



Inquiry into the Centenary House Lease

Decision on Public Interest Immunity Claims

Commissioner The Hon David Hunt AO QC

Counsel

Counsel Assisting the Inquiry : Lindsay Foster SC & David Robertson,

Counsel for the Commonwealth : Henry Burmester AO QC & Tom Howe

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Orders made

1. The claim for public interest immunity is upheld in relation to the following documents:
 - (i) in the first affidavit of Dr Shergold – Documents 3 and 4;
 - (ii) in the second affidavit of Dr Shergold – Documents 1 and 2; and
 - (iii) in the affidavit of Mr Hamburger – Document 4.
2. The claim for public interest immunity is rejected in relation to the following documents in the first affidavit of Dr Shergold – Documents 1 and 2.
3. Documents 1 and 2 referred to in the first affidavit of Dr Shergold (which have already been produced) may be disclosed generally after seven days.
4. In relation to the documents referred to in the second affidavit of Dr Shergold, the Department of Finance and Administration is –
 - (a) excused from its perceived obligation to comply with the Notices to Produce directed to it in relation to Documents 3-8, 10-19, 22, 25-43, 47 and 50; and

(b) ordered to provide within seven days a more detailed description of Documents 9, 20-21, 23-24, 44-46 and 48-49 to enable proper consideration to whether the claim should be upheld or rejected or whether it is necessary to inspect them as a preliminary step towards the exercise of balancing the competing public interests.

5. In relation to the documents referred to in the affidavit of Mr Hamburger, the Department of Finance and Administration is excused from its perceived obligation to comply with the Notices to Produce directed to it in relation to Documents 1-3 and 5-11.
6. In the event that the Commonwealth applies to a court of competent jurisdiction on or before Friday 24 September to have these orders reviewed, the filing of such an application will operate as a stay of Orders 3 and 4(b) until further order.



Inquiry into the Centenary House Lease

20 September 2004

THE COMMISSIONER:

Decision on Public Interest Immunity Claims

The background

1. By Letters Patent issued on 24 June 2004 in the name of the Governor-General, on the advice of the Federal Executive Council and pursuant to the Constitution, the *Royal Commissions Act 1902* and other enabling powers, I was appointed to inquire into and to report on the circumstances surrounding the 1992 lease to the Commonwealth of Centenary House in Canberra [the present Inquiry], and in particular to inquire into:

- (a) whether movements and trends in commercial rates and leasing arrangements since the Inquiry into those circumstances conducted by the Hon Trevor Morling QC in 1994 [the 1994 Inquiry], or any other matters, cast new light on the findings of that inquiry;
- (b) whether the Centenary House lease is in line with leasing arrangements, whenever made, of a comparable kind;
- (c) whether the terms of reference of the 1994 Inquiry could have been better designed to enable information relevant to the Centenary House lease to be elicited;
- (d) whether the resources provided to the 1994 Inquiry, the absence of counsel assisting, or the particular processes adopted, adversely affected the 1994 Inquiry;
- (e) whether Commonwealth agencies gave or received appropriate advice in relation to the Centenary House lease before it was entered into, including in relation to:
 - (i) the term of the lease;
 - (ii) the effect of the rent escalation provisions in the lease;
 - (iii) whether there was an adequate market review mechanism in the lease;
 - (iv) market conditions; and
 - (v) other relevant matters;

- (f) whether, in light of any new information that is elicited, there were payments or inducements offered in relation to the Centenary House lease which raise issues of impropriety, and whether further examination of witnesses or documents by the 1994 Inquiry may have identified such issues;
- (g) whether, in light of any new information that is elicited, any person involved made a misleading statement in relation to the Centenary House lease or any proposal since 1994 to renegotiate or vary the lease;
- (h) whether the government leases referred to in submissions in the 1994 Inquiry, or in the Report of the 1994 Inquiry, for the purposes of comparison with the Centenary House lease provided a reasonable basis of comparison, and whether other leases, including non-government leases, would have provided a more appropriate basis of comparison; and
- (i) whether there exist any other issues of concern in relation to the Centenary House lease.

I have been given until 15 October 2004 in which to report upon these issues.

The Notices to Produce

2. A Royal Commission established pursuant to the *Royal Commissions Act 1902* has power (a) to summon a person to give evidence,¹ (b) to require that person to produce documents when appearing at the hearing,² and (c) to give notice in writing to any person to produce documents and things.³ Any such person who fails to comply with those obligations commits an offence of strict liability (subject to a defence of reasonable excuse) and becomes subject to a fine or imprisonment if found guilty.⁴

3. In the present Inquiry, Notices to Produce were directed to a number of government departments – including the Department of Prime Minister and Cabinet, the Attorney-General's Department and the Department of Finance and Administration. The Department of Prime Minister and Cabinet and the Attorney-General's Department between them were responsible for the formulation of the terms of reference for the 1994 Inquiry (to which term of reference (c) for the present Inquiry is directly related); the Department of Prime Minister and Cabinet was also responsible for the establishment of the 1994 Inquiry and in particular, it presently appears, for decisions in relation to the resources provided to that inquiry (to which term of reference (d) for the present inquiry is directly related). The Notices to Produce directed to these two departments were served on 22 July 2004.

¹ Section 2(1).

² Section 2(2).

³ Section 2(3A).

⁴ Section 3.

4. The Department of Finance and Administration is an amalgamation of two former departments existing at the time relevant to the present Inquiry: the Department of Finance and the Department of Administrative Services (which during that time became the Department of Arts and Administrative Services). The latter department had included at the relevant time two agencies which played an important part in the negotiations for the Centenary House lease: the Australian Property Group and the Australian Valuation Office. Most of the remaining terms of reference for the present Inquiry directly relate to the activities of these two agencies. The Department of Finance also played a part in the decision of the Australian National Audit Office [ANAO] that the terms of the lease were acceptable to it as the intended occupant of Centenary House. The Notice to Produce directed to this department was served on 20 July 2004.

The claim for public interest immunity

5. Public interest immunity has been claimed by the three departments in relation to some but not all of the documents sought by the Notices to Produce. It has generally been either assumed or conceded that public interest immunity may be claimed before a Royal Commission or other tribunals outside the ordinary court system.⁵ The justification offered for such an assumption has differed from time to time. The justification which I accept is that, by reason of its very nature, a claim of public interest immunity *must* be available before any body which has power compulsorily to require evidence to be given or documents to be produced, as the immunity against disclosure of certain documents would otherwise be denied to the government and the public service.⁶

6. Once that justification is accepted for the availability of a claim for public interest immunity before such a body, the exercise by that body of its power to compel the production of documents necessarily has to be governed by the same principles as those applied in the courts.⁷ To permit a body outside the ordinary court system to exercise its powers of compulsion without imposing the same restrictions upon those powers which are imposed by public interest immunity in the courts would fly in the face of the policy which underlies that immunity. That policy ensures that the administration of justice shall not be frustrated by the withholding of material which must be produced if justice is to be done unless the public interest that justice be

⁵ See, for example, *Science Research Council v Nasse* [1980] AC 1028 at 1071; *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 65 ALR 247, which proceeded upon the unstated assumption that public interest immunity may be claimed before, and determined by, such a tribunal.

⁶ *Royal Commissions Act 1902-1966*, Campbell, published as Appendix 4.K to the Report of Royal Commission on Australian Government Administration (1976); *Royal Commissions, Parliamentary Privilege and Cabinet Secrecy*, Carmody (1995) 11 QUTLJ 49 at 62; *Royal Commissions and Permanent Commissions of Inquiry*, Donaghue (2001) at 114; *cf Royal Commissions and Boards of Inquiry*, Hallett (1982) at 116 *et seq*, where the issue is discussed without any clear resolution.

