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## Waiver of Executive Privilege

The Commission of Inquiry has summonsed me to give evidence in relation to the proceedings of certain cabinet meetings in early 1990. As a courtesy to my former cabinet colleagues and to the legal community I would like to explain why I wish to waive privilege, and I ask that this document be incorporated into the proceedings of the Inquiry.

The legal community, or a significant sector of the legal community, would expect a former Attorney General who is currently a barrister, to claim privilege and as a result be excused from giving evidence regarding what happened in a cabinet meeting. This is because the constitutional convention that the proceedings of cabinet remain secret is a tradition that is upheld by an extensive body of law relating to public interest immunity. Waiver of that immunity in an individual case may be taken as a precedent which, if followed in other cases, could erode a convention that is integral to the effective functioning of our system of government. The legal community would expect that a former Attorney General, more than any other cabinet minister, would be a constitutionalist, and refuse to be part of creating a precedent that might erode a constitutional convention.

Nevertheless I wish to waive privilege in this case. Executive Privilege, also known as Crown Privilege or Public Interest Immunity is a rule of evidence that provides that a court may exclude material relevant to an issue on the ground that its disclosure would be injurious to the public interest. The courts recognise that the convention that proceedings of cabinet remain secret is vital to the separation of powers and to the effective functioning of Westminster democracies, and that its maintenance is integral to the public interest and to the rule of law.

While I respectfully agree with all the above, there are other factors I feel I have to take into account in the present circumstances. While there is a public interest in protecting the conventions of our constitution, there is also a public interest in disclosure of the proceedings of cabinet when there is a widespread but mistaken belief that has long been asserted with great confidence including on the internet that a particular set of cabinet proceedings amounted to a criminal cover up.

An Attorney General's primary responsibility when exercising the discretions of that office is to maintain public confidence in the legal system. Now many years after leaving that office, when I find myself in the situation of having to decide whether to do what I can to protect a convention of our constitution or do what will best serve to maintain public confidence in the legal system, I must act in accordance with what I believed back then was my primary obligation. In so doing I rely upon the remark of Mr Justice Mason in *Australian National Airlines v Commonwealth* (1975) 132 CLR 582 where he said that public interest immunity applies only in

*exceptional cases where the public interest in the proper administration of justice has outweighed by a superior public interest of a self evident and overwhelming kind.*

I think the jurisprudence Mason J drew upon assists me in my decision to waive executive privilege. His Honour was making the point that where two fundamental constitutional principles conflict with one another it is necessary to weigh them in the

light of all the circumstances of the case. It seems to me that in these present circumstances the greatest good of the greatest number favours disclosure. I would make it clear that I would not waive privilege in respect of any other cabinet proceedings, and I do not see this as a precedent for any other circumstances. This is a unique issue, the resolution of which turns on its own facts.

In making this decision I note that privilege has already been waived by two other former ministers and apparently by the government of the day, and the Inquiry is already in possession of a great deal of documentation that would attract privilege if it had been claimed. Up to a point a decision by me to seek to uphold the constitutional convention would be a mere gesture anyway. On the other hand there is a little additional but perhaps significant information I can provide which I believe would assist the Inquiry, and I think my duty to provide it is greater than my obligation to do what I can to act in accordance with the Westminster convention in the present circumstances.

Dean Wells  
19 April 2013