

## **Cabinet and Executive Council documents (clauses 24 and 25)**

**18.1** Two issues arise in this chapter: What should be the definitions of 'Cabinet documents' (which are exempt under clause 24) and 'Executive Council documents' (which are exempt under clause 25); and what appeal rights should be available to an applicant who has been denied access to either type of document? In our discussion we shall refer, for convenience, to clause 24 and Cabinet documents only; however our remarks apply as well to Executive Council documents and to clause 25, which is phrased in identical terms to clause 24. Clause 24 provides:

24. (1) A document is an exempt document if it is—
- (a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted;
  - (b) an official record of the Cabinet;
  - (c) a document that is a copy of, or of a part of, a document referred to in paragraph (a) or (b); or
  - (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
- (2) For the purposes of this Act, a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is one of a kind referred to in a paragraph of sub-section (1) establishes conclusively that it is an exempt document of that kind.
- (3) Where a document is a document referred to in paragraph (1) (d) by reason only of matter contained in a particular part or particular parts of the document, a certificate under sub-section (2) in respect of the document shall identify that part or those parts of the document as containing the matter by reason of which the certificate is given.
- (4) Sub-section (1) does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet.
- (5) A reference in this section to the Cabinet shall be read as including a reference to a committee of the Cabinet.

### **The scope of the exemption**

**18.2** Clause 24 (1) protects the Cabinet decision-making process, by protecting Cabinet submissions, decisions, and deliberations, and documents containing a copy of, or extract from, one of these categories. Some indication of the scope of the exemption is afforded by the submission from the Department of Prime Minister and Cabinet, in which the Department lists examples of documents that are considered to be protected by the exemption. The examples include Cabinet submissions (and documents prepared in support); Cabinet business lists; departmental notes containing details of proposals in Cabinet submissions and decisions; correspondence between ministers, between ministers and departments and between departments, which disclose Cabinet deliberations and decisions; and drafts of leg-

islation being prepared in accordance with Cabinet decisions.<sup>1</sup> Clearly this exemption is a potentially broad one, yet it is also a very important one (particularly from the point of view of a government). It is not surprising that none of the submissions we received really came to grips with the exemption and suggested detailed proposals for reform. At most we received a few suggestions that background papers and supporting material should not be protected, that Cabinet decisions should be available and that if Cabinet submissions are protected this should be pursuant to clause 26 which incorporates a public interest test. In general the criticisms echoed the sentiments of Gibbs ACJ in *Sankey v. Whitlam*, who counselled that 'State papers do not form a class, all the members of which must be treated alike.'<sup>2</sup>

**18.3** One belief which did appear to be shared in the submissions we received is that it is only Cabinet deliberations themselves, and the contributions by individual ministers, that need protection if we are to preserve Cabinet solidarity and to avoid any inhibition of the interchange of opinions with the Cabinet. According to this view, the public has a right to know the decisions that are made by Cabinet, and the content of the submissions and proposals that may or may not have provided a foundation for these decisions. It is argued that accountability of the Cabinet is not possible unless the public knows what has been decided, what ideas or alternatives have been rejected, and what arguments or research have been accepted as providing an adequate basis for a decision.

**18.4** We sympathise with this view. The main difficulty we foresee, however, is in differentiating legislatively between those Cabinet documents that are to be available and those that are not. For instance, we can see that some Cabinet submissions at least require a measure of protection, such as Cabinet submissions that are identified closely with, or are substantially prepared by, the proposing minister; and we can see also that disclosure of some Cabinet decisions should be deferred, even though the decision does not deal with matters that are exempt under the Bill—such as decisions on purely political matters, or on the appointee to a new statutory position. We are not convinced that the legislative distinction that would be necessary in a clause premised upon the arguments to which we have earlier referred can be adequately drafted.

**18.5** We do feel however that some amendment by the draftsman to clause 24 (1) is necessary to clarify the question of attachments to Cabinet submissions. Currently the exemption includes 'a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted' (para. 24 (1) (a)). The only express limitation upon this provision is sub-clause (4) which provides that the earlier definition

does not apply to a document by reason of the fact that it was submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted if it was not brought into existence for the purpose of submission for consideration by the Cabinet.

