PUBLIC INTEREST IMMUNITY FOR CABINET DOCUMENTS:

HARBOURS CORPORATION OF QUEENSLAND v. *VESSEY CHEMICALS PTY. LTD.*[1]

The doctrine of public interest immunity has undergone considerable change over the past forty-five years. A progressive relaxation can be discerned, occurring in several quite distinct stages. The first was the rejection of the decision in *Duncan* v. *Cammell, Laird & Co. Ltd.*[2] that an objection to production of documents by a Minister on the grounds of public interest was conclusive. This view had prevailed in the United Kingdom at least,[3] until it was overruled by the House of Lords in *Conway* v. *Rimmer.*[4] In its stead was placed the more complex judicial task of balancing the public interest in withholding documents against the public interest in ensuring the proper administration of justice.[5]

The second stage of evolution was the decision of the High Court in *Sankey* v. *Whitlam*[6] that there is no class of documents entitled to absolute immunity from disclosure. Previously, membership of a sensitive class conferred automatic immunity on a document, irrespective of its actual contents. State papers have traditionally been the quintessential example of privileged documents, cited along with documents relating to national security and diplomatic relations.[7] This expression embraced Cabinet minutes, minutes of discussions between heads of departments, papers brought into existence for the purpose of preparing Cabinet submissions and any other high level policy documents.[8] Lord Reid in

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[1] (1986) 67 A.L.R. 100 (hereafter *Vessey Chemicals*).

[2] [1942] A.C. 624 at 642-643. Amendments to the Evidence Act, 1898 (N.S.W.) have effectively reinstated the practice in *Duncan* v. *Cammell, Laird & Co. Ltd.* Under s. 61 a certificate from the Attorney-General is conclusive. The section relates to "government communications", defined to include Cabinet and Executive Council communications, communications relating to policy and senior government administration regardless of subject matter. There have been important instances, however, where no certificate was presented, e.g. *Prineas* v. *Forestry Commission of New South Wales* (1984) 53 L.G.R.A. 160 and *Hooker Corporation Ltd.* v. *The Darling Harbour Authority*, N.S.W. Supreme Court, *per* Rogers, J., 7 May 1987, (unreported). Thus the development of the common law relating to public interest immunity remains relevant in New South Wales.

[3] *Cf. Ex parte Brown; Re Tunstall* (1966) 67 S.R. (N.S.W.) 1; *Bruce* v. *Waldron* [1963] V.R. 3; *R.* v. *Snider* [1953] 2 D.L.R. 9; *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878.

[4] [1968] A.C. 910.

[5] *Id.* 952 *per* Lord Reid.

[6] (1978) 142 C.L.R. 1 at 40-42 *per* Gibbs, A.C.J., 58-62 *per* Stephen, J., 95-96 *per* Mason, J.

[7] E.g. *Conway* v. *Rimmer supra* n. 4 at 952 *per* Lord Reid, 973 *per* Lord Hodson, 987 *per* Lord Pearce, 993 *per* Lord Upjohn; *Burmah Oil Co. Ltd.* v. *Bank of England* [1980] A.C. 1090 at 1121 *per* Lord Salmon, 1127 *per* Lord Edmund-Davies (hereafter *Burmah Oil*); *Aboriginal Sacred Sites Protection Authority* v. *Maurice* (1986) 65 A.L.R. 247 at 250 *per* Bowen, C.J.

[8] D. Pearce, "Of Ministers, Referees and Informers—Evidence Inadmissible in the Public Interest" (1980) 54 *A.L.J.* 127 at 129.

