HIGH COURT OF AUSTRALIA

The Commonwealth of Australia

Vs.

Northern Land Council

(Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and Mchugh JJ.)

21.04.1993

JUDGMENT

1. This action was commenced in the original jurisdiction of this Court. In it the Northern Land Council is seeking remedies against the Commonwealth arising out of an agreement made between it and the Commonwealth on 3 November 1978 pursuant to s.44(2) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ((1) Re-enacted, in substantially the same form, as s.48D by the Aboriginal Land Rights (Northern Territory) Amendment Act (No.3) 1987 (Cth), s.5.) Among other things, the Northern Land Council claims that the agreement is inadequate, unreasonable and unfair to it; that the Commonwealth was in breach of obligations arising out of a fiduciary relationship with it in matters relating to the negotiation and execution of the agreement; that the agreement was executed by it as a result of duress or undue influence exerted by the Commonwealth; and that in acting as it did the Commonwealth behaved unconscionably. It claims a declaration that the agreement is void or that it has validly avoided it. It is unnecessary for present purposes to describe the statutory background to the action; a description is to be found in Northern Land Council v. The Commonwealth ((2) [1986] HCA 18; (1986) 161 CLR 1, at pp 5-7.) and Northern Land Council v. The Commonwealth (No.2) ((3) [1987] HCA 52; (1987) 61 ALJR 616, at p 617; [1987] HCA 52; 75 ALR 210, at p 211.). It is sufficient to observe that the legality of uranium mining operations upon land known as the Ranger land is said to depend upon the status of the agreement, which provides for certain payments to be made to the Northern Land Council in respect of mining on that land.

2. The action was remitted to the Federal Court. In that Court Jenkinson J. ordered that the Commonwealth produce for inspection by the legal representatives of the Northern Land Council 113 notebooks containing notes made by Cabinet officers of the deliberations of federal Cabinet and 13 other notebooks containing notes made by officers of the Department of Trade and Resources of the deliberations of Cabinet or committees of Cabinet. The Commonwealth made discovery of these documents and there is no dispute, therefore, that they were discoverable. That is to say, it may be assumed that the notebooks contain entries which relate to matters in issue in the action in the sense they would, or would lead to a chain of enquiry which would, either advance the Northern Land Council's case or damage that of the Commonwealth ((4) See Mulley v. Manifold [1959] HCA 23; (1959) 103 CLR 341, at p 345). However, the Commonwealth resists inspection of the documents on the ground that it is against the public interest for the contents to be disclosed.

3. The inspection ordered by Jenkinson J. was limited to the legal representatives of the Northern Land Council and they were bound to make no disclosure of the contents to anyone else until further

order. Jenkinson J. did not himself inspect the documents, but in ordering inspection "of all entries concerning events which occurred before the impugned agreement was made and which relate to the agreement or to negotiation for it", he clearly intended that the parties (restricted in the case of the Northern Land Council to its legal representatives) should identify more closely those entries of which the Northern Land Council sought disclosure in order that he might make such inspection himself as might be necessary, hear argument and make such further orders for production as might be appropriate. In making the limited order for inspection Jenkinson J. expressed the view:

"The probability is in my opinion strong that the entries in the notebooks relating to deliberations about the negotiation and the making of the impugned agreement will afford information by means of which the case of the (Northern Land Council) for rescission of the agreement as unconscientious may be advanced or the case of the Commonwealth against the grant of that remedy may be damaged. There is accordingly a public interest in favour of granting inspection of those entries as well as a public interest in favour of denying inspection. In my opinion the balance is clearly in favour of granting inspection to the legal representatives of the (Northern Land Council), upon their undertaking not without the leave of the court to disclose to others what they learn by inspection."

4. The Commonwealth appealed unsuccessfully to the Full Court of the Federal Court against the order made by Jenkinson J. and it is from the judgment of that Court that this appeal is brought.

5. It should be observed at the outset that the documents for which the Commonwealth claims immunity from disclosure are documents which record the actual deliberations of Cabinet or a committee of Cabinet. They are not documents prepared outside Cabinet, such as reports or submissions, for the assistance of Cabinet. Documents of that kind are often referred to as Cabinet documents. When immunity is claimed for Cabinet documents as a class and not in reliance upon the particular contents, it is generally upon the basis that disclosure would discourage candour on the part of public officials in their communications with those responsible for making policy decisions and would for that reason be against the public interest. The discouragement of candour on the part of public officials has been questioned as a sufficient, or even valid, basis upon which to claim immunity. On the other hand, Lord Wilberforce has expressed the view that, in recent years, this consideration has "received an excessive dose of cold water" ((5) Burmah Oil Co. Ltd. v. Bank of England [1979] UKHL 4; (1980) AC 1090, at p 1112; see e.g. Sankey v. Whitlam (1978) 142 CLR 1, at pp 62-63; Conway v. Rimmer [1968] UKHL 2; (1968) AC 910, at pp 952, 957, 987-988, 993-994; Rogers v. Home Secretary (1973) AC 388, at p 413; but contrast with Sankey v. Whitlam (1978) 142 CLR, at p 40; Conway v. Rimmer (1968) AC, at p 972.)

6. But it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential ((6) See U.K., Parliament, Report of the Committee of Privy Counsellors on Ministerial Memoirs ("the Radcliffe Committee"),) Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. Moreover, the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system or otherwise, is liable to subject the members

of that body to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course ((7) See Conway v. Rimmer (1968) AC, per Lord Reid at p 952; Sankey v. Whitlam (1978) 142 CLR, per Mason J. at pp 97-98; U.K., Parliament, Departmental Committee on Section 2 of the Official Secrets Act 1911 ("the Franks Committee"), (1972), Cmnd.5104, vol.1, p.33). The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support.

7. The classification of claims for public interest immunity in relation to documents into "class" claims and "contents" claims has been described as "rough but accepted" ((8) See Burmah Oil Co. Ltd. v. Bank of England (1980) AC, per Lord Wilberforce at p 1111). It serves to differentiate those documents the disclosure of which would be injurious to the public interest, whatever the contents, from those documents which ought not to be disclosed because of the particular contents. Both upon principle and authority, it is hardly contestable that documents recording the deliberations of Cabinet fall within a class of documents in respect of which there are strong considerations of public policy militating against disclosure regardless of their contents ((9) See Lanyon Pty. Ltd. v. The Commonwealth [1974] HCA 11; (1974) 129 CLR 650; Sankey v. Whitlam (1978) 142 CLR, at pp 39, 57, 97, 102, 108; Conway v. Rimmer (1968) AC, at pp 952, 973, 987, 993; Air Canada v. Secretary of State for Trade (1983) 2 AC 394, at p 432). But, whatever the position may have been in the past, the immunity from disclosure of documents falling within such a class is not absolute. The claim of public interest immunity must nonetheless be weighed against the competing public interest of the proper administration of justice, which may be impaired by the denial to a court of access to relevant and otherwise admissible evidence. As Gibbs ACJ. said in Sankey v. Whitlam ((10) (1978) 142 CLR, at p 43; see also per Stephen J. at pp 63-64 and Mason J. at pp 98-99):

"I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with especial care, giving full weight to the reasons for preserving the secrecy of documents of this class, but it will not treat all such documents as entitled to the same measure of protection - the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned. If a strong case has been made out for the production of the documents, and the court concludes that their disclosure would not really be detrimental to the public interest, an order for production will be made."

