Before the High Court

Discovery of Cabinet Documents: the *Northern Land Council* Case

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In *Commonwealth of Australia v Northern Land Council* the High Court must determine a number of related issues concerning discovery of Cabinet papers. These have arisen in the course of an action brought by the Council seeking rescission of an agreement with the Commonwealth, made under s44 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), relating to uranium mining in part of the Northern Territory. The Council claims that the agreement was made under duress and as a result of breaches of fiduciary duties owed by the Commonwealth, involving unconscionable conduct by senior ministers. The Federal Court[1] rejected the Commonwealth's appeal against an order, made by Jenkinson J,[2] for the confidential inspection by their parties' legal advisers of 126 notebooks recording Cabinet discussions during the period of pre-contractual negotiations.

The Federal Court held that Cabinet papers were no longer to be regarded as a class of documents which enjoyed absolute protection against disclosure. Nor did the court accept the 'threshold' criteria for invoking the necessary balancing of public interests which were favoured by the House of Lords in *Burmah Oil v Bank of England*[3] and *Air Canada v Secretary of State of Trade*.[4] Those decisions were made in the context of English rules of court. Jenkins J had been entitled to order limited inspection by the legal advisers, as a prelude to any decision to permit wider disclosure. No "fishing expedition" had been countenanced: it was common ground the documents were relevant in the sense that they satisfied the ordinary criteria for discovery. The propriety of this course, and the matters of principle entailed, must now be addressed by the High Court.[5]

The threshold criteria

It will be convenient to consider the "threshold" criteria before advancing to the question of the status of Cabinet documents. Although the Federal Court emphasised that *Burmah Oil* and *Air Canada* were decided in relation to Order 24 of the Rules of the Supreme Court, it is very difficult to accept that different answers to these questions concerning disclosure and inspection were really the result of differently worded rules of court. The test applied by both Order 24 and Order 15 of the Federal Court Rules is substantially the same: the former permitting an order for production where it is "necessary for

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1 (1991) 103 ALR 267 (Full Court).
2 (1990) 24 FLR 576; 102 ALR 110.
3 [1980] AC 1090.
4 [1983] 2 AC 394.
5 Special leave to appeal was granted on 15 November 1991.

fairly disposing of the cause" (or for saving costs), the latter where production is "necessary at the time when the order is made". The same criterion of necessity is applied by both sets of rules to orders for production as well as orders for service of lists of documents.

It is well established that, as a general principle, documents are to be discovered (that is, their existence disclosed) whether or not they would form admissible evidence. It is sufficient that they contain information which may either directly or indirectly enable the party seeking discovery either to advance his own case or to damage the case of his adversary, or which may fairly lead him to a train of inquiry which may have either of those consequences.[6] The important question is whether a higher standard of relevance must be satisfied before the court should proceed to consider the question of production, when public interest immunity is pleaded in respect of particular documents. It is an important question of principle, rather than one of construction of Rules of court.[7] What is necessary for the fair hearing of a case — the specified criterion — is an issue of procedural justice. I shall suggest this can ultimately be determined only in the circumstances of the particular case.

In any case where a court is confronted with an object to disclosure, based on public interest immunity, it seems reasonable to ask whether production appears to be necessary for a fair trial. For, as Lord Scarman noted in *Burmah Oil*:

> if it be shown that production was not necessary, it becomes unnecessary to balance the interest of justice against the interest of the public service to which the Minister refers in his certificate.[8]

The claim for immunity can be upheld without risk of injustice.

It seems unlikely, however, that the test of necessity could fairly be equated with any particular threshold requirement, adopted as a general rule. The requirements of fairness or necessity can only be judged in the light of the Minister's certificate and the evidence already disclosed. In *Burmah Oil* the House of Lords accepted, without need to inspect the documents in question, that a good prima facie case for immunity had been established by the ministerial certificate. It was against that background that Burmah *conceded* the necessity for them to establish that the documents sought were "very likely to contain evidence" which was "highly material" to the issues arising. Lord Edmund-Davies explained that documents which were of "merely vestigial importance" would not be the proper subject matter of an order for disclosure; and of course, even cogent evidence could ultimately be excluded if the immunity claim was sufficiently strong.[9]

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6 *Compagnie Financiere et Commerciale du pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

7 Cf *Carey v R* 35 DLR (4th) 161 at 194, where the Supreme Court of Canada denied that Order 24, if it existed in Canada, "would require the rigorous approach adopted in England". Its language was "not compelling".

