



Inquiry into the Centenary House Lease

20 October 2004

THE COMMISSIONER:

Reasons for Decision on Judicial Immunity Against Disclosure

The background

1. Pursuant to the *Royal Commissions Act 1902*, I have been appointed by Letters Patent to inquire into the circumstances surrounding the lease of Centenary House in Canberra to the Commonwealth.¹ An agreement to enter into this lease, between John Curtin Ltd and the Commonwealth, was signed in 1992.² The purpose of the lease was to provide accommodation for the Auditor-General and the Australian National Audit Office. This Inquiry is concerned principally with the reasonableness of the terms of that lease and the part played by various Government departments and agencies in the negotiations for the lease. However, I have also been directed by the Letters Patent issued to me to inquire into two specific issues relating to an earlier Inquiry into those circumstances pursuant to the *Royal Commissions Act*, conducted by the Hon Trevor Morling QC in 1994:

- (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, and
- (d) whether the resources provided to the 1994 Inquiry, the absence of counsel assisting, or the particular processes adopted, adversely affected the 1994 Inquiry,

which must be read together with term (i), “whether there exist any other issues of concern in relation to the Centenary House lease”.

¹ Letters Patent, 24 June 2004.

² The agreement was signed on 8 April 1992, and the lease itself was signed on 13 October 1993, although it commenced on 23 September 1993.

The claim for judicial immunity against disclosure

2. Objection has been taken by the Commonwealth to questions asked of any witnesses – in particular of Mr Graham Glenn, who was Commissioner Morling’s Administrative Assistant during the course of the 1994 Inquiry, and of Mr Stephen Sedgwick, who was Secretary of the Department of Finance at the time when the 1994 Inquiry was established – which would disclose the “processes and manner in which [Commissioner] Morling undertook the 1994 Inquiry”.³ More particularly, the Commonwealth has objected to any evidence being elicited which discloses the actual processes or procedures which Commissioner Morling instituted for the purposes of his 1994 Inquiry, an objection which goes far beyond the disclosure of the reasons why such processes or procedures were instituted. This objection was based upon what has usefully been called a judicial immunity against disclosure, a concept to which I will return. Such immunity was said by the Commonwealth to extend to preventing all questions which would disclose any “things done in the exercise of the broad and general authority conferred by Letters Patent”,⁴ or “aspects of the Inquiry process” undertaken by Commissioner Morling.⁵ The Commonwealth asserted that there was no relevant distinction drawn by that immunity between the disclosure of the deliberations or reasoning which led to findings made by Commissioner Morling and the processes or procedures which he instituted for the purposes of that Inquiry.⁶ Submissions were made both orally and in writing.⁷ Objections were taken to Mr Glenn disclosing, for example, that the only request made by the 1994 Inquiry to the Government for further resources was for the payment of fees to an independent expert valuation witness called by the Inquiry itself, that the expert carried out his own research, and that no request was made for the appointment of counsel assisting the Commission.

The ruling

3. I have already made it clear that, in accordance with the judicial immunity against disclosure, it has not been my intention to elicit evidence from any source as to the reasons for any of Commissioner Morling’s findings or decisions made as to the conduct of the Inquiry where he had not already made those reasons known either in public or to the parties who appeared before him.⁸ I did, however, intend to elicit evidence as to those decisions themselves where relevant to the terms of reference. I ruled that:

³ Letter from the Australian Government Solicitor, 5 October 2004, p 1.

⁴ *Ibid* at pp 1-2. This is discussed at pars 20-23, *infra*.

⁵ Letter from the Australian Government Solicitor, 23 September 2004, at p 3.

⁶ Letter from the Australian Government Solicitor, 5 October 2004, at p 1.

⁷ Hearing, 7 October 2004; Submissions in the letters identified.

⁸ T 2475.

- (i) the Commonwealth's argument stated the concept of judicial immunity against disclosure too widely;
- (ii) such immunity was restricted to preventing the disclosure of the deliberative processes by which any particular decision was reached by a judge – what the reasons were for that decision, what weight was placed by the judge upon any particular matter, and what material was taken into account when reaching that decision – other than what the judge has said concerning those deliberative processes in the course of the proceedings in which the decision was made and in his or her capacity as a judge; and
- (iii) the immunity did not prevent the disclosure of the decision itself.⁹

I do not intend to suggest that the scope of any immunity cannot be developed as new situations arise, but such a development must be a conscious one. No persuasive reason has been suggested for the need for such a development in the present case. I undertook to provide my reasons for that ruling. These are my reasons.

4. Section 7(1) of the *Royal Commissions Act* provides that a Commissioner –

... shall in the exercise of his or her duty as Commissioner have the same protection and immunity as a Justice of the High Court.

There is no legislative provision in relation to the protection and immunity enjoyed by the Justices of the High Court, and they have such protection and immunity as is conferred by the common law upon judges of a superior court of record in England and, perhaps, such as is to be derived by implication from Chapter III of the Constitution.¹⁰ It is necessary, then, to ascertain that common law by reference to what has been said concerning this immunity in the cases.

The common law

5. The first case in which the immunity appears to have been mentioned is *Knowle's Trial*,¹¹ in 1692. Holt LCJ and Eyres J were called before a committee of the House of Lords to explain why they had quashed an indictment for murder against the Earl of Banbury, who had been indicted in the name of Charles Knowles. Holt LCJ stated that he had given his reasons at the time of the decision, and he asserted that he was not to be questioned for his judgment.¹² Eyres J repeated the reasons which had been given by the court – that the defendant had pleaded a patent to his grandfather from Charles I and claimed by descent from him, and that this had been held to be a good plea. Eyres J asserted that he ought not to be called to account for the reasons given,

⁹ T 2443-2444.

¹⁰ *Herijanto v Refugee Review Tribunal* (2000) 170 ALR 379 at [3]; *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at [197].

¹¹ (1692) 12 Howell's State Trials 1167.

