



Your ref. MDH:GKR:BDB:20031553  
Our ref. 12026651

26 September 2012

Mr Michael Harmer  
Harmers Workplace Lawyers

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**WITHOUT PREJUDICE SAVE AS TO COSTS**

By email

Dear Mr Harmer

**James Ashby v Commonwealth & Anor (NSD 580/2012)**

1. We refer to the without prejudice discussions held between lawyers for the applicant and the first respondent on Friday 21 September 2012.
2. We note that in addition to the terms previously offered by the Commonwealth in its letter of 4 September 2012, the Commonwealth also offered a sum of \$15,000. We note that you elected not to put a counter offer of any amount, although you did indicate various terms which would need to be addressed if the matter were to resolve without a final determination by the Court.
3. Given the impasse, we are instructed to make the following offer of settlement. We set out briefly the basis on which we have determined the amount of the offer.

**Settlement offer**

4. The first respondent is willing to resolve these proceedings if the first respondent and the applicant agree to the following:
  - a) The first respondent will formally discontinue its application for summary judgment;
  - b) The applicant will discontinue the Federal Court proceedings against the first respondent;
  - c) The applicant and the first respondent will agree not to make applications for costs
  - d) The Commonwealth will pay the applicant \$50,000 in settlement of his claim against the first respondent;
  - e) The parties provide appropriate releases to each other from all claims arising out of Mr Ashby's employment with the Speaker including claims made to the Human Rights Commission and Fair Work Australia (with the exception of

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Senate Legal and Constitutional Affairs Committee  
Supplementary Budget Estimates 2012, 15 & 16 October 2012

Tabled Document 4  
By: Senator Brandis

Date: 16/10/12

claims for worker's compensation under the *Safety, Rehabilitation and Compensation Act 1988* which would still be available to Mr Ashby);

5. The Commonwealth will implement an improved education program for staff employed under the *Members of Parliament (Staff) Act 1984* concerning the process by which issues of bullying and harassment can be brought to its attention and remedied, and offer specific training for members and senators in relation to issues of sexual harassment.

#### Reasons for Settlement Sum

6. At present your client remains employed by the Commonwealth. His employment with the Commonwealth will terminate if Mr Slipper ceases to hold the office of Speaker (section 16(2) of the *Members of Parliament (Staff) Act 1984*). This event will occur if Mr Slipper resigns as Speaker, is replaced by another, ceases to be a member of Parliament or is not re-elected Speaker after the next Federal election. One or other of those events is likely to occur.
7. Accordingly, the longest period your client can reasonably expect to remain employed with the Commonwealth is some time toward the end of 2013.
8. Our client is not aware of any basis on which it can be said that the conduct alleged by your client has led to a reduction in his earning prospects for the period after his employment is terminated by operation of law.
9. Consequently, in our assessment there is minimal or no loss of income which has been suffered, let alone suffered because of the contravention of the *Fair Work Act* alleged. In those circumstances we have allowed only a small sum for loss of income in our offer and cannot see that a court could take a different view.
10. In relation to other economic loss, the only substantiated loss is the treatment proposed by Associate Professor Phillips. The treatment regime is somewhat open ended, but the specifically quantifiable treatment totals around \$16,000. Allowing for a few additional years of treatment and interest on the past economic loss, an amount of \$20,000 seems to be more than fair.
11. We note that your client continues to complain to you of blood in his urine. Given that Associate Professor Phillips has expressed the view that this condition "is likely to have a physical origin", there appears to be no basis at all for linking this condition to the conduct alleged in the proceedings even on the applicant's own case.
12. This then leaves the question of general damages and civil penalties which the Court may order.
13. Amounts for distress, hurt and humiliation have been awarded in the past, and in a very serious case where an employee had his employment terminated and was forced to leave Australia, the amount of \$7500 was awarded.

14. In relation to civil penalties, in the same case where the conduct was deliberate and undertaken in disregard of the *Fair Work Act*, a civil penalty of \$10,000 was imposed.
15. Accordingly, on a reasoned assessment of your client's case, the most he can expect to recover if the matter proceeds to a judgment in his favour is in the order of \$37,500. In order to avoid further costs, the first respondent is willing to pay \$50,000, a sum which exceeds any reasonable calculation of your client's loss based on decided cases. It does so on the basis that the costs of continuing with this proceeding exceed the amount in contest by such an enormous margin that our client is willing to pay a small premium for early resolution and in recognition of the fact that the matters alleged may have resulted in some small amount of future economic loss.
16. The amount offered does not in any way discount for the likelihood that your client will not succeed. In our assessment there are significant problems in fastening primary liability on the Commonwealth given the nature of the relationship between the Commonwealth and the Speaker and the fact that the acts alleged were not authorised in any way by the Commonwealth. However, 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 a worst case scenario analysis.
17. The offer is open until close of business on Friday 28 September 2012.

Yours sincerely

**Damien O'Donovan**  
Senior General Counsel

cc Mr Peter Slipper