⁷ See also pars 34-40, *infra*.

done is outweighed by a second public interest, that harm shall not be done to the nation or the public service by the disclosure of that material.⁸

7. Section 103(1) of the *Evidence Act 1995* (Cwth) defines the way in which public interest immunity is to be determined in relation to the admission of evidence, but the common law still applies to a claim for such immunity in response to a Notice to Produce.⁹ In any event, although s 130(1) provides a more specific provision than that provided by the common law, it is nevertheless consistent with, and effectively did not change, the principles which were laid down by the courts prior to its enactment.¹⁰ I have proceeded upon the basis that the principles developed by the common law apply to the issues which I have to determine.

8. The Notices to Produce to one of the departments were couched in necessarily wide terms, and some documents for which immunity is now claimed go beyond the intent of those notices which had been clearly stated in a letter to the department concerned. When I come to deal with the individual documents themselves, I will excuse that department from its obligation to comply with the Notices to Produce in relation to some documents.

The affidavits in support of the claim

9. Dr Peter Shergold AM, the Secretary of the Department of Prime Minister and Cabinet, has claimed immunity on behalf of all three departments, in two affidavits – one sworn on 1 September and the other on 7 September 2004.¹¹ In the absence of Dr Shergold, Mr Peter Hamburger, the First Assistant Secretary (Cabinet Division) of the Department of Prime Minister and Cabinet, has made a further claim for immunity on behalf of Department of Finance and Administration, in an affidavit sworn 10 September.

10. Where an objection to the production of documents in answer to a subpoena (or its modern equivalent, a Notice to Produce) is based upon a claim of public interest immunity, the usual practice – established many years ago – has been for an affidavit to be made by either the Minister who is the political head of the particular department concerned or the Secretary of that department.¹² The weight to be afforded to that affidavit is governed to some degree by the extent of the knowledge which the deponent possesses concerning the documents which are the

⁸ *Conway v Rimmer* [1968] AC 910 at 940; *Rogers v Home Secretary* [1973] AC 388 at 400, 406-407; *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39, 60, 94; *Alister v The Queen* (1884) 154 CLR 404 at 412, 434; *Commonwealth v Northern Land Council* (1993) 176 CLR 614 at 616-617.

⁹ *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511 at 516-519, 564-566 (a case dealing with another ancillary process, the discovery of documents); *Northern Territory v GPAO* (1999) 196 CLR 553 at 571 [par 16], 606 [135], 629 [199]; *Regina v Young* (1999) 46 NSWLR 681 at 691 [par 37], 692 [50], 721 [217], 741 [318], 747 [345].

¹⁰ *New South Wales v Ryan* (1998) 101 LGERA 246 at 253.

¹¹ The first of those affidavits was not delivered to the Inquiry's office until late on Friday 3 September.

¹² *Sankey v Whitlam*, *supra* at 43. The term formerly used was "permanent head" of the department.

subject of the claim.¹³ Merely reading the documents is not of great value unless the person reading them possesses knowledge of the circumstances in which they came into existence.

11. Dr Shergold is a very senior and experienced officer of the Australian Public Service, but neither of his affidavits identifies the extent of his knowledge of the circumstances in which the documents in question here came into existence in either the Attorney-General's Department or the Department of Finance. I was informed by Counsel for the Commonwealth that, as the head of the Department of Prime Minister and Cabinet, Dr Shergold has ultimate responsibility for the whole of the public service and that the claim here is involved substantially with "Cabinet documents" (a description to which I will return),¹⁴ which fall directly within his own department's functions. I was assured that Dr Shergold would have had sufficient knowledge of the matters being discussed to be in as good a position as the Secretary of the particular department concerned to make the claim for public interest immunity. I do, of course, accept the assurances which I have been given, but it would have been preferable for these matters to have been stated in the affidavits. Counsel assisting me in the Inquiry expressly stated that no point was taken in relation to the way in which the claim has been made by Dr Shergold.

12. In his affidavit sworn 10 September 2004, Mr Hamburger states that he has had experience in the Department of Prime Minister and Cabinet in briefing the Prime Minister and in attending Cabinet meetings as a note taker, as well as in the Department of Finance in briefing Ministers and attending meetings of Cabinet committees as an adviser to Ministers; he had also consulted with the relevant staff of the Department of Finance and Administration before making the claim.¹⁵ I am satisfied that both deponents had appropriate knowledge in order to make the public interest immunity claims.

13. As is required,¹⁶ each deponent says that he has read all the documents for which the immunity is claimed, and he has sought to explain why the disclosure of that document is detrimental to the proper functioning of the executive government and of the public service. Dr Shergold has identified four categories of public interest immunity which he says are relevant and how the public interest may be harmed by the disclosure of documents which fall within them. The claim for immunity for the documents said to fall within the fourth category was

¹³ *Ibid* at 44.

¹⁴ Paragraph 26, *infra*.

¹⁵ This affidavit was sworn after the oral argument in relation to the immunity claim on 8 September, during which the extent of Dr Shergold's knowledge concerning the documents was discussed. I was informed that no further submissions were to be made in relation to this claim (letter dated 10 September 2004).

¹⁶ *Sankey v Whitlam*, *supra* at 43-44, 96, 108.

withdrawn during the argument on the immunity claim.¹⁷ Mr Hamburger adopts the three remaining categories identified by Dr Shergold and how disclosure of the additional documents with which he is concerned would cause detriment to the public interest.

The categories of public interest immunity

14. The first of the remaining categories stated by Dr Shergold is **Category A**, which consists of documents which directly reveal either the *deliberations* or the *decisions* of Cabinet.

This category appears to have been intended to be restricted to documents which formally *record* such deliberations or decisions. Immunity for other documents which *reveal* the deliberations of Cabinet is sought within the remaining categories.

15. One basis upon which the immunity against disclosure of documents which record or reveal the *deliberations* of Cabinet is currently justified is that it enables the members of Cabinet to exchange differing views during their deliberations whilst preserving the principle of collective responsibility for the decision reached by Cabinet, in which the individual attitudes and opinions of its members are merged. Such a system could not survive unless the members of Cabinet were prepared to observe the confidentiality of all that has gone on in the course of their deliberations leading to that decision.¹⁸

16. Another basis upon which the immunity against disclosure of documents which reveal the *deliberations* of Cabinet is currently justified is that their disclosure would be likely to subject the members of Cabinet to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course.¹⁹ The mere threat of disclosure is likely to be

¹⁷ The fourth category consisted of documents which reveal the deliberative documents of a former government. It was said to be based upon a political convention directed to preventing the disclosure of such documents to a particular section *within* government circles (those who comprise the new government), rather than (as is usual in public interest immunity claims) to preventing the disclosure of the documents which comprise the first three categories to the public *outside* appropriate government circles. The documents for which a claim for immunity was withdrawn consisted of (i) letters from the Minister for Finance to the Prime Minister and to the Attorney-General concerning an application made by a party to the 1994 Inquiry for financial assistance, (ii) a memorandum from a senior officer of the Department of Prime Minister and Cabinet to the Prime Minister discussing the issues raised by those two letters, with recommendations as to how the Prime Minister should deal with those issues, and (iii) a further memorandum from a senior officer of his department to the Prime Minister concerning the procedures to be followed in relation to the forthcoming Report of the 1994 Inquiry, with recommendations as to how those procedures should be followed in this case. No reliance had been placed by Dr Shergold upon any other category for their immunity, and the documents have now been produced.

¹⁸ *Report of the Committee of Privy Councillors on Ministerial Memoirs* (1976), chaired by Lord Radcliffe, Cmnd 6386, par 33, quoted in *Sankey v Whitlam*, *supra* at 98; *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 615.