Conway v. *Rimmer*[9] even included within this charmed circle all departmental documents concerned with policy making, even by quite junior officials. The rationale for absolute protection of this class was threefold: the preservation of full and frank discussion at high levels of government, the efficient working of government, and, with respect to Cabinet papers, the maintenance of collective responsibility.[10] That these objectives warranted absolute immunity was assumed even in *Conway* v. *Rimmer*,[11] and by the time *Sankey* v. *Whitlam* was decided, there existed a well-entrenched principle of immunity from disclosure for State papers.[12] The High Court, however, insisted that State papers be subjected to the general balancing process set down in *Conway* v. *Rimmer* and rejected the notion that documents of a particular class should be absolutely protected from disclosure.[13] Moreover, the subject matter with which the documents deal was held to be an important element in the equation.[14]

The refusal to countenance automatic immunity for State papers[15] and the relevance attached to their contents substantially narrowed the scope of the class claim in public interest immunity. It is arguable that class claims were swept aside by *Sankey* v. *Whitlam*, although this suggestion was rejected by McClelland, C.J. in *Breen* v. *Minister for Environment and Planning*.[16] The extent to which this proposition is correct is determined by the weight accorded to the contents of the papers in the balancing process. If it is sufficiently great, then class claims effectively merge with contents claims, so that the range of subject matter which will support a claim is identical in both categories. This question is not resolved in *Sankey* v. *Whitlam*, partly because the unusual character of the proceedings accentuated the public interest in the administration of justice,[17] and also because the documents related to issues of no current significance.[18]

Clarifying the boundaries of the principle in *Sankey* v. *Whitlam* is the next stage in the development of the doctrine of public interest immunity. This task was undertaken by the Federal Court decision of *Harbours Corporation of Queensland* v. *Vessey Chemicals Pty. Ltd.*[19]

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[9] *Supra* n. 4 at 952.

[10] I. G. Eagles, "Cabinet Secrets as Evidence" (1980) *Public Law* 263 at 264-270; Australian Law Reform Commission, *Evidence Reference Research Paper No. 16: Privilege*, 1983 at 285.

[11] *Supra* n. 4.

[12] *Rogers* v. *Home Secretary* [1973] A.C. 388 at 412 *per* Lord Salmon; *Lanyon Pty. Ltd.* v. *Commonwealth* (1974) 129 C.L.R. 650; *Australian National Airlines Commission* v. *Commonwealth* (1975) 132 C.L.R. 582 at 591; *Liddle* v. *Owen* (1978) 21 A.L.R. 286; *Elston* v. *State Services Commission* [1979] 1 N.Z.L.R. 193.

[13] *Supra* n. 6 at 41-42 *per* Gibbs, A.C.J., 58-62 *per* Stephen, J., 95-99 *per* Mason, J., 108 *per* Aickin, J.

[14] *Id.* 42 *per* Gibbs, A.C.J., 60-62 *per* Stephen, J.

[15] Similar attitudes have now prevailed in *Air Canada* v. *Secretary of State for Trade* [1983] 2 A.C. 394 and *Environmental Defence Society Inc.* v. *South Pacific Aluminium Ltd. (No. 2)* [1981] 1 N.Z.L.R. 153.

[16] (1981) 48 L.G.R.A. 275 at 284.

[17] *Supra* n. 6 at 56-57 *per* Stephen, J.; see also *Hospitals Contribution Fund of Australia* v. *Hunt* (1983) 76 F.L.R. 408 at 423-424 (hereafter *H.C.F.* v. *Hunt*).

[18] *Supra* n. 6 at 46 *per* Gibbs, A.C.J., 100 *per* Mason, J.

[19] *Supra* n. 1.

The Facts

The applicant in the principal proceedings (the Corporation) accepted a tender from the respondent (Vessey) for the supply of paint. The Corporation was a government authority and, prior to acceptance, the tender had been considered and approved by the State Cabinet. After incurring a loss alleged to be the result of using the paint supplied by Vessey in an off-shore coal loading facility, the Corporation claimed damages under s. 52 of the Trade Practices Act 1974 (Cth.) for misrepresentations as to the quality of the paint amounting to misleading or deceptive conduct. In the course of discovery the Corporation claimed the protection of public interest immunity for certain documents comprising Cabinet minutes, submissions to Cabinet and drafts thereof.[20]

