

Submissions of counsel assisting

1. On 19 February 2013 the further hearing of matters relevant to paragraph 3e) of the Order in Council was adjourned to a date to be fixed so that all those with authority to appear could submit written submissions concerning a number of matters which the Commissioner identified at transcript day 25, pages 86. 40 – 87.5.

The First Matter – how should paragraph 3e) of the Order in Council be interpreted?

2. In view of: the ruling made on 24 July 2012; and, the consideration that the adjective “historic”, which is commonly used to describe a famous or important event in history (see the Australian Concise Oxford Dictionary and the Macquarie Dictionary), is a less apt term than “historical”, which is commonly used to refer to a matter which happened in the past (see the Australian Concise Oxford Dictionary and the Macquarie Dictionary), it should be concluded that the Order in Council obliges the Commissioner to fully and carefully review the adequacy and appropriateness of responses and action taken by the Premier and Cabinet in relation to allegations of child sexual abuse arising out of the operations of institutions set aside for the purposes of detaining youths. In conducting that review the Commissioner is also required to review any assertions that the Premier and Cabinet engaged in criminal conduct when responding to such allegations.
3. The review of assertions of criminal behaviour supposedly engaged in by the political executive is dependent upon that behaviour first being shown to be responsive to allegations of child sexual abuse. Thus, if the Commissioner cannot be satisfied that the alleged behaviour of the political executive was indeed responsive to allegations of sexual abuse then the Commissioner is neither obliged to nor is he empowered to proceed any further with a review of the response of Premier and Cabinet.

QCPCI 3 (e)

Date: 14.3.2013

Exhibit number: 340

The Second Matter – is there sufficient evidence of child sexual abuse in youth detention centres thus obliging the Commissioner to review the adequacy and appropriateness of the Cabinet decision to destroy the documents created by Mr Heiner during the course of his investigation?

4. The inquiry into matters said to be within the scope of paragraph 3e) has been conducted in accordance with section 17 of the *Commissions of Inquiry Act 1950* (Qld). Conformably with that provision the rules of evidence have not been applied to exclude evidence unless the proffered evidence could not meet the fundamental test of relevance. The Commission, having hitherto only received evidence in the form of oral or written testimony or exhibits should not now have regard to any information not admitted in evidence in determining whether there is sufficient evidence to oblige it to review the adequacy of the Cabinet decision.
5. In order to determine whether the late Mr Heiner received any information about sexual abuse regard can be had to evidence from a number of sources.
6. One source is the staff employed at the John Oxley Youth Centre (JOYC) at or about the time that Mr Heiner conducted his investigations. The investigations Mr Heiner conducted cannot have commenced prior to 13 November 1989 because he was not appointed to conduct the investigation until that date. (So much is apparent from Ex 83, a letter dated 13 November 1989 and signed by Mr Pettigrew, the then Director-General of the Department of Family Services. That letter also enclosed the terms of reference for Mr Heiner's investigation.) Mr Heiner did not conduct any further investigations from 19 January 1990. (So much is apparent from Ex 123 which includes a letter apparently signed by Mr Heiner and addressed to Ms Matchett, the then acting Director-General, in which Mr Heiner stated that he was "*not prepared to continue any further with my inquiry.*") Indeed there is evidence (in the form of memoranda from Mr Coyne and Ms Dutney, Ex 109 and Ex 109A respectively) to support a conclusion that Mr Heiner completed the task of information gathering by 17 January 1990. So the relevant period within which staff could have spoken with Mr Heiner was that period between 13 November 1989 and 19 January 1990.

7. Leaving to one side Mr Coyne and Ms Dutney, 98 government employees worked at the JOYC over this period. Of this number, 72 provided statements and or testimony to the Commission which was to the effect that they had never spoken with Mr Heiner or anyone acting on his behalf. That left 26 persons, again leaving aside Coyne and Dutney, who spoke with Mr Heiner or who, in a small number of cases, spoke with someone they believed was Mr Heiner.
8. Mr Christensen spoke with Mr Heiner during the course of an afternoon shift at the JOYC. Mr Christensen said that he was questioned about Coyne's management. He said that Mr Heiner did not question him about sexual abuse and he made no disclosures to Mr Heiner about any such matters (transcript day 4, pages 54.30 – 55.10).
9. Ms Konician said that she was interviewed by Mr Heiner and Ms Flynn. She was asked to provide examples of the issues she had raised in a letter she had written on 3 October 1989 (Ex 72J). She said that she was not asked about and did not provide any information about sexual abuse at the JOYC (transcript day 4, page 65.5 - .20).
10. Ms West said that she spoke with a man and a lady at the JOYC. She did not tell either of them anything about sexual abuse at the institution (transcript day 5, page 14.40).
11. Mr Everett said that he saw Mr Heiner either at the JOYC or at an office in the city. He spoke with Mr Heiner about how he had been treated as an employee. He had no recollection of discussing sexual abuse or anything else (transcript day 5, page 29.10 - .20).
12. Mr Cartledge said that he met with Mr Heiner and a female assistant in the city. The whole of the discussion concerned Coyne's management style. There was no discussion of sexual abuse (transcript day 6, page 35.1 - .10).
13. Mr Cassidy met Mr Heiner and his assistant at the JOYC. His recollection was that the discussion concerned something to do with Coyne. He had no recollection of