¹⁹ *Conway v Rimmer*, *supra* at 952; *Sankey v Whitlam*, *supra* at 63, 97-98; *Commonwealth v Northern Land Council*, *supra* at 615.

sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse by Ministers with an eye to subsequent public scrutiny.²⁰

17. These two bases for justification apply both to documents which formally record the deliberations of Cabinet and to those which reveal those deliberations. I accept the possibility of some harm being caused to the public interest by the disclosure of documents formally recording or revealing the *deliberations* of Cabinet.

18. Neither basis provides any appropriate justification for the immunity against disclosure of documents which formally record or which reveal the *decisions* of Cabinet. There clearly does exist an immunity against the disclosure of documents which formally record or which otherwise reveal such decisions where those decisions remain *confidential*. I accept that the disclosure of still confidential decisions relating to matters such as national security, impending changes to fiscal policies and other important issues with which Cabinet often has to deal could be likely to cause substantial harm to the public interest. But once the confidentiality of a decision has been lost as a result of a legitimate or authorised publication to the world at large, the immunity cannot be justified upon the same bases which justify an immunity against disclosure of documents formally recording or otherwise revealing the *deliberations* of Cabinet.

19. It was submitted by Counsel for the Commonwealth that the official record of a Cabinet decision, even though it has been legitimately made public by authority or otherwise, nevertheless continues to attract the immunity because (i) “its disclosure would reveal the deliberations of Cabinet, namely what Cabinet finally decided”, (ii) it would “reveal quite clearly what Cabinet decided and, in that sense, reveal the deliberations of Cabinet”,²¹ and (iii) such a record is “the actual deliberation of Cabinet recorded in an official document”.²² This submission ignores the distinction clearly drawn in the High Court,²³ between disclosure of the discussions leading to a decision and disclosure of the decision itself. A decision of Cabinet does not reveal the deliberations of the Cabinet leading to that decision in any relevant way. A disclosure of the decision itself does not affect the principle of collective responsibility. Nor does it prematurely subject the members of Cabinet to criticism, divert the process from its proper course, mute the vigorous exchange of views or encourage lengthy discourse within the Cabinet meeting with an eye to subsequent public scrutiny.²⁴

²⁰ *Commonwealth v Northern Land Council*, *supra* at 615.

²¹ T 1634.

²² T 1643.

²³ *Sankey v Whitlam*, *supra* at 108.

²⁴ These expressions are taken from par 16, *supra*, where their origin is cited.

20. It was conceded by Counsel for the Commonwealth that an authorised Ministerial press statement announcing an important policy decision reached by the Cabinet in the very terms of the decision itself did not breach the confidentiality of Cabinet minutes, but he maintained that immunity remained against the disclosure of the Cabinet minute itself because such a record is “of the highest quality of a Cabinet document”.²⁵ However, what must be considered in the case of legitimate prior publication to the world at large is not “the character of the document” as Counsel for the Commonwealth submitted,²⁶ but rather whether its contents have been disclosed.²⁷ The proper characterisation of any document is to be derived from its contents and the use made of it.²⁸ I do not accept the submissions made by Counsel for the Commonwealth on this point. However, there is little practical effect of such a conclusion because (a) the public interest in non-disclosure would be either much reduced or destroyed by that prior publication,²⁹ and (b) its disclosure would only be sought in circumstances where it is required for some very technical but important reason which cannot otherwise be resolved.

21. The second category stated by Dr Shergold is **Category B**, which consists of documents which were submitted to Cabinet and the documents from which those submitted to Cabinet were derived.³⁰

Such documents are usually in the form of Cabinet Submissions, but also include letters from a Minister to the Prime Minister raising matters of genuine urgency requiring immediate Cabinet consideration. Such letters are called “under the line”, or informal, Cabinet submissions.

22. The justification for the immunity for documents within this category is that their disclosure would reveal the position which the Ministers making the submissions or writing the letters would be likely to take during the Cabinet deliberations of the issues which they raise, and thus once again endanger the principle of collective responsibility. The position taken by the Minister is part of the deliberations of the Cabinet, and the possibility of disclosure of such documents would inhibit the Cabinet process. The considerations already expressed in relation to Category A documents are also applicable to Category B documents. Such documents may also contain preliminary views of the relevant Minister which are no longer held, or even an inaccurate perception by officials of the Minister’s views. I accept the possibility of some harm

²⁵ T 1643

²⁶ T 1633.

²⁷ *Sankey v Whitlam*, *supra* at 45.

²⁸ *Commonwealth v CFMEU* (2000) 98 FCR 31 at 43 [par 45].

²⁹ *Sankey v Whitlam*, *supra* at 64.

³⁰ Dr Shergold has called these documents variously the “precursors” of the documents submitted to Cabinet and documents which were “preparatory” to Cabinet Submissions. The description which I have given to them was intended to make the concept somewhat clearer, not to change its content.

being caused to the public interest by the disclosure of such documents, but principally for the reasons stated in the first two sentences of this paragraph.

23. The third category stated by Dr Shergold is **Category C**, which consists of documents which have been brought into existence for the purposes of Cabinet, such as preparatory material partly included in a Cabinet Submission, letters from a Minister seeking consideration of a matter by Cabinet and documents such as Cabinet Briefs.

Cabinet Briefs analyse or comment on the content of Cabinet Submissions, and they are created for Ministers by their departments for use in Cabinet. They contain background material, discussion of the issues which arise and possibly also talking points for use by the Minister.

24. The justification for the immunity for documents within this category is that their disclosure would breach the confidentiality of the Cabinet process in the same way as the disclosure of the documents in the previous category, by revealing issues, options and proposals which have been considered by Cabinet, and (insofar as they reveal by inference the position in fact later taken by the Minister in Cabinet) in the same way as the disclosure of documents in the first category. I accept the possibility of some harm being caused to the public interest by the disclosure of such documents.³¹

The balancing exercise

25. For the purposes of the balancing exercise between the two competing public interests which must be carried out in determining whether the public immunity claim should be upheld,³² the High Court has drawn a distinction between (a) documents which record the actual deliberations of Cabinet or of a committee of Cabinet, and (b) the rest of the documents referred to in these three categories, such documents having been prepared outside Cabinet, and which are often referred to as “Cabinet documents”.³³ It is clear from the discussion of this issue by the High Court that this first class of documents was intended to include not only those documents which formally *record* the actual deliberations of Cabinet or of its committees but also any other documents which *reveal* those deliberations. This was the approach taken by the Full Court of the Federal Court in *Commonwealth v CFMEU*,³⁴ with which I respectfully agree. The nature of such documents have already been discussed in this Decision.³⁵

³¹ Dr Shergold’s second affidavit, in par 6, could be interpreted as seeking to expand Categories (B) and (C) considerably further than they were stated in his first affidavit, but I was assured by Counsel for the Commonwealth that this was not intended (T 1619-1620).

³² Paragraph 6, *supra*.

³³ *Commonwealth v Northern Land Council*, *supra* at 614.

³⁴ *Commonwealth v CFMEU*, *supra* at 390 [pars 42-44].

³⁵ See “*The categories of public interest immunity*”, pars 14-24, *supra*.

26. The description “Cabinet documents” has been more expansively defined in the Cabinet Handbook as including Cabinet submissions and memoranda, reports and attachments to submissions and memoranda which have been brought into existence for the purpose of being considered by Cabinet and any papers circulated by Ministers in the Cabinet room relating to matters under discussion by the Cabinet.³⁶ It follows that this second class of documents would *not* include Cabinet documents which reveal the deliberations of Cabinet or of its committees.

