to be any realistic criminal charge arising on the material provided.

#### Consideration of Relevant Charges

Consideration has been given to the operation of the following charges:

1. Section 70 Crimes Act (Cth)
2. Section 147.1 Criminal Code (Cth)
3. Section 478.1 Criminal Code (Cth)
4. Section 316 Crimes Act (NSW)
5. Section 408C Criminal Code (Qld)
6. Section 433 Criminal Code (Qld)

Each will be considered in turn.

Section 70 Crimes Act (Cth)

The section relevantly reads:

70 Disclosure of information by Commonwealth officers

(1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, shall be guilty of an offence.

...

Penalty: Imprisonment for 2 years.

For this section, it is necessary to prove the following elements beyond a reasonable doubt:

- (1) James Ashby was a Commonwealth officer;
- (2) James Ashby published or communicated a fact or document (copy of an electronic diary);
- (3) The copy of the electronic diary came into possession of James Ashby by virtue of being a Commonwealth officer;
- (4) James Ashby had a duty not to disclose the fact or document.

With respect to the first element, it appears uncontroversial that at the relevant time James Ashby met the definition of 'Commonwealth officer' as that term is defined in s.3 Crimes Act. There is significant evidence from witnesses and documentary evidence to support that conclusion.

There is information that shows a document was published or communicated by James Ashby to Mal Brough and Steve Lewis. It is to be noted that at present I have not seen the source documents for the evidence in the material I have been provided. It would be thought that for any investigation or prosecution, such evidence would be more reliable than the copies or extracts that have been produced.

To prove the third element, evidence would need to be called by the prosecution to establish how the electronic diary came into the possession of James Ashby. Peter Slipper would be an appropriate witness for that task. Provided there was a competent witness to give that evidence, it is anticipated this would be an uncontroversial issue.

The final element requires proof that James Ashby had a duty not to disclose the fact or document. First, there is no evidence that demonstrates the diary was a classified or restricted document, although that is a possible inference. Second, the nature of a diary itemising the attendance of events is suggestive the information is generally going to be otherwise available and disclosed in the public domain, which tends against it being a document where there is a positive duty not to disclose it. Third, given the nature of an office diary, it is likely its contents were regularly disclosed by members of staff with numerous other colleagues, dignitaries and other members of the community.

It is significant that Mr Slipper withdrew the allegation that the conduct by Mr Ashby was unlawful. A prosecution would require positive evidence that there was a duty not to disclose the diary. While it is unknown why Mr Slipper withdrew the allegation of unlawfulness by Mr Ashby, it does have the consequence of creating a gap in the proof on the issue.

Further, for the third element, a possible defence of James Ashby mistakenly believing he had the authority to disclose the contents of the diary would need to be negated by the prosecution. At this point, with the absence of evidence surrounding the use of the diary, an assessment of the viability of this defence cannot be effectively made. One point against such a defence succeeding, it must be noted, is the secretive manner in which the disclosures occurred.

There is a suggestion of a constitutional defence of an implied freedom of political communication. I am unaware of any authority that would provide clear guidance on this point. The basis for the implied freedom of political communication is founded on sections 7, 24, 64 and 128 of the Constitution. The combination of those sections provide for a system of representative and responsible government. By virtue of that structure provided by our Constitution, freedom of communication concerning government and political matters that enables free choice of electors is protected. The test for whether protection in this implied freedom may be applicable can be found in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. There are two questions that form part of the test:

- (1) "does the [impugned] law effectively burden freedom of political communication about government or political matters either in terms, operation or effect?"

(2) "is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government..."

There are sound reasons for the law would not be found to be constitutionally invalid. Government may legitimately require certain matters not to be disclosed for its effective operation. I consider it is strongly arguable that there is no effective burden on political communication by this law. As such, I do not consider this would be an impediment to prosecution.

There is simply not enough evidence to conclude a prosecution for this charge would have any prospect of success against Mr Ashby. It therefore cannot be concluded there is any reasonable basis for a prosecution to be instituted against any other individual on an extended or accessorial basis of criminal liability. Therefore there is no prospect, on the material provided, of any prosecution succeeding against Mal Brough or Steve Lewis. I note the same conclusion was reached by Siobhan Keating.

Any investigation may reveal credible and reliable information about the use and restrictions on the diary, which could affect the advice as to the prospects of a conviction on this charge.

#### Section 147.1 Criminal Code (Cth)

The Commonwealth Criminal Code provides an offence for causing harm to a Commonwealth public official.

The offence provides:

147.1 Causing harm to a Commonwealth public official etc.

(1) A person (the first person) is guilty of an offence if:

- (a) the first person engages in conduct; and
- (b) the first person's conduct causes harm to a public official; and
- (c) the first person intends that his or her conduct cause harm to the official; and
- (d) the harm is caused without the consent of the official; and
- (e) the first person engages in his or her conduct because of:
  - (i) the official's status as a public official; or
  - (ii) any conduct engaged in by the official in the official's capacity as a public official; and
    - the public official is a Commonwealth public official; and
    - if subparagraph (e)(i) applies—the status mentioned in that subparagraph was status as a Commonwealth public official; and
    - if subparagraph (e)(ii) applies—the conduct mentioned in that subparagraph was engaged in by the official in the official's capacity as a Commonwealth public official.