¹² *Ibid* at 1179.

which if wrong could be cured by a writ of error.¹³ The claim of immunity against disclosure was accepted.¹⁴

6. In *Duke of Buccleuch v Metropolitan Board of Works*,¹⁵ an issue before the House of Lords was whether an arbitrator might be called as a witness in legal proceedings to enforce his award. The advice tendered to the House of Lords by Cleasby B was that the arbitrator was a competent witness, and could be questioned as to what took place before him, but that he could not be asked questions for the purpose of arriving at how his award was arrived at, or what items were included or what was the meaning which he intended to be given to it, and that the award could not be explained or varied or extended by extrinsic evidence of the person making it.¹⁶ The distinction drawn by Cleasby B was between the “acts” of arbitrators and the “hidden operations” of their minds. Lord Chelmsford held that the arbitrator could not be asked what led him to the conclusions he expressed in his award because that was really to inquire what passed through his mind before he formed his judgment, and that to scrutinise the exercise by an arbitrator of a discretionary power to award compensation was contrary to all principles.¹⁷ Lord Cairns held that the arbitrator may be asked to elucidate the history of the litigation before him up to the time he made his award, but that the award must speak for itself, and the arbitrator could not give evidence to explain or to aid, much less to attempt to contradict, what is to be found upon its face.¹⁸

7. In *Hennessy v The Broken Hill Pty Co Ltd*,¹⁹ an issue before the High Court was whether the evidence of a member of the Medical Board which had examined a worker pursuant to the *Workmen’s Compensation Act 1916* (NSW) was admissible to prove the state of the worker’s health as at that date. Relying upon the *Duke of Buccleuch* case, the joint judgment of three members of the Court said:

No doubt, we think, exists as to the competency of the proposed witnesses. Even Judges are competent witnesses, though they may not be compellable to testify as to matters in which they have been judicially engaged; but their evidence has been received upon matters which did not involve the exercise of their judicial discretions and powers. Arbitrators, too, are equally competent as witnesses, though they cannot

¹³ *Ibid* at 1180.

¹⁴ *Ibid* at 1204.

¹⁵ (1872) LR 5 HL 418.

¹⁶ *Ibid* at 432-433.

¹⁷ *Ibid* at 457-458.

¹⁸ *Ibid* at 462.

¹⁹ (1926) 38 CLR 342.

be compelled to testify as to the reasons which influenced them in the exercise of their discretionary powers or to explain, vary, contradict or extend their awards.²⁰

8. The same issue arose before Streatfield J in *Ward v Shell-Mex and BP Ltd*,²¹ where his Lordship held, again relying upon the *Duke of Buccleuch* case, that it was well settled that a judge cannot be called as a witness to justify, still less to vary or contradict, his judgment.²² The member of the Medical Board was an admissible and competent witness to give evidence as to the facts and matters which were presented before him, but he was not able to give any evidence at all as to the reasons which prompted him in coming to any conclusion which led to his certificate, which had to stand on its own footing and could not be contradicted or explained or varied by its author.²³

9. In *Ex parte Electronic Rentals Pty Ltd: Re Anderson*,²⁴ an issue before the NSW Court of Appeal was whether two justices of the peace who had issued summonses under the *Factories, Shops and Industries Act 1962* (NSW) could give evidence that they had not read the informations upon which the summonses were based before signing those summonses. The purpose for which the evidence had been led was that it would show (it was said) a failure on their part to exercise their judicial discretion properly. It was held by the majority, relying upon the *Duke of Buccleuch* and *Hennessey v BHP* cases, that a justice of the peace may be asked what happened before him and what was presented to him, but evidence by the justice that he had failed to apply his mind to the contents of the information was wholly inadmissible; statements made by the justice when exercising his judicial office in the matter of the particular information were admissible, but subsequent statements by the justice when giving evidence were inadmissible to prove the state of his judicial mind at the relevant time.²⁵ Asprey JA, who dissented in the application of the immunity to the facts of that case, said that, whilst courts will never attempt to investigate the mental processes of a justice of the peace who issues a summons, they have consistently received and acted upon evidence of the objective facts of events taking place between an informant or complainant and such a justice; however, the impression which the contents of the document conveyed to his mind, his mental reactions to those contents, and the conclusions which he reached and which formed the undisclosed reasons for the exercise of

²⁰ *Ibid* at 349 (Knox CJ, Gavan Duffy & Starke JJ). The citations have been omitted. Isaacs & Higgins JJ delivered judgments which did not need to deal with the issue of judicial immunity against disclosure. In its context, particularly in the light of the *Duke of Buccleuch* case, it is clear that the phrase “matters in which they have been judicially engaged” upon which the evidence of judges could not be compelled was intended to refer to the deliberative processes by which their decisions were reached.

²¹ [1952] 1 KB 280.

²² *Ibid* at 282.

²³ *Ibid* at 284-285.

²⁴ (1970) 72 SR (NSW) 532. Special leave to appeal was refused by the High Court: (1971) 45 ALJR 302.

²⁵ (1970) 72 SR (NSW) 532 at 536 (Jacobs & Moffitt JJA).

his discretion one way or the other, his Honour held, fell into a different category to the act of physically reading the document.²⁶

10. In *Zanatta v McCleary*,²⁷ the appellant sought to tender evidence of statements alleged to have been made by a District Court judge to counsel appearing for one of the parties before him at a social occasion after judgment had been given, and which (if made) would have indicated his adjudicative process in that judgment which had not been disclosed in that judgment. Relying upon the *Duke of Buccleuch*, *Hennessey v BHP* and *Electronic Rentals* cases, the NSW Court of Appeal held that such evidence was inadmissible, as would the evidence of the judge himself. Street CJ held that evidence cannot be adduced from a judge seeking to establish how his decision was reached, whether the line of inquiry be directed to the admissibility of the material before him, to the process of reasoning which he adopted, or to the weighing by him of extraneous irrelevancies or otherwise underlying his adjudicative process.²⁸ Samuels JA held that a judge of a court of record cannot be compelled to testify as to the considerations which led him to his decision, or the manner in which he has exercised his judicial powers, if its purpose is to show the process of reasoning or the factors taken into account in coming to that decision.²⁹ Mahoney JA agreed with the Chief Justice.³⁰

11. In *MacKeigan v Hickman*,³¹ the Supreme Court of Canada had to consider whether judges of the Appeal Division of the Nova Scotia Supreme Court could be questioned by a Royal Commission appointed to inquire into the circumstances of a murder conviction and the handling of an appeal from that conviction as to why certain affidavits were admitted or rejected and whether they had relied upon evidence which was not properly before them in that appeal,³² and whether the Chief Justice of that Province could be questioned as to why he had included in the panel of five judges which heard the appeal a judge who had been the Attorney-General of the Province at the time of the conviction.³³ The Court of Appeal had quashed the conviction but had made comments unfavourable to the successful appellant which had had a negative impact upon the amount of compensation awarded to him for his lengthy incarceration.³⁴ The Supreme Court proceeded upon the basis that a Royal Commission possessed no greater powers than those

²⁶ *Ibid* at 538-539.