making any complaints about anything and he said that he did not discuss sexual abuse (transcript day 6, page 50.3 – .60).

14. Mr Healing met Mr Heiner and a lady at a building near the river in the city. He said that no issues were raised about sexual abuse and he was certain that he was not even asked about such a matter (transcript day 7, page 13.35).
15. Ms McGregor saw Mr Heiner at the JOYC. She thought that there may have been a woman present there too. She could only recall there being discussion about Coyne and his management (transcript day 7, page 30.30).
16. Mr Cox spoke with Mr Heiner in the presence of Ms Flynn at the JOYC. He told them about the manner in which Coyne had treated him and other staff. The investigation was all about the abuse of the staff. Sexual abuse was not a part of the investigation so he would not have thought that it was a topic that was raised (transcript day 7 pages 34.55 – 42.35).
17. Mr Feige met with Mr Heiner and Ms Flynn at the JOYC. He said that he was questioned mainly by Ms Flynn. He said that the investigation was about the management of the staff and that was what he spoke about and that he confined his comments to such matters. At no stage did either Mr Heiner or Ms Flynn raise sexual abuse (transcript day 7, pages 49.15 – 52.12).
18. Ms Thompson met with Mr Heiner at the JOYC, nobody else was present. They discussed staff safety issues. She had no recollection of discussing any sexual issues (transcript day 8, page 34.20).
19. Mr McNeven recalled meeting with a lady and a man at the JOYC. He was questioned about the general running of the institution and about how the staff felt about that. There was no discussion about sexual abuse (transcript day 9, pages 8.40 – 10.8).

20. Ms Pearce met with Mr Heiner at the JOYC. Their discussion was confined to the matters she had raised in an undated document (Ex 72D). She said that there were no discussions about sexual abuse (transcript day 9, page 110.35).
21. Ms Ranger met with Mr Heiner and others at the JOYC. She was questioned about a particular event but it did not involve sexual indiscretion, it concerned management (transcript day 10, page 53.20 - .40).
22. Mr Parfitt could not recall whether he spoke with Mr Heiner or not (transcript day 11, page 48.15).
23. Ms Yuke, the JOYC nurse, recalled meeting Mr Heiner at the JOYC on at least one occasion. She thought that another woman was present recording their discussion. She thought that their discussions concerned management issue at the institution and staff unhappiness with Coyne. She thought that they also discussed the childrens' behaviour, the riots and an incident involving hand-cuffing. She did not raise any issues to do with sexual abuse and she did not think that Mr Heiner raised any such issues (transcript day 11, pages 51.20 – 53.30).
24. Ms Haywood met with Mr Heiner at the JOYC. She thought that someone else was present to take notes of their discussion. The conversation concerned the functioning and management of the JOYC. She had no recollection of there being any discussion about sexual abuse (transcript day 11, page 58.35).
25. Ms Mersaides met with Mr Heiner and Ms Flynn at the JOYC. She said that the discussion was tape-recorded. She had no recollection of there being any discussion of sexual abuse (transcript day 13, page 83.5). She acknowledged that she had been the author of Ex 94. It was a letter addressed to Mr Pettigrew and it was dated 8 December 1989. It is a significant document because it was made relatively close in time to the events about which it speaks. In connection with the meeting with Mr Heiner it was asserted that she was repeatedly asked if she had problems with management and she was asked her opinion about Coyne's attitude and behaviour.