Penalty:

(f) if the official is a Commonwealth judicial officer or a Commonwealth law enforcement officer—imprisonment for 13 years; or

(g) in any other case—imprisonment for 10 years.

Pursuant to s.146.2 Criminal Code (Cth), it is necessary to prove that the harm was substantially caused or contributed to by the conduct of the defendant.

Prior to dealing with the other elements, it is convenient to begin with the element of 'harm'. While Ms Keating in her advice noted the meaning of 'harm', it did not include reference to the meaning of "harm to a person's mental health", which is also defined in s.146.2 Criminal Code (Cth). It provides:

harm to a person's mental health includes significant psychological harm to the person, but does not include a reference to ordinary emotional reactions (for example, distress, grief, fear or anger).

There is no evidence that I have been provided that Mr Slipper suffered 'significant psychological harm'. That is a matter of expert evidence.

On the present evidence the offence cannot be established. Expert evidence that could be used to found a basis for the conclusion that Mr Slipper suffered harm to his mental health, as that is defined, and the conduct of a defendant was a significant contribution.

The relevant 'conduct' to be established for 147(1)(a) Criminal Code (Cth) will need to be particularised on an individual basis for anybody alleged to have engaged in any relevant 'conduct'. Ms Keating referred to the relevant conduct of Mr Brough as his involvement, inferred through documentary evidence, was obtaining the diary of Mr Slipper from Mr Ashby, as well as some other matters. It may be inferred that Mr Brough had been told that there had been questionable use of government entitlements by Mr Slipper. For that reason, on the material provided and the inferences open from it, I do not consider there to be any realistic prospect of that 'conduct' being found to be of the kind where Mr Brough intended that conduct to cause 'harm' (in a relevant sense) to Mr Slipper.

The conduct of Mr Ashby and Ms Doane is more extensive. It may be open to conclude that there was political calculation behind the litigation pursued by Mr Ashby, however the material supports an inference that both had some belief, whether genuine or

misguided, there was a legitimate complaint to be made against Mr Slipper. Given the competing inferences open on the evidence provided to this firm, it cannot be concluded the conduct of Ms Doane or Mr Ashby was 'intended'<sup>3</sup> to cause harm (in a relevant sense) to Mr Slipper.

Steve Lewis is a political journalist and there is no evidence that could provide any legitimate basis for concluding his intention related to anything beyond obtaining information for his professional role.

It is concluded that any attempt to prosecute any person under this section would be misguided unless further evidence came to light that could credibly and reliably give rise to an inference that conduct engaged in by any person occurred with the intention of causing significant psychological harm to Mr Slipper. There is presently no evidence that I am aware of to establish the threshold issue of such harm being suffered by Mr Slipper.

#### Section 478.1 Criminal Code (Cth)

The offence pursuant to s.478 Criminal Code (Cth) relates to unauthorised access to restricted data. It falls within Division 478 – Other computer offences.

I note this is an offence referred to by Graham Perrett MP in his letter to the Commissioner of the Australian Federal Police. It is not an offence that was considered by Siobhan Keating.

Section 478.1 Criminal Code (Cth) relevantly provides:

#### 478.1 Unauthorised access to, or modification of, restricted data

(1) A person is guilty of an offence if:

- (a) the person causes any unauthorised access to, or modification of, restricted data; and
- (b) the person intends to cause the access or modification; and
- (c) the person knows that the access or modification is unauthorised.

Penalty: 2 years imprisonment.

...

(3) In this section:

restricted data means data:

- (a) held in a computer; and
- (b) to which access is restricted by an access control system associated with a function of the computer.

The meaning of unauthorised access, modification or impairment is found in s.476.2 Criminal Code (Cth):

#### 476.2 Meaning of unauthorised access, modification or impairment

(1) In this Part:

- (a) access to data held in a computer; or
  - (b) modification of data held in a computer; or
  - (c) the impairment of electronic communication to or from a computer; or
  - (d) the impairment of the reliability, security or operation of any data held on a computer disk, credit card or other device used to store data by electronic means;
- by a person is unauthorised if the person is not entitled to cause that access, modification or impairment.

(2) Any such access, modification or impairment caused by the person is not unauthorised merely because he or she has an ulterior purpose for causing it.

(3) For the purposes of an offence under this Part, a person causes any such unauthorised access, modification or impairment if the person's conduct substantially contributes to it.

(4) For the purposes of subsection (1), if:

(a) a person causes any access, modification or impairment of a kind mentioned in that subsection; and

(b) the person does so:

- (i) under a warrant issued under the law of the Commonwealth, a State or a Territory; or
  - (ii) under an emergency authorisation given to the person under Part 3 of the Surveillance Devices Act 2004 or under a law of a State or Territory that makes provision to similar effect; or
  - (iii) under a tracking device authorisation given to the person under section 39 of that Act;
- the person is entitled to cause that access, modification or impairment.