**18.6** Notwithstanding this limitation many documents will possibly be included as Cabinet documents that should not be. For instance, it is possible that a minister

<sup>1</sup> Submission no. 159, incorporated in *Transcript of Evidence* pp. 2279–80. Items on this list are discussed in the *Transcript of Evidence* by Mr (now Sir) Geoffrey Yeend, Secretary, Department of Prime Minister and Cabinet—e.g. at pp. 2295, 2301ff.

<sup>2</sup> (1978) 53 ALJR 11 at pp. 22–3.

may order the compilation of a broad category of important statistics on Australian social or economic life, for consideration by Cabinet, in relation to a proposed policy. Again, Cabinet may require a major study, primarily of a factual nature, on the feasibility of a new policy or on the implications for Australia of a projected proposal. Reference can also be made to important reports prepared by such bodies as the Administrative Review Council on new or proposed legislation, which we understand are often submitted to a minister for consideration by the Cabinet. Of a comparable nature are the reports of consultants. Quite often these are prepared, at considerable cost to the public, to evaluate the efficiency of existing government programs. Each of these examples refers to a document that has been brought into existence for the purpose of submission to Cabinet. In each case the document, which is an important one of public interest, could be treated as conclusively exempt as a Cabinet document.

**18.7** We believe that clause 24 lays down an inappropriate criterion for determining what is exempt. Essentially, the clause is designed to protect the Cabinet decision-making process. Yet, in protecting anything that is submitted or proposed to be submitted to Cabinet, it goes far beyond what is reasonably necessary for this purpose. To disclose documents of the type to which we referred in the previous paragraph is to disclose only the raw material on which the Cabinet process operates; it is not necessarily to disclose anything about Cabinet process itself. Disclosure may conceivably damage the political fortunes of those who participate in the Cabinet process, but this is essentially distinct from, and should not be confused with, the Cabinet process itself. Only the latter should be protected by the exemption.

**18.8** When determining the criterion which should be used in clause 24, useful reference can be made to clause 26. That exemption (for internal working documents) seeks to differentiate between policy documents containing opinion, advice or recommendations (which are protected) and factual, statistical, scientific and technical reports or analyses (which are not protected). We think that a similar distinction can be drawn in clause 24, so that any document or report of that nature which was attached to a Cabinet submission would not be protected. Indeed, we think that an even broader distinction could be drawn than in clause 26. For instance, the draftsman could exclude from clause 24 a range of general categories of documents such as consultants' reports, reports from advisory committees, and so on. These reports would still be entitled to protection under clause 26, but a decision to this effect would have to satisfy the public interest criterion contained in that clause.

**18.9 Recommendation: Clauses 24 and 25 should be amended to limit the scope of the conclusive exemption for Cabinet documents to documents containing opinion, advice or recommendations of a policy nature, thereby excluding documents of a purely factual nature such as consultants' reports, reports from advisory committees and so on.**

### **Appeal rights**

**18.10** Cabinet and Executive Council documents attract conclusive protection—in the case of Cabinet documents, by a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that the document is of the kind described in clause 24 (1); and in the case of Executive Council documents, by a certificate of the Secretary to the Council. In either

case the certificate states conclusively that the document is an exempt document of the kind described, and the Administrative Appeals Tribunal does not have power to review the decision by the Secretary to issue a certificate; nor does it have power to determine whether there are any grounds, or any proper grounds, which would justify the issuance of a certificate. Whether the document is innocuous in content, or whether it is so old that it is no longer sensitive in content, are questions which could not be examined by the Tribunal; they are decided by the Secretary to the relevant body.

**18.11** We have earlier indicated our opinion that conclusive certificates of this nature are unacceptable in a Freedom of Information Bill. We see no reason why an applicant should not be able to appeal on the question of whether a document is a Cabinet or Executive Council document as defined in either exemption. In most cases this is likely to be a simple question of fact: whether a document alleged to be of a certain description in fact meets that description. In determining this question it will not be necessary for the Tribunal to consider constitutional doctrines that go to the heart of the Cabinet process itself, such as Cabinet solidarity and the role and accountability of ministers. The Tribunal will be deciding a question of classification; clause 24 does not define Cabinet documents by reference to any criteria, the assessment of which requires some special insight (for instance, a criterion describing the effect that disclosure of a document would have upon Cabinet processes). In other words the Tribunal would have to reach a conclusion as to a fact, not an opinion. In so doing, the Tribunal will be deciding questions that are essentially similar to other questions that are routinely decided by the courts. Indeed, the Commonwealth Ombudsman commented in evidence to the Committee that 'from a legal point of view they are easy questions to answer.'<sup>3</sup> We agree; it is our opinion that the question of classification included in clauses 24 and 25 is one that the Tribunal is ideally suited to determine. At the same time, we recognise the apprehension a government would feel that, if a 'wrong' decision were made by the Tribunal, a Cabinet document might be disclosed with damaging results; this danger could be reduced by having such appeals heard by a single presidential (that is, legally qualified) member of the Tribunal.