²⁷ [1976] 1 NSWLR 230.

²⁸ *Ibid* at 234.

²⁹ *Ibid* at 239.

³⁰ *Ibid* at 241.

³¹ [1989] 2 SCR 796.

³² This was the interpretation placed by the Supreme Court on the questions which had been proposed (see p 805).

³³ [1989] 2 SCR 796 at 821.

³⁴ *Ibid* at 817-818.

of a judge of the Supreme Court sitting in a civil case.³⁵ Because of the lack of ready accessibility to the report of this decision, it is necessary to deal with it in a little more detail.

12. The leading judgment was delivered by McLachlin J on behalf of L'Heureux-Dubé & Gonthier JJ and herself. She identified the issue in the appeal as being whether judges may be compelled to testify as to the reasons for their judicial decisions in a particular case (how and why the decision was reached) and the reasons for their administrative decisions as to the configuration of the Court to hear a particular appeal (why a certain judge was selected in the panel).³⁶ Her Ladyship approached the issue mainly upon a constitutional basis, but also by reference to the *Knowles, Duke of Buccleuch* and *Zanatta* cases, which she said affirmed the immunity of judges from compulsion to testify about judicial proceedings in which they have been involved – and why a judge has the right to refuse to answer to a Royal Commission as to how or why the judge had arrived at a particular judicial conclusion, a right which she said was essential to the personal independence of the judge.³⁷ Although McLachlin J nowhere describes this immunity as an absolute one, it is clear from her discussion of the principle that she did so regard it – insofar as it applies to the disclosure of a judge's deliberative processes in reaching a judicial decision.³⁸ The questions to the Chief Justice as to why he had selected a particular judge for the panel to hear the appeal against conviction would, she said, constitute an unacceptable interference with the independence of the judiciary, although she made it clear that she was not to be taken as suggesting that such questions concerning the reasons for an administrative decision could never be asked.³⁹ She left it to other cases to determine that issue. In other words, the immunity was only qualified so far as the reasons for an administrative decision are concerned. La Forest J agreed with McLachlin J.⁴⁰

13. Cory J held that the judicial immunity against disclosure of a judge's mental processes in arriving at a judgment, or as to how he or she reached a decision in any case (he called it an adjudicative privilege), was of fundamental importance and that it is absolute in nature; the reasons given for judgment speak for themselves and may be challenged on appeal, but it is vital to the preservation of the system of justice that a judge not be required to answer any questions as to how a decision was reached.⁴¹ The right of the Chief Justice to refuse to answer questions concerning the reasons for an administrative decision was only a qualified one, an issue which

³⁵ *Ibid* at 825.

³⁶ *Ibid* at 814, 825.

³⁷ *Ibid* at 830.

³⁸ See, in particular, pp 828, 830-831, 832-833.

³⁹ [1989] 2 SCR 796 at 833.

⁴⁰ *Ibid* at 811.

⁴¹ *Ibid* at 840-841.

his Lordship discussed in detail, and he concluded that the Chief Justice should answer the questions in this case.⁴² Lamer J also held that the judicial immunity against disclosure of the reasons for a judicial decision was absolute in nature,⁴³ but he preferred to agree with the principles stated by Cory J concerning the reasons for an administrative decision.⁴⁴ However, he agreed with McLachlin J that the Chief Justice had a right to refuse to answer those questions in this case.⁴⁵ Wilson J agreed with Lamer J.⁴⁶

14. In summary, all seven justices of the Supreme Court of Canada sitting in this case were agreed that an immunity against disclosure of a judge's deliberative processes in reaching a judicial decision existed, and that it was an absolute immunity. There were two lines of reasoning supporting that agreement; that of McLachlin J was adopted by three justices, and that of Cory J was adopted by two other judges. Insofar as McLachlin J relied upon the common law as affirming the constitutional immunity which she also upheld, the reasons of the seven justices are essentially all the same. All seven justices agreed with the existence of an immunity against disclosure of the reasons for an administrative decision, but that this immunity was a qualified one only.

15. In *Warren v Warren*,⁴⁷ the appeal before the UK Court of Appeal was concerned with the immunity of judges from being compelled to give evidence in proceedings in relation to functions which they had performed as judges.⁴⁸ In proceedings ancillary to divorce litigation, an undertaking had been taken by a District Judge from one of the parties and the other party subsequently brought committal proceedings for its breach. There was a dispute as to precisely what was intended by the undertaking, and it was sought to have the judge give evidence in the subsequent proceedings upon that issue. Relying upon the *Duke of Buccleuch* case, Lord Woolf MR, with whom Butler-Sloss & Saville LLJ agreed, held that a judge is a competent witness, but (at least so far as a judge of a superior court is concerned) the judge cannot be compelled to give evidence except of "matters of which he became aware relating to and as a result of his performance of his judicial functions".⁴⁹ It is, with all due respect to Lord Woolf, not exactly clear what was intended by the statement I have quoted, but in that case the District

⁴² *Ibid* at 841-847.

⁴³ *Ibid* at 806.

⁴⁴ *Ibid* at 804.

⁴⁵ *Ibid* at 804-807.

⁴⁶ *ibid* at 807-809.

⁴⁷ [1997] QB 488.

⁴⁸ *Ibid* at 491.

⁴⁹ *Ibid* at 496-497.

Judge was to be asked to say only what had been intended by the undertaking which he had taken, and it was held that he could not be compelled to do so.⁵⁰

16. In *Karmas v New South Wales Land and Housing Corporation*,⁵¹ a subpoena had been issued to produce a note made by a member of the Residential Tenancies Tribunal – who is given the same protection and immunity as a justice under the *Justices Act 1902* (NSW) – of that person’s deliberations in the course of his acting as a member of the Tribunal. In the NSW Supreme Court, Dunford J held that, although the formal act or orders of a judge may be proved, no evidence can be given or can be required to be given of the thought processes or deliberations of a judge or arbitrator in reaching a decision, nor can any notes recording his or her thoughts or deliberations in that process be produced.⁵² Reference is made to the *Duke of Buccleuch, Hennessey v BHP, Shell-Mex* and *Electronic Rentals* cases, as well as to a further statement of Samuels JA, in *Wentworth v Rares*,⁵³ in which it was held that a judge is prohibited from giving evidence or producing documents which disclose the considerations which led him to the decision he made.

