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The Parliament of the Commonwealth of Australia

# **Report concerning legal action in the Federal Court of Australia and possible issues of parliamentary privilege**

House of Representatives  
Committee of Privileges and Members' Interests

October 2021  
Canberra

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## **Membership of the Committee**

**Chair** Mr Russell Broadbent MP

**Deputy Chair** Mr Patrick Gorman MP

**Members** Hon Kevin Andrews MP

Hon Anthony Byrne MP (to 18 October 2021)

Hon Damian Drum MP

Hon Joel Fitzgibbon MP (nominee of the Deputy Leader of the Opposition)

Mr Ian Goodenough MP

Mr Julian Leeser MP (nominee of the Leader of the House)

Ms Joanne Ryan MP (from 18 October 2021)

Hon Warren Snowdon MP

Ms Anika Wells MP

Mr Trent Zimmerman MP

## **Committee Secretariat**

<b>Secretary</b>	Mr Peter Banson
<b>Research Officer</b>	Ms Peggy Danaee
<b>Administrative Officer</b>	Ms Debbie Hardie



## **Terms of reference**

That the following matter be referred to the Committee of Privileges and Members' Interests:

Whether the legal action in the Federal Court of Australia taken by the Registered Clubs Association of New South Wales against Mr Troy Stolz raises issues of parliamentary privilege or contempt such that the House should formally claim privilege and intervene in the court proceedings to assert the protection of parliamentary privilege.



## List of recommendations

### Recommendation 1

The Committee recommends that the House agree to a motion in the following terms –

That the House:

- (1) notes the legal action taken in the Federal Court of Australia by ClubsNSW against Mr Troy Stolz, known as *Registered Clubs Association of New South Wales v Stolz*;
- (2) notes the report of the Standing Committee of Privileges and Members' Interests on its inquiry into whether the legal action raises issues of parliamentary privilege or contempt such that the House should formally claim privilege and intervene in the court proceedings to assert the protection of parliamentary privilege;
- (3) considers that email communications relating to ClubsNSW between the office of the Member for Clark and Mr Stolz, between 17 December 2019 and 1 December 2020, are likely to fall within the definition of 'proceedings of Parliament' under subsection 16(2) of the *Parliamentary Privileges Act 1987* (the Act);
- (4) notes the restrictions placed by subsection 16(3) of the Act on the treatment of proceedings in Parliament;
- (5) acknowledges that interpretation of the Act, and therefore determination of the application of parliamentary privilege in court proceedings, is a matter for the courts; and
- (6) authorises the Speaker to take steps to ensure that the interests of the House are represented in this matter before the courts, such that parliamentary proceedings are appropriately protected as provided by the Act.



## Reference to the committee

- 1.1 Under standing order 51, a Member may raise a matter of privilege in the House. The Speaker, either immediately or after reserving the matter for further consideration, may give precedence to a motion to refer the matter to the Committee of Privileges and Members' Interests. The Speaker may do so if satisfied that the matter has been raised at the earliest opportunity and a prima facie case of contempt or breach of privilege has been made out.
- 1.2 The subject of this reference was raised in the House, as a matter of privilege, by the Member for Clark, Mr Andrew Wilkie MP, on 15 June 2021 (a copy of the transcript is at Appendix A). Mr Wilkie referred to an interlocutory judgment of the Federal Court of Australia made on 1 June 2021 in an action brought by the Registered Clubs Association of New South Wales (ClubsNSW) against Mr Troy Stolz. He stated that the judgment granted leave to ClubsNSW to obtain correspondence between Mr Stolz and the member's office, including emails, text messages and documents.
- 1.3 Mr Wilkie stated that these materials had been relied upon by him to speak in the House on 13 February 2020, and thereby there was a direct link between the materials covered by the court decision and the member's contributions in parliamentary proceedings. Mr Wilkie asked the Speaker to allow precedence to a motion to refer to the Committee of Privileges and Members' Interests the question of whether the parliament should intervene to assert the protection of parliamentary privilege in the proceedings before the court.

