

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2024 00280

BARRY BERIH

Plaintiff

v

HOMES VICTORIA

Defendant

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JUDGE: Keogh J  
WHERE HELD: Melbourne  
DATE OF HEARING: 11 December 2024  
DATE OF RULING: 10 February 2025  
CASE MAY BE CITED AS: Berih v Homes Victoria (No 3)  
MEDIUM NEUTRAL CITATION: [2025] VSC 30

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PRACTICE AND PROCEDURE – Call for production of documents – Public interest immunity – Disclosure sought of documents submitted to Cabinet and related preparatory documents – Where public interest immunity applies – Whether public interest in disclosure outweighs public interest in maintaining confidentiality – Documents likely to reveal content of Cabinet committee deliberations – Subject matter of documents is current and controversial – Disclosure would likely have detrimental effect on integrity of Cabinet processes – *Evidence Act 2008* (Vic) ss 130 and 131A – Documents immune from disclosure.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	K O’Gorman SC with L Howard, T Farhall and G Cafarella	Inner Melbourne Community Legal
For the Defendants	L Brown SC with J Maxwell	Victorian Government Solicitor



HIS HONOUR:

- 1 This proceeding concerns an application by the plaintiff, Barry Berih, to review a decision made by the defendant, Homes Victoria, relating to the demolition and redevelopment of three public housing towers located in Flemington and North Melbourne ('towers'), as part of a larger Victorian government policy to redevelop 44 high-rise public housing towers ('public housing towers') by 2051 ('redevelopment program').
- 2 The trial of the proceeding commenced before Richards J on 28 October 2024. During cross-examination, the Chief Executive Officer of Homes Victoria, Simon Newport, gave limited evidence referring to a submission by Homes Victoria to a Victorian government Cabinet committee about the redevelopment program ('Cabinet Submission') and other related documents. Berih made a call for production of the Cabinet Submission and the other documents identified by Newport in his evidence. Production was resisted by Homes Victoria on the basis of a claim of public interest immunity pursuant to s 130(1) of the *Evidence Act 2008* (Vic) ('*Evidence Act*'), relying on the circumstances in sub-s (4)(f). Richards J adjourned the trial part heard and referred the question of whether the Cabinet Submission and related documents were immune from production to another Judge of the Court for hearing and determination.
- 3 The materials filed by Homes Victoria show that the documents identified by Newport were part of a broader class of documents that relate to the Cabinet Submission ('Cabinet Submission documents'). The Cabinet Submission documents can be relevantly divided into three categories:
  - (a) the Cabinet Submission;
  - (b) documents that Homes Victoria provided to Cabinet committees relevant to the redevelopment program ('Cabinet documents'); and
  - (c) documents used by Homes Victoria to prepare submissions to Cabinet committees that were not themselves provided to those committees



(‘preparatory documents’).

4 For the following reasons I conclude that the Cabinet Submission documents are immune from disclosure.

### **Background**

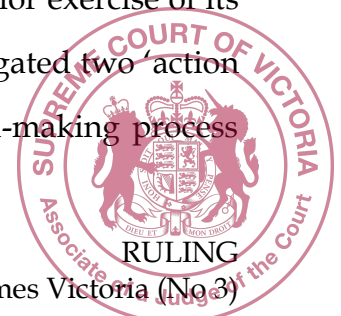
5 Newport commenced as Chief Executive Officer, Homes Victoria, and Deputy Secretary to the Department of Families, Fairness and Housing (‘Department’) on 31 July 2023. He said that he was instructed by the Secretary to the Department to prepare the Cabinet Submission for inclusion in a statement outlining the government’s housing policies (‘Housing Statement’) after consideration by Cabinet, as one of his first responsibilities in those roles.

6 Newport said that on 18 September 2023, a Cabinet committee approved funding for the redevelopment program. He said that on 20 September 2023, Cabinet confirmed its approval of the redevelopment program and released the Housing Statement.

7 Newport said that upon being informed that the redevelopment program had been approved, he decided to take steps to give effect to that approval by commencing the redevelopment program (‘Implementation Decision’). Implementation of the redevelopment program will involve tenants vacating their rental premises and the demolition of the public housing towers.

8 Berih is a longstanding tenant in one of the towers. He brings this proceeding on his own behalf and on behalf of other tower tenants seeking, amongst other relief, an injunction restraining Homes Victoria from taking any further steps in relation to the Implementation Decision in respect of the towers.

9 Berih advances three claims in the proceeding. First, he alleges that the Implementation Decision was a decision to demolish the towers made under s 15(a) of the *Housing Act 1983* (Vic) (‘*Housing Act*’). He alleges that in a prior exercise of its power to manage the towers under s 15(b), Homes Victoria promulgated two ‘action plans’ which entitled tower tenants to a consultation and decision-making process



with respect to the proposed redevelopment. Berih alleges that group members were not afforded the right to be heard in accordance with the action plans in the making of the Implementation Decision, and that the decision is therefore invalid.

10 Second, Berih alleges that, when it made the Implementation Decision, Homes Victoria failed to properly consider the human rights of group members in accordance with the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ('*Charter*').

11 Third, Berih alleges that the Implementation Decision was incompatible with human rights in the *Charter*.

### Disclosure

12 On 17 September 2024, Richards J made the following order under s 26 of the *Civil Procedure Act 2010 (Vic)* ('*CPA*') ('disclosure order'):

1. By **4:00pm on 27 September 2024**, the defendant is to disclose to the plaintiff the existence of all documents that are, or have been in its possession, custody, or control of which it is aware and which it considers are critical to the resolution of the issues in dispute in the proceeding. For the avoidance of doubt, the critical documents to be disclosed include any document evidencing consideration by the defendant, in making the decision referred to in paragraph 6 of the Indorsement, of Group Members' human rights referred to in paragraph 21 of the Indorsement.

### Evidence

13 Newport gave evidence in chief in an affidavit sworn 30 September 2024 and was cross-examined at trial on 28 October 2024. Some of his evidence is relevant to the claim for public interest immunity over the Cabinet Submission documents.

14 Homes Victoria filed the following further evidence in support of its public interest immunity claim over the Cabinet Submission documents:

- (a) redacted affidavit of Martin McCurry, Executive Director, Asset Management, Homes Victoria, affirmed 19 November 2024;
- (b) affidavit of Michele Morrison, Chief Development Officer, Homes Victoria, affirmed 19 November 2024; and

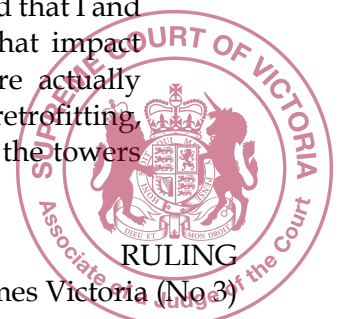


- (c) affidavit of Joshua Puls, Deputy Secretary of the Justice and Public Administration Group, Department of Premier and Cabinet ('DPC') sworn 19 November 2024.