27. In relation to **documents which record the actual deliberations of Cabinet or of a committee of Cabinet**, the High Court has now held that there are strong considerations of public policy militating against disclosure regardless of the contents of such documents. However, the public interest immunity against disclosure for these documents is not absolute,³⁷ and the public interest against their disclosure must nonetheless still be weighed against the competing public interest of the proper administration of justice.³⁸ For Cabinet deliberations upon matters which are still current or controversial, there are extremely strong considerations of public policy weighing against their disclosure regardless of how significant the disclosure of their contents may be to the proceedings in which the claim for immunity is made.³⁹ The documents recording them have a pre-eminent claim to confidentiality, and only considerations which are indeed exceptional would be sufficient to overcome the public interest in their immunity from disclosure.⁴⁰ The degree of protection against disclosure which is called for by the nature of this class will dictate the paramountcy of the claim for immunity in all but quite exceptional circumstances.⁴¹ The High Court doubted whether the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in proceedings where a litigant is seeking to vindicate his private rights.⁴²

28. In relation to **Cabinet documents** (that is, those prepared outside Cabinet which do *not* reveal its deliberations or those of its committees), the High Court imposed no such restrictions upon the usual balancing exercise to be carried out in determining whether a claim for immunity should be upheld.⁴³ Nevertheless, the usual balancing exercise may be undertaken only when the

³⁶ See *NTEIU v Commonwealth* (2001) 111 FCR 583 at 589-590.

³⁷ The joint judgment quotes the judgment of Gibbs ACJ in *Sankey v Whitlam*, *supra* at 43, where he also describes the protection for this class of case as “not absolute” and goes on to say “and it does not endure for ever”.

³⁸ *Commonwealth v Northern Land Council*, *supra* at 616.

³⁹ *Ibid* at 617.

⁴⁰ *Ibid* at 618.

⁴¹ *Ibid* at 618.

⁴² *Ibid* at 618.

⁴³ In *Maritime Union of Australia v Geraldton Port Authority* [1999] FCA 151 (RD Nicholson J), 25 February 1999, the judge appears to have interpreted the *Northern Land Council* case as requiring the court to be satisfied that there are exceptional circumstances before ordering disclosure of Cabinet documents which do

[footnote continued on next page]

court is satisfied that both of the competing public interests are applicable to the documents in question. The party seeking disclosure must first demonstrate a legitimate forensic purpose in having the documents disclosed, that it is at least “on the cards” that the documents will assist that party.⁴⁴

Inspection

29. Once the court is satisfied that the balancing exercise should be undertaken, it is appropriate *in the usual case* for the documents in question to be produced to the court for its inspection.⁴⁵ This is because the Minister making the claim for immunity has no duty to consider the competing public interest in the administration of justice (although he or she may do so),⁴⁶ and the Minister is usually in no position to form any view of the strength of the competing public interest.⁴⁷ The power of the court to inspect the documents is clear.⁴⁸ It does so as a preliminary step towards determining where the balance lies between the competing public interests.⁴⁹

30. Such an inspection will assist the court in performing its function of determining where the greater interest lies,⁵⁰ by determining, for example, the importance of the particular document to the case of the party seeking disclosure,⁵¹ or (in a class claim where the description given provides insufficient indication of the nature of the documents)⁵² whether the non-disclosure of a particular document was really necessary for the proper functioning of the public service.⁵³ In a “class” case, as the immunity claim is here, there is a heavy burden upon the person claiming

not reveal Cabinet deliberations – as opposed to requiring satisfaction that there are *very* exceptional circumstances before ordering disclosure of documents which *do* reveal the actual deliberations of Cabinet (par 40, and see also par 19). I have great respect for the views of RD Nicholson J, but I do not accept that such an interpretation is correct. The joint judgment of the six judges who formed the majority in the *Northern Land Council* case referred variously to “considerations which are indeed exceptional”, “quite exceptional situations” and “the necessary exceptional circumstances” (at 618), “quite exceptional circumstances”, “such exceptional circumstances” and “those circumstances” (at 619), and “exceptional circumstances” (at 620). Each of these expressions was used with reference to the disclosure of documents which *recorded* the actual deliberations of Cabinet – and, by the process of deduction discussed in pars 25-26, *supra*, with reference to Cabinet documents which *revealed* Cabinet deliberations. None of these expressions was used with reference to Cabinet documents which did *not* reveal Cabinet deliberations. The expression “very exceptional” was not used in relation to documents which either recorded or revealed Cabinet deliberations, although such a sense may well be conveyed by the expression “indeed exceptional”.

⁴⁴ *Burmah Oil Co Ltd v Bank of England*, *supra* at 1113-1114, 1129; *Alister v The Queen*, *supra* at 412, 414, 438.

⁴⁵ *Sankey v Whitlam*, *supra* at 46, 65, 96; *Alister v The Queen*, *supra* at 412, 414-415, 453-457.

⁴⁶ *Sankey v Whitlam*, *supra* at 60.

⁴⁷ *Alister v The Queen*, *supra* at 436-437.

⁴⁸ *Sankey v Whitlam*, *supra* at 46.

⁴⁹ *Conway v Rimmer*, *supra* at 979 (see also 954, 981, 995); *Sankey v Whitlam*, *supra* at 65.

⁵⁰ *Alister v The Queen*, *supra* at 453.

⁵¹ *Burmah Oil Co v Bank of England*, *supra* at 1129; *Alister v The Queen*, *supra* at 457.

⁵² *Alister v The Queen*, *supra* at 456-457.

⁵³ *Sankey v Whitlam*, *supra* at 39.

immunity to justify its application to the document in question,⁵⁴ and not all documents within the class may be entitled to the same measure of protection – depending to some extent upon the general subject matter with which the document is concerned.⁵⁵ Where the description given to such documents is insufficient to indicate the general subject matter, inspection is necessary to identify that general subject matter.

31. By inspecting the documents, the court is put in the position of being able determine, in the light of the nature of the proceedings in which the claim arises,⁵⁶ the extent to which documents will be of importance in those proceedings.⁵⁷ At all times, the court is required to give weight to the Minister’s opinion that the documents should not be disclosed,⁵⁸ even though that opinion is no longer to be regarded as conclusive. That is how the court approaches the inspection of Cabinet documents which do *not* reveal the deliberations of Cabinet or of its committees.

32. But such resort to an inspection of the documents must first satisfy a more stringent test where the documents in question *do* reveal the deliberations of Cabinet or of a committee of Cabinet. The High Court has held that, before ordering the documents to be produced to the court for its inspection, the court must be satisfied that quite exceptional circumstances give rise to a significant likelihood that the public interest in the proper administration of justice so outweighs the very high public interest in the confidentiality of documents recording Cabinet deliberations that it will be necessary or appropriate for the documents to be produced to the court for its inspection.⁵⁹ In such cases, the court must then satisfy itself from such inspection that the relevance of the material in the particular documents to the proceedings in which disclosure is sought is sufficient, even in those exceptional circumstances, to justify disclosure to the party seeking it.⁶⁰ Because of the strength of the claim for immunity, the disclosure of the documents should not be ordered unless the court is satisfied that the materials are crucial to the proper determination of the proceedings.⁶¹ Counsel for the Commonwealth conceded that the test to be satisfied before the documents in question are inspected is “not quite as high” as that which must be satisfied before ordering disclosure.⁶²

⁵⁴ *Rogers v Home Secretary*, *supra* at 400; *Sankey v Whitlam*, *supra* at 39, 62.

⁵⁵ *Sankey v Whitlam*, *supra* 43, 109-110; *Commonwealth v Northern Land Council*, *supra* at 616-617

⁵⁶ *Sankey v Whitlam*, *supra* at 56, 60-61.

⁵⁷ *Ibid* at 41-42.

⁵⁸ *Ibid* at 96.

⁵⁹ *Commonwealth v Northern Land Council*, *supra* at 619.

⁶⁰ *Ibid* at 619.

⁶¹ *Ibid* at 619.

⁶² T 1663-1664.