8. In the last sentence in the passage which we have just quoted, Gibbs ACJ. was referring no doubt to the outcome of a balancing process in a case where the detriment to the public interest involved in disclosure was outweighed by the public interest in the advancement of justice. In a case where a

document fell into a class of document the disclosure of which would be injurious to the public interest regardless of the contents, a court could conclude that "disclosure would not really be detrimental to the public interest" only in circumstances where there was a competing public interest, such as the public interest in the advancement of justice, which outweighed the public interest in the preservation of confidentiality. To inspect the contents of documents as a matter of course would be to disregard the basis of the immunity for a document falling within the class described. The apparent dilemma is, we think, to be resolved by recognizing that the classification of claims for immunity into "class" claims and "contents" claims is indeed often rough and imprecise. In many so-called "class" cases a court may find it necessary to consider a document, inspecting it if necessary, in order to determine whether it does in truth fall into a class which attracts immunity. The contents of the document may have a bearing on that question as may the topic with which it deals, particularly if it is no longer current or controversial.

9. Where, however, a document clearly falls within a class which attracts immunity, a different approach is called for. Documents recording Cabinet deliberations upon current or controversial matters, such as the records in question in this case, are an example. Obviously, there are extremely strong considerations of public policy weighing against their production regardless of how significant disclosure of their contents might be to the case of one side or the other in the proceedings in which the claim for immunity is raised ((11) See Rogers v. Home Secretary (1973) AC, at p 400; Alister v. The Queen (1984) 154 CLR 404, at pp 436, 453). However, as we have said, the immunity which membership of the class confers is not absolute and that is so even if, as in the case of records of Cabinet deliberations, the highest degree of protection against disclosure is warranted ((12) See Air Canada v. Secretary of State for Trade (1983) 2 AC, at p 432). Nevertheless, where it is established that a document belongs to a class which attracts immunity, a court will lean initially against ordering disclosure. Whether the circumstances of a particular case will be sufficient to displace the considerations which favour immunity depends to a large extent upon the nature of the class. In the case of documents recording the actual deliberations of Cabinet, only considerations which are indeed exceptional would be sufficient to overcome the public interest in their immunity from disclosure, they being documents with a pre-eminent claim to confidentiality. The process of determining whether an order for disclosure of documents in that class should be made remains one of weighing the public interest in the maintenance of confidentiality against the public interest in the due administration of justice, but the degree of protection against disclosure which is called for by the nature of that class will dictate the paramountcy of the claim for immunity in all but quite exceptional situations.

10. Indeed, for our part we doubt whether the disclosure of the records of Cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings. The public interest in avoiding serious damage to the proper working of government at the highest level must prevail over the interests of a litigant seeking to vindicate private rights. In criminal proceedings the position may be different. Thus, the necessary exceptional circumstances may exist in cases involving allegations of serious misconduct on the part of a Cabinet minister. Sankey v. Whitlam was such a case ((13) See also United States v. Nixon [1974] USSC 159; (1974) 418 US 683; Environmental Defence Society Inc. v. South Pacific Aluminium Ltd. (No.2) (1981) 1 NZLR 153). In that case, a former Prime Minister and three former Ministers were charged with unlawful conspiracy to borrow a large sum of money. Gibbs ACJ. ((14) (1978) 142 CLR, at pp.46-47.) pointed to the fact that the matters referred to in the documents, which he categorized as "state papers", related to a proposal which was never put into effect; three years had gone by and there had been a change of government. He expressed the view that if the documents were withheld "the informant will be unable to present to the court his case that the defendants committed criminal

offences while carrying out their duties as Ministers". It may be observed at this point that, a fortiori, exceptional circumstances would also have existed if denial of access to the documents had impeded the defendants in the conduct of their defence. Stephen J. made reference to similar considerations. He pointed out ((15) ibid., at p.56.) that the ordinary reasons supporting a claim for public interest immunity, "the need to safeguard the proper functioning of the executive arm of government and of the public service, seem curiously inappropriate when to uphold the claim is to prevent successful prosecution of the charges: inappropriate because what is charged is itself the grossly improper functioning of that very arm of government and of the public service which assists it." We should point out that in Sankey v. Whitlam the documents which this Court ordered to be produced were not even Cabinet documents, let alone documents disclosing Cabinet deliberations.

11. It follows that, in our view, it is only in a case where there are quite exceptional circumstances which give rise to a significant likelihood that the public interest in the proper administration of justice outweighs the very high public interest in the confidentiality of documents recording Cabinet deliberations that it will be necessary or appropriate to order production of the documents to the court. Where such exceptional circumstances do exist, the appropriate course to be followed will ordinarily be for the judge personally to inspect the documents for the purpose of deciding whether the relevance of the material to the proceedings in which disclosure is sought is sufficient, even in those exceptional circumstances, to justify disclosure ((16) See per Lord Reid in Conway v. Rimmer (1968) AC, at p 953). Having regard to the strength of the claim for immunity, a judge ought not order the disclosure of the contents of documents of that class unless the judge is satisfied that the materials are crucial to the proper determination of the proceedings.

12. The present case is a civil case. Although the Northern Land Council seeks to attack the agreement upon the separate ground of unconscionable behaviour on the part of the Commonwealth, the other claims of unfairness, breach of fiduciary duty, duress and the exercise of undue influence are in one sense all forms of unconscionable conduct ((17) See Commercial Bank of Australia Ltd. v. Amadio [1983] HCA 14; (1983) 151 CLR 447, per Mason J. at p 461). The claims are alleged to arise out of the position of relative disadvantage which the Northern Land Council occupied in comparison with the Commonwealth, having regard to its experience and the resources available to it; the course of negotiations leading to the conclusion of the agreement; the refusal of the Commonwealth to supply documents relating to the mining of the Ranger land which were in its possession; various misrepresentations made by the Commonwealth; and the inadequacy of the agreement in the events which have transpired. The Northern Land Council cannot be dependent upon access to the deliberations of Cabinet for proof of these matters, which occurred outside the confines of the Cabinet room. No doubt access to the records of the deliberations of Cabinet may disclose material which is relevant in the extended sense which is adopted for the purpose of discovery. Indeed, it is necessary to assume as much because the records were discovered. But in no way does it appear that access to those records is crucial to the conduct by the Northern Land Council of its case. True it is that some years have passed since the agreement was executed and the government has changed in the meantime, but it cannot be said that the matters which are the subject of the agreement have ceased to be current or controversial. It cannot, in our view, be said that exceptional circumstances exist which would justify the denial of the claim of public interest immunity, as a class claim, for the documents in question.

