



Inquiry into the Centenary House Lease

11 October 2004

THE COMMISSIONER:

Fifth Decision on Public Interest Immunity Claims

1. This Decision on a further public interest immunity claim relates to a Notice to Produce directed to the Department of Prime Minister and Cabinet, requiring it to produce:

... those parts of a Cabinet Submission concerning a response by or on behalf of the Minister for Finance to Report 296 of the Joint Committee of Public Accounts (“Reform of the Australian Audit Office”) which relate to Recommendation 78 of that Report, the Cabinet Submission having been considered by Cabinet on 4 October 1989.

That Notice to Produce was accompanied by a letter from the Secretary to the Inquiry which explained in very clear terms that the parts of the Submission required by the Notice to Produce related only to those views concerning Recommendation 78 which had been expressed by the Department of Finance through its Minister.

2. Recommendation 78 of Report 296 recommended that the Australian National Audit Office (then known as the Australian Audit Office) plan for a new building either within the Parliamentary Triangle or on the State Circle adjacent to what was then the new Parliament House. 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, the lease of which is the subject of this Inquiry. A substantial issue which arises for determination in this Inquiry, under term of reference (e),¹ is whether opposition by the Department of Finance to such a move by the ANAO affected the appropriateness of the advice which that Department gave to the ANAO in relation to the proposed lease of Centenary House.

¹ Term of reference (e) in the present inquiry asks “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”.

3. The evidence suggesting that there was opposition to such a move within the Department of Finance (as it was then called) comes in part from statements which are alleged to have made by Departmental officers to the Auditor-General and to officers of the ANAO, and in part from statements within the records of the Department of Finance already produced which are consistent with the existence of some such opposition within that Department. This is particularly so of a number of handwritten annotations by senior and very senior officers of the Department of Finance upon documents presented by the ANAO in support of its proposal. On their face, some of those annotations are almost contemptuous of the proposal. One senior officer of the Department of Finance in his evidence explained these annotations away as the result of frustration with the ANAO, rather than opposition to the move; or as resulting from the inevitable tension between the Auditor-General, having an independent statutory position, and the Department, which has a duty to advise upon such proposals in the same way for all departments and agencies; or as not expressing finally concluded views. How these statements, documents and annotations are to be interpreted has yet to be decided but, if interpreted as opposition to the move, it is, in my view, necessary to ascertain whether they truly reflect an official view of the Department, rather than merely that of individual officers. Only in that way can the issue be determined in any conclusive way.

4. There is evidence which suggests that opposition to the ANAO's proposal was recorded in the Cabinet Submission by the Minister for Finance which is the subject of the Notice to Produce now under consideration. According to other evidence, the Minister's Submission was drafted by the Department. None of the drafts of the Cabinet Submission to which previous Notices to Produce have been directed makes any reference at all to Recommendation 78.² However, the response to the present Notice to Produce indirectly concedes the existence of at least one statement in the Cabinet Submission which relates to the views of the Minister for Finance concerning Recommendation 78,³ a conclusion which is strongly supported by the context in which that response is given and by records of the Department of Finance already in evidence created both before and after the Cabinet Submission. This is therefore the only official document available which clearly records such a view.

5. The response to the Notice to Produce the Cabinet Submission has been the production, on a confidential basis, of those parts of the Cabinet Submission which relate to Recommendation 78, with a sentence or a heading which identifies the source of most of the

² This was stated in the responses to those Notices to Produce, and the Department was excused from compliance with the Notices to Produce in relation to those drafts.

³ See par 8, *infra*.

particular pieces of material relating to Recommendation 78, but with the relevant material itself completely deleted. A claim for public interest immunity against production is made in relation to the deleted material. In his third affidavit (affirmed 1 October 2004), Dr Peter Shergold AM, the Secretary of the Department of Prime Minister and Cabinet, says that this material falls within **Category B** as described in his first affidavit (affirmed on 1 September), which includes documents submitted to Cabinet.

6. Dr Shergold says that he has read the parts of the document which have been identified to him by a senior officer of his Department as relating to Recommendation 78. He states his opinion that the disclosure of the deleted material would reveal the deliberations of Cabinet and undermine the working of the Cabinet system of government, and thereby harm the public interest. As stated in Dr Shergold's first affidavit, this is because the disclosure of such material would reveal the position which the Minister making the submission would be likely to take during the Cabinet deliberations of the issues raised. I stated in the first of these Decisions on public interest immunity that I accept the possibility of some harm being caused to the public interest by the disclosure of such documents.⁴ The Department of Prime Minister and Cabinet has stated that it relies upon the submissions of the Commonwealth in relation to previous claims for public interest immunity against disclosure made in the present Inquiry, and that no further submissions would be made in relation to this particular claim.⁵

7. Neither this affidavit of Dr Shergold nor the material produced confidentially gives any description of the *contents* of the deleted material. However, even upon the material which has been provided, it is obvious that many of the parts of the Cabinet Submission identified (but not disclosed) in the confidential document now produced fall outside the terms of the Notice to Produce as explained by the letter which accompanied it. Of the nine so-called "elements" to which Dr Shergold refers in his third affidavit (which I have interpreted as meaning those parts of the Submission identified to him as relating to Recommendation 78), it is said that the disclosure of five would reveal the views of the Auditor-General which formed part of the basis on which Cabinet conducted its deliberations in relation to the Submission,⁶ and that the disclosure of one other "element" would similarly reveal the views of the Department of Administrative Services.⁷ The Notice to Produce did not seek the disclosure of the views of either the Auditor-General or the Department of Administrative Services concerning

⁴ *Decision on Public Interest Immunity Claims*, 20 September 2004, par 22.

