(a) A copy of the legal advice obtained by the Department of Finance and Administration from Phillips Fox, referred to in evidence at the public hearing on 7 February 2001

Please see the enclosed extract of this document.

The Department of Finance and Administration has asked for advice whether the return of submissions made to an inquiry or review conducted by an independent inquirer or reviewer would be a breach of the *Archives Act 1983* (**Act**).

SUMMARY OF ADVICE

We consider that:

- If the submissions were made to the inquirer in his or her personal capacity as the independent inquirer, the better view is that they are not "Commonwealth records" for the purposes of the Act, and there would be therefore no breach of the section 24(1) of the Act.
- If the submissions were made to an officer of the Commonwealth or to any other Commonwealth body, it is likely that there would be a breach of section 24(1) of the Act.

REASONS FOR ADVICE

Background

1. We are asked to consider the following situation:

1.1 An "independent reviewer" or "independent inquirer" (**Inquirer**) is appointed by a simple letter of appointment from the Minister to conduct a review or inquiry (**Inquiry**) into a particular policy or practice of the Commonwealth Government in accordance with identified terms of reference. The letter contains no provisions dealing with, for example, material generated as a result of the Inquiry or which indicate that the

Inquirer is employed as an officer of the Commonwealth for the term of the Inquiry.

1.2 The letter attaches terms of reference which set out the matters into which the Inquirer must inquire, and provides that he or she must report to the Department of Finance and Administration by a particular date.

1.3 An advertisement in a national newspaper calls for submissions by interested persons in relation to the Inquiry. The advertisement names the Inquirer as the person conducting the Inquiry and describes that person as "an independent inquirer/reviewer". It does not give any indication of the basis upon which submissions will be received (for example, there is no suggestion that submissions would be kept confidential and/or returned to the maker after completion of the Inquiry).

1.4 A number of individuals, companies and organisations from both the Government and the private sector make submissions in connection with the Inquiry. After the Inquirer's report is given to the Minister and published, all submissions are returned to the person or body which made that submission.

Archives Act 1983

2. Section 24 of the Act provides that a person must not:

(a) destroy or otherwise dispose of;

(b) transfer, or be party to arrangements for the transfer of, the custody of;

(c) transfer, or be party to arrangements for the transfer of, the ownership of; or

(d) damage or alter

a Commonwealth record.

3. A "Commonwealth record" is defined in section 3 as:

(a) a record that is the property of the Commonwealth or of a Commonwealth institution; or

(b) a record that is deemed to be a Commonwealth record by virtue of a regulation made under subsection (6)[1] or by virtue of section 22[2]

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[1] There are no regulations made under this section which are relevant to the issues involved in this advice.

but does not include a record that is exempt material or a register or guide maintained in accordance with Part VIII[3].

4. A "Commonwealth institution" is defined to include an authority of the Commonwealth. An "authority of the Commonwealth" is defined to mean:

(a) an authority, body, tribunal or organisation, whether incorporated or unincorporated, established for a public purpose:

(i) by, or in accordance with the provisions of, an Act, regulations made under an Act or a law of a Territory other than the Northern Territory or Norfolk Island;

(ii) by the Governor-General; or

(iii) by, or with the approval of, a Minister;

(b) the holder of a prescribed office under the Commonwealth; or

(c) a Commonwealth-controlled company or a Commonwealth-controlled organisation.

(There are some exemptions, but none of these is relevant to this matter).

Application of the law to the facts

5. Section 24(1) of the Act provides that "a person" must not transfer, or be party to arrangements for the transfer of, the custody of a Commonwealth record. The section is not limited to transfer by officers of the Commonwealth and will apply to the Inquirer.

6. In order to determine whether there has been a breach of section 24(1), it is necessary to ask:

(a) was the Inquirer an "authority of the Commonwealth";

(b) if so, were the submissions the property of the Commonwealth or a Commonwealth institution (so as to satisfy the remainder of the definition of "Commonwealth record"); and

(c) if so, does any exemption to section 24(1) apply?