13. There was, therefore, no call for Jenkinson J. to order that the documents be produced for inspection. But we would add that, even if there had been, the procedure of ordering production of documents for inspection by the legal representatives of one of the parties, even upon a restricted basis, before the claim for immunity had been decided by the court, was open to serious question.

Whatever the safeguards, it represents an encroachment upon the confidentiality claimed for the documents. And in this case, public interest in their immunity from disclosure was of the highest order. If inspection of documents is necessary to determine the question of immunity (and in this case it was not) then it ought to be carried out by the court before ordering production for inspection by a party ((18) As in Alister v. The Queen (1984) 154 CLR, at p 469). No doubt this may in some cases cast a heavy burden on the court, but it is unavoidable if confidentiality is to be maintained until a claim for immunity is determined.

14. For these reasons we would allow the appeal.

The Commonwealth of Australia appeals from a judgment of the Full Court of the Federal Court ((19) Commonwealth v. Northern Land Council (1991) 103 ALR 267.)

dismissing an appeal from an order made by Jenkinson J. on 18 September 1990 ((20) Northern Land Council v. Commonwealth [1990] FCA 275; (1990) 102 ALR 110.) that it produce for inspection by the Northern Land Council ("the NLC") on a restricted basis a number of identified documents. For the moment it is enough to say that the documents comprise 126 notebooks recording proceedings of the Cabinet of the Commonwealth Government. In brief, the Commonwealth contends that these documents are privileged from inspection by the NLC by the doctrine of public interest immunity.

2. To appreciate the circumstances giving rise to the order made by Jenkinson J. and the basis of the challenge made to that order, it is necessary to say something of the litigation between the parties. The background to the litigation

3. On 3 November 1978 the NLC and the Commonwealth executed an agreement under s.44(2) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ("the Act") ((21) The Aboriginal Land Rights (Northern Territory) Amendment Act (No. 3) 1987 (Cth) repealed Pt IV of the Act which contained the mining provisions and substituted a new Pt IV. This involved a renumbering of comparable provisions). As the Act then stood, s.40(1) precluded the grant of a mining interest in respect of "Aboriginal land" as defined in the Act, except with the written consent of the Minister of State for Aboriginal Affairs and the relevant Land Council established under the Act or upon a proclamation by the Governor-General that the national interest required such a grant to be made. Section 40(6) provided that those restrictions were not applicable to the uranium-bearing land described in Schedule 2 to the Act and identified as the Ranger Project Area. Section 41(1) excluded the application to Aboriginal land of the Atomic Energy Act 1953 (Cth) or any other Act authorizing the mining of minerals in so far as that would authorize the entry of persons onto Aboriginal land. That exclusion was in turn subject to the consent of the Minister and the Land Council or a proclamation in the national interest. By reason of s.41(2), s.41(1) did not apply to the Ranger Project Area. However, in the case of the Ranger Project Area, s.44(2) provided a mechanism whereby an agreement might be made between the Land Council and the Commonwealth to authorize entry upon Aboriginal land under the Atomic Energy Act or other statute. That sub-section read:

"Where, by virtue of sub-section 41(2) or a Proclamation under paragraph 41(1)(b), the Atomic Energy Act 1953 or any other Act authorizing mining for minerals applies, in the manner referred to in section 41, in respect of any Aboriginal land without the consent of the Land Council for the area in which the land is situated, that Act shall not be taken to authorize the entry or remaining of a person on that land or the doing of any act by a person on that land unless the Commonwealth has

entered into an agreement under seal with the Land Council for the payment to the Land Council by the Commonwealth of an amount or amounts specified in, or calculated in accordance with, the agreement and the acceptance by the Commonwealth of such other terms and conditions as are provided for in the agreement."

4. If the Land Council and the Commonwealth were unable to reach an agreement, the Minister might refer the matter under s.46(1) to an arbitrator who would be empowered to fix the terms and conditions of an agreement that would bind the Land Council by virtue of s.46(2) and ((3) [1987] HCA 52; (1987) 61 ALJR 616, at p.617; [1987] HCA 52; 75 ALR 210, at p.211.)

5. The NLC is a Land Council under the Act. Certain land known as the Ranger land falls within its area and also within the Ranger Project Area. By the agreement of 3 November 1978, the Commonwealth was obliged to make certain payments to the NLC in respect of mining on the Ranger land. The Commonwealth also accepted other terms and conditions, some of which related to environmental control and rehabilitation of mine pits.

6. To complete the background, it is necessary to mention that on 9 January 1979 the Commonwealth, Peko-Wallsend Operations Ltd. ("Peko-Wallsend"), Electrolytic Zinc Company of Australia ("Electrolytic Zinc") and the Australian Atomic Energy Commission ("the Commission") entered into a written agreement for the mining of uranium on the Ranger land. On that day the Minister of State for Trade and Resources granted Peko-Wallsend and Electrolytic Zinc authority to mine the Ranger uranium deposits on behalf of the Commonwealth pursuant to s.41 of the Atomic Energy Act. On 12 September 1980 Peko-Wallsend, Electrolytic Zinc and the Commission assigned their interests in the agreement and in the mining authority to Energy Resources of Australia Ltd. ("Energy Resources"), the second respondent. Energy Resources, however, took no part in the appeal either to the Full Court of the Federal Court or to this Court. The litigation

7. By a writ issued out of the High Court on 7 November 1985 the NLC sought relief against the Commonwealth and against Energy Resources, claiming that the agreement of 3 November 1978 was "inadequate, unreasonable, and unfair to the NLC" and that at all material times "the Commonwealth was in a fiduciary relationship with the NLC" ((22) statement of claim, pars 34, 35.) The NLC also claimed duress, undue influence and unconscionability on the part of the Commonwealth. The NLC sought by way of relief orders rescinding the agreement of 3 November 1978, alternatively declaring it to be void or to have been avoided by the NLC and declarations that s.5 of the Atomic Energy Act was beyond the legislative competence of the Commonwealth, that Energy Resources had no authority to enter upon the land the subject of the agreement and that it was not carrying on the Ranger Project on the Ranger land on behalf of the Commonwealth under s.41 of the Atomic Energy Act. The NLC sought associated injunctive relief and orders for the Commonwealth to account to the NLC for all profits derived by it from the Ranger Project, for payment of such sums as were found to be due to the NLC on the taking of such accounts and for damages. There have been interlocutory applications before this Court ((23) Northern Land Council v. The Commonwealth [1986] HCA 18; (1986) 161 CLR 1; Northern Land Council v. The Commonwealth (No.2) [1987] HCA 52; (1987) 61 ALJR 616; 75 ALR 210).