17. In *Herijanto v Refugee Review Tribunal*,⁵⁴ Gaudron J described the *Knowles* case as having settled the law that judges cannot be compelled to answer as to the “manner” in which they have exercised their judicial powers.⁵⁵ Her Honour quoted the *Hennessey v BHP* case as authority for the proposition that judges cannot be compelled to testify as to “matters in which they have been judicially engaged”, but that their evidence has been received concerning matters which did not involve “the exercise of their judicial discretions and powers”.⁵⁶ She saw *MacKeigan v Hickman* as denying that judges could be compelled to disclose what affidavit evidence was before them in a particular case where that did not clearly appear on the record, pointing out that Wilson J had dissented when he held that they could be asked what the record before them was.⁵⁷ It is not altogether clear that that is how the justices themselves (at least those in the majority) interpreted the questions. The affidavits had been tendered in earlier proceedings before a different panel of judges, who had reserved to the hearing of the appeal the decision as to whether the affidavits should be received in evidence. What was sought, it was held, were (a) the reasons for admitting the affidavits upon which reliance was placed, and

⁵⁰ *Ibid* at 498.

⁵¹ [1999] NSWSC 157, unreported.

⁵² *Ibid* at [6].

⁵³ Court of Appeal, 19 December 1990, unreported.

⁵⁴ (2000) 170 ALR 379.

⁵⁵ *Ibid* at [13].

⁵⁶ *Ibid* at [13].

⁵⁷ *Ibid* at [14].

(b) whether reliance had been placed upon those which had not been admitted.⁵⁸ But the difference in interpretation matters not, as Gaudron J herself saw no reason why judges should not be compelled to disclose the record before them, provided that it does not reveal some aspect of the decision-making process.⁵⁹ I respectfully agree. Gaudron J pointed out that this was all the more so in relation to administrative decisions, and she emphasised that the immunity was against disclosing any aspect of the decision-making process.⁶⁰ The interrogatories which she disallowed sought details of times when decisions were reached, and whether particular documents were read and how long was spent reading them, from which at least part of the deliberative processes involved in the decisions reached could be inferred.

18. In *Wentworth v Rogers*,⁶¹ Handley JA of the NSW Court of Appeal was asked to disqualify himself from the hearing of an appeal upon the basis of what was alleged to have been said by him concerning the appellant at a private meeting with other judges which (if accepted) would lead to a perception of bias on his part against her. From the approach taken by Handley JA, it seems that the statements in question related to a previous appeal between the same parties in which he had participated. His Honour denied having made the remarks, and he rejected as inadmissible the evidence of a judge's former Associate who claimed to have overheard them. He relied upon the *Zanatta* case – in particular, the statement by Samuels JA in that case that evidence of statements made by a judge out of court which disclosed the considerations which led the judge to the decision given, or the manner in which the judge had exercised his or her judicial powers, was inadmissible.⁶²

19. In *Muin v Refugee Review Tribunal*,⁶³ the High Court considered a claim that the plaintiff had been denied procedural fairness by the Tribunal because he had not been made aware of certain material which was adverse to his application, which had been forwarded to the Tribunal and to which he had not been given an opportunity to reply. The adverse material was not specific to the plaintiff, but was contained in a large database relating to political conditions in the country from which the plaintiff sought refuge. An issue arose as to whether the member of the Tribunal assigned to the plaintiff's application had gained access to this database and had read the adverse material. An argument was put that the failure to call the member of the Tribunal to give evidence that she had *not* read the material led to an inference being more

⁵⁸ [1989] 2 SCR 796 at 815.

⁵⁹ (2000) 170 ALR 379 at [15].

⁶⁰ *Ibid* at [16].

⁶¹ [2000] NSWCA 368, unreported.

⁶² *Ibid* at [6]-[7].

⁶³ (2002) 190 ALR 601.

readily drawn that she *had* done so.⁶⁴ This argument was rejected. Gleeson CJ said that it would place the Tribunal member in a false position, inconsistent with the immunity against disclosure which she enjoyed,⁶⁵ if she were expected to go outside the published reasons for her decision to explain the process of research and consideration leading up to the making of that decision.⁶⁶ He agreed with the separate reasons of Kirby J and of Callinan J upon this issue. McHugh J similarly said that it would be inconsistent with that immunity to draw inferences from the Tribunal member's failure to give evidence concerning the matters which she took into account.⁶⁷ Kirby J said that the duty of members of the Tribunal to give reasons for their decisions stated the entire ambit of their duty to explain and justify their decisions, and that, relying upon the *Duke of Buccleuch*, *Hennessy v BHP* and *Zanatta* cases, they were not compellable to testify as to the matters in which they have been judicially engaged.⁶⁸ Callinan J, relying upon the *Herijanto* case, said that the rationale for the immunity against disclosure was the assurance which it gave that judges should be free in thought and independent in judgment, and that it extended to all aspects of the decision-making process itself.⁶⁹ To expect Tribunal members to give evidence in collateral challenges to their decisions would mark a departure from the well-established principle that, in general, a court or tribunal is taken to have exposed its thinking and reasoning in its reasons for decision.⁷⁰

Suggested analogy to judicial immunity against suit

20. The Commonwealth has also relied upon the cases dealing with the judicial immunity against suit which are helpfully reviewed by Fitzgerald JA of the NSW Court of Appeal in *Wentworth v Wentworth*.⁷¹ That immunity, which is well established, protects judicial officers from actions arising out of acts done in their judicial function or capacity. The immunity is absolute when the judicial officers act in the exercise of their judicial function or capacity.⁷² It extends to all acts done within the jurisdiction of the judge in the sense of the broad and general authority conferred upon that judge's court and upon the judge to hear and determine issues.⁷³ The immunity also extends to administrative decisions made by a judge which are intimately or

⁶⁴ *Jones v Dunkel* (1959) 101 CLR 298 at 321.

⁶⁵ A member of the Refugee Review Tribunal, like a Royal Commissioner, has the same protection and immunity as a Justice of the High Court. See *Migration Act 1958*, s 435(1); *Administrative Appeals Tribunal Act 1975*, s 60(1); and par 4, *supra*.
⁶⁶ (2002) 190 ALR 601 at [25].

⁶⁷ *Ibid* at [118].

⁶⁸ *Ibid* at [197].

⁶⁹ *Ibid* at [299].

⁷⁰ *Ibid* at [300].

⁷¹ [2000] NSWCA 350, particularly in pars 28 and 43.