**18.12 Recommendations:**

- (a) **There should be a right of appeal to the Administrative Appeals Tribunal under clauses 24 and 25 on the limited question whether a document is in fact a Cabinet or Executive Council document; and**
- (b) **The jurisdiction to hear such an appeal against a determination under clause 24 or 25 that a document is a Cabinet or Executive Council document should be exercised by a presidential (legally qualified) member of the Tribunal acting alone.**

**18.13** We have not gone further and recommended that the Tribunal should have a power similar to that proposed for it under clause 26, that is, the power to examine whether a Cabinet document should be disclosed in the public interest. Since the decision in *Sankey v. Whitlam*,<sup>4</sup> such a power is now exercisable by a court in a Crown privilege case. To confer a similar power upon the Tribunal would raise entirely new considerations. For instance, if such a power in the Tribunal existed, most Cabinet documents would be requested at one time or another. It is probably beyond the purview or experience of the Tribunal

<sup>3</sup> *Transcript of Evidence*, p. 1591.

<sup>4</sup> (1978) 53 ALJR 11.

to determine whether disclosure of, say, one or five per cent of the total sum of Cabinet documents would irretrievably damage the Cabinet process. In evidence to the Committee, the Secretary to the Department of the Prime Minister and Cabinet, Mr (now Sir) Geoffrey Yeend, expressed the view (in the context of a general discussion of the need for confidentiality of the Cabinet process) that one tampers with one part of the Cabinet process at the risk of the whole.<sup>5</sup> For the purposes of our analysis we accept the thrust of that argument, as it is not possible to forecast evidentially whether isolated disclosures may ultimately cause irretrievable damage to the Cabinet system. We can see, nonetheless, that there is a more fundamental issue that is perhaps ripe for consideration, as to whether the confidentiality of the Cabinet room should continue to be accorded the importance in our system that it always has. However fundamental questions of that nature are clearly beyond the scope of our present task.

**18.14** If, as we recommend, the protection for Cabinet attachments is narrowed and limited appeals to the Tribunal are allowed, there will be consequences for the system of classification of documents. We have recommended in Chapter 16 that national security classifications should not be used on Cabinet documents unless their contents justify such national security classifications. We envisage a distinctive marking for Cabinet documents (such as 'Cabinet Document') with supplementary national security classification on documents where appropriate. It would of course be important that this special marking of Cabinet documents should be confined to documents (including attachments) for which exemption could be claimed under clause 24 of the Bill.

**18.15** If, on an appeal for release of a document for which exemption had been claimed as a Cabinet document, the Tribunal decided that the document was not properly classified as a Cabinet document but found that the document in question bore a national security classification, the Tribunal would then consider this matter separately on the lines we have recommended in Chapter 16.

#### **18.16 Recommendations:**

- (a) **A special marking should be established to distinguish Cabinet documents and their attachments; and**
- (b) **The special 'Cabinet' marking should be used on attachments to Cabinet documents only where those attachments would be exempt from disclosure under clause 24 of the Bill.**

#### **Judicial power**

**18.17** The final matter we should raise concerns the constitutional validity of the amendment we have proposed to the powers of the Tribunal. The Tribunal is not a federal court created under section 71 of the Commonwealth Constitution, and consequently it cannot exercise the judicial power of the Commonwealth.<sup>6</sup> The Tribunal has in fact been constituted, and hitherto functions have been conferred upon it, in such a way that it is not regarded as being the repository of judicial power.<sup>7</sup> However when new functions are conferred upon it (for

<sup>5</sup> *Transcript of Evidence*, p. 2299.

<sup>6</sup> *R. v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; affirmed by Privy Council (1957) 95 CLR 529.

