



Inquiry into the Centenary House Lease

1 October 2004

THE COMMISSIONER:

Third Decision on Public Interest Immunity Claims

1. In the first of my Decisions on claims made by the Commonwealth for public interest immunity against the production of documents,¹ I ordered the Commonwealth to provide a more detailed description of Documents 9, 20-21, 23-24, 44-46 and 48-49 referred to in the second affidavit of Dr Shergold to enable proper consideration to be given to whether the claim for immunity made on behalf of the Department of Finance and Administration should be upheld or rejected or whether it was necessary to inspect the documents as a preliminary step towards the exercise of balancing the competing public interests.² Further descriptions have now been supplied. The Australian Government Solicitor has informed the Inquiry that it is not proposed that any more submissions will be made in relation to these documents.

2. Taking the documents by reference to the numbering adopted by Dr Shergold, the position which has now been reached is that **Documents 9, 20, 23 and 46** are said to be identical to, respectively, Documents 6, 7, 10 and 1 referred to in the affidavit of Mr Hamburger (which was also dealt with in the first Decision). The Department of Finance and Administration has already been excused from its perceived obligation to comply with the Notices to Produce directed to it in relation to those documents in Mr Hamburger's affidavit because they were concerned only with the 296th Report of the Joint Committee of Public Accounts (*The Auditor-General: Ally of the People and Parliament*, Reform of the Australian Audit Office) and there was no discussion in them of Recommendation 78, the only part of the Report which is relevant to the Notices to Produce.³ There is a slight difference in some of the descriptions given of the documents now under consideration, but the Inquiry has been assured by the Department of Prime Minister and Cabinet that the documents are indeed identical.

¹ *Decision on Public Interest Immunity Claims*, 20 September 2004.

² *Ibid* at pars 68-69.

³ *Ibid* at par 70.

3. **Document 21** is said to be a copy of Document 20 in Dr Shergold's second affidavit, except for an annotation which reflects the facts that a particular officer of the Department of Finance had seen the copy and had forwarded it to another officer of that Department. The annotation is irrelevant here. Document 21 will therefore be treated in the same way as Document 20.

4. **Documents 24, 44 and 45** are concerned with the response of the Department of Finance to Report 296, but they also contain no discussion of Recommendation 78.

5. Accordingly, 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 9, 20-21, 23-24 and 44-46.

6. The disclosure of **Document 48** would reveal matters discussed in Cabinet concerning the operations of Commonwealth departments and agencies in relation to some property matters. It falls within **Category A** of the categories described in the first of these decisions. Although there was a legitimate forensic purpose for the issue of the Notices to Produce, I am not satisfied that the document (as now more fully described) would be of sufficient assistance to the Inquiry as to warrant even inspection. Accordingly, the claim for public interest immunity against the production of this document is upheld.

7. The disclosure of **Document 49** would also reveal certain matters discussed in Cabinet, and it too falls within **Category A**. This document was originally described in Dr Shergold's second affidavit as:

49. 6/8/90 Cabinet Minute Copy of an extract from a Cabinet Minute dated 6 August 1990, annotated "of 6 Aug '90 on Parkes/Barton Office Accommodation".

The further description now given has been produced "in confidence". It does not breach the confidential nature of the document any further than does the original description by stating that the further description names three government departments whose office accommodation was the subject of the Cabinet minute, and it identifies a second subject which I do not propose to reveal at this stage. I am satisfied that this second subject is neither current nor controversial and that it is one of substantial importance in this Inquiry, as is readily apparent from the Inquiry's terms of reference. However, the further description now given provides no assistance at all, beyond the identification of this subject, as to the importance of the actual contents of the document to the proper determination of the issues arising in this Inquiry. The further description therefore *still* does not enable me to determine whether the actual contents of the

document are crucial to the resolution of the issues arising in the Inquiry, a matter which I must determine in deciding whether to uphold or to reject the claim for public interest immunity made in relation to this document.⁴

8. The continuing failure to give a proper description of this particular document is part of an unfortunate pattern which has already become apparent in this drawn out process of obtaining from government departments the documents which will assist the Inquiry in determining the issues which it has been directed to investigate. In the first of these decisions dealing with the claims for public interest immunity against the production of documents, I had to deal with two documents which were described in these terms in Dr Shergold's first affidavit:

1. 5/5/94 Letter Letter from the then Minister for Finance, the Hon Kim Beazley MP, to the then Prime Minister, the Hon Paul Keating MP, proposing that the foreshadowed inquiry into the Centenary House lease be discussed under the line at the next meeting of Cabinet.
2. 6/5/94 Brief Cabinet Briefing from Ms Phillippa Horner, then Assistant Secretary, Parliamentary and Government Branch of PM&C, to the Prime Minister providing briefing for use in Cabinet on a matter without submission (see Document 1) relation to the proposed inquiry into the leasing of Centenary House.