The Decision

Pincus, J., having already inspected the Cabinet documents, ordered their production for inspection by Vessey's legal advisers, subject to an undertaking that the contents not be disclosed to Vessey itself unless the Court on application permitted wider access.[21] His Honour declined to follow Lord Reid's suggestion in *Conway* v. *Rimmer*[22] that all government documents concerned with policy making, even by junior officials, should be absolutely protected.[23] Faced with a choice between the conflicting views in the recent decision of *Prineas* v. *Forestry Commission of New South Wales*[24] of Hutley, J.A.: that protection for Cabinet documents should only in very special circumstances be departed from;[25] and Priestley, J.A.: that there is no special rule of law regarding Cabinet documents;[26] (Samuels, J.A. declined to express an opinion on this point[27]), Pincus, J. preferred the latter approach.[28] The documents were routine commercial papers whose disclosure would cause no greater disadvantage to the Crown than would accrue to any large commercial organisation[29] and they were mostly no longer current.[30]

Presumption of Privilege

Pincus, J., in declining to follow the views of Lord Reid and Hutley, J.A.,

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[20] The Corporation also claimed protection for technical reports obtained pursuant to an undertaking to keep them confidential.

[21] An order for production of the technical reports to Vessey's legal advisers was also made. Pincus, J. was able to avoid the difficulties associated with a claim for protection on the grounds of confidentiality (see, e.g., *Science Research Council* v. *Nassé* [1980] A.C. 1028; *Aboriginal Sacred Sites Protection Authority* v. *Maurice supra* n. 7) as a substantial part of the material had already been inadvertently disclosed to Vessey. In these circumstances, his Honour ordered the disclosure of the balance.

[22] *Supra* n. 4 at 952.

[23] *Supra* n. 1 at 103.

[24] *Supra* n. 2 (hereafter *Prineas*).

[25] *Id.* 165.

[26] *Id.* 168-169.

[27] *Id.* 168.

[28] *Supra* n. 1 at 103.

[29] *Id.* 103-104.

[30] *Id.* 103.

exploded the myth that claims for public interest immunity for Cabinet documents should be treated any differently from other such claims. Although *Sankey* v. *Whitlam*[31] established that protection was no longer absolute, the case involved a quite extraordinary fact situation, a private prosecution brought against the former Prime Minister, Mr E. G. Whitlam Q.C., and three of his former Ministers, alleging a conspiracy connected with the Loans Affair. This left the potential for it to be confined to such "very special circumstances" as was done by the Ontario Divisional Court in *Re Carey and the Queen.*[32]

In that case the plaintiff was suing the Crown in the right of Ontario and two statutory corporations in relation to agreements alleged to have been reached and an alleged unconscionable assignment of the plaintiff's interest in a failing tourist resort complex. Production of various Cabinet documents was sought. The Divisional Court quashed the *subpoena duces tecum* and held that: "Cabinet documents are *presumed to be privileged . . . in the absence of special circumstances*"[33] (emphasis in the original). The Ontario Court of Appeal, whilst reaching the same conclusion, expressly rejected this test.[34] Unfortunately, it seems neither decision was cited to Pincus, J. The Divisional Court had adopted the test of Menzies, J. in *Lanyon Pty. Ltd.* v. *Commonwealth*[35] as did Hutley, J.A. in *Prineas*[36] (whilst Priestley, J.A. rejected this approach).[37]

To resolve the conflict Pincus, J. turned to *Sankey* v. *Whitlam* and was unable to discover a clear ruling either way. Gibbs, A.C.J. (as he then was) stressed that papers should only be withheld from disclosure to the extent necessary in the public interest[38] and Mason, J. (as he then was) emphasised that balancing competing public interests was for the Court,[39] both holding that these principles apply equally to Cabinet documents. However, Stephen, J. (with whom Aickin, J. agreed) appeared to give more support for a strong presumption than Pincus, J. acknowledged, expressly characterising the facts before him as "very special circumstances"[40] and distinguishing cases requiring absolute privilege on that basis.[41] Nonetheless, the common thread running through the High Court judgments was that all documents should be subjected to a balancing process between the public interest in protecting sensitive areas of government and administration from disclosure and the public interest

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[31] *Supra* n. 6.