33. In relation to some of the Cabinet documents for which immunity is claimed in the present case, however, it has not been made clear, either by the deponents or by Counsel for the Commonwealth, whether – unlike the documents which fall within Category B – the documents said to fall within Category C relate in every case to issues which were later *in fact* the subject of deliberations in Cabinet. Documents prepared for the assistance of a Minister in relation to an expected discussion in Cabinet, but which deal with issues which have *not* in fact been considered in Cabinet, cannot reveal the deliberations of Cabinet. It may in some cases be necessary, where the temporal connection has not been made clear, to require a more detailed description to be given in order to determine into which class of documents they fall, and thus whether the more stringent test for an inspection must be satisfied. This is analogous to the need to inspect the documents in order to determine whether they do indeed fall within the category claimed.⁶³

34. Earlier in this Decision, I stated that, once it is accepted that a claim for public interest immunity is available before a tribunal outside the ordinary court system with power compulsorily to compel the production of documents, the exercise of that power necessarily has to be governed by the same principles as those applied in the courts.⁶⁴ For ease of reference in the discussion of them which has just concluded,⁶⁵ I outlined the principles underlying public interest immunity in the terms usually adopted in the authorities, which assume that they are being applied in the courts and not in a Royal Commission or other relevant tribunal.

35. Counsel for the Commonwealth initially informed me that there was no challenge to this view when I put it to them during the course of the oral argument.⁶⁶ However, Counsel later submitted that, when deciding whether to inspect the documents for which immunity is claimed as a preliminary step towards determining where the balance lies between the competing public interests, a Royal Commissioner must err on the side of caution, and must decide to inspect only with more reluctance than a judge would in litigation between parties. The role of a Royal Commissioner, it was argued, is different from that of such a judge, who acts on the basis of submissions made and the evidence which has been tendered, and who has regard to the forensic use to which the parties to that litigation might put those documents. Counsel accepted that a Royal Commissioner is not bound to accept a claim for immunity, but it was submitted that, because the documents would be disclosed for the use of the Commissioner, rather than for the

⁶³ *Commonwealth v Northern Land Council*, *supra* at 617.

⁶⁴ Paragraphs 5-6, *supra*.

⁶⁵ Paragraphs 25-33, *supra*.

⁶⁶ T 1626.

use of the parties to litigation, the Royal Commissioner would not be able to take as independent a view in making that decision as could a judge in litigation between parties.⁶⁷

36. In my view, this submission is based upon a misapprehension as to the nature of a Royal Commission. Obviously there are no ultimate issues (as they may be called) joined between those appearing in a Royal Commission as there are between the parties to litigation. The proceedings in a Royal Commission are largely inquisitorial by nature although, as I have the benefit of Counsel assisting me in the present Inquiry, the evidence is led and tested in a way similar to that in adversarial litigation. I have made it clear during the course of the hearing in this Inquiry that it has been left largely to Counsel assisting me (and those instructing them) to pursue lines of inquiry in relation to material which may be relevant to the terms of reference, and I have signed Notices to Produce without requiring justification for their contents. There has, of course, been consultation concerning the general direction of that exercise. However, I played no part in formulating the Notices to Produce which called for the production of the documents for which a claim for immunity is now made.

37. There is no significant difference in the way in which a claim for public interest immunity is dealt with – whether it is made in a court or in a Royal Commission. When a judge rejects a claim for public interest immunity and orders production of the documents in question, those documents may be used by a party to the litigation by tendering them in evidence, or by using them for the cross-examination of witnesses, or by using the information which they convey in order to trace where relevant evidence may be found. Documents which are ordered to be produced to a Royal Commission after a claim for immunity has been rejected are used in exactly the same way, by Counsel assisting the Royal Commission or by a party tendering them in evidence, or by using them in cross-examination, or by using the information which they convey for the same purpose of finding other evidence. A judge has a duty to give judgment on the issues between the parties, and a Royal Commissioner has a duty to report upon the terms of reference identified in his or her Letters Patent. That duty must be performed in both situations in a judicial manner.

39. I accept that the different role played by a Royal Commissioner could have some relevance in the conduct of an inquiry, but the claim that such a Commissioner would not be *able* to take as independent a view as could a judge in making that decision is rejected. The relevance of the different role is only that there may be a mistaken impression obtained by those who are ignorant of the judicial process that a Royal Commissioner may not act as independently as a

⁶⁷ T 1640-1642.

judge in determining whether to inspect the documents as a preliminary step towards determining where the balance lies between the competing public interests. However, a fair-minded and informed bystander, rather than one ignorant of the judicial process, would know that a Royal Commissioner has a duty to act judicially, and that, like judges, those conducting Royal Commissions have frequently had to exclude from their minds material which they have learnt during a case but which is not tendered in evidence – for example, when determining the admissibility of evidence. I do not accept that the role of a Commissioner could reasonably be apprehended by the fair-minded and informed observer as affecting that Commissioner's independence or impartiality.

40. In case the issue is raised at some later stage, I should emphasise that, just as the conclusion by a judge in litigation between parties to inspect the documents as a preliminary step towards the balancing process does not necessarily lead to the conclusion that the documents must be disclosed, so a decision to inspect certain of the documents in this Inquiry would not mean that I would order that those documents must be disclosed.⁶⁸

The documents

41. In the light of the principles which have been stated, I turn now to deal with the individual documents for which immunity has been claimed in order to consider whether the claim in relation to each document may be upheld or rejected at this stage, whether I should inspect the document as a preliminary step towards the balancing exercise, or whether further information is required in order to make those determinations.

First affidavit of Dr Shergold

42. **Document 1** is described as a letter dated 5 May 1994, from the then Minister for Finance to the then Prime Minister, proposing that the foreshadowed inquiry into the Centenary House lease be discussed at the next meeting of Cabinet. The letter is said to contain the Minister's proposals relating to issues such as how the inquiry should be conducted, the terms of reference and the proposed budget. The claim for immunity against production is made by both the Department of Prime Minister and Cabinet and the Attorney-General's Department. Counsel for the Commonwealth informed me that the letter constituted an "under the line" Cabinet submission, and thus falls within **Category B**.⁶⁹ If disclosed, it would reveal the position which the Minister would be likely to take during the Cabinet deliberations upon the issue raised.

⁶⁸ cf *Alister v The Queen*, *supra* at 437.

⁶⁹ T 1632.

43. On the face of that description alone, the document may be thought to relate directly to terms (c) and (d) into which I am directed by the Letters Patent to inquire:

- (c) whether the terms of reference of the 1994 Inquiry could have been better designed to enable information relevant to the Centenary House lease to be elicited;
- (d) whether the resources provided to the 1994 Inquiry, the absence of counsel assisting, or the particular processes adopted, adversely affected the 1994 Inquiry;

Counsel for the Commonwealth conceded that there was a legitimate forensic purpose for seeking the production of the document,⁷⁰ but submitted that exceptional circumstances had not been established to warrant disclosure.⁷¹ It was also submitted that these terms of reference were concerned only with the nature of the facilities and resources provided to the 1994 Inquiry in an objective sense, divorced from any part played by the executive government in relation to them; however, it was subsequently conceded that the sense in which they could be read was whether the 1994 Inquiry had been “hamstrung” by those matters.⁷²

44. In my view, the terms of reference in the present Inquiry are sufficiently wide (including the direction to inquire into whether there exist “any other issues of concern in relation to the Centenary House lease”) to include an examination as to whether the 1994 Inquiry was established in such a way as to have detrimentally affected its outcome. The 1994 Inquiry was conducted in a generally informal manner, without using the power which it possessed to compel the production of documents, without counsel assisting and with only a former senior public servant to assist the Commissioner in obtaining the statements of witnesses and the relevant documents from the various departments and organisations associated with those witnesses. The issue is whether this resulted from a denial of resources or a direction or a pointed suggestion that the Inquiry should be conducted in such a manner.