### **Newport**

- 15 Homes Victoria is responsible for social housing in Victoria. It manages assets including the public housing towers.
- 16 Newport said he was aware that the government had considered the condition of the public housing towers and of the possible ways to address relevant housing issues over many years. He said that the public housing towers were built between 1958 and 1975 and house around 10,000 people. He said that the Department had conducted ongoing works to maintain and replace essential services (including lifts, boilers and fire systems) over the past 22 years. Newport said that despite these works, and because of issues that include physical condition and dwelling amenity, noise, thermal and structural performance, accessibility, fire protection, sustainability, and waste and recycling, the public housing towers are no longer fit for useful living.
- 17 Newport said that retrofitting the public housing towers was not a feasible option and that it 'would not be materially different from the redevelopment option in its impact on renters'.
- 18 Newport said that when he made the Implementation Decision, he was aware of matters relevant to the public housing towers because of his involvement in the preparation of the redevelopment program policy. He said:

I believed that the objective of the program was critically important and that taking no action was not an option, in light of the condition of the towers and the problems with the broader housing supply in Victoria. I knew that relocation would have a significant impact on the renters and their human rights, by disrupting their home life, their connections to local supports and services, and their links to their communities in the towers and the surrounding area. I also knew that steps had been taken to minimise that impact as far as possible through the sequencing of the program, and that I and others would continue to take steps to consider and minimise that impact during the implementation process and before any renters were actually required to move out of their towers[.] ... Given the problems with retrofitting, I considered that there was no way to address the problems with the towers



without causing significant disruption to the renters – either option was going to cause a significant disruption. I also considered that the program would ultimately benefit future renters on the sites, including those current renters who choose to return, by delivering more and better homes for them to live in. On that basis, I considered that the program was justified and that the impact on the renters, while significant, was acceptable.

19 Newport said that in making the Implementation Decision, he considered that he was discharging his obligation to implement a Cabinet policy decision which promoted the objects of the *Housing Act*. He said that he did not make any written record of the Implementation Decision.

20 Newport referred to the Cabinet Submission and two of the Cabinet Submission documents in cross-examination. He said that when drafting his affidavit, he relied on technical reports which had formed part of the Cabinet Submission. He said that these included a report by commercial real estate services firm Cushman & Wakefield and a report by engineering consultancy firm Beca.

21 Newport recalled that the Cushman & Wakefield report was prepared before he commenced his role with Homes Victoria. He said that it concerned technical aspects of the current public housing towers and the measures required to retrofit, repair and maintain them, with specific analyses of 10 of the 44 towers. He said that the Beca report was commissioned to gain a better understanding of compliance with relevant building codes and to determine whether the towers could be refurbished.

22 Newport said that he did not have the reports in front of him when he prepared his affidavit, but that both were in his mind by virtue of their relevance to the Cabinet Submission.

23 When asked to identify whether there was any written advice of any kind given to him that directly or indirectly concerned the impacts of the Implementation Decision on *Charter* obligations, Newport identified the Cabinet Submission as ‘the main piece that [he had] seen in writing’, and that ‘[the *Charter*] was part of the decision-making process when [the Cabinet Submission] was put together’.

24 Newport was asked:



Did you consider the Cabinet submission and take it into account when you made the implementation decision?---All of the work we'd done right up to that point was in my mind when we did that, and, of course, that formed part of the submission.

He said that the Cabinet Submission 'wasn't [created] in isolation', and 'was a series of ... meetings, pieces of work, reviewing, shaping'. Newport said he considered that all of the elements contained in the Cabinet Submission were relevant to the Implementation Decision.

25 In re-examination, Newport said that he did not have the Cabinet Submission or other documents physically in front of him when he made the Implementation Decision.

### **McCurry**

26 McCurry leads the Asset Management branch within Homes Victoria, and is responsible for the management of Homes Victoria's housing assets which include the towers. McCurry commenced his current role in December 2023. From August 2021 he was Director, Asset Lifecycle Planning. McCurry said that he has regularly contributed to, managed and had visibility over material prepared for the purpose of Cabinet deliberations in these roles, including the preparation of submissions for Cabinet's consideration.

27 McCurry considered that it was necessary for the Minister for Housing to brief Cabinet in relation to the public housing towers to ensure it was fully informed about relevant issues, to obtain approval for the capital expenditure required for any necessary works, and to enable Cabinet to make a decision about the future of the towers. In order to support decision making by Cabinet on the nature and prudence of the future investment direction and asset management options for the towers, Homes Victoria sought advice from a range of technical experts.

28 McCurry produced a schedule of the 29 documents that together make up the Cabinet Submission documents.

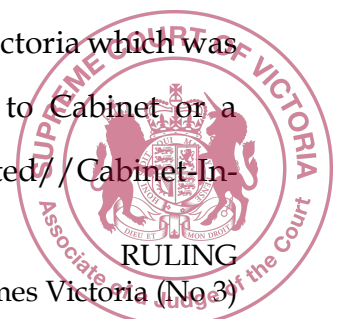
29 McCurry identified Document 1 in the schedule as the Cabinet Submission. He said that having inspected Documents 2-9, 11-14, 16-20 and 22-24 he considered those





documents were brought into existence for the purpose of preparing a submission to Cabinet or a Cabinet committee. He gave the following further evidence about those documents:

- (a) Document 2 is a report prepared by Beca for Homes Victoria on 22 December 2022. Beca was engaged to provide contemporary input into the decision-making process. The purpose of the Beca report was to provide information which Homes Victoria would use to prepare a submission for the Minister to bring to Cabinet or a Cabinet committee. Document 2 was used in preparing a submission to the Implementation Sub-Committee of Cabinet ('ISC'), which is 'Document 23' below.
- (b) In September 2021, Creo Consultants ('Creo') was requested to consult on and assist with the process of obtaining contemporary input into the decision-making process concerning the public housing towers. Document 3, which is a spreadsheet prepared by Creo for Homes Victoria, was commissioned in December 2022 to prepare a submission for the Minister to bring to Cabinet or a Cabinet committee. Document 3 was used in preparing Document 23.
- (c) Document 4 is a report prepared by Beca for Homes Victoria that was commissioned for the purpose of preparing a submission to Cabinet or a Cabinet committee. Document 4 is the final output and compilation of the work in Document 2. McCurry said that Document 4 was used in preparing ISC submissions including Document 23 and Documents 5-6 below.
- (d) Document 5 is a submission to the ISC which is marked 'Cabinet-In-Confidence'. Document 6 is an attachment to Document 5 which is marked 'Protected//Cabinet-In-Confidence'. Both documents were considered by the ISC.
- (e) Document 7 is a discussion paper Beca prepared for Homes Victoria which was commissioned for the purpose of preparing a submission to Cabinet or a Cabinet committee. The document is marked 'Protected//Cabinet-In-





- Confidence'. Document 7 was used in preparing Document 23. It contains an explanation of the assessments and findings set out in Document 4 for a non-technical audience.
- (f) Documents 8 and 9 are reports prepared by Cushman & Wakefield for Homes Victoria in March and April 2023 respectively, which were commissioned for the purpose of preparing a submission to Cabinet or a Cabinet committee. Both documents were used in preparing Document 23.
- (g) Document 11 is a report prepared by Aurecon Australasia Pty Ltd ('Aurecon') for Homes Victoria which was commissioned for the purpose of preparing a submission to Cabinet or a Cabinet committee. Homes Victoria engaged Aurecon to conduct an independent peer review of Document 4, which was intended to inform the preparation of a further submission for the Minister to bring to a relevant Cabinet committee. Document 11 was used in preparing, and was an attachment to, Document 23.
- (h) Documents 12 and 19 were prepared by the Victorian Chief Engineer and the State Building Surveyor, respectively, for Homes Victoria, for the purpose of preparing a submission to Cabinet or a Cabinet committee. The Victorian Chief Engineer and State Building Surveyor participated in the appointment and oversight of Aurecon's peer review of Document 4, in order to inform the preparation of a further submission for the Minister to bring to a relevant Cabinet committee. Documents 12 and 19 were used in preparing Document 23.
- (i) Documents 13, 14 and 16 are reports prepared by Cushman & Wakefield for Homes Victoria which were commissioned for the purpose of preparing a submission to Cabinet or a Cabinet committee. The documents were used in preparing Document 23.
- (j) Document 17 is an Excel spreadsheet prepared by Homes Victoria for the purpose of preparing a submission to Cabinet or a Cabinet committee. The



information contained in Document 17 was used in preparing Document 23.

