



Express law fast track information for clients

29 November 2012

Full Federal Court decision on public interest immunity

In [*Spencer v Commonwealth of Australia* \[2012\] FCAFC 169](#) (*Spencer*) a Full Court of the Federal Court refused an application for leave to appeal against an order upholding a class claim of public interest immunity (PII) over certain Cabinet documents. This decision confirms the significant protection from disclosure accorded to such documents.

Background

Spencer concerned an application for leave to appeal against an order, made by the primary judge (Emmett J), upholding a PII claim over certain 'Cabinet documents'.

The documents in question, significantly, were not comprised exclusively of documents that directly revealed the deliberations of Cabinet. They also included documents submitted to and considered by Cabinet, and documents brought into existence for the purpose of preparing a submission to Cabinet (at [42]). The primary judgment concerned 7 'sample' documents – the parties having agreed during the course of the hearing that a determination on these 7 documents would resolve the entire class claim.

The decision

A Full Court of the Federal Court (Keane CJ, Dowsett and Jagot JJ), in a unanimous judgment, refused the application for leave to appeal.

The Court reviewed prior decisions relating to PII and affirmed the following general principles (at [28]–[40]):

- Cabinet documents, as a class of documents, are prima facie entitled to protection from disclosure. This, however, does not entitle them to *absolute* immunity: any PII claim would need to be weighed against the competing public interest in the proper administration of justice.
- While documents recording deliberations of Cabinet have 'a pre-eminent claim to confidentiality', other documents, including 'papers brought into existence for the purpose of preparing a submission to Cabinet' and 'documents and communications passing between a Minister and the head of his department relating to Cabinet proceedings and material prepared for Cabinet' are also prima facie entitled to PII protection.
- In assessing whether there is cogent evidence of the grounds for making the PII claim for the class of documents, due weight is to be given to an assertion made by a

responsible representative of government that there is a public interest that would be placed in jeopardy by the production of the documents. Further, if such cogent evidence exists and there is no apparent basis for concluding a 'sufficient demand of justice' for disclosure of the document, having regard to its importance to the resolution of the proceedings, there will be no warrant for inspection of the documents by the judge resolving the claim.

In rejecting the applicant's claim, the Court made a number of observations, including the following:

- The applicant had not adduced any evidentiary support for its claim that a strong case had been made out for the production of the documents (at [37]; see also at [56]).
- The primary judge did not inspect the documents, as he was satisfied that the documents fell within the classes identified in the affidavits and that the claims for PII were supported by cogent evidence. Further, the documents were of only possible marginal relevance to the applicant's case (at [39]–[40]).
- The Commonwealth's discovery of the documents did not imply they had sufficient importance to the applicant's case to outweigh the public interest in protection from disclosure (at [51]).
- The primary judge was entitled to take the Commonwealth's evidence, primarily an affidavit from the Secretary of the Department of the Prime Minister and Cabinet, at face value, as it had been admitted without objection and no application was made to cross-examine (at [54]). This evidence was sufficient (at [55]) and it was not necessary for a minister to give evidence in support of the Commonwealth's claim.
- The applicant could not 'resile' from the agreement that resolution of the claims in respect of the 7 sample documents would resolve the entire claim (see at [12]–[13], [59]).

Implications for Commonwealth agencies

This decision highlights the fact that Cabinet documents – a category that is not comprised exclusively of documents that directly reveal Cabinet deliberations – will be accorded significant protection from disclosure.

The decision also highlights some useful procedural aspects of making a successful PII claim. For example, an affidavit from the Secretary may suffice as supporting evidence; evidence from a minister may not be required. It may also be useful to secure agreement from the other party – where possible – to having its claim determined on the basis of a small number of 'sample' documents that are representative of the broader claim.

The Commonwealth was represented by Tom Howe QC and Andrew Berger and AGS was instructing solicitor.

For further information please contact:

Tom Howe QC
Chief Counsel Dispute Resolution
T 02 6253 7415
| tom.howe@ags.gov.au

Andrew Berger
Senior General Counsel
T 02 6253 7405
andrew.berger@ags.gov.au

Tim Begbie
Senior General Counsel
T 02 6253 7521
| tim.begbie@ags.gov.au

Irene Sekler
Senior Executive Lawyer
T 02 6253 7155
irene.sekler@ags.gov.au

Zita Rowling
Senior Executive Lawyer
T 02 6253 7462
| zita.rowling@ags.gov.au

Nathan Sinnathurai
Lawyer
T 02 6253 7512
nathan.sinnathurai@ags.gov.au

Peter Melican
Senior Lawyer
T 02 9581 7404
| peter.melican@ags.gov.au

Important: The material in the *Express Law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:
<mailto:unsubscribe@ags.gov.au>