There is a restriction on the meaning found in s.476.1(2):

(2) In this Part, a reference to:

- (a) access to data held in a computer; or
  - (b) modification of data held in a computer; or
  - (c) the impairment of electronic communication to or from a computer;
- is limited to such access, modification or impairment caused, whether directly or indirectly, by the execution of a function of a computer.

The use of the word 'causes' does capture a broad range of conduct in the use of a

computer but that must be balanced against the other definitions, particularly s.476.1(2) and 476.2(2). Nevertheless, it is arguable 'causes' would include a person who directs, procures or encourages another person to gain unauthorised access to restricted data.

There is no evidence, however, Mr Ashby did not have authorisation to access the diary.

Given his position, it may be expected he would have authorisation to access it. The definition of restricted data may include an electronic diary. However, there is presently no information that conclusively shows that it is restricted data in this particular case. It may be inferred that that was the case but evidence would need to be obtained to prove that element.

There is therefore insufficient evidence at this point to demonstrate that Mr Ashby did not have authorisation and that the information (diary) was 'restricted data'.

The evidence is sufficient to found an inference that Mal Brough procured or encouraged Mr Ashby to forward him a copy of the diary. That is revealed in electronic communications to and from Mr Brough. However, if it cannot be shown that Mr Ashby was not authorised to access the information, there would appear no offence committed by Mr Brough or Mr Lewis. The accessory liability, on the information presently available, does not have any prospect of succeeding, especially given the restrictions on the offence in the definition of what constitutes 'access'.

Further investigation may reveal information regarding the authorisations held by the staff of Mr Slipper. In particular, it would need to be established that Mr Ashby did not have authorisation to access the diary and that the diary constitutes restricted data.

#### Section 316 Crimes Act (NSW)

Given the Cabcharge allegations arise from New South Wales, there is cause to briefly consider the Crimes Act (NSW). The Crimes Act in New South Wales contains an offence for concealing a serious indictable offence.

The offence reads:

##### 316 Concealing serious indictable offence

(1) If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

(2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.

(3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.

(4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

(5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

The definition of 'serious indictable offence' in s.3 Crimes Act (NSW) means "an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more."

Mr Slipper is charged with Commonwealth offences that carry a maximum penalty 5 years imprisonment. Section 313 Crimes Act (NSW) provides that it is not an element of the offence in s.316 that the accused knew that the offence was a serious indictable offence.

There would be a number of difficulties in proving this charge. First, it is difficult to conclude James Ashby ever held the belief that an offence had been committed. His affidavit, while pointing to a belief, does not go so far as to assert the commission of an offence. While the inference that he had the belief may be drawn, I do not consider on the material that I have been provided to establish that inference to the exclusion of all other inferences. There is also a question as to when any belief would be particularised as arising, which further highlights the deficiency in the evidence in this respect.

With respect to others who had been told about the issue by Mr Ashby, such as Mr Russell QC and Mr Brough, I do not consider there to be any basis to extend any form of criminal liability to them. Mr Brough on the evidence appears to have proffered a possible innocent explanation for the conduct of Mr Slipper.

I consider there to be no prospect of a charge pursuant to s.316 Crimes Act (NSW) being successfully brought against any individual arising out of the allegations relating to the use of Cabcharge vouchers by Mr Slipper. I note Siobhan Keating did not

consider this offence.

Sections 408C and 433 Criminal Code (Qld)

Siobhan Keating considered these two provisions in her advice. Ms Keating did not consider the question of jurisdiction in the offence, nor the fact that there are specific property and dishonesty offences relating to Commonwealth property, which is likely to be the case rather than the personal property of Mr Slipper. The fact that it is Commonwealth property and there are specific offences relating to dishonest dealing with such property would, in all likelihood, render such charges as invalid under the Constitution.

I do not consider there is a charge pursuant to Part 7.3 of of the Criminal Code (Cth) that would have a prospect of succeeding against any individual with respect to the disclosure of the diary extracts, based on the information presently available.

Conclusions

There are a number of individuals who were involved in the lead-up to the litigation commenced by James Ashby. That included politicians, political staffers and political journalists.

There has been significant public interest in this case and whether any further investigation will be undertaken by the Australian Federal Police. Given the gaps that have been identified in the material available to this firm, clearly there is more information that could shed light on whether any criminal offences have been committed by any individual from actions in the lead-up to the litigation commenced by James Ashby. However, on the material provided, it cannot be concluded that either any private prosecution nor a prosecution commenced otherwise would have any reasonable prospect of succeeding. That may change upon further investigation or new evidence being produced. There is good reason to think there is a strong public interest in a full investigation being conducted into this matter by the Australian Federal Police.

Please do not hesitate to contact me should you wish to discuss any aspect of this advice.

Kind regards,