



Civil and Administrative Tribunal

New South Wales

Case Name: Primrose v NSW Department of Premier and Cabinet

Medium Neutral Citation: [2017] NSWCATAD 366

Hearing Date(s): 24 November 2017

Date of Orders: 14 December 2017

Decision Date: 14 December 2017

Jurisdiction: Administrative and Equal Opportunity Division

Before: R C Titterton, Principal Member

Decision: (1) The decision under review is affirmed.

(2) Pursuant to s 64(1)(c) of the Civil and Administrative Tribunal Act 2013, paragraphs [34] to [42] of these reasons are not to be published.

(3) Pursuant to s 64(1)(c) of the Civil and Administrative Tribunal Act 2013, any confidential evidence filed with the Tribunal or given in a confidential hearing pursuant to s 107 of the Government Information (Public Access) Act 2009, is not to be published.

(4) Pursuant to s 64(1)(d) of the Civil and Administrative Tribunal Act 2013, paragraphs [34] to [42] of these reasons and any confidential evidence filed with the Tribunal or given in a confidential hearing pursuant to s 107 of the Government Information (Public Access) Act 2009, is not to be disclosed to the applicant.

Catchwords: ADMINISTRATIVE LAW – public access to government information – access to Cabinet information – reasonable grounds for claim that information is Cabinet information

Legislation Cited: Administrative Decisions Review Act 1997
Civil and Administrative Tribunal Act 2013
Government Information (Public Access) Act 2009

Cases Cited: Bennison v NSW Department of Premier and Cabinet [2016] NSWCATAD 101
Jones v Dunkel (1959) 101 CLR 298
Ku-ring-gai Council v NSW Department of Premier and Cabinet [2016] NSWCATAD
McAdam v NSW Treasury [2014] NSWCATAD 68
McAdam v NSW Treasury [2015] NSWCATAP 61
Searle v Transport for NSW [2017] NSWCATAD 256

Texts Cited: J D Heydon, Cross on Evidence, 10th edn, Lexisnexis

Category: Principal judgment

Parties: Peter Primrose, MLC (Applicant)
NSW Department of Premier and Cabinet (Respondent)

Representation: Counsel:

Mr A Searle, MLC (Applicant)
Ms J Davidson (Respondent)

Solicitors:
Crown Solicitor's Office (Respondent)

File Number(s): 2017/00209316

Publication Restriction: (1) Pursuant to s 64(1)(c) of the Civil and Administrative Tribunal Act 2013, paragraphs [34] to [42] of these reasons are not to be published. (2) Pursuant to s 64(1)(c) of the Civil and Administrative Tribunal Act 2013, any confidential evidence filed with the Tribunal or given in a confidential hearing pursuant to s 107 of the Government Information (Public Access) Act 2009, is not to be published. (3) Pursuant to s 64(1)(d) of the Civil and Administrative Tribunal Act 2013, paragraphs [34] to [42] of these reasons and any confidential evidence filed with the Tribunal or given in a confidential hearing pursuant to s 107 of the Government Information (Public Access) Act 2009, is not to be disclosed to the applicant.

REASONS FOR DECISION

- 1 On 26 April 2017, the applicant sought access under the *Government Information (Public Access) Act 2009* (the Act) to two documents prepared by KPMG, namely:
 - (1) A “long form” document the main title of which is “Merger Impacts and Analysis” (the Long Form document); and
 - (2) A document titled “Implementation of Local Government Mergers: Business Case” (the Business Case document),(collectively, the Documents).
- 2 On 26 May 2017, the respondent decided to deny the applicant access to the Documents because there was an overriding public interest against their disclosure because of s 14(1) and cl 2(1)(b) of Sch 1 of the Act (the Decision).
- 3 On 10 July 2017, the applicant sought a review of the Decision by the Tribunal.
- 4 Section 63 of the *Administrative Decisions Review Act 1997* provides that when determining an application for an administrative review of an administratively reviewable decision, the Tribunal may confirm or vary that decision, set it aside and make a substitution for the decision, or set aside the decision and remit the matter for reconsideration by the administrator.
- 5 For the following reasons, I have decided to affirm the decision of the respondent of 26 May 2017.