8 Above n3 at 1142. Cf *Alister v R* (1983) 154 CLR 404 at 412 (Gibbs CJ).

9 Above at n3 at 1125. Cf *Sankey v Whitlam* (1978) 142 CLR 1 at 38-9 (Gibbs ACJ).

It hardly follows that a threshold of equivalent stringency will invariably be appropriate. The very minimal threshold accepted by the Federal Court in the present case no doubt reflects much greater doubt about the merits of the case for immunity. It is not self-evident that the proper conduct and functioning of government in 1991-92 will be deleteriously affected by disclosure of Cabinet documents relating to events which occurred in 1978. What is necessary for the proper administration of justice will depend on the circumstances, which must include the apparent strength of the public interest in non-disclosure.

It is helpful to look more closely at the distinction between "class" and "contents" claims for immunity — a distinction accepted, with some reservations in *Conway v Rimmer*.[10] As an analytical tool for the resolution of particular cases, the distinction turns out to be somewhat opaque. If there were truly classes of documents which were wholly immune from disclosure, regardless of their importance in litigation, it would follow that no balancing of interests could be undertaken. There would be a rule against disclosure of documents within the appropriate class. The distinction between class and contents claims would be clear, and the question of inspection could arise in relation to the former only where doubt existed about the inclusion of a particular document within the class. At one time, certain categories of government documents (including Cabinet papers) would have been regarded as constituting a protected class in this sense.[11]

If, however, the Federal Court was right to deny Cabinet documents an absolute immunity — a matter dealt with below — the need for secrecy must be determined in the circumstances of each case; and the court must embark on a balancing of interests akin to that appropriate to a "contents" claim. It follows that the weights of the respective interests in disclosure and secrecy will vary indefinitely within an almost infinite range of circumstances. As Lord Wilberforce stated, in a analogous context — the public interest in the free flow of (even confidential) information — its strength may vary greatly from case to case.[12]

There may, then, be circumstances in which the immunity claim is very weak, perhaps because of the lapse of time since the events in question, or because its cogency cannot be established without inspection. It must then be entirely proper for the court to reduce the "threshold" to a simple test of relevance, in the *Peruvian Guano* sense.[13] *Ex concessis*, by virtue of discovery, the documents would be relevant to the case and might turn out to be highly material. They would therefore have to be produced, if requested, but for the claim to immunity — a claim which (we are supposing) appears to have little weight. It would be "necessary" for the court to proceed to the balancing of interests stage, generally facilitated by inspection, if justice is to be fairly done.

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10 [1968] AC 910.
11 See id at 952 (Lord Reid), at 987 (Lord Pearce), and at 995 (Lord Upjohn).
12 *British Steel Corporation v Granada* [1981] AC 1096 at 1174.
13 Above n6.

These conclusions derive support from Lord Scarman's reasoning in *Burmah Oil*, when rejecting the contention that Burmah was engaged in a "fishing expedition":

> the documents for which immunity is claimed relate to the issues in the action and, according to the *Peruvian Guano* formulation, may well assist towards a fair disposal of the case. It is unthinkable that, in the absence of a public immunity objection and without a judicial inspection of the documents disclosure would have been refused.[14]

They are also implicit, however, in Lord Wilberforce's approach, whose dissent from the decision to order production of documents for the court's inspection clearly reflected a strong disinclination to overrule the claim for immunity. Lord Wilberforce expressed a readiness to decide the case on the basis that a "high level governmental public interest" might sometimes have to give way to the interests of the administration of justice, although significantly, he thought it arguable that it should be treated as conclusive. Although the ministerial certificate clearly identified the nature of the governmental decisions to which the documents related, and explained the process of decision-making, the need for secrecy was ultimately *asserted* rather than justified.[15] Nevertheless, Lord Wilberforce apparently considered the cogency of the immunity claim beyond challenge. It was for that reason that he thought *Burmah Oil* was "a plain case"

> of public interest immunity properly claimed on grounds of high policy on the one hand in terms which cannot be called into question; of nothing of any substance to put in the scale on the other.[16]

It should therefore be clear that questions about the threshold for inspection or balancing must depend on the cogency of the arguments for disclosure and secrecy, respectively. And the proper adjudication of the conflict of interests should not be foreclosed by adoption in advance — and in ignorance of the facts of the particular case — of any general rule imposing a stringent threshold. *Burmah Oil* should not be regarded as an authority (even in England) for such an approach. The speeches should be read in the light of what was taken to be a particularly strong case for immunity.