These descriptions, too, gave no assistance at all in determining the importance of these documents to the Inquiry. It so happened that the relevant department had (apparently inadvertently) produced without claim for immunity against production a draft of one of these documents and a memorandum by the same author which was contemporary with the other document, and which I had already read before the claim for immunity was made. From the documents which had been produced, it became apparent that the documents for which immunity was claimed contained statements which are vital to a proper consideration of the relevant terms of reference, and one statement (for which these documents were the only source) which was of crucial importance to the resolution of the questions asked in the Inquiry's terms of reference.⁵ The claim for immunity was rejected. Had the other documents not been inadvertently produced, crucial evidence would not have become available to this Inquiry because of the failure of the person making the claim for immunity to give a proper description of the documents in question.

⁴ *Ibid* at pars 30-32.

⁵ *Ibid* at pars 42-51.

9. The failure in relation to Document 49 is all the more marked because the further description now given was produced (and marked) “in confidence”, when any reluctance to disclose information which may otherwise become public should be overcome. Against the background of the previous failures to give proper descriptions, the loss of immunity when the true nature of the documents was discovered, and an apparent willingness to produce (without a claim for immunity) documents of a similar status which provide no such crucial information, the only inference available from this continuing failure to provide a proper description of the documents is that it results from either a deliberate decision not to do what is required or a complete failure to understand the obligation firmly placed upon a claimant for such immunity to identify the document in question sufficiently to enable a court to consider whether the claim should be upheld or rejected or whether it is necessary to inspect it as a preliminary step towards the exercise of balancing the competing public interests.⁶ It is unnecessary for me to decide whether the failure in relation to this particular document was deliberate or incompetent because, whatever its cause, I have not been given the assistance which *must* be given where a public interest immunity claim is made for a document which reveals Cabinet deliberations. I have no confidence that proper assistance would be forthcoming were a third opportunity to be given to provide it.

10. These conclusions necessarily lead to a consideration of whether I should inspect the document for myself.

11. Before inspecting a document which is claimed to reveal the deliberations of Cabinet and for which public interest immunity has been claimed, a judge must now be satisfied that quite exceptional circumstances give rise to a significant likelihood that the public interest in the proper administration of justice *outweighs* the very high public interest in the confidentiality of documents recording Cabinet deliberations to the extent that it is necessary or appropriate to make an inspection.⁷ This test is more stringent than that which applies to documents other than those which reveal the deliberations of Cabinet. In cases where the document is *not* claimed to reveal Cabinet deliberations, inspection takes place in order to assist the judge in performing the function of determining where the balance lies between the two competing interests, by determining, for example, the importance of the particular document to the case of the party seeking disclosure, or (in a class claim where the description given provides insufficient

⁶ *Ibid* at pars 30, 54, 69. This was stated directly in relation to this particular document at par 69.

⁷ *Commonwealth v Northern Land Council* (1993) 176 CLR 614 at 619. The test which the High Court has laid down is expressed in terms which make it clear that the class of documents to which it refers includes not only those which *record* Cabinet deliberations but also those which *reveal* those deliberations: see *Decision on Public Interest Immunity Claims, supra* at pars 25-26.

indication of the nature of the documents) whether the non-disclosure of a particular document was really necessary for the proper functioning of the public service.⁸

12. The more stringent test now laid down for documents revealing Cabinet deliberations makes it clear that the judge has less opportunity than in the other case to use such inspection in order to be satisfied that the non-disclosure of that document was really necessary for the proper functioning of the public service, but it also appears to recognise that there will be (as before) cases where the Minister making the claim for immunity will not be in a sufficiently informed position to form any view of the strength of the competing public interest which requires disclosure in the particular case.⁹ However, in order to determine whether it is necessary or appropriate to inspect a document which reveals the deliberations of Cabinet, the judge is nevertheless required to perform a preliminary balancing exercise between the two competing interests as described in the preceding paragraph of this Decision before actually seeing the document.