Background

- 6 The applicant is a Member of the Legislative Council of NSW. On 26 April 2017, he sought access under the Act to the Documents. On 26 May 2017, the Director of the respondent, Mr Matt Richards, refused access to the Documents on the basis that there was an overriding public interest against disclosure, pursuant to s 58(1)(d) of the Act. In reaching the Decision, Mr Richards stated that:
 - (1) Section 14(1) of the Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of any of the information described in Sch 1 of the Act;
 - (2) Cl 2(1) of Sch 1 of the Act provides that it is to be conclusively presumed overriding public interest against the disclosure of Cabinet information;

- (3) He was advised that the Documents were prepared for the dominant purpose of being submitted to Cabinet for its consideration, and submitted to Cabinet, in relation to proposed local government reforms;
- (4) He was satisfied that the Documents were Cabinet information for the purposes of cl 2(1)(b) of the Act;
- (5) He was satisfied that the Documents did not consist solely of factual material.

Evidence

7 The only evidence before the Tribunal were the two affidavits of Ms Karen Smith, respectively affirmed on 20 September 2017 and 14 November 2017 (respectively 'Ms Smith's' (or 'her') first and second affidavits). Each affidavit contained confidential portions and annexures.

Introduction

- 8 Ms Smith is the Deputy Secretary of the Cabinet and Legal Group of the respondent. She has occupied that role since 12 September 2016. Her responsibilities include acting as the legal advisor to the Premier, by leading and directing the provision of expert Legal services and cabinet secretariat functions, and ensuring the delivery of high quality services and support to meet the requirements of the Premier, Cabinet and the respondent.
- 9 Ms Smith has direct experience and knowledge of Cabinet and its processes, as the respondent is responsible for the provision of secretariat services to the NSW Cabinet. As the Deputy Secretary of the Cabinet and Legal group, she has overall responsibility for the provision of secretariat services to Cabinet. She provides advice on a regular basis on vice-regal, administrative and procedural issues relating to the conduct of Cabinet meetings and the handling of Cabinet records. She also provides advice to the Premier for her use in Cabinet, and has been responsible for the drafting of numerous Cabinet submissions, and the drafting of Cabinet decisions.
- 10 Ms Smith has on occasion attended Cabinet, in the absence of the Cabinet Secretary or their Deputy. She is the Committee Secretary to the Cabinet Standing Committee on Legislation and regularly attends meetings of that Cabinet Committee.

- 11 For the purposes of preparing her affidavits, Ms Smith sought information from other employees within the respondent about matters relating to the Documents, in particular from:
- (1) Mr John Clark, who was the Executive Director of the Local Government Reform Branch of the respondent from June 2015 to March 2016. During that time Mr Clark was responsible for managing the Department's engagement of KPMG to provide consulting services in relation to the local government reform process; and
 - (2) Mr Dennis Smith, a solicitor in the Legal Branch of the respondent, who has provided legal advice on the local government reform process since December 2015.
- 12 Ms Smith was required for cross-examination. It was not suggested by the applicant's counsel that she lacked credibility or experience. What was suggested was that she did not have first-hand knowledge of the matters deposed to, and that much of her evidence was a matter of her understanding and belief.

Open evidence

- 13 After setting out her background, and experience, Ms Smith then, at pars [5] to [21] of her first affidavit, describes the operations and processes of the NSW Cabinet. In summary, she states that Cabinet involves a pattern of deliberations which forms the process by which the Government makes decision on major policy issues. The NSW Cabinet Practice Manual (which is Annexure A to the first affidavit) describes the processes for the preparation of proposals to Cabinet including the processes under which a Cabinet Submission is prepared by an agency for a Minister to submit to Cabinet.
- 14 Cabinet also conducts proceedings through Cabinet Committees such as the Cabinet Expenditure Review Committee (ERC) and the Cabinet Standing Committee on Legislation. Decisions of Cabinet Committees have the same status as decisions of the full Cabinet, and the same conventions and procedures generally apply to the conduct of Cabinet Committee proceedings. The ERC, chaired by the Treasurer, is the only Cabinet committee that can recommend any new spending or expenditure or revenue proposals to Cabinet. The role of ERC is to assist Cabinet and the Treasurer in framing fiscal strategy and the Budget.