This analysis is strengthened by consideration of the judgments of the High Court in *Alister*.[17] Gibbs CJ distinguished the English cases on the ground of the strength of the interest in disclosure in criminal cases. To refuse discovery because it could not be shown that documents were likely to assist the defence would leave the accused with a legitimate sense of grievance, where he might have used them to test the prosecution evidence. He adjusted the "threshold" to meet the circumstances of the case:

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14 Above n3 at 1142.

15 Lord Wilberforce thought it clear that "the Minister has not merely repeated a mechanical formula, that the certificate is not 'amorphous' or of a blanket character, but is specific and motivated". The Minister maintained that the documents concerned discussions at a high level, regarding the formulation of policy. No reason for secrecy was given, however, beyond a reference to *Conway v Rimmer*. Cf *Sankey v Whitlam* above n9 at 967 (Mason J).

16 Above n3 at 1117.

17 Above n8.

> Just as in the balancing process the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person...so, in considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the court must attach special weight to the fact that the documents may support the defence of an accused person in criminal proceedings.[18]

It is also clear that, in adopting a stricter threshold criterion, Wilson and Dawson JJ gave the greatest weight to the claim of immunity: they thought the court bound to accept the Minister's view that disclosure would endanger national security. In the face of the genuine 'class' claim — where protection will be afforded regardless of contents — the burden of the party seeking production will clearly be onerous.[19]

The special importance of disclosure in the context of criminal proceedings highlights an analogous feature of civil disputes. In this respect, the customary talk of public interest may cause confusion. It is important to see that the public interest in the administration of justice, which must be ranged against the public interest in favour of confidentiality, is a deceptive reference to legal rights.[20] There will often be little public interest in the disclosure of information for the benefit of any particular litigant, except in the broad sense that it is in the public interest that he be able effectively to vindicate his legal rights. Those substantive legal rights would clearly be of little value without procedural rights enabling their practical enforcement. Their recognition would be hollow if their protection depended wholly on official (or even judicial) discretion.

Moreover, we do not subject substantive rights to an ordinary utilitarian calculation in determining their content in cases of dispute: if a person's right (for example, not to be subject to unconscionable conduct) were to be acknowledged only in so far as the public welfare or the general interest — in that particular case — recommends, it would not be a genuine right at all. A claim of right asserts an entitlement which subsists even when its recognition may *jeopardise* the public interest (although, of course, the *degree* of jeopardy may properly help to fix the boundaries of the right in any particular case).

Determination of the content of an acknowledged legal right is entirely different from deciding what, as a matter of public policy, the general welfare requires.[21] Enforcing a right honours a previous commitment to some individual interest, even when that commitment proves inconvenient. Since, however, procedural rights accompany substantive rights, this as true of the former as of the latter. It would be a serious mistake to suppose that a party's procedural rights to discovery could properly be overridden by anything less than powerful interest in non-disclosure. Indeed, if that were not the case, the right to discovery would rarely survive in competition with any claim of

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18 Id at 414.

19 Wilson and Dawson JJ denied that the certificate was conclusive. However, the court could not "do other than accept the disclosure of the information would endanger national security...The ramification of security are such that only complete confidentiality is effective. It is for this reason that is character as a class claim is significant" (at 437).

20 Cf Dworkin, R, *A Matter of Principle* (1985) Ch 3.

21 See generally Dworkin, R, *Taking Rights Seriously* (1977).

public policy which government might raise. It is, of course, the necessary adjudication on matters of right which gives the court its unique responsibility in deciding the fate of executive claims to privilege.[22]

We should briefly notice the variation on *Burmah* introduced into English law by *Air Canada*. It raised the question whether it was sufficient for the applicant for discovery to show that the documents in question were likely to affect the court's decision of the case, whichever party they assisted when disclosed, or whether he must establish a likelihood that the documents would advance his own cause. Bingham J, at first instance, held that documents would be necessary for fairly disposing of a case, or "for the due administration of justice", if they gave substantial assistance to the court in determining the relevant facts. He asserted, plausibly, that

> the concern of the court must surely be to ensure that the truth is elicited, not caring whether the truth favours one party or the other but anxious that its final decision should be grounded on a sure foundation of fact.[23]

