



Inquiry into the Centenary House Lease

22 October 2004

THE COMMISSIONER:

Sixth Decision on Public Interest Immunity Claims

1. One Notice to Produce to the Department of Prime Minister and Cabinet remains current. It seeks the production of those parts of a Cabinet Submission which concerned a response by the Minister for Finance to a recommendation made by the Joint Committee of Public Accounts in 1989 that the Australian National 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. This recommendation was considered by Cabinet (together with other recommendations made in relation to the Audit Office) on 4 October 1989. The Notice to Produce was accompanied by a letter which made it very clear that the Inquiry was interested only in the response to that recommendation which had been offered by the Minister for Finance. According to the evidence, that response had been drafted by the Department of Finance. The relevance of all this to the present Inquiry was detailed in the *Fifth Decision on Public Interest Immunity Claims*.¹ In general terms, the response by the Department of Finance to that recommendation is relevant to a substantial issue in the Inquiry, whether opposition by that Department to a move by the Audit Office to the Parliamentary Triangle affected the appropriateness of the advice which it gave to the Audit Office in relation to the proposed lease of Centenary House (which was to be built within that area).²

2. Nine passages from the Cabinet Submission were produced in answer to the Notice to Produce relating to the recommendations of the JCPA, with either a sentence or a heading which

¹ *Fifth Decision on Public Interest Immunity Claims*, 11 October 2004, pars 2-4, 11.

² 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”.

identified the source of most of those passages. The relevant material in those passages was itself completely deleted, and public interest immunity against their production was claimed in relation to those deleted passages. The source of one passage was identified as the Minister for Finance; the sources of six passages were identified as either the Auditor-General or Ministers other than the Minister for Finance; and there were two passages for which the source was not identified. In the *Fifth Decision*, I was able to state that, upon the basis of the descriptions given, the six passages in the Cabinet Submission whose sources were other than the Minister for Finance may be disregarded as irrelevant to the Notice to Produce.³

3. The two passages for which the sources were not identified were the second and fifth passages. They were described only as containing “other material” which formed part of the basis upon which Cabinet conducted its deliberations in relation to the Submission. The third passage was described as revealing the views of the Minister for Finance concerning “an issue decided by Cabinet on the basis of the Submission”, a generality which is in marked contrast to the descriptions of the six passages disregarded as irrelevant from the outset. In its context, however, the “issue decided by Cabinet” must necessarily have referred to the relevant JCPA recommendation.

4. For reasons which I gave in the *Fifth Decision*, I ordered the Department of Prime Minister and Cabinet to produce for my inspection certified copies of the second, third and fifth identified passages. When I saw the contents of the second and fifth passages, it became clear that they also did not fall within the terms of the Notice to Produce as explained by the letter which accompanied it, and that they too may now be regarded as irrelevant. If the description of these two passages given in the affidavit claiming public interest immunity against production had followed the detail of the descriptions given to the six which have already been disregarded as irrelevant (instead of concealing those sources), the irrelevance of those two passages would have been immediately apparent when the claim was first made.

5. That leaves the third passage, which was said by necessary inference to reveal the views of the Minister for Finance on behalf of the Department of Finance concerning the JCPA recommendation in question. I have now seen the contents of the third passage, and I am therefore in a position at last to rule upon the claim made for public interest immunity against its production.

³ *Fifth Decision, supra* at par 7.

6. In determining an immunity claim for a document which would reveal the deliberations of Cabinet, account must be taken of the pre-eminence of the claim for its confidentiality laid down by the High Court in *Commonwealth v Northern Land Council*.⁴ I 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

(b) satisfy myself that, even in those quite exceptional circumstances, the relevance to this Inquiry of the contents of this particular passage in the document is sufficient to justify its disclosure and that such disclosure is crucial to the proper determination of the issues in these proceedings.⁵

7. The claim for immunity has been based solely upon the fact that the relevant passage would disclose the deliberations of Cabinet – in the sense that it would reveal the position taken by the then Minister for Finance during those deliberations – and that its disclosure would undermine the working of the Cabinet system of government and thereby harm the public interest.⁶ I have earlier stated that I accept the possibility of some harm being caused to the public interest by the disclosure of this *class* of documents.⁷ However, in the balancing exercise which still underlies the test laid down in the *Northern Land Council* case, emphasis is placed upon the *contents* of the particular document. This emphasis arises from the requirements that, even in the quite exceptional circumstances which must exist in order to overcome the usual paramountcy of the claim for immunity for this *class* of documents, the relevance of the document's *contents* must be sufficient to justify the disclosure of those contents and that such disclosure must be crucial to the proper determination of the issues in the case.

8. In the *Fifth Decision*, I pointed out that, after fourteen years, neither the recommendation made by the JCPA nor the views of the Department of Finance concerning that recommendation remains a current matter, and that neither has ever been controversial, so that the “extremely strong considerations of public policy” which weigh against the production of Cabinet

⁴ *Commonwealth v Northern Land Council* (1993) 176 CLR 614 at 618.

⁵ *Ibid* at 618-619.