On 21 October 1987 the Court ordered that the matter be remitted to such other court and upon such terms as might be determined by a Justice ((24) Northern Land Council v. The Commonwealth (No.2) (1987) 61 ALJR, at p 621; 75 ALR, at p 217). Thereafter the parties filed a consent to an order remitting the matter to the Federal Court in its Melbourne registry. An order was made accordingly on 9 November 1987.

8. On 11 December 1987 Woodward J. gave various directions in the proceedings, including the making of an order that the parties give discovery of documents. Discovery was given by the parties in due course. On 29 March 1989 a further order was made which, so far as material, gave directions for the inspection of documents and the filing of an affidavit in support of a public interest immunity claim made by the Commonwealth in regard to certain of the documents discovered by it. Some documents for which public interest immunity was claimed were produced on a restricted basis, namely, that inspection was limited to the legal representatives for the NLC and Energy Resources. Other discovery orders were made but it is unnecessary to detail them.

Motion for production

9. On 1 November 1989 the NLC gave notices to the Commonwealth seeking further discovery of documents relating to the Department of the Prime Minister and Cabinet and to the Department of Primary Industries and Energy. Each notice included a request in the following terms:

"3. It is noted that generally speaking there are no documents which relate to or record proceedings in cabinet other than departmental minutes to the minister, cabinet submissions and minutes of cabinet decisions. No documents have been discovered which record even the dates of meetings, the names of Ministers and officials present at Cabinet or Cabinet committee meetings, or the names of the members of Cabinet or of the Cabinet committees in respect of which documents have been discovered. No agenda, transcripts or other minutes have been discovered. It is understood that regularly, or at least commonly, shorthand or other notes are made of cabinet meetings by a cabinet official and or departmental officers.

A search for and discovery of any such documents in the possession of this department and a statement as to whether any other such documents not so discovered were ever in the possession of this department (and if so, listing them and giving particulars of the circumstances in which they left such possession and of their present whereabouts), is requested."

10. In response to the notices the Commonwealth provided further lists of documents and, once again, made available for inspection on a restricted basis some of the documents for which public interest immunity was claimed. There were other documents for which immunity was claimed and for which no inspection was offered. These are the documents the subject of the present appeal. There are 113 books, identified as Cabinet notebooks, and 13 other books in which notes were made of discussions in Cabinet and committees of Cabinet by two officers of the Department of Trade and Resources. The claim for immunity in respect of these documents was based on the need to maintain confidentiality of Cabinet discussions and to support the principle of collective responsibility of Cabinet Ministers.

11. On 14 February 1990 the NLC filed a notice of motion aimed at securing inspection of various documents, including the 126 Cabinet notebooks. In opposition to the motion an affidavit was filed, sworn by Anthea Tinney, Acting Director of the Cabinet Office in the Department of the Prime Minister and Cabinet. Ms Tinney explained that the Director is responsible for the management and co-ordination of the work of the Cabinet Office and that the Director attends meetings of Cabinet and Cabinet Committees, inter alia as a notetaker. It is desirable to reproduce verbatim certain paragraphs of Ms Tinney's affidavit:

"3. Meetings of Cabinet are attended by three Cabinet

notetakers. These notetakers are officers of the Department of the Prime Minister and Cabinet, the senior of the three notetakers, the No. 1 notetaker, normally being the Secretary of the Department who is also the Secretary to Cabinet. Apart from Cabinet Ministers themselves, the three Cabinet notetakers are the only persons who routinely attend throughout the course of Cabinet meetings. The Director of the Cabinet Office often attends meetings of the Cabinet in the No. 2 or No. 3 notetaker position. A similar system of attendance by Cabinet notetakers is followed in relation to meetings of Cabinet Committees although in the case of such committees the senior notetaker or the Committee Secretary is usually either a Deputy Secretary of the Department or the Director of the Cabinet Office.

4. The three notetakers concurrently make notes of the meeting in their Cabinet Notebooks (to which I make further reference below) for the sole purpose of enabling them to write Cabinet Minutes at the end of the meeting which record the outcomes of matters considered at the meeting. The respective roles of the three notetakers are described in paragraphs 2, 3, 4 and 5 of the document entitled 'Guide for Cabinet Notetakers' issued by the Cabinet Office ... Although that document was only issued in September 1989, to my knowledge the system relating to Cabinet notetakers described therein has been in use in relation to the Cabinet since 1975. In the course of my duties in the positions which I have held in the Cabinet Office and in other Branches in the Department I have occupied the position of each of the three Cabinet notetakers.

5. As the Guide indicates in paragraph 13, the notes taken by notetakers are intended to be an aide memoire for their use and notetakers may record the discussions in any way they wish. Notebooks, because they are kept according to individual styles, do not necessarily record information on Ministers' attendance, names of notetakers or any other officials present. Cabinet attendance records and business lists for particular meetings record such information quite separately from the notetakers' Notebooks and therefore obviate the need for the Notebook to be a source of these details. As part of the notetaker's record, the description of the meeting, the date, place and time thereof should be recorded, the subject matters of the discussion highlighted, as well as the identity of speakers in relation to any particular matter. As paragraph 57 of the Guide indicates, the contents of Cabinet notebooks are not intended to be an authoritative record of Cabinet discussions. Cabinet Minutes are the only official record of an outcome. Since the sole purpose of the notes in the notebooks is to enable the notetakers to reach agreement as to the terms of the outcomes reached at the Cabinet Meeting, none of the notebooks, nor the three notebooks together, contain a verbatim transcript of the Cabinet discussions. Thus a note may be made of what one Minister said but no note made of what others said. Also the order of notes in a notebook does not necessarily reflect the order of discussions. The Notebooks are used by notetakers to settle any disagreements about the terms of a minute.

6. The styles of different notetakers as to what and how much is recorded vary considerably. Some use recognized shorthand scripts and others use their own form of abbreviations. Some use longhand.

7. Cabinet Notebooks are uniquely identified, folio numbered notebooks provided by the Cabinet Office solely for use by notetakers when they attend meetings of Cabinet or Cabinet Committees. Each Notebook is issued to an individual notetaker for his or her exclusive use. Ministers do not have access to them. Notebooks which are not in regular use are returned to the Cabinet Office for secure custody and reissued to the same notetaker only as required by that notetaker. Once a Notebook is full, a new one is issued to the notetaker as required and the full Notebook is put in secure storage where it is retained. Under this system, Notebooks will cover part or all of a number

of meetings of Cabinet and Cabinet Committees and include entries relating to a variety of subjects coming before Cabinet or a Cabinet Committee.