26. Ms Mersaides testified that she could recall being asked about the chaining of someone to a pool fence but had no recollection of being asked about the Annette Harding matter. Not surprisingly she said that she regarded the latter as a much more serious incident than the former. She said that she would therefore have recalled if she had been asked about it.
27. Mr Farnworth said that he met with a man and a woman at the JOYC. He could not remember what was discussed but the matters which Ms Mersaides said he had told her and which she recounted in her letter, Ex 94, would have reflected his feelings after the meeting (transcript day 13, pages 16.30 – 17.15.) In that letter Ms Mersaides said that Mr Farnworth had told her that Ms Flynn had asked many leading questions suggestive of a belief that the management had harassed and undermined youth workers and their work. She said that Mr Farnworth effectively observed that Mr Heiner's questions betrayed an acceptance of the youth workers' complaints. He was repeatedly asked why he had participated in the investigation if he had no specific complaints or information "*on the complaints*". The letter went on to say that "*When asked about the complaints, the Magistrate refused to provide information. The Magistrate stated a number of times that the inquiry was not about the management, but about the Centre, and yet he seemed unwilling to listen to the positive comments David wished to make.....*"
28. Mr Smith met Mr Heiner and his female assistant at the JOYC. He could not recall whether he told Mr Heiner anything about sexual abuse. He had written Ex 72C. That letter is dated 3 or 8 October 1989. It made no reference to any sexual abuse, rather it concerned Coyne's management of staff and his relationship with the author. The letter referred to a Sunday Sun newspaper article of 1 October 1989 in which it was apparently asserted that Coyne could not manage the institution.
29. Mr Smith testified that although he knew of the Harding matter he did not regard it as linked to the Heiner investigation which was about the "*general management of the centre not about the sexual – or the management of the sexual incident.*" (transcript day 14, page 54.30 - .40).

30. Mr Manitzky spoke with Mr Heiner at the JOYC whilst Ms Flynn was present. He raised the need to improve the training of staff. Sexual abuse did not come up (transcript day 17, page 61.45). He did not raise the Harding matter (page 62.1). He recalled that Mr Heiner said that something that Manitzky had said may have been defamatory (page 63.15).
31. Mr Robertson was recalled to the JOYC to be interviewed about his time there and his interaction with Coyne. Three people from "*head office*", possibly all male persons, were present in Coyne's office. A man asked most of the questions. A stenographer took notes. His opinion was sought about Coyne. No allegations of sexual abuse were raised with him (transcript day 7, page 79.12).
32. It is as well to refer at this stage to Ex 102, a memorandum written by Ms Draper, now Woolard, to Ms Matchett. Although the author did not meet Mr Heiner (transcript day 6, page 40.45), Ex 102 arguably reflected an understanding the author had at the time about the investigation. In the letter it is said that the author had been led to believe that there was no interest on the part of the inquisitor in receiving information adverse to the "*complainants*".
33. Mr Peckelharing died some years ago. He too met with and spoke with Mr Heiner. Evidence of what he may have said to Mr Heiner was given by Mr Newnham, a former Commissioner of the Queensland Police Service, who had acted in 1998 on "*behalf of finding out the truth*" (transcript day 15, page 119.38). Sometime between 13 and 15 May that year he interviewed and made contemporaneous notes of his conversation with Peckelharing. Newnham asked him what he had told Mr Heiner. Newnham noted the answer to be, "*I told Heiner about the handcuffing and my disagreement with it.*" (transcript day 15, page 121.40). Newnham agreed that if Peckelharing had said anything about having told Mr Heiner about sexual abuse then that would have been recorded in the notes (page 122.45).
34. Mr Lannen said that he met with Ms Flynn and a female assistant at the JOYC. He thought he recalled that the assistant made notes. No man was present and Mr Lannen said that he never met Mr Heiner. The discussion was generally about what was happening at JOYC. He thought that he told Ms Flynn about the abuse of kids,

including handcuffing, use of drugs and victimisation of staff, however, he was not certain about what he had told her. Although he did not recall telling her about sexual abuse he believed that he would have spoken of this as it was a concern to him (transcript day 5, page 40.35). He agreed that he had been one of the principal agitators for an inquiry and had written Ex 62 and Ex 72B dated 28 August 1989 and 3 October 1989 respectively. He agreed that neither made any reference to sexual abuse. He agreed that he had signed Ex 105, a document dated 11 January 1990. It was headed "*Statement to Mr Heiner*". He maintained though that he had never met him. However, he agreed that the document contained no reference to sexual abuse. He agreed with the proposition that at the time he spoke with Ms Flynn the only incident he knew of was the one which involved several young persons (page 66.5 - .35). This was a reference to the Harding matter.