⁵ Letter from the Australian Government Solicitor, 6 October 2004.

⁶ The first, fourth, sixth, seventh and eighth "elements".

⁷ The ninth "element".

Recommendation 78, as the letter accompanying the Notice made clear.⁸ Those “elements” may therefore be disregarded as irrelevant.

8. Dr Shergold also says that the disclosure of two other “elements” would reveal “other material” which formed part of the basis upon which Cabinet conducted its deliberations in relation to the Submission.⁹ The sources of this “other material” have not been identified, and its *contents* have not been described. The Notice to Produce seeks only that material which indicates the views of the Department of Finance through its Minister concerning Recommendation 78, again as the accompanying letter made clear. Although the context in which that response was given implies that the “other material” concerns Recommendation 78, it remains uncertain as to whether it also includes the views of the Department of Finance concerning that recommendation. Finally, it is said by Dr Shergold that disclosure of the third “element” would reveal the views of the Minister for Finance concerning “an issue decided by Cabinet on the basis of the Submission”. In its context, the “issue decided by Cabinet” must refer to Recommendation 78. This is the indirect concession already referred to,¹⁰ and that is the precise matter to which the Notice to Produce was directed.

9. The fundamental rule in *all* claims for public interest immunity is 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 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.¹¹ However, in *Commonwealth v Northern Land Council*,¹² the High Court has invested documents which reveal the deliberations of Cabinet (including those which reveal the position which the Minister making the submission would be likely to take during the Cabinet deliberations) with a pre-eminent claim to confidentiality.¹³ In determining whether a claim for public interest immunity against disclosure of such documents, the court must:

(a) weigh the very high public interest in the maintenance of the confidentiality of Cabinet deliberations against the public interest in the proper administration of justice, recognising the paramountcy of a claim for immunity against disclosure of this class of documents in all but quite exceptional circumstances, and

⁸ There is more than adequate evidence already available of the then Auditor-General’s views. The views of the Department of Administrative Services on this issue are irrelevant to the issue which has arisen.

⁹ The second and fifth “elements”.

¹⁰ Paragraph 4, *supra*.

¹¹ *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 616-618.

¹² *Commonwealth v Northern Land Council* (1993) 176 CLR 614.

¹³ *Ibid* at 618.

(b) satisfy itself that, even in those quite exceptional circumstances, the relevance of the contents of this particular document to the proceedings in which disclosure is sought is sufficient to justify their disclosure and that such disclosure is *crucial* to the proper determination of the issues in those proceedings.¹⁴

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. However, the public interest immunity against disclosure for documents revealing Cabinet deliberations is not absolute, and the public interest against their disclosure must nonetheless still be weighed against the competing public interest of the proper administration of justice.¹⁵

10. After fourteen years have passed since Cabinet considered this Submission, neither Recommendation 78 nor the views of the Department of Finance concerning that recommendation remains a current matter, and neither has ever been controversial. As already stated,¹⁶ this is the only official document available which expresses the views of the Department of Finance concerning Recommendation 78. Those views do not relate to matters such as national security or other important issues with which Cabinet often has to deal and which could still be likely to cause substantial harm to the public interest if disclosed years later. I can see no specific harm to the public interest which would be caused by the disclosure of these views at this late stage. The Commonwealth through its Counsel has already produced documents to this Inquiry which reveal Cabinet deliberations some years later than 1989 without objection.

11. But is the deleted material *crucial* in the required way? The views of the Department of Finance concerning Recommendation 78 which would be revealed by the disclosure of the third “element”, whether those views oppose or support the move by the ANAO to the Parliamentary Triangle, are of very substantial importance to the issue as to whether opposition by that Department to that move affected the appropriateness of the advice which it gave to the ANAO in relation to the proposed lease of Centenary House. However, what must be *crucial* is not just the subject matter of the material for which immunity against disclosure is claimed but also the actual *contents* of that material.¹⁷ Disclosure of views expressed by the Department of Finance

¹⁴ *Ibid* at 618-619.

¹⁵ *Ibid* at 616-619. See also *Decision on Public Interest Immunity Claims*, *supra* at pars 25-33.

¹⁶ Paragraph 4, *supra*.

¹⁷ *Burmah Oil Co v Bank of England* [1980] AC 1090 at 1129; *Alister v The Queen*, *supra* at 415, 457; *Commonwealth v Northern Land Council*, *supra* at 619.

concerning Recommendation 78 which did not clearly indicate one view or the other would not be *crucial* to the resolution of that issue, and the disclosure would not be warranted.