- (k) Document 18 is a report prepared by Beca for Homes Victoria on 4 July 2023 which was commissioned for the purpose of preparing a submission to Cabinet or a Cabinet committee. Document 18 contains a summary of the assessments and findings set out in Document 4 that was used in preparing Document 23.
- (l) Document 20 is a report prepared by Approval Systems Pty Ltd for Homes Victoria, which was commissioned for the purpose of preparing a submission to Cabinet or a Cabinet committee. Document 20 was used in preparing Document 23.
- (m) Document 22 is a report prepared by Delta Group for Homes Victoria for the purpose of preparing a submission to Cabinet or a Cabinet committee.
- (n) Document 23 is the submission to the ISC marked 'Cabinet-In-Confidence'. Documents 2, 4, 11, 12 and 18–20 are attachments to that submission and are also marked 'Cabinet-In-Confidence'. Document 23 also contains a summary of Document 24 below.
- (o) Document 24 is a discussion paper prepared by Beca for Homes Victoria in June to September 2023 which was commissioned for the purpose of preparing a submission to Cabinet or a Cabinet committee. The document is marked 'Cabinet-in-Confidence'. Document 24 overlaid the assessments and findings set out in Document 4.

30 The index to the 29 documents exhibited to McCurry's affidavit identifies Document 25 as a submission to Cabinet dated 19 September 2023, and Documents 26–29 as attachments to that submission.

### **Morrison**

31 Morrison is the Chief Development Officer of Homes Victoria. She said that her responsibilities include delivery of the social and affordable housing initiative set out in the Housing Statement, which includes development options and implementation



as approved by government of the demolition, design, construction and redevelopment of the towers.

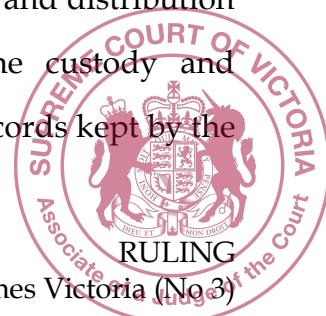
32 Morrison said that she had reviewed Documents 15 and 21, which are reports prepared by an external firm, Hayball, for Homes Victoria for the purpose of preparing a submission to Cabinet or a Cabinet committee. She said that in May 2023, the interim chief executive office of Homes Victoria was asked to prepare a Cabinet submission regarding the towers, specifically a proposal to retire and redevelop them. Morrison said that Hayball was engaged to conduct a mass and yield assessment of two sites on which towers were located. She said that these reports were required by Homes Victoria to enable it to advise Cabinet on the potential increase in dwellings that could be achieved through redevelopment.

### **Puls**

33 Puls is currently employed by the Secretary to the DPC as the Deputy Secretary of the Justice and Public Administration Group. Before 2016, he was the Executive Director of the Cabinet office in DPC.

34 Puls described Cabinet as the principal decision-making body for the Victorian government which is responsible for considering major questions of policy, administration and legislation. He said that Cabinet is supported by a number of Cabinet committees which were established by decision of the Premier or Cabinet and are chaired by the Premier or a Minister. He said that the operations of Cabinet in Victoria are described in a Cabinet handbook, a copy of which he exhibited to his affidavit. He said that Cabinet and Cabinet committees typically consider matters by way of formal written submissions prepared by government departments and presented by one or more Ministers.

35 Puls said that the Cabinet Office is an office within DPC responsible for the administrative operation of Cabinet processes, including the receipt and distribution of papers, management and organisation of meetings, and the custody and maintenance of Cabinet records. He said that the official Cabinet records kept by the

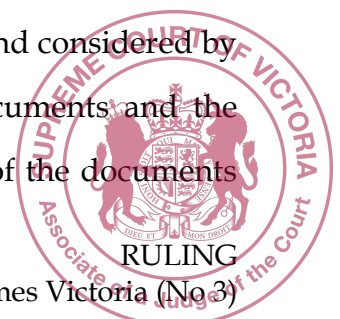


Cabinet Office include submissions to Cabinet or its committees, agendas of meetings of Cabinet or its committees, and records of the decisions taken by Cabinet or its committees.

36 Puls said that the operations of Cabinet are governed by longstanding Constitutional conventions which ensure the effective and efficient operation of the Westminster system of government. He said that two of those conventions are collective responsibility, which provides that Cabinet decisions are binding on all Ministers as government policy; and Cabinet confidentiality, which requires absolute confidentiality of Cabinet deliberations. Puls said that the second convention applies to all documents created as part of the Cabinet process, because disclosure of those documents can reveal or allow reliable inferences to be drawn about matters discussed or views expressed within Cabinet. He said that disclosure of such documents would undermine the effective and efficient operation of Cabinet because it is critical that Ministers are able to request and obtain frank and fearless advice from public servants about sensitive policy issues, and that public servants are able to collect and synthesise information, deliberate, consult and advise on such issues without the prospect of public disclosure of that advice or the deliberative processes involved in obtaining it. He said that disclosure of information gathering, deliberation, consultation and advice documents prepared at an early stage can give a misleading impression of the basis for decisions taken by government, which is particularly problematic where the issues in question are sensitive or politically controversial.

37 Puls said that he had reviewed the Cabinet Submission. He said that it had the security classification 'Cabinet-In-Confidence' printed on each page, was considered by the Expenditure Review Committee of Cabinet ('ERC') at a meeting on 15 September 2023, and was indorsed by the ERC on 18 September 2023. He said that the Cabinet Submission was discussed by the ERC at both of these meetings.

38 Puls said that Documents 4-6, 10-11 and 25-29 were submitted to and considered by Cabinet or a Cabinet committee. Puls reviewed the Cabinet documents and the agendas of Cabinet committee meetings. He described how each of the documents



was considered and discussed at Cabinet committee meetings. Puls said that each page of the copies of the Cabinet documents provided to Cabinet committees was marked 'Cabinet-In-Confidence'.

39 Puls said that public disclosure of the Cabinet Submission documents would necessarily undermine the confidentiality of the Cabinet process and significantly prejudice the proper functioning of the Victorian government. He said that disclosure would reveal the position taken by particular Ministers in Cabinet or by a Cabinet committee and the subject matter of Cabinet deliberations. He said that if Ministers and public servants were conscious that any documents created for or related to Cabinet may be released in future, they might temper the content of such documents to minimise controversy. He said that as a result, it was likely that Ministers would feel constrained in seeking information and advice from the public service for the purpose of Cabinet deliberations, and public servants would feel constrained in their task of collecting and synthesising information, deliberating, consulting and advising in response for the purpose of Cabinet deliberations. This would undermine the effective and efficient operation of Cabinet and may prevent Ministers and Cabinet from accessing complete, frank and impartial advice and information to support Cabinet decision-making. He said that the effect would be the same whether the documents were publicly disclosed or disclosure was limited to Berih and his lawyers. Puls said that even if the documents were subject to confidentiality orders, disclosure would likely still inhibit the preparation of documents for Cabinet and Cabinet committees in future.

40 Puls said that disclosure of preparatory documents created for the purpose of preparing a submission to Cabinet or a Cabinet committee would also breach confidentiality of the Cabinet process, by allowing reliable inferences to be drawn about the subject matter of Cabinet or Cabinet committee deliberations.

41 Puls said that disclosure of the Cabinet Submission documents would seriously undermine Cabinet's ability to function as a forum for Ministers to engage in unimpeded and properly informed discussion of complex and sensitive policy



questions, and as a consequence would significantly harm the public interest in the proper functioning of Victorian government.

### Documents subject to the call for production

42 At the hearing before me, Berih limited his call for production to the Cabinet Submission, the Cushman & Wakefield documents and the Beca documents.

43 The Cushman & Wakefield documents are numbered 8, 9, 13, 14 and 16 in the schedule exhibited to McCurry's affidavit. The Beca documents are numbered 2, 4, 7, 18 and 24. Documents 2, 4 and 18 were provided to Cabinet committees and are therefore Cabinet documents. The Cushman & Wakefield documents and remaining Beca documents are preparatory documents.