35. Mr Roch worked at the JOYC until about 1988. He had suffered a stroke in 2007 and a result of that was that he had difficulty recalling events (trans day 11, page 3.10). He said that he was interviewed on two occasions, possibly by the same man (page 10.8). It seems that the fact that there were two interviews was something he forgot when he provided the first of his two statements to the police attached to the Commission. The first interview was conducted at the JOYC and it would, he said, have to have taken place when he was still employed there (page 11.30). He did not know the name of the interviewer but Heiner rang a bell (page 10.34). He could not recall what he said at that meeting but assumed that it concerned the management style because it was appalling. He was unsure whether the Harding incident was discussed then (page 13.30).
36. If the witness was in fact interviewed before he finished working at the JOYC then the interview could not have been conducted by Mr Heiner. However, Ms Flynn recalled that Roch was interviewed there by Mr Heiner so it is clear that Roch is unreliable about when he was interviewed. Another pointer as to his reliability is his recollection that on 9 November 1988 it was Mr Pettigrew who belittled him at the meeting with staff (page 4.13 - .32 and page 7.1). The minutes made of the meeting (Ex 87) showed that Mr Peers attended, no mention is made of Mr Pettigrew's presence. When that was pointed out to Roch he said that Peers was the person who

belittled him. Peers recalled attending that meeting (transcript day 13, page 29.15). He had no recollection of Mr Pettigrew being there (page 19.45).

37. The second meeting occurred at a government building near the river and there was a woman present at that meeting. The name Barbara rang a bell with him. When asked what was discussed Roch replied, *"That's a good question. I think it was a combination of Peter Coyne's administration and I think it did touch on Annette Harding"* (page 9.15 - .20). Later in his evidence he said that, *"I think maybe the Annette Harding incident may have come up"* (page 17.1 -.5). Asked how sure he was he said, *"I'm not"* (page 17.5). He was not even sure that the man he spoke to was Mr Heiner (page 16.45).
38. Ms Parfitt worked at the JOYC from around August 1987 until around August 1990 (transcript day 10, page 15.8). She began work with the Department of Corrective Services on 10 September 1990 (page 15.26). She participated in an inquiry relating to the JOYC. She thought that her participation occurred after she had finished working at the JOYC, although she was not sure about that (page 16.15) but her feeling was that she was accurate on this (page 30.8). She was 100% sure that she mentioned the Harding incident (page 26.30), though she later said that she could have been totally wrong about everything including the details in her statement (page 29.55). She remembered being at the Childrens Court and speaking with an older man. She was sure it was the Heiner inquiry, she thought (page 16.30). She did not recall anyone else being present. Sometime later she was asked to sign a statement. If it is assumed that she did mention the Harding incident it is relevant to know what she actually said about it. Ms Parfitt said that her knowledge was that a young female inmate had been subject to rape by some fellow residents, probably five boys. Although she was not present it was the talk of the centre and she probably would have mentioned that it was much discussed. She was sure she would have said that the girl was kept secluded for a while (page 20.1 - .20). Ms Parfitt testified that the girl never told her anything (page 29.24).
39. Ms Parfitt had said in her statement (Ex 42) that she may have been interviewed in either March or September 1990. She had no recollection of being interviewed at a building in Makerston Street on 3 March 1999 and speaking with a Mr Hobson

about the JOYC (transcript day 12, pages 25.40 – 26.45). Although she could only recall one occasion when she was interviewed she accepted that in fact she had been interviewed in 1999 and that the interview concerned the JOYC (day 12, page 27.50 – 28.30).