- 1.4 On 22 June 2021 the Speaker responded on the matter (a copy of transcript is at Appendix B). The Speaker noted that section 16 of the *Parliamentary Privileges Act 1987* (the Act) provides protections for proceedings in parliament, which means all words spoken and acts done in the course of, or for the purposes of or incidental to the business of the House. The Speaker acknowledged that the courts have a role in interpreting the Act, including the scope of the term ‘for the purposes of, or incidental to the transacting of the business of the House’.
- 1.5 The Speaker stated that Mr Wilkie had not presented detailed information which might lead him to be satisfied that there was prima facie evidence of a contempt or breach of privilege. However, the Speaker further indicated that the House would benefit from the advice of the Committee of Privileges and Members’ Interests on the matter, and gave precedence for a motion to be moved to refer the matter to the committee.
- 1.6 Mr Wilkie subsequently moved the following motion, which was agreed to by the House:

That the following matter be referred to the Committee of Privileges and Members’ Interests:

Whether the legal action in the Federal Court of Australia taken by the Registered Clubs Association of New South Wales against Mr Troy Stolz raises issues of parliamentary privilege or contempt such that the House should formally claim privilege and intervene in the court proceedings to assert the protection of parliamentary privilege.

## **Conduct of inquiry**

- 1.7 Having received the reference from the House, the committee wrote to Mr Wilkie, inviting a written submission from him. The committee received and considered Mr Wilkie’s submission and then sought and received additional material from him. Correspondence was also received on this matter from ClubsNSW.

- 1.8 The committee also considered the originating application in ClubsNSW's suit against Mr Stolz and two affidavits in the matter of *Registered Clubs Association of New South Wales v Stolz*:
- Affidavit filed by the Applicant on 7 April 2020
  - Affidavit filed by the Applicant on 14 July 2021 (excluding the confidential exhibit).<sup>1</sup>
- 1.9 In conducting its inquiry, the committee received legal advice from the Australian Government Solicitor, and also had reference to the interlocutory judgment of Justice Yates in *Registered Clubs Association of New South Wales v Stolz* [2021] FCA 576.

## Relevant law of parliamentary privilege

- 1.10 Parliamentary privilege encompasses the special legal rights which apply to each House of Parliament, its committees and its members. The powers and protections are in place to enable the Parliament to carry out its functions properly, including debating matters of importance freely, discussing grievances, and conducting investigations effectively, without interference from government, the courts or others.
- 1.11 The special rights and immunities of parliamentary privilege are not the prerogative of members in their personal capacities. They apply to members insofar as they are intended to allow members to carry out their responsibilities to the House and their constituents without obstruction or fear of prosecution.
- 1.12 The law of parliamentary privilege is relevant in relation to documents used by members in making their contributions to parliamentary proceedings, as some of these documents may enjoy the protection of parliamentary privilege. If certain documents are covered by parliamentary privilege there are restrictions on legal action that could be taken in relation to them. There also could be restrictions on the use of those documents in any legal proceedings.
- 1.13 In order for the documents to be covered by parliamentary privilege, they must fall within the definition of 'proceedings in Parliament' as provided in the *Parliamentary Privileges Act 1987*:

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<sup>1</sup> *Registered Clubs Association of New South Wales v Stolz* (Federal Court of Australia, NSD405/2020, commenced 7 April 2020).

## 16 Parliamentary privilege in court proceedings

...

- (2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, *proceedings in Parliament* means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
- (a) the giving of evidence before a House or a committee, and evidence so given;
  - (b) the presentation or submission of a document to a House or a committee;
  - (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
  - (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

1.14 If a member's documents are so covered this is not a prohibition on their disclosure or production in courts or tribunals, rather there are strict limits on the use that can be made of them in a court or tribunal. The protection to be given to 'proceedings in Parliament' is defined as follows:

## 16 Parliamentary privilege in court proceedings

...

- (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
  - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
  - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

## Case law

- 1.15 While section 16 of the Act provides some clarity in relation to the term ‘proceedings in Parliament’, the scope of the definition, particularly the expression ‘for the purposes of or incidental to’ the transacting of the business of a House or a committee, has not been determined.
- 1.16 The question of whether a document is likely to attract parliamentary privilege is clearer in some cases than in others. As indicated previously by this committee, documents that have been the subject of debate or a question in the House would seem more clearly to attract the protection of parliamentary privilege.<sup>2</sup> On other occasions it may be less clear whether material might be regarded as being ‘for the purposes of or incidental to’ business of a House or a committee. Each individual set of circumstances therefore requires careful consideration.
- 1.17 Case law provides some additional guidance on the definition of ‘proceedings in Parliament’. Of most relevance to the present matter is the case of *O’Chee v Rowley* [1997] QCA 401. The case was an appeal from a Supreme Court order for a senator to produce certain documents. The documents were sought in relation to a defamation action brought against a senator following statements by the senator in a radio interview. The senator claimed that ‘such documents were created, prepared, brought into existence or came into my possession for the purposes of or incidental to the transacting of the business of the Senate of the Parliament of Australia’.
- 1.18 The Queensland Court of Appeal held that the documents did not need to be produced, although did not decide the specific claim in relation to parliamentary privilege. A majority of the Court accepted that, in the words of Fitzgerald P, ‘Creating, preparing, bringing into existence or coming into possession of a document is an “act” within the meaning of sub-s. 16(2) of the Parliamentary Privileges Act’.
- 1.19 Of relevance to the present matter is the Court’s consideration of ‘letters sent by or documents received [by Senator O’Chee] from other persons or sources’.<sup>3</sup> About these documents, McPherson JA stated:

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2 Standing Committee of Privileges and Members’ Interests, *Claim of parliamentary privilege by a Member in relation to material seized under a search warrant*, House of Representatives, November 2016, Canberra.

3 *O’Chee v Rowley* [1997] QCA 401, 12 (McPherson JA).

Generally, it seems to me that if documents like these came into the possession of Senator O’Chee and he retained them with a view to using them, or the information they contain, for the purpose of Senate questions or debate on a particular topic, then it can be fairly said that his procuring, obtaining or retaining possession of them were “acts done ... For purposes of or incidental to the transacting of the business” of that House. Although “acts done” is not specially apt to describe what happens when a possibly unsolicited document arrives through the mail or by other forms of communication, a member who became aware that the document has arrived and elects to keep it for purposes of transacting business of a House, may properly be said to have done an “act” or “acts” for purposes of, or incidental to, the transacting of that business.<sup>4</sup>

1.20 In this instance, this includes:

- the provision of documents to a member, on the understanding that those documents would be used by the member in connection with the member’s participation in proceedings of the House, and
- action taken by a member or someone acting on his or her behalf, which might include the receipt, retention and use of those documents for the purposes of parliamentary proceedings.

1.21 Broadly speaking, if documents in the possession of a member are used in some way to transact the business of a House or a committee, then parliamentary privilege would attach.

## **Key considerations**

1.22 Having carefully assessed the evidence available to it, the committee considers that the key facts and issues in this matter are as follows.

1.23 As Mr Wilkie confirmed in his submission to the committee, Mr Stolz, a former employee of ClubsNSW, was in regular contact with a staff member of Mr Wilkie’s from December 2019.

1.24 Mr Stolz provided Mr Wilkie’s office with a range of documents, including documents obtained in connection with his employment with ClubsNSW. Mr Wilkie asserts that Mr Stolz provided information in the

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4 *O’Chee v Rowley* [1997] QCA 401, 13 (McPherson JA).

knowledge that Mr Wilkie could use the information in parliament, with a view to protecting the Australian community from money laundering. Mr Wilkie stated that the only purpose of the communications between his office and Mr Stolz was to further the transacting of the business of the House.

- 1.25 On 13 February 2020 Mr Wilkie, in a statement in the House, quoted from and referred to documents provided to him by Mr Stolz, including a ClubsNSW board paper. Mr Wilkie sought, but was not granted, leave to present a copy of the board paper in the House.<sup>5</sup> Later that day, the *Sydney Morning Herald* carried an online report on the issue and referred to the board paper.<sup>6</sup>
- 1.26 ClubsNSW subsequently initiated legal proceedings against Mr Stolz, alleging that he had misused confidential information in breach of section 183 of the Corporations Act. An affidavit filed by ClubsNSW on 7 April 2020 referred to Mr Stolz as the source of the board paper quoted from by Mr Wilkie on 13 February. The affidavit also referred to several media outlets having reported on the contents of the board paper.
- 1.27 On 1 June 2021 an interlocutory judgment, the basis of the matter referred to the committee, granted leave to ClubsNSW to obtain a range of documents from Mr Stolz, including items of correspondence between Mr Stolz and Mr Wilkie's office.
- 1.28 In the court proceedings, Mr Stolz objected to the production of certain documents on the basis of parliamentary privilege, including the emails to Mr Wilkie, but subsequently withdrew the objection.
- 1.29 Two categories of documents referred to by McPherson JA in the case of *O'Chee v Rowley* are of particular relevance to the committee's present inquiry. According to the reference material consulted by the committee and the submissions made to this inquiry, the documents Mr Stolz provided to Mr Wilkie's office could be characterised as documents which came into a member's possession, and documents (either solicited or unsolicited) which a member elects to keep for the purposes of transacting the business of a House.

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5 House of Representatives, *Debates*, 13 February 2020, p. 1205.