The Court of Appeal and majority of the House of Lords disagreed: it was necessary for the party seeking disclosure to establish that the documents were likely to contain material providing substantial support for his or her own case. Bingham J's view was inconsistent with the adversarial nature of common law adjudication. The court's task was merely to do justice between the parties, not "to ascertain some independent truth".[24]

As I have argued elsewhere, this reasoning is not persuasive;[25] and the Federal Court was surely right to reject it. Lord Scarman, dissenting on this point, observed that discovery operated as an exception to the adversary character of the legal process: it is designed to assist the parties and the court to ascertain the truth. Moreover, the fact, which was stressed by Lords Wilberforce and Fraser, that one party is always free to withhold information which might assist his case does not justify a failure to disclose information which might assist his adversary — even if his adversary cannot, without sight of the documents, *prove* that such assistance is likely. As La Forest J pointed out, in the Canadian Supreme Court, it will usually be impossible for the party seeking disclosure to establish their value to his case when he has not seen them.[26] Inevitably, their contents must to some degree be a matter of speculation. In these circumstances, it is unfair and unrealistic to impose the hurdle which the majority in *Air Canada* sought to erect. Since the House of Lords unanimously agreed that Air Canada's application for discovery failed, the restrictive threshold test favoured by the majority can, in any event, be regarded as obiter dicta.

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22 In M J Detmold's account of this distinction, it is the court's responsibility in respect of reason as opposed to will: see *The Australian Commonwealth* (1985) at 230-6.

23 [1983] 1 All ER 167.

24 Above n4 at 438 (Lord Wilberforce).

25 "Abuse of Power and Public Interest Immunity: Justice, Rights and Truth" (1985) 101 *LQR* 200.

26 Above n7 at 192

Inspection by the legal advisers

The approval given by the Federal Court to the procedure whereby the judge permitted confidential inspection by the legal advisers seems a natural, if not inevitable, concomitant of its liberal approach of the English courts has certainly been influenced by the fear of placing too great a strain on limited judicial resources. In *Burmah Oil*, Lord Wilberforce remarked that the courts had "not in general the time or the experience to carry out in every case a careful inspection of documents and thereafter a weighing process".[27] It is hard to object to the solution adopted by Jenkinson J in the present case. Since counsel and solicitors are under a duty to the court to make no unauthorised disclosure of information to their clients, their participation in the process of inspection can greatly facilitate the balancing process by assisting the judge to discharge what might otherwise be a very heavy burden, and without endangering the public interest which confidentiality is alleged to protect.[28]

Do cabinet documents form a special class?

In *Sankey v Whitlam*,[29] the High Court rejected the notion, favoured in *Conway v Rimmer*, that Cabinet documents were entirely immune from disclosure. They were treated as members of a wider class of "high level" government documents concerned with the formulation of policy — "state papers" in Gibbs ACJ's terminology — which enjoyed a limited protection: the public interest in their non-disclosure could be overridden when the requirements of justice were sufficiently pressing. In effect, if not in terms, the immunity accorded to state papers was made to depend on their *contents*, rather than their description. That conclusion was inherent in the court's refusal to sanction any general rule against discovery, implicit in the court's denial of absolute protection from disclosure "irrespective of the subject matter" of the documents in question.[30] It is not possible to weigh conflicting public interests or general principles in the abstract: the balancing process inevitably depends on the circumstance of particular cases, which include the nature of the contents of the documents concerned.[31]

The reasons offered for public interest immunity in this context have not always been convincing. The idea that premature disclosure would undermine the tradition of candour, in respect of official advice or ministerial discussion, was rejected by a number of the judges in *Conway v Rimmer*.[32] But it seems

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27 Above n3 at 1117.

28 Cf *Alister*, above n8 at 470 (Murphy J).

29 Above n15

30 Id at 40. Gibbs ACJ denied that the court would treat all documents within the class as entitled to the same degree of protection: "the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned" (at 43). Cf Jacob, J, "Discovery and the Public Interest" [1976] *PL* 134 at 142: "... a 'class claim' is only a method of describing the prospective damage in any particular case as regards any particular document".

31 In *Whitlam v Australian Consolidated Press* (1985) 73 FLR 414, Blackburn CJ recognised a genuine "class" of Cabinet documents — a general *rule* against disclosure — permitting only rare exceptions. Balancing was, in effect, precluded on the basis of the "enormous importance of Cabinet secrecy by comparison with the private rights of an individual" (at 424).