- 15 Ms Smith then states at some length why Cabinet processes and deliberations are confidential. Her reasons include, but are not limited to:
- (1) Cabinet processes, including Cabinet meetings, constitute a forum for frank and uninhibited discussion, consideration and formulation of significant and sensitive issues of public policy and administration;
 - (2) The release of documents which contain information on the content of deliberations of the Cabinet, including the views of individual Ministers, endangers the principle of collective responsibility
 - (3) Ministers, while working towards a collective position, being able to discuss proposals and a variety of options and can express their views frankly, and with complete freedom.
 - (4) The decisions taken by Cabinet often involve matters of controversy and complexity. Good decision-making is facilitated by creating an environment in which Ministers are free to provide to Cabinet all the information relevant to an issue on a frank and candid basis. The possibility of disclosure of documents revealing Cabinet's deliberations would be likely to impede future deliberations and curb the free and vigorous exchange of views by Ministers mindful of subsequent public scrutiny.
- 16 Ms Smith states that the prospect of future disclosure of Cabinet's deliberations could impede Cabinet deliberations by muting a free and vigorous exchange of views between members of Cabinet or by discouraging lengthy discussions entered into with a view to subsequent public scrutiny. This would divert Cabinet processes from their proper course and would not be in the interests of public policy.
- 17 Ms Smith states at [16] that if the advice or a submission that Ministers or Cabinet received on an issue determined by Cabinet was at risk of disclosure, this would significantly inhibit the ability of Cabinet to make decisions because either:
- (1) Ministers or Cabinet may not seek such advice or submission at all; or
 - (2) If they did seek such advice or submission they may only seek it in oral form so there is no written record of it; or
 - (3) The advice or submission may be drafted in such a way as to minimize controversy if it is disclosed such as, for example, by excluding discussion of a controversial issue or drafting the advice in very vague terms.
- 18 Ms Smith concludes:

19. In summary, it is vital to the development of public policy and the good administration of the affairs of the State that:

A. Ministers in Cabinet are able to have a free and candid discussion on the issues that come before it for determination;

B. Ministers and Cabinet are able to obtain full and frank advice from government officers and external experts on issues that come before a Cabinet for determination, and

C. Those advising the Ministers and Cabinet are able to obtain full and frank advice and views of other government officers and external experts on matters in respect of which they are providing advice to Cabinet.

20. The disclosure or threat of disclosure of documents that contain information about any of the above matters will adversely affect the proceedings of Cabinet and the quality of the advice given to Cabinet, and will Wherefore inhibit Cabinet's decision-making process.

21. The disclosure of the Cabinet documents caught by the present GIPA application would tend to mute and impede the advice given to Cabinet, and mute and impede the discussions and deliberations of Cabinet on future matters, including unrelated matters, because Ministers and those preparing advice for Cabinet could no longer be confident that their confidentiality would be respected and upheld by the State's tribunals.

- 19 I did not understand that any of the Cabinet processes described by Ms Smith to be in dispute. Nor was her explanation of the need to protect and maintain the confidentiality of Cabinet deliberations including the information before Cabinet.
- 20 At pars [28] to [37] of her first affidavit Ms Smith describes the Documents, and states that there is an overriding public interest against disclosure of the documents as they contain Cabinet information.
- 21 In relation to the Long Form document, Ms Smith states, that:
- (1) She is advised that the Long Form document was prepared for the purpose of being submitted to Cabinet for Cabinet to consider approving public release of the document in order to outline to the public the high level benefits of the proposed local government reforms;
 - (2) On 10 September 2015, the Local Government Reform Taskforce (Taskforce) agreed that the KPMG would be asked to prepare a public report;
 - (3) On 22 September 2015, KPMG provided an Outline of Table of Contents for a draft report to the respondent;
 - (4) She can confirm, from a review of the official Cabinet records, that the Long Form document was submitted to Cabinet as an attachment to a Cabinet submission;

- (5) She is advised that following Cabinet's decision a document which is different to the Long Form document, but based on the Long Form document, was released on 18 December 2015;
 - (6) It does not consist solely of factual material, but also contains opinion and analysis.
- 22 Ms Smith states that her review of the Long Form document, and the information provided to her by Mr Clark and Mr Smith, are consistent with the Long Form document having been prepared for the purpose of submission to Cabinet for Cabinet's approval for the document to be publicly released.
- 23 In relation to the Business Case document, Ms Smith states, in summary, that:
 - (1) She is advised that the Business Case document was prepared for the dominant purpose of being submitted to the ERC for the Committee's consideration and approval;
 - (2) The Business Case document was submitted to a meeting of the ERC, and was approved at that meeting;
 - (3) She has reviewed the Business Case document and confirms, based on her review of the document, that the substance of the document was consistent with it having been prepared for the dominant purpose of submission to Cabinet; and
 - (4) That the Business Case document does not consist solely of factual material, but also contains opinion and analysis.
- 24 In her second affidavit, Ms Smith annexes an email dated 22 September 2015 from Janis Tebecis of KPMG to Cassandra Gercken of the respondent, together with the sixth attachment to that email, being described as "the Strategy Schedule Attachment". The Strategy Schedule Attachment sets out, at items 7 to 20, proposed stages in the local government reform process, including the development of the Business Case document, the drafting of the Business Case Document by KPMG, and the submission of the final Business Case document to Cabinet.
- 25 These matters were explored during the cross-examination of Ms Smith. In summary, she confirmed that she had derived her information and knowledge of the Documents from discussions with Mr Smith and Mr Clark, that she derived that information and spoke with them on a number of occasions. She said that she knew that Mr Smith was still an employee of the respondent, and believed that Mr Clark was. She confirmed that she had herself examined the Documents, the Cabinet submissions and decisions and the other documents