⁷² *Re East; ex parte Ngugen* (1990) 196 CLR 354 at 365-366; *Rajski v Powell* (1987) 11 NSWLR 522 at 538-540.

⁷³ *Nakhla v McCarthy* [1878] 1 NZLR 291 at 301; *Gallo v Dawson* (1988) 63 ALJR 121 at 122.

immediately associated with that judge's judicial function.⁷⁴ The Commonwealth has argued that, by analogy to the application of the judge's immunity to "the broad and general authority" conferred upon that judge's court "to hear and determine issues", a Commissioner carrying out an Inquiry under the *Royal Commissions Act* "enjoys an immunity with respect to all things done in the exercise of the broad and general authority conferred by Letters Patent".⁷⁵

21. I accept all of the propositions distilled from the cases reviewed by Fitzgerald JA in *Wentworth v Wentworth*. I accept also that Commissioner Morling enjoys the same immunity against suit with respect to all things done by him in the exercise of the broad and general authority conferred upon him by the Letters Patent issued in relation to his Inquiry. But that does not assist the Commonwealth in its argument that no evidence may be elicited which disclose the processes or procedures which he instituted for the purposes of that Inquiry, rather than merely the *deliberative processes* by which it was decided that those processes or procedures were to be instituted.⁷⁶ The judicial immunity against suit which a judge (and a Royal Commissioner) enjoys is not the immunity which is in issue here.

22. Both the judicial immunities – one against suit and the other against disclosure – are founded upon the need for judges to be able to act freely and independently by ensuring that their decisions may be challenged only by the usual processes of appeal or review. The judicial immunity against *suit* is grounded in "high public policy" designed to ensure that, in the performance of their judicial functions, judges may act fearlessly and without harassing concern that they will be made personally liable for the performance of their functions before another judge at the suit of a person disgruntled by the decision.⁷⁷ Because such immunity is essential to the independence of judges, it is a policy which is designed to protect the citizen and not merely to give protection to judges.⁷⁸ The judicial immunity against *disclosure* is also based upon "strong considerations" of public policy,⁷⁹ to ensure that judges may be free in thought and independent in judgment,⁸⁰ without fear that they will be called upon to justify their decisions to another branch of government.⁸¹ The only effective exception to this immunity arises in the case of disciplinary procedures, but there is inevitably some safeguard imposed upon the institution of disciplinary procedures, such as the need to demonstrate an arguable case that the conduct of the

⁷⁴ *Yeldham v Rajski* (1989) 18 NSWLR 48 at 72-73.

⁷⁵ Letter from the Australian Government Solicitor, 5 October 2004, at p 2.

⁷⁶ See par 2, *supra*.

⁷⁷ *Yeldham v Rajski*, *supra* at 52, 66

⁷⁸ *Ibid* at 69.

⁷⁹ *Zanatta v McCleary*, *supra* at 234.

⁸⁰ *Sirros v Moore* [1975] QB 118 at 136; *Herijanto v Refugee Review Tribunal*, *supra* at [15]; *Muin v Refugee Review Tribunal*, *supra* at [299].

⁸¹ *MacKeigan v Hickman*, *supra* at 830-831; *Moreau-Bérubé v New Brunswick (Judicial Council)* [2001] 1 SCR 249 at [57].

judge has threatened the integrity of the judiciary as a whole.⁸² It has been suggested that another justification for the immunity against disclosure was put forward in the *Duke of Buccleuch* case,⁸³ when Cleasby B said that there were grave objections to the conduct of judges being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them, and that, as everything which they can properly prove can be proved by others, the courts discountenance, perhaps prevent, them being examined.⁸⁴ However, with all due respect, such a suggestion overlooks the assumption made by Cleasby B that the judges would be giving evidence only in relation to those matters which could “properly” be proved – that is, on matters *other than* their deliberative processes.

23. As the cases I have discussed make clear, the judicial immunity against disclosure is very much more narrowly based than the judicial immunity against suit. It is not concerned with the immunity of a judge against civil liability for acts done within that judge’s judicial function or capacity, but rather with his or her immunity against being compelled to disclose the deliberative processes by which that judge made decisions in the course of that judicial function or capacity. It is effectively a corollary to the obligation of a judge to give reasons for decisions which adequately reveal those deliberative processes and which can be examined upon appeal or review, when there is no suggestion that the judge is being called upon to justify that decision.

Another suggested support for immunity claim

24. The Commonwealth has nevertheless relied upon two phrases used in the cases which I have discussed to argue that, even within those cases, there is support for its argument that no evidence may be elicited which would disclose the processes or procedures which Commissioner Morling instituted for the purposes of his 1994 Inquiry.⁸⁵ This argument, in my view, has adopted the apparent generality of these phrases without regard to their context. I have no doubt that, in each case, the phrase was intended to refer only to the disclosure of a judge’s deliberative processes.

25. The first phrase – the *manner* in which certain functions were exercised – originated in the *Hennessy v BHP* case,⁸⁶ when, following the statements based upon the *Duke of Buccleuch* case, reference is being made to evidence of members of the Medical Board:

⁸² *Moreau-Bérubé v New Brunswick (Judicial Council)*, *supra* at 58-59.

⁸³ *Supra* at 433.

⁸⁴ See, for example, *Zanatta v McCleary*, *supra* at 239.

⁸⁵ (1) The *manner* in which certain functions were exercised: Letter from the Australian Government Solicitor, 5 October 2004, p 2. (2) Every (or all) aspects of the decision making process: *Ibid*, pp 2, 3; Letter from the Australian Government Solicitor, 23 September 2004, p 1.

⁸⁶ *Supra* at 349, in the joint judgment.

[T]heir functions are administrative and supervisory. To them is confided the duty of ascertaining and certifying whether a workman is or is not suffering from lead poisoning, and whether he should be removed from future exposure to its risks. It is impossible in these circumstances, in our opinion, to deny their competency as witnesses; but the extent to which they can give evidence of matters coming before them officially is another matter.

In our opinion, the evidence tendered is admissible because it is not prohibited or privileged, because it does not seek to invalidate any act of the Board or to explain, contradict or vary any of its certificates or acts or to disclose the *manner* in which the Board exercised any of its functions, and because it merely seeks the disclosure of existing facts and symptoms and the opinion of expert witnesses who also happened to be members of the Board upon those facts and symptoms.⁸⁷

It is, in my opinion, clear from the whole of its context that the phrase “the *manner* in which the Board exercised its functions” was not intended to go beyond the matters which were in issue in that case, which was whether persons who exercise adjudicative functions can be compelled to disclose their deliberative processes in making that adjudication.