6 O'Malley N, Cormack L, Gladstone N, 'NSW clubs breaking money laundering and terrorism finance laws', *Sydney Morning Herald*, 13 February 2020, 7.37 pm, <https://www.smh.com.au/national/nsw/nsw-clubs-breaking-money-laundering-and-terrorism-finance-laws-20200213-p540ms.html> (accessed 21 October 2021).

## Threshold issue

- 1.30 A threshold issue in considering whether documents fall within the definition of ‘proceedings in Parliament’ is whether an act has been done in relation to the documents ‘in the course of, or for purposes of or incidental to’ the transacting of the business of a House or committee.
- 1.31 In determining whether the documents referred to by Mr Wilkie fall within this definition, the committee first considered whether:
- the documents were provided to the member in the knowledge that they would be used by the member in parliamentary proceedings, and
  - whether an action was taken by or on behalf of the member, such as the receipt, retention and use of those documents for the purposes of parliamentary proceedings.
- 1.32 Having regard to the judgment in the case of *O’Chee v Rowley*, the committee considered it pertinent to confirm that the documents in question had been provided to Mr Wilkie, either directly or through his staff member, and were retained to use in the Parliament. The committee was of the view that these facts would be necessary for determining whether the documents in question would meet the criteria established by the Queensland Court of Appeal.
- 1.33 At the committee’s request, Mr Wilkie confirmed that the documents given to him by Mr Stolz were provided for the purpose of or incidental to the transacting of his business of as a Member of the House of Representatives.

## Findings

- 1.34 On the evidence available to it, the committee is satisfied that, as the documents were provided to Mr Wilkie, either directly or through his staff member, and were retained by Mr Wilkie to use in the Parliament, the provision of the documents is likely to constitute an act done in the course of, or for purposes of or incidental to, the transacting of the business of the House, under subsection 16(2) of the *Parliamentary Privileges Act 1987*. In reaching this conclusion, the committee acknowledges that the question of law is ultimately for the courts to decide.
- 1.35 The committee also acknowledges that it does not have knowledge of the full range of documents referred to in the interlocutory judgment, and



accepts that parliamentary privilege may attach only to a subset of the documents.

- 1.36 As noted earlier, if a member's documents are covered by parliamentary privilege, this does not prohibit their disclosure or production in a court or tribunal, rather it places limits on the use that can be made of the documents in such proceedings. The protections are set out in section 16(3) of the Act and, as with all aspects of the Act, are subject to interpretation by the courts.
- 1.37 Notwithstanding these considerations, the committee is satisfied that parliamentary privilege is likely to attach to some of the documents in question. Further, the committee is of the view that the legal action raises issues such that the House should intervene in the court proceedings. The committee considers that the most appropriate course of action is for the Speaker, as the representative of the House, to take steps to ensure that the interests of the House are represented in this matter before the courts, such that parliamentary proceedings are appropriately protected as provided by the Act.

**Recommendation 1**

The Committee recommends that the House agree to a motion in the following terms –

That the House:

- (1) notes the legal action taken in the Federal Court of Australia by ClubsNSW against Mr Troy Stolz, known as *Registered Clubs Association of New South Wales v Stolz*;
- (2) notes the report of the Standing Committee of Privileges and Members' Interests on its inquiry into whether the legal action raises issues of parliamentary privilege or contempt such that the House should formally claim privilege and intervene in the court proceedings to assert the protection of parliamentary privilege;
- (3) considers that email communications relating to ClubsNSW between the office of the Member for Clark and Mr Stolz, between 17 December 2019 and 1 December 2020, are likely to fall within the definition of 'proceedings of Parliament' under subsection 16(2) of the *Parliamentary Privileges Act 1987* (the Act);
- (4) notes the restrictions placed by subsection 16(3) of the Act on the treatment of proceedings in Parliament;
- (5) acknowledges that interpretation of the Act, and therefore determination of the application of parliamentary privilege in court proceedings, is a matter for the courts; and
- (6) authorises the Speaker to take steps to ensure that the interests of the House are represented in this matter before the courts, such that parliamentary proceedings are appropriately protected as provided by the Act.



