

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 10/08/2022 11:28:07 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)  
File Number: NSD912/2020  
File Title: CLIVE FREDERICK PALMER v MARK MCGOWAN  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 10/08/2022 11:38:43 AM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 59  
Rule 29.02(1)

### Affidavit

Federal Court of Australia  
District Registry: New South Wales  
Division: General

No. NSD 912 of 2020

**Clive Frederick Palmer**

Applicant/Cross-Respondent

**Mark McGowan**

Respondent/Cross-Claimant

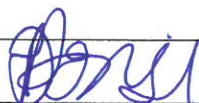
**Affidavit of:** Timothy James Donisi  
**Address:** 250 St Georges Terrace, Perth, WA 6000  
**Occupation:** Solicitor  
**Date:** 10 August 2022

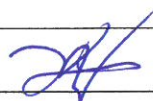
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I, **Timothy James Donisi**, care of Clayton Utz, Level 27, QV1 Building, 250 St Georges Terrace, Perth in the State of Western Australia, Solicitor, affirm and say as follows:

- I am a Special Counsel at Clayton Utz, the solicitors for the Respondent and Cross-Claimant in this matter. I am one of the lawyers with day to day conduct of this matter under the supervision of Nick Cooper, Partner at Clayton Utz.
- Unless otherwise stated, the facts contained in this affidavit are within my own knowledge and are true.

  
Deponent

  
Witness

**Filed on behalf of:** The respondent

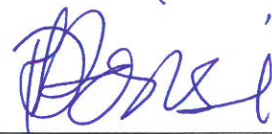
Prepared by: Nick Cooper  
Law firm: Clayton Utz

**Address for service:**  
Level 27 QV.1  
250 St Georges Terrace  
Perth WA 6000

**Contact details:**  
Tel: (08) 9426 8000  
Fax: (08) 9481 3095  
Contact: Bryony Dewar-Leahy  
Email: bdewarleahy@claytonutz.com  
Ref: 14101/17189/81011768

3. I affirm this affidavit in relation to the Respondent/Cross-Claimant's submissions on costs of the proceeding.
4. At around 10.00am (WST) on 20 December 2021, I was copied into an email from Mr Cooper to Mr Michael Sophocles, the solicitor for the Applicant/Cross-Respondent, attaching a letter. Annexed hereto and marked "TJD-1" is a copy of Mr Cooper's email and the attachment.
5. No substantive response was received to the letter attached to Mr Cooper's email of 20 December 2021 referred to at 4 above.

**Affirmed** by the deponent Timothy James Donisi at Perth in the State of Western Australia  
this 10<sup>th</sup> day of August 2022



Deponent

Before me:



Signature of witness

**KARINA LEE HANRAHAN**, a legal practitioner  
who has held a practice certificate for 2 years and  
who holds a current practice certificate

Rule 29.02

**Annexure Certificate  
TJD-1**

Federal Court of Australia  
District Registry: New South Wales  
Division: General

No. NSD 912 of 2020

**Clive Frederick Palmer**

Applicant/Cross-Respondent

**Mark McGowan**

Respondent/Cross-Claimant

This is the Annexure marked "TJD-1" referred to in the affidavit of Timothy James Donisi affirmed at Perth on 10 August 2022.

Before me: *KARINA LEE HANRAHAN*



.....  
Witness

## Fienberg, Jordie

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**From:** Hawes, Leanne <lhawes@claytonutz.com> on behalf of "Cooper, Nick"  
**Sent:** Monday, 20 December 2021 10:00 AM  
**To:** 'mjs@sophocles-lawyers.com'  
**Cc:** Donisi, Tim; Dewar-Leahy, Bryony  
**Subject:** Clive Frederick Palmer v Mark McGowan | NSD 912 of 2020  
**Attachments:** 20.12.2021 - Letter to Sophocles Lawyers.pdf

Dear Michael,

Please find **attached** letter of today's date.

Regards  
Nick

**Nick Cooper, NPGL - Commercial Litigation**  
**Clayton Utz**

Level 27, QV.1 Building, 250 St Georges Terrace, Perth WA 6000 Australia | D +618 9426 8228 | F +61 8 9481 3095 | M +61 423857854 |  
[ncooper@claytonutz.com](mailto:ncooper@claytonutz.com) | [www.claytonutz.com](http://www.claytonutz.com)

Please consider the environment before printing this e-mail

**Confidential****Email**

20 December 2021

Mr Michael Sophocles  
Principal  
Sophocles Lawyers  
Level 23, 52 Martin Place  
SYDNEY NSW 2000  
[mjs@sophocles-lawyers.com](mailto:mjs@sophocles-lawyers.com)

**Without prejudice**

Dear Mr Sophocles

**Clive Frederick Palmer v Mark McGowan NSD 912 of 2020  
Settlement Offer**

1. The purpose of this letter is to make an offer of settlement of your client's claim and our client's cross claim in the above proceedings (**Proceedings**).
2. For the reasons set out below, our client considers the offer contained herein is reasonable in all the circumstances and should be accepted by your client.
3. We note that:
  - (a) pleadings have closed;
  - (b) each party's affidavit evidence has been filed and served;
  - (c) the parties and the State have provided discovery;
  - (d) the parties have agreed background facts and the factual and legal issues for determination; and
  - (e) a trial of this matter is due to commence on 31 January 2022.
4. In light of the advanced stage of the Proceedings (as set out above), we consider each party is well apprised of the details and merits of the other party's case, and therefore we have not set them out in detail in this letter.