32 Above n11. See esp Lord Morris at 957 and Lord Upjohn at 995. And see above n3 at

equally difficult to accept Lord Reid's view that the "most important" reason is that disclosure "would create or fan ill-informed or captious public or political criticism". It is an inherent defect of open, democratic government that its operation is "exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind".[33]

In *Sankey v Whitlam*, Mason J surely elicited the most plausible ground for immunity when he explained that secrecy was needed while the policy-making process unfolded, with the corollary that it was much less important once deliberations had resulted in policy decisions. This ground is of particular relevance to Cabinet documents, recording Cabinet discussions, because of the ultimate responsibility for government policy which the Cabinet under the convention of collective responsibility assumes. Accepting that

> the efficiency of government would be seriously compromised if Cabinet decisions or papers were disclosed whilst they or the topics to which they relate are still current or controversial,

he adverted to

> the inherent difficulty of decision making if the decision-making processes of Cabinet and the materials on which they are based are at risk of premature publication.[34]

It follows from this approach that an absolute immunity for Cabinet papers would be arbitrary. It would permit the frustration of the course of justice in particular cases when, by reason of lapse of time, disclosure posed no serious threat to the operation of Cabinet government and collective responsibility. Lord Widgery CJ declined to restrain publication of a former Cabinet minister's diaries for precisely this reason;[35] and, though he took it for granted that the production of Cabinet papers would never be compelled, the logic of his reasoning, in the absence of an alternative ground for secrecy, leads clearly to the opposite conclusion. Pertinently, he observed that no general rule could apply: each case would depend on the nature of the information which would be revealed. Woodhouse P's forceful judgment in *Fletcher Timber v Attorney-General* expressed a similar view. A certificate claiming immunity in respect of Cabinet documents would be given due respect:

> but the weight to be given one factor rather than another ought not to be hedged about by cautious or diplomatic forecasts made in abstraction.[36]

The judgments in *Sankey v Whitlam* also illuminate the special importance of procedural flexibility in cases involving government. Adoption of a rigid category approach to discovery could seriously endanger the rule of law by enabling government ministers to evade judicial scrutiny for reasons of personal or party advantage — or, at the very least, by fostering widespread

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1132-3 (Lord Keith).

33 Above n1 at 952.

34 Above n15 at 97.

35 *Attorney-General v Jonathan Cape* [1976] QB 752.

36 [1984] 1 NZLR at 296.

cynicism about their legal accountability. Stephen J observed, in the "unusual" context of criminal proceedings against a former Prime Minister and other senior ministers, that

> to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who may occupy or may have occupied high offices of state if proceeded against in relation to their conduct in those offices.[37]

These observations point to more fundamental considerations, which may be thought to claim particular relevance in the present case. It is deeply antagonistic to the rule of law that central government should be able to resist discovery, without judicial evaluation of the claim to immunity, where it is itself implicated in the proceedings. It cannot be acceptable, on constitutional grounds, that the Commonwealth should be able to invoke an absolute immunity when it is the defendant in civil proceedings. In *Burmah Oil*, Lord Edmund-Davies drew attention to the fact that the government's own role might be subjected to criticism — a feature of that case which he thought it would be "pusillanimous to ignore". He cited Lord Blanesburgh's observations, in *Robinson v State of South Australia (No 2)*,[38] that the fact that documents might, if produced, damage the Crown's own case was

> of itself a compelling reason for their production — one only to be overborne by the gravest considerations of state policy or security.

This aspect of the question is none the less pertinent when, because of lapse of time, the persons involved in the relevant events no longer hold government office.[39] Lord Edmund-Davies stressed the importance of the *appearance* of justice; and in that respect it is essential that the separation of powers between the court and the executive be clearly and visibly preserved.[40] Moreover, these constitutional considerations help illuminate the deficiencies of the reasoning in *Air Canada*, mentioned above. The strict approach to the threshold question, favoured by the majority, was premised on the adversary character of a "contest purely between one litigant and another".[41] But that hardly seems an apt description where the Crown is involved as a party to the proceedings. It was peculiarly inapt in *Air Canada* itself, where the plaintiffs challenged the legality of the minister's exercise of his statutory powers. Even in private law cases, however, the involvement of the Commonwealth injects a dimension of the public interest which would not be present in ordinary cases.