[32] (1982) 4 C.C.C. (3d) 83 at 89-90. White, J. took the same approach to *United States* v. *Nixon, President of United States* (1974) 418 U.S. 683 (Watergate) which involved criminal charges against members of Cabinet and the President of the United States. Lord Keith of Kinkel in *Burmah Oil supra* n. 7 at 1134 regarded *Sankey* v. *Whitlam* and *U.S.* v. *Nixon* as extreme cases which "might fortunately be unlikely to arise in this country"!

[33] *Id.* 89.

[34] (1983) 7 C.C.C. (3d) 193 at 237 (hereafter *Re Carey*).

[35] *Supra* n. 12 at 653.

[36] *Supra* n. 2 at 165.

[37] *Id.* 168-169.

[38] *Supra* n. 6 at 41.

[39] *Id.* 95-96.

[40] *Id.* 57.

[41] *Id.* 63.

in ensuring judicial decisions are based on all relevant and material evidence.[42] Any rule of law which would prevent a Court deciding the case on its merits or prohibit disclosure when this was not strictly necessary in the public interest, as Pincus, J. felt was the case in *Vessey Chemicals*,[43] would clearly be usurping the Court's role in the balancing process and does not seem to have been intended by any member of the High Court in *Sankey* v. *Whitlam*. His Honour is to be commended for rejecting it.

Class Claims

The notion of presumptive privilege assumes that all documents are equally entitled to privilege because of their membership of that class irrespective of contents—a class claim as opposed to a claim based on particular contents. *Vessey Chemicals* is most significant for its treatment of the concept of class claims. Pincus, J. based his decision principally on the fact that the documents did not involve high affairs of state but were of a "routine commercial" kind,[44] dealing with the purchase of paint. His Honour did not believe that disclosure would cause any harm to the Government of a kind different from that likely to accrue to any large enterprise deciding to accept a tender.[45] Therefore, he examined the traditional grounds for immunity for Cabinet papers in the light of their subject matter and concluded that the risk of harm to the public interest from disclosure was negligible.[46]

It is submitted that this must be the correct approach. The case is a classic example of Cabinet appropriation of low-level decision making,[47] illustrating Gibbs, A.C.J.'s point in *Sankey* v. *Whitlam*[48] that "state papers do not form a homogeneous class, all the members of which must be treated alike" but that the extent of their protection must depend on the subject matter. This aspect of the doctrine of public interest immunity received greater exposition in the very recent decision of the New South Wales Supreme Court in *Hooker Corporation Ltd.* v. *The Darling Harbour Authority*,[49] a case in which *Vessey Chemicals* received unqualified endorsement.

Production was sought for Cabinet and Cabinet Subcommittee papers which had come into existence in the course of an investigation to determine the successful tenderer for the erection and conduct of a casino at Darling Harbour. Rogers, J. regarded the subject matter as essentially commercial notwithstanding the "profound political sensitivity" associated with the selection of a suitable operator[50] (a factor singularly

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[42] *Id.* 38-39 *per* Gibbs, A.C.J., 58 *per* Stephen, J., 95-96 *per* Mason, J.
[43] *Supra* n. 1 at 102.
[44] *Ibid.*
[45] *Id.* 103-104.
[46] *Id.* 105.
[47] Eagles, *supra* n. 10 at 278-279.
[48] *Supra* n. 6 at 42.
[49] *Supra* n. 2 at 7 (hereafter the *Darling Harbour Case*).
[50] *Id.* 7-9.

lacking in *Vessey Chemicals*). His Honour made the point that: "It cannot be right that the same importance attach to the preservation of the entire range of Cabinet papers and decisions"[51] and accepted the distinction established in the field of sovereign immunity by *Playa Larga* v. *I. Congresco del Partido*[52] between the functions of government within the "sphere of Governmental or sovereign activity" and those of a "merely trading character".[53]

Vessey Chemicals and the *Darling Harbour Case* together show that even if the class concept has not been "swept aside"[54] it has been clearly modified. Although one does not look at the particular contents, Pincus, J., in the former case, analysed the documents as relating to "a purchase of goods and performance of works"[55]—a very specific definition of class. Rogers, J., in the latter case, went even further, rejecting the proposition that any generalisations could be made about documents relating to tenders, which may be for the supply of submarines or the cleaning of a hospital.[56] The decisions are part of a trend towards greater specificity when judging class claims in order to reach an accurate assessment of the public interest, a trend which, it is submitted, is producing a merger of class and contents claims.

