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## TWO RECENT DECISIONS HIGHLIGHT IMPORTANT PUBLIC INTEREST IMMUNITY CONSIDERATIONS

**Two decisions of interest concerning public interest immunity claims have been handed down recently.**

*Bartlett v Sage (No 2)* [2011] FCA 274 (25 March 2011) (*Bartlett*) concerned an unusual contest to a claim for public interest immunity by the Australian Crime Commission (ACC) with respect to redacted portions of documents concerning ACC's exercise of coercive statutory powers under s 28 of the *Australian Crimes Commission Act 2002* (the ACC Act).

*State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 (23 March 2011) made significant findings about public interest immunity claims relating to documents submitted to Cabinet where the documents contain discussions of a contractual dispute involving the State and one of its instrumentalities.

### *Bartlett v Sage (No 2)*

The applicant, Mr Bartlett, came to the attention of the ACC through investigations under the Australian Crime Commission Special Investigation Authorisation and Determination (Wickenby Matters) 2006, which includes investigation of fraudulent conduct in relation to the evasion of taxation obligations. Relevantly, the ACC was interested in the sale of Mr Bartlett's stake in an overseas business and distribution of sale proceeds (about $4 million) to his friends as 'gifts', with the effect that no tax was paid. As part of the investigation, the ACC summoned Mr Bartlett to attend an examination under s 28 of the ACC Act. During the examination, the ACC issued an interim non-publication direction with regard to Mr Bartlett's answers but specifically exempted the Australian Taxation Office (ATO) from that direction.

Mr Bartlett commenced proceedings in the Federal Court asserting that the gift payments did not fall within the scope of the Wickenby investigations and that the ACC had, in actuality, acted for the improper purpose of assisting the ATO.

#### Argument against public interest immunity claim

Mr Bartlett served a Notice to Produce on the ACC requesting production of documents relating to the ACC's decision to issue the summons for the s 28 examination and the conduct of that examination.

In response, the ACC produced copies of the documents but with numerous redacted portions. The ACC asserted public interest immunity in respect of the redacted portions on the basis that disclosure to the applicant of confidential information would seriously damage public interest by prejudicing ongoing Wickenby investigations.

Mr Bartlett did not dispute the basis on which ACC claimed public interest immunity. However, he contended that a party claiming public interest immunity for information gathered by the exercise of coercive investigative statutory powers was required to adduce evidence that demonstrated a prima facie case that the party had acted lawfully in the exercise of those statutory powers. This was a novel argument.

By way of analogy, Mr Bartlett relied on the principle that legal professional privilege could not be claimed to protect communications made for the propose of assisting in the commission of fraud, referring to the High Court decision in *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 (*Kearney*), which dealt with deliberate abuse of statutory power in the making of delegated legislation.

#### Relevant findings by Siopis J

Justice Siopis rejected Mr Bartlett's submission. Though Siopis J expressed no view on whether *Kearney* applied in relation to public interest immunity claims, his Honour stated that, even if it did, the decision in *Kearney* would not support Mr Bartlett's contention because:

- the *Kearney* exception would only apply where there is a 'deliberate' abuse of power (which was not alleged in the case before his Honour)
- *Kearney* did not establish an onus on the statutory authority to establish a prima facie case that it was acting lawfully in the exercise of its power. To the contrary, *Kearney* held that the onus is on the party alleging the deliberate abuse of power to lead prima facie evidence that the claim has its foundation in fact.

#### Implications

The unique point of argument in *Bartlett* (though unsuccessful in this instance) highlights the need for vigilance in exercising statutory powers of coercion to gather information.

## *State of NSW v Public Transport Ticketing Corporation*

The State of NSW claimed public interest immunity in respect of documents discovered by one of its instrumentalities, the Public Transport Ticketing Corporation (PTTC), in proceedings against Integrated Transit Solutions Ltd and ERG Ltd (ERG).