13. To perform this exercise, the judge necessarily requires a sufficient description of the contents of the document to form at least a preliminary view of the importance of the disclosure of the document to the case of the party seeking disclosure. Based upon the description provided, and upon any other inferences available from the material in the case, the judge must then determine whether (in very general terms) the likelihood that the interests of justice will *outweigh* the interest of confidentiality in the documents revealing Cabinet deliberations is sufficient that it becomes necessary or appropriate to inspect the document itself. That inspection enables the judge to ascertain whether the document is not only sufficiently important to the proper determination of the proceedings as to warrant inspection but indeed crucial to that determination so as to warrant its disclosure for use in the litigation.¹⁰ This is where the test now laid down by the High Court appears to recognise that the Minister making the claim for immunity will not always be in a sufficiently informed position to form any view of the strength of the competing public interest. Provided that the preliminary balancing exercise is in favour of the party seeking disclosure, it must be the judge who determines finally whether the document is crucial in the required sense by inspecting the document itself.

⁸ *Decision on Public Interest Immunity Claims, supra* at par 30.

⁹ *Ibid* at par 29.

¹⁰ I have not repeated at every stage every element of the test now laid down. To observe that the test is extremely complicated and difficult to state with clarity is not intended to be disrespectful to those who participated in that decision. I have not, however, overlooked any of the elements of the test (including the quite exceptional circumstances, which the High Court has held arises at both the preliminary and final stages of the exercise).

14. A government claiming immunity against the production of the document cannot prevent the judge determining whether the more stringent test required for inspection has been satisfied simply by denying to the judge a sufficient description of the contents of the document which cannot otherwise be ascertained until after the preliminary balancing exercise has been undertaken. The description produced can be given on a confidential basis, as the Commonwealth has already done in relation to the further descriptions of the document now in issue (albeit insufficiently) and of other documents. The insufficiency of the description given of the document in question has usually provided a basis for requiring inspection.¹¹ As a sufficient description now becomes absolutely essential to the preliminary task of balancing the interests where the document in question reveals Cabinet deliberations, and in all the circumstances outlined in pars 7-9 of this Decision, I am satisfied that quite exceptional circumstances give rise to a sufficiently significant likelihood that (even giving full weight to Dr Shergold's opinion that the document should not be disclosed) the public interest in the resolution of the issues in this Inquiry will outweigh the very high public interest in the confidentiality of a document revealing Cabinet deliberations, and that it is therefore both necessary and appropriate for Document 49 to be inspected by me for the purposes of the final balancing exercise.¹²

15. Again, and for the sake of those who may be ignorant of the judicial process, I emphasise that my conclusion to inspect this document does not necessarily mean that I will order it to be disclosed for use in the Inquiry.¹³ Whether or not disclosure of the document will be ordered depends upon my determination of the importance of the actual contents of the document to the resolution of the issues which arise in the Inquiry and the application of the remaining tests stated in the *Northern Land Council* case.¹⁴

16. In accordance with the usual procedure where public interest immunity is claimed, I will defer enforcing the order for inspection until the Commonwealth has had an opportunity to have the order reviewed by a court of competent jurisdiction.¹⁵ However, the serious delays by the Commonwealth in this case and its failure for the second time to provide the description of the document which is required mean that the time within which such a review must be sought will be very limited.

¹¹ The authorities are cited in *Decision on Public Interest Immunity Claims, supra*.

¹² *Ibid* at par 32.

¹³ *Ibid* at pars 39-40.

¹⁴ *Commonwealth v Northern Land Council, supra* at 616-619.

¹⁵ *Decision on Public Interest Immunity Claims, supra* at par 73.

17. I make the following orders:

1. The claim for public interest immunity is upheld in relation to Document 48 referred to in the second affidavit of Dr Shergold.
2. 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 9, 20-21, 23-24 and 44-46 referred to in that affidavit; and
 - (b) ordered to produce Document 49 referred to in that affidavit for my inspection as a preliminary step towards the final exercise of balancing the competing public interests and the decision as to whether its claim for immunity should be upheld or rejected. The document must be produced on or before Thursday next, 7 October 2004.
3. In the event that the Commonwealth applies to a court of competent jurisdiction on or before Wednesday next, 6 October 2004, to have the order for inspection reviewed, the filing of such an application will operate as a stay of that order until further order.