26. Similarly in the *Zanatta* case,⁸⁸ when, following references to the *Duke of Buccleuch* and *Hennessy v BHP* cases, Samuels JA said:

A judge of a court of record cannot be compelled to testify to the considerations which led him to his decision, or the *manner* in which he exercised his judicial powers,⁸⁹

he was not intending to go beyond the same matters which were in issue in that case. This is made clear when, after including within the immunity any indirect proof of the judge’s deliberative processes which could not be proved directly, his Honour concluded with the statement:

It is unnecessary, in this case, to express any final view as to whether there are circumstances in which a court will receive evidence of extra-curial statements made by a judge in which he has given judgment. But I am firmly of the opinion that such evidence is not admissible, if its purpose is to show the process of reasoning or the factors taken into account in coming to the decision.

And similarly again in the *Herijanto* case, the statement by Gaudron J that “judges cannot be compelled to answer as to the *manner* in which they have exercised their judicial powers” was based directly upon the *Knowles* case.⁹⁰ There was nothing in the *Knowles* case which would justify a wider immunity than one which was limited to the disclosure of the deliberative processes by which the judges’ decision had been reached. Her Honour’s ruling in the *Herijanto* case was directed solely to the deliberative functions of the Tribunal member who made the

⁸⁷ I have added the emphasis to the word “manner”.

⁸⁸ *Supra* at 239.

⁸⁹ Again, I have added the emphasis to the word “manner”.

⁹⁰ *Supra* at [13]. Again, I have added the emphasis to the word “manner”.

decision being reviewed.⁹¹ She also referred to the *Hennessey v BHP* and *MacKeigan v Hickman* cases. I have already identified the limited nature of the issue in *Hennessey v BHP*; it was the same limited issue in *MacKeigan v Hickman*. There is no basis for interpreting the expression “the *manner* in which they have exercised their judicial powers” in any wider sense.

27. The second phrase – any (or all) aspects of the *decision-making process* – appears to have originated in the judgment of La Forest J in the *MacKeigan v Hickman* case. To recapitulate briefly, that case was concerned with the disclosure of the reasons for both a judicial decision by the Appeals Division (that there had been a miscarriage of justice in a particular criminal trial) and an administrative decision by the Chief Justice of the Province (the composition of the Appeals Division for the appeal from the conviction in that case). The reasons of the seven justices of the Supreme Court of Canada sitting in this case were unanimous in holding that the immunity against disclosure of the deliberative processes which led to the judicial decision was absolute in nature.⁹² La Forest J said that he agreed with McLachlin J that the statute authorising the Royal Commission to inquire into the trial and the appeal in that case was –

... not specific enough to override the fundamental principle of judicial immunity from being compelled to testify about the *decision-making process* or the reasons for the composition of the court in a particular case.⁹³

McLachlin J, who delivered the leading judgment on behalf of L’Heureux-Dubé & Gonthier JJ and herself, was concerned only with the disclosure of the “reasons” for the judicial and administrative decisions.⁹⁴ There is no warrant for interpreting the phrase “decision-making process” as bearing anything but its primary meaning of the process by which any particular decision is reached – what the reasoning was by which the decision was reached, including what weight was placed upon any particular matter and what material had been taken into account in reaching it. It includes the reasons for any decision made during the proceedings, and it is not restricted to the reasons for the ultimate decision in the final judgment given. The *MacKeigan v Hickman* case does not in any way suggest that the immunity includes the whole of the litigation (including decisions as to how the litigation is to be conducted) which leads to the final decision.

⁹¹ These are described in par 17, *supra*.

⁹² See pars 11-14, *supra*.

⁹³ *Supra* at 811. I have added the emphasis to the phrase “decision-making process”.

⁹⁴ McLachlin J said that the issue in the appeal was whether an investigative commission of inquiry can compel judges involved in the matters being investigated to testify as to the *reasons* for their judicial decision and the composition of the panel that heard the case”: p 814. I have added the emphasis to the word “reasons”. The question was whether a Supreme Court judge sitting in a civil case (with whose powers the Royal Commission’s powers were equated) “can compel another judge to testify (a) on how and why he or she arrived at a particular judicial decision; and (b) on why a certain judge sat on a particular panel of the court”: p 825. The restriction to deliberative processes is repeated at pp 828, 830 and 831.

28. When Gaudron J described the immunity as an “immunity from disclosing any aspect of the *decision-making process*” in the *Herijanto* case,⁹⁵ she did not identify the source of the phrase, but stated that the immunity was “required to ensure freedom of thought and independence of judgment”, an approach which she said was entirely consistent with what had been said in *Hennessy v BHP*. The *Hennessy v BHP* case was, as I have already pointed out, concerned only with whether persons who exercise adjudicative functions can be compelled to disclose their deliberative processes in making that adjudication.⁹⁶ The phrase “aspect[s] of the decision-making process” was restated by the Commonwealth in its submissions – by way of an analogy, it was claimed – as “aspects of the Inquiry”.⁹⁷ This very considerable enlargement of the meaning of the original phrase is not justified. The use of the phrase “freedom of thought and independence of judgment” is consistent with the interpretation which I have given to the phrase “decision-making process”. Again, the meaning is the process by which any particular decision is reached. That is clearly how Handley JA interpreted the phrase “decision-making process” when he adopted it from the *Herijanto* case in the *Wentworth v Rogers* case,⁹⁸ for he went on to quote from the *Zanatta* case the phrase used there by Samuels JA – a judge “cannot be compelled to testify to the considerations which led him to his decision”.⁹⁹

29. The Commonwealth then asserted that Gleeson CJ had said in the *Muin* case that the member of the Refugee Review Tribunal could not be called “to give an account of the process of decision-making beyond that which is set out in her published reasons for her decision”.¹⁰⁰ This is identified as having been said in par [25]. What the Chief Justice actually said in par [25] was that the submission made on behalf of the plaintiff – that an inference could be drawn in favour of the plaintiff from the absence of evidence from the Tribunal member – placed the member in a position inconsistent with the immunity enjoyed by that member by expecting her, in proceedings challenging her decision –

... to go outside the published reasons for decision and explain the process of research and consideration leading up to the making of the decision.