### Statutory provisions

#### *Evidence Act*

44 The exclusion of evidence of matters of State is dealt with in s 130(1) of the *Evidence Act*, which provides:

If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

The operation of s 130(1), which is directed to the admissibility of evidence, is extended by s 131A to include various forms of compulsory disclosure.

45 Section 130(4) sets out a non-exhaustive list of circumstances in which information or documents will be taken to 'relate to matters of state' for the purposes of s 130(1). Those circumstances relevantly include where adducing the information or document as evidence would 'prejudice the proper functioning of the government of ... a State'.<sup>1</sup> It is not in issue that the Cabinet Submission documents are documents that 'relate to matters of state' for the purposes of s 130(1) of the *Evidence Act*.

46 The matters to be taken into account in determining whether to direct that such

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<sup>1</sup> *Evidence Act 2008* (Vic) s 130(4)(f) ('*Evidence Act*').

documents not be adduced as evidence relevantly include the following matters set out in s 130(5):

- (a) the importance of the information or the document in the proceeding;
- ...
- (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
- (d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;
- (e) whether the substance of the information or document has already been published[.]

### *Civil Procedure Act*

47 Berih submitted that Homes Victoria failed to disclose the Cabinet Submission and at least some of the Cabinet Submission documents in compliance with s 26 of the CPA and the disclosure order. Section 26(1) of the CPA imposes an obligation on a litigant to disclose documents in that person's possession, custody or control that the person ought reasonably consider are critical to the resolution of the dispute. Homes Victoria argued that, in relation to the *Charter* claims, the critical issue is what was in Newport's mind when he made the Implementation Decision. Homes Victoria submitted that the Cabinet Submission documents were either not relevant or were only peripherally relevant to that issue, and were therefore not 'critical' documents within the meaning of s 26(1) of the CPA. Further, Homes Victoria submitted that those documents are protected from disclosure 'on the grounds of privilege which has not been expressly or impliedly waived'.<sup>2</sup>

### Principles and authorities

48 The High Court explained the rationale for the protection of Cabinet documents in *Commonwealth v Northern Land Council* ('*Northern Land Council*'):<sup>3</sup>

But it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members

<sup>2</sup> *Civil Procedure Act 2010* (Vic) s 26(3)(a) ('CPA').

<sup>3</sup> (1993) 176 CLR 604 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ) (citations omitted) ('*Northern Land Council*').





of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential. Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. Moreover, the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system or otherwise, is liable to subject the members of that body to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course. The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support.<sup>4</sup>

The plurality noted that where immunity was sought for a class of documents, it was on the basis that disclosure ‘would be injurious to the public interest, whatever the contents’.<sup>5</sup> The immunity from disclosure of such a class is not absolute. The public interest in immunity must ‘be weighed against the competing public interest in the proper administration of justice, which may be impaired by the denial to a court of access to relevant and otherwise admissible evidence’.<sup>6</sup>

49 In *Murdesk Investments Pty Ltd v Secretary to the Department of Business and Innovation*,<sup>7</sup> John Dixon J identified the principles and further considerations relevant to an assessment of public interest immunity:

As to other considerations which may be relevant, the statute plainly operates in the context of well established principles of public interest immunity at common law: see *Sankey v Whitlam*, *Alister v The Queen*, and *Commonwealth v Northern Land Council*. Drawing on these authorities, McClellan J conveniently summarised the applicable principles in *Murrumbidgee Ground-*

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<sup>4</sup> Ibid 615.

<sup>5</sup> Ibid 616.

<sup>6</sup> Ibid.

<sup>7</sup> [2011] VSC 436.



Water Preservation Association v Minister for Natural Resources, and I will, with respect, adopt that summary.

1. “There is no absolute immunity from production and inspection of cabinet documents: Sankey at 43, 58-59, 95-96; Northern Land Council at 616. In this context ‘cabinet documents’ extends to:

(a) Cabinet minutes or other records of Cabinet discussions and records of discussions between heads of departments;

(b) papers prepared as submissions to Cabinet;

(c) any documents which relate to the framing of government policy at a high level: Sankey at p 39.

2. The general rule is that a court will not order the production of a document although relevant and otherwise admissible if it would be injurious to the public interest to disclose it.

3. The public interest has two aspects: the protection of government from the harm which may be caused by disclosure and the interest in ensuring that justice can be effectively administered: Sankey at 38, Conway v Rimmer [1968] UKHL 2; (1968) AC 910 at 940.

4. The court must weigh the competing elements of the public interest: Sankey at 43, 60-64, 98-99.

5. A claim for immunity for a class of documents as opposed to a claim in relation to individual documents will be upheld only if it is really necessary in the public interest or the proper functioning of the public service: Sankey at 39.

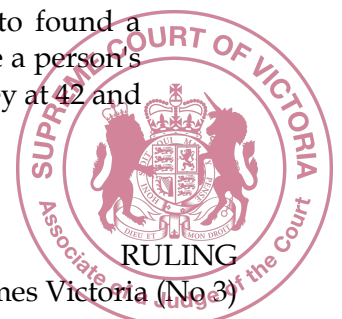
6. The court has power to inspect the documents in order to determine any claim. However, there remains some controversy as to the circumstances in which that power should be exercised. If the documents clearly fall into a class which attracts immunity they should not be inspected: Northern Land Council at p 617.

7. Documents recording the actual deliberations of cabinet are more likely to attract immunity than documents prepared outside Cabinet such as reports or submissions for the assistance of Cabinet: Northern Land Council at 614-615.

8. Documents relating to a topic which is current or controversial will attract a high level of confidentiality: Northern Land Council at 617-618.

9. Documents in relation to a matter which has passed into history attract a lesser level of confidentiality, as do documents which may have been already published.

10. The intended use of documents, particularly if required to found a defence to a criminal charge, is a relevant consideration. Where a person's liberty is at stake production is more likely to be ordered: Sankey at 42 and 61-62.



11. (a) It is unlikely that disclosure of the records of Cabinet deliberations upon current matters would be appropriate in civil proceedings: Northern Land Council at 618.

(b) Documents and communications passing between a Minister and the head of his department relating to cabinet proceedings and material prepared for Cabinet are likely to be protected: at Sankey 99.

(c) Reports relating to important matters of policy between public servants and Ministers or between senior public servants also warrant a high level of protection: at Sankey 99.”

Other relevant considerations in balancing competing interests of state, beyond those enumerated in s.s (5), can be drawn from the cases and a number of relevant matters can be conveniently collated:

- Whether the objection to disclosure is a class claim or a content claim;
- Whether a representative of government has supported non-disclosure of the information or document;
- The subject matter of the information or document, for example, whether it relates to national security or, on the other hand, commercial matters;
- Whether the information or document relates to Cabinet deliberations or lower levels of government;
- Whether the information or document has contemporary importance or is only of historical interest; and
- Whether the information or document was required on the basis that it would be kept confidential.<sup>8</sup>

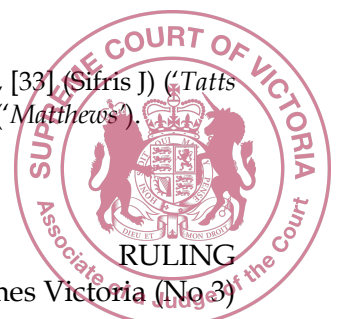
50 There is a public interest in protecting from disclosure papers that have been brought into existence as part of a government process directed to obtaining a Cabinet decision on a matter of policy.<sup>9</sup>

51 The rationale for public interest immunity in Cabinet documents was discussed by Macaulay J in *Kamasae v Commonwealth of Australia (Nos 3 and 5)*.<sup>10</sup> His Honour said that consistently with the fundamental rationale for public interest immunity being ‘to avoid the inhibition of “free and vigorous exchange of views”, even upon “controversial paths” which do not, in the end, lead to a decision that all members of

<sup>8</sup> Ibid [22]-[23] (citations omitted); see also *Tatts Group Ltd v Victoria* [2013] VSC 301, [33] (Sifris J) (*Tatts Group*) and *Matthews v SPI Electricity Pty Ltd (No 11)* [2014] VSC 65 (Derham AsJ) (*Matthews*).