The need for this was made clear as long ago as 1931 in *Robinson* v. *State of South Australia [No. 2]*,[57] when Lord Blanesburgh warned against extending the scope of public interest privilege too freely along with the "increasing extension of State activities into the sphere of trading business and commerce". Pincus, J. applied this approach when considering one of the classic justifications for privilege of Cabinet documents, candour—allowing Ministers and their advisers to put their views freely without fear of subsequent disclosure. This has met with mixed judicial reaction,[58] and Pincus, J. did not deny its validity, but considered that no disadvantage peculiar to government would result from disclosure of tender discussions other than would be likely to be faced by any large commercial organisation which regularly invited tenders.[59] This analysis is apt because the Crown is claiming an immunity not available to ordinary litigants on grounds of public interest and therefore when entering ordinary commercial spheres it should be able to show that specifically public issues are involved or face disclosure like any other litigant. This it was able to do in *Burmah Oil Co. Ltd.* v. *Bank of England*,[60] where a mere commercial activity (purchasing shares in a petroleum company) formed part of the national economic policy.[61]

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[51] *Id.* 7.
[52] [1983] 1 A.C. 244.
[53] *Supra* n. 2 at 8.
[54] *Breen* v. *Minister for Environment and Planning supra* n. 16.
[55] *Supra* n. 1 at 102.
[56] *Supra* n. 2 at 9-10.
[57] [1931] A.C. 704 at 715.
[58] E.g. *Sankey* v. *Whitlam supra* n. 6 *cf.* 40 *per* Gibbs, A.C.J. and 63 *per* Stephen, J.
[59] *Supra* n. 1 at 104.
[60] *Supra* n. 7.
[61] *Cross on Evidence* (3rd Australian ed. by D. Byrne and J. D. Heydon, 1986) at 671.

Reasons for Disclosure

Pincus, J. gave three other reasons to justify disclosure of the documents. The first is that they were mostly no longer current.[62] This was relied on heavily by Mason, J. in *Sankey* v. *Whitlam*[63] and is really an aspect of the modified concept of class claims. Logically, class claims for government documents should be "independent of time" as Lord Wilberforce in *Burmah Oil* shows:[64] removing privilege in the present case could deter candour in the future. However, incorporating a time factor and allowing disclosure of documents that are no longer current and controversial shows that the real concern is for the potential political ramifications of disclosure of that particular subject matter.

The judgment can be seen as part of a healthy judicial and legislative movement in the past two decades towards more open and responsible government.[65] Pincus, J. did not bother to refer to Lord Reid's justification of privilege in *Conway* v. *Rimmer* to prevent "ill-informed or captious public or political criticism".[66] This is perilously close to protecting the government from political embarrassment, as Eagles points out,[67] and whilst it may be the real reason for the politicians' desire for privilege, it does not, of itself, justify immunity. Lord Reid's excessively deferential attitudes are dismissed as being attractive "to those who believe the public should know only what is thought by the government to be of benefit to them".[68] Instead, his Honour, displaying a strong streak of political realism, observed that the systematic practice of leaking government information pursued by politicians themselves for political advantage reduced the credibility of arguments based on the need for Cabinet secrecy. He considered that the courts should not assist a system which encouraged a selective, and potentially misleading, flow of information.[69] This may be contrasted with the view of Lord Widgery, C.J. in *Attorney-General* v. *Jonathan Cape Ltd.*[70] that the courts should not join the politicians in the demolition of important Cabinet conventions. Given that the courts are powerless to prevent the leaking of documents, however, it seems preferable, in accordance with the views of Pincus, J., not to bind litigants by a rule which Ministers themselves do not wholeheartedly support, as Eagles suggests.[71]