40. The senior managers of the JOYC in the latter part of 1989 were Peter Coyne and Anne Dutney, the former was the manager, the latter was the deputy manager. Ms Dutney met with Mr Heiner at the JOYC in late 1989. Ms Flynn and another woman were present at the meeting. Most of the questioning was undertaken by Mr Heiner. Ms Dutney said that she could not recall Mr Heiner asking any questions concerning the sexual abuse of children. She said that she did not provide him with any information about that issue (transcript day 8, page 38.20 - .30). Ms Dutney said that her impression of the interview was that Mr Heiner was only interested to explore what she called "*negative elements of Peter Coyne*" (page 42.35).
41. Mr Coyne was questioned by Mr Heiner over a period of about four hours. Their meeting took place at the JOYC in the presence of Ms Flynn. He was questioned about a broad range of topics that related to the terms of reference. He recalled being questioned about the use of handcuffs. At no stage was he questioned about the sexual abuse of children. He was not questioned about the Harding incident (transcript day 9, page 53.1 -.10). He said that there was no connection between the Heiner investigation and sexual abuse. He said that the only issue that he knew of that could have fallen into the category of sexual abuse was the Harding incident (page 57.40).
42. Another source of evidence which can assist in understanding whether Mr Heiner received information about sexual abuse is the staff who had been assigned by the Department of Family Services to assist Mr Heiner to conduct the investigation.
43. Ms Cosgrove said that she asked to provide administrative support to Mr Heiner. To that end she went to the JOYC and set up a tape recorder so that the interviews that Mr Heiner intended to conduct could be recorded. She said that she did not remain in the room during the interviews. She assumed that she transcribed some of the tapes. She did not recall whether any allegations of sexual abuse were raised in the

tapes (transcript day 4, page 12.35). She thought she set a tape recorder up in a building in the city for Mr Heiner but could not recall that occasion very well.

44. Ms Flynn said that the interviews Mr Heiner conducted were had in a room at the JOYC. She had no knowledge of him conducting interviews anywhere else. No one ever raised any allegations of sexual abuse with Mr Heiner (transcript day 4, pages 36.40 – 37.5). Ms Flynn said that she could particularly recall the interview with Mr Roch because he became very distressed when recounting the way he had been treated by management. The interview with Mr Roch occurred at the JOYC (pages 42.10 – 43.10). Of relevance to Mr Lannen's claim that he was interviewed by Ms Flynn is her evidence that she did not carry out any inquiry or questioning in the absence of Mr Heiner (page 44.40).

45. Another source of information which could have assisted in understanding whether information about sexual abuse was received by Mr Heiner would have been Mr Heiner. He died some years ago. However, Mr Newnham asked him what he had been told (transcript day 15, page 128.38) when he arrived at Mr Heiner's house without prior arrangement sometime in the period 13 – 15 May 1998. According to Newnham Mr Heiner said that he had been told about handcuffing and the administration of drugs (page 129.35).

46. The understanding Mr Heiner had about the task he was undertaking can be gleaned from a letter he wrote to Ms Matchett on 19 January 1990 and which forms part of Ex 123. In that letter he said that he agreed to carry out an inquiry "*into the style of management at the John Oxley Youth Centre*". He acted pursuant to the terms of reference but "*perceived my enquiry to encompass the first*" term of reference. The terms of reference can be seen in Ex 83. The first term required him to investigate and report about "*The validity of the complaints received in writing from present or former staff members and whether there is any basis in fact for those claims.*" Returning to Ex 83, Mr Heiner wrote that, "*I believed that the other seven matters in that annexure [terms of reference] were concomitant with the first matter*" There can be no doubt that the reference to complaints was a reference to the nine letters of complaint (Ex 72B – 72J) which the State Service Union forwarded to Mr

Pettigrew on 10 October 1989 (Ex 72). None of those letters have anything to say about the topic of sexual abuse or about the Harding matter.

47. Having regard to the seriousness of an assertion that Cabinet destroyed evidence of child sexual abuse the Commission should proceed in accordance with the standard spoken of by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 – 362:

“No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes..... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.”

48. The Commission cannot be reasonably satisfied that Mr Heiner received or discovered information about child sexual abuse. Twenty three persons have testified either that they had no recollection that such a matter was discussed or that it in fact was not discussed. Peckelharing did not mention such a matter when spoken to by Newnham. The man who conducted the investigation did not mention to Newnham that he discovered anything of this nature. Merely because so many said that the issue was not discussed would not mandate that the evidence of even only one person that it was should be disregarded if that person’s evidence could be considered to be reliable. Reasonable satisfaction could be reached on the basis that only one person raised sexual abuse because it would only require one person to have told Mr Heiner about it for it to have found its way into the material Mr Heiner gathered. However, reasonable satisfaction cannot be reached on indefinite testimony.

49. Lannen could only testify to a belief that he informed Ms Flynn about it. However, his belief is inconsistent with Ms Flynn’s testimony. He also said that he was interviewed in the absence of Mr Heiner. That too conflicts with Ms Flynn’s evidence. The Commission must necessarily prefer the positive recollection of Ms Flynn rather than the belief harboured by Lannen especially when the matter, which he says then concerned him, did not manifest itself in any of the correspondence he wrote in 1989 or 1990.