<sup>9</sup> *Matthews* (n 8) [24].

<sup>10</sup> (2016) 52 VR 322 (*Kamasae*).



Cabinet support’, the ‘protection may be given to a preparatory submission intended as an option to be put before Cabinet but which, in the end, does not ultimately get to Cabinet’.<sup>11</sup> Macaulay J said, in relation to the reasoning of Byrne J in *Victoria v Seal Rocks Victoria (Australia) Pty Ltd (No 2)*:<sup>12</sup>

When his Honour contrasted ‘might disclose’ and ‘would disclose’ in that passage it seems he was acknowledging that regardless of whether a document actually went to Cabinet – and so revealed an actual Cabinet deliberation – the important thing was that it ‘might’ have gone to Cabinet. In other words, it was the document’s capacity, if disclosed, to prejudice the policy development process that culminated in Cabinet that was the fundamental basis for its protection.<sup>13</sup>

Macaulay J noted that reliable inferences about the subject matter of a Cabinet meeting or a position taken by a Minister in Cabinet can logically be drawn from information that was not put to Cabinet.<sup>14</sup> His Honour added:

Further, it may be equally damaging to the national interest, and inhibitory of the free and open exchange of ideas in the deliberative process both before and during Cabinet, if disclosure is made of what was not put to Cabinet.<sup>15</sup>

Macaulay J gave the following example of the damage that might result from disclosure of documents not put to Cabinet:

For example, if it was known publicly that Cabinet adopted policy X, the revelation that policy Y was not put to Cabinet as an option may allow a reasonable inference that policy Y was never the subject of Cabinet deliberation. It might also enable a reasonable inference that a particular Minister responsible for recommending options to Cabinet did not favour the rejected option. ... In that way, the revelation that an option was not discussed by Cabinet could, logically, have much the same inhibitory effect on future policy development communications as would the revelation of what was actually discussed.<sup>16</sup>

52 Weight must be given to the evidence of a responsible representative of government as to the risk to the public interest that would result from disclosure of documents.<sup>17</sup>

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11 Ibid [46].

12 [2001] VSC 249 (*‘Seal Rocks’*).

13 *Kamasae* (n 10) [48].

14 Ibid [49].

15 Ibid.

16 Ibid [50].

17 *Matthews* (n 8) [24].

53 In *Zirilli v The King*,<sup>18</sup> the Court of Appeal considered what was necessary in order to show in a criminal proceeding that there was a public interest in disclosure of documents:

Disclosure is justified where the applicant has a legitimate forensic purpose in the pursuit of the information or documents in question. A legitimate purpose will be demonstrated where the Court considers that it is 'on the cards', that is, there is 'a reasonable possibility' that the documents, if disclosed, would materially assist the defence.

The public interest in the proper administration of justice requires that evidence necessary to elucidate facts be available. However, 'the Court is not required to ensure ... that [the applicant] has access to any and all material that could have some possible relevance to arguments it may wish to put'.<sup>19</sup>

The authorities demonstrate that in civil cases, there is a greater emphasis on the need to establish that the Cabinet documents contain material evidence that will have an important bearing on determination of the central issues in the proceeding.<sup>20</sup> Propositions derived by Derham AsJ in *Matthews v SPI Electricity Pty Ltd (No 11)*<sup>21</sup> from a consideration of the authorities relevantly include:

...

(k) In order for the public interest in the administration of justice to arise in the balancing process, the documents must contain 'material evidence'. Relevance to the proceedings is of itself insufficient. The documents must have an important bearing upon the ultimate decision on the relevant questions;

(l) In civil cases it will only be where exceptional circumstances give rise to a significant likelihood that the public interest in the proper administration of justice outweighs the very high public interest in the confidentiality of documents recording Cabinet deliberations that it would be necessary or appropriate to order production of the documents to the Court;

...

(n) The judge ought not to order the disclosure of the contents of documents recording Cabinet deliberations unless the judge is satisfied that the material is crucial to the proper determination of the relevant proceeding[.]<sup>22</sup>

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<sup>18</sup> [2023] VSCA 64 ('*Zirilli*').

<sup>19</sup> *Ibid* [28]-[29].

<sup>20</sup> *Tatts Group* (n 8) [33]; *Krew v Federal Commissioner of Taxation* (1971) 2 ATR 230, 232.

<sup>21</sup> *Matthews* (n 8).

<sup>22</sup> *Ibid* [24].

## Submissions

### Homes Victoria

54 Documents that were brought into existence for the purpose of preparing a submission to Cabinet that:

- (a) involve communications between a Minister and a head of department or between heads of department;
- (b) relate to Cabinet proceedings; or
- (c) relate to framing of government policy at a high level;

attract public interest immunity protection as Cabinet documents for at least the following reasons. First, such documents enable reliable inferences to be drawn about matters that were considered by Cabinet.<sup>23</sup> Second, such documents can enable reliable inferences to be drawn about matters that were not submitted to or considered by Cabinet, which may be equally damaging to the public interest.<sup>24</sup> Third, disclosure of such documents can inhibit the free and vigorous exchange of views in the policy development process leading up to Cabinet, thus impairing the operation of Cabinet and undermining the basic rationale for the protection.<sup>25</sup> That is so even if the documents did not ultimately get to Cabinet.

55 The public interest against disclosure is particularly strong where, as in this case, the content of the documents is current or controversial.<sup>26</sup>

56 Considerations in favour of disclosure are necessarily less compelling in civil cases than in criminal cases. It is not enough that information be merely relevant to the proceeding in question. The information must be 'material evidence',<sup>27</sup> or have an

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<sup>23</sup> *New South Wales v Ryan* (1998) 101 LGERA 246, 252; *Commonwealth v Construction, Forestry, Mining and Energy Union* (2000) 98 FCR 31, 42–43; *Seal Rocks* (n 12) [26] (Byrne J).

<sup>24</sup> *Kamasae* (n 10) [49] (Macaulay J).

<sup>25</sup> *Ibid* [46], citing *Northern Land Council* (n 3) 615 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

<sup>26</sup> *Sankey v Whitlam* (1978) 142 CLR 1, 46–47 (Gibbs ACJ), 100 (Mason J) ('*Sankey*'); *Northern Land Council* (n 3) 617–618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

<sup>27</sup> *Alister v The Queen* (1984) 154 CLR 404, 412 (Gibbs CJ); *Tatts Group* (n 8) [26].





important bearing on the ultimate decision on the questions in issue.<sup>28</sup>

57 Puls' evidence is that the public interest against the disclosure of the Cabinet Submission is substantial.

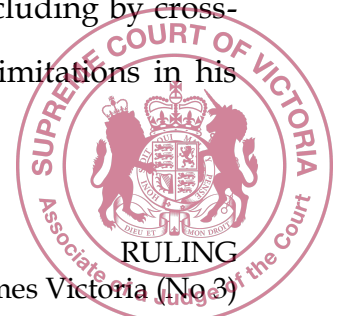
58 The Cabinet Submission is not relevant to the claimed denial of procedural fairness. There is no dispute that Newport did not give Berih or the group members an opportunity to be heard before making the Implementation Decision. Instead, this dispute concerns whether Newport was under any obligation to afford procedural fairness; whether the Implementation Decision was part of a multi-staged decision-making process that, viewed in its entirety, provided Berih and group members with a reasonable opportunity to be heard; and whether any denial of procedural fairness was material.