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[62] *Supra* n. 1 at 103.
[63] *Supra* n. 6 at 97-100.
[64] *Supra* n. 7 at 1112.
[65] *Id.* 1134 *per* Lord Keith of Kinkel. An important part of this development has been the Freedom of Information Act 1982 (Cth.). However, included in the category of "exempt documents" to which there is no legally enforceable right to access under s. 11 are submissions and proposed submissions to and official records of Cabinet and the Executive Council, extracts of such documents involving the disclosure of Cabinet or Executive Council deliberations and decisions (ss. 34 and 35).
[66] *Supra* n. 4 at 952.
[67] Eagles, *supra* n. 10 at 269.
[68] *Supra* n. 1 at 102.
[69] *Id.* 103.
[70] [1976] Q.B. 752 at 770.
[71] Eagles, *supra* n. 10 at 267.

His Honour's third justification for disclosure is, however, much less compelling and, as the papers did not involve records of Cabinet discussions, quite unnecessary. He queried the view that confidentiality for all internal processes of Cabinet, not simply such matters as budget discussions, should be maintained when policy debates in Parliament, which is legally superior, are completely open.[72] This ignores the reality that, wherever ultimate power theoretically lies, the country is governed from Cabinet. It is there that controversial policy decisions are made, including what legislation will be placed before Parliament—where Government Ministers can present a united front because of their secret Cabinet discussions. Cabinet and Parliament have two quite distinct functions and it is submitted that little is to be gained from attempting to compare them.

Furthermore, Pincus, J. was essentially launching an attack on the doctrine of collective responsibility. No doubt his earlier criticism regarding systematic leaking of information for political advantage is also relevant in this context. There is, however, a judicial reluctance to undermine the doctrine of collective responsibility, as witnessed in *Attorney-General* v. *Jonathan Cape Ltd.*[73] and Mason, J.'s comments in *Sankey* v. *Whitlam.*[74] Hence, in *Whitlam* v. *Australian Consolidated Press Ltd.*,[75] a decision well after *Sankey* v. *Whitlam*, particular importance was attached to collective Cabinet responsibility and a claim for protection of Cabinet discussions and notes of individual members was upheld. These conflicting approaches leave unresolved the position of a document recording Cabinet deliberations on a commercial matter.

There is no reference in Pincus, J.'s judgment to the fact that the "party objecting to discovery is not a wholly detached observer"—but the plaintiff to the original proceedings—a factor favouring discovery according to Lord Edmund-Davies in *Burmah Oil.*[76] Even more significantly, he placed virtually no emphasis on the evidentiary value and importance of the documents to Vessey's case, one of the main factors to be considered in assessing the strength of the interest in the administration of justice as balanced against the harm to the public interest in allowing disclosure.[77] Indeed, his Honour considered it likely that the documents would not be needed for the purposes of the litigation, although from his inspection he was not able to infer that they would necessarily be of no assistance to Vessey.[78] This is in marked contrast to the *Darling Harbour Case* where Rogers, J. spoke in terms of the "crucial relevance the documents may have to Hooker's case" and the "possible inability of Hooker to establish the case it pleads in any other way".[79]

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[72] *Supra* n. 1 at 104.
[73] *Supra* n. 70 at 770.
[74] *Supra* n. 6 at 97-98.
[75] (1985) 73 F.L.R. 414 at 421-423.
[76] *Supra* n. 7 at 1128.
[77] *Alister* v. *R.* (1984) 154 C.L.R. 404 at 412 *per* Gibbs, C.J.
[78] *Supra* n. 1 at 101, 105.
[79] *Supra* n. 2 at 11-12.

It appears that Pincus, J. has not conducted the balancing process at all. The explanation seems to be that, as Gibbs, C.J. stated in *Alister* v. *R.*,[80] the balancing exercise is only the "final step" taken after both aspects of the public interest have been shown to require consideration—when it appears that damage will be done by disclosure and that the documents are likely to contain material evidence. *Re Carey*[81] neatly explained that for this the party seeking protection must establish a *prima facie* case and then the persuasive burden of proof shifts to the party seeking production. On this analysis it seems that Pincus, J. regarded the danger from production to be so low—in fact "rather fanciful"[82]—that he did not need to consider the likelihood of the documents containing evidence and balance the competing interests. This is quite extraordinary given that Cabinet documents, albeit of a commercial character, were involved.