referred to in her affidavits. She confirmed that Mr Clark was a member of the Taskforce, but she was not, and did not attend its meetings. She agreed that she had no first-hand knowledge of the Documents. She said that she was able to say in par [23] that KPMG was commissioned to prepare the Documents from her discussions with Mr Clark and the documentary evidence she had examined, including minutes of meetings.

- 26 Ms Smith said that, in so far as she was aware, Mr Clark was responsible for preparing the respondent's instructions to KPMG. She confirmed that she could depose that KPMG was instructed that the documents it was preparing were for submission to Cabinet, or were inputs for Cabinet documents, from her discussions with Mr Clark and the documentary evidence available to her. In response to the question whether she had read the instructions to KPMG, she said that she had read the documents that were attached to her affidavits. She said that she assumed that the instructions to KPMG were consistent with the decision of the Taskforce, and that the documents she had read and the conversations she had had with Mr Clark were consistent with the Long Form document being prepared on that basis. Mr Seale submitted during the course of the cross-examination that it was only by viewing the instructions to KPMG could this issue be determined. In this respect he relied on pars [48] and [49] of his written submissions.
- 27 As to par [26] of her first affidavit, in which she stated that the respondent determined that the Documents should not be released to the applicant, Ms Smith indicated that she understood that it was Mr Richards, the Director of the respondent who had made that determination.
- 28 As to par [29] of her affidavit, in which she states that she was advised that the Long Form document was prepared for the purpose of being submitted to Cabinet for Cabinet to consider approving public release of the document in order to outline to the public the high level benefits of the proposed local government reforms, Ms Smith said that she was advised by Mr Clark and Mr Smith and that she also reviewed the documentary evidence. She confirmed that she did not prepare the Long Form document or prepare the instructions to KPMG.

- 29 As to par [38], where she discusses the purpose for the preparation of the Business Case document, she stated that she was advised by Mr Clark and Mr Smith and informed by her review of the documents.
- 30 As to Annexure B to her second affidavit, she said that she believed KPMG was the author of the document, but otherwise had no personal knowledge of the document.
- 31 At the conclusion of the cross-examination, Mr Seale asked that the Tribunal explore the issue whether Ms Smith had personally seen the documents that were the instructions to KPMG, and whether they were before the Tribunal. Mr Seale submitted that it was only if the instructions were before the Tribunal could the Tribunal determine whether the instructions were consistent with the position of the Taskforce, and whether the claims made in Ms Smith's evidence were correct.
- 32 In re-examination, Ms Smith agreed with the proposition put to her by Ms Davidson that, having read Annexure B, which had been sent to the respondent by KPMG, she had no doubt that it had been prepared by KPMG in its task of preparing the Business Case document.

Confidential Evidence

- 33 The matters affirmed by Ms Smith were amplified in her confidential evidence.
- 34 **Not for Publication:**
- 35 **Not for Publication**
- 36 **Not for Publication.**
- 37 **Not for Publication**
- 38 **Not for Publication**
- 39 **Not for Publication**
- 40 **Not for Publication**
- 41 **Not for Publication**
- 42 **Not for Publication**

Consideration

43 Clause 2(1) of Sch 1 of the Act provides:

2 CABINET INFORMATION

(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as "Cabinet information") contained in any of the following documents:

- (a) a document that contains an official record of Cabinet,
- (b) a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),
- (c) a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given),
- (d) a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions,
- (e) a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet,
- (f) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)-(e).

44 Section 106 of the Act provides for special procedures for decisions by the Tribunal in respect of Cabinet and Executive Council information, namely:

106 DECISIONS ABOUT CABINET AND EXECUTIVE COUNCIL INFORMATION

(1) On an NCAT administrative review of a decision by an agency that there is an overriding public interest against disclosure of information because the information is claimed to be Cabinet or Executive Council information (as described in Schedule 1), NCAT is limited to deciding whether there were reasonable grounds for the agency's claim and is not authorised to make a decision as to the correct and preferable decision on the matter.