**Appendix A: Matter of privilege raised by  
the Member for Clark**

*Tuesday, 15 June 2021*

**The SPEAKER (Hon. Tony Smith)** took the chair at 12:00, made an acknowledgement of country and read prayers.

### **PRIVILEGE**

**Mr WILKIE (Clark)** (12:01): I wish to raise a matter of privilege under standing order 51. The matter concerns an interlocutory judgement made on 1 June 2021 by Justice Yates of the Federal Court of Australia in the case of ClubsNSW versus Stolz. In essence, the judgement granted leave to ClubsNSW to obtain all items of correspondence between Mr Stolz and my office, including emails, text messages and documents. The background is that Mr Stolz contacted my office as a whistleblower informing me of widespread noncompliance by member clubs of ClubsNSW with anti-money laundering laws. I subsequently ventilated the matter in the House on 13 February 2020, including reference to a ClubsNSW board memorandum explicitly detailing this noncompliance. ClubsNSW is now suing Mr Stolz for breaching confidentiality obligations including in relation to his communication and provision of documents to me. In other words, the interlocutory judgement by Justice Yates means that ClubsNSW can use the correspondence between my office and Mr Stolz in their suit against Mr Stolz, correspondence that contains other sensitive and confidential information including the names of other actual and potential whistleblowers.

Mr Stolz did initially seek to raise privilege in these proceedings, but it is my understanding that, during a directions hearing, Justice Yates indicated it was improper for someone other than parliament to assert privilege. Whether that is the correct interpretation of the law is another matter but it means, for present purposes, that if we don't act no-one will, and parliamentary privilege will be eroded.

It is also my understanding that entirely irrelevant to the House is whether or not Mr Stolz shared information with other people and whether or not ClubsNSW pursues that matter, because the substantive issue before us here is the unbroken chain between Mr Stolz's approach to me as an MP and me doing my job and standing up in the House revealing his concerns. I submit that in the circumstances there's a prima facie case that section 16 of the Parliamentary Privileges Act precludes ClubsNSW from using the correspondence between my office and Mr Stolz. Indeed, that much is evidenced by section 16(3) of the Parliamentary Privileges Act 1987, which provides 'it is not lawful for evidence to be tendered or received ... concerning proceedings in Parliament'. Moreover, proceedings in parliament are defined broadly in section 16(2), to include 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'.

It is obviously important that the House protects itself against all acts or omissions which obstruct or impede the House in the performance of its functions, which is why I ask you to consider giving precedence to a motion to refer to the Committee of Privileges and Members' Interests whether the parliament should intervene in this case to protect privilege. I thank you for your consideration of this matter, Mr Speaker.

**The SPEAKER** (12:04): I thank the member for Clark and I will consider the matter in the normal way.



## **Appendix B: Response by Speaker and reference to committee**

## PRIVILEGE

**The SPEAKER** (15:18): Last Tuesday the honourable member for Clark raised a matter of privilege in connection with a recent interlocutory judgement of the Federal Court of Australia in an action brought by the Registered Clubs Association of New South Wales against Mr Troy Stolz. The basis of the member's concern is that the judgement granted leave to ClubsNSW to obtain correspondence between Mr Stolz and the member's office, including emails, text messages and documents. The member for Clark stated that these materials had been relied upon by him to speak in the House of Representatives chamber on 13 February 2020, and thereby there was a direct link between the materials covered by the court decision and the member's contributions in parliamentary proceedings. The member has urged that the parliament intervene to assert the protection of parliamentary privilege in the proceedings before the court.

Section 16 of the Parliamentary Privileges Act provides protections for proceedings in parliament, which means all words spoken and acts done in the course of, or for the purposes of or incidental to the transacting of the business of the House. It is acknowledged that the courts have a role in interpreting what is included in proceedings in the parliament—in particular, the scope of the term 'for the purposes of, or incidental to the transacting of the business of the House'.

In the present case, the honourable member for Clark has not presented detailed information which might lead me to be satisfied there is prima facie evidence of a contempt or a breach of privilege. Nevertheless, I am willing to give precedence to a motion for a matter concerning privilege or contempt in relation to the circumstances raised by the member to be referred to the Standing Committee of Privileges and Members' Interests. In my opinion, the House would benefit from the advice of the committee on this matter.

## COMMITTEES

### Privileges and Members' Interests Committee

#### Reference

**Mr WILKIE** (Clark) (15:20): Mr Speaker, I thank you for your consideration of this matter, and I acknowledge that there has been a lot of consideration over a lot of time. As a consequence, and by leave, I move:

That the following matter be referred to the Committee of Privileges and Members' Interests:

Whether the legal action in the Federal Court of Australia taken by the Registered Clubs Association of New South Wales against Mr Troy Stolz raises issues of parliamentary privilege or contempt such that the House should formally claim privilege and intervene in the court proceedings to assert the protection of parliamentary privilege.

Question agreed to.