59 The Cabinet Submission is not relevant to an alleged breach of the procedural limb of s 38(1) of the *Charter*. That is because, assuming the procedural limb applied to the Implementation Decision, whether or not Newport gave proper consideration to relevant human rights turns on his state of mind when making the decision. Homes Victoria is defending the proceeding on the basis that Newport engaged in the requisite intellectual process when making the Implementation Decision, not on the basis that proper consideration was given to human rights in the policy development process.

60 The substantive limb of s 38(1) of the *Charter* provides that it is unlawful for a public authority to act incompatibly with human rights. Assuming the substantive limb applies, Homes Victoria bears the onus of establishing that any limitation on human rights was reasonable, lawful and justified under s 7(2) of the *Charter*. Homes Victoria does not rely on the content of any of the Cabinet Submission documents to discharge that onus. Homes Victoria relies solely on the evidence of Newport. Berih has had a substantial opportunity to challenge or contradict that evidence, including by cross-examining Newport to highlight any perceived deficiencies and limitations in his

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<sup>28</sup> *Tatts Group* (n 8) [33].





evidence, and by adducing his own expert evidence on the matters about which Newport testified, specifically the justification for the redevelopment program.

61 Limiting disclosure of the Cabinet Submission documents by a confidentiality regime would result in disclosure to parties that Cabinet and the relevant Cabinet committees did not contemplate. Even limited disclosure would likely inhibit the preparation of Cabinet documents in future. There is also the inherent risk of inadvertent disclosure associated with a confidentiality regime.<sup>29</sup>

### **Berih**

62 The grounds of review of the Implementation Decision entail the following questions of fact:

- (a) what Newport considered when he made that decision;
- (b) whether he considered the human rights of the group members; and
- (c) if so, how and to what extent.

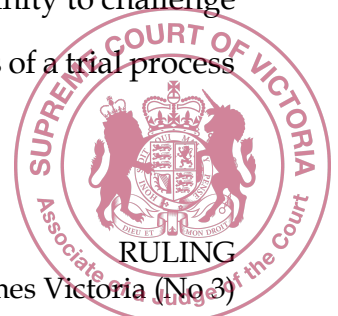
Berih carries the onus of proof with respect to these facts.

63 The evidentiary value and importance of the Cabinet Submission documents is high. As Newport's evidence made clear, the Cabinet Submission is the only documentary evidence that would allow the Court to assess how and to what extent he considered the *Charter* and the possibility of retrofitting the towers. The documents are the most contemporaneous source of what Newport considered and are superior evidence to Newport's *ex post facto* characterisations. The opportunity for Berih to review and make use of the documents is key to his ability to test the bald assertion that Newport engaged in the requisite intellectual process that the *Charter* requires when making the Implementation Decision.

64 Homes Victoria's contention that Berih has had a substantial opportunity to challenge or contradict Newport's evidence misunderstands important features of a trial process

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<sup>29</sup> *Jackson v Wells* (1985) 5 FCR 296, 307-308 (Wilcox J).



in at least two ways. First, it is irrelevant that Homes Victoria does not seek to rely on the content of the Cabinet Submission documents to discharge the onus it bears in respect of the *Charter*. Berih seeks to run his case by reviewing the terms of the reports that Homes Victoria contends it obtained and took into account when considering the available options to redevelop the towers. Second, it cannot be said that Berih has had a substantial opportunity to challenge or contradict Homes Victoria's evidence when he first learned of the Cabinet Submission documents during cross-examination of Newport. Procedural fairness entitles Berih to test, by reference to the terms of the documents, whether Newport's evidence is capable of withstanding scrutiny.

65 The strength of a Cabinet privilege claim must be judged against the rationale that there is a public interest in allowing a free and vigorous exchange between Cabinet members.<sup>30</sup> Berih is only seeking disclosure of the part of the Cabinet Submission which was used by Newport when he made the Implementation Decision, and the reports by Cushman & Wakefield and Beca which predate the preparation of the submission and on any view were not prepared for Cabinet's exclusive use. These documents cannot, in any sense, reveal the terms or nature of the exchange of views between Cabinet members. Further, it is already public knowledge that Cabinet approved the Housing Statement and the decision to commence implementation of the Housing Statement with the demolition of the towers. Far from being a secret, the product of Cabinet's deliberations has instead been promoted by Cabinet members.

66 It matters little that the subject matter of this proceeding might be current and topical.<sup>31</sup> The impact of this consideration is diminished in circumstances where Berih is not seeking production of a document that will disclose the deliberations of members of Cabinet. The public is already aware of Cabinet's decision and there is no risk of unwarranted scrutiny of the views of particular Cabinet members.

67 Homes Victoria's argument that confidentiality of the Cabinet Submission documents

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<sup>30</sup> *Sankey* (n 26) 43 (Gibbs ACJ); *Ku-ring-gai Council v West* (2017) 95 NSWLR 1, [89] (Basten JA) [116] (MacFarlan JA) ('*Ku-ring-gai*').

<sup>31</sup> *Ku-ring-gai* (n 30) [90] (Basten JA).

should be maintained because disclosure may result in Ministers feeling constrained in seeking information and advice from the public service for the purpose of Cabinet deliberations, and in public servants feeling constrained in collecting and synthesising information, deliberating, consulting and advising for the same purpose, does not withstand scrutiny. As the High Court said in *Northern Land Council*, ‘the discouragement of candour on the part of public officials has been questioned as a sufficient, or even valid, basis on which to claim immunity’.<sup>32</sup> Puls’ evidence in support of the arguments amounts to no more than sweeping assertions and is devoid of any analysis of the risks of disclosure in relation to the particular documents which are the subject of the call. It ‘borders on the fanciful’<sup>33</sup> that enterprises such as Cushman & Wakefield and Beca produced reports on the assumption that government would not disclose their analyses. Puls’ opinion about the potential effect on the public service should be rejected as a matter of law. The *Public Administration Act 2004* (Vic) imposes a duty on the public service to act in accordance with public sector values that extend to ‘providing frank, impartial and timely advice to the Government’ and ‘making decisions and providing advice on merit and without bias, caprice, favouritism or self-interest’.<sup>34</sup>

68 The issue of Cabinet confidentiality arises in large part because of the way in which Homes Victoria has dealt with the Cabinet Submission documents: first, by failing to comply with its obligations under s 26 of the *CPA* and the disclosure order; and second, by describing the Cabinet Submission documents by reference to the otherwise irrelevant fact that Cabinet had these documents made available to it. Had Homes Victoria disclosed the documents as required, protective confidentiality orders could have been made to avoid or significantly mitigate any risk associated with disclosure. Homes Victoria’s failure to comply with its disclosure obligations is a significant relevant factor in the balancing exercise provided for by s 130 of the *Evidence Act*. Further, any prejudicial effect can still be limited by making appropriate

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<sup>32</sup> *Northern Land Council* (n 3) 615 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

<sup>33</sup> *Ku-ring-gai* (n 30) [91] (Basten JA).

<sup>34</sup> *Public Administration Act 2004* (Vic) ss 7(1)(a)(i) and (c)(i).



ancillary confidentiality orders that limit disclosure to Berih’s lawyers and avoid the need for evidence to be given about the documents in open court.

69 There is considerable public interest in the observance of procedural fairness in government decision-making.<sup>35</sup> That public interest is heightened given the particular subject matter of this proceeding, which concerns the human rights of vulnerable members of the Victorian community. The public interest is further heightened because it is a group proceeding by which all but four of the approximately 1225 tower tenants are bound. Upholding the public interest immunity claim would enable the decision-makers to undermine the rigour of the judicial review to which their decisions would otherwise be subject.