50. The Commission cannot act upon the basis that Roch told Mr Heiner about sexual abuse when the witness was not sure that he did and not sure that the person he spoke to on the second occasion was Mr Heiner. The Commission should regard him as an unreliable historian. The Commission would not even be able to be satisfied he met with Mr Heiner in the city. There is a basis for concluding that Roch is suggestible (page 30.1 – 34.40 and Ex 254).

51. The indefinite testimony of Lannen and Roch can be contrasted with Ms Parfitt's confidence that she raised the Harding matter in her interview. But for the consideration that she was interviewed in 1999 about matters at the JOYC, during the course of which she raised issues about sexual behaviour by the inmates, it would have been open to conclude that she was simply wrong in her recollection about the time at which she spoke to the person who she said questioned her in March or September of 1990. Her failure to recall the interview with Mr Hobson in 1999 demonstrates that she is not a reliable historian.

The Third Matter – whether any review of the Cabinet decision to destroy the documents can be fully and carefully undertaken without hearing evidence from the members of the Cabinet who made that decision.

52. Ex 181 reveals what the Cabinet decided and reveals that Cabinet acted upon a submission signed by Ms Warner, the Minister for Family Services.

53. The members of Cabinet knew that Mr Heiner gathered information of a potentially defamatory nature. They were told that destruction of that material would reduce the risk of legal action and provide protection for all involved in the Heiner investigation. They were told that the State Archivist's approval for destruction was a necessary prerequisite and they knew that it had been provided by her in writing.

54. The members of Cabinet were told that the speedy resolution of the matter would benefit all concerned and avert possible industrial problems. Cabinet enabled the destruction of the material notwithstanding that the members of Cabinet knew that "*representations*" had been made by a solicitor on behalf of certain staff at the

JOYC seeking “*production*” of, which they must have understood meant “access” to, the material the subject of the Minister’s submission.

55. It is open to conclude that the Cabinet decision enabling destruction was not made without some misgivings. Even without the testimony provided by Ms Warner (transcript day 23, page 97.10) such a conclusion can be inferred from the Cabinet decisions of 12 February 1990 (Ex 151) and 19 February 1990 (Ex 168). There is no reason to assume that any member of Cabinet knew that the Archivist’s consent had been obtained without her being aware of a circumstance material (transcript day 20, pages 49.45-50.5; 51.18; 72.10; 73.30 - .35; 74.1 -.35) to her consideration whether to authorise destruction.
56. Accordingly, there is no useful purpose to be served in summoning the remaining members of the Cabinet to attend and give evidence. The Commission already has evidence about what the members of the Cabinet decided and has evidence about what the members of the Cabinet knew when they made their decision. Hence, but for the difficulty with paragraph 3e) a review of the decision could be fully and carefully undertaken without hearing evidence from the members of the Cabinet who made that decision.
57. Public interest immunity has never been thought to be confined to judicial or quasi judicial proceedings (*Jacobsen v Rogers* (1995) 82 CLR 572 at 589). Unless abrogated by a statutory provision expressed in the clearest of terms (*Jacobsen* at 598) the doctrine of public interest immunity may be invoked to prevent the disclosure of not just documentary but also oral evidence (*Sankey v Whitlam* (1978) 142 CLR 1 at 38). Sections 3 and 5(2) (b) of the *Commissions of Inquiry Act* would not appear to be statutory provisions which satisfy the above description. It has never been doubted that it is in the public interest that the deliberations of a Cabinet should remain confidential so that the members thereof may exchange differing views and also maintain the principle of collective responsibility (*The Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 615). Immunity from disclosure is not absolute, a claim of such immunity is to be weighed against the competing interest of proper administration of justice. Evidence about the actual deliberations of Cabinet may only be admitted in a court if exceptional

circumstances are sufficient to displace the public interest in the immunity from disclosure. It has been doubted whether the disclosure of the deliberations of Cabinet about matters which remain controversial would ever be warranted in civil proceedings. The position may be different in criminal proceedings (*The Commonwealth v Northern Land Council* at 618).

58. It may be that questions about the subjective knowledge or thoughts or beliefs of individual Cabinet members would not be immune from disclosure.

Another Matter

59. Another principal which must be borne steadily in mind is that personal reputations should not be harmed by findings after an inquiry has ended unless those whose reputations are likely to be affected have had an opportunity to show why the findings should not be made (*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 578).


MJ Copley SC


M Woodford

Counsel assisting
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