In *Burmah Oil*, Lord Keith asserted that

> the nature of the litigation and the apparent importance to it of the documents in question may in extreme cases demand production even of the most sensitive communications at the highest level.[42]

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37 Above n15 at 56.
38 [1931] AC 704 at 715-16.
39 Jenkinson J noted that at least four members of the Cabinet during the relevant period were still members of the Parliament.
40 Cf *Nixon v USA* (1975) 418 US 683.
41 Above n4 at 438 (Lord Wilberforce).
42 Above n3 at 1134.

There can be no higher public interest than that of ensuring that the conduct of government conforms with the rule of law, which entails compliance with private as much as public law. It must follow that no general rule of discovery can be safely entertained, which might have the effect, in a particular case, of enabling the Commonwealth to forestall legal proceedings which might prove embarrassing the members of either present or former administrations. Nor should we embrace a general rule, or acknowledge a category of documents enjoying special immunity, which might give the *appearance* of having such an unwelcome effect.

There is an additional aspect of constitutional significance which should be separately identified. A proper understanding of the rule of law would emphasise the importance of freedom of communication for its own sake: Lon Fuller thought that that freedom lay at the basis of the ideal of legality.[43] There should be the maximum freedom of information and the minimum of secrecy in public affairs compatible with the safety and security of the state. In *Burmah Oil*, the speeches of Lords Scarman and Fraser rightly acknowledge the general value of open government. And in *Sankey v Whitlam* Stephen J explained that disclosure of documents may sometimes be required to support the proper functioning of government by revealing misconduct — a consideration which, where it applies, necessarily overrides the usual object to production. The point applies as much to civil as to criminal cases, as the Supreme Court of Canada affirmed:

> For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government.[44]

The Judge's decision: law or discretion?

One of the grounds for the grant of special leave to appeal concerned the nature of the Full Federal Court's jurisdiction. The court held that no error of principle had been disclosed by analysis of the primary judge's decision. However, each member of the Full Court "might have approached the exercise of the discretion somewhat differently and given greater or lesser weight" than did the judge to the "various factors under consideration".[45] If the suggestion here is that the court was merely reviewing an exercise of discretion, in the sense in which review is generally contrasted with an appeal, there appear to be grounds for criticism.[46]

Much of the difficulty in analysis stems from confusion about the meaning of "discretion", which is likely to vary with context. The primary judge clearly exercises discretion, which is likely to vary with context, in the sense of judgment: the law requires the balancing of conflicting general principles in the light of the circumstances of the particular case. But, of course, this is

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43 *The Morality of Law* (1964) at 185-6; cf MacCormick, N, "The interest of the state and the Rule of Law", eds Wallington, P & Merkin, R M, *Essay in Memory of Prof F H Lawson*, (1986) at 185.

44 Above n7 at 188.

45 Above n1 at 305.

46 See Wade, H W R, *Administrative Law* (6th edn) (1988) at 36-38.

not an exercise of *choice*, in any ordinary sense of that expression. The judge is required to determine what the interests of justice (or good government) truly require. It follows that, in principle, a decision at first instance should be overturned on appeal if the higher court takes a different view of the requirements of justice on the facts. The higher court is not engaged on a review of the exercise of discretion in the sense in which a court might review the decision of an administrative agency, which would normally enjoy limited scope for policy-making or the implementation of policy.[47]

There cannot be any real distinction here between a judge's selection of appropriate principles and their respective weights, as the Full Court's judgment perhaps implies. Each party to litigation is entitled to the benefit of the procedural rights which a proper understanding of the applicable law bestows. Those rights are determined by analysis of the weights of the relevant principles (or public interests) as they apply in the circumstances of the case. The higher court cannot therefore evade the necessity to decide for itself what weight should be given to each of the various factors under consideration.

The higher court may, of course, ultimately reach the same decision as the primary judge even if it attributes different weights to certain factors in the balancing process. There may therefore be a problem here of presentation rather than substance. Moreover, the decision to order production of documents may be distinguished from the decision whether or not to engage counsel in the task of preliminary inspection. The latter question may more reasonably be considered "a matter of evaluation and discretion which is peculiarly the role of the judge entrusted with the management of the case".[48]

47 See generally Galligan, D J, *Discretionary Powers* (1986) esp ch 1.
48 Above n1 at 305.