8. Paragraphs 54, 55 and 56 of the Guide set out a number of rules relating to Cabinet Notebooks. As indicated in paragraph 56 of the Guide, unlike most Cabinet documents, which generally are available for public access 30 years after their creation, by virtue of the exclusion of Cabinet Notebooks from the definition of 'Commonwealth Record' in s.3(1) of the Archives Act 1983, they never become available for public access.

...
12. In my view disclosure of those entries (i.e. entries in the notebooks) in this proceeding would harm the public interest in that disclosure would undermine the principle of collective responsibility referred to in paragraph 14 below. Disclosure would also harm the public interest for the reason that disclosure could create or contribute to ill-formed or captious public or political criticism on the basis of incomplete information on a matter of current political debate referred to in paragraph 17 below.

13. While affairs of government are conducted for the public benefit and advancement, and the deliberations of the Parliament are conducted in public, it is established by convention and acknowledged in Commonwealth legislation that confidentiality properly attaches to the deliberations of Ministers in Cabinet. This convention is followed by all governments in Australia, both State and Federal, and in all nations with a similar system of government. The convention recognises that it is necessary that there be a forum in which full and frank discussions by Ministers can take place, uninhibited by the need to temper debate to meet sectional interest or media pressures, and in which individual opinions can be expressed freely among colleagues and without public comment or exposure. If this were not so the efficiency of the policy-making process would be significantly impaired.

14. It is a complementary convention of Cabinet government that decisions once arrived at in the Cabinet are supported by all Ministers whatever their personal views. This principle of collective responsibility of members of Cabinet for decisions taken is a long- standing and an integral part of the Australian system of government. Whatever range of private views Ministers may put in Cabinet discussions, to ensure effective and efficient government it is necessary that there be finality of decision making and that decisions once arrived at, and announced, should be clear and supported by all Ministers. Collective responsibility of Ministers also ensures that government is properly accountable and responsible as a whole to the Parliament and through it to the people. The principles of collective responsibility and Cabinet confidentiality being principles of very long standing are described in the Cabinet Handbook".

12. The order made by Jenkinson J. on 18 September 1990, which is the subject of this appeal, required the Commonwealth to produce for inspection on behalf of the NLC all entries in the 126 notebooks "concerning events which occurred before the agreement made ... on 3 November 1978 and which relate to the said agreement or to negotiations for it". Until further order, inspection was limited to named solicitors and counsel for the NLC who were required, as a condition of access to the documents, to execute an undertaking not to disclose the documents or any of their contents to any person other than one of the named persons. The order was of an interim nature, designed to identify with greater precision those entries the production of which might be pressed by the NLC so that a final determination could be made as to their production in the action.

13. In an affidavit filed in support of the motion for production of the documents, the solicitor for the NLC referred to various matters which, on the basis of documents already produced, appeared to have been the subject of Cabinet decisions bearing on the negotiations between the Commonwealth and the NLC which culminated in the agreement of 3 November 1978. The question of relevance is not directly in issue here; indeed if the notebooks contained nothing relevant to the issues in the action, they should not have been discovered. If inspection is permitted it will be only of those entries that bear on the action. What is at issue is whether public interest immunity attaches to the documents and the implications such immunity has for any order for their production and inspection. There is an aspect of the argument on appeal that turns on the relevant court rules dealing with discovery, production and inspection; that aspect will be considered later in these reasons.

The grounds of appeal

14. Before the Full Court the Commonwealth advanced three grounds of appeal and those grounds were pursued before this Court. The first ground was that, in the case of Cabinet documents, there was an absolute public interest immunity, that is, an immunity which cannot yield to competing aspects of the public interest. The second ground was that, if immunity was not absolute, the NLC had failed to make good a case requiring Jenkinson J. to engage in a balancing exercise between public interest immunity and the competing public interest in the administration of justice. The third ground was that Jenkinson J. should not have ordered production and inspection of the Cabinet notebooks, even on a limited basis, until he had carried out the task of balancing the competing interests and determined whether production and inspection were appropriate.

Cabinet confidentiality

15. The judgment of the Full Court discusses at length the origin of Cabinet and the steps that led to a situation where, in the words of the Court ((25) Commonwealth v. Northern Land Council (1991) 103 ALR, at p 282):

"The conventional wisdom of contemporary constitutional practice presents secrecy as a necessary incident of collective responsibility."

16. As the historical development of Cabinet is described in the judgment of the Full Court, it would be superfluous to traverse that ground again. The Full Court notes ((26) ibid., at p.283.) that the "concept of collective responsibility did not really emerge as an element of Cabinet government until the mid-nineteenth century". And, as their Honours observe, there is evidence, at least in British constitutional practice, that the convention has been weakening ((27) See Attorney-General v. Jonathan Cape Ltd. (1976) QB 752, per Lord Widgery C.J. at p 770). The confidentiality of Cabinet discussions has been seen as the natural correlative of collective responsibility. It is not so much that the subjects discussed in Cabinet should necessarily be treated as confidential; in many cases, what Cabinet decides is translated into political action. (Of course, there are subjects such as those relating to national security where confidentiality may be vital in the interests of the country.) Rather, confidentiality has been urged in order to support collective responsibility by keeping secret the stand taken by individual Ministers on particular matters so that the Cabinet may present a united front to the public in what it does. It has also been argued that disclosure of Cabinet documents will tend to inhibit public servants in their advice to government, an argument that has not won much support in the courts ((28) See, for instance, Sankey v. Whitlam [1978] HCA 43; (1978) 142 CLR 1, per Stephen J. at pp 62-63; per Mason J. at p 97; cf. per Gibbs ACJ. at p 40. See

also Burmah Oil Co. v. Bank of England [1979] UKHL 4; (1980) AC 1090, per Lord Keith of Kinkel at pp 1132-1133; cf. per Lord Wilberforce at p 1112). The contention that to disclose Cabinet documents will "create or fan ill-informed or captious public or political criticism" ((29) Conway v. Rimmer [1968] UKHL 2; (1968) AC 910, per Lord Reid at p 952.) is also being questioned ((30) For example, Burmah Oil Co. v. Bank of England (1980) AC, per Lord Keith at p 1134). The judgment of the Full Court quotes an observation by Mr M.H. Codd, Secretary of the Department of the Prime Minister and Cabinet ((31) Commonwealth v. Northern Land Council (1991) 103 ALR, at p 284 citing Codd, "Cabinet Operations of the Australian Government" in Galligan, Nethercote and Walsh (eds), Decision Making in Australian Government: The Cabinet and Budget Processes, (1990) 1, at p.4):

"In Australia it has been said that the associated covention of confidentiality has been honoured more in the breach, but that contention has not gone unchallenged."