The Commonwealth’s misquotation is surprising, and it has not been explained. What Gleeson CJ actually said, if I may say so respectfully, neatly makes the point that the immunity is indeed restricted to the deliberative processes involved in any particular decision made during the course of litigation. Similarly, when Callinan J in the same case said, relying upon the

⁹⁵ *Supra* at [16]. I have added the emphasis to the phrase “decision-making process”.

⁹⁶ *Supra* at par 25.

⁹⁷ Letter from the Australian Government Solicitor, 23 September 2004, p 3.

⁹⁸ *Supra* at [6].

⁹⁹ *Ibid* at [6]-[7].

¹⁰⁰ Letter from the Australian Government Solicitor, 5 October 2004, p 2.

Herijanto case, that the immunity extends to the disclosure of “any or all aspects of the *decision-making* process itself”,¹⁰¹ that statement followed another statement taken from the *Herijanto* case, that the rationale for the immunity from compulsory disclosure is “the assurance that judges should be free in thought and independent in judgment”. His Honour went on to state that acceptance of the plaintiff’s submission would –

...mark a departure from the well-established principle that, in general, a court of tribunal is taken to have exposed its thinking and reasoning ... in its reasons for judgment.

Callinan J’s use of the phrase “decision-making process” in that context cannot be interpreted as refuting the unanimous view expressed by everyone else that the immunity is restricted to the deliberative processes involved in any particular decision made during the course of litigation.

A distinction?

30. The Commonwealth also submitted that decisions made by Commissioner Morling in relation to resources were decisions made in the course of fulfilling his “duty”, and thus fell directly within the immunity granted by s 7(1) of the *Royal Commissions Act* by which he was granted the same protection and immunity as a justice of the High Court “in the exercise of his or her duty as a Commissioner”.¹⁰² The use of the word “duty” in the section provides no distinction. A Royal Commissioner is granted the same immunity as a High Court justice, not a greater one. He or she therefore enjoys no more than the immunity granted to a judge of a superior court of record in England,¹⁰³ and that immunity, as all the cases say, is restricted to the deliberative processes which led to any decision made during the course of the proceedings.

31. Such decisions relating to resources may well be decisions of an administrative nature as discussed in the *MacKeigan v Hickman* case, and the reasons for those decisions are thus, according to the unanimous decision of the Supreme Court of Canada in that case, the subject of a qualified rather than an absolute immunity against disclosure. A Royal Commissioner has the responsibility not only of determining the issues raised by the terms of reference but also of administering the organisation of the Commission, and the line between judicial and administrative decisions may sometimes be blurred. The distinction does not concern this present Inquiry, as none of the terms of reference which I have to decide requires an examination of the reasons for such decisions by Commissioner Morling. The issue in relation to resources requires an examination of whether the absence of resources adversely affected the 1994 Inquiry. That is not entirely an objective test, as it includes, in my view, an examination as to whether the

¹⁰¹ *Supra* at [299]. I have added the emphasis to the phrase “decision-making process”.

¹⁰² The section is quoted more fully in par 4, *supra*.

¹⁰³ See par 4, *supra*.

1994 Inquiry was denied any resources which had been sought and which would have produced a better Inquiry. It does not, however, seek to investigate why Commissioner Morling may or may not have sought additional resources. It is therefore unnecessary in this decision to determine whether the immunity applicable to the reasons for those administrative decisions is absolute in this country (as it is for the reasons for judicial decisions) or merely qualified as in Canada (so that they may be weighed against competing public interests). But the administrative decisions themselves are outside the immunity, as are the judicial decisions.

The Evidence Act 1995

32. In the *Karmas* case, Dunford J referred not only to the common law cases on judicial immunity against disclosure but also to s 129 of the *Evidence Act 1995* (NSW). So far as it is relevant here, s 129 of the NSW *Evidence Act* is in the same terms as s 129 of the Commonwealth *Evidence Act*:

Exclusion of evidence of reasons for judicial etc. decisions

- (1) Evidence of the reasons for a decision made by a person who is:
 - (a) a judge in an Australian or overseas proceeding; or
 - (b) an arbitrator in respect of a dispute that has been submitted to the person, or to the person and one or more other persons, for arbitration;or the deliberations of a person so acting in relation to such a decision, must not be given by the person, or a person who was, in relation to the proceeding or arbitration, under the direction or control of that person.
- (2) Such evidence must not be given by tendering as evidence a document prepared by such a person.
- (3) This section does not prevent the admission or use, in a proceeding, of published reasons for a decision.

Subsection 4 is concerned with jurors. Subsection (5) provides that the exclusion in subs (1) does not apply in the prosecution for various offences or in proceedings by way of appeal or judicial review. This last provision may be ambiguous, as it appears to suggest that, in an appeal or judicial review, evidence may be given of the deliberative processes of the judge *beyond* what is contained in the judge's published reasons for the decision in issue in that appeal or judicial review. But it is unnecessary to resolve that ambiguity here.

33. The provisions which I have quoted do, however, reflect the common law as I have stated it. It is significant that the section does *not* give immunity to the decisions themselves made during the course of the proceedings, as the Commonwealth has sought to argue here. This is, however, by the way, as s 129 does not, in my opinion, apply to the present Inquiry. The

Evidence Act applies to all proceedings in a federal court.¹⁰⁴ The expression “federal court” is defined by the Dictionary as including:

... a person or body ... that, in performing a function or exercising a power under a law of the Commonwealth, is required to apply the laws of evidence.

It is accepted generally that a Royal Commission, which is both administrative and inquisitorial in nature (although the Commissioner is bound to act judicially), is not bound to apply the laws of evidence unless the terms of reference expressly so require.¹⁰⁵ The terms of reference for the present Inquiry do not include such a requirement. Section 129 is accordingly not applicable to this Inquiry.

Indirect evidence of deliberative processes within immunity

34. There is no doubt that, where evidence may not be elicited directly from a judge as to his or her deliberative processes, evidence may not be elicited indirectly of statements made by the judge otherwise than those made in the course of the proceedings in his or her capacity as a judge – where, for example, they are made to the judge’s personal staff or recorded in drafts or in other documents which reveal that judge’s deliberative processes in the particular case – by calling the person to whom the statements were made or by seeking the production of the relevant documents. This was held by Samuels JA in the *Zanatta* case, where it was sought to prove the judge’s statements made at a social occasion after judgment had been delivered by calling persons who alleged that they had heard those statements made.¹⁰⁶

35. There have been many different types of indirect evidence rejected. In *Wentworth v Rares*, Samuels JA held that the immunity includes documents revealing “those considerations which have been involved in an act of judgment”.¹⁰⁷ In the *Karmas* case, the evidence sought by the subpoena was a note made by the Tribunal member of his deliberations.¹⁰⁸ In the *Herijanto* case, the interrogatories disallowed sought details of times when decisions were reached, whether particular documents were read and how long was spent reading them, from which at least part of the deliberative processes involved in the decision reached could be inferred.¹⁰⁹ The evidence rejected in *Wentworth v Rogers* was from a person who alleged that she had heard the

¹⁰⁴ Section 4(1).

