



Our ref. 13212600

31 January 2014

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Royal Commission into the Home
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BY HAND

Dear Ms Gartmann

Royal Commission into the Home Insulation Program – summons to produce cabinet documents

1. Enclosed with this letter are documents responsive to the summons to produce issued to the Commonwealth on 22 January 2014.
2. These documents are Cabinet documents in the custody of the Department of the Prime Minister and Cabinet (PM&C) pursuant to arrangements set out in the Cabinet Handbook. Cabinet documents include:
 - 2.1. Cabinet submissions, minutes and other documents considered by the Cabinet;
 - 2.2. Cabinet notebooks which are the handwritten notes of the PM&C notetakers on the proceedings of the Cabinet;
 - 2.3. briefings prepared for the Prime Minister and / or other Ministers on matters before Cabinet;
 - 2.4. drafts of Cabinet submissions and other documents considered by the Cabinet;
 - 2.5. other documents which disclose the deliberations or decisions of the Cabinet.
3. Accordingly particular care should be taken in relation to the handling, disclosure and storage of the enclosed material and any other Cabinet documents provided to the Commission. Guidance on the proper handling of Cabinet documents can be found in the current edition of the Cabinet Handbook (in particular at page 44) which is available online at

http://www.dpmc.gov.au/guidelines/docs/cabinet_handbook.pdf.

While the arrangements described there do not apply directly to the Commission, they do emphasise the need to ensure that access to the documents is on a 'need to know' basis.

4. Given that Cabinet documents belong to a well-recognised class of documents which attracts public interest immunity, we ask that the Commission inspect these documents on a private basis (for the purpose of assessing their potential relevance),¹ and otherwise deal with the documents having regard to their sensitivity and the need to ensure that they are not the subject of inadvertent or unauthorised disclosure.
5. In addition to the material produced today, PM&C are currently reviewing other Cabinet files and the Cabinet notebooks to identify any further material responsive to the summons. The Commonwealth will produce any additional relevant Cabinet documents, including extracts from the Cabinet notebooks that are within the terms of the summons as soon as it is able to do so.

Public Interest Immunity

6. Public interest immunity is a substantive immunity recognised by the law, which is not subject to waiver. Absent a claim of public interest immunity, any court or tribunal must consider for itself the question of immunity.
7. As the Commission would no doubt be aware, if the kind of documents referred to in this letter had been subpoenaed in the course of court or tribunal proceedings or were the subject of a discovery order from a court or tribunal, the Commonwealth would ordinarily make public interest immunity claims over the entire class of Cabinet documents (prior to any inspection by the court or tribunal). It is clear that Cabinet documents are in a class of documents to which a pre-eminent claim of confidentiality in the public interest attaches. The weight of authority favours the proposition that a court or tribunal should ordinarily defer inspection of documents falling within a class protected by public interest immunity unless and until it decides that, on balance, the weighing of public interest considerations supports production and inspection by the parties.²
8. However, the Commonwealth has determined not to withhold production of documents in the present matter on the basis of a claim public interest immunity. It has done so having regard to three matters.
9. First, the Commission's terms of reference emphasise the public interest in the full exploration of the claims of harm caused by the Home Insulation Program. Provision of the documents to the Commission for the limited purpose of the Commission inspecting them on a private basis (to assess their potential relevance) will facilitate that exploration without significantly compromising the confidentiality of Cabinet deliberations.
10. Secondly, the Commission is part of the Commonwealth executive and the release of the documents to the Commission does not involve disclosure outside the Commonwealth. Accordingly, the extent to which the confidentiality of Cabinet

¹ See *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 at 672C-D.

² See *Spencer v The Commonwealth* [2012] FCFAC 169 at [38].

deliberations is reduced is considered minimal. Very different considerations would attach to release of material disclosing Cabinet deliberations to the public at large.

11. Third, the Commission has powers which can facilitate the investigation of matters without the contents of Cabinet documents necessarily becoming public (for example by conducting private hearings (s 6D(5) of the *Royal Commissions Act 1902*) or making non-publication orders (s 6D(3)).
12. Accordingly, this material (and any other documents within the Cabinet documents category) is produced on the basis that (i) such production does not constitute a waiver of public interest immunity; and (ii) the material is to be inspected by the Commission to inform itself as to the potential relevance of the material. If the Commission intends to disclose the contents of these documents outside the Commonwealth (other than to persons already aware of their contents) the Commonwealth expects that it will be provided with an opportunity to assert the public interest in preserving the confidentiality of Cabinet documents.³ The Commonwealth assumes that the Commission will proceed on the basis that it is only in the rarest cases that the public interest in disclosure outweighs the public interest in preserving the confidentiality of Cabinet documents (see comments of the High Court in *Commonwealth of Australia v Northern Land Council* (1993) 176 CLR 604 at 618).
13. Equally, if there is to be any canvassing of Cabinet material during a public hearing, the Commonwealth asks that it be afforded an opportunity to make submissions on the issues of public interest immunity or appropriate protective orders prior to that occurring (or both).
14. If other Cabinet documents are produced, the Commonwealth will endeavour to ensure it brings that fact to the Commission's attention.

Yours sincerely

Kristy Alexander
Senior Executive Lawyer

³ We note also that other persons (such as former Cabinet Ministers) may have an entitlement, and/or wish, to be heard on the question before any final decision is made by the Commission.