45. The document in question had in fact been disclosed in answer to the Notices to Produce, and it had been read by me, before it was identified as a document for which immunity against production was to be claimed.⁷³ I have therefore already unavoidably inspected it. In the last two paragraphs on the first page, the document contains statements which are vital to a proper consideration of the relevant terms of reference. Although there are references to the subject matter of those statements in other documents for which immunity has not been claimed (including letters between Ministers), there is no other source available for at least one of the statements made, and it is of crucial importance to the resolution of the questions raised.

⁷⁰ T 1636-1637.

⁷¹ T 1637. Reference was in fact made to “*extreme* exceptional circumstances”, but such an approach is not warranted: see footnote 43, *supra*.

⁷² T 1637-1638.

⁷³ I do not regard this disclosure as having made either the document or its contents public: see par 59, *infra*.

46. Not all Cabinet documents are entitled to the same measure of protection, even those which fall within a class of documents which are entitled to protection from disclosure irrespective of their contents; the protection is not absolute and it does not endure for ever. Whatever controversy may still surround the leasing of Centenary House (an issue to which I must return),⁷⁴ there is no suggestion that any controversy surrounds the circumstances of the establishment of the 1994 Inquiry. The terms of reference relevant here are quite separate from those which are concerned with the lease and the circumstances which led to that lease. The events surrounding the establishment of the 1994 Inquiry are ten years old. In such a case, the contents of the document may be significant in deciding whether it should be disclosed. A very strong case is made out for its production, and I am satisfied that its disclosure would not really be detrimental to the public interest.⁷⁵ The fact that, pursuant to a recommendation made to the Governor-General by the executive government, I have been placed under a duty by the Letters Patent to investigate this very matter cannot wholly be ignored, despite the claim now made on behalf of the very same executive government executive for immunity. If the executive government had not wished the Cabinet documents concerning the establishment of the 1994 Inquiry to be disclosed, it would have been a simple matter to draft the terms of reference in expressly objective terms.

47. The statements of principle by the High Court in the *Northern Lands Council* case (to which I have already referred)⁷⁶ are directed primarily to Cabinet deliberations upon current or controversial matters, but I must nevertheless be satisfied that there are indeed exceptional considerations involved in the public interest that this document be disclosed in the investigation of these matters which are sufficient to overcome the detriment to the public interest caused by its disclosure.⁷⁷ As I have already found that the disclosure of the document would not really be detrimental to the public interest, and for the reasons stated in the two previous paragraphs, I am satisfied that the balance clearly lies in favour of disclosure.

48. Accordingly, the claim for public interest immunity for this document is rejected. The document has already been produced, and it may be disclosed generally after seven days.

49. **Document 2** is described as a Cabinet Briefing from a senior official of the Department of Prime Minister and Cabinet to the Prime Minister, dated 6 May 1994. It is said to provide a briefing for his use in Cabinet concerning the proposed inquiry into the leasing of Centenary

⁷⁴ Paragraph 51, *infra*.

⁷⁵ Authority for all the preceding statements in this paragraph is to be found in *Sankey v Whitlam*, *supra* at 43, and in *Commonwealth v Northern Land Council*, *supra* at 616-617.

⁷⁶ Paragraphs 27 and 32, *supra*.

⁷⁷ See par 45, *supra*.

House to which the previous document (Document 1) relates. The subject of this briefing was subsequently considered by Cabinet. The claim for immunity against production for this and the remaining documents identified in Dr Shergold's first affidavit is made by the Department of Prime Minister and Cabinet only. Disclosure of this particular document would reveal the issues discussed in Cabinet and possibly the position taken by the Prime Minister in relation to those issues; it thus falls within **Category C**.

50. The description demonstrates that the document also relates directly to terms (c) and (d) of the terms of reference. Counsel for the Commonwealth conceded that it was "on the cards" that the document contains similar material to Document 1, but argued that I should not inspect it because it would only be on rare occasions that Cabinet documents should be inspected.⁷⁸ At the time when the matter was argued, I did not realise that this document had also been disclosed in answer to a Notice to Produce, and had already been read by me, before it was identified as a document for which immunity against production was to be claimed. Again, therefore, I have unavoidably inspected it. In the third and fifth paragraphs on its first page, the document contains statements which are vital to a proper consideration of the relevant terms of reference, and there is no other source available for at least two of the statements made, and again they are of crucial importance to the resolution of the questions raised.

51. I am satisfied that the issue with which it deals is neither current (except that its subject matter is a term of reference, a circumstance which is here irrelevant)⁷⁹ nor controversial. A very strong case is made out for its production, and I am satisfied that its disclosure would not really be detrimental to the public interest. Everything which I have said in relation to Document 1 is relevant to this document also. Again, and notwithstanding that it has the character of a Cabinet document, I am satisfied that the balance between the two competing interests clearly lies in favour of disclosure. The claim for public interest immunity is rejected. The document has already been produced, and it may be disclosed generally after seven days.

52. **Document 3** is described as a Cabinet Minute dated 9 May 1994 which reveals Cabinet's decision in relation to the conduct of the inquiry into the leasing of Centenary House, and it thus falls within **Category A**. There is no suggestion in the description given that the decision reveals the deliberations which led to that decision, except in the artificial way for which Counsel for the Commonwealth has contended and which I have already rejected.⁸⁰

⁷⁸ T 1639-1640.

⁷⁹ *Sankey v Whitlam*, *supra* at 99-100.

⁸⁰ Paragraphs 19-20, *supra*.

53. That decision was made public in an authorised press release the same day, and thus it would not appear from its description to remain confidential. Counsel for the Commonwealth has nevertheless relied upon the statement made by Dr Shergold in his second affidavit that, whilst a Cabinet decision may be the subject of ministerial media statements, the full and precise terms of that decision ought not be disclosed, as Cabinet needs to be free to decide on the extent and form of any statements made to announce that decision.⁸¹ The description of this document in Dr Shergold's first affidavit does not suggest that this statement in the second affidavit was intended to apply to this particular document but, insofar as a decision may be more extensive than what has been publicly announced, the unannounced portion would clearly remain confidential. It would certainly have been preferable for the affidavit to have been more precise in asserting confidentiality.

54. Is there a reasonable inference available that the decision of Cabinet *was* more extensive than that which was announced, and (more importantly) that the unannounced portion is so crucial to the terms of reference in the present Inquiry as to warrant its disclosure? The decision to appoint a Royal Commission to inquire into the circumstances surrounding a lease to the Commonwealth of premises owned by interests associated with the government then in office is an important one, but it is hardly of the nature of a decision relating to national security, impending changes to fiscal policies or other important issues with which Cabinet often has to deal which, if disclosed whilst still confidential, could be likely to cause substantial harm to the public interest. However, I am not satisfied that the inference required is reasonably available in relation to this document. Nor am I satisfied that, by reason of the insufficiency of the description given to it, there exist the quite exceptional circumstances which would warrant an inspection of a document of this nature as a preliminary step towards the exercise of balancing the competing public interests involved.

55. Accordingly, the claim for public interest immunity against the production of this document is upheld.

56. **Document 4** is described as a draft Cabinet Minute of the meeting of Cabinet to which Document 3 relates, and which is said to have been an attachment to a letter dated 9 May 1994 from the then Secretary of the Department of Finance to Mr Morling regarding his appointment to conduct an inquiry into the leasing of Centenary House. The Secretary's letter to Mr Morling has been produced in answer to the Notices to Produce. That letter states that has two attachments: (i) a letter of the same date from the Minister for Finance to Mr Morling, which in

⁸¹ Paragraph 4.

turn attached the terms of reference which were to be recommended to the Governor-General, and (ii) the text of the press statement to be issued by the Minister later the same day. The Minister's letter and its attachment have also been produced. The letter sets out the terms of engagement offered to Mr Morling and the detail of administrative assistance which would be provided to him. There is no indication in the Secretary's letter that a draft Cabinet Minute was, or was to be, attached to it.