12. In the case where the material does *not* reveal the deliberations of Cabinet, such a dilemma is usually resolved by an inspection of that material by the court.¹⁸ The power of the court to inspect the material is clear.¹⁹ It does so as a preliminary step towards determining where the balance lies between the competing public interests.²⁰ 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,²¹ the extent to which the material will be of importance in those proceedings.²² But, where the material in question *does* reveal Cabinet deliberations, such resort to an inspection of the material must now first satisfy a more stringent test. The High Court has held that, before ordering such material 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 material recording Cabinet deliberations that it will be necessary or appropriate for the material to be produced to the court for its inspection.²³

13. In order to perform this preliminary balancing exercise without having the opportunity to inspect the material itself, the court 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 court must then determine whether (in very general terms) the likelihood that the interests of justice will outweigh the very high public interest in the confidentiality of documents revealing Cabinet deliberations is sufficient that it becomes necessary or appropriate to inspect the document itself. That inspection enables the court to ascertain in the final balancing exercise whether (again in very general terms) 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.²⁴

14. The description given in the present case of the third “element” (which indirectly states no more than that its disclosure would reveal the views of the Minister for Finance concerning

¹⁸ *Sankey v Whitlam*, *supra* at 46, 65, 96; *Alister v The Queen*, *supra* at 412, 414-415, 453-457.

¹⁹ *Sankey v Whitlam*, *supra* at 46.

²⁰ *Conway v Rimmer*, *supra* at 979 (see also 954, 981, 995); *Sankey v Whitlam*, *supra* at 65.

²¹ *Sankey v Whitlam*, *supra* at 56, 60-61.

²² *Ibid* at 41-42.

²³ *Commonwealth v Northern Land Council*, *supra* at 619.

²⁴ *Third Decision on Public Interest Immunity Claims*, 1 October 2004, par 13.

Recommendation 78) provides no assistance at all as to the importance of the actual *contents* of this “element” to the determination of that issue. Similarly, the description given by Dr Shergold of the “other material” in the second and fifth “elements” (which implies no more than that it concerns Recommendation 78) is also wholly insufficient. The evidence given by a senior officer of the Department of Finance at the relevant time is that Secretaries of that Department “always have very strong views on issues”. This certainly suggests that the views expressed in the document now in question *are* likely to be crucial – one way or the other (it matters not) – to the resolution of the issue which has to be decided. However, in my view something more than such a generalised suggestion is required before the *Northern Land Council* case test is satisfied to justify an order that the document be produced for disclosure in the Inquiry.

15. A government claiming immunity against the production of material cannot prevent a court determining whether the more stringent test required for inspection has been satisfied simply by denying to that court a sufficient description of the contents of the material which cannot otherwise be ascertained until after the preliminary balancing exercise has been undertaken.²⁵ The position can be no different where it is a Royal Commission which seeks the disclosure of material.²⁶ The description produced can be given on a confidential basis, as the Commonwealth has already done (albeit insufficiently) in relation to the document in issue the *Third Decision on Public Interest Immunity Claims*.²⁷ It would have been a simple thing for Dr Shergold to have given a description of this document which made it clear that the view expressed by the Minister for Finance would have been of importance, whether one way or the other, to the issues to be resolved. The insufficiency of the description given of the document in question has usually provided a basis for requiring inspection.²⁸ A sufficient description now becomes absolutely essential to the preliminary task of balancing the interests where the document in question reveals Cabinet deliberations.

16. I have in an earlier Decision in this Inquiry referred to the continuing failure of those advising the deponents of the affidavits claiming public interest immunity on behalf of the Commonwealth to recognise that, without a sufficient description of the documents in question, they are denying to this Inquiry the assistance which they *must* give where the claim is made in relation to documents revealing Cabinet deliberations.²⁹ The unfortunate circumstances of that continuing failure are too detailed to be repeated here. In all those circumstances, and in the

²⁵ *Ibid* at par 14.

²⁶ *Decision on Public Interest Immunity Claims, supra* at pars 35-39.

²⁷ *Third Decision on Public Interest Immunity Claims, supra* at par 7.

²⁸ *Alister v The Queen, supra* at 456-457. See, generally, *Decision on Public Interest Immunity Claims, supra* at par 30.

²⁹ *Third Decision on Public Interest Immunity Claims, supra* at pars 7-9, 14.

light of the failure to provide what is required yet again in relation to the second, third and fifth “elements” in this present claim, 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 material in those “elements” 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 material revealing Cabinet deliberations, and that it is therefore both necessary and appropriate for the second, third and fifth “elements” referred to in Dr Shergold’s third affidavit to be inspected by me for the purposes of the final balancing exercise.³⁰ Certified photostat copies (without any deletions of the relevant material) will suffice in place of the original documents.

17. 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.³¹

18. I make the following orders:

1. The Department of Prime Minister and Cabinet is ordered to produce certified copies of the second, third and fifth “elements” referred to in the third affidavit of Dr Shergold 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 certified copies of those documents must be produced on or before Friday 15 October 2004.
2. In the event that the Commonwealth applies to a court of competent jurisdiction on or before Thursday 14 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.

³⁰ See par 14, *supra*.

³¹ *Decision on Public Interest Immunity Claims, supra* at par 73.