Is there an absolute public interest immunity?

17. In terms of judicial consideration of public interest immunity attaching to Cabinet documents, it is enough to start with the decision of this Court in Sankey v. Whitlam. While the Court was not directly concerned with Cabinet documents ((32) The documents in question were: 1. An explanatory memorandum and schedule relating to a meeting of the Executive Council, 2. Three memoranda between senior officials in Treasury and in the Department of Minerals and Energy and one memorandum from the Permanent Secretary in Treasury to the Treasurer, 3. A Treasury file note recording a meeting with the Prime Minister, 4. Loan programmes for submission to the Loan Council.) the decision effectively disposes of the Commonwealth's first ground of appeal, namely, that in the case of Cabinet documents there is an absolute public interest immunity which cannot yield to competing aspects of the public interest. It was, in any event, a ground that was not pressed with much enthusiasm. The approach taken by the Court in that case is exemplified in the following passage from the judgment of Mason J. ((33) (1978) 142 CLR, at pp.95-96; see also per Gibbs ACJ. at p.43; per Stephen J. at pp.58-59):

"It is now recognized that in considering an objection to production on the ground of Crown privilege the court must evaluate the respective public interests and determine whether on balance the public interest which calls for non-disclosure outweighs the public interest in the administration of justice that requires that the parties be given a fair trial on all the relevant and material evidence ... Cabinet decision and cabinet papers do not stand outside the general rule that requires the court to determine whether on balance the public interest calls for production or non-production. They stand fairly and squarely within the area of application of the rule."

18. The principle espoused in Sankey v. Whitlam that there is no absolute public interest immunity with respect to Cabinet documents has been followed in many cases in Australia ((34) For example, Hospitals Contribution Fund of Australia v. Hunt) A similar approach to Cabinet documents has been adopted in England ((35) Burmah Oil Co. v. Bank of England; Air Canada v. Secretary of State for Trade (1983) 2 AC 394.) New Zealand ((36) Environmental Defence Society Inc. v. South Pacific Aluminium Ltd. (No.2) (1981) 1 NZLR 153.) Ireland ((37) Ambiorix Ltd. v. Minister for the Environment (1991) 12 ILRM 209.) and in the United States of America ((38) United States v. Nixon [1974] USSC 159; (1974) 418 US 683.)

19. To adopt this approach is not to depreciate the importance of collective responsibility in the Cabinet system. Nor is it to give inadequate recognition to the fact that confidentiality is important

to the effective working of Cabinet, at least in some areas and for some time after discussions take place ((39) Sankey v. Whitlam (1978) 142 CLR, per Gibbs ACJ. at p 40; per Mason J. at pp 97-98; cf. Burmah Oil Co. v. Bank of England (1980) AC, per Lord Keith at p 1134). It is to say no more than that there are other aspects of the public interest involved which preclude the assertion of an absolute immunity.

20. The approach to be taken by the courts was well expressed by Woodhouse P in Fletcher Timber Ltd. v. Attorney-General ((40) (1984) 1 NZLR 290, at p 296; see also Sankey v. Whitlam):

"A Ministerial conclusion that documents ought not to be produced will always be given due respect by the Courts. A certificate claiming public interest immunity, particularly when referable to Cabinet and other high level documents, will certainly be given the sensitive attention it deserves. But in this area the influence of comity must not permit the Minister's conclusion to become the substitute for informed judicial decision."

21. Counsel for the Commonwealth submitted that, while members of the Court in Sankey v. Whitlam viewed with disfavour the argument that confidentiality of Cabinet proceedings was essential to encourage frankness and candour in communications at the highest level of government, the ground had secured more recent judicial support. Counsel referred in particular to the comments of Lord Wilberforce in Burmah Oil Co. v. Bank of England ((41) (1980) AC, at p 1112.) and of Lord Fraser of Tullybelton in Air Canada v. Secretary of State for Trade ((42) (1983) 2 AC, at p 433). So much may be accepted but, as Gibbs ACJ. said of Cabinet minutes and related documents in Sankey v. Whitlam ((43) (1978) 142 CLR, at p 40):

"(T)his consideration does not justify the grant of a complete immunity from disclosure to documents of this kind".

22. In light of what was said in Sankey v. Whitlam, it is not possible to support a rule of absolute immunity from production of the documents the subject of this appeal ((44) The Cabinet Notebooks (Access and Protection) Bill 1992 (Cth), if enacted, would prohibit the disclosure of cabinet notebooks in a proceeding but allow public access after 50 years. However, the Bill expressly excludes the present case from its operation. In any event, the Bill lapsed when Parliament was prorogued prior to the 13 March 1993 general election and at the time of writing this judgment had not been restored to the parliamentary Notice Paper)

The balancing exercise - a threshold to be crossed?

23. The second ground of appeal advanced by the Commonwealth is that the NLC failed to make good a case that required Jenkinson J. to engage in a balancing exercise between public interest immunity and the public interest in the administration of justice. This ground was described as involving a threshold requirement, namely, that where documents have been shown to attract public interest immunity, the party applying for disclosure of them is not entitled to have the court undertake the balancing exercise unless there has been shown some concrete ground for believing that the documents contain material substantially useful to the applicant.

24. As already noted, the documents in question were discovered by the Commonwealth. But, in the Commonwealth's submission, the threshold requirement for the production of documents entitled to public interest immunity was not crossed merely because the documents had been discovered. The Commonwealth necessarily acknowledged that the fact of discovery conceded the general relevance

of the documents. It submitted, however, that where a party seeks disclosure of documents entitled to public interest immunity, the party must satisfy a much more stringent requirement than the test for discovery.

25. Discovery of documents is governed by rules of court. But the language of most such rules echoes what was said by Brett L.J. in Compagnie Financiere du Pacifique v. Peruvian Guano Co. ((45) (1882) 11 QBD. 55, at p 63):

"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary."

26. There is nothing in Div.1 of O.15 of the Federal Court Rules, entitled "Discovery", that runs counter to the remarks of Brett L.J.

27. The production of documents is dealt with in O.15 r.11, which reads:

"(1) Where

(a) it appears from a list of documents filed by a party under this Order that any document is in his possession, custody or power;

(b) a pleading or affidavit filed by a party refers to any document; or (c) it appears to the Court from evidence or from the nature or circumstances of the case or from any document filed in the proceeding that there are grounds for a belief that any document relating to any matter in question in the proceeding is in the possession, custody or power of a party; the Court may, subject to any question of privilege which may arise, order the party

(d) to produce the document for inspection by any other party at a time and place specified in the order; or (e) to file and serve on any other party a copy of the whole or any part of the document, with or without an affidavit verifying the copy made by a person who has examined the document and the copy.
(2)..."