57. The fact that the document said to have been attached to the letter to Mr Morling was a draft of the Cabinet Minute rather than the Minute itself is curious, in that there could possibly be read into that fact a suggestion that the two documents are in some way different from each other. However, it is also apparent – from the fact that the letter to which the draft is said to have been attached was written on the same day that the Cabinet meeting took place – that the draft would probably have been sent to Mr Morling because the formal Cabinet Minute had not come into existence at the time when the letter was sent. If that were the case, there would have been *no* significant difference between the two versions. Certainly there is no way in which I could appropriately accept any suggestion that they *were* different in preference to such an explanation that there was no significant difference between the two. The document falls within **Category A**.

58. Acceptance of such an explanation, however, would demonstrate that the terms of the Cabinet Minute itself (which is Document 3) were conveyed to Mr Morling, and thus to someone who was not entitled to be privy to the contents of such a document. Counsel for the Commonwealth sought to explain this away by the argument that it was merely a “convenient way” in which to convey to Mr Morling the terms of reference which were to be recommended to the Governor-General, but he did concede that it was a strange way of doing so.⁸² It certainly would have been strange if the Secretary of the Minister's department had sent the draft Minute for that purpose when the Minister's letter (which he was also attaching) had the actual terms of reference themselves attached to it. I do not accept Counsel's suggested explanation, and it is very apparent that the description of the circumstances in which the publication of the draft Minute to Mr Morling took place may not be accurately stated in Dr Shergold's affidavit. In other circumstances, it would have been appropriate for an order to be made that the circumstances of that publication be re-examined by Dr Shergold. However, whatever the circumstances of the publication were, I would not be satisfied that there are indeed exceptional considerations involved in the public interest that this document be disclosed in the investigation

⁸² T 1635.

of these matters which are sufficient to overcome the detriment to the public interest caused by its disclosure.

59. I should add that a claim for public interest immunity against disclosure of a document may nevertheless be affected where it has already been published.⁸³ However, I am satisfied that immunity for the Cabinet Minute has not been lost as a result of the publication of its terms to Mr Morling. Such an immunity will be destroyed when the information which it contains has been given wide publicity.⁸⁴ At one end of the spectrum, it is said that immunity will be denied where there has been a publication of the document to the world,⁸⁵ or generally throughout the community,⁸⁶ or generally without restriction.⁸⁷ It would be otherwise if the publication were unauthorised.⁸⁸ At the other end of the spectrum, it is said that the claim for immunity will not be lost where there has been a publication of the document to one person on a confidential basis and where it was not intended to be available to anyone else.⁸⁹ In my view, the publication of the particular document in question here to Mr Morling clearly falls within the latter situation.

60. Accordingly, the claim for public interest immunity against the production of this document is upheld.

61. The remaining documents identified in this affidavit of Dr Shergold (Documents 5-8) were produced following the withdrawal of the immunity claim during the course of the oral argument.⁹⁰

Second affidavit of Dr Shergold

62. All of the documents to which this affidavit refers are the subject of a claim for immunity by the Department of Finance and Administration. **Document 1** is a copy of Document 3 referred to in Dr Shergold's first affidavit. For the reasons given previously,⁹¹ the claim for public interest immunity against the production of this document is upheld.

⁸³ See par 18, *supra*.

⁸⁴ *Sankey v Whitlam*, *supra* at 64.

⁸⁵ *Ibid* at 45, 64.

⁸⁶ *NT Power Generation Pty Ltd v Power & Water Authority* [1999] FCA 1185 (Mansfield J), 18 August 1999 at par 15. The publication referred to was that which would be made as a result of the disclosure made to parties in the course of the discovery process, where the parties are under an implied obligation not to use the information for any purpose other than in the particular proceedings.

⁸⁷ *Maritime Union of Australia v Geraldton Port Authority*, *supra* at par 34. The publication in issue was to one of the respondents and his solicitors, and then copied to his counsel.

⁸⁸ *Sankey v Whitlam*, *supra* at 45-46.

⁸⁹ *Commonwealth v CFMEU*, *supra* at 43 [par 46].

⁹⁰ This is referred to in more detail at par 13 and footnote 17, *supra*.

⁹¹ Paragraphs 52-54, *supra*.

63. **Document 2** is described as consisting of an undated and hand-annotated three page extract, the first page being entitled “Extracts from POE submission”,⁹² the second and third being an extract from Attachment G to an unknown document. These pages contain references to Cabinet’s consideration of property transactions in the Australian Capital Territory involving Commonwealth departments and agencies, and they reveal Cabinet decisions. The original of the document was considered by Cabinet on 6 March 1991. The document is marked “Cabinet-in-Confidence”, and is thus a Cabinet document. It falls within **Category A**. Its source is said to be unknown. I must assume that it has some relevance to this present Inquiry, otherwise it would not have been produced. Its relevance would seem to be merely the references to government property transactions in the Territory. I am not satisfied that the document (as described) would be of sufficient assistance to the Inquiry as to warrant production. Accordingly, the claim for public interest immunity against the production of this document is upheld.

64. All but two of the remaining documents to which Dr Shergold’s second affidavit refers are related to Cabinet submissions concerning a formal response to be made by the government to a report by the Joint Committee of Public Accounts in 1989, *The Auditor-General: Ally of the People and Parliament*.⁹³ The relevance of that Report [Report 296] to the present Inquiry lies in the Joint Committee’s recommendation that the ANAO (then known as the Australian Audit Office) “plan for a new building either within the Parliamentary Triangle or on the State Circle adjacent to the new Parliament House”.⁹⁴ The evidence before the present Inquiry suggests that this recommendation played a significant role in the decision of the ANAO to become the tenant of Centenary House. That evidence also suggests that there was opposition to such a move within the Department of Finance (as it was then called). Paragraph (e) of this present Inquiry’s terms of reference is in the following terms:

“(e) whether Commonwealth agencies gave or received appropriate advice in relation to the Centenary House lease before it was entered into, including in relation to: (i) the term of the lease; (ii) the effect of the rent escalation provisions in the lease; (iii) whether there was an adequate market review mechanism in the lease; (iv) market conditions; and (v) other relevant matters;”

A substantial issue which arises for determination in the present Inquiry under this term is whether opposition by the Department of Finance affected the appropriateness of the advice which the department gave to the ANAO in relation to the proposed lease of Centenary House. There is also evidence which suggests that opposition to such a move was stated in a submission

⁹² Property Operating Expenses.

⁹³ 296th Report, 9 March 1989.

⁹⁴ Recommendation 78, par 19.9.

by the Department of Finance for consideration by Cabinet when the formal response to the Report was determined.

65. It has become apparent from the response by the Department of Finance and Administration to the Notices to Produce directed to it that, as the Department of Finance, it was the department responsible for coordinating the submissions from all the departments and agencies to Cabinet for the purposes of the formal response to be made by the government to Report 296. The necessarily wide terms in which the Notices to Produce to the Department of Finance and Administration were couched thus brought within those terms the submissions from every department and agency which refers to Report 296 when those departments and agencies were given the last opportunity to have their say in the final submission to Cabinet.⁹⁵ This had not been intended by the Notices to Produce, and the documents within this affidavit were later re-described to state whether or not there were any references in the submissions to Recommendation 78.⁹⁶ In the light of these new descriptions, the Department of Finance and Administration is excused from its perceived obligation to comply with the Notices to Produce in relation to Documents 3, 5-8 and 10-11, in which there is no reference to Recommendation 78.

66. It was also not intended that the Department of Finance and Administration produce the submissions which had received by it from the other departments and agencies as the coordinating department. Those documents included certain submissions from or on behalf of the ANAO, but I see no basis upon which it would be necessary to override the immunity which attaches to those submissions in order to see what that agency had submitted to Cabinet. The Department of Finance and Administration is therefore excused from its perceived obligation to comply with the Notices to Produce in relation to Documents 12-18, 25-39, 41-43 and 47 also.