⁶ Affidavit of Dr Peter Shergold AM, affirmed 1 October 2004, par 4. The justifications provided are that the immunity preserves the principle of collective responsibility for a decision reached by Cabinet and that the threat of disclosure is likely to impede a free and vigorous exchange of views and to encourage lengthy discourse by Ministers with an eye to subsequent public scrutiny: *Report of the Committee of Privy Councillors on Ministerial Memoirs* (1976), chaired by Lord Radcliffe, Cmnd 6386, par 33, quoted in *Sankey v Whitlam* (1978) 142 CLR 1 at 98. See also *Conway v Rimmer* [1968] AC 910 at 952; *Sankey v Whitlam*, *supra* at 63, 97-98; *Commonwealth v Northern Land Council*, *supra* at 615.

⁷ *Decision on Public Interest Immunity Claims*, 20 September 2004, pars 17, 22.

deliberations upon such matters play no part in relation to this particular passage in the document.⁸ Moreover, the views of the Department of Finance in relation to the JCPA recommendation that the Audit Office plan to move to the Parliamentary Triangle cannot be considered as being within the category of views expressed on matters of national security or other important issues where their disclosure could still be likely to cause substantial harm to the public interest if disclosed years later. Counsel for the Commonwealth have voluntarily produced documents to this Inquiry which reveal Cabinet deliberations upon a related issue many years after 1989, notwithstanding a claim which had originally been made for public interest immunity against their production. I am satisfied that the disclosure of the contents of this passage in the Cabinet Submission would not – indeed, could not – really be detrimental to the public interest.

9. On the other side of the balance, a very strong case is made out for the production of this passage. It does indeed express a view by the Department of Finance in relation to the JCPA recommendation, and clearly so. This is the only official document available which records such a view, for the reasons which I stated in the *Fifth Decision*.⁹ The disclosure of that passage is without any doubt both essential and crucial to the resolution of the appropriateness of the advice given by the Department of Finance to the Audit Office in relation to the proposed lease of Centenary House, and the relevance of the contents of that passage to that issue more than sufficiently justifies its disclosure. In the *Fifth Decision*, I held that, in the circumstances outlined there, quite exceptional circumstances gave rise to a sufficiently significant *likelihood* that the public interest in the resolution of that issue will outweigh the very high public interest in the confidentiality of this material, and that it was therefore both necessary and appropriate for this passage to be inspected. My inspection has demonstrated that the public interest in the proper administration of justice in this case certainly *does* outweigh the very high public interest in the confidentiality of such a class of document even in those quite exceptional circumstances. The third passage of the document must therefore be produced.

10. In accordance with the usual procedure where public interest immunity is claimed, I will defer enforcing the order for production until the Commonwealth has had an opportunity to have the order reviewed by a court of competent jurisdiction.¹⁰ When a certified copy of that passage

⁸ *Commonwealth v Northern Land Council*, *supra* at 617.

⁹ *Fifth Decision*, *supra* at pars 3-4.

¹⁰ *Conway v Rimmer*, *supra* at 954; *Sankey v Whitlam*, *supra* at 43; *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090 at 1136, 1147; *Alister v The Queen* (1984) 154 CLR 404 at 415; *New South Wales v Young* (1998) 101 LGERA 246 at 252; *Commonwealth v CFMEU* (2000) 98 FCR 31 at 385. See also *Ex parte Attorney-General for the State of New South Wales*; *Re Cook* (1968) 69 SR 247 at 268; *Decision on Public Interest Immunity Claims*, *supra* at par 73.

has been produced, it will become a confidential exhibit to which access will be granted to each of John Curtin House Ltd and Bovis Lend Lease Pty Ltd upon a written undertaking being given on behalf of that company by a responsible officer that the document will not be disclosed by it to persons other than its counsel, solicitor and company representatives taking part in the Inquiry without my leave. Such leave will be granted only after the Commonwealth has been given the opportunity to express its views. When the certified copy has been produced, the certified copy of the relevant passages in the Cabinet Submission produced in answer to the order made on 11 October 2004 will be destroyed.

11. I make the following orders:

1. The claim for public interest immunity is upheld in relation to all but the third of the nine passages (or “elements”) in the Cabinet Submission referred to in the third affidavit of Dr Peter Shergold, affirmed 1 October 2004.
2. The claim for public interest immunity is rejected in relation to the third passage (or “element”) in that affidavit of Dr Shergold.
3. The Department of Prime Minister and Cabinet is to produce, on or before Thursday, 28 October 2004, a certified copy of pars 60-63 on p 57 of Attachment B to the Cabinet Submission concerning the proposed response to Report 296 of the Joint Committee of Public Accounts (“Reform of the Australian Audit Office”) which was considered by Cabinet on 4 October 1989, including the heading which precedes par 60 and the sub-heading which precedes par 61.
4. In the event that the Commonwealth applies to a court of competent jurisdiction on or before Wednesday, 27 October 2004, to have the order for production reviewed, the filing of such an application will operate as a stay of that order until further order.