¹⁰⁵ See, for example, *Royal Commission into the Building and Construction Industry*, in which Commissioner Cole QC quoted a dissenting judgment in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256, where Evatt J usefully described the rules of evidence as representing “the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth”, and thus should not be ignored as being “of no account”. This does not, however, mean that a Royal Commissioner is bound to apply the laws of evidence.

¹⁰⁶ *Supra* at 239.

¹⁰⁷ See par 16, *supra*.

¹⁰⁸ *Supra* at par 3.

¹⁰⁹ *Supra* at [20]-[24].

judge make certain statements at a private meeting with other judges.¹¹⁰ In the *Muin* case, the plaintiff sought to have the inference drawn that the Tribunal member *had* in fact read the material in question from the failure to call her to say that she had *not* read it.¹¹¹

Where a judge may be compelled to give evidence

36. A judge may be compelled to give evidence in order to establish what was on the record,¹¹² and other facts which happened in the proceedings in which the judge had been engaged. One example would be where certain evidence was given before the judge in relation to which the witness was subsequently being prosecuted for perjury, although it has been said that in all such cases – where others can give the same evidence – the judge should not be called as a matter of policy.¹¹³

Non-compellable or inadmissible?

37. Some of the decisions to which I have referred describe a judge as being a non-compellable witness in relation to that judge's deliberative processes.¹¹⁴ Many more have suggested that such evidence is not admissible even if the judge were willing to give it.¹¹⁵ Little attention appears to have been drawn to the distinction. Both of the full High Court cases have described the judge as a non-compellable rather than an incompetent witness,¹¹⁶ but again there was no discussion of the point.

38. If I had to choose, I would hold that the judge is a competent but not compellable witness, leaving it to the judge in the particular case to determine whether evidence should be given which reveals his or her deliberative processes, whether by the judge's own evidence or by the production of documents which reveal such processes. However, *other* indirect evidence of statements made by the judge out of court should be regarded as inadmissible, because there always exists a danger that disaffected ex-staff members or colleagues will only be too willing to give evidence which would lead to the judge effectively being compelled to justify the decision

¹¹⁰ *Supra* at par 3.

¹¹¹ *Supra* at [25].

¹¹² *Duke of Buccleuch v Metropolitan Board of Works*, *supra* at 432-433, 462 (see par 6, *supra*); *Ward v Shell-Mex and BP Ltd*, *supra* at 284-285; *Zanatta v McCleary*, *supra* at 233-234; *Herijanto v Refugee Review Tribunal*, *supra* at [16].

¹¹³ *R v Gazard* (1838) 8 C & P 595 at 595 [173 ER 633 at 633]; *Duke of Buccleuch v Metropolitan Board of Works*, *supra* at 433 (see par 22, *supra*)

¹¹⁴ *Hennessy v BHP*, *supra* at 349; *MacKeigan v Hickman*, *supra* at 806, 811, 830-831, 841; *Warren v Warren*, *supra* at 497; *Muin v Refugee Review Tribunal*, *supra* at [25]. [197], [299].

¹¹⁵ *Duke of Buccleuch v Metropolitan Board of Works*, *supra* at 423-433, 457-458, 462; *Ex parte Electronic Rentals Pty Ltd*; *Re Anderson*, *supra* at 536; *Zanatta v McCleary*, *supra* at 234, 239; *Wentworth v Rares*, *supra* (see par 16, *supra*); *MacKeigan v Hickman*, *supra* at 809; *Karmas v New South Wales Land and Housing Corporation*, *supra* at [6]; *Herijanto v Refugee Review Tribunal*, *supra* at [13], [15]-[16]; *Wentworth v Rogers*, *supra* at par 10. See also s 129 of the *Evidence Act 1995*.

¹¹⁶ *Hennessy v BHP* and *Muin v Refugee Review Tribunal*.

made, otherwise than in the course of the proceedings themselves. It should never be left to such a person to determine whether they will give evidence which discloses the deliberative processes of a judge in a particular case. But it is unnecessary for me to make the choice in this case, as it was made clear by Counsel appearing for the Commonwealth that the witnesses on whose behalf they objected to the evidence were not willing to give the evidence voluntarily.

Summary

39. In the summary which follows, I have sought to avoid undefined phrases of the type which led the Commonwealth in the present case to rely upon generalities taken out of their context. References to a judge are intended to include any person who acts in a similar adjudicative capacity.

- (1) The judicial immunity against disclosure means that a judge may not be compelled to give evidence which would disclose the deliberative processes which led to any decision given by the judge in the course of the proceedings in which he or she took part. It may be that such evidence is inadmissible, even if the judge is willing to give it, but it is unnecessary to decide the issue in this case. The immunity is absolute.
- (2) The deliberative processes by which a decision is reached include the reasons for that decision (how and why it was reached), the weight placed upon any particular matter, the considerations which led to the decision and the material taken into account when reaching it – everything which passed through the judge’s mind in making the decision.
- (3) The immunity extends to the reasons for any decision made during the proceedings, and it is not restricted to the reasons for the ultimate decision in the final judgment given.
- (4) The immunity also extends to evidence of persons other than the judge, and to the production and tender of documents, where that evidence or those documents would reveal the deliberative processes by which the decision was reached.
- (5) The indemnity is effectively a corollary to the obligation of a judge to give reasons for decisions which adequately reveal those deliberative processes and which can be examined upon appeal or review, when there is no suggestion that the judge is being called upon to justify that decision. It is founded upon the need for judges to be able to act freely and independently by ensuring that their decisions may be challenged only by the usual processes of appeal or review.
- (6) A judge may nevertheless be compelled to give evidence of factual matters which took place in the proceeding over which the judge presided – that is, the “record” before him or her – where such evidence does not disclose the judge’s deliberative processes in reaching any decision, although the judge may not be compelled to state what his or her

reaction (if any) was to that record. As a matter of policy, however, the judge should not be called to prove such matters where others can give the same evidence.