70 Homes Victoria did not disclose the documents that Newport alleges he had reference to when making the Implementation Decision. It was therefore necessary for Berih to call for production of those documents. At the hearing when the disclosure order was made, Homes Victoria contended that there were no documents related to the Implementation Decision. It now seeks to contend that there *were* documents on which Homes Victoria relied to make the decision, but that those documents are privileged from production. Homes Victoria has not sought to explain why Newport failed to disclose the fact that he took the Cabinet Submission into account when making the Implementation Decision.

### Analysis

71 The Cabinet Submission was considered by the ERC on 15 September 2023 and approved on 18 September 2023. Clearly, disclosure of that document would have the effect of disclosing Cabinet deliberations.

72 The Cabinet Submission was prepared by Newport and others at the request of the Secretary to the Department as the basis for Cabinet’s consideration of the redevelopment program. The Cabinet documents were submitted to Cabinet committees for the same purpose. Copies of the documents submitted to the Cabinet

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<sup>35</sup> *M61 v The Commonwealth* (2010) 243 CLR 319, [103].



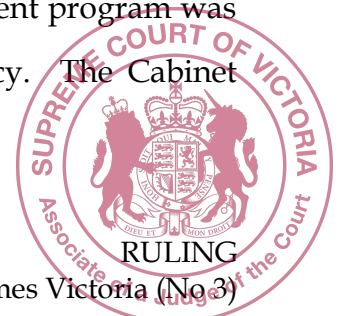
committees were marked as ‘Cabinet-In-Confidence’. The process of consideration by the Cabinet committees of the investment and management options regarding the public housing towers, and of the redevelopment program described in the evidence of Newport, McCurry, Morrison and Puls, make it likely that the Cabinet documents reflect the Cabinet committee deliberations which led to the policy decision to approve the redevelopment program.

73 The preparatory documents were commissioned and used for the purposes of the Departmental and Cabinet committee processes which ultimately led to approval of the redevelopment program. A document is not immune from disclosure merely because it came into existence for the purpose of preparing a Cabinet submission.<sup>36</sup> However, evidence in this proceeding suggests that the preparatory documents were used in two important ways. The first was to prepare submissions to Cabinet committees. The contents of some of the preparatory documents were recorded, at least in summary form, in the Cabinet Submission. Second, the preparatory documents are directly interrelated with the Cabinet documents. Both categories of documents were part of the same process that led to policy submissions being put to Cabinet committees. The preparatory documents are interwoven with the process that led to submissions to Cabinet committees and to the decision to approve the redevelopment program. Disclosure of the preparatory documents may allow reliable inferences to be drawn about Cabinet committee deliberations, or about matters that were not submitted to or considered by the ERC or other Cabinet committees in the process that led to approval of the redevelopment program. I accept Puls’ evidence on these matters.

74 The subject matter of the Cabinet Submission documents is clearly current and controversial. I reject Berih’s submission that the impact of this consideration is diminished because the decision by Cabinet to approve the redevelopment program is already public. All that is publicly known is that the redevelopment program was approved and adopted by Cabinet as Victorian government policy. The Cabinet

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<sup>36</sup> *Seal Rocks* (n 12) [31] (Byrne J).



deliberations that led to the policy decision are not publicly known. Those deliberations and processes may become known if the confidentiality of the Cabinet submission documents is not maintained.

75 For the following reasons, I reject Berih’s submission that the discouragement of candour on the part of public officials should be dismissed as a relevant consideration. First, in *Northern Land Council*, after the quote relied on by Berih, the plurality went on to say that:

On the other hand, Lord Wilberforce has expressed a view that, in recent years, this consideration has “received an excessive dose of cold water”.<sup>37</sup>

The plurality observed that the rationale for maintaining public immunity was to ensure ‘that decision-making and policy development by Cabinet is uninhibited’.<sup>38</sup> The High Court did not dismiss the impact that disclosure of Cabinet documents may have on the future conduct of public officials as being irrelevant to that rationale.<sup>39</sup>

76 Second, Homes Victoria’s witnesses describe the provenance of each Cabinet Submission document, and the use made of that document in the process that led to the redevelopment program. Puls’ evidence shows that he reviewed the documents, relevant Cabinet committee agendas, submissions and meeting minutes, and the evidence of McCurry and Morrison. I reject Berih’s submission that Puls’ evidence about the probable effect of disclosure of the documents should be dismissed as generalised assertion. The assertions made by Puls have clearly been informed by an understanding of the Cabinet and public service processes, and by a careful review of the Cabinet Submission documents and the process that led to the redevelopment program. Weight is to be accorded to such evidence.<sup>40</sup>

77 Third, I doubt that duties imposed by the *Public Administration Act 2004* (Vic) would guarantee protection from the possibly subtle but damaging effect that inhibition and constraint caused by disclosure of Cabinet documents may have on future Cabinet

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<sup>37</sup> *Northern Land Council* (n 3) 615 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

<sup>38</sup> *Ibid* 616.

<sup>39</sup> See also *Spencer v Commonwealth* (2012) 206 FCR 309, [44].

<sup>40</sup> See *ibid* [43]; *Seal Rocks* (n 12) [7]; *Matthews* (n 8) [24].



processes. Further, the Act does not impose duties on Ministers, who Puls said may be affected by disclosure.

78 For the following reasons, there is limited support for Berih’s position offered by the decision of Basten JA in *Ku-ring-gai Council v Garry West* (*‘Ku-ring-gai’*).<sup>41</sup> In that case the NSW Minister for Local Government referred a series of proposals for council amalgamations and boundary alterations to the Acting Chief Executive of the Office of Local Government, who then referred the task of examining and reporting on one of the proposals to a delegate (the respondent). The respondent recommended that the proposal submitted by the Minister in respect of the appellant Council proceed to implementation. In making this decision, the respondent relied on two reports prepared by consultancy firm KPMG relating to the financial impact of the proposal. The Council initiated the proceeding to review the respondent’s decision and sought access to the KPMG documents. Disclosure was objected to on the basis of public interest immunity, as the KPMG documents had originally been prepared for submission to Cabinet.<sup>42</sup> The immunity claim was upheld by the primary judge.

79 The merger proposal made by the Minister was publicly disclosed. The proposal document stated that the proposal had been ‘informed by four years of extensive Council and community consultation and is supported by independent analysis and modelling by KPMG’.<sup>43</sup> A summary of the KPMG analysis was set out in the proposal, and details were included of what was addressed in the KPMG documents. A departmental financial modelling document that was said to be based on the KPMG analysis was also disclosed.<sup>44</sup>

80 On appeal, Basten JA held (with Macfarlan JA agreeing) that there had been a denial of procedural fairness in circumstances where the Council did not have access to all of the documents on which the analysis was based, and so did not have a proper opportunity to be heard as to the merits of that analysis. Basten JA said, in deciding

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<sup>41</sup> *Ku-ring-gai* (n 30).

<sup>42</sup> *Ibid* [70] (Basten JA).

<sup>43</sup> *Ibid* [35].

<sup>44</sup> *Ibid* [44].





that the KPMG documents were not immune from disclosure:

A claim for immunity from production based on the fact that documents were submitted to Cabinet may properly fall within the category of matters of state which involves prejudice to the proper functioning of the government of state. However, there is an important point of distinction between documents which are submitted to Cabinet and documents which record or reveal the content of Cabinet deliberations. This case fell into the former category, not the latter. The justification for the immunity with respect to that category lies in the proposition that disclosure might prejudice the ability of Ministers and Cabinet (including those advising them) to obtain full and frank advice from other government officers and external experts.<sup>45</sup>

81 As Homes Victoria submitted, it appears from the above passage that a case was not made that a risk of revealing Cabinet deliberations would arise from disclosure of the two KPMG documents. The following matters appear to have been critical to the outcome in *Ku-ring-gai*. First, the relevant statutory mechanism in that case required that the Minister's proposal had to be the subject of examination and report, including public inquiry. Second, the documents were prepared by 'a large commercial enterprise external to the government'.<sup>46</sup> Third, there had been significant public disclosure of the contents of the KPMG reports.