(2) If NCAT is not satisfied, by evidence on affidavit or otherwise, that there were reasonable grounds for the claim, it may require the information to be produced in evidence before it.

(3) If NCAT is still not satisfied after considering the evidence produced that there were reasonable grounds for the claim, NCAT is to reject the claim when determining the review application and may then proceed to make a decision as to the correct and preferable decision on the matter.

(4) NCAT is not to reject the claim unless it has given the Premier a reasonable opportunity to appear and be heard in relation to the matter.

(5) The Premier is a party to any proceedings on an application under this section.

45 The appropriate principles to be applied are not in dispute. A convenient summary is found in *Bennison v NSW Department of Premier and Cabinet* [2016] NSWCATAD 101 at [9] to [17], *McAdam v NSW Treasury* [2014] NSWCATAD 68 (McAdam No 1) at [4] to [10] and *McAdam v NSW Treasury* [2015] NSWCATAP 61 at [8] to [11].

46 The procedure set out in s 106 was discussed in *McAdam No 1* as follows:

45 No doubt in recognition of Cabinet's role and functioning as a collective, indirectly elected executive branch of government, s 106 establishes a special and very different decision-making matrix for claims to the Cabinet information presumption. Not only is the tribunal "limited to deciding whether there were reasonable grounds for the agency's claim", but it is explicitly "not authorised to make a decision as to the correct and preferable decision on the matter" (s 106(1)). The tribunal's task is thus not to investigate the claim de novo or to engage in normal merits review. Its function is more analogous to that of a court undertaking judicial review.

46 In performing this limited task, the tribunal is to give the words "reasonable grounds" their ordinary meaning. In *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423, 445, three members of the High Court pointed out that the phrase is not synonymous with "not irrational, absurd or ridiculous". "Of course, absurd, and irrational or ridiculous grounds are not reasonable grounds. But the words "reasonable grounds" do not denote grounds which are "not irrational, absurd or ridiculous". The statutory words are to be given their ordinary meaning. It will seldom be helpful, and it will often be misleading, to adopt some paraphrase of them".

47 The respondent bears the onus of establishing that it had reasonable grounds for the claim (s 105(1)) and it must do so on the balance (meaning preponderance) of probabilities: *Jorgensen v Australian Securities and Investments Commission* [2004] FCA 143, [65], 208 ALR 73, 86.

47 This analysis was approved by the Tribunal in *Bennison* at [19] and in *Kuringai* at [9] where it was noted that the Tribunal's role in relation to Cabinet information was "significantly circumscribed by s 106" so that, initially, the role of the Tribunal is limited to deciding whether there were reasonable grounds for the claim, and the Tribunal is not at that point authorised to make a decision as to the correct and preferable decision on the matter: see [9(2)].

48 There was no suggestion in this case that there had been public disclosure of the Documents pursuant to cl 2(1)(b) of Sch 1. I was informed from the Bar Table that the Documents had not in fact been made available publicly.

49 Nor was there any suggestion that the documents were attachments, as opposed to being Cabinet information (see cl 2(3) of Sch 1). Nor was there any suggestion that the Documents contained more than “solely factual information”. Accordingly, the only issue for me to determine is whether there were reasonable grounds for the claims made by the respondent, namely that:

- (1) The Long Form document was Cabinet information by reason of cl 2(1)(b) of Sch 1 of the Act (that is, a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given)); and
- (2) The Business Case document was Cabinet information by reason of cl 2(1)(c) of Sch 1 of the Act (that is, a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet).

The evidence of Ms Smith

50 I have summarised the evidence of Ms Smith above. I accept her evidence entirely. She was an impressively qualified witness. True it is, and she made concessions to this effect, some of her evidence was based on what she had been told by others, namely Mr Clark and Mr Smith, but I see no reason why her evidence should not be accepted. This is for two reasons. First of all, Ms Smith has herself inspected the documents. She says that the Long Form document was consistent with having been prepared for the purpose of submission to Cabinet for Cabinet's approval for the document to be publicly released. She says that this is also consistent with the information provided to her by Mr Clark and Mr Smith. She further says that, having reviewed the Business Case document, the substance of the document was consistent with it having been prepared for the dominant purpose of submission to Cabinet.