7. Each of these questions is considered in turn below.

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[2] This section deals of records of Royal Commissions and is not relevant to the issues involved in this advice.

[3] Neither of these exemptions applies to submissions made to the Inquiry.

(a) *Was the Inquirer an authority of the Commonwealth?*

8. In order for the Inquirer to be an "authority of the Commonwealth" that person/entity would need to be an authority, body, tribunal or organisation established for a public purpose by, or with the approval of, a Minister (see the full definition set out above).

9. The Inquirer is an individual and is not personally an authority of the Commonwealth, since he or she is not an "authority, body, tribunal or organisation". Unless the instrument of appointment contained something to the contrary, the Inquirer would be properly characterised as an independent contractor. In describing the Inquirer as "independent" it appears that the very job which he or she is appointed to do is to come to a conclusion which is unfettered and uninfluenced by the Commonwealth's views.

(b) *Are the public submissions "Commonwealth records"?*

10. In order for the submissions to be Commonwealth records, they must be property of the Commonwealth or of a Commonwealth institution (which includes an authority of the Commonwealth).

11. The starting point is that, in the absence of an agreement to the contrary between the Inquirer and those making the submissions, the submission documents (as opposed to the information within the documents) would become owned by the entity to which they were submitted upon submission.

12. If the submissions were clearly given to the Inquirer in his or her role as the independent contractor conducting the Inquiry (which we consider to be likely given that the advertisement clearly indicates that the Inquirer is the person conducting the Inquiry), this means that the submissions were owned by the Inquirer personally. We have already concluded that the Inquirer does not fall within the definition of an "authority of the Commonwealth".

13. [We note that if there was evidence that the Inquirer specifically indicated that the submissions would be kept confidential and returned to the maker following the conclusion of the Inquiry (and we note that there is no such indication in the advertisement mentioned above), there may be an argument that ownership was not ever transferred to the Inquirer. However, we are instructed to assume that no such indication was ever given.]

14. Unlike the standard Commonwealth consultancy agreement, which typically provides that all material generated or obtained as a result of the consultant's activity is vested in or assigned to the Commonwealth, we are instructed to assume that the letter of appointment contains no such provisions.

15. There is nothing which would then transfer ownership of the submissions from the Inquirer (who is not a Commonwealth authority or institution) to the Commonwealth or to another Commonwealth institution. Therefore, again the submissions could not be "Commonwealth records".

16. However, if the submissions were actually made to any other Commonwealth body (including to the Minister or an officer of the Department), we consider it likely that the documents would fall within the definition of "Commonwealth records", although this would obviously depend upon the particular facts.

(c) Are there any exemptions that apply?

17. If the submissions were held to be Commonwealth records, it would be necessary to consider whether any exemptions apply.

18. Section 24(2) of the Act provides that the restriction against transferring custody of Commonwealth records in section 24(1) does not apply to anything done, inter alia:

(a) with the permission of the National Archives of Australia (**Archives**) or in accordance with a practice or procedure approved by the Archives; or

(b) in accordance with a normal administrative practice, other than a practice of which the Archives has notified the Department or authority that it disapproves.

19. We are instructed that there are no practices or procedures of the Department of Finance and Administration which involve the returning of submissions following a review or inquiry of this type. We do not think that returning submissions could be said to be "normal administrative practice" for reviews or inquiries. Unless the Inquirer (or if the submissions were actually made to a Commonwealth authority, that authority) obtained approval from the Archives before returning the submissions, the exemptions in section 24(2) would not apply.

20. For completion, we also note that section 29(1) of the Act provides that a Commonwealth institution may, with the concurrence of the Director-General, determine that a Commonwealth record is not required to be transferred to the Archives. Similarly, section 29(2) provides that the responsible Minister may determine that a Commonwealth record, or a class of Commonwealth records, is not required to be transferred to the Archives.

21. It is possible that there might be some scope for negotiation with the Director-General, or for a determination to be made by the Minister that the submissions made to the Inquiry should not be transferred to the Archives. However, even if such a determination were made, this would not provide a defence to a breach of section 24(1).