67. Then there are a number of documents for which immunity is claimed which are described in terms which clearly suggest, in the light of the explanation given by Counsel for the Commonwealth during the oral hearing, that they are merely compilations of all the submissions which had been received from the other departments and agencies, either as drafts or as the final coordinated submission to Cabinet. It was not intended that they should be produced. The Department of Finance and Administration is therefore excused from its perceived obligation to comply with the Notices to Produce in relation to Documents 4, 19, 22, 40 and 50 also.

68. Of the eight remaining documents which are related to Cabinet submissions concerning a formal response to be made by the government to Recommendation 78 in Report 296, five are

⁹⁵ T 1657-1658.

⁹⁶ This was in Mr Hamburger's affidavit.

described as briefs to the Minister for Finance from senior officers within his department relating to the submissions to Cabinet,⁹⁷ the sixth is described as a briefing to the Minister from a senior officer within his department which could serve as speaking notes in Cabinet,⁹⁸ and the last two are described as letters from the Minister for Finance to other Ministers relating to those submissions.⁹⁹ Cabinet considered the submissions to which these documents relate on 4 and 10 October 1989. The descriptions given of these documents are wholly insufficient to enable me to consider properly whether I should inspect them as a preliminary step towards the exercise of balancing the competing public interests. It is reasonably clear that this insufficiency may have resulted from a lack of understanding by those who have advised Dr Shergold as to the purpose for which the Notices to Produce were issued for their production. The Department of Finance and Administration is therefore ordered to provide within seven days a more detailed description of Documents 9, 20-21, 23-24 and 44-46, to enable proper consideration to be given to whether the claim should be upheld or rejected or whether it is necessary to inspect them as a preliminary step towards the exercise of balancing the competing public interests. In the light of the tight schedule under which this present Inquiry is working, the new descriptions need not be sworn.

69. The two remaining documents for which the Department of Finance and Administration claims immunity against production are described as Cabinet Minutes. **Document 48** is said to be an extract from such a Minute dated 26 July 1988 and annotated “of 26 July ’88 on Operation of APG”. **Document 49** is said to be an extract from such a Minute dated 6 August 1990 and annotated “of 6 Aug ’90 on Parkes/Barton Office Accom”. Both documents fall within **Category A**. It is the obligation of the person making the claim for public interest immunity to identify the documents in question sufficiently to enable a court to consider whether the claim should be upheld or rejected or whether it is necessary to inspect them as a preliminary step towards the exercise of balancing the competing public interests.¹⁰⁰ These headings give wholly insufficient information to enable me to make the correct determination. Accordingly, the Department of Finance and Administration is ordered to provide within seven days a more detailed description of Documents 48 and 49, to enable me to do so. Again, in the light of the tight schedule under which this present Inquiry is working, the new descriptions need not be sworn.

⁹⁷ Documents 9, 20, 21, 24 and 45.

⁹⁸ Document 23.

⁹⁹ Documents 44 and 46.

¹⁰⁰ See pars 30, 54, *supra*.

Affidavit of Mr Hamburger

70. All of the documents to which this affidavit refers are the subject of a claim for immunity by the Department of Finance and Administration. All eleven documents are concerned with the coordination of the response of the government to Report 296. Nine of them have no reference to Recommendation 78. The Notices to Produce were not intended to include these documents, and the Department of Finance and Administration is therefore excused from its perceived obligation to comply with the Notices to Produce in relations to Documents 1-3, 5-8 and 10-11.

71. **Document 4** is described as a letter dated 28 June 1989, from the Acting Auditor-General to the Minister for Finance, setting out the Auditor-General's views concerning the recommendation on Report 296. The letter was subsequently considered by Cabinet. One paragraph of an attachment to the letter discussed Recommendation 78. This passage would be directly relevant to the terms of the present Inquiry. However, I am satisfied that the Auditor-General would – to use his own words – have been singing the same song as he usually did upon this issue,¹⁰¹ and thus I see no basis upon which it would be appropriate to seek the disclosure of this document. The claim for immunity is upheld.

72. **Document 9** is described as a copy of a Minute (apparently formulated between 4 and 10 October) from a senior officer of the Department of Finance to the Secretary of that department which discussed material to be included in a further Cabinet Submission concerning Report 296. The Minute reveals that Cabinet, at an earlier meeting, had adopted a position on the great majority of recommendations in the Report, including Recommendation 78. Such a document should, in my view, be treated in the same way as a compilation of all the submissions received. It was not intended that these documents should be produced. The Department of Finance and Administration is therefore excused from its perceived obligation to comply with the Notices to Produce in relation to Document 9.

Opportunity to test rulings

73. Wherever a court orders the production of a document for which public interest immunity has been claimed, either for inspection by the judge as a preliminary step towards the balancing exercise or for disclosure generally, the usual procedure is to defer enforcing that order until the government concerned has had an opportunity to have the order reviewed by a court of competent jurisdiction.¹⁰² The same procedure must apply where such an order is made by any other tribunal which has power to compel the production of documents.

¹⁰¹ T 400-402.

¹⁰² *Conway v Rimmer*, *supra* at 954; *Sankey v Whitlam*, *supra* at 43; *Burmah Oil Co Ltd v Bank of England*,
[footnote continued on next page]

74. Because of the serious delay by the Commonwealth in making these applications for immunity, and because of the very tight time schedule which has been imposed by the government upon this Inquiry, the time which the Commonwealth will have in which to seek such a review must necessarily be short. The order will be that, in the event that the Commonwealth applies to a court of competent jurisdiction on or before Friday 24 September to have the orders made by me reviewed, the filing of such an application will operate as a stay (until further order) of the orders made that certain documents may be disclosed generally and that more detailed descriptions of certain other documents be provided.

Orders

75. I make the following orders:

1. The claim for public interest immunity is upheld in relation to the following documents:
 - (i) in the first affidavit of Dr Shergold – Documents 3 and 4;
 - (ii) in the second affidavit of Dr Shergold – Documents 1 and 2; and
 - (iii) in the affidavit of Mr Hamburger – Document 4.
2. The claim for public interest immunity is rejected in relation to the following documents in the first affidavit of Dr Shergold – Documents 1 and 2.
3. Documents 1 and 2 referred to in the first affidavit of Dr Shergold (which have already been produced) may be disclosed generally after seven days.
4. In relation to the documents referred to in the second affidavit of Dr Shergold, the Department of Finance and Administration is –
 - (a) excused from its perceived obligation to comply with the Notices to Produce directed to it in relation to Documents 3-8, 10-19, 22, 25-43, 47 and 50; and
 - (b) ordered to provide within seven days a more detailed description of Documents 9, 20-21, 23-24, 44-46 and 48-49 to enable proper consideration to whether the claim should be upheld or rejected or whether it is necessary to inspect them as a preliminary step towards the exercise of balancing the competing public interests.
5. In relation to the documents referred to in the affidavit of Mr Hamburger, the Department of Finance and Administration is excused from its perceived obligation to comply with the Notices to Produce directed to it in relation to Documents 1-3 and 5-11.
6. In the event that the Commonwealth applies to a court of competent jurisdiction on or before Friday 24 September to have these orders reviewed, the filing of such an application will operate as a stay of Orders 3 and 4(b) until further order.

supra at 1136, 1147; *Alister v The Queen*, *supra* at 415; *New South Wales v Young*, *supra* at 252; *Commonwealth v Construction, Forestry, Mining and Energy Union*, *supra* at 385. See also *Ex parte Attorney-General for the State of New South Wales*; *Re Cook* (1968) 69 SR 247 at 268.