28. The Commonwealth submits that, once production rather than discovery of documents is in issue, considerations other than relevance enter into the picture. The "threshold requirement" would oblige the party seeking production, in this case the NLC, to demonstrate something more than that the documents may advance the NLC's own case or damage the case of the Commonwealth. If there is a threshold, it is an elusive one.

29. In Alister v. The Queen, which concerned the production of documents in answer to a subpoena by the accused in a criminal trial, this Court considered what Gibbs C.J. described ((46) (1984) 154 CLR 404, at p.412.) as

"the analagous question whether the court should require the production of any documents that may answer the description in the subpoena, to enable the court first to discover whether any such documents exist, and then to inspect them for the purpose of deciding whether they should be

disclosed to the applicants".

Gibbs C.J. went on to say ((47) ibid., at p.414): "Although a mere 'fishing' expedition can never be allowed, it may be enough that it appears to be 'on the cards' that the documents will materially assist the defence." Wilson and Dawson JJ. commented ((48) ibid., at p.438): "In our opinion, the applicants cannot show any basis for a rational inference of any likelihood that the documents which ASIO might produce would go substantially to proof of their innocence of the changes against them. This much at least would, we think, be essential before any balancing exercise against a danger to the national security would become more than a formality." Brennan J. considered that ((49) ibid., at p.456): "(T)he gravity of the charge, the nature of the issues, the evidence in the case and the terms of the affidavit claiming public interest immunity are relevant factors for the court to consider in deciding whether to inspect the documents".

However, the fact that Alister v. The Queen was a criminal case serves to explain why the Court adopted a liberal approach to the question of inspection of documents by the court ((50) ibid., per Wilson and Dawson JJ. at p 439; per Brennan J. at p 456. Alister v. The Queen was recently applied in The Queen v. Connell, unreported, Supreme Court of Western Australia, 27 October 1992, where Seaman J. at p 27 held that it was sufficient for one of the accused persons "to show that it is 'on the cards' that the transcripts and exhibits tendered in the course of the taking of the evidence will materially assist his defence".)

30. Although there are passages in the judgments in Burmah Oil Co. v. Bank of England ((51) (1980) AC, per Lord Wilberforce at p 1117; per Lord Edmund-Davies at p 1129; per Lord Keith at pp 1135-1136.) and in Air Canada v. Secretary of State for Trade ((52) (1983) 2 AC, per Lord Fraser of Tullybelton at pp 435, 436; per Lord Wilberforce at p 439; per Lord Edmund-Davies at p 444. Both Burmah Oil Co. v. Bank of England and Air Canada v. Secretary of State for Trade were considered in Evans v. Chief Constable of Surrey (1988) QB 588, which concerned a police report.) which lend some support to the Commonwealth's submission, the NLC disputed the very existence of a threshold requirement. It argued that attempts to define one led to the use of verbal formulae such as "on the cards", "concrete grounds", "fishing expedition", "substantial support" and the like. There is force in the attack. Documents that attract a public interest immunity are entitled to a level of protection denied to other discoverable documents (where privilege is not involved); in particular they are entitled to protection from production where insufficient justification has emerged to call for what may be a very onerous and time-consuming task of looking at the documents to decide whether the claim to immunity should prevail. In other words, at the risk of adopting one of the formulae, courts should be astute not to participate in what is no more than a fishing expedition ((53) See Burmah Oil Co. v. Bank of England (1980) AC, per Lord Edmund-Davies at p 1126; Alister v. The Queen (1984) 154 CLR, per Gibbs C.J. at p 414; per Wilson and Dawson JJ. at p 439; per Brennan J. at pp 455-456). To put the matter that way is to offer only a starting point; nevertheless it is a useful preliminary test that will eliminate many applications for the production of documents to which public interest immunity attaches.

31. Put another way, O.15 r.15 of the Federal Court Rules precludes the Court from making an order under O.15 "for the production of any document unless satisfied that the order is necessary at the time when the order is made". If there is nothing to indicate that the production of documents is necessary, the question of balancing competing interests does not arise ((54) Burmah Oil Co. v. Bank of England (1980) AC, per Lord Scarman at pp 1141-1142). In other words, the "(public interest immunity) balance should only take place upon the court deciding that the information is required by a party" ((55) Ligertwood, Australian Evidence, (1988), p.224.) to establish material

facts alleged. To recognise that the party seeking an order for the production of documents may ultimately have to persuade the court that such an order is necessary is not to accede to the submission of the Commonwealth for a "threshold requirement".

32. Although I have referred to O.15 r.15 of the Federal Court Rules, the language of that rule does not illuminate the standard required before a court will embark on a balancing exercise. And that is true of O.24 r.13(1) of Rules of the Supreme Court 1965 (U.K.), referred to in Burmah Oil Co. v. Bank of England and Air Canada v. Secretary of State for Trade, which permits an order for the production of documents for inspection where it is "necessary ... for disposing fairly of the cause" ((56) In Carey v. The Queen (1986) 35 DLR (4th) 161, La Forest J. at p 194, delivering the judgment of the Supreme Court of Canada, spoke of the language of O.24 r.13 as "not compelling"). While the rules of court do not offer a threshold test, they do point up that the production of documents is part of the adversarial process, aimed at ensuring fairness as between the parties in the resolution of their dispute. In the ordinary course fairness demands that each party produce for inspection documents which relate to any issue in the action ((57) See Air Canada v. Secretary of State for Trade (1983) 2 AC, per Lord Fraser at p 433; per Lord Scarman at p 444). Public interest immunity recognises that there is a public interest to be protected, sometimes at the cost of withholding documents that may advance the case of the other party or damage the case of the party in possession of the documents. Once it is apparent that there are documents that fall into one or other of those categories (that is, that there is not simply a fishing expedition) and the court is satisfied that an order for the production of documents is necessary in the sense discussed, it is hard to see why there should be a further threshold onus on the party seeking production. As La Forest J. said in Carey v. The Queen ((58) (1986) 35 DLR (4th), at p 192; see Cross on Evidence, 4th Aust. ed. (1991), vol.1, par.27090, where it is argued that, in such circumstances, it would not be unreasonable for the burden of proof to be placed on the party resisting the production of documents, as he or she "will know from the pleadings what the case is, and he (or she) has access to the documents enabling him (or her) to be able to assess their relevance to it"):

"What troubles me about this approach is that it puts on a plaintiff the burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He has never seen them; they are confidential and so unavailable. To some extent, then, what the documents contain must be a matter of speculation. But they deal with precisely the subject-matter of the action and what one party was doing in relation to the relevant transactions at the time."