The present authors are not aware of another case involving Cabinet documents where such an approach has been taken. Normally the central issue is whether the acknowledged (if, perhaps, not very strong) public interest in protection is to be outweighed in the balancing process—as in the *Darling Harbour Case.*[83] Indeed, in Canada, under the highly systematic analysis of *Re Carey* little more, it would seem, is required than to establish that Cabinet documents concerned with the formulation of government policy are involved to overcome this first step.[84] It should be noted, however, that whilst Canadian law does not appear to differ significantly from its Anglo-Australian counterpart, the Courts appear in practice to take a somewhat stricter approach to protecting State papers. Unlike *Vessey Chemicals* and the *Darling Harbour Case*, no reference was made in *Re Carey* to the fact that the documents were essentially commercial, and inspection and production was refused (although admittedly the case for protection was stronger, the papers involving government economic policy for Northwestern Ontario, raising an issue similar to that in *Burmah Oil*). Notably, an important factor in refusing inspection or disclosure in *Re Carey*[85] and in *Somerville Belkin Industries Ltd.* v. *Government of Manitoba*[86] was the fact that the documents would not be likely to provide assistance to the case of the party seeking disclosure who had failed to show that his case was unlikely to be able to be proved by other means.[87]

Pincus, J. recognised that there might be sufficient risk of harm to the public interest from disclosure to limit access initially to Vessey's

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[80] *Supra* n. 77 at 412.
[81] *Supra* n. 34 at 230 (Ontario Court of Appeal).
[82] *Supra* n. 1 at 105.
[83] In *H.C.F.* v. *Hunt supra* n. 17 at 421, 424, a case involving documents on "a mundane issue of day to day government", Master Allen regarded disclosure of Cabinet papers as "a grave step".
[84] *Re Carey supra* n. 34 at 235; *MacMillan Bloedel Ltd.* v. *R. in Right of British Columbia* (1984) 59 B.C.L.R. 374 at 380.
[85] *Supra* n. 34 at 235-236.
[86] [1985] W.W.R. 316 at 322-323.
[87] See also *H.C.F.* v. *Hunt supra* n. 17 at 424.

solicitor[88]—an admirably flexible approach—but this suggests that possibly greater consideration should have been given to the importance of the documents to the litigation and indeed to the preliminary issue of whether there was at least a *prima facie* case for protection. It may well be that absolutely no question of damage to the public interest is raised by disclosure of submissions to Cabinet regarding a paint tender—although this analysis would seem to amount to the abolition of class claims altogether. However, if this was the reason for his Honour's apparent disregard of the issue of the assistance the documents were likely to provide to Vessey's case it is submitted that, at the very least, this should have been made explicit.

Pincus, J. had already inspected the documents before deciding to order production. This is exceptional, Gibbs, C.J. in *Alister* v. *R.* having considered that:

> . . . where the Crown objects to the production of a class of documents on the ground of public interest immunity, the judge should not look at the documents unless he is persuaded that inspection would be likely to satisfy him that he ought to order production. . . .[89]

The Corporation's invitation to inspect is the obvious explanation but the fact that Pincus, J. had only inspected a "small fraction" of the documents[90] shows a danger inherent in inspection by the Court, even by invitation: a false impression may be formed. This was one of the reasons given by Lord Wilberforce in his dissenting judgment in *Burmah Oil*[91] for refusing to inspect the documents. His Lordship considered that Courts did not generally have the time or the experience to carry out a careful inspection in every case and such a process could produce variable results between cases. Inspection is nonetheless a very useful tool in determining on which side of the balance particular documents fall and Lord Wilberforce's test of limiting its use to "rare instances where a strong positive case is made out"[92] is unduly harsh and did not receive the support of the majority in the House in either *Burmah Oil*[93] or *Air Canada* v. *Secretary of State for Trade*.[94] Nonetheless, Courts should be alive to this danger whenever inspecting documents and, unless a thorough examination is considered it may be better left until after the preliminary decision for production has been made, even in the case of an invitation by the parties.