**Mr Palmer's Claim**

5. We consider there are a number of significant flaws in your client's claim, including (but not limited to) the following:
  - (a) your client will not establish that the various publications sued upon, in their natural and ordinary meaning, conveyed the pleaded meanings to the ordinary reasonable listener;
  - (b) even if a defamatory meaning was conveyed, our client's defences of qualified privilege will be upheld; and

- (c) your client will not establish that our client was actuated by malice in publishing the matters complained of.
6. Further, we consider our client's cross-claim will succeed, and in particular we consider:
- (a) there is little doubt the matters complained of conveyed the meanings pleaded in our client's cross-claim;
- (b) the defamatory meanings conveyed against our client were of the most serious nature particularly given our client's position as Premier of Western Australia, including allegations of lying to the people of Western Australia, corruption, involvement in criminal acts and accepting bribes;
- (c) your client will not establish his defence of justification as the relevant matters alleged (Mr McGowan's Imputations 3(a), 3(b) and 5(b)) are not substantially true;
- (d) your client will not establish his defences of contextual truth including because he will not establish that each of the contextual imputations were conveyed or that they were substantially true, or that the test under section 26 of the *Defamation Act 2005* is established; and
- (e) the Court will find that your client was actuated by malice in publishing each of the first to eighth matters complained of, primarily on the basis that your client had knowledge of the falsity of the allegations he published, or was recklessly indifferent to the truth or falsity of those matters.

#### Offer

7. In light of all of the above, we consider there is a high likelihood that your client will be unsuccessful in his claim and that our client will be successful in his cross-claim and be awarded a significant amount of damages.
8. Notwithstanding the analysis of our clients' respective cases set out above, in the interests of avoiding further time consuming and costly litigation, we are instructed to make an offer of settlement of the Proceedings upon the following terms:
- (a) your client's claim in the proceedings be dismissed with no order as to costs;
- (b) our client's cross-claim in the proceedings be dismissed with no order as to costs; and
- (c) the parties bear their own costs in relation to the proceeding
- (Offer).**
9. The Offer remains open for acceptance until 5.00pm EDST on 25 January 2022.

Mr Michael Sophocles, Sophocles Lawyers

20 December 2021

10. We **enclose** a Notice of Offer to Compromise pursuant to Rule 25.01(1) of the Federal Court Rules 2011 reflecting the terms of the Offer (**Offer to Compromise**). It is open for acceptance until 25 January 2022.
11. Only one of the Offer to Compromise or the Offer is capable of acceptance.
12. If your client fails or refuses to accept the Offer, and our client is successful in the Proceedings, then our client will rely upon the Offer in seeking an order pursuant to section 40(2) of the *Defamation Act 2005* (NSW). Alternatively, our client will rely upon the Offer to Compromise pursuant to Rule 25.14(3)(b) of the Federal Court Rules 2011.
13. The Offer is also made in accordance with the principles in *Calderbank v Calderbank* [1973] 3 All ER 333, and should your client not accept the Offer, we reserve our client's rights to produce this letter to the Court on the question of costs at which time our client will be seeking an order for full indemnity costs from the date of this letter.

Yours sincerely



**Nick Cooper, NPGL - Commercial Litigation**  
+61 8 9426 8228  
NCooper@claytonutz.com

**Tim Donisi, Special Counsel**  
+61 8 9426 8206  
TDonisi@claytonutz.com

**Enc**  
Our ref 14101/16005/81011768



## Notice of offer to compromise

No. NSD 912 of 2020

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Clive Frederick Palmer**

Applicant/ Cross-Respondent

**Mark McGowan**

Respondent/ Cross-Claimant

To the Applicant/ Cross-Respondent

The Respondent/ Cross-Claimant offers to compromise this proceeding.

The offer is that:

1. the Applicant's claim and Cross-Claimant's claim in this proceeding be dismissed;
2. each party bears its own costs of and incidental to this proceeding; and
3. any costs orders previously made in this proceeding be dismissed.

This offer is inclusive of costs.

If this offer is not accepted by the Applicant/ Cross-Respondent and the Respondent/ Cross-Claimant obtains judgment not less favourable than the terms of this offer, the Respondent/ Cross-Claimant will rely on this offer, and any response to it, to seek an order pursuant to rule 25.14(2) of the *Federal Court Rules 2011* that the Applicant/ Cross-Respondent pay its costs:

- a) before 11:00am on the second business day after the offer was served - on a party and party basis; and
- b) after the time mentioned in (a) - on an indemnity basis.

This offer of compromise is open to be accepted for 14 days after service of this offer of compromise (excluding days in the period starting on 24 December 2021 and ending on 14

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**Filed on behalf of:** The respondent

Prepared by: Nick Cooper  
Law firm: Clayton Utz

**Address for service:**  
Level 27 QV.1  
250 St Georges Terrace  
Perth WA 6000

**Contact details:**

Tel: (08) 9426 8000  
Fax: (08) 9481 3095  
Contact: Bryony Dewar-Leahy  
Email: bdewarleahy@claytonutz.com  
Ref: 14101/17189/81011768

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January 2022, per Federal Court Rule 1.61(5)). Therefore, this offer of compromise is open to be accepted until 25 January 2022.

This offer is made without prejudice.

Date: 20 December 2021

A handwritten signature in blue ink, appearing to be 'N. J. Cooper', is written above a horizontal line.

---

Signed by Nicholas Jonathon Cooper  
Lawyer for the Respondent/Cross-Claimant