33. It follows that once the existence and relevance of documents has been demonstrated (their inclusion in an affidavit of documents will satisfy that requirement), the party seeking production has ordinarily done enough to establish that access to the documents is necessary and therefore to require the court to take the further step of balancing the competing public interests. It is necessary to add the qualifying term "ordinarily" because the party from whom production is sought may demonstrate that the documents are of such "high level governmental public interest", to use the language of Lord Wilberforce in Burmah Oil Co. v. Bank of England ((59) (1980) AC, at p 1113.) that the public interest immunity should prevail without any examination of the documents ((60) See generally Fletcher Timber Ltd. v. Attorney-General (1984) 1 NZLR, at pp 295, 301-302, 307-308). Or it may be apparent that, while the documents fall short of that description, their confidentiality is important to government and their relevance to the issues in the action is peripheral. However, in most cases it will be necessary for the court to take the next step in order to resolve the competing public interests. What is required to persuade the court to undertake the task of balancing the competing public interests necessarily depends on the circumstances. But once it is accepted that absolute immunity does not attach to any category of documents, the class into which

documents fall serves to point up the likely character of the documents rather than to conclude the matter of their production.

34. In the present case, the relevant matters discussed by Cabinet and recorded in the Cabinet notebooks concerned the negotiation of a commercial arrangement to which the Commonwealth was a party. It is not obvious at this stage that the entries are of "high level governmental interest" or that they are merely peripheral to the issues in the action.

35. The Full Court said ((61) Commonwealth v. Northern Land Council (1991) 103 ALR, at p 304):

"(T)he court does not need to advert to the possibility of purely speculative inspection or fishing expeditions for it is not in dispute that the documents in question relate to matters in issue between the parties, at least to the extent that they may lead to a train of inquiry which will either advance the applicant's case or damage that of its adversary. And it follows as a matter of logic that there is a likelihood, in the sense of a finite, non-trivial probability, that the documents will advance the council's case or damage that of the Commonwealth."

36. In his reasons for judgment Jenkinson J. went further. Referring to par.34 of the statement of claim ((62) See fn.(22).) his Honour said ((63) (1990) 102 ALR, at p.122.) that the particulars under that paragraph:

"disclose subjects of controversy in which it is very likely that quite divergent opinions could be honestly and reasonably held. Records of Cabinet deliberations relating to the negotiation of the impugned agreement are likely to disclose whether any consideration was given to those subjects and, if it was, to disclose information relevant to an evaluation of the reasonableness and the honesty of the consideration given to those subjects by the persons who controlled the actions of the Commonwealth."

In those circumstances Jenkinson J. concluded that the balance was clearly in favour of granting inspection in the restricted terms in which his Honour's order issued.

Should the judge have inspected the documents before ordering production?

37. The third ground of appeal proceeded on the footing that the first two grounds had failed. The argument then became one that, before Jenkinson J. permitted inspection of the Cabinet notebooks by the NLC's legal advisers, he should have examined the notebooks for himself. Only by doing so, it was said, could his Honour determine how far the public interest immunity attaching to the documents should yield to competing aspects of the public interest. Failure on the part of his Honour to inspect the documents himself was said to be a failure to exercise the judicial function involved in determining whether the documents should be available for inspection, even by a limited number of persons.

38. Once the position had been reached where the NLC's application for production of the Cabinet notebooks could not be rejected as constituting part of a fishing expedition, the mechanics of the procedure then to be followed were to a large extent in the hands of the judge dealing with the application. In the case of a few documents only, it would be appropriate for the judge to examine the documents and decide whether inspection should be permitted or refused. But here there are 126 notebooks containing, it is said, thousands of pages. Why should not the judge permit interim inspection by the NLC's legal representatives, subject to an undertaking by them of non-disclosure (64)? Even then, if some documents were said to be particularly sensitive, the judge might decide to

examine those for himself.

39. In the end it may be that the NLC will wish to make use of a limited number of entries only and it will then be appropriate for the judge to examine those entries and decide whether production on an unconditional basis should be ordered. And, as Jenkinson J. observed, the closer to trial a decision is made about disclosure, the more likely it is that "a just and fully informed balancing of the two public interests will be made" ((65) (1990) 102 ALR, at p.123.)

40. Inspection by an applicant's legal representatives, subject to an undertaking of non-disclosure, will often place them in a position of difficulty vis-a-vis their client ((66) Some of the difficulties likely to arise where an undertaking of non-disclosure has been given as a condition of access to documents are discussed by Wilcox J. in Kanthal Australia Pty. Ltd. v. Minister for Industry, Technology and Commerce (1987) 71 ALR, at pp 115-116. See also Jackson v. Wells (1985) 5 FCR, at pp 307-308, where Wilcox J. refused to grant even the parties' legal representatives access to the documents. (An appeal from this decision was dismissed on other grounds: (1985) 64 ALR 147). It may even tie their hands in the further conduct of the litigation. Although this is largely a matter between them and their client, the judge may take this aspect into account when deciding the appropriate course to be followed in the determination of a claim for public interest immunity.

41. The Full Court saw the approach to be taken by Jenkinson J. as the exercise of a discretion, not to be interfered with by the Full Court unless there had been some error of principle on his part even if "each of us might have approached the exercise of the discretion somewhat differently" ((67) Commonwealth v. Northern Land Council (1991) 103 ALR, at p 305). It would not be right to say that the matter was simply one for the exercise of discretion. Rather, the question is whether Jenkinson J. erred in the approach he took. If he could be shown to have erred, for instance by failing to appreciate the need to preserve the confidentiality of the entries in question, on the one hand, or their possible importance for the NLC case, on the other, it was for the Full Court to correct the error. But, when regard is had to the amount of material involved and the need to conserve the time of the court as well as of the parties, it cannot be said that Jenkinson J. erred in making an order designed to put himself in the position of being able to say, once the entries had been sifted through by the NLC's legal representatives, whether the protection to which the entries were otherwise entitled should yield to the public interest in the administration of justice in light of the justiciable issues between the parties.

42. The order made by Jenkinson J. was one for the interim production of documents. It did not purport to determine the question of public interest immunity. In my view it was an order properly made in the circumstances.

43. The appeal should be dismissed.

ORDER

Appeal allowed with costs.

Set aside the order of the Full Court of the Federal Court of Australia and in lieu thereof order that; (i) the appeal to that Court be allowed with costs; (ii) the orders contained in pars l to 10, 12(a) and 14 of the order of Jenkinson J. be set aside and in lieu thereof the motion of the first respondent in this Court, the Northern Land Council, so far as it relates to the relief sought in par. (1) of its notice of motion of 14 February 1990, be dismissed with costs.

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