51 The second reason is that I reject the applicant's submission that there was been an unexplained failure by the respondent to call a witness (namely Ms Clark and Mr Smith) warranting me drawing an inference against the respondent for that failure. I accept the respondent's submission that the “rule” in *Jones v Dunkel* (1959) 101 CLR 298 has no application where the failure to call a witness or tender an item of evidence is explained: J D Heydon, *Cross on Evidence*, 10th edn, Lexisnexis at [1215].

52 Furthermore, this Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice: see s 38(2) of the *Civil and Administrative Tribunal Act 2013*.

53 In my view, Ms Smith as the Deputy Secretary of the Cabinet and Legal Group of the respondent is an appropriate deponent to assist the Tribunal with that question, and that her knowledge and experience of Cabinet and its processes is clearly relevant to the matter and that she is well qualified to give evidence in the proceedings (as was Mr Paul Miller, then General Counsel of the Respondent (some of whose evidence was also hearsay) in *Bennison* (see at [25], [29]) and *Ku-ring-gai* (see at [23])). Ms Smith has given evidence (based in part on information provided by Mr Clark and Mr Smith) which is relevant to the issues before the Tribunal, in a form which is appropriate and should be regarded as sufficient, having regard to the objects of the NCAT Act and the Tribunal's and procedures. It follows that I reject the applicant's submission that the three conditions the Applicant relies upon for the drawing of a *Jones v Dunkel* inference are not met.

The Long Form Document

54 The respondent refused to provide access to the Long Form document on the basis that the document constituted Cabinet information for the purposes of cl 2(1)(b) of Sch 1 of the Act. However, the respondent now submits that the document is Cabinet information by application of cl 2(1)(c) of Sch 1 of the Act. In doing so the respondent submits, correctly, that the Tribunal is not limited to consideration of the original reasons for the decision, or to the material upon which the decision-maker relied: *Searle v Transport for NSW* [2017] NSWCATAD 256 at [32].

55 Relying on the evidence of Ms Smith, the respondent submits that the Long Form document:

- (1) Was prepared for the purpose of being submitted to Cabinet for Cabinet to consider approving public release of the document;
- (2) Was submitted to Cabinet for Cabinet's approval for the document to be publicly released, in the form of an attachment to a Cabinet submission;

- (3) Was not publicly released, a document different to the Long Form document, but based on that document, being released on 18 December 2015,

and that the protection in cl 2(1)(c) continues to apply “by dint or the words: ‘whether or not the approval is actually given’”.

- 56 I accept that submission. The evidence of Ms Smith, which I accept, in particular her confidential evidence, establishes that there are reasonable grounds for the respondent’s claim that the Long Form document was Cabinet information by reason of cl 2(1)(c) of Sch 1 of the Act. In addition, I am satisfied that the instructions to KPMG were consistent with the position of the Taskforce, and that the claims made in Ms Smith’s her evidence were correct, and that a proper basis exists for her evidence to the extent that it is based on information and provided to her from officers of the respondent.

The Business Case document

- 57 Clause 2(5) of Sch 1 of the Act provides that "Cabinet" includes a committee of Cabinet and a subcommittee of a committee of Cabinet. I am satisfied on the basis of Ms Smith’s evidence, in particular her confidential evidence, that the Business Case document was prepared for the dominant purpose of being submitted to ERC for ERC’s consideration and approval, and therefore that there are reasonable grounds for the respondent’s claim that the Business Case document was Cabinet information by reason of cl 2(1)(c) of Sch 1 of the Act.

Other

- 58 Both *Bennison* and *Kuringai* considered the respondent’s claims in respect of the (same two) Documents, although I note that the claim in respect of the Long Form document in each of those decisions was based on cl 2(1)(b) of Sch 1 of the Act (and not as claimed here cl 2(1)(c)). There was a short discussion before me about whether the principle of comity provided another basis on which reject the applicant’s claims in the present proceedings, at least in relation to the Business Case document. Given that I am in fact satisfied that there were in fact reasonable grounds for the respondent’s claims in respect of the Business Case document, it is unnecessary for me consider this issue, and

I do not think it helpful for me to add to the Tribunal's observations in *Kuringai* at [17] to [21].

Order

59 The Tribunal orders that:

- (1) The decision under review is affirmed.
- (2) Pursuant to s 64(1)(c) of the Civil and Administrative Tribunal Act 2013, paragraphs [34] to [42] of these reasons are not to be published.
- (3) Pursuant to s 64(1)(c) of the Civil and Administrative Tribunal Act 2013, any confidential evidence filed with the Tribunal or given in a confidential hearing pursuant to s 107 of the Government Information (Public Access) Act 2009, is not to be published.
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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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