The issue of inspection raises again the problem of the importance of the documents to the outcome of the proceedings. According to the

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[88] *Supra* n. 1 at 105.
[89] *Supra* n. 77 at 414.
[90] *Supra* n. 1 at 101.
[91] *Supra* n. 7 at 1117.
[92] *Ibid.*
[93] *Id.* 1129 *per* Lord Edmund-Davies, 1135-1136 *per* Lord Keith Kinkel, 1145 *per* Lord Scarman.
[94] *Supra* n. 15 at 435 *per* Lord Fraser of Tullybelton, 439 *per* Lord Wilberforce, 444 *per* Lord Edmund-Davies, 445 *per* Lord Scarman, 449 *per* Lord Templeman (hereafter *Air Canada*).

majority in *Air Canada*[95] documents in civil cases[96] should be inspected only if they appear likely to support the case of the party seeking discovery, the minority regarding it as sufficient that they should appear likely to provide material assistance to any of the parties to the proceedings. The purpose of this requirement is to prevent fishing expeditions by litigants. Whilst the issue of inspection did not arise in *Vessey Chemicals*, logically the same test must apply at both the inspection and production stages, as Lord Fraser in *Air Canada* made clear.[97] Therefore, one might be tempted to criticise the judgment of Pincus, J. for appearing to apply some lesser requirement to actual disclosures than he would if he had been deciding whether to examine them. However, this "fairly strict" test presupposes a "valid claim" for public interest immunity,[98] a point brought out especially in *Re Carey*,[99] which regards the *Air Canada* test as the burden of persuasion falling upon the party seeking production once a *prima facie* case for protection has been established. According to the Ontario Court of Appeal this burden relates exclusively to the first stage of inspection; at the second stage, production, the Court alone must assess the weight of the competing interests in the light of its inspection without further submissions from the parties.[100] This, it is submitted, also expresses the Australian position.[101] Therefore, as suggested above, Pincus, J. appears to have considered that no *prima facie* case for protection had been made out and merely applied the far less stringent test of the relevance of the document to the proceedings applicable to all cases of discovery.

Conclusion

The decision in *Vessey Chemicals* represented an important development in the doctrine of public interest immunity. Although it was clear that the principle of absolute immunity for Cabinet papers regardless of their contents was abrogated by the High Court in *Sankey* v. *Whitlam*, the extent of class-based protection which remained was uncertain. *Vessey Chemicals* established that there is no strong presumption in favour of protection of Cabinet documents. Consideration must be given to the topic which they address. One clear principle was established in *Vessey Chemicals* and subsequently developed in the *Darling Harbour Case*. Where Cabinet papers relate to matters of a commercial, rather than a governmental nature, the risk that their disclosure will cause harm to the public is minimal. As a consequence, the commercial activities of a government are placed on the same footing as those of private enterprise and the factors

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[95] *Ibid.*

[96] The High Court in *Alister* v. *R. supra* n. 77 held that a more liberal approach should be adopted in criminal cases.

[97] *Supra* n. 15 at 434.

[98] *Id.* 436 *per* Lord Fraser of Tullybelton.

[99] *Supra* n. 34 at 230-232.

[100] *Id.* 230-231.

[101] *Alister* v. *R. supra* n. 77 at 469-470.

in favour of disclosure in the interests of administration of justice will be likely to predominate. This is a reasonable position. What is less clear is whether there are circumstances where the danger in disclosure in documents involving a commercial transaction considered by Cabinet is so minimal that it does not warrant being placed in the balance at all. This is also not unreasonable, given continuing trends towards open government and governments' extension in fields far removed from high affairs of state. Nonetheless, it is to be regretted that Pincus, J. did not make explicit his apparent support for this very new development in the doctrine of public interest immunity.

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