The proceedings concerned PTTC's termination of a contract to design, build and install an integrated ticketing and fare payment system for public transport in the greater Sydney area. The grounds of termination were breach of contract and delay in performance by ERG. In response, ERG asserted that PTTC's purported termination was in fact a repudiation of the contract that ERG accepted. The reasons for PTTC's termination were central to the resolution of the underlying dispute.

#### Relevant documents

The proceedings at hand concerned 5 of the 14 categories of documents discovered by PTTC as relevant to the fact in issue in proceedings against ERG. The State categorised these documents into either a 'first tier' or 'second tier' of documents, based on the strength of the immunity claim. The 'first tier', consisting of decisions of the Budget Cabinet Committee (category D) and documents that disclose the deliberations of the Budget Cabinet Committee (category G), had the strongest claim to immunity. The 'second tier', comprising of draft speaking notes prepared for ministers to use in Cabinet (category A), draft minutes of the Budget Cabinet Committee and related correspondence (category E), and other forms of Cabinet advice (category N) were considered lesser claims to immunity.

**Public interest immunity claims – applicable principles**

In *Commonwealth v Northern Land Council* [1993] HCA 24; 176 CLR 604 (*NLC*), the majority (Mason CJ; Brennan, Deane, Dawson, Gaudron and McHugh JJ) of the High Court stated at 618:

> 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*.
>
> 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. [Emphasis added by Allsop P in *State of NSW v Public Transport Ticketing Corporation*.]

The majority in *NLC* approved a passage from the judgment of Gibbs ACJ in *Sankey v Whitlam* [1978] HCA 43; 142 CLR 1 at 43:

> 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 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 protection will be made.

In *NLC*, the 'currency or controversiality' of the subject matter, as well as its character, were thought to be relevant factors in the balancing exercise. Their Honours emphasised that immunity of Cabinet deliberations and Cabinet documents (ordinarily attracted irrespective of contents) is not absolute: *NLC* at 617–618. A court will initially lean against disclosure: *NLC* at 618. Whether circumstances are sufficient to displace the immunity depends in part on the nature of the class.

**Key findings**

Allsop P (with whom Hodgson JA and Sackville AJA agreed) ordered disclosure of a significant number of documents and parts of documents that related wholly or substantially to the contract and the dispute arising from the contract's performance. His Honour did so on the basis that these documents 'can be seen to be of substantial significance to the resolution of the dispute and thus to the due administration of justice'.

Upholding the principles established in *Sankey v Whitlam* and *NLC*, Allsop P affirmed that the nature of the balancing process is at the heart of any contested public interest immunity claim. Significantly, his Honour's interpretation of the balancing tests perhaps represents a further development of principles with respect to relevant factors for consideration in the weighing process and particularly the meaning of 'relevant exceptional circumstances' as referred to in *NLC*.

***On the strengths/appropriateness of a class claim (64–65, 68)***

The State argued that the clear status of the 'first tier' documents as 'State papers' or as records of the decisions of a Cabinet committee should, prima facie, lead to the attraction of the immunity without the need to examine the contents. The State was therefore asserting a class claim.

However, Allsop P chose to proceed on the view (propounded in *NLC*) that, even when dealing with a class of documents with a prima facie attachment to immunity, the immunity is not absolute. His Honour held that whether or not Cabinet documents are immune from disclosure is based on the public interest, which can be affected by the question of the currency or continuing relevance of the subject matter of the documents and their relevance to the proceedings.

Allsop P further stated at para 68:

> All the documents with which we are concerned (categories D, G, A, E and N) are documents created and deployed for use at the highest levels of government: Cabinet and Ministerial level. *That said, care must be taken to recognise that parts of them deal solely with a particular commercial contract (of some magnitude) entered by the PTTC. To the extent that these documents simply discuss the particular contract and the conduct of the parties to that contract, no questions of government policy will arise.* [Author's emphasis.]