<sup>7</sup> See, e.g. the comments of Brennan J in *re Adams and the Tax Agents Board* (1976) 12 ALR 239.

example, the function of determining whether Cabinet documents are exempt documents) the question arises afresh as to whether the discharge of these functions involves the exercise of judicial power.<sup>8</sup>

**18.18** The definition of judicial power is elusive, and has been the subject of a great deal of constitutional litigation. There have been at least four different criteria, or perhaps more accurately, indicia, identified in the cases as bearing upon the question. But the presence or absence of any one of them is not decisive: the question of whether a given function involves an exercise of judicial power is resolved, rather, by weighing and balancing the different criteria against each other in the particular context in issue.<sup>9</sup> The first criterion of judicial power is that it involves the making of authoritative and binding decisions, affecting the rights or liabilities of a person by reference to a pre-existing standard.<sup>10</sup> A second criterion of judicial power is that the function in question does not involve the exercise of inordinate discretion by the decision-maker, especially discretion which can be described as administrative or quasi-legislative in character.<sup>11</sup> A third criterion is the existence of a power in the body in question to enforce its own orders by way of punishment for disobedience of them.<sup>12</sup> The final criterion, and nowadays probably the most important (though by no means the simplest to articulate), is the legislative intent, as revealed by the whole context of the legislation, the history of the body in question and the 'trappings' of its operation.<sup>13</sup>

**18.19** Generally speaking, the decision-making powers vested in the Tribunal under the Freedom of Information Bill are of a very broad discretionary kind; it can range as widely as the original decision-maker, substituting its own decision for his on essentially the same criteria. It is true that the Tribunal, by virtue of clause 37 (3), does not have the same residual power to release exempt material as is vested in agency and ministerial decision-makers under clause 12, but this would not in itself appear to limit the discretion of the Tribunal to an extent that suggested the exercise of judicial rather than non-judicial power. Again, the Tribunal, albeit that its President is a judge, is not established with any of the trappings of a court; the terminology and procedures (especially in relation to the taking of evidence) are quite different from those normally associated with the exercise of judicial power. Nor is the Tribunal in the position of enforcing its own decisions in any way that would be directly suggestive of judicial power.

**18.20** On the other hand, we do acknowledge that it is arguable that if the Tribunal were to be vested, as we propose, with a power, arising out of an amended clause 24, to determine whether a particular document was or was not properly described as a Cabinet document, then this would be a power of a kind which is commonly exercised by the courts. It would involve only the minimal exercise of discretion, no reference to matters of a non-judicial character.

<sup>8</sup> In evidence to the Committee Dr G. D. S. Taylor, Director of Research, Administrative Review Council, queried whether the Tribunal's function under the Freedom of Information Bill is, in respect of any exemption, an exercise of judicial power—see *Transcript of Evidence*, pp. 1670-1674.

<sup>9</sup> See generally C. Howard, *Australian Federal Constitution Law*, 2nd ed. (1972), Law Book Company, Sydney, pp. 154-189.

<sup>10</sup> *R. v. Trade Practices Tribunal; ex-parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, esp. per Kitto J.

<sup>11</sup> See, e.g., *Mikasa (N.S.W.) Pty Ltd v. Festival Stores* (1972) 127 CLR 617.

<sup>12</sup> See, e.g. *Tasmanian Breweries*, cited footnote 10, esp. per Owen and Walsh JJ.

<sup>13</sup> See, e.g. *R. v. Davison* (1954) 90 CLR 353 and *Cominos v. Cominos* (1972) 127 CLR 588.

and the determination of a question by the application of a criterion or criteria reasonably precise in nature. But the question to be resolved is not so much whether the power in question could be regarded as judicial, as whether it *must* be regarded as non-judicial. On this point we venture to suggest that the answer would be in the negative. It is acknowledged over and over again in the cases that there are many kinds of decision-making power which are in practice, and can be in principle, exercised by both judicial and non-judicial bodies, and that the demarcation lines are not sharp, distinct or mutually exclusive. Given the present character of the Tribunal as overwhelmingly non-judicial in its operation and functions, and that the great majority of its proposed new functions are equally unambiguously non-judicial, we do not see that there is any serious risk of constitutional challenge arising out of the conferring on it of one or two additional functions which might be, when looked at individually, consistent with the exercise of a judicial function, but are equally compatible with the exercise of non-judicial power.