

Legal Services **COMMISSIONER**

Your ref:

Our ref: COM-2012-1380
Cara O'Shanassy

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13 March 2013

Private and Confidential

Mr Peter Mericka
Lawyers Real Estate Pty Ltd
Shop 6, 3-5 Hewmart Arcade
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CROYDON VIC 3136

By email: PeterMericka@lawyersrealestate.com.au

Dear Mr Mericka

Own-motion investigation pursuant to section 4.4.8 of the *Legal Profession Act 2004 (Vic)* ("the Act")

I refer to your email of 20 February 2013 received by my office at approximately 11.42 am.

In that email letter, you raise three issues:

- A. a request that I suspend my investigation indefinitely, or pending the outcome of other (unspecified) investigations;
- B. a suggestion that I should investigate the behaviour of Dr Noone and Mr Usher as background to your letter to the Chief Justice; and
- C. a request that I identify the basis for my reason to believe that the conduct identified in my letter of 16 November 2012 may amount to unsatisfactory professional conduct or professional misconduct for the purposes of section 4.4.8 of the Act.

I respond to each matter in turn.

1. Request to suspend my investigation

I have carefully considered your request that I suspend my investigation, whether temporarily or indefinitely.

In doing so, I have reviewed all of the material presently available to me, which includes your 28 page detailed "working draft" email to Ms O'Shanassy of 18 February 2013, and your subsequent letter to the Office of the Premier - copied to the Attorney General, Leader of the Opposition, Mr Pakula MLC and to me - of 19 February 2013.

I do not see that there is presently any reason for me to suspend my investigation into your conduct.

I am confident that the investigation will be conducted impartially, and in accordance with the provisions of the Act. Whilst I understand that you may not share this view, my investigation will nevertheless proceed.

2. **Dr Noone and Mr Ussher**

I understand that you consider that the conduct of Dr Noone and Mr Ussher warrants specific investigation by me.

I will carefully consider all the materials submitted by you in relation to Dr Noone and Mr Ussher to the extent that they bear upon my investigation into your conduct.

3. **Jurisdiction**

The Legal Services Commissioner is given jurisdiction under Chapter 4 of the Act to investigate the conduct of Australian legal practitioners and Australian lawyers (defined in section 1.2.1 of the Act). More specifically, pursuant to section 4.4.8 of the Act, the Commissioner may:

...investigate the conduct of an Australian legal practitioner if the Commissioner has reason to believe that the conduct may amount to unsatisfactory professional conduct or professional misconduct, even though no complaint has been made about the conduct or a complaint about the conduct has been withdrawn'.

In this regard, I refer you to my letter dated 16 November 2012 and to the email from Ms O'Shanassy to you of 29 January 2013, where the basis and scope of my investigation was outlined.

It is not my intention to enter into protracted debate with you in relation to the reasons for commencing my investigation pursuant to section 4.4.8 of the Act. However, the content of your email to Ms O'Shanassy of 20 February 2013 suggests that you have a mistaken view of both the exercise that I am undertaking, and my legal basis for doing so. To that extent, I write to clarify the position for your benefit.

I confirm that the conduct that I am investigating arises out of the fact that you wrote directly to the Chief Justice of the Supreme Court on or about 29 May 2012 to make a "formal complaint" against Justice Sifris, directly alleging actual bias, "incompetence", and the "laundering" by his Honour of corrupt conduct in the Court.

Those allegations made by you against a judicial officer were allegations of the highest gravity, a matter which must have been apparent to you at the time that the letter was written by you. Notwithstanding that:

- (a) the matters set out in the substance of your letter did not set out any ground or proper factual or legal basis for your bald assertions that:
 - (i) his Honour was biased;
 - (ii) his Honour was incompetent;
 - (iii) his Honour had "allow[ed] his Court to be used for the purpose of "laundering" corrupt conduct";
 - (iv) you believed that his Honour was "fully aware" of certain background matters that you considered relevant, and had "deliberately limited his

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involvement" in such a way as to merely rubber stamp the orders sought by the Plaintiff, the Director of Consumer Affairs;

- (b) the attachments to your 29 May 2012 letter did not support or evidence any of the assertions made by you in respect of his Honour's conduct summarised in paragraphs (a)(i)-(iv) above; and
- (c) the written text of his Honour's judgment (specifically cited in your letter to the Chief Justice) does not, on its face, support or evidence any of the assertions made by you in respect of his Honour's conduct summarised in paragraphs (a)(i)-(iv) above.

For the avoidance of doubt, whether or not the Chief Justice considered there to be merit in your complaint is not a matter that founds my jurisdiction. My concern is not whether or not the allegations made by you were untrue; rather, I am concerned with the manner in which you, an Australian lawyer and legal practitioner within the meaning of the Act at the relevant time, put these most serious allegations to the Chief Justice. In this regard, it matters not whether at that time you were acting (as you suggest) in your capacity as a private citizen, or whether you were acting on your own behalf in relation to the foreshadowed hearing of the contempt application.

Further, I note that the definitions of professional misconduct and unsatisfactory professional conduct set out in the Act are not exhaustive.

In particular, the definition of professional misconduct in section 4.4.3(1) of the Act is an inclusive definition, and preserves the traditional concept of "common law misconduct". Common law misconduct has been understood for many years as conduct of a legal practitioner that would reasonably be regarded by other legal practitioners of good repute and competence as disgraceful and dishonourable. I am concerned that your conduct in sending the letter to the Chief Justice in the manner described above may indeed be conduct that other legal practitioners of good repute and competency would consider dishonourable and disgraceful. It was for this reason that I commenced my investigation pursuant to section 4.4.8 of the Act.

Finally, I note that you appear to have misunderstood the effect of section 4.4.3(1)(b) of the Act, which generally concerns conduct occurring either in connection with legal practice or otherwise that would justify a finding that a legal practitioner is not a fit and proper person to engage in legal practice. Although section 4.4.3(2) provides that regard may be had to the suitability matters relevant to an application for admission or the grant or renewal of a practising certificate, the critical question for determination is whether the conduct being investigated is such that it would justify a finding that the legal practitioner is not *at that time* a fit and proper person to engage in (or to *continue to engage in*) legal practice. It also is possible that your conduct in sending a letter to the Chief Justice in the manner described above would justify such a finding.

Yours sincerely



R. O. A.
Delegate of the
Legal Services Commissioner