82 It was in this context that Basten JA said the following:

...To describe the topic of the submission to Cabinet as involving a current controversy may provide a cause for upholding immunity in some cases, but not others. It is necessary to consider the subject matter of the controversy... Importantly, the proposals had to be the subject of examination and report, including public inquiry, in the manner summarised above. It would be incoherent for the Minister to assert that any material presented to Cabinet to support an amalgamation of local government areas, a proposal for which had to be referred for examination by the Departmental Chief Executive or the Boundaries Commission, carrying out statutory functions under the Local Government Act, should not be disclosed. Particularly is that so where the proposal expressly relied on financial information which was derived from an external report submitted to Cabinet.

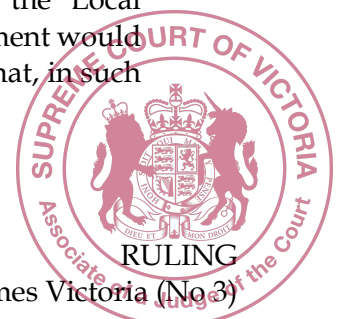
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Further, there is no reason to assume that when an organisation such as KPMG, applying its own professional expertise, prepares a business case in relation to council amalgamations in the statutory context provided by the Local Government Act, it would do so on an assumption that the government would never disclose the figures and information it supplied. The claim that, in such

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<sup>45</sup> Ibid [80].

<sup>46</sup> Ibid [92].



a case, candour and frankness might be compromised by disclosure borders on the fanciful.<sup>47</sup>

The statutory and factual context in *Ku-ring-gai* explains the outcome in that case and why Basten JA concluded that the impairment of candour and frankness was not a relevant consideration. The context in this proceeding is very different. Unlike in *Ku-ring-gai*, Homes Victoria opposes disclosure on the primary basis that the Cabinet Submission documents would reveal Cabinet deliberations; there has been no public disclosure of the Cabinet Submission documents or the process that resulted in the redevelopment program policy decision; the statutory context in this case does not involve a separate examination of the Cabinet decision, let alone a public inquiry; and Homes Victoria relies on the inhibiting effect that disclosure may have on Ministers and public servants who were involved in commissioning reports and preparing submissions for the purpose of advising Cabinet in respect of a policy decision that was ultimately made, not on the independent third party companies that prepared those reports.

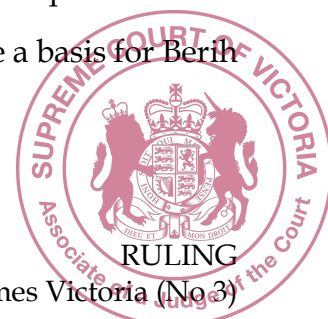
83 I conclude that the Cabinet submission documents warrant a high level of protection.

84 For the following reasons, I conclude that Berih has demonstrated a legitimate forensic purpose in having the Cabinet Submission documents available for his use in the proceeding.<sup>48</sup> First, the documents are likely to be relevant to Berih's claim that when he made the Implementation Decision, Newport failed to give proper consideration to the human rights of group members as required by the *Charter*. Newport said that matters concerning the *Charter* were 'interwoven throughout' the Cabinet Submission, and that all of the work that Homes Victoria had done to that time formed part of the Cabinet Submission and was in his mind when he made the Implementation Decision. On Newport's evidence, the Cabinet Submission documents contain evidence relevant to his consideration of *Charter* matters. The Cabinet Submission documents are the only documents identified by Newport as being relevant to the Implementation Decision and his consideration of *Charter* matters. They may provide a basis for Berih

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<sup>47</sup> Ibid [90]-[91].

<sup>48</sup> *Zirilli* (n 18) [28].



to challenge Newport's evidence about the consideration of *Charter* matters.

85 Second, the documents may be relevant to Berih's substantive *Charter* argument. The process which underpinned the redevelopment program described by the witnesses appears to have been extensive, and to have involved the commission of a significant number of technical reports. It is at least possible that some of those reports record observations, data and other information which is not available to Berih and his expert witness. It is possible that the Cabinet Submission documents contain factual evidence that would be relevant to Berih's expert when considering the feasibility of tower retrofitting by comparison to redevelopment.

86 However, I conclude that immunity of the Cabinet Submission documents should be maintained pursuant to ss 130 and 131A of the *Evidence Act*.

87 I am satisfied, for reasons stated in detail above, that disclosing the Cabinet Submission documents is likely to reveal Cabinet deliberations and the position taken by Ministers and senior government officials in submissions to Cabinet committees. While the relationship between Cabinet committee deliberations and the Cabinet documents and preparatory documents may be somewhat less direct, those documents were an intrinsic part of the single process which led to the redevelopment program policy decision. Disclosure of any of the documents is likely to allow inferences to be drawn about elements of Cabinet committee deliberations. I have accepted Puls' evidence as to the possible inhibiting effect that disclosure of the documents would have on public servants and Ministers in relation to future policy development.<sup>49</sup> There has been no publication of the documents to date.<sup>50</sup>

88 I accept that there is a forensic purpose to Berih having the Cabinet Submission documents available for his use. However, I am not satisfied that the documents are important to the outcome of the proceeding.<sup>51</sup> The documents could only be peripherally relevant to Berih's procedural fairness case. Whether any data contained

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<sup>49</sup> *Evidence Act* (n 1) s 130(5)(d).

<sup>50</sup> *Ibid* s 130(5)(e).

<sup>51</sup> *Ibid* s 130(5)(a).

in the documents is relevant to Berih's expert witness, while possible, is uncertain. Further, Berih has had the opportunity to gather other evidence to support his substantive *Charter* claim. Finally, while Newport said that he had the Cabinet Submission and other documents in his mind when he made the Implementation Decision, he also clarified that he did not have them physically before him.

89 A confidentiality regime could initially limit publication of the Cabinet Submission documents if they were produced. However, the effectiveness of confidentiality orders may ultimately depend on the use sought to be made of evidence contained in them. Further, I accept Puls' evidence that the confidential release of the documents to parties that Cabinet did not contemplate would receive them would still be likely to inhibit Cabinet processes in future.<sup>52</sup>

90 The Cabinet Submission and the Cabinet documents are marked 'Cabinet-In-Confidence'. I accept that the process which led to the redevelopment program policy decision was intended to be confidential.

91 Homes Victoria's lack of disclosure in response to the disclosure order is of little weight. I accept that Homes Victoria does not regard the documents as critical to the resolution of the proceeding. Arguably, Homes Victoria was not required to identify the existence of the documents that were privileged from production.<sup>53</sup> In any event, had Homes Victoria listed the Cabinet Submission documents and claimed privilege in response to the disclosure order, it would have been necessary to address the same confidentiality issues.

92 The public interest in disclosing the documents weighs more heavily in the circumstances of this proceeding, which concerns the housing rights of vulnerable community members.<sup>54</sup> However, taking into account the above matters, I conclude that the public interest in disclosure of the documents is not sufficient to outweigh the public interest in maintaining the confidentiality of Cabinet documents relating to a

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<sup>52</sup> Ibid s 130(5)(d).

<sup>53</sup> CPA (n 2) s 26(3).

<sup>54</sup> Evidence Act (n 1) s 130(5)(c).



matter that is current and controversial.

**Conclusion**

93 The Cabinet Submission documents are immune from disclosure. I will hear from the parties as to the form of consequential orders.

**CERTIFICATE**

I certify that this and the 32 preceding pages are a true copy of the reasons for Ruling of the Honourable Justice Keogh of the Supreme Court of Victoria delivered on 10 February 2025.

DATED this 10<sup>th</sup> day of February 2025.



.....  
Associate