His Honour further held that the disclosure of documents recording the actual deliberations of Cabinet itself (or one of its committees, such as the Budget Cabinet Committee) must be governed by what was said in *NLC*. In respect of such documents, 'only considerations which are indeed exceptional would be sufficient to overcome the public interest in their immunity from disclosure': paras 70, 73.

***Status of Cabinet submissions and speaking notes (82–83)***

In dealing with the 'second tier' documents, Allsop P held that speaking notes, even if drafts, would tend to disclose what the minister told the Budget Cabinet Committee. His Honour again considered whether these documents have current and contemporary relevance, especially to policy and whether they deal with the particular dispute.

Allsop P held that, although speaking notes are not records of deliberations or decisions of Cabinet, they are (like minutes for submission to Cabinet) documents that tend to disclose what was put to Cabinet. For disclosure to be justified, the balancing exercise should reveal at least that their disclosure is of substantial significance for the proper determination of proceedings.

***Cabinet documents which deal with the subject matter of a litigated dispute (97–100)***

Perhaps the crux of this decision lies in Allsop P's approach in assessing material used in the preparation of Cabinet minutes (falling into the 'second tier' group of documents that would tend to disclose the deliberations of Cabinet). Allsop P distinguished between, on the one hand, documents that dealt with the contract but which focused on broader policy questions and boarder questions as to the consequence of the termination of the contract and, on the other hand, documents that did not relate to policy (at all or not sufficiently to prevent disclosure) and were not current but related to the contract the subject of the dispute.

Allsop P found immunity to attach to the former group of documents. In regard to the latter group, his Honour reasoned that, where a document is not current or controversial but provided an important body of information that goes to the subject matter of the proceedings (ie PTTC's perception of ERG's performance of the contract, the reasons for terminating the

contract, considerations of good faith), the particular and central relevance of such a document to the litigated dispute outweighed any attachment of the immunity. On Allsop P's reasoning, for immunity to attach, the 'currency or contemporaniety' of the document must be satisfied by reference to factors external to the litigated dispute. However, documents which deal with issues concerning the litigated dispute may be relevant in establishing the 'exceptional circumstances' referred to in *NLC* that would warrant disclosure. On this basis, Allsop P found in favour of the disclosure of a number of draft Cabinet minutes.

**Other points to note**

***The nature of appellate review of public interest immunity decisions at first instance***

Allsop P stated at para 15:

> Rather than remit the matter to be dealt with according to law, both sides urged us to decide the question, the appeal being by way of rehearing under the *Supreme Court Act 1970* (NSW), s 75A. As to the nature of appellate review in respect of a decision as to the immunity see *Victoria v Brazel* [2008] VSCA 37; 19 VR 553 at [38]-[43] and *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* [2008] FCAFC 123; 169 FCR 227 at 230-232 [11]-[21], but cf *New South Wales Commissioner of Police v Nationwide News Pty Ltd* [2007] NSWCA 366; 70 NSWLR 643 at 646 [26]. Given the error of the primary judge it is unnecessary to embark upon any analysis of what may be conflicting approaches in these cases.

***Public interest immunity claims based on the need to preserve candour (56)***

In setting out some general principles concerning public interest immunity, Allsop P made a point worth noting on the issue of candour (not relevant to the documents in question in this case). Allsop P stated that, whatever may be the legitimacy of the candour consideration in regard to non-commercial questions or in questions of policy, it should have little weight when dealing with the factual and legal aspects of a contractual or commercial dispute involving the State, particularly where the disclosure is inevitable when the disputes become litigious in due course.

**Implications**

The approach of Allsop P directs attention to the meaning of 'matters which remain current or controversial'. His Honour considered that this formulation would only be satisfied if a matter had topicality outside of, or independent of, the legal proceedings in question. This approach warrants very careful consideration when drafting an affidavit in support of a public interest immunity claim in analogous circumstances.

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